Parent Education Programs in Family Law Courts:
Perils and Potential

Shelley Kierstead

A DISSERTATION SUBMITTED TO THE FACULTY OF GRADUATE STUDIES
IN PARTIAL FULFILMENT OF THE REQUIREMENTS
FOR THE DEGREE OF
DOCTOR OF JURISPRUDENCE

GRADUATE PROGRAM IN LAW
Osgoode Hall Law School of York University
Toronto, Ontario

May 2005
NOTICE:
The author has granted a non-exclusive license allowing Library and Archives Canada to reproduce, publish, archive, preserve, conserve, communicate to the public by telecommunication or on the Internet, loan, distribute and sell theses worldwide, for commercial or non-commercial purposes, in microform, paper, electronic and/or any other formats.

The author retains copyright ownership and moral rights in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

In compliance with the Canadian Privacy Act some supporting forms may have been removed from this thesis.

While these forms may be included in the document page count, their removal does not represent any loss of content from the thesis.
Parent Education Programs in Family Law Courts: Perils and Potential

By

Shelley Kierstead

a dissertation submitted to the Faculty of Graduate Studies of York University in partial fulfillment of the requirements for the degree of

DOCTOR OF JURISPRUDENCE

© 2005

Permission has been granted to the LIBRARY OF YORK UNIVERSITY to lend or sell copies of this dissertation, to the NATIONAL LIBRARY OF CANADA to microfilm this dissertation and to lend or sell copies of the film, and to UNIVERSITY MICROFILMS to publish an abstract of this dissertation.

The author reserves other publication rights, and neither the dissertation nor extensive extracts from it may be printed or otherwise reproduced without the author's written permission.
Abstract

There is ongoing debate in current family law discourse about how the state can best achieve the goal of promoting less conflict-laden decision making in child-related matters while allowing separated parents to exercise parental autonomy. Specifically, there is disagreement about whether formal or informal dispute resolution processes can most appropriately achieve this goal.

In this dissertation, I argue that court-connected parent education programs have the potential to bridge this apparent “divide” between informal and formal dispute resolution mechanisms. Drawing on theoretical discussions about “empowerment” and “informed consent” in the mediation context, my thesis is that within a system that involves different dispute resolution alternatives, it is essential that participants are able to provide truly informed consent to whichever of the options they choose. Further, within such a system, the role of legal information and legal advice for consumers is critical. I explore the phenomenon of unrepresented family law litigants, and the importance of providing them with access to legal information.

The work involves a combination of doctrinal and statistical analysis. After reviewing literature outlining current debates about family law dispute resolution processes, I examine socio-political motivations for the integration of parent education into the family law system. I then consider doctrinal limits on state interference with parental autonomy in the context of private custody disputes, and how these limits impact attendance policies for court-connected parent education programs. A review follows of data collected from a court-connected parent education program titled the Parent Information Program (PIP). Data were collected from court file reviews of a sample of...
PIP participants along with a control group of non-PIP participant files. PIP participants also provided feedback on their views about program facilitation and content.

After combining the doctrinal and empirical analyses to canvass questions about the most appropriate types of parent education program content and implementation policies, the dissertation concludes with the argument that such programs can play an important role in assisting parents to work their way through the separation process in an informed, autonomous manner that serves their children’s best interests.
Acknowledgements

Many thanks to Patrick Monahan, Mary Jane Mossman, and Frederick Zemans for their guidance and feedback throughout this endeavour. Thanks also to Marc, Anique, and Alex, for their patience during what was sometimes a very challenging process. Finally, as always, I am grateful to my parents for their unwavering belief in my abilities.
Table of Contents

Abstract........................................................................................................................................... iv

List of Tables ..................................................................................................................................... xiii

Preface About the Context of this Project ......................................................................................... 1

CHAPTER 1 – The Context for Parent Education Programs on Relationship Breakdown .................... 7

Introduction: Court-connected Parent Education Programs and Family Law Dispute Resolution ....... 7

1. The Development of Less Litigious Processes in Response to Criticism of the Traditional Adversary System......................................................................................................................... 7

2. No-fault Divorce has Impacted the Focus of Family Law Dispute Resolution................................. 11

3. Growing Societal Complexity Has Prompted Criticism of the Adversarial System ......................... 12

4. Promotion of Private Ordering as a Preferable Alternative ................................................................. 15
   a. An Introduction to the Work of Mnookin & Kornhauser .............................................................. 15
   b. Mediation Advocates’ Continued Promotion of Private Ordering ............................................ 19
   c. The Extent of “State-Sanctioned” Mediation ............................................................................. 22

5. Rejection of a Wholesale Adoption of Alternative Dispute Resolution ............................................ 25
   a. Mischaracterization of the Adversarial System and Professionals Working Within the System ......... 26
   b. Concerns that Mediation is Not Always Empowering .................................................................. 32

6. Overlapping Concerns for Mediation and Litigation Advocates ....................................................... 34
   a. Lack of Legal Representation ......................................................................................................... 35
   b. Participant Autonomy .................................................................................................................... 38
   c. Roles of Professionals .................................................................................................................. 39
   d. Best Interests of the Child .............................................................................................................. 41
   e. State Role in Family Lives ............................................................................................................ 42
   f. Specific Clientele Groups ............................................................................................................. 44

vii

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
7. Summary and Definition of the Research Problem ...........................................46
   a. The Hypothesis: Court-connected Parent Education as a System “Link” ....49
   b. The Research Methodology: Doctrinal and Empirical ............................50

CHAPTER 2 – Parent Education as a Phenomenon ...........................................52

1. Parent Education as a Component of Public Legal Education in Canada ..................52

2. Rationales Linked to Court-Connected Parent Education Programs ............57
   a. Raising Public Confidence in the Family Law System ..........................58
   b. Assisting Unrepresented Individuals ..................................................60
   c. Promoting Alternate Dispute Resolution and Reducing Court Dockets ......63
   d. Promoting the Best Interests of the Child: Conflict Avoidance and Co-operative Parenting .....66
   e. Empowering Family Law Consumers ...............................................73

3. The Structure of Court-Connected Parent Education Programs .......................77
   a. The Range of Program Content .......................................................77
   b. Facilitation Methods ........................................................................80
   c. Attendance Policies and Implementation Status of Court-Connected Parent Education Programs ......81

4. The Environment Surrounding Parent Education Initiatives .............................84
   a. The Impact of Privatization .............................................................85
   b. The Changing Moral Discourse .......................................................90
   c. Changes within the Litigation System ............................................94
   d. Changed Perceptions About Children’s Interests ...............................97
   e. Lobby for Increased Shared Parenting ............................................99

CHAPTER 3 – Court-Connected Parent Education and the Best Interests of the Child .........................................................106

1. Why the Best Interests of the Child Principle is Relevant to Court-Connected Parent Education .........................................................106

2. Origins of the Best Interests of the Child Test ............................................108
CHAPTER 5 - Parent Education - Goals, Content and Clientele

Introduction................................................................................................................................192

1. Feasible Goals for Court-Connected Parent Education Programs...........................................192
   a. First Feasible Goal: To Inform and Empower Parents.........................................................193
   b. Second Feasible Goal: To Promote Demonstrably Improved Parental Behaviour.................................196

2. Program Content.....................................................................................................................198
   a. Non-legal Information .......................................................................................................200
   b. Legal Information .............................................................................................................202
3. Legal Information - Desires of Family Law Consumers
   a. Unrepresented Parties
   b. Represented Parties
   c. Concluding Thoughts About Consumers’ Desire for Legal Information
4. Program Clientele
   a. Relationships of Short Duration
   b. Situations of Domestic Violence
   c. Cultural and Language Barriers
   d. Content Guidance Provided by Needs of Different Client Groups

CHAPTER 6 – Parent Education Programs – Attendance and Implementation Mechanisms

Introduction

1. Overview of Potential Attendance Policies

2. Implementation Policies
   a. Voluntary Attendance
   b. Mandatory Attendance

CHAPTER 7 – Defining a Role for Parent Education Programs

Introduction

1. Court-Connected Parent Education and Private Bargaining

2. Fostering Parental Autonomy Through Informed Consent
   a. Applying Nolan-Haley’s Framework to Court-Connected Parent Education
   b. Parental Autonomy and Different Client Groups

3. Role of the State: Empowerment Versus Social Control
   a. Applying Girdner’s Framework to Court-Connected Parent Education
      i. Power Differences and Mediation
      ii. Parent Education’s Messages about Preference for Co-Parenting
4. Ensuring Access to Court-Connected Parent Education Programs ............... 280
5. Role of Professionals within the Family Law System .................................. 285
6. Maintaining a Focus on Child-Related Benefits ......................................... 288

Conclusion ........................................................................................................... 292

Appendix A .......................................................................................................... 295
Appendix B .......................................................................................................... 299
Appendix C .......................................................................................................... 345
Appendix D .......................................................................................................... 357
Appendix E .......................................................................................................... 360
Appendix F .......................................................................................................... 365
Appendix G .......................................................................................................... 371
Appendix H .......................................................................................................... 375
Appendix I .......................................................................................................... 386
Appendix J .......................................................................................................... 400

Bibliography ...................................................................................................... 403
List of Tables

CHAPTER 2

Table 1: Most Intensively Covered Topics .................................................................78
Table 2: Topics Covered with Moderate Intensity .......................................................78
Table 3: Least Intensely Covered Topics .................................................................79

CHAPTER 4

Table 1: Measures of Litigiousness by Control Group and Sample Group ..............174
Table 2: Impact of PIP on Legal Representation Within the Process .....................176
Table 3: Phase 1 Satisfaction Measures .................................................................177
Table 4: Phase 2 Satisfaction Measures .................................................................179
Table 5: Comparison of Satisfaction by Legal Representation Status .....................180
Table 6: Comparison of Satisfaction by Reason Attending the Program .................181
Table 7: Parents’ Pre-test Assessment of Ability to Meet Children’s Separation-Related Needs ..................................................................................................................186
Table 8: Comparison of Parents’ Assessment of Ability to Meet Children’s Separation-Related Needs ..................................................................................................................188
Table 9: Comparison of Parents’ Assessment of Ability to Meet Children’s Separation-Related Needs by Levels of Conflict in Parental Relationship ......................190
Preface About the Context of this Project

In 1997, I became the coordinator of a court-connected parent education program titled the Parent Information Program (PIP - formerly the Parent Information Pilot Project). When I refer to “court-connected” programs within this work, I am referring both to programs that are offered in cooperation with court administrators and members of the judiciary, who provide input into the program’s operations through membership on the program’s steering committee, and to those that form part of a court’s formal “core service” package, as occurs within the (unified) Family Court setting. Some court-connected parent education programs require (by statute or local court rule) attendance while others are offered on a voluntary basis to individuals who wish to attend.

Attendance at PIP is not mandated, though in its first two years of operation, it was strongly recommended to litigants by three members of the Ontario Court of Justice (Family) judiciary. As a result, PIP attendees have been comprised of both totally “voluntary” participants and participants who have indicated that they attended the program because a judge recommended that they do so.

Originally, PIP, which provides information to assist separating parents who are contemplating or involved in court proceedings within the Ontario Court of Justice (Toronto region) was funded by the Donner Canadian Foundation. From 1999 to winter of 2004 it was funded as a joint venture by the Donner Canadian Foundation and the

---

Ministry of the Attorney General for Ontario, and from Winter 2004 to present, it has operated with the financial support of the Ministry of the Attorney General.

The PIP arose directly from a research study into the Legal Aid system in Ontario conducted by Professor Frederick Zemans and Professor Patrick Monahan in 1996 and 1997. In their study, Professors Zemans and Monahan found that legal aid funding cuts had led to a significant increase in the numbers of unrepresented individuals attending family court. These litigants were, in the opinion of many individuals involved in the family court system, coming to court with little or no understanding of the court process or their legal rights, and with inadequate supporting material and extremely litigious attitudes.

Members of the Donner Canadian Foundation and steering committee members2 hoped that providing unrepresented litigants with basic information would assist them to understand the family law process and to make their way through that process with decreased levels of litigiousness.

As a result of the nature of the motivation for the program, PIP’s original objective was to provide early “legal” information to program participants about the court structure, the litigation process, and alternatives to litigation. As the program curriculum was developed between May and October 1997 in conjunction with judges, mediators, lawyers and community legal education personnel, information about the importance of

---

2 PIP’s steering committee includes representation from the Toronto Bar, mediators, a member of the judiciary, a member of Community Legal Education Ontario, the Ministry of the Attorney General and Professors Zemans and Monahan. For the first two years of its operation, the steering committee met every few months. Subsequently, meetings were held less frequently, though updates on the program were provided on an annual basis.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
the more emotional aspects of the separation process, and the relationship of these elements to the legal aspects of separation, was also incorporated. Further, the scope of the anticipated PIP audience was expanded as the program evolved. It was determined by the steering committee that while a key objective of the program was to assist unrepresented litigants, the information contained in the PIP curriculum might also be beneficial to litigants with lawyers. The steering committee determined that the program should be offered to both represented and unrepresented parties. As a result, from the time that seminars began operating in October 1997, they were available to both represented and unrepresented parties. The research strategy was also adapted to allow for comparative research in relation to both sets of participants.

As the PIP's coordinator, I was primarily responsible for drafting the program goals and objectives\(^3\) and program script.\(^4\) It was also my responsibility to develop the resource materials\(^5\) provided to program participants. However, the original materials were reviewed by the Steering Committee, whose members suggested revisions that were incorporated into the materials. While the core features of the materials remains consistent with the those approved of by the steering committee, content has been refined throughout the program’s operation, primarily as a result of feedback from seminar facilitators in light of their experience with the delivery of the scripted materials, and changes within the family law system that required incorporation into the program script.

---

\(^3\) See PIP Goals and Objectives at Appendix “A”.
\(^4\) See PIP Part A Script at Appendix “B”.
\(^5\) See PIP Participant Resource Manual Excerpts at Appendix “C”.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
Community resource listings for the resource manual are completed annually under my supervision by a research assistant at Osgoode Hall Law School.

Seminar facilitators for the PIP consist of a group of eight lawyers and six social workers who work in teams of two to present the seminars. The process for choosing the instructors involved: soliciting applications by way of advertisement in an Ontario Bar Association – Toronto region publication in July 1997; having applicants “audition” for the instructor position by presenting a portion of the scripted material to two committee members in August 1997; and selecting from among this pool of applicants in August of the same year. The facilitators were chosen from a group of approximately thirty lawyer applicants and twenty social work applicants. There has been some change in the group composition – two lawyers and three social workers have left the program. In each case, available positions are filled by applicants who go through a similar “audition” process.

Training for the seminar facilitators occurred on two occasions; once in 1998 and once in 2000. The trainer for each of these sessions was Orysia Kosyiuk, former director of the “For the Sake of the Children” parent education program in Manitoba. Topics during the training sessions included ensuring adherence to scripted material, fielding questions from participants without providing legal advice, ensuring culture and gender sensitivity in program delivery.

The Donner Canadian Foundation, as a condition of its funding, required that research be undertaken to gauge whether there was any correlation between program attendance and the manner in which parents journeyed through the legal process to
resolve post-separation disputes such as child custody, access, and support. The principal investigators (Professor Monahan and Professor Zemans) determined that two primary means of evaluation should be used. The first was direct participant feedback, acquired through questionnaires completed by participants. The second was information derived from the court files of individuals who participated in the PIP, as compared to a group of non-participants. Access to these files was provided by administrators at the 311 Jarvis Street Court in Toronto. I was responsible for the drafting of the survey tools. In drafting these tools, I consulted with the principal investigators. The survey instruments administered as of May 1998 were also reviewed by Professor David Northrup, Associate Director for York's Institute for Social Research, and revised in accordance with his suggestions. A more detailed description of the survey instruments is provided in Chapter 4 of this work.

Initially, I was motivated to discover whether and how the PIP would impact parents and the court system. Over time, as I delved further into the state of tension within the academic and professional literature between mediation (and other “alternative dispute resolution”) proponents and detractors, I also began to ponder how court-connected parent education programs, being another of the recent initiatives aimed at reforming the family law system – to make it less conflict oriented - “fit” within the debates and whether it could respond to some of the “gaps” in understanding between the two. This question of where court-connected parent education fits within the current

---

6 See, at Appendix “D”, a copy of a letter dated May 14, 1997, from the Donner Canadian Foundation to York University President Susan Mann, setting out the conditions for funding.
dispute resolution framework for family law matters became the focal point for the work that follows. Of course, this discussion of "fit" also involves considering my initial core question of how the PIP impacts on parents and the court system. These are the issues that form the basis for the work addressed in the chapters that follow.
Chapter 1: The Context for Parent Education Programs on Relationship Breakdown

Introduction: Court-connected Parent Education Programs and Family Law Dispute Resolution

My aim in this work is to engage in an analysis of court-connected education programs for separating and divorcing parents. In particular, I will explore the relationship between these programs and overall family law dispute resolution processes and consider whether and how court-connected parent education programs can assist families to access dispute resolution processes that best suit their needs. This chapter introduces some of the debates about current dispute resolution processes that lead me to conclude there is an important role for court-connected parent education programs that has not yet been clearly articulated within either relevant literature or the policy rationales associated with their implementation. A brief introduction to ongoing developments in family law dispute resolution will serve, I hope, to highlight the ways in which court-connected parent education may provide an important service to people becoming engaged with the family law regime.

1. The Development of Less Litigious Processes in Response to Criticism of the Traditional Adversary System

Over the past four decades, Canada, along with other common law countries, has struggled to cope with increasing dissatisfaction with the traditional adversary system as applied to resolve family law matters, and in particular, matters concerning post-separation parental responsibilities for children. What have emerged as a result of various reform initiatives are systems that increasingly encourage the notion of private
dispute resolution, primarily by way of mediation, as a viable means of resolving family law issues. However, the evolution of the mediation process within the legal system has not been entirely smooth, and a great deal of debate has arisen about whether and when mediation should be preferred to court adjudication for the resolution of custody and access disputes. The processes, particularly the private nature of mediation versus the public nature of court adjudication, espouse certain goals that are very different (for example, due process concerns within the litigation system versus welfare concerns within the mediation sphere) and others that are similar (promoting a fair resolution of matters for parties). Along with the tensions between the processes, there exist companion tensions with regard to the types of professionals best suited to meet the needs of modern separating families.

Coincident with the development of alternate dispute resolution initiatives has been the introduction of other changes within the litigation system, aimed at achieving less conflict-oriented processes such as case managed court schedules involving shorter time frames for the resolution of disputes and more active promotion of settlement by the judges hearing matters, through mechanisms such as settlement conferences. Services such as custody assessments and representation through Ontario’s Office of the Children’s Lawyer are also aimed at assisting with the resolution of child-related disputes. Another mechanism that has found its way into the legal system, to a greater

---

1 I recognize that other processes, such as arbitration and settlement achieved with the assistance of lawyers practicing “collaborative law”, have also gained popularity in Canadian family law. While I have chosen to focus primarily on the tension between mediation and the court process, the scope of my analysis of parent education’s potential role within the family law system is intended to encompass the range of dispute resolution processes available to separating couples.
extent in the United States than in Canada, is court-connected parent education programs. In essence, these programs are state endorsed educational programs aimed at providing separating and divorced parents with information about emotional and legal issues related to their separation. Most of these programs are focused primarily on the impact of separation and divorce on children, and on the ways that parents can go about the resolution of their disputes in a manner that allows for the most successful adjustment by their children to the parental separation. Many early programs were developed as “orientations” to mediation.

The PIP, which I refer to extensively in this work, is somewhat different from many of these programs in the sense that while it contains the kind of information described above, it also contains a significant amount of information about the legal process, legal terminology, and community sources for obtaining legal advice. Additionally, the information seminars offered through the program are jointly facilitated by a lawyer and a social worker. This differs from many programs, which are frequently facilitated solely by mental health professionals. It bears some similarity to the Family Information Sessions that operate on a mandatory basis within Toronto’s Superior Court of Justice, though the two programs differ in some respects. The Family Information

---

2 The information sessions are mandated for all litigants filing contested matters in the Superior Court of Justice in Toronto: *Family Law Rules*, O. Reg. 114/99, r. 8.1. The rule mandating attendance provides that the program “shall provide parties … with information about separation and the legal process…: Ibid. at r. 8.1(3). Note that the Parent Information Program operates on a voluntary attendance basis. For more detail about PIP program registration and attendance, see Chapter 4 of this work.
Sessions make greater use of video-based information than used within the PIP\(^3\), and provides information about property division on separation. By way of contrast, the PIP does not provide information about property division, but does focus in some detail about sources through which participants may obtain legal advice and additional legal information. Within both the PIP and Family Information Sessions, information dealing with the legal process, options for dispute resolution, and the emotional impact of separation is co-presented by a lawyer and another facilitator. With PIP seminars, the other facilitator is a social worker; within the Family Information Sessions, the other facilitator may be a mediator or social worker.\(^4\)

Below, I review some of the writing that reflects the status of ongoing debate about family law dispute resolution within the common law countries, for virtually the same discussions appear in the literature from Canada, the United States, Australia, and the United Kingdom. This review is intended to serve as a starting point for my inquiries about the potential role of court-connected parent education programs in the Canadian family law system. Note that while I believe that it is possible to apply my overall analysis nation-wide, many of the specific references in the work are to Ontario laws and resources.

---

\(^3\) The program includes showing a 55 minute video called *Separate Ways* in segments. Between these segments, seminar presenters provide participants with information about the emotional and legal aspects of separation and divorce, as well as the impact of these processes on children. Alternatives to litigation and the role of lawyers within the dispute resolution process are also discussed: Desmond Ellis, *The Impact of Mandatory Information Sessions on the use of Court Resources: A Report Prepared for the Attorney General of Ontario* (North York). The PIP uses a mediation clip of approximately three minutes' duration from the video titled *Family Mediation: We Can Work it Out.*

\(^4\) See www.attorneygeneral.jus.gov.on.ca/english/family/parentinfo.asp.
2. No-fault Divorce has Impacted the Focus of Family Law Dispute Resolution

In addition to overall questions about the continued adequacy of traditional dispute resolution processes, particular impetus for considering alternative dispute resolution (ADR) can be traced to the revolution in family law that occurred in North America in the 1960's. This revolution involved the move from a fault based system of divorce to a system whereby divorce became a matter of private choice rather than one requiring proof of negative conduct falling within state enumerated grounds.

In 1968, the federal Parliament enacted Canada's first national divorce statute. In addition to establishing entitlement to divorce upon the proof of party's "fault" through conduct such as adultery or cruelty, the 1968 Divorce Act introduced the additional concept of divorce based on parties living separate and apart for a defined length of time with no prospect for reconciliation. In 1985, further amendments reduced to one year the period of time parties were required to live separate in order to be granted a divorce.

---

5 Divorce Act, S.C. 1967-68, c. 24, s. 4(1). Section 4(1) provided that in addition to the fault grounds established in s. 3, a divorce petition could be filed based on: the respondent having been imprisoned for a specified period of time; the respondent having been grossly addicted to alcohol or narcotics as defined in the Narcotic Control Act for at least three years prior to the petition, with no reasonable expectation of rehabilitation; the petitioner having had no knowledge of the respondent's whereabouts for at least three years immediately preceding the divorce petition, and having been unable to locate the respondent during that time; non-consummation of the marriage, with the respondent, for a period of at least one year, having been unable or unwilling to consummate it; the spouses having lived separate and apart for a period of at least three years; or the petitioner having deserted the respondent for at least five years.

6 Divorce Act R.S.C. 1985 (2d supp.) c. 3, s. 8. Section 8 maintained the fault grounds of cruelty and adultery, and reduced the no-fault grounds such that breakdown of a marriage warranting divorce could be established where the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding.
Not surprisingly, coincident with the more liberal grounds for divorce was a dramatic increase in divorce rates.\(^7\) With increased numbers of judicially sanctioned family dissolutions, came questions about child custody and access,\(^8\) and about the most appropriate processes for resolving these disputes.

3. **Growing Societal Complexity Has Prompted Criticism of the Adversarial System**

Before addressing the appropriateness of the adversarial system as it relates specifically to the dynamics of family relationships, it should be recognized that critics argue that, at a much more fundamental level, the western adversarial system may not serve the goals that a legal system ought to serve. For example, Carrie Menkel-Meadow has written that the adversary tradition, based on a system of binary, oppositional presentations of facts, which neither provides truth nor takes into account the complexity of modern problems, may no longer suffice for situations involving complex and multi-

---

\(^7\) In the year following the passage of the 1968 *Divorce Act*, the divorce rate doubled. By the end of 1978, the rate had nearly doubled again: See Ann-Marie Ambert, *Divorce in Canada* (Toronto, Academic Press Canada, 1980) at 20-1. In the two years following the enactment of the 1985 *Divorce Act*, the divorce rate again rose significantly, reaching its peak in 1987 at 362 divorces per 100,000 people. Divorce rates have actually declined since then, and in 1997, stood at 223 divorces per 100,000 people. Marriage rates, which peaked in the early 1970's, are declining. The marriage rate for 1997 was 526 marriages per 100,000 people. See Department of Justice Canada – Child Support Team, *Selected Statistics on Canadian Families and Family Law* (2d ed. (Ottawa: Minister of Justice and Attorney General of Canada, 2000).

\(^8\) In *Selected Statistics, ibid.*, the Department of Justice reported on the *National Longitudinal Survey of Children and Youth*, a biennial survey of 25,000 children commenced in 1994 (when the children were aged 11 and under). In the 1994-95 cycle of data collection, 48% of separated parents indicated they had either received a court order or were in the process of receiving one. The *Selected Statistics* report also noted that an increasing proportion of children are living in single-parent families. By the age of 10, one child out of four born in 1983-1984 had experienced life in a single parent family.
faceted problems. In her view, it is not sufficient to simply attempt to reform the adversary system sufficiently to render it a workable model for our entire legal system. She takes particular issue with cases that she says do not lend themselves easily to right or wrong answers or to binary solutions. She argues that “[o]ften, third-party-imposed solutions, such as those imposed by courts, do not deal with causes underlying ongoing conflicts or disputes, especially if personal or relationship issues are at stake ....” She urges readers to begin to experiment with processes other than those focused on fact finding, ‘third party neutralizing’, and judging in an attempt to respond more appropriately to modern needs. While she offers no one solution, she invites the reader to “contemplate a variety of different ways to structure processes in our legal system to reflect our multiple goals and objectives.”

A number of commentators have criticized adversarialism for the ways that it teaches individuals to act toward each other. In the family law context, for example, Robert Shepard, Jr. has pointed out that both the general structure of family law (particularly as it relates to custody and visitation) and the structure of decision-making processes can impact significantly on “the ease of resolving disputes in a child-friendly fashion.” H.A. Finlay, writing within the context of the Australian legal system, is more direct: “Lawyers and other professionals working in the family law area in

---

9 Carrie Menkel-Meadow, “The Trouble with the Adversary System in a Postmodern, Multicultural World” (1996) 38 Wm. & Mary L. Rev. 5 at 10-11.
10 Ibid. at 12.
11 Ibid. at 26-27.
12 Ibid. at 11-12.
must be aware of the damage amounting at times to devastation which is caused in this sensitive area of interpersonal relationships by our common law system of litigation.  

Characteristics inherent to the system, which involve the development of a partisan story for each side of the dispute and the process of cross examination, intended to expose inaccuracies or untruths in a party’s story, writes Finlay, work to polarize parties and create hostility between them.  

In a 1985 article predicting a trend toward the development and use of alternate dispute resolution mechanisms - and mediation in particular - to determine custody matters, Weissman and Leick also cite the exacerbation of conflict between parents involved in the adversarial system, along with the following list of issues that support the mediation trend: clogged courts making the process too long; expense; laundering of marital linen in public; and the court system’s stripping of parental authority to make lifelong decisions regarding one’s children.  

Further negativity regarding the adversarial system is supported by research conducted with actual divorcing parents, who are able to provide a personalized accounting of their separation and the process by which their disputes were resolved. According to Pruett and Jackson, “[b]y reflecting on their own experiences, newly divorced persons may identify basic needs within the system that may otherwise be 

---

15 Ibid. at 65.  
overlooked by the professionals who maintain the “big picture” perspective in which individual voices can be drowned out."17

In research focusing on parents’ narrative accounts of their experiences with two Connecticut judicial districts and the professionals involved with the court system, the authors found that 34% of the parents interviewed said that no aspect of the legal process had helped them to reach resolution, and only 12% felt that they had ended the process with the positive expectations with which they had entered the legal process.18 Frequent comments about the legal process suggested that parties held little faith in the system. The most common complaints with the system were: (1) the cost of divorce and lawyer fees; (2) the court system’s lack of efficiency; and (3) barriers in communication between parents and lawyers.19 Further, parents often commented on the hostility toward the other parent generated by the court process, and the contribution of the legal process to decreased parental energy and competence in relation to children.20

4. Promotion of Private Ordering as a Preferable Alternative

a. An Introduction to the Work of Mnookin & Kornhauser

The foundation for many current discussions of alternatives to the adversary system as a preferred method of dispute resolution is the work of Robert Mnookin and

18 Ibid. at 22.
19 Ibid. at 22-23.
20 Ibid. at 24.
Lewis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce.” In this article, the authors begin with the premise that divorce law’s primary role is to provide a framework within which separating parties can resolve their own separation-related disputes. This empowerment to create their own legally binding post-separation arrangements is a form of private ordering – “law” that parties bring into existence by agreement.

Mnookin and Kornhauser do not suggest that law and the legal system are unimportant to divorcing parties – to the contrary, family law is undeniably relevant to the parties. Rather, the authors set out to discuss how the rules and procedures used within adjudicative procedures will affect the bargaining process that occurs between parties outside the courtroom.

They begin with the premise that the no-fault revolution in divorce has rendered divorce largely a private matter, though in relation to matters concerning minor children, they acknowledge that parents lack the formal power to fashion their own law in the sense that, for example, privately negotiated custody matters cannot bind a court. However, they rely on evidence about the courts’ processing of undisputed divorce cases to conclude that parents are, in reality, given broad discretion over child-related issues. This discretion is appropriate, they argue, in light of the state’s limited resources to complete thorough investigations of families’ circumstances, the vagueness of the best interests of the child standard, along with the concomitant difficulty for judges to

---

22 At footnote 1 of their work, ibid., the authors attribute this definition of private ordering to Lon Fuller.
determine what circumstances would warrant overriding a parental decision, and the limited ability of judges to control parental actions after parents leave the courtroom.\textsuperscript{23} For these reasons, they conclude that it is to be expected that courts would view their function in the divorce process as dispute settlement rather than child protection, notwithstanding their broad \textit{parens patriae} powers for the protection of children's interests. In divorce matters, they argue, parental freedom to determine custody matters should be given considerable deference – subject only to the child protection threshold for state intervention that would be applied to all families.\textsuperscript{24} While parents might indeed make mistakes in determining custodial arrangements, so too may judges. The role of the state should not be to second guess parental arrangements, though this role does involve an important responsibility for informing parents about a child’s needs during and after divorce, and facilitating parental agreement.\textsuperscript{25}

Regardless, argue Mnookin and Kornhauser, whether one accepts the desirability of private ordering, it is clear that many divorcing couples do not need adjudication of many of their divorce-related issues. Therefore, it is appropriate to consider how the legal system would affect the bargaining behaviour of divorcing couples. The essence of the task facing parents is to attempt to resolve financial and child-rearing matters to reflect personal preferences. Negotiation of this agreement will be affected by the bargaining endowments bestowed by substantive law. As Marc Galanter explained, Mnookin and Kornhauser’s work means that: “[w]hat might be done by (or in or near) a

\textsuperscript{23} \textit{Ibid.} at 954-956.
\textsuperscript{24} \textit{Ibid.} at 957.
\textsuperscript{25} \textit{Ibid.} at 958.
court ... gives the parties bargaining chips or counters. Bargaining chips derive from the substantive entitlements conferred by legal rules ...."26 It is this relationship between knowledge of these substantive rules, the ability to predict how a matter might be resolved by a court, and negotiation that has given rise to the concept of “bargaining in the shadow of the law”. The potential outcomes dictated by the substantive law, coupled with parties’ willingness to “gamble” on outcomes, bargaining strategies, and willingness/ability to absorb financial and non-financial transaction costs, provide a basis for the manner in which private ordering may or may not occur.27 Ideally, parties minimize the transaction costs and uncertainty of result involved in adjudication. Parties generally have little or no incentive to take cases through the court system for their precedential value, since they are unlikely to be “repeat players”28 and would have little sense that any precedent created through adjudication would have any benefit to them.

Mnookin and Kornhauser’s analysis, combined with the sorts of criticism of the adversary system described above, has been influential in shaping discussions about mediation as a preferred means of dispute resolution in family law matters. In a later article, Mnookin summarized what, in his view, were primary justifications for private ordering: the liberal ideal of individuals making what they choose to make of their lives; the efficiency involved with the potential of negotiation to achieve results for both spouses that are better than either would achieve if a court or other third party were to impose a result; and the costs savings for a couple involved in reducing the financial cost

27 Mnookin and Kornhauser, supra note 21 at 968-974.
28 Ibid. at 974.
of litigation and the pain of formal adversarial proceedings with the potential of all or nothing results.\textsuperscript{29}

b. Mediation Advocates' Continued Promotion of Private Ordering

Mediation advocates rely on Mnookin and Kornhauser’s ideas in advocating for the mediation process as a preferable mechanism for the resolution of family law matters. Perhaps the most frequently cited benefit of the mediation movement is its alleged consistency with the premise of no-fault divorce – that the responsibility for determining when divorce is warranted rests with individual spouses, not with the public.\textsuperscript{30} Ann Milne, a prominent advocate for mediation within the divorce system, argues that a procedural mechanism which allows parties to determine their own post-separation matters appeals as a way of promoting autonomy and “returning decision making to the family.”\textsuperscript{31} Another author defines mediation as:

\begin{quote}
\ldots a process in which an impartial third person, the mediator, assists the couples considering separation or divorce to make arrangements, to communicate better, to reduce conflict between them, and to reach their own agreed joint decisions. The issues to be decided may concern separation, the divorce, the children, finance and property.\textsuperscript{32} [Emphasis added]
\end{quote}

The advantages of mediation may be characterized as falling into two categories – those that relate to costs for the legal system, and those that relate to personal benefits for families. First, proponents argue that mediation can assist in reducing court dockets and

\begin{footnotes}
\end{footnotes}
in decreasing the demand on judicial resources. Second, in the words of Professor Lon Fuller, "the central quality of mediation [is] its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another." Further, proponents claim that mediation reduces undesirable governmental interference in the ordering of marital and family affairs.

Empirical studies of the effectiveness of mediation have been conducted by individuals in different fields. Within the legal field, Jessica Pearson has conducted a number of studies that report on mediation's benefits. She and Nancy Theonnes reported on two major research projects dealing with the mediation of divorce disputes, focusing on those involving contested custody and access matters. They concluded that while in one of the studies, 77% of individuals who mediated were pleased with the process, whether or not they reached agreement, no more than 40% of respondents in any of their mediation or adversarial samples were satisfied with the court process. They found that women and men were similar in their post-mediation ratings of the experience, and that mediation was considered by survey respondents as less damaging to the parental

---

33 Alison Gereneser and Megan Kelly, "Family Mediation: An Alternative to Litigation" (1994) 68 Fla. B.J. 49 at 49.
34 Lon L. Fuller, "Mediation – Its Forms and Functions" (1971) 44 S. Cal. L. Rev. 305 at 325.
35 Weissman and Leick, supra note 16 at 279-280.
37 Ibid. at 463-464.
38 Ibid. at 469.
relationship than adjudication. The authors were not able to confirm a positive relationship between mediation and an increase in the quality and consistency of parental visitation with children, but suggested that parents who used mediation reported that the sessions focused on children and were aimed at educating parents about the needs of children during divorce. These types of comments were not provided by individuals involved in court hearings. Finally, they concluded that modest financial savings to individuals ensued where mediation was used successfully, while unsuccessful mediation did not result in higher legal fees than those associated with the adversarial process. As a result of their research, Pearson and Theonnes call for greater access to mediation for parties seeking to resolve separation-related disputes.

Access to mediation can be derived privately by parties who are aware of the mediation alternative and seek it out on their own. Judith Ryan points out that "the process of mediation ... has been practiced for thousands of years and is universal among human groups from so-called primitive to advanced societies." For the purposes of this work, however, the discussion focuses on mediation that is accessed as part of the "state-sanctioned" dispute resolution process, either by judicial or legislative recommendation.

---

39 Ibid. at 472.
40 Ibid. at 476.
41 Ibid. at 477.
42 The authors acknowledge that the research revealed both limitations and strengths of divorce mediation. For example, they note that voluntary mediation programs fail to attract large numbers of clients, affecting the ability of such programs to be cost-effective: ibid. at 479.
or mandate, or by virtue of the creation of greater awareness of court-connected mediation services.

c. The Extent of “State-sanctioned” Mediation

It has become quite common in the U.S. for mediation to be mandated for parties seeking the resolution of their separation related disputes. In 1991, Trina Grillo reported that in some states, mediation was a prerequisite to a judicial hearing. In other states, courts were permitted by statute to order mediation.\(^4^4\) Jessica Pearson reported that by 1998, all but six states had statutes that made specific mention of some form of family mediation.\(^4^5\)

In Canada, mediation has received increased support from the legal profession over the past two decades. Ontario’s Rules of Professional Conduct encourage the use of alternate dispute resolution. Rule 2.02 (3) provides that a lawyer shall “consider the use of alternative dispute resolution (ADR) for every dispute, and, if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to use those options.”\(^4^6\) The Divorce Act imposes a duty on lawyers to advise clients of mediation facilities of which they are aware.\(^4^7\) However, no province or territory mandates mediation in family law matters.

\(^{4^6}\) Law Society of Upper Canada, Rules of Professional Conduct (Adopted by Convocation June 22, 2000; Effective November 1, 2000).
\(^{4^7}\) Divorce Act, supra note 6, s. 9(2).
The other avenue through which mediation has been fostered is within the
development of unified family court structures in both Canada and the United States. In
describing the development of unified family courts in Ontario, Mr. Justice David
Steinberg reiterated the following essential characteristics of such a court:

It must hold and exercise jurisdiction in relation to all aspects of
family law in order that all justiciable problems relating to the family unit
can be settled in a comprehensive manner by one tribunal.

There must be services attached to the Court and under its control,
which make available assistance of other professionals in the field of
behavioural sciences.

The Court must function with an efficient system of legal aid for
indigent parties in order to make certain that adequate representation is
available for all parties including, or perhaps especially, children. ... 48
(Emphasis added)

In the United States, discussions about unified family courts have sometimes embraced
the notion of “therapeutic justice.” Jeffrey Kuhn, in fact, suggests that therapeutic justice
is the principle of practice underlying unified family courts. He argues that

[...]therapeutic justice concentrates on empowering families with skills
development, assisting them in resolving their own disputes, enhancing
coordination of court events within the justice system, providing direct
services to families when and where they need them, and developing a
system of dispute resolution that is more cost efficient, user friendly, and
time conscious. 49

One of the key aspects of unified family court projects is the availability
of ADR, usually mediation, as an integral service offered through the legal

Fam. & Concil. Cts. Rev. 454 at 454, citing Stewart Purvis, “Rationale for a Family
Court” (1971) 1 R.F.L. 402 at 403-404.
49 Jeffrey A. Kuhn, “A Seven-Year Lesson on Unified Family Courts: What we have
Learned Since the 1990 National Family Court Symposium” (1998) 32 Fam. L. Q. 67 at
68.
system.  

Barbara Babb argues that the earlier these alternatives are incorporated within the legal system, the more successful the court becomes at “circumventing the adversary process and locating services to assist families.”

Parent education programs have been incorporated into many unified family courts.

Andrew Schepard and James Bozzomo recently conducted a survey of various courts in US states believed to have made a commitment to implement a unified family court model, in order to provide a “snapshot” of unified family courts at the beginning of the twenty-first century. They found that in every jurisdiction claiming to be a unified family court, clients had access to some form of mediation. Likewise, unified family courts in Ontario include mediation services. Commenting positively on the presence of mediation services within unified family courts in the United States, Schepard and Bozzomo write that: “UFCs overwhelmingly mandate or refer parents to mediation in child-custody

Other important elements include the use of case management, the assignment of one judge to hear all pre-trial matters within a case, and the consolidation of various family related subject areas within the jurisdiction of the unified family court. See Steinberg, supra note 48. Barbara A. Babb, “Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court” (1998) 71 S.Cal. L. Rev. 469 at 522.


Ibid. at 334.

For example, the Ministry of the Attorney General reports that mediation for family law matters is available at all 17 Family Court locations: online: <http://www.attorneygeneral.jus.gov.on.ca/english/family/mediation.asp> (accessed 7 December 2004).
and child protection disputes ...”56 and, citing other surveys that suggest court
mandated mediation is an important service for individuals experiencing family
disputes,57 they conclude that “[t]he UFC’s incorporation of mediation
recognizes that mediation generally serves the best interests of parents and
children.”58

5. **Rejection of a Wholesale Adoption of Alternate Dispute Resolution**

Not all of those interested in serving the best interests of parents and
children, and promoting less conflict-laden approaches to family law matters,
advocate for the wholesale adoption of alternate dispute resolution. A number of
commentators have offered reasons to be cautious about any prospect of
abandoning the court process, either largely or entirely in favour of mediation.
Generally, the genesis for these critiques stems from some or all of the following
positions: that the adversarial system has been mischaracterized by ADR
advocates, that the benefits of mediation and the description of key aspects of the
process have been mischaracterized, and that private bargaining actually entails
dangers for some people who are involved with the family law regime.

56 Schepard and Bozzomo, *supra* note 52 at 336.
Professional Partnerships with the Court on Behalf of High-Conflict Divorcing Families
453 at 471.
58 Schepard and Bozzomo, *ibid.* at 347.
In 1988, Teitlebaum and DuPaix advised caution in considering the 'experiment' with alternative procedural solutions, and specifically, mediation, that was occurring with divorce cases. This movement, they argued, constituted a "significant experiment in the manner of social and legal response to marital breakdown." In their view, the shift toward ADR involves not only the typically stated instrumental claims that mediation will carry out the generally accepted goals involved with the settlement of divorce matters and will at the same time avoid undesirable side effects better than litigated settlement, but also implies a move toward the promotion of different values in the processing of marital disputes. As such, there is cause to be extremely careful in considering the purported benefits of mediation.

In reviewing the empirical evidence supporting mediation as a preferred alternative to litigation, Teitlebaum and DuPaix found room to question claims that mediation is a more efficient process than litigation, and they questioned the meaning of "satisfaction" involved in one prominent assessment of client satisfaction with the mediation process. They argued:

It [satisfaction] could mean that they were objectively satisfied, or that they were "satisfied" as compared with their expectations of a litigated settlement. Moreover, some projects ... provided mediation services without charge, while the traditional litigation approach is believed to be

---

60 Ibid. at 1104.
61 Ibid. at 1107-1111.

26
expensive: that economy itself might be considered satisfying. ... Finally, the self-selection in some studies and judicial prescreening in others may have produced a mediation group that was especially likely to be satisfied with a cooperative procedure.  

Further, the authors questioned the interpretation of survey results by the New York Law Revision Committee that the distress experienced by children of divorce will be mitigated by resolution of custody and access disputes via alternate dispute resolution processes. In their view, much of the literature dealing with the effects of divorce on children cited by the Commission could also support another conclusion – that it is the divorce itself, and the impact of divorce on parents, that account to a large degree for the distress experienced by children. "Parents are often preoccupied with bitterness towards each other and the adjustments they must make in their own lives. It is unclear to what extent these circumstances might be relieved through a non-litigative divorce procedure." These conclusions regarding the purported relative disadvantages of the adversarial system (and concurrent benefits of mediation) warranted, in the authors’ view, further research and consideration before wholesale adoption of mediation as the presumptive dispute resolution mechanism.

While surveys continue to suggest some level of dissatisfaction with the adversary system, questions regarding the legitimacy of some of the assumptions underlying the promotion of alternate dispute resolution have not disappeared. Writing in relation to

63 Teitlebaum and DuPaix, *ibid.* at 119 - 1120. The authors were referring to the same study conducted by Pearson and Theonnes, *ibid.*
64 *Ibid.* at 1122.
65 See, for example, Mary R. Cathcart and Robert E. Robles, *Parenting our Children: In the Best Interests of the Nation* (1996) at 39. The authors found that over 50% of litigants considered the legal system intimidating, impersonal and intrusive.
Australia’s legal system, Rosemary Hunter has sought to refute claims of ADR advocates that “lawyers and courts are entrenched in an adversarial mindset, and consequently exacerbate rather than resolve interpersonal and social conflict.”66 One of the assumptions she addresses is that the initiation of court cases leads to protracted litigation and judicial decisions (viewed as a “bad” outcome by ADR advocates). To the contrary, she asserts, in light of what she finds to be family lawyers’ conciliatory nature,67 even when cases are taken to court, it is not inevitable that they will be subject to full-blown adversarial hearings and adjudication. Rather, she reports, interviews of over one hundred lawyers indicate that lawyers have adopted a settlement culture, and accept that there is a court expectation of settlement.68 As noted by one Australian advisory group, “the litigation pathway often involves concurrent attempts at settlement by means of mediation or negotiation …”69 Hunter further notes that other prominent authors

---

67 The author’s conclusion about lawyers’ conciliatory nature was based on the results of a study conducted by the Justice Research Centre, Law Foundation of New South Wales, of which she was one of the researchers. All of the approximately 100 family lawyers interviewed within the study indicated that they believed it was best to settle cases, that settlement was in the best economic interests of their clients, and in the overall long term best interests of children and families. Almost three quarters of the interviewees indicated that they would only go to court in an effort to progress negotiations, if their efforts to achieve an out-of-court settlement had been unsuccessful. See Hunter, ibid. at 159.
68 Ibid. at 161.
discussing United Kingdom studies have concluded that lawyer negotiations produce a higher rate of full settlement than does mediation.\textsuperscript{70}

Indeed, some proponents of mediation acknowledge that the adversary system is actually comprised of a number of different processes, including cases that are not contested, negotiated settlements, and cases that go to trial.\textsuperscript{71} In discussing access to justice concerns with fee-based mediation, Carol King also describes research suggesting that processing a divorce case is not a simple, linear process, but rather, often encompasses court hearings, negotiation, and mediation.\textsuperscript{72}

Hunter also takes issue with the proposition that litigation and judicial decision-making are always negative. One example of a situation where a judicial decision is the only appropriate outcome is a scenario involving alleged child abuse, wherein unsupervised contact with the allegedly abusive parent could pose a risk to the child’s safety. This situation would require testing of evidence, fact finding, and an authoritative judicial decision.\textsuperscript{73} Other categories of cases where litigation is viewed as more appropriate than mediation would be those where all attempts at non-adversarial resolution have failed, those involving allegations of domestic violence, and those where parenting capacity is called into question due to drug or alcohol addiction, intellectual


\textsuperscript{73} \textit{Supra} note 66 at 163.
disability, or mental illness.\textsuperscript{74} These examples suggest a possible role for the provision of information to parties who need to decide the best route for the resolution of their family law disputes.

A number of professionals working in family law express concerns about the tendency of the mediation movement’s rhetoric to “demonize” the legal profession. Justice Gangel-Jacob seeks to dispel these negative perceptions. She begins with the statement: “I know the difference between a negotiated settlement developed in the shadow of the law and a mediated settlement based on what sounds fair and reasonable to an untutored and unrepresented litigant.”\textsuperscript{75} After asserting that some issues and some cases must go to trial, she continues: “There is no doubt in my mind that the mediation movement either consciously or inadvertently demonizes the legal profession. It discourages legal “nit-picking,” but at the same time the movement discourages a focus on important legal needs and issues.”\textsuperscript{76} While a supporter of the use of “third party neutrals”, Justice Gangel-Jacob cautions against abandoning the protection of knowledgeable individuals with legal training.

Carol Smart and Bren Neale, writing about the impact of changes in the U.K.’s \textit{Family Law Act}, 1996, argue that conceptions of what constitutes ‘good’ legal practice have shifted in light of the introduction of mediation into the Act, and the corresponding “welfare” philosophy which emphasizes the welfare of the child and the future relationship of parents. Indeed, they argue, “except where they have the unequivocal

\textsuperscript{74} Ibid. at 166.

\textsuperscript{75} Phyllis Gangel-Jacob, “Without Lawyers, Mediation Sacrifices Justice” (1997) 33 Trial 44.

\textsuperscript{76} Ibid.
backing of a court welfare officer and expert witnesses, lawyers (and parents) are now viewed as ‘bad’ (as obsessive and intransigent) if, instead of reaching a settlement, they doggedly pursue litigation through to judicial determination.”\(^7\) The authors question the validity of this characterization. Based on interviews with thirty-seven family lawyers, they conclude that the divide between litigation and negotiation is not clear-cut, and that some clients who might not be willing to negotiate a settlement in the mere ‘shadow of the law’, may be more willing to do so ‘in the shadow of the courtroom door.’ “Far from being a litigious step, a court application can also be seen as the quickest route to an impartial, mediated resolution of a dispute. …”\(^8\) Characterizing lawyers as good or bad depending on their willingness to absorb the ideologies of social workers, mediators and child psychologists, Neale and Smart say, may be alarming, depending on the extent to which family lawyers feel they must abandon their roles as advocates within the legal system.\(^9\)

In addition to questioning assumptions about the adversarial system, and of the legal professionals operating within that system embodied by proponents of the mediation movement, other commentators have taken issue with the purported benefits of mediation, particularly for certain parties to mediation. Many critiques of mediation, and particularly of mandatory mediation, have been provided by writers who are concerned with the impact of mediation for parties who possess unequal bargaining power.

\(^8\) Ibid. at 392.
\(^9\) Ibid. at 396.
b. ** Concerns that Mediation is Not Always Empowering

Although its proponents maintain that mandatory mediation is a vehicle for empowering parties to resolve their own disputes, a number of key dangers have also been identified for women, which will be addressed shortly, and for parties generally.

Trina Grillo wrote:

> When mandatory mediation is part of the court system, the notion that parties are actually making their own decisions is purely illusory. First, the parties have not chosen or timed the process according to their ability to handle it. Second, they are not allowed to decide themselves how much their lawyers should participate, but instead are deprived of whatever protection their lawyers have to offer. Finally, they are not permitted to choose the mediator and they often cannot leave without endangering their legal position even if they believe the mediator is biased against them.

For women, the critical concern about mandatory mediation is the fact that often they have experienced domestic abuse, placing them in an unequal bargaining position vis a vis the abusing partner. Further, unequal bargaining power can exist in the absence of abuse, and the existence of such imbalance can prove detrimental to the party of lesser power within the mediation process. As Martha Bailey says “[m]ediation is touted as allowing the couple the freedom to make their own standards of fairness. To the extent that the weaker party’s standards are overruled by the other’s, this freedom claim is

---

80 See, for example, Campbell C. Hutchinson, “The Case for Mandatory Mediation” (1996) 42 Loy. L. Rev. 85 and Gerencser and Kelly, supra note 33.
81 Trina Grillo, supra note 44 at 1581.
82 In 1991, 43% of adult female victims of violence known to police were victimized by a marital partner, compared with only 3% of adult male victims: Statistics Canada, Catalogue 85-002, vol. 12 no. 21.
Additionally, argue some critics, by remaining neutral, a mediator accepts and condones the abuser’s behaviour. Colleen Kotyk argues that this approach can disempower the abuse victim and result in a coerced resolution.84

In relation to mediation more generally, Linda K. Girdner has argued that the type of mediation used will impact the extent to which parties are empowered or controlled through mediation.85 She differentiates between ‘controlling’ mediators and ‘empowering’ mediators. She describes the former group as: holding the view that it is their prerogative, and not the parties’, to determine whether a mediated agreement is preferable to a court-rendered one; willing to get past an impasse in proceedings by leveraging the weaker party; inclined to place a higher priority on the needs of the court system to reduce its caseload than on the parties’ needs; and willing to place the possible benefits to children of a forced agreement as a higher priority than the rights and interests of the parents.86 Girdner writes:

My impression is that many mediators perceive their role as advocating for the child, and they have a strong ideological preference for co-parenting. If they also give relatively little weight to the legal consequences of custody decisions of the parties, to the exploration of other custody arrangements, and to the right of parties to settle in another forum (even court, if they choose), they are likely to tip the scales in the direction of social control.87

Mediation as empowerment, on the other hand, involves a very different approach:

84 Colleen Kotyk, “Tearing Down the House: Weakening the Foundation of Divorce Mediation Brick by Brick” (1999) 6 Wm. & Mary Bill Rts. J. 277 at 278.
86 Ibid. at 146-147.
87 Ibid. at 147.
Empowering mediators recognize a responsibility to balance power between the parties. The mediators are aware that some power differences can be altered; whereas others cannot. … Empowering mediators accept that there are times when it is better not to arrive at an agreement in mediation. … Although many mediators have an ideal preference of coparenting, mediators using an empowering approach do not impose this view upon clients. … They address the importance of the child’s continuing relationship with both parents, of the developmental needs of children at different stages, and the need for children not to be exposed to parental conflict.88

Girdner argues that policies which allow mediators to advocate one form of custody over another actually diminish parties’ ability to take control over their own lives, and are inappropriate to democratic governments.89 Her approach has much to offer in terms of encouraging private ordering without imposing a particular outcome on parents. Girdner’s recommendations provide a sound basis for considering potential ways in which mediation and litigation proponents can comfortably co-exist. Further, her framework for characterizing services as empowering or controlling provides a useful tool for assessing the goals and content of court-connected education programs.

6. Overlapping Concerns for Mediation and Litigation Advocates

Most of the authors described in this work acknowledge that the legal system is likely to retain a place for both mediation and litigation,90 barring radical reform.91 At

88 Ibid. at 148-149.
89 Ibid. at 153-154.
90 For example, Schepard and Bozzomo, supra note 52 at 337 assert that the challenge for Unified Family Courts in the future is “not a choice between mediation and litigation, but a plan to integrate the two.”
91 Robert Mullally, an advocate of “structural” reform as a focus for social work practice, suggests that liberals accept that a certain number of social problems will arise from the operation of the capitalist system, and that the state has some responsibility to assist in the amelioration of these problems. The response to social problems is not to undertake
the very least, an 'uneasy relationship' exists between mediation and the remainder of the family law system. One author suggests that it is "inevitable that where an informal process like mediation is being adopted by the formal legal structure there will be clashes between the two different approaches." Within this uneasy relationship, there rest a number of common areas of concern between proponents of mediation and supporters of court adjudication. The sections below discuss briefly the manner in which each of these concerns has been characterized by both mediation proponents and detractors.

a. Lack of Legal Representation

Increased numbers of unrepresented individuals seeking the assistance of the legal system have been documented by several authors. According to Jona Goldschmidt, "[i]t is now common knowledge among judges and court managers that the great tide of pro se litigation today appears on the steps of the family courts." This of course exacerbates the phenomenon of overcrowded court dockets discussed above. Jessica Pearson points out that changing patterns of representation have an impact on how the dramatic system change, but rather to "fine tune" the existing system by way of minor social reform. See Robert Mullally, Structural Social Work: Ideology, Theory, and Practice, 2d ed. (Toronto: Oxford University Press, 1997) at 58. While some might see the procedural reforms of the past number of decades as significant, they do not involve any sort of total overhaul of the fundamental premises of the legal system.  

94 "Pro se" is the term commonly used in American literature to refer to self-represented litigants.  
increasing number of family law cases is dealt with by the courts.96 “High rates of self-representation place new burdens on stressed court systems that are forced to assist pro se litigants in completing forms and following court procedures without giving ‘legal advice.’”97 Goldschmidt advocates for increased proactivity by court staff in providing basic legal information to members of the public.98 Nancy Ver Steegh suggests that being “unrepresented in an adversarial proceeding is particularly disadvantageous to a survivor of domestic abuse.”99 She does not seem to associate the same dangers with mediation, stating that for some abuse survivors (whose abuse has been of a ‘less’ severe nature) with small children and inability to afford a lawyer, exploring mediation might be a viable option.100

Some authors imply that mediation may assist in processing unrepresented individuals’ cases, thereby providing them with a state approved dispute resolution mechanism while not burdening the already overloaded court dockets; others discuss whether there is a continued role for lawyers within the mediation system.101 Jacqueline Nolen-Haley argues that as a matter of general practice, mediation does not provide for truly educated decision-making by parties, particularly where these parties are not legally represented. She argues that unrepresented parties pose a significant challenge to ensuring that parties engage in mediation having provided truly informed consent to the process and its outcomes, and that there is an increased burden on mediators to ensure

96 Jessica Pearson, supra note 45 at 620.
97 Pearson, ibid.
98 Goldschmidt, supra note 95 at 46.
99 Ver Steegh, supra note 71 at 167.
100 Ibid.
101 One such example is Walker, supra note 32.
that consent is informed in mediations involving unrepresented litigants. Kathy Mack argues that men’s more ready access to money and legal advice can provide them with an even more powerful advantage in mediation than in litigation, unless mechanisms exist to compel disclosure or to prevent the dissipation of assets by one party.

Lack of legal representation can also occur, within mandatory mediation settings, due to the express exclusion of lawyers from the mediation process. While family law mediation is not mandatory in Canada at present, it is still relevant to consider the potential implications of such a move. Trina Grillo suggested that the reason for the exclusion of lawyers may be the belief that lawyers will not be cooperative. She went on to say, however, that the exclusion of lawyers from the mediation process renders parties more vulnerable to the exercise of authority by the mediator. In my view, within a family law regime where legal rights are clearly enforced through a court adjudication process, it seems logical to suggest that participants of a process endorsed by that family law regime should have the ability to gain some understanding of those legal rights. Presumably, the most reasonable source of that understanding is lawyers, working both in a private capacity for particular individuals, and in a more public setting as conveyors of general legal information.

104 Grillo, supra note 44 at 1599.
105 Ibid. at 1599-1600.
b. Participant Autonomy

Grillo’s concern about the authority of the mediator within the mediation process can be related to Nolan-Haley’s thesis regarding informed consent to mediation. Much of the above literature suggests that a great deal of mediation’s appeal relates to its ability to empower parents to choose a process in which they can “choose their own destiny”, rather than having their destiny imposed through judicial decision. However, Nolan-Haley takes the position that parties’ lack of informed consent undermines the system’s commitment to party autonomy. In order for consent to mediation to be informed, she asserts, parties must be educated about the mediation process before they consent to participate in it. Further, their continued participation in the process must be voluntary, and they must fully understand and consent to the outcomes reached in mediation.

Unfortunately, she says, “the state of informed consent in mediation today is often more illusory than real. Parties, particularly those without lawyers, often enter into mediation without a real understanding of the process and leave mediation without a real understanding of the result [to which they have agreed].” In order for the mediation process to achieve its goal of promoting autonomy, it is essential that informed consent be given, and that, in providing this consent, parties understand that they may, in effect, be waiving their right to seek resolution of their matters through the formal legal system.

---

106 Nolan-Haley, supra note 102 at 777.
107 Ibid. at 778.
108 Ibid. at 778 – 779.
Participants must understand both their legal entitlements and their right to make alternative agreements through mediation.109

c. Roles of Professionals

The question of the promotion of autonomy within the process is directly related to issues about the appropriate role of various professionals involved in the family law regime. The literature reviewed clearly reveals a state of uncertainty about the respective roles of lawyers and mediators (particularly those with mental health backgrounds) within the current family law regime. While the system obviously recognizes a role for various professionals, the ways in which these professionals can and should interact, and the extent to which different groups of professionals relate to one another, are still matters of debate. Mention has already been made of the criticisms of the traditionally perceived “adversarial” lawyer, and the alleged inappropriateness of such professionals within a no-fault system. Much of the legal response to such criticism has been to defend the legal system as upholding conciliatory approaches along with notions of due process and client advocacy.110 However, literature criticizing the influx of social workers within the legal system, and suggesting that their presence has led to negative outcomes, has also been produced.

In her provocative 1988 article, Martha Fineman argues that the social work profession has in fact usurped the custody and access domain to a point where no

109 Ibid. at 821.
110 Smart and Neale suggest that in the UK the legal professional’s response to indictments of its work was to remodel its practices. Certain family law organizations “did not challenge the dichotomy of ‘good’ and ‘bad’ lawyers, [but] merely sought to be defined in the category of the ‘good’.” Smart and Neale, supra note 77 at 380.
discussion of this area of the law can occur without reference to the social work
discourse, which has now become mainstream in family law.\textsuperscript{111} Fineman argues that the
shift in family law rhetoric can be traced to the no-fault divorce revolution, and to social
workers' characterization of divorce as an emotional crisis or social event which should
most logically be treated with therapeutic intervention.

Within a framework where the role of the professional system is to be therapeutic,
it is said that lawyers are considered ill equipped to handle the emotional crisis of divorce
and its corollaries in light of their adversarial focus. Fineman takes issue with the
dominance of the helping professions' rhetoric, which includes significant support for
shared custody. She argues that mandating mediation may hide rather than eliminate
conflict, and may allow the stronger of two parents to dominate and control the weaker of
the two.\textsuperscript{112} Another problem she identifies is an assumption underlying the discourse that
a parent who seeks sole custody rather than shared custody of a child will do so on the
basis of some illegitimate motivation.\textsuperscript{113} She argues that a number of concerns and
problems are lost within the social work rhetoric. For example, she points out that the
prospect of a continued relationship with an ex-partner may be horrifying for one parent
to contemplate, while the shared custody ideal assumes that a relationship between the
non-custodial parent and a child cannot proceed without this ongoing relationship.\textsuperscript{114}

Further, she argues, allegations of mistreatment, abuse or neglect by husbands toward

\textsuperscript{111} Martha Fineman, "Dominant Discourse, Professional Language, and Legal Change in
\textsuperscript{112} Ibid. at 765.
\textsuperscript{113} Ibid. at 766.
\textsuperscript{114} Ibid.
their wives or children tend to be trivialized, masked or lost in the midst of psychological rhetoric. This effectively reduces mothers’ desires to have custody and control of their children to pathology.\textsuperscript{115} In summary, Fineman concludes that the dominance of the social work role and rhetoric in the family law regime may work to the clear disadvantage of many family law consumers, and she seeks a re-balancing of the role of social workers and lawyers (along with changes to substantive custody laws) to reflect a decreased focus on social work rhetoric and more focus on legal rights.\textsuperscript{116}

d. Best Interests of the Child

Another issue permeating the literature relating to the disposition of family matters is the role of the legal “best interests of the child” principle, attached as it is to the common understanding that preserving children’s best interests is one of the state’s key roles. While much of this debate is played out around the discussion of dispute resolution processes, the foundation for the tension is more accurately located within the issue of whether there is a presumptive rule that will, in most cases, promote the best interests of the child. As alluded to earlier, many mediators with a mental health background adopt the position that joint custody is presumptively the best model.\textsuperscript{117} Research suggests that joint custody results more frequently from mediated decision making than from court adjudication.\textsuperscript{118} Others question the joint custody presumption, and the impact of the adoption of this presumption by mediators. While authors such as Linda Girdner lobby

\textsuperscript{115} Ibid.
\textsuperscript{116} Ibid. at 774.
\textsuperscript{117} See Fineman’s discussion of the helping profession’s strong affiliation with mediation and joint custody: ibid. at 746-753.
\textsuperscript{118} Girdner, supra note 85 at 142.
for the use of empowering mediation, in which mediators do not actively promote any one form of custody arrangement.\textsuperscript{119} Martha Bailey argues that the preferable presumption for custody is that the person having had primary caretaking responsibilities prior to the family dissolution should presumptively be the parent who acquires custodial responsibility upon dissolution. Adoption of this principle would, she argues, clearly bring custody matters within the ambit of issues better suited to adjudication by virtue of the fact that their determination would be subject to the presentation of proofs and reasoned arguments,\textsuperscript{120} hence fitting the model of adjudication propounded by Lon Fuller.\textsuperscript{121}

e. State Role in Family Lives

Equally complex, and related to the promotion children's interests, are questions about the appropriate role for the state to assume in the lives of separating families. Various commentators debate the appropriateness of existing dispute resolution mechanisms as state endorsed processes. Martha Bailey identifies what she terms a "seemingly schizophrenic support for growing government intervention, accompanied by expressions of renewed allegiance to the principle of liberty."\textsuperscript{122} Nowhere, she says, is this schizophrenia more evident than in the area of modern family law, where on one hand...

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{119} \textit{Ibid.}
\item\textsuperscript{120} Bailey, \textit{supra} note 83 at 65.
\item\textsuperscript{121} Fuller wrote that the distinguishing feature of adjudication was the form of participation it confers on parties, namely the ability to present proofs and reasoned arguments. His test for whether a matter was appropriate to adjudication was stated as: "If a given task is assigned to adjudicative treatment, will it be possible to preserve the meaning of the affected party's participation through proofs and arguments." See Lon L. Fuller, \textit{supra} note 34 at 393.
\item\textsuperscript{122} Bailey, \textit{supra} note 83 at 91.
\end{enumerate}
\end{footnotesize}
hand we have rules creating the conditions for marriage dissolution so that people can know what to expect, and on the other hand, we encourage parties to exercise their freedom to dissolve their marriage in a way that suits them. Perhaps, she suggests, “family law acknowledges the potentially prejudicial effect of marriage dissolution on one or both parties and society’s jurisdiction over it by the enunciation of rules, but, by permitting parties to ignore these rules, family law stops short of claiming complete jurisdiction on the grounds of general welfare.” 123

Others have noted the tension between encouraging decision making autonomy and having the state promote particular ideologies and/or processes. For example, Linda Girdner notes the paradoxical relationship between state responsibility and parental autonomy illustrated by the child custody issue. 124 While the state prefers to have parents determine custody matters through private ordering mechanisms, it preserves the ultimate right to determine children’s placement. Mediation, which is used as a procedural means for parents to arrive at custody decisions, involves a balance between empowerment and social control. We must question, says Girdner, the extent to which mediation functions as an agent of social control, “coercing and persuading parents to enter into agreements which reflect the new ideological preferences of the state and/or of a new group of professionals[.]” 125 One aspect of the ideology to which she refers is that of the preference for joint custody held by many mediators. Indeed, one proponent of mediation has described that process as a “handmaiden to joint custody, and a device for

123 Bailey, ibid.
124 Girdner, supra note 85.
125 Girdner, ibid. at 139.
implementing its values." Particularly when mediation is mandatory, one must question the role of the state, and of mediation, argues Girdner, in the implementation of a new ideology. Tina Grillo agreed, and argued against the adoption of mandatory mediation policies:

If the state were committed only to making sure that disputants become familiar with mediation, something less than mandatory mediation – such as viewing a videotaped mediation or attending an orientation program – could be required ... That more than the simple receipt of information is required under a statutory mediation scheme demonstrates a profound disrespect for the parties’ ability to determine the course of their own lives.

Caroline Bridge attempts to find the dividing line in the debate. She suggests that when mediation is the product of true choice by the parties, the elements of injustice that are inherent to the mediation process are minimized. However, “[w]hen it is institutionalized and integrated into the legal process as a compulsory substitute for legal advice and Court proceedings it cannot be reconciled with accepted concepts of justice.”

f. Specific Clientele Groups

Issues of autonomy and state involvement in family life span all client groups. However, within the literature reviewed, particular concerns are raised regarding the impact of dispute resolution on certain groups. One clearly identified group of concern is victims of domestic violence. While authors such as Nancy Ver Steegh suggest that adversarial processes are particularly dangerous for unrepresented women who have been

126 Schepard and Bozomo, supra note 52.
127 Girdner, supra note 85 at 142.
128 Grillo, supra note 44 at 1608.
129 Bridge, supra note 92 at 253.
victims of domestic violence, feminist authors point out the disadvantages of “privatizing” domestic abuse and subjecting victims of domestic abuse to mediation with abusive former partners in the face of extreme power imbalance. There seems to be little common ground about processes that best serve these victims.

Other issues regarding client groups that have received some mention within the dispute resolution literature are cultural diversity and never-married parents. With regard to the former, Nina Meierding suggests that mediation is a more effective mechanism than is the court process for dealing with religious and cultural issues which may affect parties’ perceptions of fairness and approach to dispute resolution. However, Roger Wong discusses the need for mediators to avoid imposing their own ethnocentric attitudes within the mediation process, lest the “client’s cultural values become secondary to the arduous task of obtaining an agreement.” Like Girdner, his comments seem to be concerned with achieving a mediation process within which parties to the mediation are empowered rather than controlled.

Finally, Joan Raisner has raised the issue of whether mediation is appropriate for never-married parents, and if so, whether alterations need to be made to the typical mediation process in order to better serve never-married parents. She reports on a survey of family law mediations conducted with married parents as compared to mediations conducted with never-married parents. Raisner concludes that never married and married

---

130 Ver Steegh, supra note 71.
131 See, for example, Grillo, supra note 44 and Bailey, supra note 83.
parents seemed to reach agreements at similar rates once mediation occurred\textsuperscript{134} (never
married parents had a higher “no-show” rate in terms of actually attending mediation than
married parents). However, she suggests certain adjustments that might be made to
enable mediators to respond appropriately to the needs of never-married parents within
mediation, increasing their chances of success. These include increasing the educational
component of mediation, particularly in relation to child development issues, for parents
who may have had little prior contact with the child; increasing behaviours of power
balancing, increasing time spent on modelling communication styles, and interviewing
the child where possible.\textsuperscript{135}

7. Summary and Definition of the Research Problem

While this review has by no means canvassed all of the existing literature dealing
with the issue of procedural reform in the family law system, it has provided sufficient
information to discern a number of key issues that are of concern to the majority of
individuals interested and/or involved in family law dispute resolution. As Nolan-Haley
points out, mediation and the court system share a common goal: to achieve justice and
fairness in the resolution of disputes.\textsuperscript{136} Further, there is shared concern with the best
means of promoting children’s well being, for, while not parties to the process, they are
directly impacted by its outcomes. How to best achieve the promotion of these objectives
is subject to differing views, some of which relate to questions about appropriate

\textsuperscript{134} Joan K. Raisner, “Family Mediation and Never-Married Parents” (1997) 35 Fam. and
\textsuperscript{135} \textit{Ibid.} at 98-99.
\textsuperscript{136} Nolan-Haley, \textit{supra} note 102 at 777.
substantive laws. While the work that follows does not deal directly with these substantive questions, it touches upon them where necessary to the analysis of the role of court-connected parent education.

One of the themes present in the literature reviewed is the difficulty in determining how the state should best achieve its goal of promoting less conflictual decision-making while allowing for the exercise of parental autonomy. There is acceptance by virtually all players within the family law system that where possible, protracted, highly conflict-laden litigation is to be avoided. Most of the disagreement within the literature relates to the most appropriate means of discouraging excessive litigation, and of avoiding the placement of children in the middle of parental conflict.

Adopting Linda Girdner’s theory about “empowering mediation” and Nolan-Haley’s argument that in order for mediation to achieve its goals, it must be a process to which parents provide truly informed consent, my thesis is that within a system that involves different dispute resolution alternatives, it is essential that participants be able to provide truly informed consent to whichever of the options they choose. Nolan-Haley states that “conceptually, the principle of autonomy distinguishes mediation from the adjudicatory dispute resolution process. Instead of allocating decision making power to a third party, the parties who are affected by a dispute retain such power.”137 My focus on informed consent is on the actual decision as to which process(es) to use for the resolution of family disputes. In other words, parties’ decision

137 Nolan-Haley, ibid. at 790.
to enter into either the litigation process or another process\textsuperscript{138} such as mediation should be based on an informed understanding of that process and its possible outcomes. In this way they are more empowered participants in the family law system. Part of the focus of my work is to consider whether and how court-connected parent education has the capacity to assist with participant empowerment by helping parents to make informed choices without excessive state interference.

The shared concern about the role of professionals within the legal system, and the differing perspectives about those roles, is an additional area for consideration. In my view, within a legal system that institutionalizes the option of dispute resolution by way of adjudication, it is difficult to argue that legal information and advice is no longer required. There is little dispute that parties are in fact, as Mnookin and Kornhauser asserted, even when engaged in private ordering, bargaining in the shadow of the law. As a result, it is hardly tenable to suggest that the legal system as currently configured can (or should want to) rid itself of the value of legal advice. Indeed, recognition that separation and divorce entail both legal and emotional elements suggests that there is a viable and valuable role for both lawyers and mental health professionals within the legal system. Through research relating to the PIP, I would like to explore the impact of both legal and non-legal information on participants, along with the perceptions held by program participants about the legal and social work professionals facilitating the PIP seminars.

\textsuperscript{138} Other possibilities include arbitration and negotiation through a "collaborative law" process.
There is no doubt that the large numbers of unrepresented litigants within the legal system are a cause for much analysis and debate. Mediators caution of the dangers of being unrepresented in a court process; non-mediators warn that entering into mediation without appropriate legal advice can be equally dangerous, if not more dangerous, than engaging in the court process. In the work that follows, I attempt to look at the desire of various court participants for legal information and advice, and at the role that court-connected parent education might play in assisting parents to gain a greater understanding of court and ADR processes. Again, I hope to show that court-connected parent education programs can assist parties to make informed decisions about which system processes they wish to engage.

a. The Hypothesis: Court-connected Parent Education as a System “Link”

The hypothesis I wish to test is that court-connected parent education, while originally conceived as a complement to mediation, has the potential to act as a link between informal dispute resolution mechanisms such as mediation and the court adjudication process by explaining each, providing information about the law at issue regardless of the process undertaken, and providing information about both the legal and emotional aspects of the separation process for both parents and children so that parents can be assisted in making informed and empowered decisions about how to proceed with the resolution of their post-separation issues. Part of the hypothesis is that this potential role for parent education programs is contingent on program content including both legal and non-legal information and refraining from acting as a social control mechanism. While many programs downplay or discourage the inclusion of legal content, it is my
view that this information, presented along with the “emotional” content and the process options, is key to the presentation of a balanced set of information from which parents can make informed decisions.

b. **The Research Methodology: Doctrinal and Empirical**

Testing the hypothesis above will entail primarily doctrinal analysis and empirical research conducted in relation to the PIP. The analysis will proceed as described in the paragraphs below.

In Chapter 2, existing literature about court-connected parent education programs is presented, followed by an examination of some of the socio-political motivations for the procedural reform initiatives described above. This discussion will serve as the background from which to examine in more detail the rationales for the integration of parent education into the family law system. This background can provide assistance in clarifying priorities for parent education programs, both in the context of their substantive content and regarding their scope and method of application.

In Chapter 3, I consider the doctrinal limits on state interference with parental autonomy in the context of private custody disputes. This discussion is key to thinking about the extent to which it is appropriate for the state to require parents to engage in a particular process. Here, picking up from the discussion in the literature review about the appropriateness of requiring parties to participate in mediation, the analysis proceeds to the question of whether it is appropriate for the state to require parents to participate in court-connected parent education programs.
Chapter 4 presents data collected in relation to the Parent Information Program. These data are two-fold. First they consist of the results of court file reviews conducted of a sample of PIP participant files along with a control group on non-PIP participant files to determine whether participation in the PIP suggests any discernable impact on the way litigants proceeded through the court process. Second, there are data relating to PIP participants’ views of program facilitation, the legal and emotional content, resource information, and the continued utility of the information over time. The data are also analyzed with regard to whether legal representation or other demographic factors appear to have affected the participants’ responses.

Chapter 5 combines the analysis from Chapter 3 with the results described in Chapter 4 to canvass the most appropriate type of program content. Chapter 6 continues by canvassing implementation and attendance policies.

Finally, Chapter 7 briefly returns to the hypothesis that informed the research strategy, and comments on the valuable role that court-connected parent education might play within current family dispute resolution regimes. It concludes with the argument that such programs can play an important role in providing information to separating parents about both the emotional and legal aspects of their separation-related disputes. This information can assist parents to make informed decisions about the processes they choose to resolve their disputes. Further, the programs can encourage parents to approach dispute resolution in a manner that serves their children’s best interests.
Chapter 2: Parent Education as a Phenomenon

As noted in Chapter 1, court-connected parent education is one reform mechanism that has been introduced into both the Canadian and American legal systems in response to calls for a less litigious approach to the resolution of family law issues, and in particular, to child custody and access matters. However, consistent with debates about litigation versus mediation (and other forms of alternate dispute resolution [ADR]), court-connected parent education has not been unanimously accepted as useful or desirable. Rather, the debates around this form of program represent a snapshot of converging and divergent interests at play within the family law system, many of which were introduced in Chapter 1. In this chapter, I seek to provide a clearer context for understanding both the current status of court-connected parent education and the socio-political climate within which it has developed.

1. Parent Education as a Component of Public Legal Education in Canada

Court-connected parent education is a form of public education. Public education, of course, is not new to law. The 1960's and 1970's ushered in a wave of efforts in both Canada¹ and the United States² to better inform the general public about law and its impact upon them. A broad range of initiatives was adopted, including the

production of pamphlets dealing with various areas of law, delivery of information through public seminars, and organization of national conferences. These endeavors were promoted primarily by consumer interest groups and adult educators and were most often directed toward areas of law such as Landlord and Tenant, Consumers’ Rights, and Human Rights.

For a number of years after its heyday in the 1970’s, the profile of Canadian public education in many areas of law seemed to have decreased. However, the emergence of the internet as a mechanism for the broad dissemination of information has acted as one form of inspiration for the provision of various kinds of information to the public. In particular, governments have developed quite extensive web sites and links to information. A renewed overall interest in public legal information seems to have emerged.

In particular, a revised focus on educating members of the public about family law-related issues has arisen. Over the past decade in Canada and the United States, a number of initiatives are discussed in C.H.S. Jayewardene & T. Pelpola, *Access to Justice: International Review of Public Legal Education and Information* (Ottawa: Minister of Supply and Services Canada, 1986) at 55-82.


* The federal government web site, www.gc.ca, provides links to primary provincial and territorial web sites. A number of vibrant public legal education initiatives exist. For example, Community Legal Education Ontario (CLEO) produces a great deal of literature in several areas of law. Other organizations devoted to the promotion of public legal education include Community Legal Education Association (Manitoba); Community Legal Education Association (P.E.I.); Public Legal Education and Information Service of New Brunswick; Public Legal Education Association of Saskatchewan; Public Legal Education Network of Alberta; Public Legal Education Society of Nova Scotia; Societe quebecoise d’information juridique; and Law Courts Education Society (B.C.).
educational programs, typically titled "parent education" or "parent information" programs, have become increasingly popular. While these programs are designed to cover a range of issues, such as the impact of divorce and separation on parents and children, the harmful effects of prolonged, conflict-laden litigation on children, basic legal terms, the court process and the existence of alternative dispute resolution mechanisms, content differs from program to program. The format of these programs also varies, from didactic presentations to more interactive learning models. Program length varies from two hours at the low end to twelve hours at the upper end of the range.

At least two unique aspects of this educational movement are worthy of comment. First, parent education programs embody an "interdisciplinary" focus on both the legal and emotional aspects of separation and divorce. In fact, there is a greater preponderance of mental health professionals than legal professionals involved in the facilitation of these programs. Second, while many organizations have offered courses to separating

---

6 For the sake of consistency, the term "parent education" is used within this work.
7 Parent education programs can be distinguished from "parenting" programs which parents involved in child protection proceedings are sometimes required to attend. Parenting programs are focused on teaching basic caregiving and nurturing skills within the home, and are not focused on post-separation issues. In Toronto, for example, programs such as those provided by the Hinks-Dellcrest centre focus on "parent training" along with counselling, play therapy for children and family resources. See online: www.hinksdellcrest.org (accessed 7 December 2004).
8 Sanford Braver et al, "The Content of Divorce Education Programs: Results of a Survey" (1996) 34 Fam. & Concil. Cts. Rev. 41. This survey reports on U.S. programs. A recent report of Family Mediation Canada regarding selected Canadian programs, one of which was the Parent Information Program, suggests that existing Canadian programs follow similar patterns: B. Bacon and B. McKenzie, *Best Practices in Parent Information and Education Programs After Separation and Divorce* (University of Manitoba: Childhood Family Research Group, 2001) at 45-61 [Best Practices].
and divorcing couples in a private setting for a number of years, recent family law reform initiatives suggest a growing emphasis on parent education programs’ capacity to operate as one of a number of government services offered to separating parents contemplating involvement with the family law system. As a result, they fall squarely within the subject matter of the debates about family law dispute resolution processes identified in Chapter 1. Some steps have been taken toward the integration of parent education within the legal system in Canada and more extensive integration has occurred in the United States. Early parent education programs were linked to mediation, and government contracts for the provision of court-connected parent education programs are still often awarded to the same service providers who are selected to provide court-connected mediation services. As my analysis proceeds, it will become apparent that this “bond” between parent education and mediation, in my view, may be neither necessary nor desirable.

9 Braver et al, ibid. at 47.
10 For a listing of parent education programs offered throughout Canada, see Family Mediation Canada, Families in Transition: Children of Divorce, and Inventory of Canadian Parent Education Programs and Resources (Ottawa: Family Mediation Canada, 1998).
12 See discussion of implementation mechanisms in Chapter 5.
13 For example, both parent education and mediation service provision within Ontario’s Family Courts are contracted out to single service providers in each region. See the list of “Family Mediation and Information Service Providers,” online: Ministry of the Attorney General (Ontario) <http://www.attorneygeneral.jus.gov.on.ca/english/family/famcrtaddress.asp> (accessed 6 December 2004).
Perhaps due to the relative "newness" of the concept of court-connected parent education, it has received little legal policy analysis. To the extent that parent education programs may be used for the transmission of information not only about technical aspects of the family law process but also about prevailing and evolving philosophies connected to the family law system, this lack of analysis is unsatisfactory. For some, state endorsement for parent education programs makes intuitive sense. However, incorporation of such programs into the legal system represents a clear shift in the Canadian family law system that requires assessment. In light of the tensions described in Chapter 1, it is important to consider content, facilitation methods, and implementation mechanisms, since they relate to the overall dispute resolution mechanisms available to family law consumers.

It seems logical to suggest that a principled approach to any prospective wholesale integration of parent education into the family law system requires a detailed analysis of the purposes that can and should be served by such integration, and how the integration would most appropriately be achieved. More specifically, consideration should be given to the priority of rationales linked to program development. Clarity about program rationales will assist in determining: (1) the desired and the realistically attainable effects of such programs; (2) desired program content; (3) desired program format and level of intervention; and (4) most viable program implementation and attendance policies.
A review of the existing literature shows that to date there has been no detailed analysis of the kinds of information and goals that would lead to the most effective integration of parent education programs into the Canadian family law system. My objective is not to engage in a cost-benefit analysis. Rather, I hope to reflect on court-connected parent education’s overall potential role within Canada’s dispute resolution regimes.

2. Rationales Linked to Court-Connected Parent Education Programs

A number of rationales have been linked to court-connected parent education. It is perhaps not surprising that the rationales reflect, generally speaking, concern for many of the same issues identified in Chapter 1. Commentary about court-connected parent education programs generally depicts a myriad of potential motivators for court-connected parent education. In the U.S., for example, one article suggests that factors which spur the growing interest in parent education are: (1) growing recognition of the long term implications of post divorce parental conflict for families and the court; (2) a rise in filings by parents who are unrepresented by lawyers; and (3) parent education’s “affordability” as an intervention.14 Another author notes that:

[t]o deal with overburdened dockets, protect children from the harmful effects of adversarial proceedings, and accommodate the rising tide of allegations of dysfunction and the declining use of lawyers in family law cases, courts have tried numerous approaches. Among the programs being used are ... parent education. ...15

14 Braver et al., supra note 8 at 41-43.
In Canada, a similar range of motivators has lead various interest groups to suggest that there may be a viable position for parent education in connection with family law issues. The motivators, introduced in the passages below, include: (i) raising public confidence in the family law system; (ii) assisting legally unrepresented individuals; (iii) promoting alternate dispute resolution and decreasing court dockets; and (iv) encouraging conflict avoidance and cooperative parenting.

a. **Raising Public Confidence in the Family Law System**

In 1995, a Civil Justice Review Committee was convened in Ontario to “develop an overall strategy for the civil justice system in an effort to provide a speedier, more streamlined and more efficient structure ... to maximize the utilization of public resources allocated to civil justice.” In the first of its two reports, the Committee established what its members considered the fundamental characteristics required of a modern justice system. One key characteristic, in the Committee’s view, was that such a system ... “have the confidence of the public ....”

After assessing the existing civil justice system in Ontario against the fundamental characteristics it had outlined, the Committee concluded that several weaknesses existed. Regarding public confidence and the family law regime, the Committee noted:

---

17Ibid. at 4. The other requirements were that the system must: be properly and adequately funded and resourced; make available to the public both the traditional court based dispute resolution process and alternative dispute resolution processes; have completely impartial members of the judiciary; have qualified and trained personnel at all administrative levels; feature a unified management, administration and budgetary model for the administration of the justice system; be equipped with modern technology; and operate under a model of caseflow management. See Ibid. at 4-5.
During the Consultation stage ... the Review was told frequently about the tragic consequences of the high cost -- monetarily and emotionally -- of family law proceedings; about the numerous motions; about the often-poisonous nature of lengthy affidavit materials; about the uncertainty of hearing dates; and about the lack of a province-wide specialized Family Court.18

The fundamental characteristic of public confidence, the Committee concluded, was lacking. In the Committee’s view, part of the difficulty was attributable to insufficient education for the public.19

To address this problem, the Committee recommended that litigants in the family court setting be required to watch a video consisting of information about the court process and the emotional impact of separation, prior to having their matters continue through the system. It was also suggested that a follow up to the video be provided by mental health and legal professionals.20 Presumably, the Committee hoped that this improved understanding of the family law system might lead to increased participant satisfaction with the legal process.

By contrast, U.S. literature does not reflect discussions about a potential relationship between parent education programs and public confidence in the family law system, though commentators have stressed the extent to which such programs illustrate the courts’ concern for the wellbeing of communities. Salem, et al suggest that:

18Ibid. at 269.
19Ibid. at 273. The Committee also viewed insufficient education of the bar, the bench and administrative staff, as contributing to problems with the family law system. While these are by no means minor issues, they are beyond the scope of this inquiry. The commentary in this work is limited to the Committee’s recommendations for improving public confidence through public education.
[b]y supporting parent education programs, courts make a significant social statement. They tell the community that the function of courts extends beyond making and enforcing judgments. Rather, parent education programs are a symbol that courts are an integral part of their communities, with a responsibility to help families address problems before they become acute.21

b. Assisting Unrepresented Individuals

As noted in Chapter 1, the “machinery” of the family law process poses particular challenges for individuals who encounter the family law system without the benefit of legal assistance. In Ontario, this problem became acute in 1996/97 when Ontario courts experienced a dramatic increase in the number of unrepresented22 litigants appearing before courts, an occurrence that has been attributed to significant cuts in legal aid funding.23 In the reexamination of the legal aid system that followed the cuts, one key question that arose was how, in light of the recognized entitlement to legally aided services for family law consumers24 and the reality of more restrained legal aid budgets, the state could provide quality services in an economically feasible manner. A partial solution, offered by the Ontario Legal Aid Review (which undertook the preparation of a report and recommendations on the Ontario Legal Aid Plan), mirrored the

---

20 Ibid. at 276.
22 Sometimes referred to as “self represented”.
24 According to the Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services, v. 1 (Ontario: 1997), this entitlement rests on three factors: (i) the complexity of the state enacted legal regime; (ii) the significance of the interests that the
recommendation of the Civil Justice Review Committee discussed earlier - to provide family law information to members of the public.\textsuperscript{25}

In the United States, advocates of court-affiliated parent education also cite its potential to assist unrepresented litigants:

The information non-represented minority parents – indeed all pro-se parents – receive from PEACE\textsuperscript{26} about the legal process and how to minimize the difficulties their children experience may be the only such information they will receive.\textsuperscript{27}

Parent education evaluations have not focused on the question of whether these programs have any different impact on unrepresented litigants than it does for individuals who have obtained legal counsel. Some research, which does not differentiate between represented and unrepresented individuals, indicates that participants desire increased

\textsuperscript{25}Ibid. at 165. The recommendation was supported by a study in family law prepared for the Committee by Brenda Cossman and Carol Rogerson, titled “Case Study in the Provision of Legal Aid: Family Law” in \textit{A Blueprint for Publicly Funded Legal Services}, v. 3 (Ontario: 1997) at 903-909. The number of unrepresented litigants within the provincial family courts remains high. The Ministry of the Attorney General’s 2003/2004 statistics record 47.5\% of litigants as unrepresented at the time they filed divorce, \textit{Children’s Law Reform Act}, or \textit{Family Law Act} matters in either the Ontario Court of Justice Family Court or the Family Court Branch of the Superior Court of Justice. (A copy of these statistics is on file with the author). As noted by Justice Marguerite Trussler, “there has been a lack of empirical studies conducted to ascertain the exact number of self-represented litigants in Canada.” See Marguerite Trussler, “A Judicial View on Self-represented Litigants” (2002) 19 Can. Fam. L.Q. 547 at 547.


information about the legal process. One might hypothesize about why the particular needs of unrepresented individuals have not been addressed in the reported research to date. In the United States, there is a fairly extensive branch of public education focused on assisting “pro-se” or unrepresented litigants, to become capable of representing themselves. It may be that due to the legal content in pro-se programs designed for unrepresented litigants, there is less perceived need for legal information in parent education programs. Rather, the focus is on mental health content. In Canada, the increased numbers of unrepresented litigants within the family court system have only reached recognizably problematic levels over the past six to eight years. As such, it is arguable that the earlier programs were not designed with this problem in mind. Nonetheless, since the desire to assist unrepresented litigants is clearly present in current policy discussions, the issue is worthy of research consideration.

I indicated in Chapter 1 that part of this work would deal with data collected from research in relation to the Parent Information Program (PIP). Rather than stemming from a mental health initiative, PIP was created in response to the increased numbers of unrepresented individuals who were appearing in family courts in the wake of legal aid cuts. Part of the research undertaken in connection with this program seeks to determine whether the information provided is helpful to litigants, both represented and unrepresented. It should be noted however, that, as distinct from some pro-se programs developed in other jurisdictions to assist individuals who have no legal representation to

---

28 Ibid. at 164.
effectively represent themselves, the PIP was not proposed as a stand-alone solution to the needs of individuals who are unable to afford legal representation.

c. Promoting Alternate Dispute Resolution and Reducing Court Dockets

One of the commonly stated objectives of parent education programs to date has been to inform participants of the benefits of resolving post-separation disputes by methods other than protracted court proceedings. A number of early parent education programs were developed in conjunction with family mediation programs, based on the belief that “to maximize mediation’s value as a tool for resolving custody and visitation disputes it is necessary to create a context to understanding that helps orient the client to the goals and “work” of mediation”.30 This orientation is provided largely through court-based education and orientation sessions. It is essential to recognize this frequent bias toward mediation, for if court-connected parent education is to act as a link between ADR and the court process, rather than an “agent of social control” in Girdner’s terms, the content of parent education programs may, in some cases, need to be altered.

The objective of promoting alternate dispute resolution mechanisms through parent education programs was emphasized in a 1998 proposal submitted by the Ministry of the Attorney General to the Federal Department of Justice for a Unified Family Court expansion in Ontario.31 Within the proposal, the Ministry identified part of the “Core Services Package” to be offered within the Unified Family Courts as consisting of information sessions on family law and alternative methods of resolving disputes as well

as sessions dealing with the impact of parental separation on children.\textsuperscript{32} One rationale for the proposed information sessions was to "provide clients with sufficient background information to enable them to make an informed choice as to how they wish to resolve their dispute".\textsuperscript{33} Within those sessions, mediation would be one of the services characterized as a valid dispute resolution mechanism which may operate either in conjunction with, or separate from, more formal dispute resolution mechanisms.

Finally, it has been suggested that with their focus on cooperative behaviour and alternate dispute resolution methods, parent education programs have the potential of reducing overcrowded court dockets, a phenomenon experienced in both the U.S. and Canada over the past decade. Interestingly, notwithstanding its roots in mediation orientation, there has been little analysis of whether attendance at parent education programs actually increases the use of ADR. As will be discussed later in this work, PIP research did address this issue, and results suggest that attendance at a parent education program may lead to a higher usage of mediation services than occurs for non-program participants.

Other research suggests that parent education has a positive effect on mediation outcomes. Authors of a nationwide survey of two hundred and fifty three mediation practitioners in the United States\textsuperscript{34} found that the majority of those surveyed believed

\begin{itemize}
  \item \textit{Ibid.} at 11.
  \item \textit{Ibid.} at 12.
  \item Jack Arbuthnot & Kevin Kramer, "Effects of Divorce Education on Mediation Process and Outcome" (1998) 15 Mediation Quarterly 199 [\textit{Effects of Divorce Education on Mediation}].
\end{itemize}
parents who attended divorce education programs were "significantly more focused on their children's needs than were parents who did not take such classes." Additionally, the majority of those surveyed perceived parent education participants as negotiating more cooperatively and communicating more effectively.

In terms of court dockets, there is little information about the rate of diversion from litigation to alternative forms of dispute resolution, and early results are mixed as to whether parent education programs reduce relitigation rates. While there is some U.S. research suggesting that relitigation rates may be lowered through parent education programs, other studies find no such reduction. For example, a study of divorced parents in Louisville, Kentucky disclosed no significant difference in relitigation patterns among 281 parents who, upon filing for divorce, were randomly sent to a parent education program as compared to 181 parents who were not referred to such a program. Further, findings of court reviews conducted in relation to the "For the Sake of the Children" program in Manitoba did not substantiate such reductions in relitigation

35 Ibid. at 211.
36 Ibid.
37 Jack Arbuthnot, Kevin Kramer, & D.A. Gordon in "Patterns of Relitigation Following Divorce Education" (1997) 35 Fam. & Concil. Cts. Rev. 269, suggest that relitigation rates may be lowered through parent education programs. In this study, two groups of parents were tracked for 2 years following their divorce: a group of 89 who had attended a mandatory divorce education class and a comparison group of 23 who did not. The two groups did not differ in any assessed demographic or family characteristics. At the follow-up assessment, the parents who attended the class had relitigated (over all issues) less than half as often as those who had not attended the class. Further, the authors found that rate of relitigation was related to mastery of skills learned in the class.
38 Ibid.
Evaluators noted that the files reviewed related to individuals who attended the three-hour version of the program. They anticipated that the new six-hour program, which focuses more strongly on the development of coparenting skills, may have more success in lowering relitigation rates. Finally, reports do not place any significant focus on parent education’s impact on parents’ understanding of substantive legal matters related to separation and divorce.

d. Promoting the Best Interests of the Child: Conflict Avoidance and Co-operative Parenting

Tied to the issue of litigation are the problems that arise when children are placed in the middle of parental conflicts arising in post-separation/divorce scenarios. The rationale for parent education that seems to receive the most widespread endorsement is encouragement for parents to avoid placing their children in the middle of the conflicts that arise after adult separation. In keeping with a goal of discouraging behaviour that places children in these harmful situations, the Attorney General’s proposal for Unified Family Court expansion included an undertaking to implement a program to “educate parents about the effects of separation and parental conflict on children and to assist them in refocusing the dispute on the best interests of the children.”

---

40 B. McKenzie & I. Guberman, “For the Sake of the Children” - A Parent Education Program for Separating and Divorcing Parents: Evaluation of the Pilot Project of Family Conciliation, Manitoba Family Services in conjunction with Manitoba Justice and Court of Queen’s Bench Family Division (December 1996) [For the Sake of the Children]. Data were collected from the court records of 290 participant cases and 182 non-participant cases. The authors concluded at page 128 that the data disclosed “no persuasive evidence that a three hour parent education program produced a major effect on litigation activity between 1.5 and 2.5 years after program attendance.”

41 Ibid.

Seventeen "Family Court" sites are now operational in Ontario. The Ministry of the Attorney General reports that each location offers parent education sessions, and that the topics covered include: the negative effects on children of protracted litigation and hostility between parents; the children’s needs at various stages of development; parenting responsibilities and strategies for problem solving after separation; the impact of violence in the family on children; and community resources for children. It is noteworthy that, notwithstanding a stated rationale of the information sessions to help parents to make informed choices, legal information is not included within the specified topics. To date, the government’s undertaking to provide legal information to members of the public appears to have been addressed primarily through the establishment of Family Law Information Centres (FLICs) at each Family Court site. These Centres provide written brochures and videotaped information about the legal system and available parent education programs. Additionally, advice lawyers from Legal Aid Ontario who provide summary legal advice form part of the FLICs.

In keeping with the objective of promoting children’s interests, parent education programs are often aimed at assisting parents to adopt more cooperative parenting techniques. Professional support for the adoption of such strategies is increasing. In For the Sake of the Children, a 1998 Joint Parliamentary-Senate report on Child Custody and

---

43 The title Unified Family Court has been replaced by “Family Court.”
44 Unified Family Courts also exist with differing levels of geographical coverage, in the other provinces and territories.
Access Reform in Canada, the Committee, in addition to recommending the acceleration of unified family court development across Canada, noted the value of integrating parent education programs into the divorce process:

[A] parents seeking parenting orders, unless there is agreement between them on the terms of such an order, [should] be required to participate in an education program to help them become aware of the post-separation reaction of parents and children, children’s developmental needs at different ages, the benefits of co-operative parenting after divorce, parental rights and responsibilities, and the availability and benefits of mediation and other forms of dispute resolution, provided such programs are available.

While the Joint Committee’s report has attracted criticism, primarily due to the amount of attention it gave to complaints of fathers’ rights groups, the recommendations regarding parent education have been one aspect of the report that have not drawn significant negative feedback.

The Joint Committee called for the creation of a more extensive definition of the ‘best interests of the child’. The list of criteria suggested in relation to the best interests of the child include criteria calling for the recognition of “the importance and benefit to the child of shared parenting, ensuring both parents’ active involvement in his or her life

---

46 See supra note 31.
48 Ibid., Recommendation 10.

68
after separation" as well as "the willingness shown by each parent to attend the required education session." In a report to the Federal Department of Justice released following the publication of the *For the Sake of the Children* report, the Canadian Bar Association repeated an earlier recommendation that parent education programs become mandatory for divorcing parents.

Notwithstanding these endorsements of the idea of mandating parent education programs, Bill C-22, legislation to amend the *Divorce Act* which died after first reading, did not include a provision requiring attendance at a parent education program. It did, however, contain the following factor for courts to consider in determining the best interests of the child:

16.2(2)(b) the benefit to the child of developing and maintaining meaningful relationships with both spouses, and each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;

The emphasis on encouraging parents to focus on children's needs is acutely apparent in American parent education programs. One U.S. commentator has described the potential of parent education programs as follows:

The core belief of P.E.A.C.E.'s founders is that children are more likely to cope with the transitions of parental divorce or separation if parents reduce

---

their conflict and take responsibility for creating an effective parent-child relationship.\textsuperscript{54}

Most of the parent education research that has been conducted in Canada and the United States to date focuses on how programming has impacted on family relations and continued parental relationships with children.\textsuperscript{55} Generally speaking, parents have

\footnotesize
\textsuperscript{54} Andrew Schepard & Stephen W. Schlissel, \textit{Planning For P.E.A.C.E.}, supra note 26 at 848.

\textsuperscript{55} The following reports are among those which document the conclusions discussed within this section:

1. Andrew Schepard, \textit{War and P.E.A.C.E.} supra note 27. This research focused on sixty-seven participants in the P.E.A.C.E. program, from four locations within the state of New York. Sixty four percent of the participants were recommended to the program by judges, 26\% by lawyers, and 8\% by mental health professionals. In addition to questionnaires gathered from participants who completed the program, the evaluation consisted of questionnaires completed by observers of P.E.A.C.E. sessions and results of discussions by P.E.A.C.E. organizers with presenters, observers, and other individuals. Each local advisory board provided an evaluation of its program.


5. B. McKenzie & I. Guberman, "For the Sake of the Children - A Parent Education Program for Separating and Divorcing Parents (Phase 2) (July, 2000) [Manitoba Phase 2];

6. D. Bertrand, J. Hornick & J. Lybarer, \textit{An Evaluation of Alberta's Parenting After Separation Seminars} (Calgary: Canadian Research Institute for Law and the Family, 1999);


reported receiving from parent education programs a better understanding of the impact of their separation on children and better appreciation of the need to keep children out of the middle of parental conflict. Additionally, some programs with a more specific emphasis on the teaching of coparenting competence and the development of communication skills report that participants learn better parenting and communication strategies as a result of participating in an educational program. In a clear indication that programs are providing participants with information that they consider useful, most survey results show that a majority of individuals think parent education programs should require mandatory attendance.

Extensive research dealing with various ways of delivering information to parties considering divorce was also undertaken within the United Kingdom in anticipation of


While other evaluations have been conducted, the foregoing works represent a range of the general results that have emerged from evaluations of parent education programs to date. Obviously, more nuanced result descriptions are described within the cited works.

56 Thoennes & Pearson, Multisite Assessment, ibid.

57 Manitoba Phase 2, supra note 55; Parental Conflict, supra note 55.

58 See, for example, Gray et al, supra note 55 at 288-89 and Manitoba Phase 2, supra note 55. Authors of a recent review of psychoeducational programs to reduce interparental conflict in divorcing families and the negative impact of interparental conflict on children found that the results of longer term programs [which tend to involve more active learning models] “provide encouraging evidence about improving parenting and child adjustment.” See Darya Bonds, Irwin Sandler, and Sanford Braver, “Parent Psychoeducational Programs and Reducing the Negative Effects of Intercparental Conflict Following Divorce” (2004) 42 Fam. Ct. Rev. 263 at 274.

59 In the Manitoba Phase 2 evaluation, supra note 55, responses to the statement “I think all separating or divorcing parents with children should be required to attend this kind of program” were as follows: disagree “somewhat” or “strongly” – 63 respondents (4.6%); uncertain – 94 respondents (6.7%); agree somewhat – 331 respondents (23.5%) and agree strongly – 918 respondents (65.2%). In Multisite Assessment, supra note 55, Thoennes
the implementation of Part II of the *Family Law Act, 1996.*\(^{60}\) Though this part of the Act was not ultimately brought into force, s. 8 would have required parties claiming marital breakdown to have attended an information meeting.\(^{61}\) Several models of information provision were piloted with a view to: a) directing parties’ attention to the issues to be considered in contemplating the end of a marriage; and b) making people aware of options for the resolution of difficulties, including marriage support services, mediation, and legal services.\(^{62}\) While ultimately researchers at the Centre for Family Studies at the University of Newcastle upon Tyne suggested there was no “one-size fits all” approach to information provision, and cautioned against “making a simple link between information provision and outcomes such as the use of counseling and mediation services,”\(^{63}\) they noted that 90% of attendees expressed satisfaction with the information meetings they attended.\(^{64}\) With respect to information about children’s separation-related needs, over 80% of program participants said that the information about how children feel had been useful, and 65% found that the information they received about reaching post-separation arrangements for children was helpful.\(^{65}\) Ultimately, researchers proposed a model for mandatory information meetings that involved an individualized meeting tailored to whether participants were: (1) uncertain about whether they wanted to divorce; (2) knew

---


\(^{64}\) *Ibid.*
their marriage was over but were uncertain about how to proceed; or (3) knew the marriage was over and knew how they wanted to proceed, but were concerned about specific issues. Additional follow up information via CD-Rom, video and written documents would be provided according to participants' circumstances. The report also acknowledged the possibility of adopting alternatives such as the kind of mandatory parent education programs offered to parents with dependent children in Canada and the United States.

e. Empowering Family Law Consumers

In analyzing the motivators for parent education programs, one should not overlook the growth of what has been termed the “self help movement” over the past three decades, even though parent education programs do not technically fall within the traditional definition of self-help groups:

Self-help groups are voluntary, small group structures for mutual aid and the accomplishment of a special purpose. They are usually formed by peers who have come together for mutual assistance in satisfying a common need, overcoming a common handicap or life-disrupting problem, and bringing about desired social and/or personal change. The initiators and members of such groups perceive that their needs are not, or cannot be, met by or through existing social institutions. Self-help groups emphasize face-to-face social interactions and the assumption of personal responsibility by members. They often provide material assistance as well as emotional support; they are frequently “cause oriented” and promulgate an ideology or values through which members may attain an enhanced sense of personal identity.

---

65 Ibid. at 49.
66 Ibid. at 81-85.
67 Ibid. at 86-87.

73
One of the defining characteristics of self-help groups is their mutual reliance on group members as opposed to dependence on professional advice: "self-help emphasizes internal resources in contradistinction to a variety of other approaches, all of which emphasize external intervention, coming from the outside, from church or state or professional expert." While there has been some movement toward the integration of professionals within some self-help models, such integration is not intended to change the non-hierarchical nature of mutual aid groups.

Parent education programs fit more readily within traditional definitions of public legal education:

- To increase people's knowledge about their rights and responsibilities, to increase knowledge about laws and regulations and the services in place to support the laws in order to change attitudes about the law …
- To increase public comprehension, not just the provision of information on the law, but how the law affects their lives and how to improve lives through working with the law.

---


70 Goodman and Jacobs (1994) indicate in a report on a survey of professional involvement within self-help groups that the most common form of professional involvement is referrals of new members to self-help groups. Other forms of involvement include participating as regular members of such groups, serving as consultants to self-help groups, and acting as guest speakers. See *Redefining Self-Help*, *ibid.* at 47.


However, the tremendous growth in and support for parent education programs that has occurred over the past two decades in North America can no doubt be attributed at least in part to the same “quest for empowerment” that has been linked to the self-help revolution.\(^3\) This same quest has led to a mass market for “self-help” books and forms ranging from “do-it-yourself” wills to “create your own separation agreement”\(^4\).

In short then, many consumers seem inclined to take more responsibility for becoming informed about their legal affairs. This assumption of responsibility might be characterized as one manner of obtaining a kind of “informed consent” to the legal processes to which individuals are submitting their affairs. Indeed, one author has quite validly asserted that parent education programs constitute a method of acquiring informed parental consent with regard to the conduct of their family law cases. According to Andrew Scheppard: “The premise of P.E.A.C.E. is that before parents begin escalating their level of conflict, they should know the probable consequences for themselves and their children, and they should be informed of the alternatives.”\(^5\)

\(^3\) In *Redefining Self-Help*, supra note 69 at 18-20, the authors suggest four conditions that give rise to the quest for empowerment: (1) the consumer’s role of evaluating, appraising, questioning and choosing in advanced capitalist society which develops the consumer’s skills in making choices and feelings of power; (2) the consumer’s contribution to the productivity of human services – for example, consumers do their own shopping in the grocery store, complete their own banking functions, and participate closely in their own health practice; (3) the huge expansion of both formal and informal education; and (4) major political events over the past few decades which have contributed to a decline for respect for authority and experts and increased respect for experiential knowledge.

\(^4\) “Can Law” website offers several “Canadian Legal Forms Kits” that can be ordered online: online to <www.canlaw.com> (accessed 1 December 2004).

\(^5\) See *War and P.E.A.C.E. supra* note 27 at 150.
While the concept of informed consent is most familiar in the context of medical procedures\textsuperscript{76} it is useful to understand parent education as one means by which parents can obtain relevant information about the risks and benefits associated with the options for conducting post-separation dealings on behalf of themselves and the other members of their families for whom they are responsible.\textsuperscript{77} This is consistent with Nolan-Haley’s concern for the provision of informed consent to mediation.

Discussions and research about parent education seem to support giving top priority to the goal of encouraging parental behaviour and decision-making that avoids exposing children to conflict. However, as has been shown in this review of the literature, there has been no analysis of whether and how the other rationales can be incorporated into programming with this main objective. Further, the literature reveals a


\textsuperscript{77} For an interesting proposal for the development of a new tort whereby lawyers would be held liable in their dealings with clients for failure to obtain consent to pursuit of a course of action, see Cornelius J. Peck, “A New Tort Liability for Lack of Informed Consent in Legal Matters” (1984) 44 La. L. Rev. 1289. With regard to family law matters, Peck states at page 1304:

Family law (specifically marriage dissolutions) is an area in which clients probably undergo much treatment by lawyers to which they have not given informed consent. For the most part clients coming to lawyers concerning a marriage dissolution are troubled, inexperienced, and unsophisticated. A battered wife will certainly need more than legal services and protection, and she will have been inadequately served if that is all she receives. ... While it is not argued herein that such a duty of care should specifically be placed on lawyers, it is plausible that at some level, the state, as administrator of family law processes, can better inform individuals of the risks associated with the litigation system and the alternatives to use of litigation than has previously been done. I have introduced questions about the appropriate role for the state in relation to family lives in Chapter 1 at pages 42-44.
dearth of analysis about how court-connected parent education might embrace objectives that mediate the tensions inherent in a move toward greater use of informal dispute resolution processes, while recognizing the continued viability of court adjudication in certain cases. The lack of clarity regarding the objectives of parent education programs leads to an equally unclear description within the existing literature of the desired effects of parent education programs. Prioritization of goals should inform deliberations about the specific objectives for programming. Decisions about objectives then allow for principled decisions about program content and facilitation methods.

3. The Structure of Court-Connected Parent Education Programs

a. The Range of Program Content

There are a large number of parent education programs operating in the United States, and a review of the existing descriptive literature reveals they do not contain a standardized range of material. In Canada, a similar lack of consensus regarding program material seems to exist, though the smaller number of programs decreases the range of material to some extent.

The following tables reflect the result of surveys gathered from 102 program providers in the United States.

---

78 See, for example, Best Practices, supra note 8, which describes a range of program material within the various sites (including the Parent Information Program) that were part of the survey.

79 Braver et al., supra note 8 at 48-50.
### Table 1 - Most Intensively Covered Topics (in decreasing order of average coverage for all programs)
(Average coverage)*

<table>
<thead>
<tr>
<th>Topic</th>
<th>% no coverage</th>
<th>% some coverage</th>
<th>% intensive coverage</th>
<th>All programs</th>
<th>Mandated programs</th>
<th>Voluntary programs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefits of parental cooperation versus costs of parental conflict</td>
<td>1</td>
<td>30</td>
<td>68</td>
<td>4.52</td>
<td>4.58</td>
<td>4.42</td>
</tr>
<tr>
<td>Typical postdivorce reactions of children</td>
<td>0</td>
<td>49</td>
<td>51</td>
<td>4.34</td>
<td>4.45</td>
<td>4.18</td>
</tr>
<tr>
<td>Impact of “brainwashing” child, “badmouthing” other parent</td>
<td>1</td>
<td>50</td>
<td>49</td>
<td>4.29</td>
<td>4.48**</td>
<td>4.02**</td>
</tr>
<tr>
<td>Different reactions and needs of children at different ages</td>
<td>0</td>
<td>47</td>
<td>53</td>
<td>4.28</td>
<td>4.39</td>
<td>4.13</td>
</tr>
<tr>
<td>Responsibilities of custodials (e.g., permitting, encouraging visiting)</td>
<td>6</td>
<td>62</td>
<td>33</td>
<td>4</td>
<td>4.15</td>
<td>3.79</td>
</tr>
</tbody>
</table>

* On a scale in which 1=no coverage and 5=intensive coverage
** Significantly differ from one another at p<.05.

### Table 2 - Topics Covered with Moderate Intensity (in decreasing order of average coverage for all programs)
(Average coverage)*

<table>
<thead>
<tr>
<th>Topic</th>
<th>% no coverage</th>
<th>% some coverage</th>
<th>% intensive coverage</th>
<th>All programs</th>
<th>Mandated programs</th>
<th>Voluntary programs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conflict management skills</td>
<td>4</td>
<td>60</td>
<td>37</td>
<td>3.88</td>
<td>3.74</td>
<td>4.12</td>
</tr>
<tr>
<td>Parenting skills</td>
<td>4</td>
<td>64</td>
<td>32</td>
<td>3.82</td>
<td>3.84</td>
<td>3.78</td>
</tr>
<tr>
<td>Emotional responsibilities of non custodials (e.g., visiting)</td>
<td>3</td>
<td>69</td>
<td>29</td>
<td>3.8</td>
<td>3.87</td>
<td>3.72</td>
</tr>
<tr>
<td>Typical postdivorce reactions of parents</td>
<td>0</td>
<td>73</td>
<td>27</td>
<td>3.8</td>
<td>3.92</td>
<td>3.63</td>
</tr>
<tr>
<td>Benefits and costs of developing a formal co-parenting plan</td>
<td>14</td>
<td>57</td>
<td>30</td>
<td>3.43</td>
<td>3.45</td>
<td>3.39</td>
</tr>
<tr>
<td>Additional community resources available for divorcing parents</td>
<td>7</td>
<td>73</td>
<td>20</td>
<td>3.27</td>
<td>3.38</td>
<td>3.11</td>
</tr>
<tr>
<td>Dispute resolution options (e.g., mediation, custody evaluation, litigation)</td>
<td>15</td>
<td>73</td>
<td>12</td>
<td>2.92</td>
<td>3.13</td>
<td>2.62</td>
</tr>
<tr>
<td>Custody options (e.g., joint, sole)</td>
<td>21</td>
<td>71</td>
<td>8</td>
<td>2.56</td>
<td>2.72**</td>
<td>2.41**</td>
</tr>
</tbody>
</table>

* On a scale in which 1=no coverage and 5=intensive coverage
** Significantly differ from one another at p<.05.
Table 3 - Least Intensively Covered Topics (in decreasing order of average coverage for all programs)

(Average coverage)*

<table>
<thead>
<tr>
<th>Topic</th>
<th>% no coverage</th>
<th>% some coverage</th>
<th>% intensive coverage</th>
<th>All programs</th>
<th>Mandated programs</th>
<th>Voluntary programs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Issues concerning domestic violence</td>
<td>22</td>
<td>73</td>
<td>5</td>
<td>2.41</td>
<td>2.38</td>
<td>2.44</td>
</tr>
<tr>
<td>Financial responsibilities of non custodial parents (e.g., child support)</td>
<td>31</td>
<td>61</td>
<td>8</td>
<td>2.33</td>
<td>2.43</td>
<td>2.19</td>
</tr>
<tr>
<td>Legal rights of parents</td>
<td>29</td>
<td>67</td>
<td>4</td>
<td>2.21</td>
<td>2.22</td>
<td>2.2</td>
</tr>
<tr>
<td>“Nuts and bolts”: How to properly file the legal paperwork, etc.</td>
<td>77</td>
<td>22</td>
<td>1</td>
<td>1.34</td>
<td>1.27</td>
<td>1.43</td>
</tr>
<tr>
<td>How to calculate child support under the guidelines</td>
<td>78</td>
<td>22</td>
<td>0</td>
<td>1.28</td>
<td>1.25</td>
<td>1.32</td>
</tr>
</tbody>
</table>

* On a scale in which 1=no coverage and 5=intensive coverage

These tables clearly show the topics receiving least coverage to be those related to legal issues. The authors assume that this result is due to the fact that only 15% of the reporting programs use judges, lawyers or other legal professionals as presenters, and that program providers stay away from covering legal issues to avoid concerning members of the legal community and to avoid straying from their own areas of expertise.80

The low incidence of legal information seems to suggest a low priority for the objective of assisting unrepresented litigants and a significant focus on social work ideology. As suggested earlier, in the U.S., the low priority placed on providing legal information for unrepresented litigants may be attributable to the well-developed pro-se movement which consists of programs designed to assist individuals to represent themselves in family law matters. In Canada, similar services for unrepresented individuals are not nearly as well developed. The statistics and commentary, however, also reflect potential issues in relation to the interdisciplinary nature of the parent education endeavour, and the extent to which cooperation between members of the legal

80 Ibid. at 53.
profession and members of the mental health profession should be promoted. Finally, efforts to “avoid” “concerning members of the legal community” do not seem to provide a convincing reason for avoiding legal content. In fact, maintaining the focus on non-legal content may give rise to questions about whether a balanced view of formal and informal dispute resolution processes is being presented.

b. Facilitation Methods

There are also different methods of presenting program content, which have been characterized as involving different levels of state intervention in the family: 81

(1) **Minimal Level**: Minimal Emphasis on Family (not considered education). An example is the provision of a booklet outlining procedures for filing for divorce;

(2) **Basic Level**: Information and Advice. An example is a one session, two hour program featuring lecture, videotape and handouts on the impact of divorce, adult and child adjustment to divorce, types of parenting relationships, court processes, etc.

(3) **Active Level**: Support and Skill Building. An example is a multi-session group meeting featuring experiential learning such as skill building exercises, self-awareness activities and role-plays.

(4) **Intense Level**: Interventions for High-Conflict Families. An example would be a multi-session, small group setting with individuals or couples who are experiencing troubled or highly conflictual co parenting relationships.

---

(5) **Therapeutic Level: Family Therapy (not considered educational)**

As noted by the authors of the scheme outlined above note, most parent education programs fall within the "Basic Level" category. The second most common category would be the "Active Level" programs introduced above, which have also been described as "Secondary Prevention" programs offered within or in connection with Unified Family Court structures in the United States.

To date in Canada, there does not appear to have been any uniform set of established priorities upon which court-connected parent education programs have been based. Just as lack of detailed consideration of the prioritizing of program rationales has resulted in divergent programming, it has also contributed to divergent views on issues concerning attendance policies and methods of implementing court-connected parent education programs.

c. **Attendance Policies and Implementation Status of Court-Connected Parent Education Programs**

Discussions of implementation of parent education programs really must involve the consideration of two issues: first, whether programs should involve voluntary or mandatory participation, and second, how such policies should be implemented. In

---

82 For example, the Parent Information Program.
83 Examples would be the "Families in Transition" program in Louisville, Kentucky, which features information, discussion and role plays to assist both children and adults with the separation adjustment process, and "Parents Apart", a program offered at seven sites throughout Massachusetts which was developed collaboratively between the University of Massachusetts Medical Center Department of Psychiatry and Family Services of Central Massachusetts. Both programs are described in Andrew Schepard, Peter Salem, & Stephen W. Schlissel, "The Push for Parent Education: Blueprints for Helping Families Cope with Divorce" (1997) 19 Fam. Advoc. 52.
Canada, no federal statutory provisions mandate parent education for litigating parents. In a number of provinces, attendance is mandated for certain regions through various mechanisms. In Manitoba and New Brunswick, parents must attend the “For the Sake of the Children” parent education program prior to making use of government funded conciliation services. Quebec also requires attendance at a mediation orientation program prior to accessing government funded mediation services. In short, there is no consistency with regard to whether and by what mechanism programs are mandated.

Between 1994 and 1998 the United States experienced a four-fold increase in the number of states implementing legislation either authorizing or mandating parent information programming. There, where parent education as a court-connected service is more firmly established than in Canada, a greater range of implementation measures

84 See Andrew Schepard, “Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective” (1998) 32 Fam. L. Q. 95, esp. at 114 to 118.
85 For example, Alberta’s Parenting After Separation Program (see Court of Queen’s Bench of Alberta Practice Note No. 1, Parenting After Separation (online: http://www.albertacourts.ab.ca/qb/practicenotes/familylaw/notel.pdf)), Toronto’s Family Information Sessions (see Family Law Rules, O. Reg. 114/99, r.8.1), British Columbia’s Parenting Program After Separation (Attendance is required in Burnaby, New Westminster, Surrey, Vancouver, Kelowna, Prince George, Abbotsford, Victoria, Kamloops and Nanaimo at the Provincial Court level – see online: http://www.ag.gov.ca.bc.ca/family-justice/help/pas/mandatory.htm (accessed 7 December 2004) and Saskatchewan’s Parenting After Separation/Divorce Program (see Bill 32, The Queen’s Bench Amendment Act, 2001, which made the program mandatory in Yorkton and Saskatoon. In 2003, Prince Albert and Yorkton became mandatory sites – see Brenda Bacon, supra note 55 at 3).
exists. A relatively recent article updates the status of U.S. parent education programs and describes American sources of authority for requiring attendance as including state law and individual judicial districts.

Within the state law context, three models exist: (1) legislation mandating attendance on a statewide basis for all divorcing parents with minor children; (2) legislation granting statewide discretionary authority for judges to evaluate, on a case by case basis, which parents should attend a parent information program; and (3) state legislation that authorizes courts to implement parent information programs in their district should they wish to do so. Local court rules, which require that sufficient inherent jurisdiction has been granted by the state's constitution, form the basis for requiring attendance in some states.

There is more data in the United States than in Canada from which to obtain a sense of the options available for the implementation of parent education programs. However, neither the statistics reporting on parent education programs, nor the literature discussing these programs offer any real insight into potential debates, from a policy perspective, about the appropriateness of requiring parents to attend an educational program as a prerequisite to obtaining judicial relief. Further, they do not contribute greatly to an understanding of the advantages and disadvantages of different implementation mechanisms, or how these mechanisms might impact on the objective of

---

that the number of U.S. counties and independent cities with education programs for divorcing parents increased from 541 in 1993-94 to 1,516 in 1997-98.

88 Clement, ibid. at 219.

89 Ibid.
providing consumers with an understanding of different available dispute resolution processes within the family law system.

4. The Environment Surrounding Parent Education Initiatives

While earlier parts of this work identified the stated rationales for the development of court-connected parent education, and I have described program structures above, it is impossible to properly discuss policies surrounding the integration of such programs into the family law system without considering the social, political, and economic environment within which such programs have taken shape. The remainder of this chapter aims to provide a contextual background from which to consider the rationales associated with parent education programs and the structural elements linked to the promotion of these rationales.

Chapter 1 identified the impetus for reform provided by the no-fault divorce revolution. While that chapter focused primarily on the impact of this movement on dispute resolution generally, it is appropriate to briefly provide additional context regarding the shifts in discourse that accompanied no-fault divorce. Specifically, no-fault divorce inspired two shifts that have had an ongoing and significant impact on family law discourse. First, the validation of "private ordering" embodied within the no-fault divorce concept was consistent with the liberal process of privatization. In fact, one influential author argues that no-fault divorce is emblematic of "a much larger revolution in family law – the transformation from public to private ordering of behaviour."90 Second, divorce and related corollaries such as custody became increasingly

---

characterized as emotional, rather than, legal events. This new characterization paved the way for a changed and increased role in post-separation ordering for mental health professions generally, and the social work profession in particular. The combination of privatization ideals and social work ideology has largely shaped the recent course of family law.

a. The Impact of Privatization

Over the past two decades, Canadian governments have undertaken initiatives that illustrate their increasing acceptance of the “privatization of family law.” As one author has written, “…1980’s neo-conservatism closely integrated its family politics with proposals to reduce the role of the state and give free reign to an unrestricted market.”

One of the phenomena associated with privatization has been described as “familialization” – the process of reconstituting what were once understood as public goods and services as being naturally located within the family sphere. In other words, for example, support services to families which were once viewed as a collective (state) responsibility are now characterized as falling upon individuals who function as a family unit. The impact of “familialization” can be readily understood by reference to a sample of recent jurisprudence and legislation.

---

91 Ibid. at 1504.
94 One of the important, and unanswered questions in family law policy is how, and by whom, “family” should be defined. Cossman and Fudge, *ibid.* argue that
For example, the Supreme Court of Canada decision in *M. v. H.*\(^95\) has been viewed as both a victory for same-sex couples and a progression in the drive to place increasing responsibility for support upon people who have at some time in the past functioned as families. In *M. v. H.*, the Supreme Court of Canada held that Ontario's *Family Law Act*\(^96\) provisions which defined who might be entitled to claim spousal support contravened s. 15 (and was not saved by section 1) of the *Canadian Charter of Rights and Freedoms*\(^97\) because they did not include same-sex couples. As a result of the *M. v. H.* decision, the Ontario Government amended sixty-seven statutes to reflect the spirit of the Supreme Court ruling.\(^98\) Now some same-sex couples may be liable for the support of a former partner.

Another relatively recent case illustrating increased institutional support for the placement of financial support obligations on former family members is *Chartier v.*

\(^{96}\) R.S.O. 1990, c. F.3 as am.
\(^{97}\) Part I of the *Constitution Act, 1982* [en. by the *Canada Act 1982* (U.K.), 1982, c. 11, Sched. B].
\(^{98}\) While the most significant changes were made to the *Family Law Act*, other statutes were more peripherally impacted. In terms of s. 29 of the *Family Law Act*, the amendment did not, as may have been expected, redefine “spouse” to include individuals in same-sex relationships. Rather, it created a new legal category of person, namely a “same-sex partner” entitled to the same rights enjoyed by unmarried persons who met the definition of “spouse” under the Act. See *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act, 1999*, S.O. 1999, c. 6, s. 25(2). M. sought leave for a rehearing which would allow her to challenge the validity of the manner in which the
Chartier\(^99\) where the Supreme Court held that a step-parent could not unilaterally revoke his or her status as parent after termination of the adult relationship which gave rise to the step-parent status. This decision negated the suggestion that reference to "standing in place of a parent" in subs. 2(2)(b) of the *Divorce Act*\(^100\) should be interpreted in a manner consistent with the common law doctrine of *in loco parentis*. This doctrine, which accepted the unilateral termination of parental status, had evolved during the 19\(^{th}\) century when it was considered morally offensive for a man to be held responsible for another man's child.\(^101\)

According to Mr. Justice Bastarache, who delivered the majority decision in *Chartier*, because the provisions of the *Divorce Act* dealing with children aim to affect them as little as possible, "spouses are entitled to divorce each other, but not the children who were part of the marriage."\(^102\) The test then, to determine support obligations, was whether at the time the family functioned as a unit, the adult at issue stood in place of a parent.\(^103\) In this case, notwithstanding that he had ceased to have contact with the child amendments were made. Her application was dismissed on May 25, 2000. See [1997] S.C.C.C. No 101.

\(^100\) R.S.C. 1985, c. 3 (2d Supp.) as am.
\(^102\) Supra note 99 at para 32.
\(^103\) At paragraph 39, *ibid.*, the court suggested factors that would be relevant to such a determination:
  - whether the child participates in the extended family in the same way as would a biological child; whether the person provides financially on the child (depending on ability to pay); whether the person disciplines the child as a parent; whether the person represents to the child, the family, the world, either explicitly or implicitly, that he or she is responsible as a
at issue shortly after the termination of his relationship with the child’s mother, the husband was required to pay support for the child where he had acted as her parent during his marriage to her mother.

In *Bracklow v. Bracklow*\(^{104}\) the Supreme further expanded the scope of familial responsibility for support. In this decision, the wife had suffered various health problems from the beginning of the relationship. In 1991, one year prior to the parties’ separation, she was hospitalized as a result of psychiatric problems, and she was unlikely ever to work again. On the wife’s application for spousal support, the trial judge held that there was no connection between the wife’s health problems and the marriage; nor were the wife’s economic circumstances due to the marriage or its breakdown. At the Supreme Court of Canada, Madame Justice McLachlin, writing for the majority, noted that there were certain situations where the very existence of the marriage and the interdependencies associated with that union, gave rise to an obligation for ongoing support. Mr. Bracklow was ordered to pay support of an unlimited duration to his former wife.

The Supreme Court of Canada’s reasoning in *Bracklow* further limits the scope of the state’s responsibility for the support of its needy members. Arguably, it also represents a modified form of the “pension for life” model of spousal support applied historically. Under this model, a wife acquired a life interest in economic security upon

marriage, and should the husband breach the marriage contract, he was required to pay support.\textsuperscript{105}

In addition to the \textit{M v. H.} legislation described above, another significant piece of legislation bearing privatization “markings” is the 1997 \textit{Federal Child Support Guidelines}.\textsuperscript{106} The Guidelines established a table-based method of calculating child support obligations.\textsuperscript{107} The enforcement of these obligations is intended to be complemented by additional legislative enactments establishing stringent enforcement mechanisms.\textsuperscript{108} The Guidelines objectives, found in section 1, along with concerns for the promotion of institutional fairness, embody assumptions of individual responsibility:

\begin{itemize}
\item[(a)] to establish a fair standard of support for children that \textit{ensures that they continue to benefit from the financial means of both spouses after separation};
\item[(b)] to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
\item[(c)] to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
\item[(d)] to ensure consistent treatment of spouses and children who are in similar circumstances. (Emphasis added)
\end{itemize}

\begin{footnotes}
\footnote{106}{SOR/97-175 as am.}
\footnote{107}{A paying parent calculates his or her support obligation based on their gross income, and the number of children for whom support is owed. Additional “extraordinary expenses” may also be shared by parents: \textit{Ibid.}, s. 7.}
\footnote{108}{For example, recalcitrant payers may have their drivers’ license suspended. See \textit{Family Responsibility and Support Arrears Enforcement Act}, S.O. 1996, c. 31 as am., Part V.}
\end{footnotes}
The changed approaches in family law matters have been described as consistent in many ways with both neo-conservative and neo-liberal ideals. While much commentary focuses on the implications of privatization on child support, spousal support, and public financial assistance, important discussions have also been generated about the ramifications of privatization for custody and access matters. It is within this context that many discussions of a changing moral discourse in family law arise. It is also, of course, within this context that discussions about dispute resolution mechanisms arise.

b. The Changing Moral Discourse

In 1983, Carl Schneider described what he viewed as "the diminution of law’s discourse in moral terms about the relations between family members, and the transfer of many moral decisions from the law to the people the law once regulated." Divorce, he argued, was one of the clearest examples of this change, primarily because whereas prior to no-fault divorce, judicial consideration of divorce petitions necessitated a discussion in

---

110 For example, Mary Jane Mossman has recently commented on the 1997 Child Support Guidelines and the government’s expenditure of resources related to the enforcement of child support obligations. In her view the state “opted to use its resources to enforce support payments by parents, rather than to transfer benefits, economic and social, directly to children.” See Mary Jane Mossman, “Conversations About Families in Canadian Courts and Legislatures: Are There ‘Lessons’ for the United States?” (2003) 32 Hofstra L. Rev. 171 at 187.
moral terms, in a “no-fault” system, moral discussion was neither required nor desirable.\textsuperscript{114} Speaking directly to child custody matters, Schneider noted that moral factors, and in particular matters of sexual morality, had become virtually insignificant to custody decisions, in the absence of some relationship between morally inappropriate behaviour and the quality of care for the child. Further, he stated, “legislatures and courts have, by limiting discussions to the psychological well-being of the child, tried to close off the consideration of morals and values that the ‘best interests of the child’ standard once seemed to invite.\textsuperscript{115}

The U.S. legislation to which Schneider referred\textsuperscript{116} in support of his assertions regarding the developments in custody and access laws is comparable to Canadian legislation. At the time the \textit{Divorce Act, 1968} was enacted, determinations of custody were essentially fault based, with courts being given the legislative direction to have regard to the welfare of the infant, \textit{and to the conduct of the parents} \ldots \textsuperscript{117} By the time the 1985 \textit{Divorce Act} came into effect, there was an express legislative directive to courts \textit{not} to take into consideration the past conduct of any person “unless the conduct is relevant to the ability of that person to act as a parent of a child.”\textsuperscript{118}

Theories about the impact of no-fault divorce on moral discourse differ. Jane C. Murphy, for example, argues that in fact a new and broader meaning of morality has emerged. She suggests current moral philosophy attempts to foster the concept of

\textsuperscript{114} \textit{Ibid.} at 1809-1810.  
\textsuperscript{115} \textit{Ibid.} at 1811.  
\textsuperscript{116} Unif. Marriage and Divorce Act, s. 402, 9A U.L.A. 197.  
\textsuperscript{117} \textit{The Infants Act}, R.S.O. 1960, c. 187, s. 1(1). The same provision appeared in \textit{The Infants Act}, S.O. 1970, c. 222, s. 1(1).  

91
morality as the practice of virtues, and that while it is difficult to specifically define the core values at play in a given society, particularly in an age where moral relativism is strongly embraced, there are communitarian values such as compassion, duty and care, along with more liberal values such as equality, fairness and justice present within American society. She reflects on the role that law should have in defining or promoting the core values, or morality, within society, and notes that this is a particularly challenging question within the family law context. However, Murphy argues that one of the key manners in which morality is increasingly defined within families and family law relates to an increased responsibility and commitment to children. In fact, she argues that the protection of children is emerging as a commonly held core value that warrants promotion within the family law context.

Growing recognition of the importance of the protection of children has been articulated in discourse about children's rights, both within and outside the family law context. This concern is illustrated both domestically and internationally. On the domestic front, in the family law context, it is illustrated by the increased call for children's "voices" to be heard in legal proceedings in which their interests are at stake, preferably through independent legal representation.

118 Divorce Act, supra note 100, s. 16(9).
120 Ibid. at 1128.
121 There is some debate about the role of a lawyer representing a child. In Strobridge v. Strobridge (1992), 42 R.F.L. (3d) 154 (Ont. Ct. (Gen. Div.)) Granger J. thoroughly reviewed the procedure, the rules of evidence and the role of counsel for the child in custody and access cases. Granger J. summed up the role of counsel as follows at 175:
Internationally, the last two decades have ushered in two major treaties aimed at better protecting children. In 1980, the *Hague Convention on the Civil Aspects of International Child Abduction* was adopted by the Hague Conference. Canada is a signatory to the *Hague Convention* and in Ontario, it forms part of the *Children's Law Reform Act*. In 1989, the United Nations General Assembly adopted the *United Nations Convention on the Rights of the Child*. It was ratified by Canada in 1991. The Convention is aimed at promoting children's autonomy. It deals with a multitude of matters, including drug use, child neglect, a healthy environment, children in armed conflict, and the special needs of disabled children. Key to the subject of child custody are: article 3, which provides that in all actions concerning children the best interests principle shall be applied; article 9, which establishes the right of the child to have contact with both parents if separated from one of them; and article 12, which provides that children have the right to express their views freely in matters affecting them.

Recognizing that the resolution of custody/access protection proceedings involves an adversarial process and that in such cases children have a legitimate interest in the outcome, children should be represented in order to ensure that their voices are heard. Although the role to be played by counsel will depend upon the ability of the child to instruct counsel, the role of counsel as an advocate in the courtroom will never vary. Counsel is to be an advocate, and his personal beliefs and statements of evidence should be disregarded.

Granger J.'s views on this issue were affirmed by the Ontario Court of Appeal: (1994), 4 R.F.L. (4th) 169 (Ont. C.A.) (appeal allowed in part on other grounds).


Others have also suggested the primacy of children’s interests as a defining characteristic of the “new” family law moral order. For example, Harry D. Krause and David D. Meyer predict that “family” in this century will be less defined by tradition than once was the case, and they argue that there is growing acceptance that family must be defined by way of some modern consensus about what is essentially good and special about the family relation. This “new morality” in family law has as a central tenet the definition and enforcement of continuing adult responsibility towards children.125

E. Schneider, a proponent of the enhanced emphasis on children, is probably accurate in his assertion that “there is consensus about the centrality of children’s well being, at least within the narrow end of the law’s capacity. The question is just how you reach that goal.” 126 For some, part of the answer is to implement parent education programs with messages that encourage parents to maintain their children’s well being at the centre of their considerations as they go about resolving their post-separation issues. However, one author has pointed out that the information that [a parent education program] provides is only as good as the law and procedure about which it educates.127

c. Changes within the Litigation System

In Chapter 1, at least two responses to the growing discontent with the traditional litigation system were identified – the development of unified family courts, and the increased use of mediation. One reason that ADR methods, and mediation in particular,

127 Schepard, War and P.E.A.C.E., supra note 27 at 192.
have become increasingly popular relates to the increased fiscal restraint on the part of the state that is illustrative of the current neo-liberal climate. Within this climate, there is concern for “overcrowding of court dockets,” a phenomenon which has become more problematic in the wake of a growing number of unrepresented litigants (resulting from recent reductions in legal aid funding across Canada\(^\text{128}\) who appear in court without any understanding of the family law regime, and without the benefit of any legal advice.

Earlier, I noted that in the United States, one response to the issue of unrepresented litigants within the court system has been the development of “pro-se” educational courses aimed at providing litigants with the information and skills that will allow them to effectively represent themselves in court. Depending on the legal services program, this training may be offered as a choice to litigants requesting legal assistance, it may be the only assistance offered, or it may be offered as a result of screening applicants to determine whether they will receive this service or legal representation.\(^\text{129}\)

Whether such training is desired by litigants, or is a realistic expectation, has been convincingly questioned.\(^\text{130}\)

\(^{128}\)For example, Monahan and Zemans, supra note 23 at 45 – 51, note that British Columbia had cut tariffs by approximately 35% since 1991 while Nova Scotia had cut its legal aid budget in the two years prior to the writing of the Monahan and Zemans report, and in 1991-92, Prince Edward Island’s budget for legal aid applications in family law matters had been reduced. In 2002, the Attorney General of British Columbia announced the government’s intention to reduce the funding of legal aid in the province from $88.3 million to $54 million over the subsequent three years: online <www.lawsociety.bc.ca/library/notices/body-notices-02-02-27 (SGM-a).html (assessed 1 December 2004).


\(^{130}\)Ibid.
In Canada, pro-se programs have not been developed, though some have questioned the extent to which parent education programs containing legal information might be used to legitimize legal aid funding cuts. The more pronounced trend in Canada has been to move toward a greater emphasis on mediation in family cases.

Because mediation is often viewed as a less costly alternative to litigation it is consistent with the privatization trend for governments to endorse mediation. One of the other most significant reasons for the growing popularity of mediation in the family law context is the extent to which the mental health profession, and in particular the social work profession, has, in the wake of no-fault divorce, become entrenched in the family law system. Social work discourse has shaped not only the substantive law in relation to custody and access matters, but also perceptions about the most desirable methods for resolving post-separation issues relating to children.

With the introduction of no-fault divorce, there was a shift in the role of mental health professionals who had worked with families whose marriages were troubled. Whereas prior to the no-fault revolution, social workers worked primarily to reconcile parties, the no-fault shift necessitated an adaptation in the application of their therapeutic skills. This shift was reflected in their move toward divorce counselling and custody mediation, along with their involvement as professionals with special expertise relating to

---

131 Author's discussion with members of the Metropolitan Toronto Provincial Family Court Bench and Bar (Fall, 1998).
132 Note that there are some questions about the validity of this assertion. See Chapter 1, note 62 and accompanying text.
the social, psychological and education circumstances of children. This expertise is often relied on by judges who are required to assess custody and access questions, not by reference to morally based rules, but rather by the elusive “best interests of the child” standard without any guiding presumptions.

d. Changed Perceptions About Children’s Interests

The best example of reliance on “non-legal” professionals other than mediators is the legislative sanctioning of assessments dealing with the needs of children and the ability of the parents to meet those needs. For example, the Ontario statute states:

The court before which an application is brought in respect of custody or access to a child, by order, may appoint a person who has technical or professional skill to assess and report to the court on the needs of the parties and willingness of the parties or any of them to satisfy the needs of the child.

Assessments are generally conducted by social workers or psychologists and are intended to assist judges in making a final decision about custody and/or access matters in light of factors such as stability of the proposed home unit, continuity of children’s contact with friends in their neighbourhood, and continuity of contact between siblings. Such non-legal factors involve not only some measure of subjective assessment but also a required degree of understanding of family dynamics. As one author has noted: "Social, medical and psychological considerations intersect with traditional legal analysis in many

---

135 Children’s Law Reform Act, supra note 123, s. 30.
cases concerning families". It is not surprising then, that the input of the social work and psychology communities has taken on a greater role in the process of custody determinations.

The combination of an increased number of divorces following the passage of no-fault legislation and a generally increased concern for and focus on children’s needs has also led to a proliferation of social science research dealing with the effects of separation and divorce on children. Early surveys suggested that divorce in and of itself led to adjustment problems for children while more recent research points to ongoing conflict between parents as being an extremely harmful factor for children. Not only has this

---

137 Indeed, this was the focus of Joseph Goldstein et al’s influential book *In the Best Interests of the Child: Professional Boundaries* (New York: Free Press, 1986).
See also M.A. Fine, J.R. Moreland and A.I. Schwebel, “Long-Term Effects of Divorce on Parent-Child Relationships” (1983) 19 Developmental Psychology 703. Here, the authors surveyed 44 males and 56 females whose parents were divorced before they were 11 years old. The survey participants were college age at the time the study commenced. The authors concluded that the parent-child relationships of these subjects whose families were divorced before they were 11 years old, as contrasted with those in intact families, are characterized as having greater distance, poorer communication, less affection and warmth, and less positive feelings in general.
factor received increased recognition from professionals in terms of their work in the custody and access arena; it has also become relevant in considering the forum that is most appropriate for the determination of such matters, and the professionals who are most able to facilitate.

I reviewed in Chapter 1 Martha Fineman’s scepticism about the dominance of social work rhetoric in shaping substantive and procedural family laws. Jana Singer has also commented on the influence of mediation theorists’ view of divorce not primarily as a legal event to be resolved with reference to a set of public norms, but rather as a process that is psychological and emotional, and that is best managed within the family unit. Having established divorce as an emotional rather than a legal event paves the way for arguing that the adversarial system is not well equipped to perform the tasks of ongoing family management which really are non-legal in nature. Further, by promoting shared custody as the goal to be achieved, social workers are placed in the ideal position to facilitate post-separation arrangements that embrace shared parenting norms.

e. Lobby for Increased Shared Parenting

The litigation process is not the only aspect of family law that has been subject to growing skepticism. As alluded to earlier, custody and access legislation has received considerable criticism, largely as a result of the indeterminacy of the “best interests of the useful overview of numerous other studies the social development of children of divorce).

139 Chapter 1, notes 111-116 and accompanying text.
140 Supra note 90.
child" standard. There have been calls for greater certainty in the determination of custody and access disputes. Two of the main suggestions for reform have been: (1) the adoption of a primary caregiver presumption and (2) the adoption of a shared custody presumption. The primary caregiver presumption, favoured by Professor Fineman, assumes that the person who, prior to the parties’ separation, was the primary caregiver of the children should be the parent to have custody of the children after separation. The shared custody proposal would create a presumption that after separation parents should enjoy shared custodial rights, responsibilities and time with their children.

The discourse around shared parenting has been sufficiently pervasive to prompt legislative change in some jurisdictions. One example is the United Kingdom’s Children Act, 1989 which incorporates the concept of parental responsibility - a jointly held status for parents that continues automatically after divorce, replacing the former practice

---

141 In chapter 3, I examine the best interests of the child standard in detail.
142 Professor Fineman, says that the essence of the primary caretaker standard is that children need day to day care and that the parent who has performed this primary care during the marriage should get custody. The primary caretaker standard does not ignore the less essential, secondary contributions of the other parent: they are rewarded by the establishment of visitation periods with the children. See Martha Fineman, “Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision Making (1988) 4 Harv. L. Rev. 727 at 771.
143 It should be noted that in Ontario, for example, s. 20(1) of the Children’s Law Reform Act, supra, note 123 provides that “[e]xcept as otherwise provided in this Part, the father and the mother of a child are equally entitled to custody of the child.” Essentially then, until an order is made to the contrary, equal custodial entitlement applies. However, there is no presumption when a matter comes before a court for determination, that joint custody should be the resulting order.
of awarding sole custody to one parent. There is an assumption that parents will continue to exercise parental authority and care for their children in a collaborative process. Section 1(5) of the Act provides that courts shall not make an order regarding parental responsibility “unless it considers that doing so would be better for the child than making no order at all.”

At least in the early stages of post-legislation research, there are indications that joint custody legislation may not reduce parental conflict. Failure to experience decreased levels of parental conflict in joint custody situations may lead to worse situations for children than did traditional sole custody arrangements. In “Experiments with Parenthood?” Bren Neal and Carol Smart interviewed fifty parents who had separated or divorced after the enactment of the Children Act in England. The authors concluded:

The Children Act … has provided the legal mechanism and principles to enhance fathers' share in the children and challenge mothers' assumptions that they should have the children. … But … the material and emotional resources for sustaining co-parenting are scarce and there is no real infrastructure available to properly support co-parenting during marriage, let alone after divorce.

---

146 Children’s Act, 1989, supra note 144, s. 1(5). Examples of other jurisdictions that have implemented legislation which effectively establishes a preference for joint custody or shared parenting are Washington State Parenting Act, R.C.W. s. 26.09 (1986) and Australia (Family Law Act, 1975 (cth) as am. by Family Law Reform Act, 1995 (cth.) In West Virginia, judges are required to defer to parental agreements about parental responsibilities unless it would be harmful to the child: 530 U.S. 57 (2000).
147 See Jessica Pearson, "Court Services: Meeting the Needs of Twenty-First Century Families" (1999) 33 Fam. L. Q. 617 at 618 and Neal and Smart, supra note 145.
148 Neale and Smart, ibid at 214.
In Canada, the Special Joint Committee on custody and access\textsuperscript{149} reviewed calls by some interest groups that there be a presumption of shared custody after the parties' separation. While rejecting the adoption of either a presumption of joint custody or a primary caretaker presumption\textsuperscript{150} in its 1998 report the Committee does embrace the concept of shared parenting.\textsuperscript{151} In Elizabeth Hughes' view, Canada should be wary of adopting a shared custody norm, particularly in light of the fact that research suggests that shared parenting does not lead to a decrease in conflict among parents and does not increase the involvement of traditional non-custodial parents. She concludes that "the data reveals that a significant percentage of divorced parents experience ongoing conflict or difficulty with respect to cooperative parenting after separation. Systems preferring joint legal custody or shared parenting do not clearly result in increased cooperation, lower levels of conflict, or better outcomes for children."\textsuperscript{152}

A 2002 Federal-Provincial-Territorial Family Law Committee Report titled \textit{Putting Children First} declined to recommend the adoption of any presumption in relation to custody:

> It is recommended that legislation not establish any presumptive model of parenting after separation, nor contain any language that suggests a presumptive model of parenting. The fundamental and primary principle of determining parenting arrangements must continue to be the best interests of the child.\textsuperscript{153}

\textsuperscript{149} \textit{Supra} note 47.
\textsuperscript{150} \textit{Ibid}, Chapter 4.
\textsuperscript{151} Elizabeth J. Hughes, \textit{supra} note 49.
\textsuperscript{152} \textit{Ibid.} at 25-26.
Likewise, Bill C-22, which proposed amendments to the *Divorce Act*, did not contain legislative presumptions about post-divorce parenting.154

It is important to note that legislatively imposed joint custody represents a significant level of state intervention into private family life. When viewed against the backdrop of the initiatives described above, the potential for parent education to encourage cooperative parenting without forcing parties into situations that will potentially leave them in more difficult circumstances than would a sole custodial situation, may be promising. As one author has noted, "[I]n high conflict situations, attempting to force parents to cooperate by imposing joint custody can increase tension and loyalty conflicts for children."155 However, it is essential that the content of parent education programs provide a clear, unbiased position (or at least a clearly stated bias) on custody related issues so that there is no undue "system" pressure for parents to adopt shared parenting routines that are unlikely to work. Parenting that avoids exposing children to parental conflict should not be confused with shared or joint parenting.

In summary, the discourse surrounding both substantive custody related laws and dispute resolution mechanisms has shifted an enormous amount, but it has in many ways led to greater uncertainty in both areas. Some of the questions about the role for parent education programs within the family law system can be directly linked to the underlying

154 *Supra* note 52.
uncertainties about which substantive laws and procedural mechanisms are most appropriate for today’s families. In the chapters that follow, I attempt to provide further insights about ways that parent education programs can respond to at least some of the uncertainties.

It was noted earlier on in this work that one of the most commonly accepted objectives of parent education programs is to ameliorate the circumstances of children whose parents are making their way through the separation/divorce process, and to assist parents to choose options that promote children’s interests. Clearly however, parent education programs embody other objectives, which include assisting unrepresented litigants and reducing court dockets. It is necessary to maintain a clear understanding of how the operation of these various objectives can impact upon both the interests of children and other important interests arising within the family law context. However, since the focus on children provides a shared foundational rationale for the existence of court-connected parent education, I will, in the next Chapter, analyze how the concept of court-connected parent education fits within the currently accepted scope of the best interests of the child concept. In later chapters, I will incorporate an analysis of the other rationales identified with court-connected parent education programs. I hope, in the course of this overall analysis, to establish that court-connected parent education: (1) allows for the recognition of the interdisciplinary nature of separation and divorce; (2) can encourage less conflict-laden dispute resolution without establishing a presumptive “best” form of dispute resolution; (3) can encourage continued parental involvement in children’s lives without suggesting any one preferred parenting model; and (4) can assist
parents - both represented and unrepresented - in understanding their child-related rights and responsibilities.

Whether Court dockets will be considerably reduced through parent education programs, is not the ideal basis upon which to develop a parent education program. It is hoped that this result will occur because more people for whom alternative dispute resolution is suited will opt to pursue that alternative. However, to have this as one's rationale for an entire branch of court-connected service brings with it the danger of failing to consider other important circumstances where traditional court assistance is still required.
Chapter 3: Court-Connected Parent Education and the Best Interests of the Child

1. Why the Best Interests of the Child Principle is Relevant to Court-Connected Parent Education

The purpose of this chapter is to consider how current interpretations of the best interests of the child principle can be related to the concept of court-connected parent education. An initial assessment of the language used in conjunction with parent education programs suggests a congruence between it and the "legal" best interests of the child concept. Indeed, the very term "best interests" is used in some of the literature about parent education, though not specifically in the context of the legal interpretation of that term.

The analysis in previous chapters suggests that parent education is consistent with a growing concern, both domestically and internationally, for children's well being and children's rights. However, this chapter will illustrate that there are differences between: (1) the current interpretation and implementation of laws relating to the best interests of children; and (2) the state role involved in promoting the best interests of the child through court-connected parent education. Specifically, while current interpretations of the best interests standard in custody and access decisions assumes that the best interests doctrine will be invoked in direct response to the requests for relief made within pleadings submitted to a court by private disputants, court-connected parent education

---

1 See Chapter 2.
may require pro-active intervention on behalf of children without regard for the content of the pleadings and evidence submitted by the parties.

The chapter proceeds as follows. Below, I trace the evolution of the best interests of the child standard from its inception in the concept of *parens patriae* jurisdiction. Next, there is a discussion of the two primary functions that have evolved in relation to the application of the best interests of the child standard - that of child protection, which has traditionally been understood as involving a public interest justifying state intervention, and that of custody decision making, which has as its primary purpose the weighing of competing private interests. Subsequently, I assess the extent to which emotional harm to children has gained increasing attention in both child protection and private custody matters, and the manner in which the concerns are dealt with in each setting. The concept of emotional harm provides a focal point for this chapter since it is one of the most commonly addressed topics within court-connected parent education programs. This discussion of emotional harm in child protection and private custody situations leads to the suggestion of a potential conceptualization of the best interests of the child principle in private custody dispute resolution that might allow for state activity in the form of state-imposed parent education at an earlier stage. The premise involved in this conceptualization would be that the provision of parent education addresses some of the concerns about emotional harm to children without interfering excessively with parental child-rearing practices. A rounding out of this conceptualization is assisted by an assessment of the best interests of the child principle in relation to two other state-endorsed philosophies - namely, parental autonomy, which
has been identified as an ongoing area of concern for reformers, and access to justice. These issues are introduced as matters which must be considered in any reconceptualization of the state role in promoting the best interests of children through the provision of court-connected parent education programs.

2. Origins of the Best Interests of the Child Test

The authority for a state to act, either legislatively or through its judiciary, for the benefit of the children living within its jurisdiction, finds its roots in the *parens patriae* doctrine. While this doctrine enjoys a rich historical background, for the purposes of this work, only a minimal accounting is necessary.

Literally translated, *parens patriae* means “parent of the country.”

Broadly speaking, the *parens patriae* jurisdiction is exercised either legislatively or through the inherent jurisdiction of superior courts, for the benefit of those who are unable to act for themselves. Such persons can include adults who are mentally unable to handle their own affairs, and children, who have long been considered to fall within the scope of protection extended by the state. One author who has recently examined some implications of the *parens patriae* doctrine notes that the origins of *parens patriae* are...
quite uncertain: views differ as to whether the doctrine was derived from Roman law, feudal law or both, or whether it was an invention of chancery courts. Regardless of its origins, the Canadian foundations for the doctrine lie in the British tradition.

In England, power to rule in the "best interests" of children rested with the courts of Chancery, where the parens patriae jurisdiction was originally exercised in relation to children's property rights. Gradually, the concept of the best interests of the child was expanded to include the emotional, physical and spiritual welfare of the child. When the courts of equity and common-law merged pursuant to the Supreme Court of Judicature Act, 1873, the ability of courts to overrule any common-law parental right, where found to be in the best interests of the child, was confirmed. The theoretical result was that the welfare of children prevailed over any potential rights that parents had held at common law prior to the merger of the courts.

Over time, statutory enactments setting out standards and rules to deal with particular child-related situations have become increasingly common. In Canada, it has been suggested that current legislation has reached the point of being adequately broad to cover most child-related situations likely to arise. In the family law setting, the

---


7 36 & 37 Vict., c. 66 (U.K.).

8 Young, supra note 6 at 36.

9 As Simon Fodden points out, however, courts will still turn to the parens patriae jurisdiction to deal with unanticipated situations which require the protection of
evolution of the state's legislative and judicial role regarding the preservation of children's "best interests" can be traced along two paths – one followed further to the public interest in maintaining the welfare of children whose parents can not or will not do so and the other further to private litigants' requests to have courts resolve their contests over custody-related issues.  

3. Legislation For the "Best Interests" of the Child  
   a. Child Welfare: Historical Roots  
      
      In Ontario, prior to 1874, many children who were deserted or orphaned received assistance primarily by means such as orphanages established by religious orders or children. See Simon Fodden, Family Law (Toronto: Irwin Law, 1999) at 183. In a recent custody decision, the Supreme Court of Canada held that the British Columbia Court of Appeal had inappropriately exercised its parens patriae jurisdiction to add the respondent's wife to custody proceedings between the respondent and the mother of the child about whom custody was disputed. The Court of Appeal then held that the trial judge would, had the wife been a party at first instance, have awarded custody to the respondent and his wife. The Supreme Court of Canada noted that the Court of Appeal had avoided the British Columbia Supreme Court Rules. The mother's appeal from the Court of Appeal decision was allowed on this and other grounds. See Van de Perre v. Edwards, [2001] 2 S.C.R. 1014, 204 D.L.R. (4th) 257.  

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
apprenticeship programs. By the end of the 19th century, there was a growing sense of the importance of maintaining childhood as a distinct stage of development, and reformers began to lobby for the abolition of child labour and for compulsory school attendance for children.11

In 1874, legislation was enacted to allow charitable institutions to intervene to prevent the maltreatment of apprenticed children. This legislation was followed in 1888 with An Act for the Protection and Reformation of Neglected Children,12 which allowed courts to make children wards of institutions and charitable organizations. In 1893, the Act for the Prevention of Cruelty to and Better Protection of Children13 was passed, and over time, several statutes dealing with child welfare were enacted. The current legislation in effect in Ontario is the Child and Family Services Act,14 which was amended significantly in 1999.15

The cornerstone organizations responsible for the protection of children under the provincial legislative child welfare schemes are quasi-governmental organizations known in Ontario as children’s aid societies. These agencies are provided for under the Child and Family Services Act.16 In the early part of the 20th century, children’s aid societies were given broad discretionary intervention powers. The liberal exercise of these powers

12 S.O. 1888, c. 40.
13 S.O. 1893, c. 45.
16 Ibid. at s. 15(2).
resulted in growing concern generally about the number of children being taken into state care, and, specifically, that many of these children were becoming victims of abuse within first, the child welfare institutions in which they were placed, and later, foster homes.\(^{17}\)

b. **Child Welfare: Emergence of the Family Preservation Approach**

In addition to concerns about children’s well-being within state-sanctioned facilities, the latter part of the 20\(^{th}\) century saw other societal and legal changes that impacted directly on the child protection regime. First, Canadian society moved toward a more “rights” based mind set, particularly fostered by the introduction of the *Canadian Charter of Rights and Freedoms*,\(^ {18}\) which provided individuals with greater rights in the context of their relationship with the state.\(^ {19}\) Additionally, there was a growing body of opinion that favoured leaving children in parental care in all but the most clear cases of neglect or abuse.\(^ {20}\) This led to what has been referred to as a “family preservation” model of child protection, which required greater provision by children’s aid societies of support to families in an effort to minimize risks to children. Legislation such as


\(^{19}\) Bala, *supra* note 11 at para. 18.

\(^{20}\) Ibid. at para. 21.
Ontario’s *Child and Family Services Act* reflected this focus on family preservation:

1. DECLARATION OF PRINCIPLES – The purposes of this Act are:

   (a) as a paramount objective, to promote the best interests, protection and well-being of children;

   (b) to recognize that while parents often need help in caring for their children, that help should give support to the autonomy and integrity of the family unit, and, wherever possible, be provided on the basis of mutual consent;

   (c) to recognize that the least restrictive or disruptive course of action that is available and is appropriate in a particular case to help a child or family should be followed (Emphasis added)

From the 1970s to the mid-1990s, this non-interventionist, family preservation model prevailed across Canada. As all levels of government in Canada became fiscally restrained in the 1990s, the budgets required to fund the family support services envisioned by such a regime came under attack. This budgetary constraint environment brought the continued viability of the family preservation model into question.

Additionally, research dealing with the importance of children’s emotional well being, as well as several highly publicized children’s deaths as a result of parental neglect, contributed to support for a swing back toward a more interventionist approach to child protection. Thus, while Supreme Court of Canada cases over the past decade have

---

21 *Supra* note 14.

22 In Ontario, one of the highest profiled tragedies was the death of infant Jordan Heikamp who died on June 23, 1997. His mother was at the time of his death a homeless teenager living at a native women’s shelter under the supervision of a children’s aid society worker. While a charge of criminal negligence causing death was dropped against Jordan’s mother, Renee Heikamp, in April, 2001, the jurors of a coroner’s inquest into the baby’s death returned with a verdict of homicide based on “clear and cogent evidence that Renee Heikamp killed Jordan.” See online: <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/1027383791204_22792991> (accessed: 26 December 2004).

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
emphasized parents' procedural rights in cases where the parental relationship with the child is threatened, it has also arguably moved toward greater emphasis on the well-being of children over the concept of parental rights, an approach colloquially known as the "Child Saver Approach."  

c. Ontario: the New "Child Saver"

In 1997, the Ontario Government convened a panel of experts in child protection to study several issues including: (1) whether then-existing legislation reflected the right balance between the protection of children and family preservation; (2) whether the existing legislation adequately addressed the issue of children suffering from neglect; (3) whether the burden of proof for finding a child in need of protection was at an adequate

---

23 See, for example, *R.B. v. C.A.S. of Metropolitan Toronto*, [1995] 1 S.C.R. 315, 9 R.F.L. 157 [*R.B.*] where procedures under the *Child and Family Services Act* of Ontario for a temporary wardship order and extension of that order to enable medical doctors to provide blood transfusions to a child against the parents' wishes were sufficient to satisfy ss. 1 and 7 of the *Charter*. See also *N.B. (Minister of Health and Community Services) v. G.(J.*), [1999] 3 S.C.R. 46, 177 D.L.R. (4th) 124 [*G. (J.*) cited to S.C.R.*], where the Supreme Court of Canada held that the New Brunswick Government was under a constitutional obligation to provide an indigent parent with state-funded counsel in a case where the Minister of Health and Community Services sought an extension of a custody order relating to the parent's three children. The Court held at page 56 that "while a parent need not always be represented by counsel in order to ensure a fair custody hearing, in some circumstances, depending on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent, the government may be required to provide an indigent parent with state-funded counsel." For a comment on this decision, see Mary Jane Mossman, "Constitutional Requirements for Legal Representation in Child Protection Matters" (2000) 12 Can. J. Women & Law 490.


25 This terminology is used by Jeffrey Wilson and Mary Tomlinson in *Children and the Law*, 2d. ed. (Toronto: Butterworths, 1986) and compared to the "Radical Non-Intervention," another label for the "family preservation" model described above.
level; (4) whether legislation was being interpreted properly and applied at key decision points; and (5) whether the legislation was clear about the roles and responsibilities of different service sectors.²⁶

The panel concluded that several factors gave rise to a need for legislative reform. Key to the panel’s reasoning was the finding that:

> [t]he legislative principles regarding the least restrictive or disruptive course of action and the autonomy and integrity of the family have been emphasized to the detriment of the child’s safety, protection and well-being. Where the rights of parents have been in conflict with the needs of the child the legislation has not always been interpreted in accordance with its apparent primary purpose to promote the best interests of the children.²⁷

The panel further suggested that reforms were warranted by increased recognition of the importance of early childhood development²⁸ and the “damaging impact of child neglect, emotional abuse, and exposure to domestic violence.”²⁹

Following the release of the panel report, significant amendments to the Child and Family Services Act were enacted. These amendments, in comparison with the laws that existed prior to their enactment, clearly moved Ontario toward a more interventionist approach, illustrated in large part by the much more broadly defined concept of a “child in need of protection” than had previously existed, which will be reviewed more closely below.³⁰

---

³⁰ See 127-129 below.
Other key provisions, which can be contrasted with the provisions set out earlier as examples of the “family preservation” model of child protection, were also enacted. Whereas section 1 of the Act formerly provided that the promotion of the best interests of children was a paramount objective, the current reading of the provision is that “the paramount purpose of this Act is to promote the best interests ... of children.” This seemingly subtle difference reflects legislative acceptance of the panel’s view that “each child is entitled to safety, protection and well-being as the fundamental and dominant purpose of the legislation, and ... other purposes are secondary.” Further, while the pre-1999 Declaration of Principles in the Child and Family Services Act dictated that the least disruptive course of action available in a particular case to help a child or family should be followed, the current subsection 1(2) 2 of the Act establishes that one purpose of the legislation is “[t]o recognize that the least disruptive course of action that is available and is appropriate in a particular case to help a child should be considered.” (Emphasis added). These provisions suggest greater latitude for decision-making that intrudes upon the family unit where such intrusion is held to be in the best interests of the child.

d. Child Custody Decision Making: Historical Presumptions

The best interests of the child principle has changed considerably in the child custody context over the past two centuries. Only in the late 19th century was there any

---

31 Supra note 15.
32 Panel of Experts, supra note 26 at 13-14.
33 Supra note 15.
34 One might question whether funding for family support programs will continue to exist with the shift from family preservation to more radical intervention. Indeed, informal discussions between the author and Children’s Aid Society agents suggest that while a great deal of funding has been provided for “front line” workers, provision of adequate support programs poses a difficult challenge.
movement away from the common law presumption that the father of children born in wedlock had right to custody of his children.\textsuperscript{35} Even after the \textit{Custody of Infants Act}\textsuperscript{36} was enacted in Upper Canada in 1859, which enactment formally permitted mothers of children over twelve years of age to apply for custody or access, courts still retained a tendency to view fathers as knowing best what was in the interests of their children, absent exceptional circumstances.\textsuperscript{37}

During the 20th century, with an increasing focus on children’s welfare taking place in Canadian society, courts began to eschew the traditional characterization of children as property belonging to their fathers. Instead, increasing emphasis turned to the benefits of children “of tender years” (seven years of age and younger) being placed in the custody of their mothers. The “tender years doctrine” held particular favour in relation to young girls:

\begin{quote}
No father, no matter how well intentioned or how solicitous for the welfare of such a [very young female] child, can take the full place of the mother. Instinctively, a little child, particularly a little girl, turns to her mother in her troubles, her doubts and her fears. In that respect nature seems to assert itself. The feminine touch means so much to a little girl; the frills and the flounces and the ribbons in the matter of dress; the whispered consultations and confidences on matters which to the child’s mind should only be discussed with Mother, the tender care, the soothing voice; all these things have a tremendous effect on the emotions of the
\end{quote}


\textsuperscript{36} \textit{An Act Respecting the Appointment of Guardians and the Custody of Infants}, Consolidated Statutes of Upper Canada, 1859, c. LXXIV.

\textsuperscript{37} See, for example, \textit{In Re Agar-Ellis} (1883), 24 Ch. Div. 317, cited in Bala, \textit{supra} note 35. In \textit{Re Agar-Ellis}, the father was a Protestant, and the mother a Roman Catholic. The mother sought to have the father compelled to allow the mother to exercise access to her child. The Chancery Division agreed that absent extraordinary circumstances, there was no reason to interfere with the father’s decision to deny access.
child. This is nothing new; it is as old as human nature and has been recognized time after time in the decisions of our courts.\(^\text{38}\)

Other courts were less eloquent in their discussion of the doctrine and simply described it as the common sense proposition that children under the age of seven generally needed the care of their mothers.\(^\text{39}\) This proposition did not apply, however, where a mother was deemed “morally unfit.” In many cases, a lack of fitness was found where a mother had left her husband; certainly a mother’s commission of adultery was considered the most serious sign of moral unfitness.\(^\text{40}\) Even when no-fault divorce provisions were introduced in 1968, the applicable provisions relating to custody and access retained a strong emphasis on parental conduct. The 1968 *Divorce Act* provided that when making custody decisions, a court should do what “it thinks fit and just […], having regard to the conduct of the parties, and the condition, means and other circumstances of each of them.”\(^\text{41}\)

e. Child Custody Decision Making: Removal of Presumptions

In its 1976 *Report on Family Law*,\(^\text{42}\) the Law Reform Commission of Canada recommended that the best interests test (without presumptions) be entrenched as the sole criterion for custody and access decisions made pursuant to the *Divorce Act*. The 1985 *Divorce Act* did adopt the best interests test, and parental conduct became relevant only to the extent that it impacted on a parent’s abilities to meet his or her child’s needs.


\(^{41}\) S.C. 1968, c. 24, s. 11(1)(c).

Provincial and territorial legislation contains the same directive. While it might seem that the establishment of a “sole criterion” would simplify custody and access determinations, this has clearly not been the case.

4. **How is “Best Interests” Defined?**

To say that the best interests of the child principle is a guiding element for child protection and private custody dispute matters is simply to introduce a very complex and sometimes frustrating question: by what means is one to determine the (prospectively applied) resolution that will work in the best interests of children?

One of the key criticisms linked to the best interests of the child standard is that it provides a very indeterminate and subjective manner by which courts are to make

---


44 *Child and Family Services Act*, supra note 15, s. 57(1).

45 *Children’s Law Reform Act*, R.S.O. 1990, supra note 3, s. 19 and *Divorce Act*, supra note 10, s. 6(8).
determinations in relation to children.\textsuperscript{46} By virtue of being a standard and not a rule, the best interests of the child principle is by its very nature less determinate in an objective sense than are the rules established in some areas of law. Briefly, while rules offer very clear and definite instructions to decision makers about how to deal with particular factual situations, offering certainty and allowing individuals to know their rights and responsibilities, standards provide general principles which are flexible enough to allow decision makers to tailor outcomes in particular cases. Standards lead to less predictable dispute resolution. Rules, however, are sometimes viewed as inflexible and may be under or over inclusive.\textsuperscript{47}


\textsuperscript{47} Paraphrased from Nicholas Bala, "Judicial Discretion and Family Law Reform in Canada" (1986) 5 Cdn. J. of Fam. Law 15 at 18 - 19.
The advantage of having a standard as opposed to a rule for a matter such as custody decision-making is that decision makers are able to make individualized deliberations about what will be in the best interests of a particular child. The disadvantage of this form of decision-making, in the view of critics, is that it requires judges to decide cases based on their personal values and beliefs about what is "the good life".48

Various legislative provisions have been enacted in an attempt to guide decision makers faced with matters involving a "best interests" analysis. While the ultimate forms of relief available in child protection and private custody dispute matters are very different,49 the statutory factors to be considered in reaching a decision that is in the child's best interests share a number of similarities, as illustrated by subsection 37(3) of

---

49 In custody and access matters, parenting responsibilities are allocated as between the parties named in the proceedings. With child protection matters, a different range of possible dispositions exists, as set out in s. 57 of the Child and Family Services Act, supra note 15:
57(1) Where the court finds that a child is in need of protection and is satisfied that intervention through a court order is necessary to protect the child in the future, the court shall make one of the following orders, in the child’s best interests:
1. That the child be placed with or returned to a parent or another person, subject to the supervision of the society, for a specified period of at least three and not more than twelve months.
2. That the child be made a ward of the society to be placed in its care and custody for a specified period not exceeding twelve months.
3. That the child be made a ward of the Crown, until wardship is terminated under section 65 or expires under subsection 71(1), and be placed in the care of the society.
4. That the child be made a ward of the society under paragraph 2 for a specified period and then be returned to a parent or another person under paragraph 1, for a period or periods not exceeding an aggregate of twelve months.
the *Child and Family Services Act* and subsection 24(2) of the *Children's Law Reform Act*.

**Table 1: Comparison of Best Interests of the Child Test: Child and Family Service Act*\(^{50}\) and Children's Law Reform Act*\(^{51}\)**

<table>
<thead>
<tr>
<th>Child and Family Service Act, s. 37(3)</th>
<th>Children's Law Reform Act, s. 24(2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Where a person is directed in this Part to make an order or determination in the best interests of a child, the person shall take into consideration those of the following circumstances of the case that he or she considers relevant:</td>
<td>In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, a court shall consider all the needs and circumstances of the child including,</td>
</tr>
<tr>
<td>1. The child’s physical, mental and emotional needs, and the appropriate care or treatment to meet those needs.</td>
<td>(a) the love, affection and emotional ties between the child and,</td>
</tr>
<tr>
<td></td>
<td>(i) each person entitled to or claiming custody of or access to the child,</td>
</tr>
<tr>
<td></td>
<td>(ii) other members of the child’s family who reside with the child, and persons involved in the care and upbringing of the child;</td>
</tr>
<tr>
<td>2. The child’s physical, mental and emotional level of development.</td>
<td></td>
</tr>
<tr>
<td>3. The child’s cultural background</td>
<td></td>
</tr>
<tr>
<td>4. The religious faith, if any, in which the child is being raised.</td>
<td>(c) the length of time the child has lived in a stable home environment; the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;</td>
</tr>
<tr>
<td>5. The importance for the child’s development of a positive relationship with a parent and a secure place as a member of a family.</td>
<td>(e) the relationship by blood or</td>
</tr>
<tr>
<td>6. The child’s relationships by</td>
<td></td>
</tr>
</tbody>
</table>

*\(^{50}\) Supra note 15.*
*\(^{51}\) Supra note 3.*
<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>blood or through an adoption order. through an adoption order between the child and each person who is a party to the application.</td>
<td></td>
</tr>
<tr>
<td>7. The importance of continuity in the child's care and the possible effect on the child of disruption of that continuity.</td>
<td></td>
</tr>
<tr>
<td>8. The merits of a plan for the child's care proposed by a society, including a proposal that the child be placed for adoption or adopted, compared with the merits of the child remaining with or returning to a parent. (d) any plans proposed for the care and upbringing of the child; the permanence and stability of the family unit with which it is proposed that the child will live; and</td>
<td></td>
</tr>
<tr>
<td>9. The child's views and wishes, if they can be reasonably be ascertained. (b) the views and preferences of the child, where such views and preferences can reasonably be ascertained.</td>
<td></td>
</tr>
<tr>
<td>10. The effects on the child of delay in the disposition of the case.</td>
<td></td>
</tr>
<tr>
<td>11. The risk that the child may suffer harm through being removed from, kept away from, returned to or allowed to remain in the care of a parent.</td>
<td></td>
</tr>
<tr>
<td>12. The degree of risk, if any, that justified the finding that the child is in need of protection.</td>
<td></td>
</tr>
<tr>
<td>13. Any other relevant circumstance.</td>
<td></td>
</tr>
</tbody>
</table>

Similar factors have been suggested in proposed reforms to the *Divorce Act*, since the federal legislation currently contains no specific factors to assist decision makers in assessing the "conditions, means, needs and other circumstances of the child."\(^{52}\) A

\(^{52}\) *Divorce Act, supra* note 10, s.16(8). The only elements of supplementary guidance to the appropriate interpretation provided in the Act are s. 16(9) which provides that parental conduct should not be considered unless the conduct is relevant to the parent's
comprehensive proposal suggesting a list of criteria to govern best interests of the child decisions under the Divorce Act was set out in the For the Sake of the Children Report\textsuperscript{53} discussed in Chapter 2. Bill C-22, which died after first reading, also proposed a list of

\begin{itemize}
  \item The relative strength, nature and stability of the relationship between the child and each person entitled to or claiming a parenting order in relation to the child;
  \item The relative strength, nature and stability of the relationship between the child and other members of the child's family who reside with the child, and persons involved in the care and upbringing of the child;
  \item The views of the child, where such views can reasonably be ascertained;
  \item The ability and willingness of each applicant to provide the child with guidance and education, the necessaries of life and any special needs of the child;
  \item The child's cultural ties and religious affiliation;
  \item The importance and benefit to the child of shared parenting, ensuring both parents' active involvement in his or her life after separation;
  \item The importance of relationships between the child and the child's siblings, grandparents and other extended family members;
  \item The parenting plans proposed by the parents;
  \item The ability of the child to adjust to the proposed parenting plans;
  \item The willingness and ability of each of the parties to facilitate and encourage a close and continuing relationship between the child and the other parent;
  \item Any proven history of family violence perpetrated by any party applying for a parenting order;
  \item There shall be no preference in favour of either parent solely on the basis of that parent's gender;
  \item The willingness shown by each parent to attend the required education session; and
  \item Any other factor considered by the court to be relevant to a particular shared parenting dispute.
\end{itemize}

“best interests” considerations.54

The key difference in the “best interests” definition between current and proposed child custody legislation and child protection legislation seems to lie primarily with the Child and Family Services Act provision’s reference to the risk of harm to the child. The distinction between the two kinds of legislation in terms of their application also seems to rest with this key difference – the risk (and perhaps the extent of risk) of harm to the child which justifies state intervention in the public interest.

a. Distinguishing Best Interests Roles

In his seminal article dealing with indeterminacy in the best interests of the child principle,55 Mnookin discusses the two functions encompassed by the best interests of the child principle. He characterizes the most important distinction between the child protection function and the private custody resolution function as lying in their relationship to the distribution of power between the family and the state:

Legal standards for private dispute settlement guide judicial resolution of a private controversy. In this instance, authoritative resolution does not in itself expand the state’s role with regard to child-rearing. Legal standards for the child protection function, on the other hand, act both to define when government may intrude into the family and to control child-rearing through coercion. Defining the appropriate scope of the child protection function is therefore necessarily related to profound questions of political and moral philosophy concerning the proper relationship of children to their family and the family to the state.56 (Emphasis added)

56 Ibid. at 265.
Others have also distinguished child protection dispositions from private custody adjudication in light of their redistribution of effective power to make decisions over the lives of children from parents to the state. The assumption behind this distinction seems to be that it is acceptable for the state to actively intervene, without parental invitation or consent to do so, in families where parental functioning has fallen below a particular threshold.

In terms of the measure of harm considered sufficient to warrant state intervention, it is instructive to compare the threshold as established in the 1999 amendments to the *Child and Family Services Act* with the kinds of harm identified in social science literature and accepted by courts as having a negative impact on many children who are the subject of custody disputes.

The *Child and Family Services Act* establishes a number of ways in which a matter may reach a hearing to determine whether state intervention is necessary. One of these routes is apprehension, which occurs after a warrant has been issued by a justice of the peace who is satisfied, on the basis of the information provided by a children’s aid society agent, that there are reasonable and probable grounds to believe that the child is in need of protection and that a less restrictive course of action is not available or would not protect the child adequately.

---

58 *Child and Family Services Act, supra* note 15, s. 46(1)(a).
59 *Ibid.,* s. 46(1)(b).
The definition of “child in need of protection” is comprehensive. It includes circumstances where children have been exposed to physical and sexual abuse, as well as situations where children have suffered emotional harm as demonstrated by serious anxiety, depression, withdrawal, self-destructive or aggressive behaviour or delayed development and where there are reasonable grounds to believe that the emotional harm suffered by the children resulted from the actions, failure to act or pattern of neglect of a parent. Additionally, the definition extends to situations where a child is at risk of suffering emotional harm resulting from parental neglect. The inclusion of emotional harm as an element that places the child in need of protection reflects a greater understanding, from a social science perspective, of the impact of certain parental behaviours upon children. Parental behaviour that may cause emotional harm for children is also addressed in the kinds of court-connected parent education programs that provide the focal point for this work. In light of the commonly identified concerns about emotional harm in both child protection and private custody matters, I focus below on the question of state intervention in the context of potential emotional harm to children.

Courts are reporting a better understanding of the role of parental behaviour in causing emotional harm for children in the context of private custody and access matters. In Young, for example, Madame Justice L’Heureux-Dube referred to literature suggesting that discord and disharmony after separation are damaging to children. In her view:

---

60 Ibid., s. 37(f).
61 Ibid., s. 37(g).
62 Panel of Experts, supra note 26 at 9.
63 Young, supra note 6.
While this remains an area of social science that has yet to be comprehensively researched, studies of both the effects of divorce and the role of conflict in the subsequent family life indicate that children often suffer more extensively than is generally acknowledged on divorce and that those who must endure continuing conflict after divorce stand at serious risk of harm down the road. The resounding message is that courts must pay more, not less, attention to the needs of children on divorce.64

Other cases have referred, without always making specific reference to social science literature, to the emotional harm occasioned upon children as a result of their exposure to parental conflict.65

Without the benefit of a great deal of judicial interpretation of the amended definition of a “child in need of protection” in the Child and Family Services Act, it seems arguable that the “emotional harm” implied by that Act and the “emotional harm” recognized in a number of recent custody decisions may not be exceptionally different in nature, though presumably there is a different degree of harm at issue in each type of case. A recent decision of the Ontario Superior Court of Justice illustrates the potentially difficult distinction between post-separation behaviour that does and does not attract the attention of child protection authorities. In Children’s Aid Society of the Regional Municipality of Waterloo v. B. (A.),66 two children, aged 13 and 7, had been primarily in their mother’s care since the parties’ separation in 2000, with access being exercised by their father. After the separation, the mother made numerous complaints to the Children’s Aid Society (CAS) about the father’s care. The complaints were

64 Ibid. at 79.
65 One such example is Boukema v. Boukema (1997), 33 O.T.C. 190, 31 R.F.L. (4th) 329 (Ct. J. (Gen. Div.)), where Justice McDonald talks about the “war” between the parents in relation to the mother’s attempt to change custody arrangements for the parties’ 11 year old daughter.
unsubstantiated. Later, the CAS became concerned about the children being at risk of emotional harm as a result of the mother “coaching” them to make complaints about their father. These complaints were also not substantiated. The CAS was successful in obtaining an interim order placing the children in their father’s care with society supervision. In dismissing the mother’s appeal, Flynn J. found that the judge below had reasonably accepted that the mother’s conduct demonstrated a risk of likely harm to the children. Flynn J. quoted the following passage from the court below:

Mrs. B.A. continues to present a risk of causing emotional harm to the children in the form of severe anxiety by brain-washing them so that they seem to have psychologically-induced illnesses on the days when they are supposed to visit their father, by abusing their father verbally in front of the children, by creating an atmosphere where the children are simply unable to tell their mother if anything positive happened during an access visit and the children are only able to relate any negative things.67

While the situation in this case was exacerbated by psychological difficulties experienced by the mother, it does seem to lend some support to the assertion above that there may be similarities in the types of “emotional harm” at stake in private custody disputes and public child protection matters.

b. Process for Determining the Best Interests of Children

Working from the premise that emotional harm to children has been identified as a situation warranting state attention in both child protection and private custody settings, it is instructive to review the approach to dealing with such cases taken in each legal setting.

67 Ibid. at para. 54.
The processes for resolving child protection and private custody disputes are quite different. For the purposes of this work, it is relevant to examine the particular difference between the two with respect to the level of state intervention in the family involved prior to a hearing leading to a final order in relation to the child at issue. Specifically, often a family will have had significant contact with a children's aid society prior to the hearing to determine whether the child is in need of protection such that an order under s. 57 of the Act should be made. Subsection 57(2) of the Act requires that a court inquire as to the efforts that the children's aid society or other agency or person has made to assist the child before intervention, in the nature of removal of a child from their parent or person who has been caring for them, occurs. Subsection 3 of the same section provides that a court should not make an order removing a child from the care of a person who had charge of him or her, unless the court is satisfied that alternatives that are less disruptive to the child would be inadequate to protect the child. Among the type of less intrusive services that a court inquires about are parenting skills programs provided by children's aid societies or other agencies.\(^68\)

In child custody proceedings, a much less interventionist pre-hearing approach has traditionally been pursued. Here, there is no state agent involved with the family prior to the initiation of an application for a determination of issues relating to who shall assume parental functions, and under what conditions. When such an application has

\(^{68}\) Reference to the provision of such services is quite often made in jurisprudence dealing with a society application for guardianship of a child. See, for example, *K.L.W.*, *supra* note 24 at 560 and *Catholic Children's Aid Society of Metropolitan Toronto v. C.M.*, [1994] 2 S.C.R. 165, 113 D.L.R. (4th) 321 at para. 3.
been commenced, the judge’s primary role is to ensure that the appropriate evidence is adduced to resolve the issues raised by the parties.

The notion behind this less interventionist approach lies in the distinction between the child welfare and child custody adjudication functions described by Mnookin. That is, there has been a traditional notion that the public interest in a child's welfare gives rise to state authority to interfere with parental child-rearing practices. The primary state focus within a private child custody dispute is to guide the determination of how the child's needs and interests can best be met in the future, based on a weighing of the evidence regarding the child's needs and the parents' ability to meet those needs as represented to the court. In other words, absent extraordinary circumstances, the state’s role is to assess child-rearing practices as they relate to the needs of a child, but not to actively require change of that behaviour.

Even the role of assessments, as authorized by s. 30 of the Children's Law Reform Act, is to act as a supplement to the evidence before the judge which assists him or her in the adjudicative role. Indeed, courts have cautioned against the use of assessments on a routine basis because they represent “intrusions into a person’s reasonable expectations of privacy and should be warranted before being ordered by the Court.”69 The current judicial trend is to require that one or more clinical issues be present before an assessment is ordered.70


Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
This more reactive approach to the determination of the best interests of the child is illustrated very clearly in the British Columbia Court of Appeal's decision in Young v. Young:

In the exercise of the court's duty to protect the well-being of the child, care must be taken to ensure that real harm of the sort, and arising in the manner, just described is distinguished from the general emotional distress which every child experiences when confronted with both the reality of divorce and the turmoil which characterizes the post-divorce relationship of many ex-spouses. The former can properly be addressed by judicial intervention. The latter is inevitable, and in most cases lies beyond the influence of any order of the court.71 (Emphasis added)

This comment, made in 1990, seems quite definitive in terms of the boundaries it sets on the scope of the court’s ability to assist children who are subject to the emotional harm caused by the “turmoil” in the relationships of many former spouses. It would suggest that a court order requiring parental attendance at a parent education program, particularly an order that is to take effect prior to parties’ court attendance or to any adducing of evidence, is not within the purview of the court in its role as promoter of the child’s best interests. However, the recent conceptual narrowing of difference between the type of harm recognized as relevant to child protection proceedings and to child custody matters, as well as the evolutionary nature of the best interests of the child principle, may allow for a reconceptualization of both the judicial and legislative roles in promoting the best interests of the child such that the state endorsement of mandatory parent education programs falls within the scope of the best interests principle.

c. **Scope for a Reconceptualized “Best Interests” Definition**

Arguably, the lowered legislative threshold of harm required to trigger state intervention in child protection matters, the heightened awareness of the emotional harm occasioned upon children who are exposed to parental conflict, the growth over the past few decades in the number of families who experience parental separation and corresponding conflict, and the fact that the interpretation and application of the best interests of the child standard is not static, suggest that there is room within the family law system for a reconceptualization of the role of the state in promoting the best interests of children in custody related matters. This reconceptualization would envision a more proactive state role in informing parents of the risks involved in exposing children to conflict and protracted litigation, and encouraging them to exhibit behaviours and make legal decisions in child-related matters that decrease the extent of conflict to which their children are exposed.

In undertaking this reconceptualization, however, it seems imperative to respect the core difference between child protection and private custody matters. As such, in the

---

72 Studies suggest that children of “intact” families who are exposed to a great deal of parental conflict experience equally negative results. See, for example, D.R. Morrison and M. J. Corro, “Parental Conflict and Marital Disruption: Do Children Benefit when High-Conflict Marriages are Dissolved?” (1999) 61 J. of Marriage and the Family 626. The suggestions posited in this work unfortunately will not assist these children.

73 Note Madame Justice L’Heureux-Dube’s comment in *Catholic Children’s Aid Society of Metropolitan Toronto v. C.M.*, supra note 68 at 203 that "it is clear that the best interests of a child require different solutions over time and such interests may have to take precedence over any parental interests."
absence of evidence so requiring, courts and legislatures should not attempt to (in Mnookin’s words) “control child-rearing through coercion.”74

Obviously, there must be some conceptual difference between the level of harm to which the state’s child protection machinery responds, and the harm generally suffered by children who are exposed to parental conflict. Otherwise, child protection agencies would potentially become involved in the lives of a vast number of families. In light of this conceptual difference, it would be inappropriate for the state to exercise the same level of pre-hearing intervention into the lives of parties whose behaviour has not fallen below the “acceptable” standard as it exercises with regard to parties whose children may be “in need of protection.” On the other hand, concern about emotional harm to children related to parental conflict, particularly as that conflict can be exacerbated by the dispute resolution system, may invoke the need to provide relevant information to parents in a manner that is as non-coercive as possible.75 This involvement could take the form of a state recommendation or requirement that parents attend an educational program to inform them about these issues. Some of the implications of each attendance policy (recommendation versus mandate) are discussed in Chapters 6 and 7 of this work.

The foregoing analysis of judicial passivity in the early stages of child custody proceedings need not lead to the conclusion that the reconceptualization proposed

74 Mnookin, supra note 55 at 265.
75 It might also better prepare parents and encourage them to be proactive in relation to a process that may ultimately result in an order that is quite intrusive. As Andrew Schepherd has noted, we should not somehow characterize custody awards, particularly those where sole custody is awarded to one parent over the objection of another, as involving no intrusion. See Andrew Schepherd, “Taking Children Seriously: Promoting Cooperative Custody After Divorce” (1985) 64 Texas Law Rev. 687 at 771.
involves a dramatic shift in philosophy or in the exercise of authority. Indeed, some of Madame Justice L’Heureux-Dube’s commentary in the Court of Appeal’s decision in *Young*, cited approvingly by the majority of the Supreme Court in *K.L. W.* could be interpreted as lending support to such a conceptualization. For example, according to L’Heureux-Dube J. in *Young*:

> [t]he fact that many children experience stress and disruption upon the breakdown of the marriage, in my view, only increases the obligation of courts to focus their attention on the best interests of the child. *The primary goal of the legal system on divorce must be to minimize the adverse effects on children.* (Emphasis added).

Further, beyond the inherent *parens patriae* jurisdiction of superior courts, there is existing statutory authority that allows courts to require or recommend that parents engage in specified activities in the context of custody and access proceedings. Section 28(c) of the *Children’s Law Reform Act* provides that a court to which an application is made under s. 21 (seeking custody or access) “may make such additional order as the court considers necessary and proper in the circumstances.” This provision has provided the basis for orders or recommendations that parents attend counselling. The limit of this particular provision, of course, is that it assumes a judge has examined the circumstances of the particular case before making such an order, whereas some proponents of court-connected parent education would advocate for a requirement that all

---

76 *Supra* note 24. The Court noted at 576 that “it is important to recognize that the state must be able to take preventive action to protect children.”

77 *Young*, supra note 6 at 84.

parents becoming involved in custody and access matters be required to receive certain information prior to the conduct of any judicial proceedings. One author has proposed such an approach, without framing her proposal in the context of parent education programs. Andrea Charlow suggests that:

[p]arents should be informed that research indicates that reduced conflict and access to both parents have been found to be in the best interests of the child. They also should be informed that if the court finds that they are contesting custody for reasons other than the child's best interests they would not be granted custody.79

There are problematic issues around the latter aspect of Charlow’s proposal, namely the subjectivity of the determination of whether litigation strategies are being adopted with a view to promoting the best interests of children. In fact, it is not difficult to imagine that a provision such as this might engender the same sorts of problems that have been ascribed to s. 16(10) of the Divorce Act which directs a court to take into account, in custody and access determinations, the willingness of each party to facilitate contact between the child and the other parent. This provision has given rise to concerns for abused women who may have fears about facilitating access between their child and the child’s parent, but who feel silenced by the fear that if they voice their concerns, they will be viewed as uncooperative, and may therefore be deprived of custody of their children.80 Charlow’s proposal has the potential of giving rise to similar fears (and realities).

80 This problem is discussed in Sheila Holmes, “Imposed Joint Legal Custody: Children’s Interests or Parental Rights” (1987) U. of T. Fac. of Law Rev. 300.
Perhaps a more promising version of Charlow’s proposal would be to adopt the first aspect – that of making information available to parents, and ascribing to decision makers responsibility for assessing the impact of the parties’ willingness to access this information. This is a less direct way of assessing parents’ approach to adopting stances that are in the best interests of their children, but it is also carries less potential for silencing valid concerns that parents might have.

The modified approach described above is consistent with the one proposed by the Joint Committee discussed in Chapter 2 and earlier in this Chapter. As noted, the Committee suggested that one element to be considered in assessing the best interests of the child should be the parents’ willingness to attend a parent education session.\textsuperscript{81} The potential advantage of this approach is that it allows for the consistent delivery of relevant emotional and legal information to all family law consumers, while still allowing for individualized determinations. It will not change the best interests standard from an indeterminate mechanism to a determinate one. However, it may add to the perceived legitimacy of the process by ensuring that individuals enter the dispute resolution process with at least a minimum threshold of knowledge about the emotional and legal aspects (and how the two are linked) of the process(es) in which they are becoming involved.

Such an implementation approach would involve an increased overall level of intervention for family law litigants. The extent of intervention and its impact on the concept of respecting parental autonomy in child-rearing matters would depend on the content, duration and objective of the program. In order to better assess the appropriate

\textsuperscript{81} For the Sake of the Children Report, supra note 53, Recommendation 16.13.
limits of intervention, two matters of particular concern, which have been alluded to earlier, will be addressed below: parental autonomy and access to justice.

5. **Tensions Between the Best Interests of the Child Principle and State-endorsed Philosophies**

One author has accurately noted that:

> Family issues for which people attend court raise issues of vulnerability, autonomy and paternalism. The potential for state intervention in intimate life appears here in its most powerful form. Legal, political and social debates about such matters as ... the tensions between the rights of parents and the state's interests in protecting children, and the legitimacy of state intrusion ... play out in concrete form affecting real people in these cases.\(^82\)

In *Young*, Madame Justice L’Heureux-Dube asserted that “children have a right to a parent who will look after his or her own interests...”\(^83\) However, there are times when children’s interests and parents’ interests seem, at least at surface level, at odds. Such occurrences give rise to questions about how to resolve the divergences in interests. In both the child custody and child protection areas of family law, these situations call into question the issue of parental autonomy and freedom from state intervention, which have traditionally been upheld as important aspects of the state’s relationship with families.

Another important feature of our democratic state is its provision of adequate access to justice. Court-affiliated parent education programs have been described as falling on both ends of the access to justice spectrum – for some, they represent another hurdle for individuals seeking court redress; for others, parent education programs represent empowerment and improved understanding of the legal system. Both the

---


\(^{83}\) *Young, supra* note 6 at 37.
parental autonomy and the access to justice issues need to be considered in an assessment of policy issues associated with court-connected parent education programs.

a. Parental Autonomy

The issue of parental autonomy and freedom from state intervention has arisen in a number of contexts within custody adjudication and child protection matters. Clarification should be made, however about the particular meaning of the term “parental autonomy” in each context. In the child protection context, behaviour that arguably falls below the threshold of acceptability will have come to the attention of a state agent, and when the matter comes before the court, the primary objective will be to ascertain whether the child is, indeed, in need of protection. Parental autonomy is considered within the context of that finding, and deprivations of decision-making authority over child-rearing are seen to be legitimate because the threshold standard of parental behaviour has not been met.

In private custody disputes, the parties are assumed to have adequate parenting skills to keep them beyond the reach of child protection authorities. Their ‘bundle’ of

---

84 There is certainly debate about how this threshold should be established, and the concept of “community” that should form the reference point in determining whether the threshold has been met. As noted in Bala, Hornick and Vogl, eds., *Canadian Child Welfare Law: Children, Families, and the State* (Toronto: Thompson Educ. Pub, 1991) at 67: “When trying to determine if a child is in need of protection and state intervention appropriate, it is important for the agency and court to be realistic and appreciate the cultural diversity of Canada. As one judge observed, one must not impose unrealistic or unfair middle class standards of child care upon a poor family of extremely limited potential.” For other overviews of these issues see W. Sammon, “The Ontario Child and Family Services Act, 1984: Maintaining the Balance Between Competing Rights” (1991-92) 8 C.L.Q. 129; A. McGillivray, “Reconstructing Child Abuse: Western Definition and non-Western Experience in Michael D.A. Freeman and Philip E. Verrman, eds., *The Ideologies of Children’s Rights* (Canada: Kluwer Academic Pub., 1992).
parental autonomy, then, is still assumed to contain authority over child-rearing decisions though the manner in which that authority is exercised may play a significant role in a decision maker’s assessment of the appropriate allocation of parenting responsibilities as between the parties. Except in cases where a harmful level of maladaptive behaviour that causes a significant risk of harm to a child is found to exist, courts will be reluctant to interfere with parental autonomy regarding child-rearing practices. Where the complained of behaviour is found by a court to be sufficiently problematic, orders prohibiting or requiring certain courses of action will be made

The distinction sought to be made in this work is perhaps illustrated more clearly by a review of jurisprudence that has emanated from the Supreme Court of Canada over the past decade. For some years, the Supreme Court of Canada's view of state intervention in the family was aptly summarized in *R. (B.)*.  

Although the philosophy underlying state intervention has changed over time, most contemporary statutes dealing with child protection matters … while focusing on the best interests of the child, favour minimal intervention. In recent years, courts have expressed some reluctance to interfere with parental rights and state intervention has been tolerated only when necessity has been demonstrated, thereby confirming that the parental interest in bringing up, nurturing and caring for a child, including medical care and moral upbringing is an individual interest of fundamental importance to our society. As a result, introduction into the custody/access setting of programs aimed at altering parenting styles, warrants serious reflection.

This statement, however, should be considered in light of reforms to the *Child and Family Services Act*. As noted earlier, the effect of these amendments is to lower the threshold of harm required for state intervention for the safety of a child, and to elevate

\[85\] *R. (B.)*, *supra* note 23.
the need to consider the best interests of the child. There has been little jurisprudence generated, and none at an appellate level, in relation to the amendments to s. 37(2) of the Child and Family Services Act dealing with "emotional harm." However, the Supreme Court has, over recent years, grappled in both child welfare and private custody proceedings with the need to balance children's best interests and parental autonomy. In the child welfare context, decisions have largely focused on the interaction between child protection proceedings and s. 7 of the Charter. With respect to private custody cases, the Supreme Court has dealt with aspects of parental decision-making autonomy relevant to questions at issue in relation to parent education programs.

86 Some lower courts have taken a cautious approach to determining when a child will be found to be "in need of protection based on s. 37(2)(f) or (g) of the Act. For example, in Children's Aid Society for Owen Sound & Grey (County) v. T. (J.), [2003] CarswellOnt. 6268 at para 164 (Ct. J.) (eC), Hearn J. stated:

In cases where a society seeks to rely on clause 372(g) or clause 37(2)(f), some expert evidence will usually be required to assist the court in determining the serious nature of the emotional harm described in clause 37(2)(f) and the likeliness of that harm resulting from the actions of the parent as required under clause 37(2)(g). There may, of course, be cases where the evidence is so overwhelming that expert evidence will not be required ... Nevertheless, the overwhelming nature of the evidence must be in place before the court can, in my view, safely act and determine on its own whether the requirements of clause 37(2)(g) or clause 37(2)(f) have been established.

Justice Hearn's analysis relied on a similar interpretation of clause 37(2)(g) made by Steinberg J. in Catholic Children's Aid Society of Hamilton-Wentworth v. L. (C.), [2002] O.J. No. 4255 (Sup. Ct. J.) (QL). See, however, B. (A.), supra note 66 at para. 55, where Justice Flynn stated that "the causal connection between the emotional harm and the mother's conduct was in accordance with reason and common sense."

87 See, for example, G. (J.) supra note 23 and K.L. W. supra note 24.
In *Young and P. (D.) v. S. (C.)*, disputes arose between parents when the father in each case wished to expose his children to the Jehovah’s Witness faith and practice, against the custodial mother’s wishes. The variety of decisions among the members of the Supreme Court of Canada in these cases has been subject to criticism. The primary debate rested between the opinions of McLachlin J., whose reasoning represented the majority view in *Young* and L’Heureux-Dube J., whose views constituted the majority view in *D.P.* In both cases, the Court agreed that the best interests of the child principle must be the dominant consideration, notwithstanding the parents’ constitutionally protected interests in free religious expression.

While the judgments in these cases are long and somewhat confusing, the essence of the key philosophical debate seems to be as follows. Madame Justice McLachlin placed a great deal of emphasis on s. 16(10) of the *Divorce Act*, which establishes the importance of maximizing the child’s contact with both parents as long as that contact is

---

89 As Simon Fodden notes, “Unfortunately, in what might be described as a scattering of opinions, the Court managed to confuse both the Charter questions and the issue of a custodial parent’s authority.” See Fodden, *Family Law*, supra note 9 at 209.
90 A constitutional question was raised as to whether legislative provisions requiring that decisions be made in the best interests of the child denied the Charter guarantees of equality, of freedom of religion, of expression and of association, and if so whether they were justified under s. 1 of the Charter. The diversity of opinion on the constitutional issue is summarized in the headnote to *Young*, supra note 6 at 6:

Sections 16(8) and 17(5) of the *Divorce Act* do not violate ss. 2(a), (b), (d) or 15(1) of the Charter. L’Heureux-Dube J. (and La Forest and Gonthier JJ.) found the Charter to be inapplicable. McLachlin J. found the impugned legislation did not violate the Charter. Cory and Iacobucci JJ. Agreed that there was no Charter violation. Sopinka J. found that the Charter applied and could only be overridden in limited circumstances.
in the child's best interests. In cases where the quality of access with the child was called into question, it would be appropriate to consider whether the conduct complained of posed a risk of harm to the child which was greater than the benefit of a free and open relationship which allowed the child to know the non-custodial parent as they truly were. In Young, the father had agreed to respect his children's wishes not to attend religious services with him, or accompany him on his proselytizing activities. There was no evidence that the father's discussion of his religious beliefs with the children caused harm that outweighed the importance of their enjoying a full relationship with their father. The concept of harm, then, became a relevant focal point in the context of a private custody/access matter, with parental autonomy (in this case of the access parent) being left untouched, in the absence of harm that justified interference:

Given the interest of the child in coming to know his or her access parent as fully as possible, judges may well be reluctant to impose limits on what the access parents may say or do with the child in the absence of some evidence suggesting that the activity may harm the child. The legal test is not harm; the Divorce Act makes this clear. However, in some circumstances, the risk of harm to the child or the absence thereof may become an important factor to be considered.

Madame Justice L'Heureux Dube disapproved of the "risk of harm" approach. Her analysis focused to a much greater extent on the authority inherent in a custodial order. A grant of custody, in her view, entailed the child's right to a parent who would promote the child's best interests, including making decisions about issues such as

---

91 Divorce Act, supra note 10, s.16(10) – In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child, and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

92 Young, supra note 6 at 119.
education, health and well being. The child's need for continuity required that the
custodial parent have the autonomy to make such decisions without interference from the
non-custodial parent. In terms of determining the best interests of the child, absence of
harm was not the appropriate focal point: children have a right not only to be free from
demonstrable harm, but also to have the best possible arrangements. This included
reduction or removal of sources of conflict. In L'Heureux-Dube J's view, prohibiting
the father from discussing or practicing his religion in the children's presence would
remove this source of conflict, thus meeting the children's best interests. In her view,
then, it would be appropriate to vest the custodial parent with authority over the child-
rearing practices of the non-custodial parent.

Key to Justice L'Heureux-Dube's reasoning was the perspective that once granted
custody, the custodial parent should be trusted to make decisions that would be in the
children's best interests. As such, there should be some deference to the custodial parent,
who in this case felt that prohibition of discussion of the father's religion with his
children was appropriate.

In P.(D) the debate played itself out as well, but on that occasion, probably mostly
due to different facts, McLachlin J.'s reasoning formed the dissenting view and
L'Heureux-Dube's disposition gained the favour of La Forest and Gonthier JJ. One

---

93 Some have found the divergence of the court between the two cases is difficult to reconcile, notwithstanding that the relevant legislative provisions in D.P. were the Civil Code of Lower Canada as opposed to the Divorce Act. In both cases, the best interests of the child is the legislated criterion to be applied in custody and access decisions. The factual distinction of note, however, is that the father in Young had agreed not to require the active participation of the children in his religion while the father in D.P. had not made such an undertaking.
might have hoped that the Supreme Court of Canada would have responded to the opportunity to clarify its stance on the debate in *L. (L.S.) v. C.S.* but it refused to do so.

In *L. (L.S.)* the order granting the mother custodial rights in respect of the parties’ son prohibited her from taking him to Jehovah’s Witness ceremonies, activities and door-to-door proselytizing, though she was entitled to teach him the Jehovah’s Witness religion. The Quebec Court of Appeal upheld the restrictions, but the Supreme Court of Canada, in a unanimous judgment, allowed the appeal and struck out the restrictions that had been imposed on the mother. The reasons for the judgement were contained in one brief paragraph:

Under the jurisprudence of this Court in these matters, the test is the best interests of the child. In the circumstances of this case, given the evidence before us, we are not satisfied that the best interests of the child has been compromised by the practices of the custodial parent.

*L. (L.S.)* did nothing to resolve the ambiguity around the Supreme Court’s interpretation of the best interests of the child test, at least as it relates to parental child-rearing practices in relation to the sharing of parents’ religious faith with their children. Justice McLachlin’s overall perspective on the best interests of the child test as articulated in *Young* and *P. (D)* appears to some extent, however, to have won the favour of the majority of the court, as illustrated by the court’s decision in *Gordon v. Goertz.*

*Gordon v. Goertz* involved further consideration of the issue of the best interests of the child in light of parental interests. Once more, Justices McLachlin and L’Heureux-

---

Dube displayed fundamental disagreement about the extent of authority found in the grant of custody.

The issue in Gordon v. Goertz was whether the mother, who had sole custody of the parties’ seven-year-old child, should be entitled to move the child’s residence to Australia where the mother wished to study orthodontics. The father, who exercised liberal access to the child, applied to the Saskatchewan’s Court of Queen’s Bench for an order switching custody or for an order preventing the mother from taking the child to Australia. The Saskatchewan Court of Appeal upheld the decision of the Court of Queen’s Bench, dismissing the father’s application and granting the mother’s cross application to vary access such that the father could have liberal and generous access on one month’s notice, to be exercised only in Australia.

In upholding the mother’s move, the majority of the court, per McLachlin J., emphasized the fact that in considering a variation application (and in fact all custody determinations) “the interests of parents are no longer relevant.”97 Likewise, given the directive of s. 16(9) of the Divorce Act “[u]sually the reasons or motives for moving will not be relevant to the custodial parent’s parenting ability.”98

The majority of the court rejected the argument that a grant of custody clothed the custodial parent with a presumptive right to make decisions as to where the child should live. Rather, where a material change of circumstances has been established, the inquiry into the best interests of the child is to begin afresh, with no presumption in favour of the custodial parent:

97 Ibid. at 50.
98 Ibid. at 48.
Material change established, the question is not whether the rights of custodial parents can be restricted; the only question is the best interests of the child. Nor does the great burden borne by custodial parents justify a presumption in their favour. Custodial responsibilities curb the personal freedom of parents in many ways. The Act is clear. Once a material change is established, the judge must review the matter anew to determine the best interests of the child.99

Applying the principles established to the facts of the case required weighing the importance of the child remaining with the parent to whose custody they had become accustomed in the new location against the continuance of full contact with the child’s access parent and extended family. In this case, the child had been in her mother’s custody for a number of years, the reasons for initially granting custody to the mother had not changed significantly, and a change in custody was likely to be very disruptive to the child. The fact that the child’s close relationship with her father would be diminished was somewhat attenuated by the fact that the father had the means to travel to Australia to spend time with the child, and there was no reason that she could not travel to Canada to visit with her father and extended family. The trial judge had erred in holding that access should be restricted to Australia. This aspect of the decision was varied.

For the purposes of this work, two points may be derived from the cases reviewed above. First, in order to argue that interventions directly focused on achieving changed child-rearing practices are appropriate in a particular case, there will need to be some evidence that the child’s best interests have been compromised by the parental behaviour

99 Ibid. at 54. In dissent, L’Heureux-Dube J. took the view that the original custody award entailed a presumption that the custodial party was best able to determine the child’s best interests. Since there was no restriction on mobility in the original custody order, in Justice L’Heureux-Dube’s view, the onus of proving that the move to Australia was not in the child’s best interests rested with the father.
in question. The extent of proof required to establish that such interests have been compromised is somewhat unclear; however, based on the reasoning of Justice McLachlin in Young, such intervention would probably require evidence that the practices have created (or risk creating) harm to the child.\textsuperscript{100} The second point, derived from Gordon \textit{v.} Goertz, while not surprising or new, deserves highlighting for the purposes of later discussion - courts will not be deterred from a course of action that is found to be in the best interests of the child, even where the order will lead to extreme inconvenience for a parent. Both of these observations add to the potential "boundaries" for court-connected parent education.

b. \textbf{Access to Justice}

Additional dimensions to the set of boundaries to be applied to parent education program policies can be found in the concept of access to justice. This term has often been linked primarily to the provision of legal services,\textsuperscript{101} and within the fiscally restrained setting of the past decade, the term has received its most intense scrutiny at the

\textsuperscript{100} It has been noted that in \textit{P. (D)}, McLachlin J. found herself in the minority. However, if one looks closely at the decision, those who supported L'Heureux-Dube J.'s disposition in \textit{P. (D)} did not necessarily do so based on the Justice L'Heureux-Dube's reasoning. Cory and Iacobucci JJ. based their disposition on the view that the trial judge was in the best position to assess evidence pertaining to the best interests of the child, and that in this case, the trial judge's finding, based on the evidence presented that restrictions should be placed on the father's access, was not so unreasonable as to require amendment. See \textit{P. (D)}, \textit{supra} note 88 at 192. Given the Supreme Court's subsequent support for McLachlin J.'s interpretation of the best interests of the child principle in Gordon \textit{v.} Goertz, it seems acceptable to apply her reasoning to the interpretative exercise being undertaken in this work.

\textsuperscript{101} Roderick Macdonald suggests that the term access to justice as discussed in modern terms is ambiguous. The term as currently employed often means access to law – the concepts of justice and law have been conflated in much professional discourse in this field. See Roderick Macdonald, "Access to Justice and Law Reform" (1990) 10 Windsor Y.B of Access to Justice 287 at note 4.
judicial, legislative and policy levels in relation to state provision of legal aid services and the efficient organization and delivery of judicial services.

In Ontario, where legal aid services also experienced a “financial crisis” during the latter part of the 1990s, the Legal Aid Ontario Board has approved various service improvement initiatives across all areas of legal aid law. In the family law area, these improvements include the provision of additional duty counsel resources in courts and Family Law Information Centres, and priority in provision of legal aid certificates in situations where parents or children are at risk, or to protect a parent/child bond.¹⁰²

Initiatives have also been undertaken to improve the accessibility and efficiency of the family law process by means of expansion of Family Courts and through the adoption of Family Law Rules¹⁰³ designed to streamline the procedures in family law cases by imposing strict timelines for the completion of various stages of the proceedings, imposing costs sanctions for requests for relief that are entirely unreasonable, and advocating for settlement of issues at each stage in the proceeding. Along with the enactment of the rules is the adoption of a set of court forms intended to be more “user-friendly” and comprehensible to the public.

It will be recalled that one of the recommendations of Ontario Legal Aid Review was that the provision of information to the public would be a potential mechanism for improving legal service provision.¹⁰⁴ While it appears that Legal Aid Ontario has opted to

¹⁰² Legal Aid Ontario, LAO Service Improvement: 1999/2000 online: <http://www.legalaid.on.ca/Publicat...ce%20Improvements%20--%20Final.thm> at 17-21.
¹⁰³ Family Court Rules, Ont. Reg. 114/99.
¹⁰⁴ See Chapter 2, notes 24-25 and accompanying text.
pursue this recommendation through greater participation in Family Law Information
Centres, it remains arguable that parent education programs could provide a means of
enhancing access to justice. However, this concept brings with it concerns that will be
introduced here and dealt with in more detail in Chapter 5.

Emphasis is currently being placed on accessibility to the formal mechanisms of
law, and the analysis must deal with how parent education might be best designed to
facilitate this access. However, access to justice is also increasingly being characterised
in the family law area as access to private settlement mechanisms via the family court
rules and the promotion of ADR within the Family Courts. This focus is viewed by some
with a certain level of scepticism, and it is appropriate to carry a healthy level of this
scepticism into the discussion of parent education in the context of access to justice. The
crux of the concern, as noted in Chapter 1, is the extent to which people are forced to
resort to informal dispute resolution mechanisms as opposed to being presented with
them as falling within a range of options for dispute resolution.105 Laura Nader argues:
“We can all agree that mediation and arbitration have their place. ... We might ... recognize
the utility of mediation in custody cases. But when people lose the right to
decide for themselves whether they want to mediate or litigate then we are dealing with a
shift that is coercive.”106 In the discussion of content and implementation policies for
parent education programs, it is important to propose formats that will truly foster access

105 Laura Nader, “Processes of Constructing (No) Access to Justice (For Ordinary
106 Ibid. at 503.
to justice. It is also essential to limit the extent to which access may be hindered by issues such as program cost and sanctions for non-attendance.

The provision of mandatory parent education programs as part of the family law regime does appear to be more interventionist than the adjudicatory role traditionally assumed by courts. However, in light of the increased public interest in the welfare of children and the nature of that interest, it is arguably a desirable method of intervention, and one that involves an acceptable level of intrusion on family autonomy. Further, it may, with appropriate decisions regarding program content and implementation, constitute a method of assisting in child-related cases in a manner that involves a reasonable balance between the needs and rights of children and other legitimate interests such as parental autonomy and access to justice. In Chapters 5 and 6, after introducing data collected from the PIP in Chapter 4, the impact of content and implementation decisions on this balance is explored.
Chapter 4: Parent Information Program Research

Introduction

In conducting the work for this dissertation, it was important to me that the analysis be informed not only by doctrinal and theoretical considerations, but also by reflecting on feedback from those whose experience is directly impacted by attendance at a parent education program. As discussed in earlier chapters, while previous research analyses of parent education programs have revealed some results that are helpful in considering the questions set out at the beginning of this work, additional data seems relevant to the task of engaging in continuing discussions about the development of a principled guide for court-connected parent education initiatives.

First, questions dealing with litigation patterns, use of mediation and other settlement methods, and improved parental ability to respond to children’s post separation needs as a result of parent education program attendance, help to augment the growing body of literature responding to questions that have already been posed in relation to this field. Other issues are identified but not addressed to any significant degree within existing literature. These include: differential program impact on married/common law parents as compared to parents whose relationship was short term; differential program impact on various ethnic and cultural groups; and comparative response rates from legally represented versus unrepresented participants. Finally, in light of the discussion in previous chapters about the relative influence of mental health and legal professionals in what has become an increasingly interdisciplinary area, it
seems relevant to probe the perceived value of legal information and non-legal content, as well as lawyer facilitation and social work facilitation, from participants’ perspectives.

Research conducted in relation to the Parent Information Program has attempted to gain at least some early and tentative insights into the kinds of questions raised above. This chapter provides an overview of the program itself and the research undertaken. Statistics that relate to questions raised in the next two chapters will also be discussed in greater depth within those specific chapters. In the preface to this work, I described my role as PIP’s Coordinator, as well as the background relating to PIP’s funding, steering committee, facilitators, and seminar content development. Below, I describe the PIP seminars in more detail. This is followed by an overview of the survey methods employed for the purposes of this work,¹ and a summary of the research results.

1. Parent Information Program Description

The PIP currently consists of a Part A, which is a one-seminar program of 2.5 hours duration, and a 3 hour Part B seminar.² The data reported on in this work relates

¹ A similar description of the PIP, the research methodology, and the overall results has also been presented in a report to funding bodies (the Ministry of the Attorney General and the Donner Canadian Foundation) dated December 2003. I prepared this report in my capacity as the PIP’s Coordinator. It is on file in the PIP administrative office.
² Since 2002, there has also been a Part B of the Parent Information Program. This program follows up on Part A, and is designed to assist parents to identify the level of conflict in their relationship, and to develop communication skills that are appropriate to that level of conflict. Part B seminars are offered separately for participants who consider themselves to fall within a lower level of conflict, and for those who self-assess as falling into a high conflict category. Parents receive a self-assessment form to assist them to determine whether the “low conflict” or “high conflict” seminar would best serve their needs. This portion of the PIP is used by license from the province of Manitoba. The materials form Part B of that province’s “For the Sake of the Children” Program. For a description of the program, see online http://www.gov.mb.ca/fs/childfam/for_sake_of_children.html.
exclusively to the Part A seminar. The Part A seminar is presented jointly by a lawyer and a social worker. Childcare is provided at most seminars, and translation services are available. There is no charge for the seminar, or for childcare or translation services.

a. Program Goals

The goals of the PIP fall into two broad categories: “umbrella goals” and “process goals.” The umbrella goals are: (1) to provide information to assist parents to understand the needs and reactions of children at various ages to separation, the impact of parental conflict on children, and their alternatives for resolving the issues related to their separation; and (2) to provide basic legal information, an explanation of the court process, information about courtroom formalities, and information about support resources available in the community. Process goals focus on use of simple language that can be easily understood, normalizing the separation experience, acknowledgement of participants’ own wisdom, creation of a positive and safe learning environment, provision of a program overview to clarify goals, and adjustment of the program over time, based on evaluative feedback.

The emphasis on legal and non-legal goals is somewhat different from the goals of a number of other court-connected parent education programs. For example, the Parent Education Program offered in connection with the Nova Scotia Supreme Court describes its goals as follows: to increase parents’ awareness of the impact of parental conflict on children; to improve communication between parents about their children’s

---

3 For a detailed listing of the program’s goals and learning objectives, see Appendix A.
4 Ibid.
5 Ibid.
needs; and to provide new ways to avoid placing children in the middle of issues between their parents.\textsuperscript{6} The emphasis on PIP’s legal goals is reflected in the materials used for the facilitation of the PIP seminars.\textsuperscript{7}

b. Program Materials

The lawyers and social workers who facilitate the PIP seminars are asked to adhere closely to the scripted information for the seminars. Overheads are used to highlight key concepts, and one video segment is shown to illustrate part of the mediation process.\textsuperscript{8} Participants are provided with a resource manual for their use both during and after the seminar.\textsuperscript{9} The manual is divided into two main parts. The first part contains material designed to illustrate and/or reinforce various components of the seminar content. (For example, a table describing children’s ages and stages of development is referred to during the part of the seminar focusing on children’s reactions to parental separation; court forms are reproduced for reference during the portion of the seminar dealing with the court process.) The second part provides a listing of a wide range of community resource contact information. This information is updated annually.

c. Seminar Content

The program curriculum was initially developed by the author in consultation with various lawyers, mediators, social workers, and court personnel. It was reviewed by the program’s steering committee, which includes representation from the Toronto Bar,

\textsuperscript{6} Online: http://www.courts.ns.ca/supreme/sc_family8.htm.
\textsuperscript{7} See PIP script at Appendix B.
\textsuperscript{8} May Street Group, \textit{Family Mediation: We Can Work it Out} (Victoria: University of Victoria Institute for Dispute Resolution, 1997).
\textsuperscript{9} See excerpts from the PIP Participant’s Manual at Appendix C.
mediators, a member of the judiciary, a member of Community Legal Education Ontario, the Ministry of the Attorney General and faculty members from Osgoode Hall Law School. Content was reviewed and refined throughout the evaluation period, primarily as a result of feedback from seminar instructors in light of their experience with the delivery of the scripted materials, and changes within the family law system that required incorporation into the program script. (For example, the introduction of case management to all of the Metropolitan Toronto courts in family law matters, coincident with the introduction of new Family Law Rules in 1999\textsuperscript{10} both necessitated script adjustments.)

The seminar begins with a short introduction of the topics to be covered. During the program introduction the social work facilitator clarifies the fact that the seminar content has not been designed to address situations where violence was a significant factor in the parental relationship, and provides a reference to sources available within the community for individuals who have been victims of domestic violence.\textsuperscript{11} Parents are also informed of the availability of the PIP Part B – communications skills seminars.\textsuperscript{12}

Some typical impacts of parental separation on adults are addressed next, with a focus on assisting parents to identify situations that might signal their need for additional support from family, friends, and in some situations, professionals. The content in this segment also emphasizes the importance of parents obtaining the assistance they require in order to better support their children.

\textsuperscript{10} \emph{Family Law Rules}, O. Reg. 114/99.
\textsuperscript{11} See PIP script, Appendix B at 303 and PIP Participant’s Manual Excerpts, Appendix C at 349-352.
\textsuperscript{12} See \textit{supra} note 2.
The next segment moves into children's reactions to separation, highlighting some of the predictable emotional responses that children may have to their parents' separation, and noting the role that a child's age and stage of development may have in triggering these reactions. A discussion of the impact of parental conflict on children follows, with suggestions of ways that parents can avoid exposing children to such conflict.

"Finding the best way for you and your child's other parent to resolve disputes" is the title of the next seminar segment. Here, dispute resolution is described as "a scale of decision making options which starts with parents making decisions for themselves, moves to parents making decisions with help, and finishes with parents having decisions made for them by the court."\(^\text{13}\) A description of parenting plans, their benefits, and the types of matters that can be included within parenting plans, is provided. Services such as mediation, assessment, and the Office of the Children's Lawyer are discussed.

After a short break, in the final hour of the seminar, the lawyer facilitator provides an overview of the legal process, including the availability of legal aid funding, an outline of court related forms, and a brief description of legal terminology along with the kinds of orders that might be obtained within a court proceeding. Throughout the seminar presentation, appropriate resources from the resource manual are pointed out to participants.

\(^{13}\) PIP script, Appendix B at 317.
d. Program Registration and Attendance

Attendance at the PIP is not mandated through statute or court rule. However, during approximately the first 18 months of the evaluation period, judges at two Metropolitan Toronto court locations issued strong recommendations that individuals appearing before them attend a PIP seminar. A written recommendation was included in the court forms provided to litigants by court staff. This recommendation was reiterated verbally by judges if it had not been acted on by litigants prior to their first court appearance. When some judges were moved to a different court location, judicially recommended attendance at the seminars dropped quite significantly. As a result, new efforts to attract participants were required. Advertising in a "commuter" newspaper proved to be the most successful of these efforts. The development of a program website along with an online registration vehicle also assisted. As such, the data collected for this work consists of both individuals who attended on a totally voluntary basis and those who might be characterized as having attended on a "quasi-mandatory" basis. These characterizations have been made based on participants' response to the following question within the Phase 2 pre-test questionnaire: "Which of the following best describes why you are attending the seminar?" Participants who indicated that they attended as a result of having found out about the seminar through a poster, brochure, magazine or newspaper, are categorized as "voluntary" attendees. Participants who indicated that they attended as a result of receiving a notice in their court papers advising

---

14 Other initiatives included advertising in non-commuter daily newspapers, on local cable television, and in Divorce Magazine.
15 www.pip.yorku.ca.
16 See Phase 2 Pre-test Questionnaire at Appendix F, Question 1.
them to attend, or being asked by a judge or lawyer to attend, have been labeled “quasi-mandatory” attendees. I have used the term “quasi-mandatory” to clarify that the attendance was not based on a legislated requirement. However, it has been noted by other writers that judicial recommendation is commonly viewed by participants as a “mandate” to attend.\textsuperscript{17}

Parents may register for a seminar by telephone or email. In light of program staff’s inability to screen for possible violence/power imbalance issues, former partners are not permitted to attend the same seminar. Phase 1 results describe responses provided by individuals who attended the PIP between October 1997 and April 1998 while Phase 2 results analyze pre-test, post-test and follow up questionnaires completed by participants who attended the PIP between May 1998 and April 2002. Assistance with the analysis of the Phase 2 data was provided by Paul Moore, a doctoral candidate in sociology at York University.

2. Evaluation Design

Evaluation of the PIP has occurred in two phases. Between October, 1997 and April, 1998 (Phase 1), seminar participants were asked to complete a questionnaire\textsuperscript{18} immediately after completing the seminar, evaluating its effectiveness and the effectiveness of the seminar facilitators. The questionnaire was developed primarily by

\textsuperscript{17} See Andrew Schepard and Stephen Schlossel, “Planning for P.E.A.C.E.: the Development of Court-Connected Education Programs for Divorcing and Separating Families” [1995] Hofstra Law Rev. 24. For the purposes of this work, participants attending the PIP as a result of their lawyer’s recommendation seemed to fit most appropriately into the “quasi-mandatory” category.

\textsuperscript{18} See Phase 1 Questionnaire at Appendix E.
the author, having reference to an assortment of questionnaires gathered from various existing parent education programs. The primary objective of the Phase 1 research was to elicit general reactions to the program, and to obtain feedback about the overall strength of the scripted information provided during the seminars so that required content and/or delivery adjustments could be made.

Phase 2 of the PIP evaluation began in May of 1998 and is ongoing. Phase 2 aims to elicit more detailed information about participants' knowledge, attitudes, and circumstances in relation to their family law matter. During Phase 2, data were collected from program participants at three stages. First, participants were asked to complete a questionnaire prior to seminar attendance (pre-test). The pre-test questionnaire was aimed at obtaining information about participants' knowledge of, and attitudes about, the legal and emotional aspects of their separation. Next, immediately after completing the seminar, they were asked to complete an evaluation similar to, but more detailed than, the questionnaire completed by participants during Phase 1 (post-test). Finally, four to six months after program attendance, participants were mailed a follow up questionnaire (follow-up). This questionnaire repeated a number of the knowledge, attitude and circumstance questions asked in the pre-test, with a view to determining whether any change in knowledge, attitude and circumstances had occurred.

19 For example, Manitoba's "For the Sake of the Children" program, Alberta's "Parenting After Separation" program, and Maine's "Kids First" program.
20 All of the questionnaires developed in relation to the Phase 2 research were drafted by the author, in consultation with Professor David Northrup of York University's Institute for Social Research.
21 See Phase 2, Pre-test Questionnaire at Appendix F.
22 See Phase 2, Post-test Questionnaire at Appendix G.
23 See Phase 2, Follow-up Questionnaire at Appendix H.
that might be attributable to PIP attendance. The follow-up survey also asked participants to indicate whether, given the passage of time, they considered the information provided at the PIP seminar useful.

Finally, during Phase 2, research was conducted on the court files of a group of program participants who attended the PIP between May of 1998 and November of 1999 and a control group of randomly selected litigants who had commenced proceedings at the 311 Jarvis (Toronto) Family Court of the Ontario Court of Justice within six months prior to the commencement of the PIP seminars. Both groups' progress through the court system was tracked until August of 2002.

a. Phase 1

As indicated above, data for Phase 1 were collected in the form of a brief post-test satisfaction survey completed by participants immediately after their attendance at a PIP seminar. The questionnaire was designed to obtain answers using a structured response format. Three hundred and thirty nine individuals who attended the seminar between October 1997 and April 1998 responded to this survey. This constitutes a response rate of 87% percent.

---

24 See Court File Survey Form at Appendix I. This survey was drafted by the author in consultation with Professor David Northrup of York University's Institute for Social Research.
25 The control group files were selected with the assistance of the court services manager at the Provincial Court (Family) at 311 Jarvis Street, by reference to a computer-generated list of proceedings commenced within the six months prior to the commencement of the PIP seminars.
26 Three hundred and ninety participants attended a PIP seminar during this period.
b. Phase 2

The pre-test/follow-up survey design was used for all participants who agreed to participate in the evaluation. Upon registration and prior to seminar attendance, parties were sent (either via regular mail or email) the pre-test questionnaire, which they were invited (by letter) to complete. At the end of the seminar, participants who consented to do so completed the post-test questionnaire. Both questionnaires were designed to obtain answers using a structured response format. A total of 994 pre-test and post-test questionnaires were completed by parents who attended a PIP seminar between May of 1998 and April of 2002. One thousand and fifteen individuals attended the program during this period.  

Between four and six months after they attended the seminar, follow-up questionnaires were mailed to participants who had completed the pre-test questionnaire. Obtaining an adequate response rate proved to be a challenge. Approximately two weeks after sending out the initial follow-up survey documentation, a reminder letter was mailed to those who had not yet returned the surveys. After an additional two weeks, the questionnaire was re-sent to those who had still not responded. Follow-up questionnaires were received from 414 parents who had also completed the pre-test questionnaire, resulting in a response rate of 42%. This is an acceptable response rate for a "mail survey."  

27 This represents a response rate of 98%.
28 Jeffrey A. Kuhn notes that a response rate of about 20% on a mailed follow-up survey would be typical: Jeffrey A. Kuhn, “A Seven-year Lesson on Unified Family Courts: What Have We Learned Since the 1990 National Family Court Symposium” (1998) 32 Fam. L.Q. 67 at 85. He notes that rates can be improved by providing a self-addressed,
c. **Court File Data**

While the pre-test/post-test/follow-up questionnaires were designed to address evaluation questions relating to participants' assessment of program impact, the court file survey was designed to assess whether attendance at the PIP had any impact on participants' "litigiousness". For the purposes of this evaluation, "litigiousness" was calculated by assigning numeric values to each of the following items: (1) number of motions filed; (2) whether parties' case ended in trial; (3) length of proceedings; (4) manner in which the matter was resolved (i.e. judicial determination, settlement, discontinuance/dismissal); and (5) whether parties attended mediation.

d. **Research Limitations**

There are some limitations in the research in this area that must be considered when looking at the findings. First, parents' self reported changes in attitudes and behaviour must be interpreted cautiously, since parents' self-reports may not accurately represent actual behavioural or attitudinal changes. Further, because the PIP evaluation design (for self-reported data) does not include a control group, changes in parental behaviours over time may be caused by factors other than the PIP, such as lawyer negotiation, other educational experiences, and the passage of time. In light of these factors, the "findings" within the research establish certain correlations rather than direct relationships between PIP attendance and changed parental behaviour.
A few matters should also be noted in relation to the court file survey. First, the research results can only be generalized with respect to litigants within the Ontario Court of Justice. Next, the time lapse required to examine litigation patterns required that the sample group consist of parents who attended the program relatively early in its existence. Though not major, some changes in script have occurred since that time. Further, there are obviously possible effects from other factors (for example, parents could have attended other programs) that may, over the course of the evaluation period, have impacted on patterns of litigation. As such, it is impossible to definitively isolate the effects of the PIP on observed change. Finally, in considering the results, it must be noted the control group and sample group were not specifically matched with respect to demographic variables.

3. Demographics of Questionnaire Survey Respondents

a. Phase 1

Of the 339 survey respondents in Phase 1, approximately 58% were male and approximately 40% were female, while almost 2% did not answer the question. About 64% of survey respondents had annual household incomes below $35,000, with 40% earning less than $20,000. In terms of education, approximately 52% of the participants who responded to the questionnaire had obtained technical or university training while about 47% had received a high school diploma or had completed some high school. The breakdown of participants in terms of race was 39% non-white and approximately 61% white. Eight participants did not answer this question. Participants were not asked the
status of the relationship that gave rise to the birth of their child or children (i.e., marriage, common law relationship, dating relationship).

b. Phase 2

From Phase 1 to Phase 2, the gender balance of PIP participants shifted, with just over half of the survey respondents indicating they were mothers. About one-third were fathers. The remaining respondents, about one-in-six, noted they were "other" or provided no response. More specifically, of the 994 individuals who completed the pre-test and post-test questionnaires, 52% were mothers, 35% were fathers, and 12.5% answered "other" or did not answer the question. With respect to the follow-up questionnaire, 59% of respondents were mothers, 32% were fathers, and 9% answered "other" or did not answer the question.

In terms of ethnicity, another shift is reflected in the Phase 2 surveys. Of the questionnaire respondents, 49% were white while approximately 43% identified as falling into a non-white group.29 Eighty two individuals (8%) did not answer the question. A similar breakdown in response groupings occurred for the follow-up questionnaires.

In terms of highest levels of formal education acquired by participants who responded to the Phase 2 surveys, mothers and fathers were comparable, differing only marginally. Of the mothers who completed the pre-test questionnaire, just over one-third had an education level of a high school diploma or less. Of this lowest category of

29 The non-white categories were African, Latin, Asian, Aboriginal, and other (specify).
formal education, only a slightly higher proportion of fathers had not gone past high school education.

Regarding income, however, the difference between mothers and fathers was more strongly marked. While about one-in-three mothers reported a current family income of less than $15,000 per year, a much lower percentage of fathers, about one-in-five, reported the same lowest levels of income. This is consistent with reported income differentials between men and women in the population generally.\(^{30}\)

With regard to questionnaire respondents who answered the question regarding the status of their relationship with the other parent, 58% reported being married, 22% had been living together, 16% had been dating, and 5% answered “other”.

In terms of level of representation at the time of the seminar attendance, about 60% of those responding to the question indicated they were not legally represented when they attended the seminar, while 40% reported having some form of legal representation (either through legal aid or private retainer). A fairly high number of survey respondents (158, or 16%) did not answer this question.

4. **Details About Court File Surveys**

A total of 351 court files were reviewed for the purposes of this portion of the research. The court file surveys consisted of two groups. The first group ("sample group") consisted of court files where at least one parent had attended the PIP between

\(^{30}\) For example, Statistics Canada reports that in 2000, women aged 15 and over who had employment income made 64 cents for every $1 earned by their male counterparts. See online: <www.statcan.ca/Daily/English> (Accessed 6 December 2004).
May 1998 and November 1999, and where one of the parties had commenced litigation relating to custody, access or support matters in the Ontario Court of Justice (311 Jarvis St. location). The second group ("control group") comprised files where neither parent attended the PIP and the parties had commenced litigation relating to custody, access or support matters in the Ontario Court of Justice (311 Jarvis St. – Toronto - location). The sample group consisted of 205 files (58% of the total survey). Of these, 43 files dealt with litigation in which both parents had attended the program. In 111 cases only the moving party had attended the PIP, and in 51 cases, only the responding party had attended a PIP seminar. It should be noted that the majority of the sample group (83%) consisted of parties who had been judicially quasi-mandated to attend the PIP. As such, there are insufficient numbers to analyze the results in relation to individuals’ reason for attending the program. The control group consisted of 146 files (42% of the total survey) from the same court site as the sample group. The files for each group dealt with one or more of custody, access, and child support disputes. The groups were not specifically matched with regard to demographic characteristics or levels of conflict within the parental relationship.

In both groups, women were more likely to be the moving party in the court proceedings (approximately three-quarters of the moving parties in both groups were female). Further, more moving parties than responding parties attended PIP.

5. Research Results

Results from the Court File Review are presented below, followed by results of Phase 1 and Phase 2 PIP evaluation research data. The results stemming from the Phase
I data are fairly basic and tend to reinforce general results described in other parent education evaluation literature. Some Phase 2 results also reinforce previous findings. However, they also provide a basis for additional reflection about factors that may assist in the continued evolution of court-connected program development. Additionally, they provide the basis for a further consideration of the role of court-connected parent education programs within the context of existing dispute resolution mechanisms.

I. Court File Reviews - Observable Changes in Litigiousness

In light of the earlier identified questions about parent education programs’ potential to encourage the use of alternative processes where appropriate, and to discourage prolonged court actions, it seemed useful to explore any identifiable differences in the manner by which parties moved through the court process, and any statistical relationship between such differences and attendance at a PIP seminar.

While the court file survey used for the research in this area covered several facets of litigation, I have selected a number of items that I considered reasonable indicia of “litigiousness.” For the purposes of this work, higher levels of litigiousness could be indicated by lengthier proceedings, higher numbers of procedural maneuvers (such as motions) within the proceedings, and resolution by way of court hearing or trial rather than through some form of negotiation. Based on this understanding of litigiousness,

31 See Chapter 2, footnotes 55-59 and accompanying text.
these items were selected from the court file review surveys to make up the
"litigiousness" variable.32

a. Measures of Litigiousness: Results

Considered as one combined variable, there was no statistically significant difference in litigiousness between the sample group and the control group. However, when considered separately, certain aspects of the litigation do suggest differences between the sample group and the control group. Below, I describe these differences. Then, in Table I, the same results are presented in a manner that compares the overall proportion of the sample and control groups with the proportion of each group's results on each variable.

i. Manner in Which Case Was Resolved

Results of the survey suggest that the non-participant control group is more likely than the sample group to end up in a hearing or trial. In the control group, 46 (32%) of 143 cases were resolved by hearing or trial. In the sample group, 31 (15%) of 202 cases were dealt with through these processes. Correspondingly, one or both parties to litigation having attended the PIP appears to make settlement more likely. "Settlement," for the purposes of this work, includes a consent order incorporating minutes of settlement or memorandum of agreement, and separation agreements. Of the 178 cases in the survey that settled, 69 (39%) were from the control group while 109 (61%) were from the sample group.

---

32 The manner in which proceedings were resolved (i.e. hearing or trial, settlement or mediation, discontinuance or dismissal ...); the number of motions within the proceedings; the time required to complete the proceedings; and the extent to which parties attended mediation.
The results are more pronounced where both parties have attended the PIP seminar, though attendance by one party also leads to higher levels of settlement than occur with the control group. In almost 62% of the cases where both parties attended the PIP, settlements were reached, while in cases where only the moving party attended, 50.5% (55 of 109) reached settlements and where only the responding party attended, 52.9% (27 of 51) settled. In both situations, the results reached a level of statistical significance.33

ii. *Whether Process Included Trial*

When the results are further broken down into whether cases reached the trial stage, the outcomes again show statistically significant results, with the control group being more likely to end up in trial than the sample group. While this result is highly significant from a statistical standpoint, it should be noted that the number of cases ending in trial was low for both groups. In the control group, 12 (8%) of 146 cases ended up in trial, while in the sample group, 3 (approximately 1%) of 205 cases ended in trial. Of the sample group, the trials occurred in one case where only the moving party had attended the PIP, while in the two other cases, only the responding party had attended the seminar.

iii. *Number of Motions within the Process*

There are no statistically significant differences between the sample group and control group in relation to the number of motions involved within the process.

---

33 Statistical significance means that there is a very low probability that the reported difference was due to random error. The threshold of significance used for this work was a 5% probability that the difference was due to random chance. This is the standard “19 out of 20” commonly referred to in opinion poll results in newscasts.
iv.  *Length of Process*

Likewise, the length of time taken for the matter to be resolved is not greatly affected by attendance at the PIP.\(^{34}\) One slight difference is worthy of note, however. Within the sample group, a longer process seems more likely when only the responding party attends the program, and less likely when only the moving party attends the program. Further research regarding reasons for this outcome is warranted.

An additional finding of interest is that when analyzed in connection with levels of conflict reported on the pre-test and follow-up questionnaires, lower levels of conflict between parents in the sample group correspond to the case being resolved more quickly. Graphs 1 and 2 below illustrate these results at both pre-test and follow-up.

\(^{34}\) Note that this result, and that relating to number of motions within the process, differs from the results of a study of the mandatory Family Information Sessions in the Toronto Superior Court of Justice. In *The Impact of Mandatory Family Information Sessions on the Use of Court Resources by Divorcing Parents: A Report Prepared for the Attorney General of Ontario* (North York), Desmond Ellis reports that compared with parents who did not participate in a Family Information Session, parents who did participate in such a session filed significantly fewer motions, participated in fewer case conferences, and had their cases judicially terminated in a significantly shorter period of time. Future research about possible reasons for the difference in results between the two programs/courts/participant groups would be valuable.
Part of the court file review process included determining whether parties had sought out mediation within the process. While the number of cases where mediation services were used was quite low generally, a higher proportion of cases within the sample group (12.7%) attempted mediation than did control group cases (6.2%). Outcomes suggest that having both parties attend the PIP correlates with a higher

35 Note that these results do not represent the extent to which parties were successful in resolving their matters through mediation, but rather, the extent to which they availed themselves of mediation services.
tendency to seek out mediation. Of the 43 cases where both parties attended PIP, 8 attended mediation. It is also notable that when the court file data of the sample group were analyzed in conjunction with parents’ assessment on the pre-test and follow-up questionnaires of their ability to take their child’s interests into account, participation in mediation corresponded with improvements in ability to consider the child. Mediation also corresponded highly with a reported improvement in conflict levels between pre-test and follow-up. Of those within the sample group who tried mediation (13 cases), 92% indicated at follow-up that their level of conflict with the other parent had decreased. Of those who had not mediated (84 cases), 56% reported at follow-up that their level of conflict with the other parent had decreased.

In Table 1, numerical outcomes of each of the variables considered in the measure of litigiousness are presented.36

36 How to read Table 1: The top row of the table illustrates the percentage breakdown of the control group files and the sample group files. The subsequent rows provide a comparative assessment of the breakdown of results between the control group and sample group in relation to the variables considered in the measure of litigiousness. The key to interpreting the chart is to look for dramatic differences between the overall proportion in the top row and the proportions indicated for the specific variable. Any variable that is much different for its category from the top-row overall percentage indicates a possible statistical effect of participation in the program on whether or not the court procedure described in the variable has been followed. Note, however, that low numbers (such as going to trial) increase the possibility that the observed effect is by random chance in the sample.
Table 1: Measures of Litigiousness by Control Group and Sample Group

<table>
<thead>
<tr>
<th></th>
<th>Control Group (No PIP) (%)</th>
<th>Sample Group (Either/Both in PIP) (%)</th>
<th>Sample Group: Moving Party in PIP (further breakdown of 58%)</th>
<th>Sample Group: Responding Party in PIP (further breakdown of 58%)</th>
<th>Sample Group: Both Parties in PIP (further breakdown of 58%)</th>
<th>Total Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall Totals</td>
<td>42%</td>
<td>58%</td>
<td>32%</td>
<td>15%</td>
<td>12%</td>
<td>N= 351</td>
</tr>
</tbody>
</table>

i. Manner in Which Case was Resolved

<table>
<thead>
<tr>
<th></th>
<th>Hearing or Trial</th>
<th>Settlement</th>
<th>Other (e.g. discontinued or dismissed)</th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>60%</td>
<td>39%</td>
<td>30%</td>
<td>40%</td>
<td>61%</td>
<td>70%</td>
<td>22%</td>
</tr>
<tr>
<td></td>
<td>40%</td>
<td>31%</td>
<td>41%</td>
<td>12%</td>
<td>15%</td>
<td>17%</td>
<td>12%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>31%</td>
<td>15%</td>
<td>15%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>60%</td>
<td>35%</td>
<td>13%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>7%</td>
<td>31%</td>
<td>15%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>7%</td>
<td>35%</td>
<td>12%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>33%</td>
<td>13%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>40%</td>
<td>13%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>13%</td>
<td>12%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>60%</td>
<td>12%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

ii. Process Including Trial or Not

<table>
<thead>
<tr>
<th></th>
<th>Trial</th>
<th>No Trial</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>80%</td>
<td>40%</td>
<td>31%</td>
<td>15%</td>
<td>12%</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>20%</td>
<td>60%</td>
<td>35%</td>
<td>13%</td>
<td>15%</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>7%</td>
<td>33%</td>
<td>13%</td>
<td>15%</td>
<td>13%</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>13%</td>
<td>13%</td>
<td>0%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

iii. Number of Motions Within the Process

<table>
<thead>
<tr>
<th></th>
<th>3 or Less Motions</th>
<th>4 or more Motions</th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>41%</td>
<td>42%</td>
<td>31%</td>
<td>35%</td>
<td>15%</td>
<td>12%</td>
<td></td>
</tr>
<tr>
<td></td>
<td>59%</td>
<td>58%</td>
<td>15%</td>
<td>12%</td>
<td>13%</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>31%</td>
<td>35%</td>
<td>13%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>15%</td>
<td>12%</td>
<td>13%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>13%</td>
<td>11%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>12%</td>
<td>11%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>13%</td>
<td>11%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

iv. Length of Process

<table>
<thead>
<tr>
<th></th>
<th>Less than 4 months</th>
<th>4 to 11 months</th>
<th>12 months or more</th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>44%</td>
<td>38%</td>
<td>43%</td>
<td>56%</td>
<td>62%</td>
<td>57%</td>
<td>31%</td>
</tr>
<tr>
<td></td>
<td>56%</td>
<td>62%</td>
<td>57%</td>
<td>13%</td>
<td>15%</td>
<td>22%</td>
<td>13%</td>
</tr>
<tr>
<td></td>
<td>31%</td>
<td>39%</td>
<td>22%</td>
<td>13%</td>
<td>15%</td>
<td>22%</td>
<td>12%</td>
</tr>
<tr>
<td></td>
<td>13%</td>
<td>15%</td>
<td>22%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>12%</td>
<td>9%</td>
<td>13%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>9%</td>
<td>13%</td>
<td>11%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

v. Mediation Within the Process

<table>
<thead>
<tr>
<th></th>
<th>Some Mediation</th>
<th>No Mediation</th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>26%</td>
<td>43%</td>
<td>29%</td>
<td>32%</td>
<td>23%</td>
<td>14%</td>
</tr>
<tr>
<td></td>
<td>74%</td>
<td>57%</td>
<td>23%</td>
<td>14%</td>
<td>23%</td>
<td>11%</td>
</tr>
<tr>
<td></td>
<td>29%</td>
<td>32%</td>
<td>23%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>23%</td>
<td>14%</td>
<td>23%</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>23%</td>
<td>11%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

174
b. Findings Regarding Legal Representation Within the Process

One of the unexpected outcomes of PIP participation is that seminar attendance seems to correspond with a greater tendency to hire a lawyer for the litigation process. This result seems especially noticeable where it is the responding party who has participated in the seminar. Although participation in PIP does not appear to affect the likelihood that someone will make the use of Duty Counsel services at some stage in the process, retaining a lawyer is more likely in cases where either participant has attended the program. Cases in which neither party is ever represented at all show no difference between the control group and the sample group. However, when a case involves representation of some type, the control group is much more likely to use only Duty Counsel. Attendance at PIP, especially for the responding party, corresponds to seeking out a private lawyer (either through Legal Aid funding or private funding) at some point in the process. Table 2 illustrates these results.

---

37 This result is notwithstanding the fact that a number of participants indicated in their follow-up questionnaires that they had used Duty Counsel as a result of their PIP attendance.

38 As with Table 1, the top row of the Table 2 illustrates the percentage breakdown of the control group files and the sample group files. The subsequent rows provide a comparative assessment of the breakdown of results between the control group and sample group in relation to legal representation measures.
Table 2 – Impact of PIP on Legal Representation Within the Process

<table>
<thead>
<tr>
<th>Control Group (No PIP) (%)</th>
<th>Sample Group (Either/Both in PIP) (%)</th>
<th>Sample Group-Moving Party in PIP (further breakdown of 58%)</th>
<th>Sample Group-Responding Party in PIP (further breakdown of 58%)</th>
<th>Sample Group: Both Parties in PIP (further breakdown of 58%)</th>
<th>Total Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall Totals</td>
<td>42%</td>
<td>58%</td>
<td>32%</td>
<td>15%</td>
<td>12%</td>
</tr>
<tr>
<td>No Representation</td>
<td>43%</td>
<td>57%</td>
<td>32%</td>
<td>3.5%</td>
<td>21.5%</td>
</tr>
<tr>
<td>Duty Counsel</td>
<td>62.5%</td>
<td>37.5%</td>
<td>30%</td>
<td>7.5%</td>
<td>N=28</td>
</tr>
<tr>
<td>Retained Lawyer</td>
<td>39%</td>
<td>61%</td>
<td>29%</td>
<td>10%</td>
<td>N=80</td>
</tr>
<tr>
<td>Duty Counsel and Retained Lawyer within Process</td>
<td>32%</td>
<td>68%</td>
<td>33%</td>
<td>20%</td>
<td>15%</td>
</tr>
</tbody>
</table>

II. Participant Feedback Data

Below, participant feedback is presented. In some parts, the focus is on participants’ perceptions about the seminar content and facilitation; in others, the focus is on measurable change in participant attitudes and reported knowledge.

a. Overall Reports of Program Satisfaction

In phase 1, over 90% of program respondents indicated that they would recommend the PIP to other separating parents and almost 90% of respondents indicated that parents entering the Family Court process should be required to attend a seminar such as the PIP. In Phase 2, there continued to be a strong indication that participants would recommend the program to other separating parents, with nineteen (95%) out of twenty participants who completed the post-test questionnaire indicating that they would...
either "strongly recommend" or "somewhat recommend" the program. In response to the question "should parents entering the family court process be required to attend a seminar such as this?" seven-out-of-ten indicated that all such parents should be required to attend, while another two-out-of-ten indicated that attendance should be required for those who are involved in the family court process for the first time.

b. Satisfaction with Specific PIP Information

i. Post-test Questionnaires

Reaction within both Phase 1 and Phase 2 to both legal and non-legal information was very positive. Table 3 illustrates that approximately 90% of respondents in Phase 1 found each type of information "somewhat helpful" or "very helpful.

Table 3: Phase 1 Satisfaction Measures

<table>
<thead>
<tr>
<th>Did the program provide useful information in understanding:</th>
<th>Somewhat or Very Helpful</th>
<th>Not Answered (out of 339)</th>
</tr>
</thead>
<tbody>
<tr>
<td>The needs and reactions of children to separation</td>
<td>90%</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>(45% Very Helpful)</td>
<td></td>
</tr>
<tr>
<td>The benefits to children of parents working cooperatively with each other?</td>
<td>93%</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>(55% Very Helpful)</td>
<td></td>
</tr>
<tr>
<td>Legal terms?</td>
<td>93%</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>(50% Very Helpful)</td>
<td></td>
</tr>
<tr>
<td>Alternatives to Litigation?</td>
<td>90%</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td>(48% Very Helpful)</td>
<td></td>
</tr>
<tr>
<td>What to Expect in Court?</td>
<td>91%</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>(48% Very Helpful)</td>
<td></td>
</tr>
</tbody>
</table>

During Phase 1, consideration was given to the appropriateness of the wording of various questions within the questionnaire, and of the messages implied by the questions. It was determined that the question "did the program provide useful information in understanding the benefits to children of parents working cooperatively with each other?" had the potential of sending a message to parents that they must always remain in
cooperative contact with the other parent, even in situations where domestic violence made it unsafe to do so. As a result, this question was changed (along with scripted portions, discussed in later chapters). Other refinements to the “participant satisfaction” portions of the Phase 2 post-test were also made.39 The results of this part of the post-test questionnaire are illustrated in Table 4.

In Phase 2, the same approximately 90% threshold of those finding the information “somewhat helpful” or “very helpful” was met, while the percentage of “very helpful” responses increased in all categories. Among the possible reasons for the improved ratings are modifications in the scripted material, greater instructor comfort level with the materials being presented, and greater clarity in the wording of the questions within the questionnaires.

---

39 See Phase 2 Post-test Questionnaire at Appendix G.
Table 4: Phase 2 Satisfaction Measures

<table>
<thead>
<tr>
<th>Rate the following as to whether the program provided helpful information:</th>
<th>Somewhat or Very Helpful</th>
<th>Not Answered (out of 994 total)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Understanding needs and reactions of children</td>
<td>92% (59% Very Helpful)</td>
<td>56</td>
</tr>
<tr>
<td>Understanding importance of avoiding putting children in middle of conflict</td>
<td>96% (77% Very Helpful)</td>
<td>56</td>
</tr>
<tr>
<td>Understanding how children get caught in middle of conflict</td>
<td>94% (69% Very Helpful)</td>
<td>62</td>
</tr>
<tr>
<td>Understanding importance of taking care of self to help children adjust</td>
<td>92% (67% Very Helpful)</td>
<td>61</td>
</tr>
<tr>
<td>Understanding alternatives (e.g. mediation) that can avoid or shorten the court process</td>
<td>93% (65% Very Helpful)</td>
<td>59</td>
</tr>
<tr>
<td>Understanding legal terms</td>
<td>90.5% (53% Very Helpful)</td>
<td>61</td>
</tr>
<tr>
<td>Understanding what is involved in court process</td>
<td>92% (57% Very Helpful)</td>
<td>72</td>
</tr>
<tr>
<td>Availability of community resources for legal information</td>
<td>95% (72% Very Helpful)</td>
<td>56</td>
</tr>
<tr>
<td>Availability of non-legal community resources</td>
<td>91% (64% Very Helpful)</td>
<td>64</td>
</tr>
</tbody>
</table>

ii. Follow-up Questionnaires

On follow-up, satisfaction rates suggested that many participants continued to believe they had benefited from attending the program. Five-out-of-six respondents (83%) indicated the seminar had helped them to understand their legal rights either “somewhat” or “very much”. About three-quarters of the follow-up respondents indicated that the information they received at the seminar helped them, either “somewhat” or “very much” to know what to expect in court and to find ways to avoid placing their children in the middle of their conflicts with the other parent.
c. **Comparison of Results by Level of Legal Representation**

In general, there are only small differences in satisfaction with the program between participants who had a lawyer when they attended a program and those who did not. As Table 5 indicates, there is a slight (but not statistically significant) tendency for those with lawyers to be more satisfied with the topics directly relating to children, and for unrepresented individuals to be somewhat more satisfied with the legal aspects of the seminar. Information about processes such as mediation, that can avoid or shorten the court process, were considered equally helpful by participants who had a lawyer and those who did not have legal representation.

**Table 5: Comparison of Satisfaction by Legal Representation Status**

<table>
<thead>
<tr>
<th>Understanding needs and reactions of children</th>
<th>Very Helpful (%)</th>
<th>Very Helpful (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Had Lawyer</td>
<td>60</td>
<td>55</td>
</tr>
<tr>
<td>No Lawyer</td>
<td>55</td>
<td>60</td>
</tr>
<tr>
<td>Understanding importance of avoiding putting children in middle of conflict</td>
<td>78</td>
<td>75</td>
</tr>
<tr>
<td>Understanding how children get caught in middle of conflict</td>
<td>71</td>
<td>65</td>
</tr>
<tr>
<td>Understanding importance of taking care of self to help children adjust</td>
<td>68</td>
<td>66</td>
</tr>
<tr>
<td>Understanding alternatives (e.g. mediation) that can avoid or shorten the court process</td>
<td>65</td>
<td>65</td>
</tr>
<tr>
<td>Understanding legal terms</td>
<td>51</td>
<td>55</td>
</tr>
<tr>
<td>Understanding what is involved in court process</td>
<td>55</td>
<td>59</td>
</tr>
<tr>
<td>Availability of community resources for legal information</td>
<td>73</td>
<td>73</td>
</tr>
<tr>
<td>Availability of non-legal community resources</td>
<td>65</td>
<td>66</td>
</tr>
</tbody>
</table>
d. **Comparison of Results by Reason for Attending the Seminar**

Participants' reason for attending the seminar did not have a statistically significant impact on the overall level of satisfaction reported for the program. However, some differences in responses were noted.

In relation to the categories of information provided at the seminar, there was a slight tendency for quasi-mandated attendees to be more satisfied than voluntary attendees with legal content. Specifically, understanding legal terms and what is involved in the court process was considered more helpful by quasi-mandated participants (62%) than by voluntary attendees (52%). Detailed Phase 2 results of those who responded that the material was “very helpful” by reason for attendance are provided in Table 6.

**Table 6: Comparison of Satisfaction by Reason Attending the Program**

<table>
<thead>
<tr>
<th>Information Provided</th>
<th>Very Helpful (%)</th>
<th>Very Helpful (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Voluntary Attendees</td>
<td>Quasi-mandated Attendees</td>
</tr>
<tr>
<td>Understanding needs and reactions of children</td>
<td>59</td>
<td>57</td>
</tr>
<tr>
<td>Understanding importance of avoiding putting children in middle of conflict</td>
<td>79</td>
<td>74</td>
</tr>
<tr>
<td>Understanding how children get caught in middle of conflict</td>
<td>69</td>
<td>68</td>
</tr>
<tr>
<td>Understanding importance of taking care of self to help children adjust</td>
<td>66</td>
<td>69</td>
</tr>
<tr>
<td>Understanding alternatives (ex. mediation) that can avoid or shorten the court process</td>
<td>65</td>
<td>65</td>
</tr>
<tr>
<td>Understanding legal terms</td>
<td>46</td>
<td>59</td>
</tr>
<tr>
<td>Understanding what is involved in court process</td>
<td>52</td>
<td>62</td>
</tr>
<tr>
<td>Availability of community resources for legal information</td>
<td>72</td>
<td>74</td>
</tr>
<tr>
<td>Availability of non-legal community resources</td>
<td>63</td>
<td>66</td>
</tr>
</tbody>
</table>

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
As noted earlier, a majority of respondents took the view that a program such as the PIP should be mandated for separating parents. There did not appear to be any demographic characteristic that could be linked to respondents being more or less likely to recommend that the program be mandated. On other overall measures of general satisfaction, a few demographic differences may be noted.

There was a slightly greater tendency for individuals who identified as “White” to find the seminar too long. (Compared to 7.5% of respondents across the groups, 9.8% of “White” respondents found the seminar too long.) Comparatively more Latino/Latin attendees rated the seminar as too short. (Compared to 20% of respondents across the groups, 28.8% of Latino/Latin respondents indicated the seminar was not long enough.)

African/Black participants were more likely to say the seminar helped them to understand the need for parents to care for themselves. (While across the groups, 66.5% of respondents found this information very helpful, 75% of African/Black respondents provided a “very helpful” rating.) Conversely, this group was more likely to report that the program was not helpful in helping them to access community legal resources. (While between 2% and 5% of respondents in other groups rated this information as “not helpful,” approximately 12% of African/Black respondents gave a “not helpful” response).

Finally, respondents who had been living with their child’s other parent were more likely to say the program was helpful to understand what was involved in the court process. (Compared to 56.8% across the groups who answered “very helpful” to this question, 63.7% of those who had been living together provided this response.)
e. **Change in Reported Attitudes and Knowledge Between Pre test and Follow up**

During Phase 2, a number of identical questions were asked in the pre-test and follow up questionnaires in order to assess whether there would be any change in self reported knowledge or attitudes that might be related to attendance at a PIP seminar. For the purposes of this analysis, a number of responses were grouped into two categories: “Legal Knowledge” (comprising the questions “I have a good knowledge of community sources where I can get legal information”, I have a good understanding of alternatives to court action for resolving disputes around custody, access and support,” and “I have a good understanding of the court process”); and “Non-legal Knowledge” (comprising the questions “I have a good understanding of how children are affected by conflict between parents” and I have a good understanding of the needs and reactions of children to separation).

Many participants reported increased knowledge in both categories between pre-test and follow up, with a more marked increase being recorded with respect to legal knowledge, where the average level of agreement to the “legal knowledge” questions noted above had increased for 232 (approximately 75%) of respondents. The average level of agreement to the “non-legal knowledge” questions had increased for 147 (approximately 45%) of questionnaire respondents. A caveat to these results is, of course, that some of the increased knowledge reported at follow up may be attributable to sources other than the PIP.

f. **Perceptions About Program Facilitators**

Overall, PIP facilitors received positive feedback from participants during both Phase 1 and Phase 2. In Phase 1, questions about the facilitators did not distinguish
between the social work facilitators and the lawyer facilitators. Approximately 92% of respondents indicated that the presenters of the seminar were well organized and easy to understand, while 81% indicated that the presenters had a very good understanding of the needs and problems of families going through separation. About half of the participants indicated that the presenters held their interest “very much”.

In Phase 2, questions were further broken down into presenter category, but differences between the two were negligible. Approximately 93% of respondents indicated that both the social worker and lawyer presenter were well organized and easy to follow. Eighty nine percent (89%) of questionnaire respondents found that the social work presenter had a very good understanding of the needs and problems of families going through separation, while approximately 90% of respondents found that the lawyer had a very good understanding of these needs and problems.

Participants who attended the program on a quasi-mandated basis tended somewhat to report that the lawyer facilitator held their interest “very much” more than the promotional attendance participants (73% versus 69%). The converse was the case in relation to the social work facilitators’ ability to hold participants’ interest, with voluntary attendees more likely to indicate that the social work facilitator held their interest (67% versus 58% of quasi-mandated attendees).

g. Parental Ability to Meet Children’s Separation-Related Needs

One of the strongest motivators for court-connected parent education programs is the desire to assist parents to understand the special needs that their children may have in response to parental separation. In an effort to assess whether the PIP seminars may have
been effective in assisting parents in this way, the pre-test and follow-up questionnaires administered during phase 2 included questions about how parents were dealing with their children's separation-related needs. In order to assess the potential impact of the seminar on parents’ ability to deal with these needs, a number of identical questions were included in both the pre-test questionnaire completed prior to seminar attendance and the follow-up questionnaire completed from four to six months after seminar attendance.

A measure of parents’ assessment of their ability to consider their children’s needs was calculated from a series of twelve questions specifically related to common needs of children at time of parental separation. These questions and responses at pre-test are set out in Table 7.
Table 7: Parents’ Pre-test Assessment of Ability to Meet Children’s Separation-Related Needs

<table>
<thead>
<tr>
<th></th>
<th>Almost Never (%)</th>
<th>Some Times (%)</th>
<th>Half the Time (%)</th>
<th>Most Times (%)</th>
<th>Almost Always (%)</th>
<th>N/A (%)</th>
<th>Missing (out of 994)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Try to avoid child(ren) in conflicts</td>
<td>8</td>
<td>5</td>
<td>4</td>
<td>13</td>
<td>61</td>
<td>9</td>
<td>142</td>
</tr>
<tr>
<td>Argue with other parent in front of child(ren)</td>
<td>37</td>
<td>29</td>
<td>8</td>
<td>7</td>
<td>5</td>
<td>14</td>
<td>142</td>
</tr>
<tr>
<td>Try to keep other parent from seeing child(ren)</td>
<td>50</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>4</td>
<td>40</td>
<td>165</td>
</tr>
<tr>
<td>Other parent keeps child(ren) from seeing me</td>
<td>30</td>
<td>10</td>
<td>2</td>
<td>5</td>
<td>15</td>
<td>39</td>
<td>166</td>
</tr>
<tr>
<td>Encourage child(ren)’s relationship with other parent</td>
<td>5</td>
<td>3</td>
<td>4</td>
<td>11</td>
<td>64</td>
<td>13</td>
<td>153</td>
</tr>
<tr>
<td>Child(ren) get caught in conflicts</td>
<td>33</td>
<td>23</td>
<td>7</td>
<td>8</td>
<td>13</td>
<td>18</td>
<td>154</td>
</tr>
<tr>
<td>Feel angry toward other parent</td>
<td>11</td>
<td>28</td>
<td>12</td>
<td>19</td>
<td>23</td>
<td>7</td>
<td>145</td>
</tr>
<tr>
<td>Other parent feels angry toward me</td>
<td>5</td>
<td>15</td>
<td>9</td>
<td>20</td>
<td>40</td>
<td>11</td>
<td>171</td>
</tr>
<tr>
<td>Tell child(ren) separation is not their fault</td>
<td>6</td>
<td>3</td>
<td>1</td>
<td>4</td>
<td>46</td>
<td>40</td>
<td>154</td>
</tr>
<tr>
<td>Ask child(ren) to pass messages to other parent</td>
<td>50</td>
<td>6</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>40</td>
<td>153</td>
</tr>
<tr>
<td>Let child(ren) know it’s OK to love other parent</td>
<td>5</td>
<td>4</td>
<td>2</td>
<td>10</td>
<td>56</td>
<td>24</td>
<td>157</td>
</tr>
<tr>
<td>Conflict occurs during pick-up or drop-off</td>
<td>21</td>
<td>18</td>
<td>5</td>
<td>6</td>
<td>8</td>
<td>43</td>
<td>157</td>
</tr>
</tbody>
</table>

In order to analyze the information provided by participants, responses to the twelve questions were combined into an “average” on a five-point scale. (Some negatively-worded questions had their responses reversed in order to perform this averaging function.) The result of this process was a single measure ranging from 1 (low ability to consider children’s needs) to 5 (high ability to consider children’s needs).

Because the response rate for the follow-up questionnaire is relatively high – 42% - this measure can be used to help discern whether the program has met its goal of

186
facilitating parental ability to meet their children's separation-related needs. The results show uniformly that parents report improved ability after attending the seminar. Overall, average ability to take children's needs into account was 3.78 prior to seminar attendance, and 3.95 at follow-up. This result is statistically significant.

h. Assessment of Parental Ability to Meet Children's Post-Separation Needs in Light of Other Factors

Comparisons of parents' assessment of their ability to account for their children's needs were broken into various categories having the potential to affect these results: reason for attending the program; status of legal representation; relation to child; current relation to the other parent; previous relation to the other parent; current marital/dating status; number of children under 18 years old; and level of contact between children and the other parent. There was overall improvement over all categories between pre-test and follow-up, including those that compared participants' reason for attending the program and participants' legal representation status. Table 8 records the change between the results on pre-test with those at follow-up.40

40 Most results in Table 8 (i.e. those in the “Assessment of Change in Ability” column indicated as “significantly improved”) meet the 5% threshold of significance used for this work. The results that do not meet the threshold are indicated as “Not Significant” in the “Assessment of Change in Ability” column.
Table 8: Comparisons of Parents' Assessment of Ability Meet Children's Separation-Related Needs

<table>
<thead>
<tr>
<th></th>
<th>Average Ability (at time of program)</th>
<th>Average Ability (at follow-up)</th>
<th>Change in Average Ability</th>
<th>Assessment of Change in Ability</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Overall</strong></td>
<td>3.78</td>
<td>3.95</td>
<td>0.17</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td><strong>By Reason for Attending Program</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ad or Promotion</td>
<td>3.80</td>
<td>3.96</td>
<td>0.16</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td>Lawyer or Judge</td>
<td>3.76</td>
<td>3.96</td>
<td>0.20</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td>Quasi-mandated</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>By Having a Lawyer or not when attending Program</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Had Lawyer</td>
<td>3.74</td>
<td>3.97</td>
<td>0.23</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td>Not Represented</td>
<td>3.82</td>
<td>3.96</td>
<td>0.14</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td><strong>By Relation to Child</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mother</td>
<td>3.81</td>
<td>3.95</td>
<td>0.14</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td>Father</td>
<td>3.79</td>
<td>3.99</td>
<td>0.25</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td>Other</td>
<td>3.64</td>
<td>3.66</td>
<td>0.02</td>
<td>Not Significant</td>
</tr>
<tr>
<td><strong>By Current Relation to Other Parent</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Separated</td>
<td>3.81</td>
<td>4.00</td>
<td>0.19</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td>Divorced</td>
<td>3.79</td>
<td>3.85</td>
<td>0.06</td>
<td>Not Significant</td>
</tr>
<tr>
<td>Living Together</td>
<td>3.85</td>
<td>3.93</td>
<td>0.08</td>
<td>Not Significant</td>
</tr>
<tr>
<td>Other</td>
<td>3.56</td>
<td>3.81</td>
<td>0.25</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td><strong>By Previous Relation to Other Parent</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Married</td>
<td>3.83</td>
<td>3.99</td>
<td>0.16</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td>Living Together</td>
<td>3.78</td>
<td>3.98</td>
<td>0.20</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td>Dating</td>
<td>3.62</td>
<td>3.77</td>
<td>0.15</td>
<td>Not Significant</td>
</tr>
<tr>
<td>Other</td>
<td>3.81</td>
<td>4.19</td>
<td>0.38</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td><strong>By Current Situation</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Single, not dating</td>
<td>3.79</td>
<td>3.93</td>
<td>0.14</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td>Dating</td>
<td>3.81</td>
<td>3.90</td>
<td>0.09</td>
<td>Not Significant</td>
</tr>
<tr>
<td>Common Law</td>
<td>3.58</td>
<td>3.91</td>
<td>0.33</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td>Remarried</td>
<td>3.85</td>
<td>3.96</td>
<td>0.11</td>
<td>Not Significant</td>
</tr>
<tr>
<td>Other</td>
<td>3.76</td>
<td>4.20</td>
<td>0.44</td>
<td>Significantly Improved</td>
</tr>
</tbody>
</table>
One notable factor that appears to impact parents’ ability to meet their children’s needs is the level of conflict they are experiencing with the other parent. As Table 9 illustrates, while ability does increase after program attendance, overall, parents reporting higher levels of conflict have a lower ability to consider the needs of their children.
Table 9: Comparisons of Parents’ Assessment of Ability Meet Children’s Separation-Related Needs by Levels of Conflict in Parental Relationship

<table>
<thead>
<tr>
<th></th>
<th>Average Ability (at time of program)</th>
<th>Average Ability (at follow-up)</th>
<th>Change In Average Ability</th>
<th>Assessment of Change in Ability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall</td>
<td>3.78</td>
<td>3.95</td>
<td>0.17</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td>By Reported Level of Conflict at Time of Program</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Very Low</td>
<td>4.07</td>
<td>4.08</td>
<td>0.01</td>
<td>Not Significant</td>
</tr>
<tr>
<td>Low</td>
<td>4.19</td>
<td>4.29</td>
<td>0.10</td>
<td>Not Significant</td>
</tr>
<tr>
<td>Moderate</td>
<td>3.97</td>
<td>4.17</td>
<td>0.20</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td>High</td>
<td>3.74</td>
<td>3.96</td>
<td>0.22</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td>Very High</td>
<td>3.33</td>
<td>3.65</td>
<td>0.32</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td>By Conflict at Time of Program Compared to Six Months Before Program</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Increasing</td>
<td>3.64</td>
<td>3.85</td>
<td>0.21</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td>Not Changing</td>
<td>3.82</td>
<td>4.18</td>
<td>0.36</td>
<td>Significantly Improved</td>
</tr>
<tr>
<td>Decreasing</td>
<td>4.07</td>
<td>4.08</td>
<td>0.01</td>
<td>Not Significant</td>
</tr>
</tbody>
</table>

The change in reported ability to take account of children’s needs appears more marked for men than for women. In pre-test questionnaires, one-in-five fathers who reported a high conflict relationship with their child(ren)’s mother were least able to consider their children’s well-being. The figure for mothers was only slightly lower. At follow-up, both mothers and fathers reported strongly that their ability had improved. The percentage of men in high conflict categories who were least able to consider their child’s well-being was now less than one-in-twenty. Women in the same categories improved their ability as well but somewhat less dramatically. While is possible that
these results arise in part due to biased selection – where certain types of women, men, or both are more likely to return the completed questionnaire, the level of statistical significance of the results is high, suggesting that the results are not solely attributable to selection bias.

**Summary**

The data described above provide useful information about the behaviour and perceptions of family law consumers. Of course, it must be reiterated that it is impossible to establish a clear “cause and effect” relationship between PIP attendance and the results discussed in this chapter. However, the suggested correlations established by the data provide important avenues for reflection in considering the potential scope for court-connected parent education programs to meet the goals that have been articulated by various proponents. The correlations illustrated within the results can also help to inform discussions about program content, clientele, and implementation mechanisms. These issues, and their connection to overall discussions about dispute resolution in the “modern” family law era, are addressed in the next two chapters of this work.
Chapter 5: Parent Education – Goals, Content and Clientele

Introduction

Assuming one accepts, as suggested in Chapter 3, that court-connected parent education can be justified as a valid means for the state to promote the best interests of children while respecting parental autonomy, important questions arise with respect to the content to be included in parent education programs and the clientele to whom these programs should be provided. In order to address these issues, however, one must be clear about the objectives of the programming to be delivered. This chapter begins with a discussion of the most feasible objectives for court-connected parent education. This analysis is followed by a discussion of the appropriate content for parent education programs, with a particular focus on whether and to what extent legal information should form part of program curriculum, and the extent to which legal content, if included, should be aimed only at unrepresented individuals. Further, the issues of clientele are then addressed, with a specific discussion of unmarried parents, parents who have experienced domestic violence, and parents of varied cultural and ethnic backgrounds. In each part of this discussion, detailed reference is made to PIP data. It is hoped that this data will add an element of public “voice” to the analysis.

1. Feasible Goals for Court-Connected Parent Education Programs

In light of the analysis that has emerged over the preceding chapters, and consistent with the framework devised in Chapter 3, it is plausible to argue that there are at least two feasible overall goals for court-connected parent education programs: (1) to
inform parents of the general challenges for children associated with separation and
divorce, the particular problems posed by children’s exposure to parental conflict, of the
legal rights and responsibilities associated with post-separation parenting and the various
forums for dispute resolution; and (2) To promote less conflictual parental behaviour
through programming designed to make parents aware of the issues identified under the
first objective described, and to assist parents in developing skills to ensure that they will
adopt less conflictual methods of communicating.

a. **First Feasible Goal: to Inform and Empower Parents**

In establishing goals, one must determine how the success of the goal will be
measured. With regard to the goal of informing parents, success would be established
primarily by ensuring that parents clearly understood the material presented, such that
they had a basis for making informed decisions about post-separation issues affecting
their children. This understanding would be assessed primarily by parents’ self reporting
(in exit questionnaires) of their understanding and ability to make use of the information
provided, and potentially through follow up surveys that measure participants’
understanding of the information provided. Success would not require establishing that
actual behaviours had changed, though clearly such results would suggest that parents
had understood the information provided.

Chapter 1 described Blaisure and Geasler’s characterization of parent education
programs by reference to their level of intervention in families\(^1\). The authors concluded

that most parent education programs fall within either the "basic level" or the "active level" of intervention. Adopting the goal of informing parents would logically involve implementation of a program that falls within the "basic level" – that is, a program of relatively short duration (2-4 hours) featuring lecture, videotape, and handouts on the impact of separation and divorce, adult and child adjustment to separation and divorce, types of parenting relationships, court processes, etc.

There are a number of advantages to adopting a policy that supports basic level parent education programming. First, because the goal of such a program is not to change parental behaviour, it would be an acceptable level of intervention undertaken with a view to promoting all children's best interests and providing an equal amount of information to litigants. In other words, broad range implementation of a basic level program would be consistent with the reconceptualized best interests of the child principle developed in chapter 3, and with the state's interest in providing equal access to information for all family law consumers. Broad reach implementation would have the advantage of promoting equal treatment of all children, an objective of the family law system generally, and articulated particularly in the Child Support Guidelines. The objective of ensuring equal treatment has received increased recognition as a result of a great deal of criticism of pre-guidelines child support decisions which were perceived to

2 By way of analogy, consider the objectives of the child support guidelines, found in section 1 of the Federal Child Support Guidelines, SOR/97-175, as am. Paragraph (d) specifies that one objective of the Guidelines is to ensure consistent treatment of spouses and children who are in similar circumstances. (Emphasis added)
be inconsistent in that different support obligations were imposed upon families in quite similar financial situations.

Just as consistency has been viewed as an appropriate objective in the child support area, it seems reasonable to suggest that a consistent approach to court-connected parent education should be adopted. Given the division of authority regarding custody, access, and support issues between the federal government and provincial legislatures, it is conceivable that differences in approach between the federal and provincial levels of government (and among provinces) might occur. However, it is suggested that at the very least, programs for divorcing parents could be provided in a consistent manner across Canada by virtue of federal divorce legislation, while within provinces and territories internal consistency should also exist.

For some, the key disadvantage of basic level programming is that it does not offer parents skills-building education which would have a greater likelihood of facilitating actual decreased conflict levels — "[i]t is argued that the programs are not truly educational because they do not help parents learn new skills to deal effectively with their children in their new life situation." By contrast, the inclusion of a skills building element is the key advantage of programming undertaken pursuant to the goal of promoting decreased levels of parental conflict.

---

3 Glen A. Gilmour, *High-Conflict Separation and Divorce: Options for Consideration* (Ottawa: Department of Justice, 2004) at 33.
b. **Second Feasible Goal: To Promote Demonstrably Improved Parental Behaviour**

The adoption of the goal of demonstrably improved parental behaviour (i.e. behaviour that decreases children's exposure to parental conflict) brings into play a series of different requirements. First, success in achieving this goal would be established by showing that parental child-rearing strategies (specifically those that place children in the middle of parental conflicts) have changed. Establishing this change would involve administering a pre-seminar questionnaire which assesses child-rearing strategies related to children's exposure to conflict, followed by a follow up survey after program attendance measuring the same variables.

One might be tempted to assume that success need only be established by statistics establishing decreased levels of litigation and increased use of alternate dispute resolution mechanisms.⁴ Two notes of caution must be sounded. First, as noted by Madame Justice McLachlin in *Gordon v. Goertz*, a reduction in litigation does not necessarily imply a reduction in conflict.⁵ As such, to rely solely on statistics regarding litigation or relitigation rates would not properly measure whether the goal had been achieved. Further, with regard to assessing increased use of mediation flowing from the information received through a parent education program, it would be important to assure that programming was not designed to coerce individuals to pursue mediation where it

---


was not in the best interests of either them or their children to do so. The most appropriate use of statistics regarding choice of dispute resolution mechanism would be as a supplement to measures of changes in conflictual behaviour.

Although research is still not conclusive,\(^6\) there is a suggestion that programming which involves skills building exercises such as role-plays, interactive discussion, etc., has more success in achieving demonstrably changed parental behaviour. In other words, in accordance with the classification scheme established by Blaisure and Geasler, an active level program would need to be adopted in order to hope to achieve success regarding a goal of achieving demonstrably changed parental behaviours.

This more active level represents a more intrusive foray into parental functioning, since it requires parents to become active participants in a process designed to change their child-rearing behaviours. In accordance with the analysis undertaken in Chapter 3, the only parents for whom this level of intervention into parental autonomy could be justified would be those for whom there was actual evidence that changed behaviour was necessary to the child’s best interests. To require all parents who become engaged with the family law system to participate in a program geared toward changing parental behaviour might well represent an unwarranted intrusion into some parent’s lives. On the other hand, requiring parents who are assessed as requiring the information offered

---

\(^6\) B. Bacon and B. McKenzie, *Best Practices in Parent Information and Education Programs After Separation and Divorce* (University of Manitoba: Childhood Family Research Group, 2001) [Best Practices] at 149-150. The authors tentatively concluded that programs with a more skills based component tended to record more statistically

197
within an active level parent education program, to undertake such training may be extremely beneficial to them and their children. Further, the authority to require parents to attend such a program in those circumstances exists by virtue of legislation such as s. 28 of the Children's Law Reform Act, which has been applied to require parents to attend counselling as a term of a custody or access order. As noted in Chapter 3, such authority would also likely flow from superior courts' parens patriae jurisdiction.

Among the disadvantages of adopting the goal of achieving demonstrably changed parental behaviour is the fact that, as noted above, it would be difficult to justify implementing as a broad reach program, and as a result, would not promote equal access to parent education. The ideal situation would be the provision of both basic level programs and active level programs within each jurisdiction so that all parents could benefit from the first, and parents who wished to obtain further skills building information, or parents who were found by the court to be in need of such additional training, could have access to the second type of program. The material below contains discussions that entertain the possibility of basic level and active level programming existing within any given jurisdiction.

2. Program Content

To some extent, issues of program content vary depending on whether one is contemplating basic level or active level programs. In other areas, content issues are common to both kinds of program. While it is possible to divide content in a number of

---

significant changes in mean scores on child coping and cooperative parenting approaches than did more information based programming.

ways, for the purposes of this work I would like to focus on two broad categories of content: non-legal and legal.

As the tables provided in Chapter 2 illustrate, there is a broad range of information that may potentially be included in a court-connected parent education programs. The United States survey on which the tables are based reveals that topics receiving the most intense coverage are: benefits of parental co-operation; typical post-divorce reactions of children; the impact of "brainwashing" the child and "bad-mouthing" the other parent; different needs of children at different ages; and responsibilities of custodial parents. Topics receiving moderate coverage are: conflict management skills; parenting skills; emotional responsibilities of non-custodial parents; typical post-divorce reactions of parents; benefits and costs of developing a formal co-parenting plan; additional community resources available for divorcing parents; dispute resolution options such as mediation, custody evaluation and litigation; and custody options. Finally, the least intensely covered topics (in decreasing order) are: issues concerning domestic violence; financial responsibilities for non-custodial parents; legal rights of parents; "nuts and bolts" - how to properly file legal paperwork, etc.; and how to calculate child support under the applicable guidelines.

Below, I address in a general fashion the range of non-legal topics within basic level and active level parent education programs. Next, I discuss the issue of legal content. There has been limited analysis of the value of legal information in parent education programs.

---

8 Chapter 2, note 79 and Tables 1-3.
education programming. However, if parent education is to become a court-connected service with the objective of providing parents with information that allows them to make informed decisions about their participation in the family law process, a fairly significant amount of legal information should be incorporated into programming.

a. **Non-legal Information**

There is certain “core” non-legal information at the foundation of all court-affiliated parent education programs known to this author: information about children’s needs depending on age and stage of development; the obligation of parents to allow children to love both parents; and information about the negative impact of parental conflict, examples of the kinds of conflict at issue (ex. badmouthing the other parent, example — “Your mother never could manage her money — no wonder she’s having trouble paying for your school pictures.”, arguing in front of children, asking children to carry messages between parents — example: “Tell your mom she’s late with the support cheque, and it’s only you she’s hurting when she’s late.”). Beyond this, some programs deal with issues around parental reactions to separation and divorce,¹⁰ the benefits of developing a parenting plan to organize post-separation parenting, and dispute resolution options.

The Ministry of the Attorney General’s requirements for parent education providers provides an example of the set of non-legal elements to be included in a basic level parent education program: the negative effects on children of protracted litigation

---

¹⁰ Literature suggests that adults experience the “traditional” stages of the grieving process upon separation/divorce: denial, bargaining, anger, sadness, and acceptance.
and hostility between parents; children's needs at various stages of development; parenting responsibilities and strategies for problem solving after separation; the impact of violence in the family on children; and community resources for children. The last two items are not issues typically considered to be standard elements of parent education programs. However, they are extremely important items which should, in this author's view, be included in both basic level and active level programs.

Active level programs would be likely to include additional information and exercises dealing with conflict management skills and communication skills (ex. use of "I" statements; effective listening; keeping lines of communication with children open). These elements are addressed in a very interactive manner, requiring active parent participation (ex. Role-plays, practice exercises).¹¹

Essentially, while there is some debate about detail, emphasis and method of delivery in relation to the non-legal content of parent education programs, there is no question about the necessity of the core types of information described above for basic level programming. There seems to be little doubt that information dealing with children's reactions to separation and divorce and the particular difficulties faced by children who are subject to parental conflict should be included in parent education programs. Likewise, there seems to be some consensus within Canadian programs to date that parents should be informed of alternatives to a costly and litigious dispute

¹¹ For example of an "I Statement" explanation and exercise used in the PIP Part B Program for parents who self-identify as experiencing low levels of conflict in their relationship with their former partner, see Appendix J.
resolution system.\textsuperscript{12} The same consensus cannot be said to have been reached with respect to legal content dealing with issues such as legal terminology, court orders and availability of legal resources within the community.

b. Legal Information

It is noteworthy that the survey of topics covered in U.S. parent education programs showed that the issues receiving least coverage are of a legal nature. In Canada, while no exhaustive survey has been done documenting the content of all court-connected parent education programs in the country, it appears that the extent to which legal content is included in programs does vary.\textsuperscript{13}

The integration of legal and emotional factors in parent education programs may be less prevalent in the United States than will potentially be the case in Canada. This may be in part due to the fairly extensive "pro se" program development that has occurred in the United States to meet the needs of self-represented litigants.\textsuperscript{14} It may also reflect the fact that in the Canadian context, the timing of the legal aid funding crisis has arisen concurrently with increased institutional acceptance of the position that continued conflict and lengthy litigation is harmful to families generally and to children in particular.

\textsuperscript{12} See Best Practices, supra note 6 at 178.
\textsuperscript{13} Ibid. at 166. The authors note that emphasis on legal content varies across parent education programs, and some have no legal content. They note that programs in Manitoba and Newfoundland received financial assistance from Federal Department of Justice Child Support Guidelines funds, which motivated the inclusion of information about child support.
\textsuperscript{14} In fact, later in this chapter, I review U.S. studies related to pro-se programming which provide useful background information for this work.
If one premise underlying the need for parent education is that knowledge of the emotional impact of conflict on children should impact on the choices that parents make with regard to the manner in which they handle legal issues, there is surely an argument that at least some level of legal information is required to clarify the message being provided. There is a further argument that by making at least some aspects of the legal system less mysterious to the public, resulting perceptions of the system may be improved, thus responding to some of the general problems identified by the Civil Justice Review Committee discussed in Chapter 2.\textsuperscript{15}

One of the arguments for not providing legal information to program participants is that it distracts participants' focus from child oriented concepts to concepts that are more litigious in nature. Tied to this problem might be the argument that legal information will take up time that would otherwise be spent on parenting issues. Another potential argument that runs counter to the notion of including legal information within program content is that such content is only required for individuals who are not legally represented and as such would be superfluous for those who have lawyers.

The first issue can be resolved by appropriate drafting. In other words, if one can justify the inclusion of legal information within parent education programs, it will be necessary to draft program scripts in a manner that provides the required legal information and contextualizes it so that children's needs are kept at the centre of the

\textsuperscript{15} Chapter 2 at 58-60.
Further, if the "state of the law" includes options and avenues that might be characterized as litigious, the duty of those administering parent education programs is not to omit this information. Rather, it is to provide context about when more litigious routes may be necessary. For example, cases where there is a history of domestic violence are not generally amenable to mediation and negotiated parenting plans. This kind of case may require the adversary process, and a judicially imposed parenting plan.

The work below explores more fully the issue of whether legal content is justified. This is done with reference to two American studies which provide some insight into represented and unrepresented individuals' desire for, and expectation of, legal information. Reference to data collected from the PIP is also made.

3. Legal Information – Desires of Family Law Consumers
   a. Unrepresented Parties
      i. U.S. Research

There appear to be no studies in Canada about the particular expectations, needs of or desire for legal information by family law litigants aside from the report of the Civil Justice Review referred to in Chapter 2, which recounted the frustration of litigants engaged in the family law process with the civil justice system. 18

16 See the PIP Script at Appendix B, which is an example of a basic level script.
17 In a recent article, Alana Dunnigan argues convincingly that adjudication may be a more empowering dispute resolution process for victims of violence than mediation. See Alana Dunnigan, “Restoring Power to the Powerless: The Need to Reform California’s Mandatory Mediation for Victims of Domestic Violence” (2003) 37 U.S.F.L. Rev. 1031.

\textit{The ABA Study}

In 1991, the ABA sponsored a research project to look at a broad range of factors relating to pro se activity in Maricopa County, Arizona, Divorce Court. The sample consisted of family law litigants from four categories: (1) 41 plaintiffs from lawyer represented v. lawyer represented cases; (2) 95 plaintiffs from self represented v. self represented cases; (3) 33 respondents from lawyer represented v. lawyer represented cases; and (4) 104 respondents from self represented v. self represented cases.\footnote{ABA Study.} The study consisted of a telephone interview with each litigant to elicit data concerning their case, experiences with the legal process, satisfaction with the legal process, and outcomes of cases, as well as an archival court search to obtain additional information such as dates...
of important occurrences (e.g. petition filed, decree filed, hearing dates), temporary orders, and the final outcomes of the cases.\textsuperscript{22}

The research revealed that individuals with incomes of less than $50,000 annually were substantially more likely to self represent than those with higher income, and that nearly one-third of the self represented litigants could not afford a lawyer.\textsuperscript{23}

In terms of findings that are of particular relevance to this work, the study suggested that self represented litigants often relied on kits and document preparation services, and used many secondary resources, such as paralegals, manuals, friends and family, and court personnel such as counter/filing staff through the course of their court proceedings.\textsuperscript{24} These individuals scored similarly to lawyer-represented litigants on their overall knowledge of their legal rights, though the latter group was significantly more likely to understand their rights and obligations in relation to spousal support.\textsuperscript{25}

Unrepresented litigants were less likely to receive counselling or dispute resolution services than represented litigants, were often not able to get help for all of their problems with forms and the legal process, and did not tend to pursue temporary orders.\textsuperscript{26} These issues are reflected in the feedback of some of the self represented survey respondents who expressed dissatisfaction with the legal process: excessive

\begin{itemize}
  \item \textsuperscript{21} Report to Standing Committee, supra note 19 at 6.
  \item \textsuperscript{22} Ibid. at 6-7.
  \item \textsuperscript{23} ABA Study, supra note 19 at 9.
  \item \textsuperscript{24}Ibid. at 11.
  \item \textsuperscript{25}Ibid. at 18.
  \item \textsuperscript{26}Ibid. at 11-12.
\end{itemize}
amounts of forms; court personnel, court forms or other court documentation not
providing useful information; nothing ever being explained; and cases taking too long.\textsuperscript{27}

The findings suggest that a legally oriented segment within a parent information
program might be more valuable to unrepresented litigants than to those having legal
representation. In fact, in the opening remarks of the Report to the Standing Committee,
the authors stated that “[f]or self representation to be a viable alternative for certain types
of cases, it is essential that litigants have the requisite knowledge and skills to handle
their cases or be able to obtain it from other resources.”\textsuperscript{28} After reviewing the results of
their research, the authors of the same report note that:

[S]ome problems with the legal process are likely to require support
services including educational/informational workshops to help litigants
recognize and appreciate the range of options that are available under state
law (e.g., temporary and permanent orders for spousal maintenance, child
support, child custody, visitation).\textsuperscript{29}

The findings do not suggest, however, that the provision of legal information at a
parent education program would have no value to represented individuals. Further, it
should be noted that a caveat to the findings of the \textit{ABA Study} is that the researchers were
not certain, due to the self-selection basis of their sample, of the extent to which it
represented the poor, less educated segment of the population.\textsuperscript{30} By comparison, the
\textit{Search for Counsel Study} discussed below clearly captures the views of lower income

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{27} \textit{Ibid.} at 28.
\item \textsuperscript{28} \textit{Ibid.} at 2.
\item \textsuperscript{29} \textit{Ibid.} at 39.
\item \textsuperscript{30} \textit{Ibid.} at 33.
\end{itemize}
\end{footnotesize}
individuals and provides interesting ground for comparing those experiences with the views of what the authors of the Study characterize as the “precarious poor.”³¹

The Search for Counsel Study

The fifty informants for the *Search for Counsel Study* performed by Rosalie Young were selected from volunteers who completed the forms included in a package that was provided to individuals who applied to legal agencies for assistance in obtaining legal representation. The sample included individuals seeking assistance for family law matters. The informants ranged in age from twenty two to sixty five years, and their economic status was described as follows:

At the upper end are the seven middle and working class informants who have stable earnings and sufficient income to permit them to plan and set their own spending priorities. Next are the twelve stable poor, analogous to the “forgotten Americans” of Schwarz and Volgy. They live on steady incomes with little leeway for luxuries or emergencies. Their income level is above the official poverty line, making them ineligible for most public benefits, though they are frequently unable to provide more than bare subsistence for their families. Least affluent are the ten welfare poor informants who subsist for long periods on various forms of public benefits, Life is never easy, but their income is predictable. The fourth and largest group, the twenty-one “precarious poor” informants”, includes those Americans whose economic status shifts frequently between the indigence of the welfare poor and the subsistence level income of the stable poor. As a result of their income fluctuations, their eligibility for public benefits and their economic status are in continual transition.³²

Individuals in the *Search for Counsel Study* were asked why they thought legal representation was important. Most respondents characterized the legal process as being filled with legal jargon, complex paperwork, uninterested judges and court staff, and the

³¹See quote below and *infra*, note 32.
³²*ABA Study, supra* note 19 at 554.
skilled representation of opponents, which led to them requiring legal counsel.\textsuperscript{33} They also viewed lawyers as important for their ability to serve as spokespersons, legal experts and legal system insiders.\textsuperscript{34} Interestingly, informants most often recommended obtaining counsel for family matters.\textsuperscript{35} Finally, survey respondents indicated that two factors played an important role in their comfort with the legal process. First, they wanted to be in control of their own legal destiny, and second, they wanted their legal counsel to consider their case important.\textsuperscript{36}

Obviously, public information cannot assist individuals with all of the concerns noted above, and it would be foolhardy to suggest that legal representation could be dispensed with as an essential service for family law litigants. However, the aspect of the Search for Counsel Study that is of particular interest to this work is the articulation, in even clearer terms than those expressed in the ABA Report, of information-related obstacles perceived by the respondents. In particular, these may be identified as: the significant difficulty posed by legal jargon; complex paperwork and lack of familiarity with the “system.”

The subsection below compares the perception of information-related difficulties set out in the subsections above with the reported experiences of represented family law clients who formed the subject of a study into various aspects of client-lawyer relations conducted by two American researchers, Austin Sarat and William L.F. Felstiner.

\textsuperscript{33} Ibid. at 560.
\textsuperscript{34} Ibid. at 562.
\textsuperscript{35} Ibid at 570.
b. Represented Parties

i. U.S. Research

There is very little literature documenting the perceived needs of privately represented individuals. Robert Mnookan and Lewis Kornhauser posit the following categories of lawyers' roles: (1) source of information; (2) counsellor; (3) clerk; (4) negotiator; and (5) litigator. With respect to the first category, they explain that [l]awyers can provide the basic information about each spouse's bargaining endowment - the applicable legal norms and the probable outcome in court if the case is litigated. How does the authors' perception of the lawyer's role relate to that of actual represented litigants? One of the few studies discovered in this literature search provides at least some sense of the factors that I seek to highlight for the purposes of this work.

In a series of articles drawing on research consisting of the tape recording of approximately 115 lawyer-client conferences in relation to one side of forty divorce cases, Austin Sarat and William L.F. Felstiner discuss various implications of lawyer-client interactions. In the opening paragraph of Law and Strategy, the authors describe the traditional sociology of the legal profession in the following terms:

---

36Ibid. at 573.
38Ibid. at 985.
Lawyers serve clients as important sources of information about legal rights, help clients relate legal rules to individual problems, and introduce clients to the way the legal process works. The information provided by lawyers shapes in large measure citizens' views of the legal order and their understanding of the relevance, responsiveness and reliability of legal institutions.40 (Emphasis added)

They go on to note that little is known of the communications between lawyer and client, and that without such knowledge, it is difficult to assess questions about the content, form and effects of legal services.41

The first area of focus by the authors, and most relevant to the current chapter's focus, is the legal process of divorce. Sarat and Felstiner began by noting that clients look to lawyers to explain how the legal system works and to interpret the actions and decisions of legal officials.42 This is fairly consistent with the views of the respondents of the Search for Counsel Study. The authors then go on to describe a situation where a client repeatedly inquires about the system's rules and procedures, as well as the way the legal system operates both generally and in relation to her case. These questions raise issues of both legal substance and process, both of which have been identified above as information that is perceived as necessary to clients.

Excerpts from a taped conversation between the client and her lawyer substantiate the authors' assertion that at no point does the lawyer deliver a monologue on how the system works. Rather, he intersperses relevant comments throughout his discussion of the major substantive issues at stake.43 One of the exchanges is as follows:

---

40 *Law and Strategy*, *ibid.* at 93.
41 *Ibid.* at 94.
Client: Just tell me the mechanics of this, Peter. What exactly is an interlocutory?

Lawyer: You should know. It’s your right to know. But whether or not I’m going to be able to explain this to you is questionable ... It’s a very ... It’s sort of simple in practice, but it’s very confusing to explain. I’ve got an awful lot of really smart people who’ve - who I haven’t represented - who’ve asked me after the divorce is over, now what the hell was the interlocutory judgment?44

In the authors’ opinion, the lawyers in their study did not provide their clients with information that directly responded to their questions about the rules and procedures involved in the legal system. Assuming there is validity to this conclusion, it may well negate the earlier suggestion that unrepresented individuals might benefit more than represented individuals from a legal information segment within a parent information program.

It would be inappropriate to assume that Sarat and Felstiner’s conclusions would apply to all or even most family law lawyers, or indeed that the same results would be found in the Canadian context. It is worthy of note however, that as a result of their consultations with members of the Ontario public, members of the Civil Justice Review Committee indicated that “clients in family law proceedings expressed concerns that their lawyers did not adequately explain to them the court process, the duty for ongoing disclosure and the alternatives to court.”45

44Ibid. at 102.
c. Concluding Thoughts About Consumers’ Desire for Legal Information

The research described above contains conclusions that support the argument that, assuming the perceptions and experiences of Canadian litigants bear some similarities to their American counterparts, legal information would be a useful element for parent education programs since it would allow consumers to better understand the process. Better understanding of the process in turn allows parents to make informed decisions about matters concerning their children and themselves.

The results of PIP research provided in Chapter 4 seem to suggest that legal information was viewed as helpful, and that relatively equal benefits were perceived from the legal information provided to both represented and unrepresented individuals. Likewise, in Best Practices, the authors report that in programs where legal information was provided, it was regarded by participants as being quite helpful.\textsuperscript{46} In the Family Mediation Canada survey, no data were collected to determine whether individuals were legally represented or not. PIP findings suggest that the argument against including legal content for fear of it not being useful to individuals who are legally represented is not

\textsuperscript{45}\textit{Civil Justice Review}, \textit{supra} note 18 at 272.

\textsuperscript{46}\textit{Best Practices}, \textit{supra} note 6 at 118. The authors of \textit{Best Practices} recommend at 193 that legal content probably should not constitute more than 25\% of a parent education program, but that programs should include definitions of legal terms and information on child support guidelines. In an evaluation of Saskatchewan’s “Parenting After Separation” program, parents’ ratings of legal information were less positive than their ratings of other information. However, a number of parents suggested within their written feedback about the program that more detailed legal information should be included within the curriculum. See Brenda Bacon, \textit{Evaluation of the Saskatchewan Justice Parenting After Separation/Divorce Program} (Saskatchewan: Department of Justice, 2004) at 67.
valid. Nor did this inclusion of legal information seem to detract from the perceived helpfulness of the information provided within the program in relation to "emotional" and "behavioural" information. It will be recalled that in questions related to the helpfulness of the information in assisting individuals to understand childrens' needs at separation, the manner in which children may be caught in the middle of parental conflict, adults' reactions to separation, and understanding of ways to avoid placing children in the middle of conflicts, over 90% of respondents rated this information as either being helpful or very helpful.

Comparing the overall results, while represented individuals seemed to value the non-legal information slightly more than legal information, and the opposite is true for unrepresented individuals, the response rates on both are sufficiently high to warrant the inclusion of both kinds of information within a parent education program. Assuming, then, that non-legal and legal information can be appropriately combined in a way that avoids the promotion of litigious mindsets, the inclusion of basic legal information about matters such as legal terms (and the responsibilities associated with the terms), the court process and available community resources in parent education programs is appropriate, to an extent greater than the 25% threshold suggested by the Best Practices study.

4. **Program Clientele**

Linked to the question of program content is the issue of who should be included as the participant group for parent education programs. This issue also ties into the issue
of program goals. If a program goal of demonstrably decreasing parental conflict is selected, there is likely to be some screening of participants at the judicial level. Assuming, however, that participation is not limited in that manner, it seems appropriate to start from the broadest potential range of clientele, and to then determine whether any exceptions can/should be carved from that group.

If one has determined that court-connected parent education programs are justified by the increased concern about children of separated parents being exposed to parental conflict and to legal processes which promote that conflict, it seems logical to suggest that information regarding that concern should be made available to the parents of all children who could potentially be impacted by the phenomenon. Such a broad span of program dissemination would be consistent with the policy described earlier of providing consistent treatment of spouses and children who are in similar circumstances.

Because some of the information sought to be disseminated deals with the family law system itself, all families contemplating use of the system are, at a broad level, “in similar circumstances” and should have access to this information.

This proposition might at first glance seem relatively problem free. However, upon further reflection, one can readily identify a number of circumstances that may render the provision of broad based programs somewhat complex. Among such circumstances are those where: parents have not lived in the kind of long-term relationship envisioned by most parent education programs; members of the family have been victims of domestic violence; the English language is a barrier for potential program participants (or where such participants’ cultural background impacts upon notions of
family functioning both before and after separation); and one or more party's substance abuse impacts upon the family relationship. While there may well be other situations that will give rise to further complexity in terms of program content, I canvass below some of the literature that has arisen with respect to the circumstances outlined above.

a. Relationships of Short Duration

In conferences dealing with parent education, it has been suggested that unmarried parents need different information than married parents. However, to assume that only children of parents who have lived together in a common law relationship or have been married would benefit from having their parents gain information about the legal system and the emotional impact of parental conflict is to discriminate against these children.

It cannot be assumed that because parents have not formed what may be understood as a traditional family unit, both parents will still not wish to be involved in the child's life. In addition, statistics indicate that "common law" relationships are increasing, so it may not be appropriate to view marriage as the "prevailing standard."

---

47 For example, the question of whether current parent education program content adequately meets the needs of former same-sex partners has not been addressed within the existing literature.
48 Cheryl Lee and David Manville, "Educational Programs for Never Married Parents" (Presented at the Third International Congress on Parent Education Programs, Association of Family and Conciliation Courts: Breckenridge, CO, September 1997). The authors were focusing primarily on unmarried parents who have been involved in a "dating" relationship.

Some might argue, however, that where individuals do not fall within the definition of “common law” spouses, the family situation is not one to which standard parent education content applies. As a result, the argument would be that such individuals should receive a specifically tailored information program.

It is useful to recognize that there are a number of situations where casual adult relationships have resulted in the birth of children for whom both parents wish to provide meaningful care and guidance.\footnote{See, for example, \textit{Johnson-Steeves v. Lee} (1997) 29 R.F.L. (4th) 126 (Alta. Q.B.) where a father who agreed to act as a sperm donor sought access rights. The mother opposed any access by the father, and sought an order declaring that no access should be allowed. The court concluded that the father had the ability to contribute positively to the child’s well-being and development. He was granted access.} As such, they will be dealing with many of the same issues faced by other parents. While there is some appeal to the idea of specifically tailored programs, one must consider whether there is enough difference between this group and other groups to warrant totally different program development. Rather, it may be more plausible to ensure that the broad-based program is relevant to them.

PIP research results did suggest a lower level of improvement in the ability of parents who had been involved in a dating relationship to be able to take their children’s
Ensuring that unmarried parents feel included in parent education programs requires that some attention be given to the reality that their situation is in some ways different from that of married or formerly cohabiting parents. It also, however, involves emphasizing to these parents that many of the core issues related to ongoing parenting responsibilities and functions are identical to those faced by individuals who were involved in a more traditional family relationship. For example, in an outline of a proposed curriculum for a parent education program for never married parents presented at one parent education conference\textsuperscript{53} most of the items are similar if not identical to those included in standard parent education programs. The exceptions are the issue of “determining paternity” and “parenting as a learned behaviour.” It seems clear, however, that both of these issues could be addressed in a standard parent education program. Indeed they are relevant to many individuals who were married or cohabiting in a situation of some permanence, though the law dictates a presumption of paternity in situations where parties have been married or where the child is born within 300 days after the parties stop cohabitation.\textsuperscript{54} In summary, it is difficult to make a convincing argument for excluding those who have become parents as a result of a casual relationship but it is important to employ inclusive language within the standard parent education scripting and to provide links to community resources that would be particularly helpful to parents in these situations.

\textsuperscript{52} See Chapter 4, Table 8.
\textsuperscript{53} Lee and Manville, \textit{supra} note 48.
\textsuperscript{54} \textit{Children's Law Reform Act}, \textit{supra} note 7, s.8.
b. Situations of Domestic Violence

An area where much more controversy exists in terms of the appropriate audience for parent education programs is with respect to parents who have been involved in domestic violence. The crux of the difficulty is in the message about the importance of continued parental cooperation that many parent education programs seem to endorse. This message is sometimes delivered without sufficient recognition of situations where ongoing direct communication between parents is dangerous, and where informal dispute resolution is not workable in light of power imbalances between the adult parties. There appears to be a correlation between conflict levels and parents' ability to take their children's needs into account. This finding, cited in recent Canadian studies,\(^5^5\) is reproduced in the PIP study, which found that parents reporting higher levels of conflict had a lower ability to consider the needs of their children.\(^5^6\)

Three main approaches have been taken to the resolution of this issue. First, in some jurisdictions, victims of domestic abuse are exempted from program attendance.\(^5^7\) Second, some jurisdictions have created separate parent education programs with content

---


\(^5^6\) See Chapter 4, Table 9 and accompanying text.

geared specifically toward abuse victims.\textsuperscript{58} Third, there is a trend toward including within "standard" parent education programs, language, phrasing, and content that is responsive to the needs of individuals who have been involved in situations of violence.\textsuperscript{59}

If one assesses these three options from the premise that programming should be geared toward the best interests of children, it appears difficult to accept a simple exemption for parents involved in abusive situations, for this will preclude those parents from gaining information about, for example, the impact of conflict on children from which parents and children could benefit greatly. This kind of program could help parents to identify community service programs that could be helpful to their children and themselves. Additionally, assuming it is accepted that legal information is appropriately included within program content, it would be beneficial for victims of violence to have access to this information. This is particularly relevant since abusive situations are ones that are often most appropriately dealt with by adjudication rather than by informal dispute resolution mechanisms.

While a program designed specifically for abuse victims potentially has great benefit, some obstacles will likely create challenges for jurisdictions seeking to implement parent education programs. The key challenge is that there are no reliable screening tools that will ensure parents are targeted to the appropriate group,\textsuperscript{60} an issue

\textsuperscript{58} Van Nuys, California, Ft. Collins, Colorado and Alameda County, California are examples cited in \textit{Integrating Violence Sensitivity}, \textit{ibid.} at 29.

\textsuperscript{59} \textit{Ibid.} See also Victoria L. Lutz and Cara E. Grady, "Necessary Measures and Logistics to Maximize the Safety of Victims of Domestic Violence Attending Parent Education Programs" (2004) 42 Fam. Ct. Rev. 363 [\textit{Necessary Measures and Logistics}].

\textsuperscript{60} \textit{Necessary Measures and Logistics, ibid.} at 364.
that becomes particularly problematic if the program is being implemented on a
mandatory basis.

Whether separate scripting is used or general parent education programs are
revised to become more sensitive to the dynamics of abusive relationships, it is important
to think carefully about the messages being portrayed and the options being offered
within parent education programs. As Fuhrmann, McGill and O'Connell have noted,
many statements made by parent educators are accurate unless they are seen through the
eyes of the victim of violence. The examples below serve to illustrate the difference in
messages, as they are perceived by individuals involved in a non-violent relationship as
opposed to those involved in a situation of violence.

EXAMPLE 1
Original Statement:  "How well adults are able to cooperate as parents is
one of the major variables in how well children adjust to divorce."

Modified Statement:  "How well adults are able to cooperate as parents is
a major variable affecting children's adjustment to divorce. However, in
families where domestic violence has occurred, cooperation is not a goal
since it could place a parent at risk. The goal for these parents should be
parallel or detached parenting."

Analysis:  Implied in the original statement is the message that parents
who are unable to cooperate may be inadvertently harming their children.
However, domestic violence in families produces an uneven playing field
between spouses, making cooperation impossible. The partner being
abused should not be made to feel responsible for this situation.

EXAMPLE 2
Original Statement:  "It is essential that divorced parents make efforts to
rebuild trust between themselves."

61 Integrating Violence Sensitivity, supra note 57 at 32.
62 These examples and the analysis following each of them are found in Integrating
Violence Sensitivity, ibid. at 31-32.
Modified Statement: “Parents who have a businesslike relationship that is focused on the business of raising children generally fare well. For families where there has been violence, however, the businesslike relationship may be best conducted through a third party …”.

Analysis: The original statement here is a particularly troublesome one, of a type common to many first-generation parent education programs. Rebuilding trust in one’s ex-spouse is not essential to effective post divorce parenting.

With the reality of domestic violence as such a prevalent factor within our society\(^6\) and as part of government's ongoing attempts to provide assistance to victims of violence\(^4\) it is imperative that parent education programs be sensitive and responsive to this issue. The benefit, in addition to providing victims of violence with accurate information, is that parent education programs provide an opportunity to disseminate information about resources and referrals for individuals in highly conflictual or violent relationships.\(^5\)

In addition to the substantive content of parent education programs being reviewed for appropriateness, there are procedural mechanisms that need to be followed in order to ensure the safety of the individuals attending programs to the greatest extent possible. First, there must be a policy of not registering parents for the same class. While some programs allow parents to attend the same class, it is difficult to imagine a program being offered on a province or nation-wide basis that would have sufficient

\(^4\) For example, the province has established Domestic Violence Courts to provide support to victims in domestic assault cases. Further, the government has passed the *Domestic Violence Protection Act*, 2000, S.O. 2000, c. 33 which is aimed at providing more effective orders to protect victims of abuse. The Act is not yet in force.
resources to devote to the proper screening of which participants could safely and comfortably attend the same seminar. As a follow up to the separate registration rule, attendance lists must be kept confidential, again to ensure appropriate safety for all participants. Finally, it is essential that individuals who facilitate parent education programs be trained in the dynamics and issues of domestic violence.66

c. Cultural And Language Barriers

Many individuals argue that standard parent education programs are inappropriate for individuals with differing linguistic and cultural backgrounds. It is further argued that the provision of translation services for parent education sessions is an inadequate response to the fundamental differences in language and cultural norms that exist.

Again, to be consistent with the child-focused approach of this work, the analysis must begin by assessing the question in the context of children's interests. In order to persuasively argue that parent education program needs to be specifically tailored to different cultural and linguistic groupings,67 it is essential to establish that the messages of standard parent education programs are inappropriate for this population. There are no studies known to this author which seem to indicate that the basic needs of children to be

65 Integrating Violence Sensitivity, supra note 57 at 33. The PIP Participant’s Manual contains a section devoted to resources for victims of domestic violence. See Excerpts from PIP Participant’s Manual at Appendix C.
66 Integrating Violence Sensitivity, ibid. at 33. Victoria Lutz and Cara E. Gradey also suggest keeping the location of sessions confidential, having security on the premises, and conducting seminars during the day or in the early evening: Necessary Measures and Logistics, supra note 59 at 365-367.
67 In the Toronto region, the Ministry of the Attorney General provides translation services for court proceedings in over 100 different languages.
free from parental conflict, to be free to love their parents, and to have parents who are informed about the legal system that applies to their situation, differs according to cultural group. In one survey, researchers studying one-parent families in a cross-cultural perspective acknowledged the difficulty of defining "well-being" of children in a manner that could be applied cross-culturally, but posited that:

the well-being of children in any society can be assessed impressionistically by the adequacy of nurturing, love and training they receive in preparation for the roles they eventually must play as adults, and by the resources and opportunities made available to them for achieving dignity and respect as human beings in the societies to which they belong.\(^{68}\)

It is arguable that there are certain basic non-legal issues that can be addressed to a multicultural audience dealing with Canadian family law. Further, the provision of legal information at parent education programs may be very beneficial to individuals who are unfamiliar with the Canadian legal system. Certainly in the U.S. context, one author discussing cultural considerations involved in providing legal services to ethnic communities, notes that the "lack of understanding [of the legal system] leads to

\(^{68}\) Barbara Bilge and Gladis Kaufman, "Children of Divorce and One-Parent Families: Cross-Cultural Perspectives" (1983) 32 Family Relations 59 at 60. The authors focused on the influence of family structure, marital relations, divorce rates, support systems and social inequity upon the well being of children in representative samples of societies with different degrees of socio-cultural complexity (ranging from hunting-gathering bands to urbanized, industrial, multinational systems. Their conclusion based on a review of these systems, at 69, was that

no single-family form produces an optimal milieu for growing a child. No family type is more "natural" to the human species than any other. Children should have their emotional and physical needs met, but this can be accomplished by a wide variety of social arrangements. ... [I]t is necessary that all who raise children in our society, regardless of family arrangement, have adequate material resources and emotional support.
frustration and sometimes anger in clients who may not be aware of the complexities and
time involved in resolving legal disputes through our cumbersome court system.”69
Further, she notes, the “lack of knowledge and experience with our system also generates
mistrust of the system. A legal representative must therefore spend more time explaining
the procedures, etc., so as to engender confidence in the client.”70 Provision of some of
this explanatory material at a parent education program may assist parents in
understanding the system and thus being equipped to make decisions with regard to their
children with an appropriate knowledge of the range of options available to them in the
Canadian setting.

In terms of parental satisfaction with the information provided at parent education
programs, data collected from the PIP showed few areas of difference in either reported
benefits from the program or measured behavioural and knowledge changes. The
exceptions were the slight tendency for “white” individuals to find the seminar too long
while Latinos tended slightly more to find the seminar too short, and for African/Black
parents to be more likely to find the seminar helpful in understanding the need for parents
to care for themselves yet less likely to find the seminar assisted them in accessing
community legal resources.71 It should be remembered, however, that PIP provides
translation services free of charge for those who request this service. One could assume
that greater disparity in results would occur in the event that translation was not provided.

69 Jeanne McGuire, “Cultural Considerations in Providing Legal Services to Ethnic
70 Ibid.
71 See Chapter 4 at 182.
Consideration of the cultural issues certainly has implications for the choice of goals for court-connected parent education. It seems likely that the goal of achieving demonstrably changed parental behaviour may be quite difficult. The viability of this goal is questionable in situations where cultural and language differences exist and create barriers to the effective communication of information. In order to effectively present an interactive, active level parent education program, the program would need to be facilitated at first instance in the language of the participant. Translation of an interactive seminar would diminish the effectiveness of the program delivery and the ease of participation for the parent. It is more realistic to hope that parent education programs with the primary objective of informing parents about the topics that have been discussed herein would achieve success as measured by the level of understanding achieved by the program participants.

The additional potential for parent education programs in relation to consumers of varying cultural backgrounds is to link parents of different backgrounds with community service organizations that would be of additional benefit to them and their children. Therefore inclusion of members of various cultural and ethnic backgrounds within the scope of the parent education audience is reasonable and in the interests of the children of these families. Provision of translation services, however, is an important element of this inclusion.\footnote{Translation is discussed in Chapter 6.}
d. Content Guidance Provided by Needs of Different Client Groups

As discussed in the foregoing paragraphs, when viewed through the rationale of promoting children’s interests, parent education clientele becomes quite broad and exceptions are greatly narrowed. What greater inclusion requires, however, is greater care within scripting to highlight special issues of concern that arise from situations where abusive behaviour or substance abuse, for example, are relevant. Some authors have pointed out that such focus may have a tendency to dilute programming\(^\text{73}\) and indeed it is appropriate to provide, where resources allow, additional or alternative programs that deal specifically with the particular areas of concern. However, there remains a core set of informational elements to be delivered to all groups of parents. The key is to deliver that information in a manner that is relevant to participants’ circumstances.

\(^{73}\) See *Integrating Violence Sensitivity*, supra note 57.
Introduction

Among the key issues of concern when considering the integration of a system of parent education with the existing family law regime are the most appropriate attendance policies and the most effective implementation mechanisms available. In this chapter, I introduce and analyze a range of options. Part of this analysis involves categorizing the options on a scale depicting least intrusive impact to most intrusive impact on families. As identified in Chapter 5, attendance and implementation matters also give rise to questions about family law consumers' access to justice. The analysis in the segments that follow also incorporates consideration of these matters.

1. Overview Of Potential Attendance Policies

The core division of attendance policies for parent education programs are: (1) those that are voluntarily attended and (2) those that involve mandated attendance. The line between these categories can, however, be blurred by incentives for program attendance that make voluntary attendance policies resemble mandatory attendance policies. For example, while a non-mandatory parent education program does not technically become mandatory when a participant is encouraged to attend by a judge, participants commonly understand such judicial encouragement as being something close
to a mandate to attend. Further, mandatory attendance can have different meanings depending on the scope of individuals to whom the program is geared and the implementation mechanism utilized to mandate attendance. As such, some programs may be mandatory for specific individuals whom judges believe would be appropriate candidates for program attendance, while others may require attendance for all defined individuals within a particular jurisdiction.

While many program providers view some form of mandatory parent education as appropriate, unanimity does not exist. Salem, Scheppard and Schlissel have summarized the essence of the debate. While most of the elements have been alluded to in earlier parts of this work, it is helpful to present them in summary fashion here.

Advantages that have been attributed to mandatory attendance include that: (i) it symbolizes to parents that courts take the welfare of children seriously; (ii) it ensures that both parents get the information and perspective offered by the program; and (iii) it eliminates strategic calculation by parents or their lawyers in evaluating attendance.

On the other hand, some of the disadvantages that have been associated with mandatory court-connected parent education include: (i) it raises the issue of the power of courts. Some take the view that mandatory attendance delays divorce actions and is not necessary in uncontested cases; (ii) it may represent a drain on resources, especially where the programs may not be appropriate for all divorcing or separating parents; and

---

(iii) it raises concerns about the potential sanctions for non-attendance, and how various sanctions might interfere with family law consumers’ access to justice.\(^3\)

The first two of the listed advantages of mandatory parent education programs have been addressed in earlier chapters. In particular, one might recall that the correlation between PIP attendance and decreased litigiousness was often most strong when both parents attended the seminar.\(^4\) The third – the notion of eliminating strategic calculation by parents and/or lawyers in evaluating attendance - has not been addressed. While discouraging such calculation is no doubt positive, it seems a somewhat less significant factor than the first two listed advantages.

In relation to the disadvantages to mandatory parent education, certainly the notion of court power vis-à-vis parents (i.e. intrusion) and the potential drain on resources, have been introduced in earlier discussions within this work of basic level versus active level programs. Briefly, to reiterate the position articulated in Chapter 5, it seems appropriate to consider broad scope mandatory attendance policies if the goal of programming is to heighten parents' awareness of their rights, obligations, and process options. If, on the other hand, the goal of programming is to achieve demonstrably changed parental behaviour, either voluntary attendance or mandatory attendance based on judicial discretion seems more appropriate, so that the “intrusion” is voluntarily received or is warranted in the same way that an order that a parent attend counselling


\(^3\) Ibid.
might be warranted (and authorized under legislative provisions such as s. 28 of Ontario’s Children’s Law Reform Act).

The implications of mandating attendance through judicial discretion rather than by adoption of broad scope mandatory attendance policies will be later in this chapter. Interestingly, it has been noted that in the U.S., mandatory programs currently give significantly more coverage of the impact of brainwashing and bad-mouthing, than voluntary attendance programs provide. On the other hand, the issue of conflict management skills and the development of those skills is more intensively covered in voluntary programs. This would also likely be the type of curriculum difference that would result from the suggested approach in this work, in the sense that “behaviour changing” skills development programs are clearly more intrusive than information based programs.

Given the existing research which seems to suggest that more intensive programs aimed at skills development do have some level of success, it would seem appropriate for jurisdictions embracing the notion of therapeutic justice to provide such services to individuals who wish to take advantage of them. However, if one is to maintain a distinction between the functions of child protection and assisting parents to resolve issues around custody and access, it is reasonable to set a limit on the level of intervention that can appropriately be imposed upon separating and divorcing parents.

---

4 See Chapter 4 at 18.
7 Ibid.
The approach to the mandatory - non-mandatory issue set out in this chapter is also reasonable from the perspective of the resources involved in providing such programming across various jurisdictions, though resource implications should not drive the analysis of implementation mechanisms. Indeed, a program which is aimed at providing parents with relevant information and which is to some extent didactic in nature can conceivably be delivered in a uniform manner from remote to urban areas by means of electronic presentations involving standardized program content and supplemented by resource information particular to specific locations. This approach provides a reasonable prospect of offering a consistent level of programming within particular jurisdictions.

Consideration of appropriate levels of intervention and attendance policies can be analogized to views relating to mandatory mediation versus mandatory mediation orientation. Opponents of mandatory mediation, as noted in Chapter 1, take issue with the deprivation of choice involved in the mandatory mediation process.\(^8\) If one accepts that there is a limit to the extent that parents whose parenting skills have not been shown to fall below the accepted community threshold may be required to contemplate behavioural change, provision of mandated basic level information programs is most appropriate.

The third potential disadvantage of mandatory parent education programs – that of the concern for sanctions for non-attendance and the related access to justice issues –

---

\(^8\) See Chapter 2, note 58 and accompanying text.
has not been addressed. Indeed, there has been no published literature which analyses in any detail the issue of whether mandatory attendance at parent information programs has the potential of impeding family law litigants’ access to justice. Blaisure and Geasler’s report of the consequences of non-attendance at mandatory programs, however, provides concrete examples of possible impediments to family law consumers’ access to a final resolution of disputes. These examples serve as a useful foundation for the discussion of the access to justice issue in the parent information context. The authors summarize the consequences as follows:

If parents failed to attend a parent education program when ordered to do so, facing “contempt of court” charges was a possibility in 40% of the courts represented in this study. More than 30% of courts reported that the final decree would not be granted until parents attended, and almost 30% said the decree would be delayed. Almost half of court representatives indicated that there was a variety of ways courts might respond to parents’ failure to attend a program.¹⁰

Such consequences clearly impact upon the manner in which litigants obtain access to justice. It is therefore important to consider the potential responses to a parent's decision not to attend a mandatory parent education program.

In the Canadian context, there is existing authority for a court dealing with a family law matter to make a finding that a litigant is in contempt of court. In Ontario, both the Rules of Civil Procedure, which govern family matters that are before the Ontario Superior Court of Justice, and the Family Court Rules, which govern procedure in the Ontario Court of Justice and Family Courts, authorize courts to make findings of

---

⁹ See the discussion of “Participant Autonomy” in Chapter 1 at 37-39.
contempt and to render sentences in relation to such contempt.\textsuperscript{11} Sentencing can involve ordering a person to do or refrain from doing an act, requiring a person to pay a fine and/or any costs considered just, or imprisonment of the person in contempt.\textsuperscript{12}

Both the payment of a fine and imprisonment of a parent are sentences for contempt that may work in a manner contrary to the best interests of children. Clearly, a financial impact on parents may have a direct link to children’s financial well-being. The consequences of imprisonment, particularly of a custodial parent, may be even more significant for a child who finds him or herself without that parent’s care and guidance. Courts have taken the perspective that “particularly in the family law context, a civil contempt order is a potent remedy, and should be used sparingly, only after all other solutions have failed.”\textsuperscript{13} Imposition of a sentence of imprisonment is reserved for quite

\textsuperscript{11} Note also Ontario’s \textit{Family Law Act}, R.S.O. 1990, c. F.3 which provides at section 49 (1) that “[i]n addition to its powers in respect of contempt, the Ontario Court (Provincial Division) may punish by fine or imprisonment, or by both, any wilful contempt of or resistance to its process, rules or orders under this Act, but the fine shall not exceed $5,000 nor shall the imprisonment exceed ninety days.

\textsuperscript{12} Family Law Rules, O.Reg. 114/99, r. 31(5); Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 60.11 (5).

\textsuperscript{13} \textit{M.M.K. v. P.R.M.} (2000), 9 R.F.L. (5th) 80, [2000] O.J. No. 2361 at 44 (Sup. Ct. J.) (Q.L.), aff’d (2002) 212 D.L.R. (4th) 309 C.A. In this case, the father, shortly after being granted custody of his daughter in 1996, made a unilateral decision to move with her to Bermuda. He did not appear at any of the several proceedings the mother brought in Toronto for the daughter to be returned. In 2000, the father came to Toronto. He was arrested and brought before the judge who had made earlier contempt orders against him. The judge insisted that the daughter be brought to Toronto in compliance with her earlier orders before she would proceed with sentencing for his contempt. After spending 17 days in jail, the father arranged for the child to be returned to Toronto. The judge then imposed a sentence of 12 months in addition to time served. The sentence was suspended on certain conditions. The father’s appeal from the findings of contempt and sentence were dismissed by the Court of Appeal.
egregious cases where the court considers it necessary to impose such a sentence in order to preserve the integrity of the administration of justice.\textsuperscript{14}

While it may be that repeated refusals to attend a court ordered parent education program would warrant a finding of contempt, the concept of instigating further litigation\textsuperscript{15} regarding a measure intended to encourage less litigious behaviour seems contrary to the objectives of court-connected parent education. In a similar vein, refusing to grant an order pending a party's attendance at a program serves to prolong litigation, and presumably the tension associated with that litigation. Not only does this delay in granting judicial relief arguably hinder parties' access to justice (particularly that of the party who has attended the required program) - it also seems counter-intuitive in light of the goals of parent education.

A preferable method of dealing with failure to attend a parent education program is to have the failure serve as one of the factors that a court considers in determining the abilities of each parent to meet the child's best interests. It certainly seems fair to infer that a parent who is unwilling to attend a program intended to provide information that may help them to better understand the manner in which their decisions on post-

\textsuperscript{14} See, for example \textit{McMillan v. McMillan} (1999), 44 O.R. (3d) 139 (Gen. Div.) In \textit{McMillan}, the father had launched four separate contempt proceedings in order to exercise access to his children. A contempt order was made in 1996 but was held purged in January 1998 after the court heard that there had been no recent problems with access. In purging the contempt, the judge cautioned the mother that if she was found in contempt again, she would likely receive a jail sentence. In June, 1998, the mother sent a letter to the father indicating that she and the children would be on vacation between July 25 and August 21, and that the father's visitation would resume after that time. The effect of this plan was to deny the father his regularly scheduled access. The mother was held in contempt and sentenced to 5 days' incarceration.

\textsuperscript{15} The further litigation would entail bringing a motion for contempt.
separation issues will affect their children, is less inclined to devote themselves to
meeting their children’s needs. Failure to attend a program would, of course, be only one
of the factors to be considered. Further, parties’ evidence explaining the reasons for their
non-attendance could be weighed in the decision.

This approach to non-attendance does not interfere significantly with access to
justice issues, assuming that potential barriers to effective attendance such as lack of
childcare, lack of ability to understand program content, and inability to pay program
fees, are eliminated. Further, it does not subject a parent to the risk of deprivation of
liberty should they decline to attend, but it does make that parent open to a negative
inference in response to the decision.16

One argument against mandatory parent education programs not listed by Salem
et al is that participants will be less open to learning when they are required to attend a
program.17 Statistics from the PIP generally do not seem to support this concern. In the
surveys conducted in relation to the PIP seminar, individuals who attended the program
as a result of a judge or court paper informing them that they should attend the program

16 Negative inferences are not unknown to family law. Consider s. 10 of the Children’s
Law Reform Act, supra note 5, relating to determination of parentage by way of blood
tests:

10 (1) Upon the application of a party in a civil proceeding in which the
court is called upon to determine the parentage of a child, the court may
give the party leave to obtain blood tests of such persons as are named in
the order granting leave and to submit the results in evidence. …
(3) Where leave is given under subsection (1) and a person named therein
refuses to submit to the blood test, the court may draw such inferences as
it thinks appropriate. (Emphasis added).

17 Virginia Petersen and Susan B. Steinman "Helping Children Succeed After Divorce: A
Court-Mandated Educational Program for Divorcing Parents" (1994) 32 Fam. and Concil.

236

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
and those who attended the program voluntarily\textsuperscript{18} responded positively to all of the information provided. There is no trend of court-referred participants consistently reporting the information provided as being unhelpful as one might expect if one was concerned that a mandate closed one's mind to learning. It is recognized, of course that participants' rating of the program categories does not necessarily reflect the amount of actual "learning" that has occurred as a result of program attendance. However, it seems logical to infer that individuals with a negative approach to receiving program content might also be less inclined to rate the content positively.

The PIP survey results reviewed in Chapter 4 point to relatively small differences in responses to information depending on reason for program attendance, with slightly greater numbers of quasi mandated individuals rating the legal information as more helpful, and slightly greater numbers of voluntary attendees viewing the non-legal information as helpful.\textsuperscript{19} With over half of both groups considering all types of information "very helpful", the hypothesis that mandated participants will not benefit from the information provided is not supported.

There are a few possible explanations for the slight difference in results. First, it could be that people involved in the litigation process are more open to the legal information. This may lend support to the argument raised in Chapter 5 regarding the potential for legal information to promote a litigious mind-set. As suggested in that

\textsuperscript{18} See Chapter 4 at 160-161 for a description of "voluntary" versus "quasi-mandatory" participants.

\textsuperscript{19} See Chapter 4, Table 6 and accompanying text.
chapter, the high level of satisfaction with legal content from participants generally confirms the value of maintaining the information. However, there is scope for much better integration of emotional and legal information within parent education curricula.

There is also a possibility that participants perceive court encouragement of the program to be encouragement to become more familiar with the legal process. If so, these participants might be inclined to focus more closely on legal information. Again, more integrated programming might achieve a more equal level of satisfaction with the various sources of information provided. One can hypothesize that voluntary attendance participants feel less pressure to become familiar with legal information, or that for those who have not yet become involved in the family court system, the legal information is less pressing. As such, the emotional information may receive higher priority for these participants. The integrated programming suggested herein must attempt to further enhance this perception while potentially making the legal information more relevant.

As a final note, it is the experience of those working within the Parent Information Program that participants registering for the program who have been required to attend are initially often hostile to the idea of program attendance. It then becomes quite important, in the context of increasing participants' comfort level and openness to the program delivery, to provide effective intake services for registration purposes.
2. Implementation Policies

Issues respecting program implementation mechanisms flow from decisions about attendance policies. The segments below focus on implementation mechanisms relating to voluntary and mandatory attendance policies.

a. Voluntary Attendance

One of the problems with voluntary attendance policies reported in most assessments of existing programs is that they tend to result in what is referred to as "preaching to the converted". The problem here is that those who least need the program information are most likely to seek it out.\(^{20}\) Another problem associated with voluntary attendance programs is that number of attendees tends to be low, thus making the expenditure of resources, particularly if one is looking at such programming in a court-connected context, less efficient, and the delivery of program information uneven.\(^{21}\)

There are ways in which both problems could conceivably be addressed with some hope of achieving better results. First, in relation to the issue of low numbers, networking with community service organizations within particular jurisdictions and advertising through local media are viable methods of increasing the number of participants at seminars. The latter endeavour, however is a costly one and involves greater expenditure of resources


\(^{21}\) In Braver et al, supra note 6 at 45, the authors found that programs with mandatory referrals serve a median of 110 parents per month compared to 20 parents per month for voluntary programs.

239
and the same potential problem of not reaching the group of individuals who might most benefit from access to the information provided at parent education programs.

A potentially more fruitful avenue, and one which would engender greater solidarity in approach across the legal community, would be to require lawyers, mediators, judges and other professionals working with separated parents to be satisfied that such parents have been advised of the availability of parent education programs within the community. Ensuring compliance with this requirement could involve amending both the Divorce Act and relevant provincial statutes to require that the professionals involved with families who are separated and/or divorcing make this information available to such families.

Such legislative enactments are not without precedent. For example, section 9 of the Divorce Act establish duties on legal advisors, including the duty to draw to a spouse’s attention the provisions of the Act having the objective of reconciliation of spouses, and to inform the spouse of mediation services known to the advisor. Section 10 requires a court hearing a divorce proceeding to satisfy itself that there is no possibility of reconciliation of the spouses, unless the circumstances of the case are of such a nature that it would be inappropriate to do so.\(^\text{22}\)

\(^{22}\) More specifically, sections 9 and 10 provide as follows:

9.(1) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding
(a) to draw to the attention of the spouse the provisions of this Act that have as their object the reconciliation of spouses, and
(b) to discuss with the spouse the possibility of the reconciliation of the spouses and to inform the spouse of the marriage counselling or
It would be possible to amend s. 9 of the Divorce Act by adding paragraph 3 which would read:

(3) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding involving issues of child custody, child access and/or child support, to inform the spouse of parent education programs known to him or her that might assist the spouses in resolving these matters in a manner that promotes the best interests of the child or children at issue.23

guidance facilities known to him or her that might be able to assist the spouses to achieve a reconciliation, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.

(2) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters.

(3) Every document presented to a court by a barrister, solicitor, lawyer or advocate that formally commences a divorce proceeding shall contain a statement by him or her certifying that he or she has complied with this section.

10.(1) In a divorce proceeding, it is the duty of the court, before considering the evidence, to satisfy itself that there is no possibility of the reconciliation of the spouses, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.

(2) Where at any stage in a divorce proceeding it appears to the court from the nature of the case, the evidence or the attitude of either or both spouses that there is a possibility of the reconciliation of the spouses, the court shall

(a) adjourn the proceeding to afford the spouses an opportunity to achieve a reconciliation; and

(b) with the consent of the spouses or in the discretion of the court, nominate

(i) a person with experience or training in marriage counselling or guidance, or

(ii) in special circumstances, some other suitable person, to assist the spouses to achieve a reconciliation.

23 The current subsection 3 of section 9 would then become subsection 4.
In terms of section 10 of the *Divorce Act*, the relevant amendment would involve adding subsection 6 which would read:

(6) In a divorce proceeding involving custody, access or child support issues, it is the duty of the court, before considering the evidence, to satisfy itself that parents have been informed of educational programs available to them to better inform them of the rights and needs of their children.

Similar amendments could be made provincially to statutes dealing with custody, access and child support. Additionally, in order to ensure to the greatest extent possible that families receive similar access to information, it would be advisable to include within the Rules of Professional Conduct for lawyers a duty similar to that proposed for the amended *Divorce Act* and provincial statutes. Such an amendment would be appropriately placed within Rule 2.02 of the Law Society of Canada's Rules of Professional Conduct. Rule 2.02 currently provides:

**Honesty and Candour**

2.02(1) When advising clients, a lawyer shall be honest and candid.

**Commentary**

The Lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law, and the lawyer's own experience and expertise.

---

24 In Ontario, for example, this would involve amending the *Children's Law Reform Act*, *supra* note 5, Part 3, and the *Family Law Act*, *supra* note 11, Part 3.

The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.

**Encouraging Compromise or Settlement**

2.02(2) A lawyer, shall advise and encourage the client to compromise or settle a dispute when it is possible to do so on a reasonable basis and shall discourage the client from commencing useless legal proceedings.

(3) The lawyer shall consider the use of alternative dispute resolution (ADR) for every dispute, and, if appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options.

The proposed additional provisions would focus on proceedings implicating children:

(4) A lawyer representing a client in an action against the other parent concerning their child shall advise the client of the potential harm a protracted custody battle may have on the client's child.

(5) The lawyer representing a client in an action against the other parent concerning their child shall inform the client of available parent education programs within the community.
Parental separation and divorce are traumatic situations for the involved spouses. Evidence however, has mounted in recent years that children are the most significant casualties of divorce and custody battles. Parental separation and divorce is traumatic in and of itself, but when accompanied by an acrimonious and prolonged custody dispute the damage to the children is especially severe. The evidence shows that children who experience such events can suffer developmental problems, serious emotional distress and scholastic setbacks. Any lawyer involved in a custody proceeding has an ethical obligation to inform the client as to how such a proceeding will affect the client's children, and to refer clients to resources that will further clarify these impacts. The lawyer must keep the children's best interests in mind while advising the client how to proceed.

While the measures described above may be of assistance in better informing parents of the options and impact of various options on their children, they will not as effectively achieve the objective of encouraging the best interests of children in a uniform manner across jurisdictions as will the methods described below. Further, the extent to which professional encouragement will occur depends greatly on the approach that

---

differing lawyers and judges take to the provision of parent education programs. While amendments of the sort discussed above certainly contain the potential to integrate parent education programs more fully within the court and family law system, if the state wishes to ensure that all families at least receive the same level of information, mandatory attendance policies may be more appropriate.

b. Mandatory Attendance

Within the classification "mandatory attendance", there are a number of mechanisms available by which parents can be required to attend a parent education program.

First, in light of the existence of parens patriae jurisdiction within judges of the superior courts, it would be possible for judges to exercise this jurisdiction in the interests of children to require parents to attend a parent education program where, in the view of the judge, it would be helpful for parents to be privy to such information. Some readily identifiable problems emerge with this option however.

One problem that arises is that the same inherent jurisdiction does not extend to judges of the provincial courts.27 Given that unified family courts have not yet expanded across the province an unequal service provision could result.

27 For example, the Courts of Justice Act, R.S.O. 1990, c. C.43, s. 38 (2), provides that “[t]he Ontario Court of Justice shall perform any function assigned to it by or under the Provincial Offences Act, the Family Law Act, the Children’s Law Reform Act, the Child and Family Services Act or any other Act. R.S.O. 1990, c. C.43, s. 38 (2); 1996, c. 25, s. 9 (18). In other words, the court does not possess inherent jurisdiction; it’s authority is limited to that assigned by statute. See also the discussion of parens patriae jurisdiction in Chapter 3 at 3-5.
Aside from this issue, one must also consider two other matters. First, the common view among parent education advocates is that parents benefit more from parent education programs when they are exposed to them at an early stage in their family law proceedings. Further, the issue of subjective approaches to parent education programs identified in the discussion of voluntary attendance programs applies where referrals are based on judicial discretion. A preferable mechanism for mandating parent education programs is the use of legislation.

In Canada, Saskatchewan is the sole jurisdiction to mandate parent education programs by use of provincial legislation. Other mandatory attendance policies are established by way of subordinate legislation in the form of rules of court or practice notes. Scant literature has been generated from which to discuss the required authority for, or arguments in support of and in opposition, to mandatory attendance policies.

A relatively recent article updates the legal status of American parent information programs and describes American sources of authority for requiring attendance as

---

29 *The Queen's Bench Amendment Act, 2001*, made the “Parenting After Separation/Divorce Program” mandatory in certain regions.
30 Alberta’s “Parenting After Separation Program” is mandated by Court of Queen’s Bench of Alberta Practice Note No. 1, Parenting After Separation (online: http://www.albertacourts.ab.ca/qb/practicenotes/familylaw/note1.pdf).
including state law and individual judicial districts. Within the state law context, three models exist: (1) Legislation mandating attendance on a state-wide basis for all divorcing parents with minor children, which is currently in effect in nine states;\(^2\) (2) legislation granting state-wide discretionary authority for judges to evaluate on a case by case basis, which parents should attend a parent information program, which exists in fourteen states;\(^3\) and (3) state legislation that authorizes courts to implement parent information programs in their district should they wish to do so, which is in effect in three states.\(^4\) Local court rules, which require that sufficient inherent jurisdiction has been granted by the state’s constitution, are the basis of requiring attendance in nineteen states.\(^5\) These local court rules would be comparable to Toronto, Alberta, Nova Scotia and British Columbia’s programs.

The problem with local court rules is that they do not promote consistency in program provision. If court-connected parent education programs are to achieve the kinds of objectives described in earlier parts of this work, and are to play a greater role in clarifying various dispute resolution options, as proposed in Chapter 7, broader based legislation is preferable. While the existence of federal and provincial authority over family law matters makes the consistency goal more challenging, it would be possible to

\(^2\)Ibid. at 3. These states are Arizona, Connecticut, Delaware, Florida, Iowa, Massachusetts, Missouri, New Hampshire and Utah. Additionally, legislation which mandates attendance on a statewide basis for all parents when custody or access is contested exists in Minnesota and Tennessee.

\(^3\)Ibid. The states are Colorado, Hawaii, Illinois, Maryland, Minnesota, Montana, Nebraska, Ohio, Oklahoma, Oregon, Tennessee, Virginia, Wisconsin and Wyoming.

\(^4\)Ibid. at 4. The states are Louisiana, West Virginia and Washington.
enact parallel legislation at the federal and provincial/territorial levels. Precedent for such legislation exists in the *Child Support Guidelines*,\(^{36}\) which have been enacted in virtually identical form across Canada. Another challenge involved in the implementation of broad based legislation mandating parent education programs is ensuring that the programs can in fact be delivered to all family law consumers, including those in remote regions. Advances in distance education generally suggest that mechanisms such as video conferencing exist to enable program delivery to all regions.

The wording of legislation mandating parent education attendance will be important. In this author’s view, it will be important to define the objectives of the mandated program to include promotion of children’s interests along with parental informed consent to the family law process. Guidelines as to program content could also be established within the legislation. Suggestions for the most desirable program content have been made in the previous chapter.

In the United States, there was a four-fold increase between 1994 and 1998 in the number of states with legislation either authorizing or mandating parent information programming.\(^{37}\) In their 1998 nationwide survey of Court-Connected Divorce Education Programs, Blaisure and Geasler calculated that 65% of counties or independent cities had a mandate requiring attendance at a parent education program.\(^{38}\) In Canada, we are also

---

\(^{35}\) *Ibid.* The states are Alabama, Alaska, California, Georgia, Idaho, Indiana, Kansas, Kentucky, Michigan, Mississippi, Nevada, New Jersey, North Dakota, Pennsylvania, Rhode Island, South Carolina, Vermont and Texas.

\(^{36}\) SOR/97-175, as am.

\(^{37}\) *Clement, supra* note 31 at 5.

\(^{38}\) Blaisure and Geasler, *supra* note 10 at 57.
beginning to see a clear pattern of acceptance of court-connected programming as part of
the process to which parents become subject when they seek court assistance in reaching
a resolution of their separation related disputes.
Chapter 7 -- Defining a Role for Parent Education Programs

Introduction

At the beginning of this work, I set out to review a sample of the literature that discusses issues arising from recent procedural reform initiatives within the family law dispute resolution regime. The literature identified a number of tensions that exist in the viewpoints of numerous commentators. For example, some such as Mnookin and Kornhauser,¹ seek greater reliance on private dispute resolution by parties themselves. Others, like Martha Bailey,² advocate for the maintained viability of dispute resolution through court adjudication, particularly in situations where parties require the protections of a formal system. It became clear in assessing the critiques of various authors that there are actually some shared perspectives and concerns among the different groups. For example, there would be little argument against the desirability of considering ways in which the current family law regime can offer processes aimed at dispute resolution that does not generate protracted and bitterly conflict-laden litigation to which children are exposed. However, there are other differences in viewpoint which act to polarize views about processes. Many of these differences were introduced in the opening chapter of this work.


250
In Chapter 1, I reviewed literature that questioned whether and how alternatives such as mediation could foster parental autonomy within the decision making process and could achieve the legal system's goals of providing fair and just processes. This discussion also involved a review of literature which considered existing uncertainty about the role of various professionals within the reformed family law system, and in particular, the roles of lawyers and social workers. Finally, I discussed literature that revealed common concerns over issues such as lack of legal representation within the family law system, the most appropriate ways to further the interests of children within the system, and manners of offering services that meet the specific needs of client groups such as victims of domestic violence, various cultural groups, and never married parents.

At the end of Chapter 1, I set out to consider whether and how the phenomenon of court-connected parent education might be able to bridge some of the ideological tensions between the concept of mediation and that of court adjudication. It was hypothesized that through its explanation of each process, its provision of information about the law regarding family law issues and its discussion of both the legal and emotional aspects of the separation process for children and adults, court-connected parent education could empower parents to make informed decisions about the process(es) chosen for the resolution of their post-separation issues. This type of information would likely assist parents to proceed in a manner that also fostered children's separation-related needs.

One additional factor relevant to the hypothesis was that many court-connected parent education programs have an early affiliation with mediation along with a
corresponding emphasis on the emotional aspects of separation and on the resolution of disputes through mediation. This emphasis on the “emotional” often corresponds with a lack of emphasis on “legal” information. It was the position put forward within the research hypothesis that the inclusion of additional legal information would be key to presenting parents within the family law system with a balanced view of the different processes available to them and hence with a view that better clarified the sometimes apparently conflicting information about mediation and court adjudication, placing these processes on a conceptual continuum of available processes with the potential of co-existence, rather than within mutually exclusive and competing categories.

I should be clear at this stage about the starting point for my analysis. This work proceeds on the basis that there is a valid place for both private dispute resolution and public dispute resolution within the family law system, and that advocates for each have provided valid arguments for the maintenance of both options within our system. For either “camp” to argue that the other should not exist to any degree would ignore the reality that human relations and family dynamics are complex, and that different situations and personalities will call for different dispute resolution avenues. For example, while Menkel-Meadow is correct to point out that there are cases which do not lend themselves easily to right or wrong answers or to the kinds of binary solutions provided by court adjudication, Bailey’s assertion that there are some aspects of family

---

3 Carrie Menkel-Meadow, “The Trouble with the Adversary System in a Postmodern, Multicultural World” (1996) 38 Wm. & Mary L. Rev. 5 at 26-27.
law that are appropriate for judicial determination after the presentation of reasoned proofs and arguments\textsuperscript{4} also warrants serious consideration.

While I am of the view that Canada should \textit{not} adopt either a presumption of shared custody or the "handmaiden" to that notion – a presumptive use of mediation, I am able to conduct the analysis that I have set out to do without delving in detail into this more substantive aspect of family law reform. In light of the fact that our current legal regime makes provision, both institutionally and statutorily, for both mediation and court adjudication as state-sanctioned means of resolving disputes, it is incumbent on the state to provide consumers with a balanced view of, and equal access to, these available options. I will suggest that providing parents with an understanding of the available processes, along with information that is quite commonly accepted – such as the fact that research suggests children fare better when not exposed to parental conflict, and that absent the risk of emotional or physical harm, children generally benefit from continued contact with both parents – can effectively enhance current system goals of promoting children's wellbeing while respecting parents' ability to choose from the different substantive and procedural options currently available to them.

My approach is also impacted by the birth and infancy of court-connected parent education in Canada having occurred within the period of intense "privatization" of family law described in Chapter 2 of this work. Much of the privatization trend has manifested itself in jurisprudence and legislation that places increased responsibility for

\textsuperscript{4} Bailey, \textit{supra} note 2 at 65.
the financial well-being of "family" members in the hands of current and former family members. Thus far, legislators have resisted lobbies for a presumptive privatization of family dispute resolution. There is potential, however, for court-connected parent education to become a mechanism for an excessive "back door" promotion of such privatization. In light of the views expressed in earlier paragraphs, this approach to state-endorsed parent education would be inappropriate and must be guarded against by careful consideration of program content and implementation mechanisms.

I have attempted to achieve the objectives of this work through a combination of doctrinal evaluation and empirical analysis. For example, in Chapter 3, I undertook a doctrinal analysis of the current status of the "best interests of the child" principle as revealed through current caselaw. I then considered how the currently defined scope of the best interests of the child principle could be applied to assist in the formulation of policies relating to the content for court-connected parent education programs and methods of implementing such programs. In Chapter 4, I introduced research results gathered from my involvement with a court-connected parent education program, and in Chapters 5 and 6, I attempted to combine the implications from the doctrinal analysis in Chapter 3 with the empirical results in Chapter 4 to think about the "potentials and perils" of court-connected parent education for consumers of the family law regime. This analysis included considerations of whether programming might require adjustment in light of the needs of various clientele groups.
Progressing through the research and analysis of fairly narrowly focused questions about court-connected parent education, such as feasible content structure, attendance policies and implementation mechanisms allowed me to fulfil what I identified as my original goal in becoming involved in the PIP – the consideration of whether and how the program might impact parents and the court system. In this concluding chapter, I wish to return to the broader question identified in Chapter 1, which formed the basis for my research hypothesis.

The analysis proceeds as follows. In Part 1, I consider the extent to which PIP research results confirm Mnookin and Kornhauser’s position\(^5\) that most parties resolve their disputes privately. These statistics deal only with cases that were initiated as court cases, and as such tell only a partial story – they do not quantify the individuals who settle their matters without any reference to the formal adjudicatory system. Next, I look at whether PIP attendance has any impact on the extent to which parties resort to private dispute settlement to reach a final resolution of their separation related matters.

In Part 2, I consider the extent to which PIP has the potential of promoting the kind of parental autonomy for which Nolan-Haley\(^6\) advocates. In order to undertake this analysis, I consider whether and how measures of parental satisfaction with the “legal” information”, the “dispute resolution process” information, and the “legal community resource” information provided in the PIP seminars may operate as sources that foster

\(^5\) *Supra*, note 1. See Chapter 1, notes 21-28 and accompanying text.

autonomous decision making. This is followed by an assessment of the measured change in PIP participants' reported understanding of the legal system over time, and how this change might be indicative of the ability to engage in more autonomous decision making.

Part 3 of this chapter focuses on the boundaries of the state's role in encouraging informal dispute resolution processes while presenting a "balanced view" of the process options within the family law system. For this portion of the analysis, I draw from Girdner's discussion of "empowerment" versus "social control" in mediation, and consider the extent to which selected portions of the PIP script are indicative of empowerment or social control. I also return to the Chapter 3 analysis of the limits on state intervention imposed by current interpretations of the scope of activity warranted by the "best interests of the child principle" as applied in private custody matters.

In Part 4, I consider the role that court-connected parent education can play in clarifying the roles of different professionals (specifically social workers and lawyers) within the family law process. This part relies on anecdotal information, based on my observations of PIP facilitators, in addition to feedback about facilitators provided by PIP participants. I return to the question raised by Smart and Neale7 about the impact of legislative presumptions of shared parenting and private dispute resolution on the perception of the "good" lawyer's role.

---

7 Bren Neale and Carol Smart, "'Good' and 'Bad' Lawyers? Struggling in the Shadow of the New Law" (1997) 19 J. Soc. Welfare and Fam. L. 377. For a discussion of this work, see Chapter 1, notes 77-79 and accompanying text.
Finally, in Part 5, based primarily on measured change in parental ability to consider children's needs over time and parental satisfaction with child related information provided by the PIP, I consider whether a relatively equal focus on legal and non-legal information within a court-connected parent education program can still achieve the kinds of child-related benefits generally attributed to court-connected parent education programs containing relatively little legal content. It is important to note the limitation on the extent to which the results of the PIP research can be generalized, since the program is aimed at the Ontario Court of Justice population. However, it is hoped that the analysis below will provide a starting point for further work that can be applied to a broader audience.

1. Court-Connected Parent Education and Private Bargaining

Mnookin and Komhauser argue that regardless of one's view of the desirability of private ordering, it is clear that a large number of separating couples do not need adjudication of many of their separation-related issues. Indeed, it is commonly understood that many couples do not engage the family court process at all, and of those that do, many find ways of resolving their issues that do not involve ultimate trial and judicial determination.

---

8 *Supra*, note 1. While Mnookin and Komhauser spoke of private bargaining in relation to divorcing couples, my analysis extends to parties who were not married, but who fall within “spousal” and “parental” categories that attract legal definition and related rights and obligations. See, for example, the definitions in sections 1 and 29 of the *Family Law Act*, R.S.O. 1990. c. F.3.
Results of the PIP court file review confirm that, as Mnookin and Kornhauser suggested, while parties have reference to the legal system, that system serves as a framework within which to negotiate final private resolution of disputes. Overall, both the control group and the sample group of files reviewed\(^9\) illustrate that few cases (seventy seven of the 346 cases with reported results) were actually determined by either judicial (pre-trial) hearing or trial. Breaking this analysis down further, determination by trial was a rare occurrence\(^10\) (15 of the 351 files reviewed). These results seem to support Rosemary Hunter's view that even when cases are taken to court, they are not inevitably subject to a full-blown adversarial process and that the litigation route often involves concurrent attempts at settlement by means of mediation or negotiation.\(^11\)

Building from the premise that there is evidence of a “settlement culture” within the component of the family court regime studied for the purposes of this work, the logical question becomes whether court-connected parent education programs have the potential of fostering additional consumer resort to private dispute resolution. The results reported in Chapter 4 suggest that PIP attendance did have some impact on the manner in which court cases were carried through to resolution. Comparing the control group of non-PIP participants to the participant sample group, there was a greater tendency for the sample group to resolve their case by settlement than was found in the control group.\(^12\)

---

\(^9\) See Chapter 4, Table 1 and accompanying text.
\(^10\) Ibid.
\(^12\) See Chapter 4, Table 1 and accompanying text.
(While the control group constituted 42% of the overall files reviewed they resolved their matters through hearing or trial at a proportionally higher rate of 60%, and settled at a proportionally lower rate of 39%. The sample group, on the other hand, represented 58% of the overall files reviewed, but resolved their matters through hearing or trial at a proportionately lower rate of 40% and settled their matters at a proportionally higher rate of 61%. Within this group, a proportionately higher number of cases (70%) were "finalized" by way of discontinuance or judicial dismissal (often due to parties not appearing for a number of scheduled hearings). While the statistics do not explain the reason for matters being discontinued, they may be an indication of the trend toward greater use of private bargaining. This "higher settlement" result is more pronounced where both parties have attended the PIP seminar. Assuming the trends identified are viewed as positive, this latter finding is consistent with a policy of mandated attendance which ensures that both parties to a matter receive the same messages.

"Settlement", for the purposes of this work, encompassed resolutions achieved from consent orders that incorporated minutes of settlement (reached through negotiation), separation agreements (reached through negotiation), or memoranda of agreement (achieved through the mediation process). The settlement measure does not identify specifically the process by which the cases were resolved, but rather suggests that there may be some correlation between involvement in the PIP seminar and the resolution of matters through a private bargaining process. Another measure of significance in this work is aimed at gauging whether there was any correlation between PIP attendance and parties' willingness to engage in a mediation process. The results
described in Chapter 4 confirmed a statistically significant relationship between attendance at a PIP seminar and engagement in a mediation process\(^{13}\) (but not necessarily the resolution of any or all disputed issues via that process). (Again considering the breakdown of the control group as 42% of the overall survey and the sample group as 58% of the total survey, one can see the proportionally lower level of mediation use within the control group – 26%, and higher level of mediation use within the sample group – 74%). Despite the fact that the overall number of individuals making use of mediation overall was small – 35 of the 349 cases from which this information could be gathered – the difference between sample group and control group use was statistically significant.

Overall, the combination of results on “litigiousness” described in Chapter 4 point to the potential for court-connected parent education to encourage parties to consider less litigious forms of dispute processing, whether that be mediation, negotiation, or some customized combination of these processes along with the court hearing process. This finding seems quite consistent with the writings of King and certain other authors discussed in Chapter 1, which suggest that processing family law cases often encompasses a combination of court hearings, negotiation and mediation. It would be expected that in light of the discussions within the literature review suggesting that the same process may not be appropriate for each litigating pair, one would see within the research results evidence of parties who are exposed to the same information about the

\(^{13}\) Ibid.
available process options choosing to take up different options depending on those that
best fit their circumstances.

2. **Fostering Parental Autonomy Through Informed Consent**

Establishing the fact that court-connected parent education programs appear to
have the ability to encourage less litigious forms of dispute resolution is only positive in
light of evidence suggesting that less litigious processes were chosen as a result of
parents having been presented with appropriate information about various options, and
about the legal concepts that provide the foundation of the current family law regime. If
less litigious routes are chosen, absent the exercise of parental autonomy, the system will
lose, rather than gain credibility.

While I accept Mnookin and Kornhauser's suggestion that parental freedom to
determine custody matters should be accorded considerable deference, I would like to
emphasize the authors' recognition that the role of the state does involve informing
parents about matters relevant to their exercise of autonomy. Mnookin and Kornhauser
referred to the need to inform parents of children's needs during and after divorce.\(^{14}\) I
agree. In my view, parental autonomy is additionally fostered through the provision of
information about available processes.

a. **Applying Nolan-Haley's Framework to Court Connected Parent Education**

To further explore court-connected parent education's potential to facilitate the
exercise of parental autonomy, it will be useful to consider the framework set out by

\(^{14}\) *Supra* note 1.
Jacqueline Nolan-Haley, who wrote about the promotion of parental autonomy within the mediation process. I will point out how and when analogies can be drawn between her framework and the court-connected parent education process, as well as limitations on the application of the framework to that process.

Nolan-Haley focuses on what, in her view, is the absolute necessity of parents entering into the mediation process with true “informed consent.” Absence of informed consent, she argues, undermines the system’s commitment to autonomy, one of the cornerstones of the ideological foundations of private bargaining. The three elements that she sees as essential to the exercise of parental autonomy through informed consent to mediation are:

1. parties must be educated about the mediation process before they consent to participate in it;
2. continued participation by parents in the process must be voluntary; and
3. parents must fully understand and consent to the outcomes reached in mediation.

Obviously, these criteria were created to have specific application to the mediation process. I would like to extend the criteria to court-connected parent education. In particular, I will endeavour to apply the criteria, in somewhat modified form, within the context of parent education’s role as an information provider. In this respect, there are three aspects of Nolan Haley’s framework that are helpful to draw upon: the need for information about the process overall; the need for information about the voluntary nature

---

15 Nolan-Haley, supra note 6.
16 Ibid. at 778.
of continued participation in the mediation process; and the need for information about
the importance of understanding and consenting to outcomes.

Further, I would like to extend the analysis somewhat, and to suggest that the
exercise of parental autonomy in the choice of process involves understanding not only
informal dispute resolution processes, but the other primary alternative – the adjudication
process. In a system that endorses (at least) two dispute resolution mechanisms,
providing informed consent to an informal dispute resolution process seems necessarily
to imply an understanding of the other (court adjudication) process, the differences in the
extent to which continued voluntary participation is possible in the other process, and the
different implications of outcomes achieved through the other process. It is in the
facilitation of understanding of these matters that I see the greatest potential for court-
connected parent education programs to facilitate parental autonomy within the family
law regime. Below, I attempt to clarify the kind of information that could be provided to
achieve this potential, and to acknowledge the limitations on court-connected parent
education’s potential impact in light of its primary function as information provider.

In light of their information provision function, parent education programs are
best able to facilitate parental autonomy in a manner consistent with Nolan-Haley’s first
element. This criterion involves ensuring that parties are educated about the mediation
process, and, applying the extended framework introduced above, about the court
process. An illustration of how this role can be operationalized in the parent education
setting is provided through a brief description of certain aspects of the PIP script that
deal with both mediation and the court process.
In relation to mediation, the PIP provides information about: mediation as a voluntary process in which parents must agree to participate; the mediator as a person distinct from a judge, arbitrator or evaluator who has the job of "guiding" parents to design their own parenting plan; mediation as a process that should occur in concert with independent legal advice both before the process begins and as issues are being resolved; the process by which mediation often occurs – with parties first meeting separately with a mediator followed by joint sessions to define and work through the problems that parties wish to resolve through mediation; the ability of the mediation process to be “open” or “closed”; and a caveat about the use of mediation in situations of domestic violence, abuse, and unequal bargaining power.17

With respect to the court process, the PIP includes information about: case management and the settlement culture within current family courts; various common forms associated with family court proceedings; formal requirements such as the need to “serve” the other party with court documents; and the difference between aspects of the process which are aimed at achieving a temporary or “interim” resolution (and the nature of the “affidavit” evidence required for these proceedings) as opposed to those aimed at achieving a final resolution (and, if trial ensues, the kind of “live witness” evidence required). Facilitators inform parties that it is possible to reach agreement (for example, through negotiation or mediation) on some matters, and have a court decide matters that cannot be decided by them and the other parent.18

17 For the actual scripted information, see the PIP script, Appendix B at 320-323.
18 See PIP Script, ibid at 318.
While this is just one example of scripting, it illustrates the potential for parent education to play some role in informing parties about the different processes, and the fact that the processes are not mutually exclusive. This can assist parties to make principled and informed decisions.

With respect to Nolan-Haley’s next requirement – ensuring that continued participation in mediation is voluntary - court-connected parent education can play a more limited, yet important role. While the only persons who can ensure that continued voluntary participation during the mediation process is the mediator, parent education can provide parents with the knowledge that either parent can choose to discontinue the process at any time. Further, parents should understand that the court adjudication process works differently. While one can discontinue their participation in the court adjudication process, this discontinuation could result in an outcome determined by a judge, whereas with discontinuation of the mediation process, no outcome will be reached, other than a mediator potentially submitting either a closed or open (depending on which was chosen at the beginning of the mediation) mediation report to a court. The differences here are significant, and parents need to be aware of this significance.

Responsibility for the third of Nolan-Haley’s criteria, ensuring a full understanding of, and consent to, the outcomes reached in mediation – again falls largely upon the mediator. However, parent education programs can assist parents in being aware that they must understand the outcomes reached in mediation and consent to those outcomes. Adding to Nolan-Haley’s discussion, it is also important for parties to understand that when their agreements become incorporated into documents such as
separation agreements or a mediation report, which in turn are incorporated into consent orders, these matters are viewed as "legal conclusions" that can be enforced by a court. Other relevant information in relation to outcomes that parent education programs can provide is that with a court adjudication process, parties will receive a judicial outcome delivered by a judge, rather than negotiating their own outcome. There are pros and cons to these different outcomes, knowledge of which is beneficial to parents.

In summary, then, the most significant role that parent education programs can play in the facilitation of parental autonomy is that of informing parents about the range of options and the potential significance of various choices. As Nolan–Haley has suggested,

"The principle of informed consent promotes understanding and alleviates the fears associated with a lack of information. When parties come to mediation without sufficient knowledge of what is occurring, there is a greater likelihood that they will consciously or unconsciously resist mediation and thus never fully give consent to participate."¹⁹

It is not sufficient, however, that information simply be provided. In order for this information to foster informed decision making, there must be some indication that the information has been useful to parties. To consider this element in relation to the PIP, I would like to assess whether the results obtained through PIP research are indicative of the facilitation of parental autonomy in two ways. First, I will consider participants’ reported perceptions of the utility of what I will call “system information” - that is, information about the mediation process and the court regime, along with the legal terms associated with both of those systems, and “community resource information” – that with which they

¹⁹ Nolan – Haley, supra note 6 at 792.
can obtain further information and supports. Next, a measured change in the level of understanding of both the legal process and the mediation process from the time that parents filled out the pre-test questionnaire to the time that they completed a follow-up questionnaire would, I suggest, be indicative of whether parent education programming has played some role in assisting parents to participate in the family law system through the exercise of parental autonomy. The suggestion that parties generally desire this greater level of understanding is substantiated by the *ABA Study*,20 the *Search for Counsel Study*;21 and Sarat and Felstiner’s studies,22 described in Chapter 5, all of which found that study respondents, whether legally represented or not, sought increased information about the family law process.

The results reported in Chapter 4 of this work confirm that a majority of PIP respondents did find that the “system” information and “legal” information they received was helpful to them.23 (Specifically, in relation to the post-test surveys, 65% of the program respondents indicated that the program provided very helpful information on understanding alternatives that can avoid or shorten the court process, while 53% of respondents found the information was very useful in assisting them to understand legal

---

23 See Chapter 4, Table 4 and accompanying text.
terms, and 57% found that the information was very helpful in helping them to understand what was involved in the court process.) For each of the questions relating to the system and legal terminology, over 90% of the program participants responded that the program was either very helpful or somewhat helpful. Likewise, in terms of the availability of community resource information, a very high number of respondents suggested that the information provided at the PIP seminar was very useful. (Seventy two percent of respondents found that the availability of community resources for legal information was helpful and 64% of respondents indicated that the availability of non-legal community resources was helpful.) These results suggest that participants agreed that PIP was helpful in assisting with the exercise of parental autonomy in decision making about the process in which parents were becoming engaged or had already become engaged.

The positive results provided in the follow-up questionnaires completed between four and six months after seminar participation24 (5 out of 6 respondents indicated that the seminar was helpful in terms of understanding legal rights and approximately 75% of respondents indicated that the seminar had assisted them to know what to expect in court either somewhat or very much) also tend to suggest that court-connected parent education programs can contribute to the "informational" element of the promotion of parental autonomy.

I have suggested that a measured improvement in reported knowledge about the mediation process and the court process would be indications of the potential for court-

24 See Chapter 4 at 179.
connected parent education programs to foster parental autonomy through informed
decision-making. Chapter 4 did report improved self-reported knowledge by parents
between the pre-test and follow-up questionnaire completion,\(^2\) about the court process
(60\% of reporting respondents indicated having a stronger understanding on follow-up)
and alternatives such as mediation (56\% of respondents indicated having a stronger
understanding on follow-up). While the passage of time, and involvement with the family
law regime’s processes over that time obviously play a role in increasing consumers’
understanding, it is arguable that at least some of the improved understanding may be
attributable to parent education involvement.

b. Parental Autonomy and Different Client Groups

It is also important to think about whether there is any difference in the ability of
parent education programs to promote the parental autonomy of different client groups. It
is important to point out one of the limitations of this research. The measures used did not
contain questions that delineated participants as those who had been victims of domestic
violence as opposed to those who had not, and as such, I am not able to offer here an
analysis of whether the PIP had a specifically positive or negative impact on the exercise
of parental autonomy by victims of domestic violence. As reported in Chapter 5, however
PIP content has been revised to continue to address the nuances of messages that need to
be provided to those who have experienced domestic violence. For example, rather than
making the broad (and dangerous) statement found in some early parent education

\(^2\) See Chapter 4 at 183.

269
programs, that parents should cooperate for their children’s sake, a portion of the PIP script reproduced below illustrates the kind of approach to differentiating the kinds of communication that may be appropriate in some circumstances and not in others:

It might be helpful to deal with the other parent as you would deal with someone you were doing business with. For example, we don’t always like our boss at work, but we have to deal with him or her in a business like way. Parents in low conflict relationships who have a business-like relationship focused on the business of raising children generally fare well. Their “business” may involve direct communication. For families where there are higher levels of conflict, however, necessary dealings will often be best carried on without direct contact, and sometimes through a third party. …26 (Emphasis added.)

Also, community resource reference information is specifically provided to assist both those who have been victims of violence and those who have been perpetrators of violence. While future research should focus specifically on the perceived benefit of the program for those who have experienced domestic violence, it is suggested that at the very least the program information, assuming it contains messages that do not assume a coercive, “cooperation at all costs” approach, may help victims of violence to understand that their situation may in fact call for a different form of dispute resolution and a different form of post-separation parental contact than would the situation of somebody who had not experienced domestic violence.

With respect to different cultures and their perception of the information provided through the parent information program, the data analysis suggests very little difference in levels of satisfaction between groups who identified as white and those who identified as

26 PIP Script, Appendix B, at 316-317.
falling within a non-white group, specifically Asian, African, Latino or other. There was a slight indication of higher rating for the legal information (i.e. understanding what is involved in the court process) and understanding legal terms amongst the non-white respondents, but the difference was minimal and both groups appeared to value the information highly.27 Similarly, the status of the parental relationship had very little impact on outcomes, with one minor exception being that individuals living in a common law relationship appeared to find the information relating to understanding what was involved in the court process more helpful than the married or dating groups.28 The better understanding of this group, along with the still-strong indication of utility in the other groups, supports the role of court-connected parent education programs as facilitators of parental autonomy.

In terms of assessing the perceived utility of legal information from the perspective of participants who had a lawyer when they attended the seminar as opposed to those who did not, results provided in Chapter 429 suggest that the “system information” provided by PIP seminars was considered very helpful by a majority of each group, with “understanding alternatives such as mediation” being rated as equally helpful to represented and unrepresented individuals (with 65% of each group indicating that the information provided was very helpful in understanding the court process and alternatives to the court process, such as mediation), and “understanding what is involved in the court process” and “understanding legal terms” receiving slightly higher ratings from those who

27 See also Chapter 4 at 182.
28 Ibid.
29 See Chapter 4, Table 5.
were unrepresented (59% and 55% respectively) than from those who had a lawyer (55% and 51% respectively). When the response “somewhat helpful” is added to the results, each group’s approval ratings were approximately 90%. Feedback about the utility of available legal community resources was identical for both groups (with 73% of respondents indicating the information provided was very helpful), suggesting a similar ability for court-connected parent education to empower represented and unrepresented individuals to obtain additional information that might be useful to them as they proceed through the family law process.

In summary, it is suggested that the data presented supports the initial assertion that court-connected parent education programs which include information about the legal process and alternatives to the court process along with legal definitional material can assist in the promotion of parental autonomy in a manner that is consistent with Nolan – Haley’s conceptualization of that concept. This information may additionally assist parents in participating in the mediation process with a level of understanding that will help them to understand that their continued participation must be voluntary, and to emphasize to them that it is essential that they understand and consent to the outcomes they reach in mediation. Further, while I have manipulated Nolan-Haley’s framework somewhat by addressing the need to provide participants with information about the court process, I hope that I have clarified how provision of this information by parent educators is key to helping to ensure that parties understand the implications of a decision to enter into the court adjudication process or the mediation process.
3. **Role of the State: Empowerment Versus Social Control**

The literature reviewed in Chapter 1 highlighted the fact that parental autonomy (and its associated notion of liberty) quite often exists in a tense relationship with the state's role in promoting alternative forms of dispute resolution to deal with family law disputes. This tension was discussed in some detail within the debates around mediation and court adjudication. However, the tension is also relevant to questions about both the type of parent education program that a state might choose to endorse, and the type of attendance policy chosen for the implementation of such a program. The discussion to this point has engaged primarily with the interaction of court-connected parent education programs with ADR processes and the court adjudication process. I turn now to an aspect of court-connected parent education's role that is perhaps more “internally” relevant in that it considers issues specific to the structure of parent education programs operating within a democratic liberal state. However, it will become evident that this more narrow question, which might be characterized as one of “structural program integrity” does “fit” within the literature relating to state intervention in the larger dispute resolution context.

a. **Applying Girdner’s Framework to Court-Connected Parent Education**

Linda Girdner’s discussion about the tension between fostering parental autonomy and furthering state interests as “empowerment” versus “social control” extends the discussion of parental autonomy by focusing on the state’s role in promoting that

---

autonomy. Her conceptual foundation for considering where the appropriate balance between autonomy and social control might lie is extremely helpful to the exercise of thinking about how court-connected parent education goes about its business. I have already indicated that I favour autonomous parental decision making – of necessity, I think, this means that I do not favour system initiatives that tip the scales in favour of “social control.” Again, I plan to draw on the statistics described in Chapter 4, along with the doctrinal analysis conducted in Chapter 3, and to apply them to Girdner’s theory. While Girdner’s work, like Nolan-Haley’s, was situated within the mediation context – it looked at indications of controlling mediators and empowering mediators, it is possible, I think, to apply the basic concepts underlying her work to a consideration of indications of controlling (parent education) facilitators and empowering facilitators.

If the arguments in earlier parts of this works, which place an important responsibility on parent education programs to assist parents in obtaining information about dispute resolution processes, along with the legal and emotional issues associated with the separation process, are correct, and such programs have the potential to act as facilitators of parental autonomy, it is not difficult to understand how program facilitators could become the agents of either empowerment or social control. The utility of Girdner’s theory for current purposes is illustrated by replacing the word “mediators” with the word “facilitators” in the following passage:

My impression is that many [facilitators] perceive their role as advocating for the child, and they have a strong ideological preference for co-parenting. If they also give relatively little weight to the legal consequences of custody decisions of the parties, to the exploration of other custody arrangements, and to the right of parties to settle in another
forum (even court, if they choose), they are likely to tip the scales in the direction of social control.  

Much of the degree to which empowerment or social control is exercised in the parent education program context will depend on program scripting, and on how closely facilitators adhere to the scripted content. Indeed, some literature respecting parent education, particularly that which describes programs that are linked quite closely with mediation programs, embodies the strong ideological preferences referred to in the passage above, along with a focus on the use of mediation as the ideal forum for resolving custody related matters. In this analysis, I would like to consider the extent to which the PIP seminar content falls within the parameters of empowerment suggested by Girdner and the extent to which the program has been perceived by parents as one which should be implemented on a mandatory basis, for this addresses some aspects of the public’s tolerance for such a state imperative. In the following paragraphs, I compare scripted portions of the PIP with two of the most significant statements made by Girdner about empowerment versus social control.

1. Power Differences and Mediation

Girdner says that empowering mediators are aware that some power differences can be altered whereas others cannot. Further, she suggests that empowering mediators accept that there are times when it is better not to arrive at an agreement in mediation.

---

31 Girdner, *ibid.*
The PIP script, in dealing with mediation, specifically addresses the power imbalance that may occur in situations where parties have been involved in an abusive relationship:

Some people ask about the use of mediation in situations where there has been domestic violence, abuse, and unequal balances of power within the relationship. Many mediators are trained to detect such situations and to address the problems associated with them. Mediation is not appropriate for everyone.32

The script is intended to convey the message that some view it as inappropriate to conduct mediation situations where power imbalances exist, while others view it as appropriate as long as the mediator is one who is trained to recognize and assist with such power imbalance. This segment is one of the portions the PIP script that has been subject to significant debate. It is difficult to find consensus about appropriate wording. The facilitator group consists of lawyers and social workers who hold many of the range of views described in Chapter 1 of this work. Some argue that the message is still not adequately clear, and that there should be a more definitive statement that mediation is not appropriate at all in situations of domestic violence. Yet this view does not reflect a unanimous (or even majority) position within the professional or academic literature. As such, the script attempts to take the middle ground of highlighting the problem, indicating the existence of specialized mediator training, and asserting the position that mediation is not always appropriate.

32 PIP Script, Appendix B, at 323.
It is also suggested within the script that it is imperative for parties who have been victims of domestic violence and who are considering mediation to disclose the abuse to the mediator and where possible, to a lawyer:

...[I]f you have been involved in an abusive relationship but you still think that mediation is the way you would like to settle the issues between you and your child's other parent, it is important to tell the mediator, and your lawyer if you have one, of the fact that the relationship was abusive.3

It is hoped that this message, along with the one above and when considered in conjunction with the advice that mediation should always be undertaken in conjunction with legal advice, presents mediation as a viable option. However, this viability is subject to the caveat that mediation may be inappropriate in certain circumstances, and appropriate only with very specific safeguards in others. While this message could possibly be further refined and clarified, it still seems to fall within Girdner's definition of empowerment. The part of the script described above does not, to paraphrase one of Girdner's characterizations of social control, "define it as [the prerogative of the facilitator], not the parties, to decide whether a mediated agreement is better than a court-rendered one."34 Rather, it attempts to portray mediation as one of the viable procedural choices for the parties.

ii. Parent Education's Messages about Preference for Co-Parenting

Girdner says that although many mediators have an ideal preference of co-parenting, mediators use an empowering approach by not imposing these views on

---

33Ibid.
34See Girdner, supra note 30 at 146.
clients. Instead, they focus on the importance of the child’s continuing relationship with both parents, on the developmental needs of children at different stages, and on the need for children not to be exposed to parental conflict.\(^\text{35}\)

The PIP script discusses the concepts of sole legal custody, joint legal custody, and the differing physical custodial arrangements under which parents may operate in a post-separation setting. It also touches on situations were joint custody is not appropriate:

Custody means the right to make decisions about matters that affect your child, such as his or her religion, school, and medical treatment. Custody is not related to where the child lives. The law says that each parent has the right to custody unless a court order or separation agreement gives that right to one parent only. There are two main types of legal custody: sole custody and joint custody:

i. **Sole custody:** One parent is given the responsibility and authority to make decisions for the child. Both parents may see the child and both parents can have input into the decisions about the child but the final legal responsibility is with the custodial parent.

ii. **Joint or shared custody:** A joint custody arrangement is one where both parents participate in decision making about the child’s care. It may be ordered if parents get along and if it is safe for parents to interact so closely. **Joint custody is not appropriate where someone has been assaulted.** It does not mean that the child must live half of the time with one parent and half of the time with another parent. In can also mean that the child spends more time at the residence of one parent than the other.\(^\text{36}\)


\(^{36}\) PIP Script, Appendix B, at 337-338.
The lawyer facilitator points out that even in a court-adjudicated matter, it is likely that, barring danger to a child, a child will have continuing contact of some form with each parent: “Except in the most unusual circumstances, judges will make decisions that result in both parents being involved in the child’s life.”37 The script describes the use of parenting plans as a way of allocating parental responsibility for various aspects of the child’s day to day and long term care, and notes that “a parenting plan can be an informal arrangement reached between the parents, or it can be part of a separation agreement or court order.”38 A fairly long segment of the PIP addresses children’s ages and stages of development and considerations for custody and visitation that may be relevant at particular stages.39 Additionally, there is a fairly lengthy segment which focuses on the importance of children remaining outside the purview of parental conflict, regardless of the manner in which child care issues are being resolved by the parents. The following passage introduces the issue of the impact of parental conflict on children:

Often, parents don’t realize that their own way of dealing with the other parent can add to the stress children already feel as a result of the change in the family organization. Research suggests that it may not be the actual separation, but rather the conflict related to the separation, that causes most problems. In particular, putting children in the middle of conflicts is harmful to them …40

Clearly, the statements in the paragraph above are not value neutral – and Girdner recognizes such information has the potential to exert some social pressure on parents.

37 PIP Script, *ibid* at 318.
38 PIP Script, *ibid* at 319.
39 See excerpts from the PIP Participant’s Manual at Appendix C. At 346-348, a chart setting out general information about different ages and stages of children’s development, and associated considerations in relation to care arrangements.
40 PIP Script, Appendix B at 313.
However, she takes the position that these messages, where delivered without pressure being placed upon parents to choose a particular form of custodial arrangement, fall within an empowerment model. In light of the excerpts described above, PIP facilitators, by adhering to the scripted presentation of the PIP, could present a form of state sanctioned program that represents empowerment rather than social control.

4. Ensuring Access to Court-Connected Parent Education Programs

Moving from the proposition that the information provided through a parent education program such as PIP falls at the “empowerment” end of Girdner’s scale, I next consider the role of the state in ensuring that parties have access to the information. It seems logical to suggest that the larger the number of parents who receive the messages provided through court-connected parent education programs, the greater the potential for such programs to empower parents and to foster their ability to make informed decisions about their separation. Existing literature and certain of the findings presented in Chapter 4 suggest that mandating attendance at court-connected parent education programs is desirable from the perspective ensuring that a consistent message is received by all parents contemplating involvement with the family law regime. (It will be recalled that receipt of this information by both parents increased the tendency toward settlement of court cases.) Further, the state’s interest in ensuring uniformity in approach to child-related issues is illustrated in the Child Support Guidelines objectives \(^{41}\) reviewed in

\(^{41}\) SOR/97-175, s. 1. See Chapter 2 at notes 106 and 107, along with accompanying text.
Chapter 2 of this work. However, as alluded to in earlier chapters, the decision to mandate attendance is not as straightforward as might initially seem to be the case.

The analysis undertaken in this work has made extensive use of the content and research relating to the PIP. However, there is no consistency in the kind of parent education programs offered from jurisdiction to jurisdiction. The PIP model of parent education is one that fits within the "basic" level parent education program described in Chapter 2. One key distinguishing feature between the "basic" level programming and more "active" level programming is that it seeks to be informational as opposed to seeking to achieve demonstrably changed parental behaviours. A considerably different level of state involvement is contemplated through the implementation of a mandatory "active" level court-connected parent education program than is the case with a mandated "basic" level parent education program.

In order to situate the debate about attendance policies with regard to particular kinds of parent education programming, it is useful to return to the analysis conducted in Chapter 3 of the various potential state roles in promoting children's best interests.\footnote{See, in particular, Chapter 3 at 125-132.} It will be recalled from that analysis that the degree of state intervention warranted in relation to the manner in which parents conduct their parenting roles has been construed as depending on the risk of harm to which children are subjected. For example, it is clearly viewed as acceptable for the state to actively intervene, without parental invitation to do so, in situations where parental functioning has fallen below a particular threshold.
(This threshold has been said to be assessed according to community standards, though just how the "community" is to be defined is not particularly clear.) I have further argued in Chapter 3 that a number of documented concerns within social science literature have been accepted as valid by judges and other various actors within the legal system, and are likely to be deemed acceptable topics for mandated information provision. Specifically, I would argue that providing mandatory information to all separating parents who seek to access the family law regime about the dangers to children of continued exposure to parental conflict, and about the need to keep these factors in mind as they consider their dispute resolution options within the context of the legal concepts that apply to their situation, is a warranted level of state intervention. However, it is generally accepted that other than in cases where a harmful level of mal-adaptive behaviour that causes a significant risk of harm to a child is found to exist, courts (and the state by extension) should be reluctant to interfere with parental autonomy regarding child-rearing practices. As a result, it is difficult to accept that an "active" level program aimed at achieving demonstrably changed parental practices, if mandated, would be anything other than an attempt at what Girdner would refer to as social control. Indeed, Girdner has queried (albeit in relation to mediation):

Is it appropriate for the state to order a class of persons involved as parties to a civil suit to undergo an intervention, conducted in private, which is directed to changing their thinking, feeling, and behavior in relation to their family life?43

43 Girdner, supra note 30 at 142.
It may well be true that active level programs should be offered as a component of
the model of therapeutic justice referred to by Kuhn and others. However, participation
in such programs should be available on a voluntary basis, or ordered where deemed
necessary by a decision-maker dealing with the dispute. Mandated “active” level
programming, while providing a more in-depth level of education, arguably goes beyond
the concept of empowerment. “Basic” level programming, while not achieving the same
demonstrated change in parental behaviour, maintains the empowerment focus that this
work argues is important in the context of a legal system which offers different dispute
resolution processes and which attempts to encourage parents to embark on those
processes in a manner that is cognizant of implications for the children who are at the
root of these disputes.

Basic level court-connected parent education programming, even when mandated,
respects parties’ ability to determine the course of their own lives, while allowing the
state to deliver certain “family value” messages and process option information which
may, as illustrated through the PIP court file reviews, have the effect of increasing private
bargaining and decreasing litigiousness. Active level programming, if mandated for all
individuals contemplating engagement with the family law dispute resolution regimes,
could embody a level of state invasiveness comparable to mandatory mediation in family

44 See, for example, Jeffrey A. Kuhn, “A Seven-Year Lesson on Unified Family Courts:
What we have Learned Since the 1990 National Family Court Symposium” (1998) 32
Fam. L. Q. 67 and Barbara A. Babb, “Fashioning an Interdisciplinary Framework for
Court Reform in Family Law: A Blueprint to Construct a Unified Family Court” (1998)
71 S.Cal. L. Rev. 469.

283
matters, the dangers of which have been described by authors such as Grillo,45 Bailey46 and Fineman.47

Participant support for mandated “basic” level programming is found in the data presented in Chapter 4.48 Program participants did not see the PIP as overly intrusive. Participants strongly recommended the program to other parents and 90% of respondents were agreeable to some level of mandatory attendance (with approximately 70% indicating that all parents should be required to attend a program such as the PIP and another 20% indicating that attendance should be required for those who are involved within the family process for the first time.) There were no statistically significant differences in result on these questions based on whether the participants themselves had been required to attend the program or had been self-selected to the seminar. In light of this data, combined with all of the considerations reviewed in previous parts of the work, there seems to be a reasonable “fit” for basic level information programs as a mandatory element of the family law regime with the primary purpose of informing parents about their options and the legal and emotional factors that are likely to impact upon their decision making.

46 Bailey, supra note 2.
48 See Chapter 4 at 176-177.
5. **Role of Professionals within the Family Law System**

Facilitation of the PIP involves a somewhat "forced" level of interaction between professionals since each seminar is facilitated by a lawyer and a social worker. Having witnessed over 150 seminars being conducted by these lawyers and social workers, my suggestion, based totally on observations, is that this approach to program facilitation indeed provides participants with an understanding that both lawyers and social workers understand family law matters as situations encompassing both emotional and legal elements. Further, parents receive the message that they can benefit from the different skills that each type of professional brings to these multifaceted matters. Certainly, survey results from the PIP seminars suggest that participants were highly satisfied with the facilitation methods of both the lawyers and social workers involved within the program.

Notwithstanding the positive research results and my own anecdotal observations suggesting the positive benefits of professional cooperation, I have struggled somewhat with the question, inspired by Smart & Neale's work, about whether the settlement-oriented approach used within the seminars works to diminish the validity of lawyers' roles as advocates within the family law system. Certainly, the message provided within the program is that in questions of continuing child care responsibilities, it is the best interests of the child and not those of the parents which are dominant. Further, it is suggested that generally speaking, continued contact with both parents is in the child's interests. However, and probably because as of the time of the writing of this work the
legislation in Canada dealing with custody does not set out a presumption in favour of shared parenting or of private bargaining, there is not the same sense of abandonment of any advocacy role on behalf of parents as Smart and Neale describe as resulting largely from England's Children's Act.

Further, the PIP script is very clear in its orientation toward ensuring that regardless of the process chosen by parents, legal advice is an essential aspect of successful involvement within that process. In fact, one of the interesting and unexpected discoveries within the court file research was that participation in PIP corresponds with a greater tendency to hire a lawyer. Specifically, when a case reveals representation of some type, the control group is much more likely to use only duty counsel, whereas attendance at PIP seems to correspond with parties seeking out a private lawyer either through legal aid funding or private funding at some stage in the process.49 This may be attributable to some of the messages provided within the parent information program that suggest it is always in parents' best interests to have the greatest amount of legal information and advice they are able to amass.50

Finally, it should be noted that certain segments of the PIP script quite clearly focus on parental rights as they pertain to the decision making process, such as the right

49 See Chapter 4, Table 2.
50 See, for example, PIP Script, Appendix B at 328. The script states: Whether you choose to resolve the issues that have come up between you and your child’s other parent by negotiating an agreement between the two of you, reaching an agreement through mediation, or litigating before a judge, it is helpful where possible to have a lawyer advise you about your legal rights and responsibilities.

286
to financial disclosure within the mediation process, the obligation to provide full financial disclosure and the meaning of that disclosure when completing financial statements, the right to seek restraining orders where a child or a parent is in danger, and the parameters around which support obligations are built. In summary the PIP, appears to be a model which provides some balance in portraying a realistic sense of the roles of both the mental health profession and the legal profession in the existing family law regime. However, programs that are facilitated by only members of the mental health profession, or only members of the legal profession, are unlikely to have the same capacity to present this message.

Having said this, I do believe that generally speaking, family lawyers are experiencing some uncertainty about the appropriate balance in their role between advocating for conciliatory approaches and the welfare of children on the one hand, and upholding their professional obligation to represent their client “zealously” on the other hand. In my view, one sign of this uncertainty is the recent growth of “collaborative lawyering” in which all parties (ie. The clients and lawyers for both “sides”) agree that they will work to settle the matter, and if settlement does not occur, the parties will be required to retain new lawyers to proceed to court with the case. While it is beyond the scope of this work to consider the implications of this movement in detail, I mention it simply to suggest that there are issues around this question that are likely to persist in the foreseeable future.
6. Maintaining a Focus on Child-Related Benefits

In the final section of this analysis, I consider whether it is possible that PIP’s focus on legal information, albeit while including the traditional child related information, might act to dilute the benefits normally associated with court-connected parent education, and increasingly sought within the new discourse identified in Chapters 1 and 2.

I have already written about the fact that more active level programming might lead to measurable changes in parental behaviour with respect to their children. For the reasons outlined earlier, it is my position that this more active level programming, while desirable on a voluntary basis, or where required in specifically identified cases, should not be mandated as part of the family law process in which all parties must participate in order to be part of the state endorsed dispute resolution regime. Those who seek to actively promote shared parenting for virtually all separating couples will probably disagree with my approach. I accept this, but suggest that mandated basic level programming achieves at least as much child-related benefit as has been documented of mediation programs. For example, Pearson and Theonnes, referred to in Chapter 1 of this work, were unable to confirm any positive relationship between mediation and the quality and consistency of parental visitation with their children. Instead, they noted that parents who used mediation reported favourably on the sessions partly because the process focused on children and was aimed at educating them, the parents, about the

---

needs of children during divorce. Similarly, the results of the PIP research, reported in Chapter 4, illustrated that parental assessment of their own ability to consider their children’s needs had improved from the time that they completed the pre-test questionnaire to the time that they completed a follow up questionnaire, four to six months after their seminar attendance. This change was recorded regardless of whether parents attended the program as a result of being quasi-mandated or on a voluntary basis; regardless of whether they had a lawyer or not when they attended the program; and regardless of whether parties had been married or living together prior to the separation. The change for those who had been dating prior to the attendance at the PIP seminar improved somewhat but did not reach a level of statistical significance. This result does raise some questions about the extent to which the current PIP content sufficiently addresses the needs of parents who were in a dating situation. It is suggested here that further research, preferably of a qualitative nature, might help to discern whether the lower level of change for dating individuals is more appropriately described as a function of something inherent to the relationship or to a need for more appropriate information for these parents’ needs.

I also wondered, in beginning to consider program content questions, whether there would be any difference in reported changes in behaviour that might be attributable to different cultural backgrounds. However, the research results suggest that there was no such difference. It is important to emphasize at this stage, however, the need for programs that are imposed on a mandatory basis to provide court approved translators to

52 See Chapter 4, Table 8 and accompanying text.
53 Ibid.
ensure the availability of information to all parents seeking access to the family law regime.

In addition to the measured self-reported change in parental ability, it is also relevant to note the high level of parental satisfaction with respect to the child related material provided in the PIP seminar. While it has been suggested by some that a focus on legal material might foster litigiousness on behalf of parents, this result is not borne out in the PIP data. Instead, as recorded previously, higher settlement rates were achieved by those who attended PIP as opposed to this who did not, and significant improvement in perceived ability to meet children’s needs was documented. Further, information that might be characterized in “child related” was considered very helpful by a majority of survey respondents.\(^{54}\) (For example, the information on understanding the needs and reactions of children to the separation process was considered very helpful by 59% of respondents; understanding the importance of avoiding putting children in the middle of conflict was viewed as very helpful by 77%; understanding how children get caught in the middle of conflict received a rating of very helpful from 69% of survey respondents and understanding the importance of taking care of one’s self in order to help children adjust to the separation was viewed as very helpful by 67% of those who completed the survey questionnaire.) Over 90% of those surveyed answered that the program was either very helpful or somewhat helpful.

\(^{54}\) See Chapter 4, Table 4.
All of the responses in the child related category were considered very helpful by a slightly larger percentage of those who had lawyers than of those who had no lawyer.\textsuperscript{55} One might question whether this result is reflective of the quantity of information that those with no lawyer would be attempting to assimilate in relation to a program such as PIP, and might suggest that additional information (or additional time to absorb the information) should be provided for those individuals.

When the results were calculated comparing the reason that participants attended the program, there was a mix in terms of the percentage of individuals who found different components of the child related information to be very helpful. Overall, however, the results are consistently positive among those two groups. At follow up, 75\% of the respondents still found that the PIP had provided them with assistance in finding ways to avoid placing their children in the middle of their conflicts with the other parent.

In summary, I suggest that "basic" level court-connected parent education programs that contain legal information can still provide important child related benefits, along with substantive and procedural information, work to ensure a balance between empowerment and social control. By describing different forms of custody and different methods of dispute resolution without forcing the imposition of a shared parenting norm or a presumptive mediation process, the program avoids the most common form of social control discussed within the literature.

\textsuperscript{55} See Chapter 4, Table 5 and accompanying text.
Conclusion

The analysis undertaken above suggests that mandated basic level court-connected parent education programs containing both emotional and legal content can play some role in decreasing the polarization related to the existence of formal and informal dispute resolution options within the current family law system. The best potential in this regard rests with ensuring the consistent inclusion of both legal and non-legal separation-related information within program curricula, and in a greater use of both lawyer and mental health professionals to facilitate the programs.

Programming should not advocate for one particular form of custody or for one particular form of dispute resolution process, but should be aimed at assisting parents in making informed decisions not only about the process they choose to resolve disputes but also about their own personal course in dealing with their children and their children’s other parent on an ongoing basis. To do otherwise invites the peril of further tensions, or of court-connected parent education acting as a form of social control that seeks to force parents to choose specific substantive and procedural avenues.

In a democratic liberal country that embodies the values of due process and liberty, this approach is the most viable manner of ensuring that parents make decisions about their post-separation lives, based on informed considerations of their children’s needs and of the range of options available to them. Viewed in this light, the importance of the questions about the role of court-connected parent education programs, and their relationship to processes such as mediation and court adjudication, is clear.
I have not come close to answering all of the questions about the most appropriate objectives for court-connected parent education, or the most effective means of integrating this service within family law dispute resolution regimes. I hope, however, that my analysis has highlighted some of the issues warranting debate, and has at the very least provided a starting point for future discussions.

In particular, fruitful avenues for future research and analysis could involve in-depth comparative work amongst different program participants who are involved with different court systems. For example, engaging in comparative research of Toronto's Superior Court Family Information Sessions and the Parent Information Program could provide important insights into whether there are specifically identifiable differences in the two groups that might have implications for program content. Ideally, this comparative work would be conducted in relation to a common script, piloted with both groups for the purpose of this comparative analysis.

Further important work could be undertaken regarding the extent to which parents in different circumstances are actually able to exercise the autonomous decision-making that I have suggested parent education programs should promote. This research could take the form of interviews and/or focus groups with program participants from different groups, including those that have been identified in this work as requiring specific attention, such as those who have experienced domestic violence, those whose children were conceived through dating relationships, and those from various cultural groups.
Finally, empirical research assessing whether and how gender/ethnicity of program facilitators within parent education programs impacts upon program assessment could provide valuable insights into program-delivery options.
APPENDIX A

PIP Goals and Objectives
PARENT INFORMATION PROGRAM

GOALS

UMBRELLA GOALS

The umbrella goals for the project are to provide the type of information parents need:

- to understand the needs and reactions of children at various ages to separation
- to understand the impact of parental conflict on children
- to understand their alternatives for resolving the issues related to their separation;

and to provide the following:
- basic legal information (definitional as opposed to legal advice)
- an explanation of the court process
- information about courtroom formalities
- information about support resources available in the community

PROCESS GOALS

- Simple language that can be easily understood
- Normalizing the separation experience
- Acknowledgement of participants' own wisdom
- Creation of a positive learning environment that engages participants, gives concrete information that affects participants' sense of accountability
- Creation of a safe learning environment through process management of program (e.g. guidelines for questions)
- Provision of overview to clarify goals
- Adjust program over time, based on evaluative feedback
DETAILED LEARNING OBJECTIVES

(In relation to the umbrella goal of understanding the needs and reactions of children to separation)

Understanding of the elements of separation from both the adults’ perspective and the children’s
Understanding the importance of adults taking care of themselves in order to be able to help children adjust to separation
Understanding of children’s need for and right to a healthy, ongoing relationship with both parents
Understanding of some useful responses to children’s reactions/needs

(In relation to the umbrella goal of understanding the impact of parental conflict on children)

Understanding that children are often “caught in the middle” of adult disputes and that this can be avoided
Understanding how parents draw children into conflict
Understanding of what behaviours “trap” children
Understanding of some useful ways to avoid having children be caught in the middle of adult disputes

(In relation to the umbrella goal of understanding alternatives for dispute resolution)

Understanding the role of mediators
Understanding the role of assessors
Understanding the role of the Children’s Lawyer
Understanding the nature of a negotiated separation agreement

(In relation to the umbrella goal of providing basic legal information)

Understanding of the benefits of sound legal advice
Understanding of the availability of legal aid
Knowing where to find legal information within the community
Understanding the role of duty counsel
Understanding what to expect from a private lawyer
Understanding the legal rights and obligations of parents after separation (custody, access, support)
Understanding of court orders available in family court (such as interim orders, restraining orders, non-removal orders)
(In relation to the umbrella goal of explaining the court process)
Understanding of the purpose of applications and answers
Understanding of the purpose of motions
Understanding of the purpose of affidavits
Understanding of what is required in a financial statement
Understanding of what is involved in the pre-trial stages of a case
Understanding of what is involved with a trial

(In relation to the umbrella goal of providing information about courtroom formalities)
Understanding the importance of appropriate demeanor with the judge
Understanding the importance of appropriate demeanor with the other parent
Understanding the importance of not bringing children to court where possible

(In relation to the umbrella goal of providing information about support resources available in the community)
Knowledge of mediation services
Knowledge of counselling services
Knowledge of cultural services
Knowledge of availability of legal clinics and legal information
Knowledge of supervised access services
APPENDIX B

PIP Part A Script
(Social Worker) Welcome to Part A of the Parent Information Program. My name is ___________. (provide relevant professional information). I will be facilitating the seminar this evening along with (Lawyer) ___________. (provide relevant professional information). This is the first part of a 2 part program sponsored by the Donner Canadian Foundation and the Ministry of the Attorney General.

First, we want to thank you for coming this evening/morning. We know that many of you had to change your schedules and rush to get here. The seminar will last 2 ½ hours, which will include a short break. Bathrooms are: (give location depending on site)

Next, we want you to know that we realize each of you has come here with your own individual wisdom. This means that not everything we say today will be new and different to you. Hopefully, we will be able to add a few new ideas and pieces of information that you will be able to add to the knowledge that you have already developed.
Part A—Parent Information Program

(Overhead #2) Objectives and Organization of this Seminar

(1) *Share some of the common effects that parental separation has on adults and children.*

I should explain that when we say "separation", we are not only talking about people who were married or living together. Even if the relationship that led to the birth of your child was short, many of the issues we talk about in this section will apply to you.

(2) *Discuss the stress children can experience if they find themselves caught in the middle of parental conflict.*

We'll also look at the benefits of parental cooperation. We want to be clear, though, that when we talk about cooperation we don't always mean talking directly. Cooperation can also mean communicating through things like letters, or through another adult.

I will cover these issues, and then X (Lawyer) and I will address #3:

(3) *Discuss Alternate Dispute Resolution - methods other than going to court for resolving custody, access, and support issues*

We will then take a break, and after the break, X (Lawyer) will spend our final hour addressing #4:

(4) *Take some of the mystery out of family law and the court process.*

At the end of the seminar, you will be asked to fill out evaluation forms to tell us whether the information was useful for you. We appreciate your feedback: it guides our future work. You will also be given a certificate indicating that you have taken part in the seminar. If you attend court or mediation, you should ask to have the certificate placed in your file.

*For use beginning February 23, 2004.*

February 16, 2004
Part A—Parent Information Program

In this seminar, we will be focusing on general themes that affect most separating/divorcing families.

(Overhead #3) Objectives and Organization of Part B

There is also a second part of the Parent Information Program, where we focus on helping you develop tools or skills to help with ongoing communication with your child’s other parent. How you communicate with each other depends on the level of conflict involved in your relationship with the other parent. We’ve divided the second part of our program into two seminars, one dealing with communication tools for parents in lower conflict relationships (ie differences in parenting style, differing attitudes toward parenting and so on) which will begin this fall, and another for parents with higher levels of conflict (ie. ongoing litigation, poor communication, violence), which will begin this summer. In order for us and you to know which part of the program is more helpful to you, at the break we’ll give you a short list of questions to help you decide which seminar you should attend.

No legal advice is given at any Parent Information Program seminar. Also, because of the amount of information that we want to share with you and our time restrictions, we won't be able to deal with anyone's specific situation in depth. We have found in the past that many of our participants' questions have been answered by the end of the seminar. We will stop, however, at certain points in the evening, and give you a chance to ask questions. We've included paper in your participants' manual, so please save your questions and jot them down. Also, please make sure that your questions are general in nature, so that all participants can learn from
Part A—Parent Information Program

them. Finally, don't hesitate at all to ask for clarification at any time if anything that we say is not clear. If it's not clear to you, chances are it's not clear to others either.

In this seminar, we will sometimes talk about the "conflict" that exists between you and the other parent. When we talk about conflict in this way, we are speaking only about differences in opinions, beliefs and attitudes. You may be experiencing a lot of conflict, some conflict, or maybe very little conflict with the other parent. We hope that some of the tips we give you today will help you to deal with this kind of conflict.

But, when we talk about "conflict" we are NOT talking about "violence" or "abuse" that may have occurred between you and the other parent. We will not be dealing with emotional, psychological, physical or sexual abuse, and the seminar has not been designed to address these circumstances. If you have experienced violence or abusive behaviour from the other parent, or you have been violent toward the other parent, we encourage you to seek out supports and services to help you deal with this situation. In your take-home reference material, we have listed several resources and services that may be helpful to you if you want help dealing with a past or current abusive relationship. These are listed under "Services for Victims of Violence" on pages 51 through 60 at the blue tab.
PART 1 (26 minutes) -- THE EFFECTS OF SEPARATION ON THE FAMILY UNIT

A. Parents' Reaction to Separation (5 minutes)

DETAILED LEARNING OBJECTIVES
(In relation to the umbrella goal of understanding the needs and reactions of children to separation)
- Understanding of the elements of separation from the adults' perspective
- Understanding the importance of adults taking care of themselves in order to be able to help children adjust to separation

A woman named Abigail Trafford describes what it's like when you separate in her book called Crazy Times:
"You're separated. Your world is turned upside down: you've lost your centre of gravity. You can't get back on the ground. Instead you flip-flop in slow motion like astronauts in space. You don't seem to go in any particular direction; not forward, not backward. You just float and sink and float and sink again. You wish you could just press a button and stop the emotional roller coaster you're on".

Before even talking about what your children are likely to go through when you separate, you should know that it's also common for parents to feel like their emotions have taken on a life of their own. It's important to remember that in order to care for your children and to help them adjust to a different family situation, you need to take care of yourself and your own feelings.
Here are some of the reactions you might experience following the breakup of a relationship: (1) Denial of the situation -- "I know he/she is coming back"; (2) Anger - "Why did she/he do this to me?"; (3) Bargaining - I'll do whatever it takes to get us back together; (4) Depression which can lead to alcohol and drug abuse; (5) Eventually, of course, you get to the stage of accepting the change and getting on with life. Some experts estimate that getting to that stage can take up to 3 years.

As you work toward the acceptance stage, remember that it's okay if you aren't feeling totally like yourself, and that some days it's a struggle to cope. Family and friends can often give a great deal of support at these times, but it's important to recognize that some people also need the help of a support group or professional. In thinking about whether your reactions are ones for which you might want to consider further help, the following might be useful:

♦ Are you sleeping for long periods of time? It's natural to be more tired given the new circumstances you're dealing with, but if you can't drag yourself out of bed for most of the day, there might be a problem.

♦ Have you experienced a big weight gain or loss? Most of us have to deal with the 5 or 10 pounds that can slip on over the course of a few months. It might be cause for concern if you've gained or lost, for example, 30 pounds within a couple of months.

♦ Has your use of alcohol or drugs (including prescription drugs) increased?

♦ Are you feeling so depressed that it's hard to face each day?

♦ Are you consumed with anger and/or a need to get revenge on the other
Part A—Parent Information Program

parent? Do you feel the need to tell EVERYONE what a jerk the other parent is?
♦ Do you frequently fantasize about ways in which the other parent could disappear and never come back?
♦ Do you find yourself constantly on the verge of tears?
♦ Have you lost interest in the things and people that you used to enjoy?

If you are having trouble coping or have had these feelings for a long period of time, there are lots of services in the community that can be very helpful. Some of them are listed in your Resource Information Material, which is indicated by the blue tab. For example, you will see that there are many programs geared specifically toward separation issues. We've listed a number of them between pages 1 and 10. (PAUSE BRIEFLY & LET PEOPLE LOOK AT THEM).

There are programs in this segment with a particular focus on fathers as well as programs designed specifically for mothers. A number of organizations offer counselling for families and individuals. Many employers also have employee assistance programs which can be extremely helpful. If you are employed outside the home, you might want to check and see if your employer or union has such a program. Please don't hesitate to make use of the professional services that might be of benefit to you.

For use beginning February 23, 2004.

February 16, 2004

306
Part A—Parent Information Program

B. Children's Reaction to Separation (9 minutes)

DETAILED LEARNING OBJECTIVES
(In relation to the umbrella goal of understanding the needs and reactions of children to separation)

► Understanding of the elements of separation from the child's perspective
► Understanding of children's need for and right to a healthy, ongoing relationship with both parents
► Understanding of some useful responses to children's reactions/needs

Introduction: As you would probably guess without reading any psychology or social work books, children generally feel better when they know that they have two parents who love them, even though the parents can't live happily with each other. That is why it is important for both parents to try hard to play an active role in their children's lives and to encourage the child's relationship with the other parent where it is safe for the child to do so. Children need to know it's okay to love both parents. It is also important for you to know that while you are trying to work out the new roles, children are going through their own emotional turmoil. It is at this very time when children need the most support from their parents, even though it is often hard for parents to give this support when they are going through their own difficult time.

Studies have shown that children experience a number of predictable emotional responses as they adjust to separation. The major ones are:

♦ Sadness
♦ Fear of abandonment and worry about things like where they will live, whether they'll get food and how they'll get to their baseball games
♦ A feeling of rejection by their parents (they might imagine, for example, that if Dad left Mom, he can leave me too or if Mom left Dad, she can leave me
Part A—Parent Information Program

too)

♦ Loneliness, sometimes accompanied by a longing for the parent who is not living where the child is living
♦ Anger, often at both parents, which is often expressed to the parent with whom they are living
♦ Conflicting loyalties, due to the sense that they are caught between competing parents

If you turn to pages 5 to 7 of your Participant's Manual, at the red tab, you'll see that we've included a chart that sets out some of the typical responses that children at different ages may have to separation, and suggestions for parents faced with these reactions. Take a moment to locate where your child fits on the chart. It may be helpful, now and in the future, to be able to use this chart as a guide to the types of reactions to separation that are fairly typical for each age group. (PAUSE & GIVE PEOPLE A MOMENT TO LOOK AT CHART)
## Part A—Parent Information Program

### Children's Behaviour At Different Ages

(Information Adapted from Positive Parenting, by Philippe Barrette and Children of Divorce, by Mitchell A. Baris and Carla B. Garrity)

<table>
<thead>
<tr>
<th>Age</th>
<th>Typical Characteristics</th>
<th>Separation Issues</th>
<th>How they might show their stress</th>
<th>Suggestions for parents</th>
</tr>
</thead>
</table>
| 0-2 years   | *Infants are dependant on parents for meeting their needs  
*They develop a sense of trust through having a predictable and consistent caregiver | *Infants may feel the loss of contact with a primary caretaking parent  
*Loss of familiar and comfortable environment | *Difficulty toileting or sleeping  
*Slowing down in learning new skills  
*Afraid to leave parent; clingy with parent  
*General crankiness, temper tantrums, crying | *Attempt to allow both parents to bond with infant  
*Meet infant's needs promptly and consistently  
*Try not to separate the infant from his or her primary caregiver for long periods of time  
*18 month to 2 year old children can tolerate longer separations from their primary caregiver than infants, especially if an older sister or brother will be with them. Prepare the child for the separation by explaining what will happen. |
| 2-4 years   | *Growth of a sense of independence  
*Are able to keep absent parent in mind to comfort themselves for extended periods  
*Verbal skills develop for expression of feelings and needs | *May have a sense of responsibility for the separation  
*Are anxious about basic needs being met - food, shelter, visitation  
*MAY fantasize about reuniting parents | *Regression - returning to security blankets, old toys, lapses in toilet training  
*Making up fantasy stories  
*Anxious at bedtime, sleeping fitfully, waking frequently  
*Fear of being abandoned by both parents  
*Emotionally needy, seeking physical contact  
*More irritable, aggressive, has temper tantrums | *Reassure your preschooler by telling them you love them and cuddling them  
*Allow some regression  
*Keep routines consistent  
*Explain what is going to happen to the child and role play future events  
*Child will adapt to longer separations from one parent through frequent visits and overnights with the other parent. |

---

For use beginning February 23, 2004.   

February 16, 2004
## Part A—Parent Information Program

<table>
<thead>
<tr>
<th>Age</th>
<th>Typical Characteristics</th>
<th>Separation Issues</th>
<th>How they might show their stress</th>
<th>Suggestions for parents</th>
</tr>
</thead>
<tbody>
<tr>
<td>5-8 years</td>
<td>*Are developing peer and community relationships</td>
<td>*See the separation as their problem</td>
<td>*General sadness, feeling abandoned and rejected</td>
<td>*Try to have each parent spend as much time with the child as possible</td>
</tr>
<tr>
<td></td>
<td>*Moral development progresses</td>
<td>*May cling to fantasies that their parents will reunite</td>
<td>*Crying and sobbing</td>
<td>*Allow the child to express his or her feelings</td>
</tr>
<tr>
<td></td>
<td></td>
<td>*Fear abandonment and will long for the absent parent regardless of the quality of the previous relationship</td>
<td>*Fantasizing about parents’ reconciliation</td>
<td>*Help the child understand that the decision to separate had nothing to do with him or her</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>*Conflicts of loyalty; feeling physically torn apart; problems with impulsive behaviour</td>
<td>*Encourage the child to draw pictures about her or his feelings, and to explain the story and what it means to him or her</td>
</tr>
<tr>
<td>9-12 years</td>
<td>*Children of this age are developing an increased awareness of self, evaluating own strengths and weaknesses as compared to others</td>
<td>*Although they see the separation as the parents’ problem, they are often angry about the parents’ inability to work the problems out</td>
<td>*Intense anger at parent blamed for causing the separation</td>
<td>*Parents need to try to remain involved and honest, and to avoid blaming each other</td>
</tr>
<tr>
<td></td>
<td>*Pre-adolescents are working at fitting in to the peer-level social order</td>
<td>*Likely to take sides, siding against the parent they think wanted the separation</td>
<td>*Physical complaints like headaches and stomach aches</td>
<td>*Pre adolescents can spend vacations with either parent</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>*Become overactive to avoid thinking about the separation</td>
<td>*Children should be allowed to contact the other parent</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>*Feel ashamed of what’s happening in the family and different from other kids</td>
<td>*Maintain a consistent routine</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>*Inform the child of what is happening and what will occur</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>*Keep teachers informed of any stress the child is feeling and get help for school problems</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>*Give children permission to continue loving both parents</td>
</tr>
</tbody>
</table>

For use beginning February 23, 2004.  

February 16, 2004
Part A—Parent Information Program

<table>
<thead>
<tr>
<th>Age</th>
<th>Typical Characteristics</th>
<th>Separation Issues</th>
<th>How they might show their stress</th>
<th>Suggestions for parents</th>
</tr>
</thead>
<tbody>
<tr>
<td>13-18 years</td>
<td>*Teens are solidifying their identity and establishing a sense of self in relation to the rules and regulations of society</td>
<td>*Embarassment about family</td>
<td>*Withdraw from family life and spend more time with peers</td>
<td>*Be consistent about discipline and limits while allowing for normal adolescent behaviour</td>
</tr>
<tr>
<td></td>
<td>*Possible de-idealization of one or both parents</td>
<td>*Feel hurried to become independent</td>
<td>*Engage in &quot;trying out&quot; behaviour such as sexual acting out, drinking, or drug experimentation</td>
<td>*Allow more freedom and choices</td>
</tr>
<tr>
<td></td>
<td>*Will place peer needs ahead of family and therefore may not want to visit with non-custodial parent</td>
<td>*Worry about their own future loves and marriage</td>
<td>*Chronic fatigue and difficulty concentrating</td>
<td>*Find time to be with the teen and be flexible with their schedules</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>*Give teens input about the visitation schedule, but don't burden them with the responsibility of deciding on the visitation schedule</td>
</tr>
</tbody>
</table>

This chart may also give you some guidance when you are thinking about what sort of parenting arrangements will work best for your children. Many people talk about these kinds of arrangements as parenting plans. Basically a parenting plan is a plan for how your child will spend time with you and the other parent. We'll come back to this topic a bit later in the seminar.

As the charts we've just looked at show, many children think that they somehow caused the separation. They must be reassured repeatedly that the separation is not their fault. Because children often think that there is something they can do to get their parents back together, it is helpful if they are told that separation is an adult decision and there is nothing they can do about the decision (although they can have some say in other aspects of the separation - for example, the colour of their bedspread in their bedroom at one parent's new apartment or house).
Part A—Parent Information Program

It surprises some parents to know that children almost always wish, often for a long time, that their parents will get back together, no matter how violent or hostile their family circumstances were. This is the family they know, and they are fearful of the unknown.

Though it may not always seem to be so, children are usually very tuned into their parents' feelings and needs. They are very scared of hurting one parent or making the conflict between parents worse. A child may be afraid to say he loves the other parent if he thinks that will make you angry. He may not say he wants to visit the other parent if he thinks that's what you want to hear. He may even stay home from a party if he's afraid you'll be too lonely without him. That's why, again, it is important for you to take care of your own needs. Otherwise, your child may feel an obligation to sacrifice his own needs to care for you. When your child visits the other parent, tell her that though you'll miss her, you'll be fine by yourself. If you think your child might worry about you being lonely, it might be helpful to tell her of some plans you're looking forward to.

If you think your child could benefit from community services that are geared toward helping children adjust to separation, you might want to take a look at some of the resources listed at pages 10 to 27 in the Resource Information Material, at the blue tab.
Part A—Parent Information Program

C. The Impact of Parental Conflict on Children (9 minutes)

DETAILED LEARNING OBJECTIVES
(In relation to the umbrella goal of understanding the impact of parental conflict on children)

► Understanding that children are often "caught in the middle" of adult disputes and that this can be avoided
► Understanding how parents draw children into conflict
► Understanding the behaviours that "trap" children
► Understanding some useful ways to avoid having children caught in the middle of adult disputes

Often, parents don't realize that their own way of dealing with the other parent can add to the stress children already feel as a result of the change in the family organization. Research suggests that it may not be the actual separation, but rather the conflict related to separation, that causes most problems. In particular, putting children in the middle of conflicts is harmful to them, often causing them to distort the truth so that it sounds like what they think the other parent wants to hear, or prompting them to take sides in the conflict. One striking example comes from a counsellor dealing with a six year old who said with tears in his eyes: "My dad tells me something; my mom says what my dad says isn't true. Please, please tell me what to do?" The boy strongly felt each parent wanted him to be on their side. Since he wanted to please both parents, he was put in a no win situation. He would have to disappoint one parent. How could he choose which one to upset?

I'm going to give you a few other examples of how children get caught in the middle, and I'm sure you can also think of situations. As I give these examples, think of how the child must feel. If the child chooses a side, he betrays one parent; if she remains in the middle she feels torn and conflicted.
Part A—Parent Information Program

Cover examples of ways that parents put their children in the middle, using the following sample statements. (Note: these examples are NOT in the participants' take home materials).

(Overhead #4) THE MESSENGER GAME
Parent: “When you are with your father/mother this weekend, remind him/her that s/he’s late with the support cheque. You can tell him/her s/he’s only hurting you when s/he’s late.”

(Briefly point out that if the child delivers the message, he/she will possibly be met with the other parent’s anger; if he/she doesn’t deliver the message, the first parent will be disappointed/angry.)

(Overhead #5) I SPY
Parent: “Is your mom/dad going out with that same guy/girl? Does s/he stay overnight? Someone should tell her/him that s/he’s behaving like a jerk.”

(Briefly point out that the child will feel very uncomfortable sharing information about the other parent’s private life.)

(Overhead #6) CUT DOWN GAME
Parent (to kids when they are with him/her for supper) “Let’s go get something good to eat for a change. You must be really tired of those dry hamburgers that your mom/dad makes.

Kids: “They’re not so bad.”

Parent: “Sure, if you like eating leather with too much salt (laughing). You must be starved. And look at that shirt Mark. Did your mom/dad forget to do the laundry

For use beginning February 23, 2004.
Part A—Parent Information Program

again? S/he's got a great memory like an elephant - one that's had brain surgery."

(Briefly point out that this places the child in the uncomfortable position of either defending the absent parent and possibly angering the parent doing the cut-down, or not defending the absent parent, but feeling guilty.)

(Overhead #7) THE MONEY GAME

Parent: Your mother/father says s/he doesn't have any money to help pay our rent, but s/he always manages to find money to buy gifts for that new girlfriend/boyfriend and his/her kids.

(Briefly point out: (1) that children should not need to worry about money and; (2) this is another example of the cut down game.)

Discuss alternatives to this kind of behaviour: Children do not need to know about money matters. They only need to know that they will be cared for. Also, it will be easier for your child if you encourage her or him to spend time with the other parent, speak neutrally about the other parent, talk with children about happier earlier days, and deal directly, or through another adult if necessary, about things that need to be addressed.

Try not to argue in front of your children. For example, when children are dropped off from or picked up for visits with the other parent, conflict is often very high. This conflict creates great stress for your children and you should make a commitment to yourself to protect them from that pain. You might say, "but I don't start the fight - my ex does". That may be true and you can’t control his or her behaviour (that's probably why you are no longer a couple). All you can do is

For use beginning February 23, 2004. February 16, 2004
Part A—Parent Information Program

control your own behaviour. So when your child's other parent pushes your buttons and tries to provoke you into fighting back or defending yourself in front of your child, you can and must refuse to join the fight. It is a refusal that your children will greatly appreciate. (For example: if at drop off time, your ex makes terrible accusations say "I can't discuss this now").

It is also helpful for children who are trying to adjust to parental separation to give them information in terms they can understand, be open to answering their questions, be consistent, and be a role model in showing your child how to deal with the loss of the family unit.

When thinking about the kind of behaviour that will be most effective from the child's point of view, it is best to keep in mind that while you and the other parent will no longer have the loving relationship you once had, it is in the child's best interest to continue to have a loving relationship with each of you, if doing so does not raise any concerns about the child's safety. As parents, you and your child's other parent still share the common goal of providing what is best for your child. Partly, this involves focusing on the new relationship with your child that comes out of the separation, and partly, it involves recognizing the new relationship that the child needs to build with the other parent.

It might be helpful to deal with the other parent as you would deal with someone you were doing business with. For example, we don't always like our boss at work,
Part A—Parent Information Program

but we have to deal with him or her in a business like way. Parents in low conflict relationships who have a business-like relationship focused on the business of raising children generally fare well. Their "business" may involve direct communication. For families where there are higher levels of conflict, however, any necessary dealings will often be best carried on without direct contact, and sometimes through a third party. We talk about other ways to handle such communications in Part B of the Parent Information Program.

STOP FOR QUESTIONS (3 minutes)

PART II (27 minutes) — FINDING THE BEST WAY FOR YOU AND YOUR CHILD'S OTHER PARENT TO RESOLVE DISPUTES

<table>
<thead>
<tr>
<th>LEARNING OBJECTIVES</th>
</tr>
</thead>
<tbody>
<tr>
<td>(In relation to the umbrella goal of understanding alternatives for dispute resolution)</td>
</tr>
<tr>
<td>▶ Understanding the role of mediators</td>
</tr>
<tr>
<td>▶ Understanding the role of assessors</td>
</tr>
<tr>
<td>▶ Understanding the role of the Children's Lawyer</td>
</tr>
<tr>
<td>▶ Understanding the nature of a negotiated separation agreement</td>
</tr>
</tbody>
</table>

(Social Worker) Introduction: (3 minutes) You can help your child to adjust to the separation of the family unit by choosing the kind of decision making process that best fits the needs and abilities of your family. Often, people refer to a scale of decision making options which starts with parents making decisions for themselves, moves to parents making decisions with help, and finishes with parents having decisions made for them by the court.

The best kind of decision making process for you will depend on a number of things such as: the amount of conflict between you and your child's other parent,
Part A—Parent Information Program

how quickly you want to resolve matters, how willing you and the other party are to cooperate in deciding on the resolution, whether there has been domestic violence or some form of physical and/or emotional abuse between you, and the amount of money you want to spend or have to spend.

Generally, battles about child custody and access should be avoided. They usually cause a great deal of pain for everybody involved. Children feel pulled between their parents and then parents feel even more angry toward each other.

(LAWYER) Of course, it is not reasonable to expect that all parents will be able to sit down by themselves and reach a workable plan for the parenting of their children. Except in the most unusual circumstances, however, judges will make decisions that result in both parents being involved in the child's life. There are alternatives to having a court make all of the decisions about the organization of your child's care. It may be that you can make use of services that help you to reach your own agreement, or you may be able to reach some agreements and have the court decide the matters that can't be decided by you and your child's other parent.

A. Parenting Plans (3 minutes)

(LAWYER CONTINUES) As X (Social Worker) noted earlier, parenting responsibilities after separation are often discussed in terms of a "parenting plan." How your child or children are going to spend time with both you and their other parent is the key part of a parenting plan.
Part A—Parent Information Program

A parenting plan can be an informal arrangement between the parents, or it can be part of a separation agreement or court order. It is good to have a time sharing plan established early on, even if it is temporary and needs later change. Children grow and develop and you will want to be able to change the plan for them as time goes by. But it is helpful for them to have some plan in place as soon as possible after the separation and they need to have you explain it to them, so they know what to expect.

Parenting plans help adults and children most when they include a lot of detail. That way, everyone knows what is supposed to happen when. Nobody has to be guessing - kids don't need to wonder about when they are going to see either parent, how they are going to spend their birthday or other special occasions etc., and parents can worry less about things like who's going to be taking the kids to which game, who's responsible for haircuts, how are decisions going to be made, who is responsible for what expenses, etc.

Your plan must focus on what fits for the children, for their age and stage of development. Your child's personality should be taken into account when you are making your plan. The plan has to be realistic for the parents too.

Please refer to your take home materials at the Red Tab, page 8 for an example of the types of considerations that you will probably find useful in developing a parenting plan.

For use beginning February 23, 2004.

February 16, 2004
Part A—Parent Information Program

B. Mediation (15 minutes)

(SOCIAL WORKER) Introduction: One of the ways you might work out a parenting plan is through mediation. Mediation is a voluntary process. Both parents must agree to participate before it can happen. One of the important things to remember is that it is very important to get independent legal advice about the issues being mediated. Mediation is not the same thing as legal advice. Ideally, you will get legal advice both before the mediation begins, and as issues are being resolved through mediation.

Mediation is a much less formal and usually less expensive process than the court process. As a way to resolve family law disputes, it has had a high success rate. When it is done well, some of its advantages are: (1) children benefit a lot by not having to take sides in the dispute; (2) parents are in control of the decisions and work together to reach an agreement; and (3) there is usually a greater commitment to sticking with the agreement. As effective as mediation is, however, you should not let anybody talk you into it if it isn’t right for you. In order for mediation to be effective, you must be ready to communicate, cooperate, negotiate and control your emotions.

A mediator is someone who is unbiased and who may have a background in a profession such as social work or law. He or she helps parents to reach agreements about issues in dispute. A mediator is not a judge, an arbitrator, or an evaluator. His or her “job” is to guide the parents in designing their own plan. The mediator allows parents to be their own decision-makers.

For use beginning February 23, 2004.  
February 16, 2004
Part A—Parent Information Program

In mediation, both parents will meet with a mediator. How long mediation takes will depend on your particular situation. Usually, the mediator will meet with each parent separately at first, then with both parents together. One of the first steps of the process is having the mediator help parents to define more clearly the problems they want to solve through mediation. For example, they may want to discuss custody of children, special arrangements that need to be made for their children's needs, and what sort of financial arrangements need to be made. Once the issues are defined, people can start to look at different ways of solving each of them. The mediator may be able to help parents think of solutions to the problems that they had not thought about before. In order to negotiate a settlement, each parent will probably have to "give and take" a little.

Video segment - The following video clip shows a sample first meeting between the mediator and the parents together. It will show you a bit about the mediation setting.

At the end of mediation, the mediator will prepare a report which may be placed before the court. At the beginning of the mediation process, you will have to decide whether you want the report to be "open" or "closed". It may be helpful for you to get independent legal advice when making this decision. With a "closed" report, the mediator will indicate the number of interviews held, the people who were at the interviews, and the terms of any agreement reached as well as any issues upon which agreement was not reached. Evidence of anything said during mediation cannot be raised in court proceedings dealing with the same or related issues. With "open" reports, in addition to information included in closed reports, the mediator

For use beginning February 23, 2004.

February 16, 2004
Part A—Parent Information Program

may include any information that he or she thinks is relevant to the matter being mediated. This report may be subject to cross examination in court.

(Overhead # 8) What if you Reach an Agreement Through Mediation?
(LAWYER) Explain: If parents reach agreement about the issues between them, the agreement can be written up into a memorandum of understanding by the mediator. The memorandum of understanding can be incorporated into a separation agreement or minutes of settlement prepared by a lawyer. Additionally, their agreement can be written up into a mediation report which can be incorporated into a consent order. By completing minutes of settlement, a separation agreement, or a consent order, parties have reached a legal conclusion. If parties haven't been able to reach an agreement through mediation, they might at least have been able to narrow down the issues between them or reduce their anger and the extent to which their children are involved in the conflict.

(Overhead # 9) Is Mediation a Good Option for You?
There are a couple of questions you might ask yourself in thinking about whether mediation is a good option for you.

► Can I set aside my anger for the well-being of my children?
► Am I willing to listen to the other side of the story?
► Am I willing to negotiate for the sake of the children?
► Am I willing to uphold an agreement that is satisfactory to both of us?
► Do I see this process in terms of compromise rather than winning or losing?
Part A—Parent Information Program

If you can answer yes to most of these questions, you are probably a good candidate for mediation. However, both parents must be willing to participate in the mediation process, and must be willing to set aside their anger with each other for the overall good of the family.

Some people ask about the use of mediation in situations where there has been domestic violence, abuse, and unequal balances of power within the relationship. Many mediators are trained to detect such situations and to address the problems associated with them. Mediation is not appropriate for everyone. However, if you have been involved in an abusive relationship but still think that mediation is the way that you would like to settle the issues between you and your child's other parent, it is important to tell the mediator and your lawyer if you have one, of the fact that the relationship was abusive.

In Toronto you can get mediation services at no cost by calling the Mediation Services Department which is located at the 311 Jarvis Street Court, but which serves people from all four Toronto area courts, to arrange for mediation. The service at 311 Jarvis Street is offered by social workers with experience in family mediation. That number is included in your take home materials at page 17, at the red tab. Some other sources for mediators who generally require payment are included at pages 27 to 28 of the Resource Information Materials, at the blue tab. Mediators' fees vary, and when parents use the services of a paid mediator, they generally share the cost. If you want to get advice about qualified mediators in
Ontario, you can call the Ontario Association for Family Mediation. The number is at page 28 at the blue tab.

C. **Separation Agreements:** (2 minutes) (LAWYER continues)
Sometimes, through negotiation or mediation, parents are able to agree to custody, access, support and other arrangements which they will have written up as a separation agreement. Often, mediators will deal with these agreements as memorandums of understanding. It is important that you understand everything in the agreement. Each parent must make full financial disclosure, which means they must give a true picture of their financial situation, when the separation agreement is being discussed. You should supply a sworn financial statement, which we will discuss in more detail later in the seminar, as well as your three most recent Income Tax returns, any notices of assessment and reassessment, confirmation of your current year's earnings, and your three most recent pay stubs. It is really hard to have arrangements that are covered in the agreement changed by a court. You should have a lawyer review any written separation agreement. A separation agreement can be filed with the Ontario Court of Justice in order to enforce support obligations.

D. **Assessment:** (2 minutes) (SOCIAL WORKER)
If you have not been able to reach agreement about custody and access issues, and you need an objective third party to look at the needs of your child, you may need an assessment. An assessment occurs either when parents agree or a court orders to have a social worker or psychologist do a custody assessment. This person will
Part A—Parent Information Program

speak to each parent, to the child or children, and sometimes to other people such as the child's teachers, doctors, or other professionals who are involved with you and your child. Sometimes, during this process parents will agree on a workable parenting plan. If they don't, the assessor will write a report to the court, describing the needs of the children as well as the ability and willingness of each parent to meet those needs. The report may include a recommendation about where the children should live and when they should see the parent with whom they don't live. Often, assessments can shorten up the court process because they help people to see some of the strengths and weaknesses of their positions, and what the most realistic solution to the issues relating to their children might be. This often encourages them to settle some or all of the issues in dispute.

The cost of an assessment is usually shared between the parties. A judge will consider the assessment report when making a decision about custody and/or access. If a parent disagrees with what the assessor recommends, the matter can go on to trial, and the assessor as well as the report can be questioned by the parent or lawyer for the parent who disagrees with the report.

E. Children's Lawyer: (2 minutes)

(LAWYER) Explain: You should also be aware of an office within the Ministry of the Attorney General called the Children's Lawyer. The Children's Lawyer represents the interests of children before the court in a number of matters, including custody and access. The office is composed of both lawyers and social workers.
Part A—Parent Information Program

Parents may apply to a judge for an order to request that the Office become involved in the case. If the order is made, the Office will receive the request and it will then make the decision about whether to become involved in the case. The type of involvement that the Children's Lawyer can provide is legal representation for the child by a lawyer, or a social work Report prepared by a social worker, or, the teaming of a lawyer and social worker together. There is no fee for the services of the Children's Lawyer.

The Children's Lawyer works to assist adults to resolve their disputes in the interests of the children involved. When the Children's Lawyer provides a lawyer for a child, the lawyer represents the child's legal interests before the court. Social workers advocate the interests of children by collecting information from each of the parents and making recommendations to the Court in the interests of children.

Break (10 minutes): Hand out Assessment Questionnaires for Part B

PART 3 (60 minutes): THE LEGAL PROCESS

<table>
<thead>
<tr>
<th>LEARNING OBJECTIVES</th>
</tr>
</thead>
<tbody>
<tr>
<td>(In relation to the umbrella goal of providing basic legal information)</td>
</tr>
<tr>
<td>▶ Understanding the benefits of sound legal advice</td>
</tr>
<tr>
<td>▶ Understanding the availability of legal aid</td>
</tr>
<tr>
<td>▶ Knowing where to find legal information within the community</td>
</tr>
<tr>
<td>▶ Understanding the role of duty counsel</td>
</tr>
<tr>
<td>▶ Understanding what to expect from a private lawyer</td>
</tr>
<tr>
<td>▶ Understanding the legal rights and obligations of parents after separation (custody, access, support)</td>
</tr>
<tr>
<td>▶ Understanding court orders available in family court (such as interim orders, restraining orders, non-removal orders)</td>
</tr>
</tbody>
</table>

For use beginning February 23, 2004.  

February 16, 2004
Part A—Parent Information Program

Introduction: (4 minutes)

You should know that the legal process operates in a way that makes conflict and pressure almost impossible to avoid. If you get involved in the court process, you can expect to have to deal with delays, opposition from your child's other parent and possibly his or her lawyer, and busy judges who may interrupt you to try to get a sense of what you want the court to do and why you want them to do it. If you don't have a lawyer, you will need to work extra hard to be prepared and to be clear about what you want to say to the judge.

Another important thing to know is that the family court system is set up so that in places where no combined Court exists ("Family Court"), certain orders can be granted by judges of the Ontario Court of Justice ("the lower court") while other orders can only be granted by judges of the Ontario Superior Court of Justice ("the high court"). Some of the key differences are set out in a chart at page 19, at the red tab of your participants manual.

In the (combined) Family Court, judges can make any of the orders that the lower court and the high court can make.

In the Ontario Superior Court of Justice, judges can make orders regarding the division of property. While we will not be covering this issue in our seminar, we have included a brochure in your materials titled "What you should know about Family Law in Ontario." It contains a short discussion on the division of matrimonial property. It is important to have a lawyer advise you on the division of your property.

For use beginning February 23, 2004.

February 16, 2004
1. Legal Information, Lawyers and Legal Aid (11 minutes)

Introduction: Whether you choose to resolve the issues that have come up between you and your child's other parent by negotiating an agreement between the two of you, reaching an agreement through mediation, or litigating before a judge, it is helpful where possible to have a lawyer to advise you about your legal rights and responsibilities. There are different ways to go about getting legal information and advice.

Lawyer Referral: The Law Society of Upper Canada operates what is called a lawyer referral service. When you call the lawyer referral service number, you will speak with somebody who will ask you what type of legal matter you are involved in, and will give you the name of a lawyer who will provide you a free half hour consultation. (Note that you are billed $6.00 for accessing this service.) You can request a lawyer who speaks the language with which you are most comfortable. You will find the number for the Lawyer Referral Service in your Participant's Manual, at page 19 at the red tab. It is a good idea to make a list of the things you want to ask the lawyer so you can make the best use of your time with him or her.

Private Lawyer: There is no set rate for a lawyer’s services. You can expect lawyers to charge for all work including telephone calls and correspondence. You may be asked to provide a sum of money up front. This sum is referred to as a retainer, and will be placed in the lawyer’s trust account. It is then used as a credit against services provided and money paid out by the lawyer for things like fees required to file court documents or to obtain reports needed for the proceedings. These kinds of expenses are called disbursements.

You should try to be as organized as you can when speaking with your lawyer so
Part A—Parent Information Program

you can make the best possible use of your time. For example, you can write your questions down before you speak with her or him. Don't be afraid to ask about things you are unsure of.

You should always make sure that you are clear about how the lawyer is going to calculate her or his fees, when you will be billed, and what disbursements you will be charged for. You should get the lawyer to put your arrangement in writing. You will also want to find out, before making an appointment with a lawyer, about whether you qualify for legal aid.

Legal Aid Certificate: Depending on your income and assets and the types of issues involved in your family law case, you may qualify for a legal aid certificate. If you do get a certificate, you can take it to a lawyer of your choice who accepts legal aid cases. You should definitely ask whether you might qualify. You can find out about this at any legal aid office. You will find at page 20 of your take home materials, at the red tab, a listing of the locations and telephone numbers of local legal aid offices. On pages 21 to 22 we have copied a brochure published by Legal Aid Ontario. Finally, Legal Aid has set up a Family Law Office in Toronto. After you have received a legal aid certificate, you can either go to a lawyer of your choice OR you can go to the Family Law Office for help with your family law matters. On page 23, at the red tab, we have reproduced a brochure about the Family Law Office.

Duty Counsel: If you have not been able to obtain a lawyer before you go to court,
Part A—Parent Information Program

you may be able to get some advice from the duty counsel lawyer who is at each Family Court in the Toronto area. This lawyer can provide you with some limited help the day you go to court. There will be a different lawyer on each court date. You may have to meet a financial need test before you can make use of this service. Please note that if you are receiving social assistance and asking the court for a child support order, you may get help from a parental support worker. While this person may be helpful, she or he is not a lawyer.

Advice Lawyer: You may also get some advice from certain legal clinics and the Legal Aid Area Offices. Advice lawyers can help explain the court process and see that you have the right information about the legal steps you are taking. We have included a list of advice lawyer locations, times of operation, and telephone numbers in your Participant’s Manual at the red tab, pages 24 to 26.

Family Law Information Centres: At each family court location in Metropolitan Toronto, you can get written materials dealing with many issues that affect families. The centres also have videos about things like how separation affects children, that may be borrowed.

Also, at pages 29 to 41 of the Resource Information Materials, the blue tab, we’ve provided a list of community legal services that might be helpful to you. The more informed you are about your options, the easier it will be to make decisions that are best for you and your family.

For use beginning February 23, 2004.  

February 16, 2004
STOP FOR QUESTIONS (3 minutes)

B. Legal Definitions (22 minutes)

**LEARNING OBJECTIVES**

(\textit{In relation to the umbrella goal of explaining court process})

\begin{itemize}
  \item Understanding the purpose of applications and answers
  \item Understanding the purpose of case conferences and motions
  \item Understanding the purpose of affidavits
  \item Understanding what is required in a financial statement
  \item Understanding what is involved in the pre-trial stages of a case
  \item Understanding what is involved with a trial
\end{itemize}

\textit{Introduction:} There is a lot of special language in family law and the courts. I'm going to cover some of the terms that you should know about the process you're going through, as well as some of the forms you will most commonly see. New rules and forms have recently come into effect. They are aimed at providing cheaper, fairer, and faster results in family court. Courts want family law cases to settle earlier and without trial wherever possible. You will be expected to deal with your case in a way that contributes to the early solving of disputes, and you will be expected to deal with as many issues as possible each time you go to court. An important part of these new rules is \textit{"case management"}. With case management, there are strict time frames that must be followed for the various steps in the case. I will now talk about some of the processes and forms that you will come in contact with as you go through the court system. We have included copies of the most common forms in your materials, and I will point them out to you as we go along.

\textit{Note:} To help you organize your thoughts and to help you better prepare your court
documents, you should note that in every family law case involving children, judges apply a test known as the "best interests of the child." This means that regardless of what parents think would work best for them personally, the court, as well as professionals like assessors, will be concerned with the living arrangements that will allow the child to have the most secure, happy circumstances possible.

**Applicant:** The person who starts a case is called an applicant. In the application, the applicant asks for the court to make an order (such as custody, access, support, restraining order) and states why the applicant wants the order. *(REFER PARTICIPANTS TO APPLICATION AT PAGE 30 OF THEIR HANDOUT - RED TAB - AND TAKE THEM THROUGH IT BRIEFLY)*

**Respondent:** The person who responds to the application is called the respondent. The respondent will prepare and file a document called an "Answer". In the Answer part of the document, the respondent should state clearly the paragraphs in the Application that the respondent agrees and disagrees with. Also, the respondent should state clearly any order that they wish to have the court make. *(REFER PARTICIPANTS TO ANSWER AT PAGE 35 - WHITE SECTION-OF THEIR HANDOUT AND TAKE THEM THROUGH IT QUICKLY)*

**Financial Statement and Disclosure:** The financial statement states your income and expenses, and your assets and debts. Both the applicant and respondent must fill out a financial statement if there is an application for custody or support. You must read all of the text of the financial statement form to be sure that you provide all the
Part A—Parent Information Program

necessary information. For example, you must disclose the income of your partner if you are living with that partner. You must attach either your 3 most recent years' income tax returns, or a signed direction to Canada Customs and Revenue Agency (CCRA) saying that you consent to CCRA releasing copies of the Income Tax returns to the other parent. The financial statement is a sworn document which has the same effect as if you were to take a holy book of your faith and swear to tell the truth and then gave oral evidence in court. If you do not complete the financial statement properly or if you don't provide all of the information that needs to be included, the court staff can refuse to accept the financial statement or any other forms in the case for filing. (REFER PARTICIPANTS TO FINANCIAL STATEMENT AT PAGE 41 OF THEIR HANDOUT - RED TAB - AND TAKE THEM THROUGH IT QUICKLY)

Case Conference: Unless you are dealing with an urgent matter, this will be the first step in a family law case. There may be several case conferences before your case is finished. The main purpose of the case conference is to settle the case. Parents, their lawyers (if they have lawyers), and a judge will meet informally to try to narrow issues in dispute, consider alternative ways to settle disputes, make sure each person has disclosed all the information they need to disclose, and decide how the case will proceed. Each parent will file a case conference brief which sets out the issues that need to be dealt with. (REFER PARTICIPANTS TO CASE CONFERENCE BRIEF AT PAGE 55 OF THEIR HANDOUT - RED TAB - AND GO THROUGH IT QUICKLY)
Part A—Parent Information Program

Motion: If parents are not able to reach solutions through a case conference, they may prepare a motion and affidavit. The motion is done to get a temporary order which will settle issues until a final order is made. In almost all circumstances, other parties get notice of the motion. In only extreme cases where a person's safety or the safety of their child is in danger, a motion may be brought without notice to the other party. Also, if people want to change a previous order, a notice of motion should be completed (not a new application). A person asking for such a change will need to show how the circumstances that existed when the earlier order was made have changed enough that the judge should change the order.

(A BRIEFLY GO THROUGH NOTICE OF MOTION AT PAGE 58 OF THEIR HANDOUT - RED TAB)

Affidavit: A sworn document that states what temporary order you wish the judge to make and why you want this order. The document is evidence given under oath. It has the same effect as if you were to take a holy book of your faith and swear to tell the truth and then gave oral evidence in court. Affidavits are almost always the evidence used to decide motions. This means people, even friends or professionals who are giving evidence to support your case, should be asked to swear an affidavit as opposed to coming to court. (REFER PARTICIPANTS TO AFFIDAVIT AT PAGE 62 OF THEIR HANDOUT - RED TAB - AND TAKE THEM THROUGH IT QUICKLY.

For use beginning February 23, 2004.

February 16, 2004
Part A—Parent Information Program

Service of Documents: When the documents I have described are complete, a copy must be delivered to the other side. This is known as service. A judge will not go ahead with a case unless he or she is satisfied that the other side has been given a copy of the court documents. An Affidavit of Service, which is written proof that the other person was given the documents, must be completed and sworn to be true by the person who has served the document. The Affidavit of Service must then be filed with the Court. You need to know the address where service took place, the names of the documents served, and the date of service.

Kinds of Service:
(1) Special service, by which applications need to be served. This may be done by serving the other parent in person, serving the document on that parent’s lawyer, mailing, as long as a receipt card is returned, and leaving a copy of the application with an adult along with a mailing copy. Personal service can be done by:
  ▶ A private process server who you will have to pay. In the Yellow Pages of the Toronto Telephone Book under the heading of Process Servers you will find the numbers for process servers. Or
  ▶ someone you know who will personally deliver the documents to the other person and who will come to the court office to swear the affidavit of service (this must be done before the date of your court appearance), or
  ▶ you can personally give the documents to the other person if it is safe and appropriate to do so and then do the affidavit of service at the court office.

For use beginning February 23, 2004.  

March 16, 2004
Part A—Parent Information Program

(2) Regular service, by which most documents can be served. This includes mail, courier, and fax.

Continuing Record: Everything that goes into a court file will be placed in a "continuing record". You or your lawyer are responsible to make sure your documents are in the continuing record.

Trial: A trial takes place if matters have not been settled through negotiation, mediation, case conferences, or a final settlement conference where the judge meets with parents and their lawyers to try to help parents reach an agreement. Trials are formal and time consuming. They may also be expensive. Only about 5% of cases actually go to trial, and from the time your case starts, there is much pressure on parties to resolve their case without going to trial.

Each party must prepare their case for trial. This may include bringing to court the witnesses and documents that support their claims. Sometimes an assessment done by a professional of what custody arrangement the child or children would benefit most from will be part of the trial. The judge, who will be different from the judge who heard the settlement and case conferences, will make a decision on the disputes that the parties have raised. For example, the judge will order who will have custody of and access to the children and how much child support is to be paid.
C. Types of Orders Made by Courts (12 minutes)

**LEARNING OBJECTIVES**
*(In relation to the umbrella goal of providing basic legal information)*

- Understanding the legal rights and obligations of parents after separation (custody, access, support)
- Understanding court orders available in family court (such as interim orders, restraining orders, non-removal orders)

**Costs:** A word that judges and lawyers use to describe the contribution one parent may need to make to the other parent's legal fees. The new rules set out a new system for costs in family law cases. You can be ordered to pay costs if you ask the court for something that you are very unlikely to get, and in fact you do not get. An example could be asking for custody when you have not been very involved in your child's caregiving for a long time and the other parent has been providing good care for the child. Even when you get an order for the other parent to pay your costs, the amount doesn't usually cover all of the lawyer's account, and you will be required to pay the rest.

**Restraining order:** An order that a court makes where there has been violence or there is a threat of violence, to prevent contact between the victim and the person who has been violent or has threatened violence. This order may be registered with the police.

**Custody:** Custody means the right to make decisions about matters that affect your child, such as his or her religion, school, and medical treatment. Custody is not related to where the child lives. The law says that each parent has the right to
Part A—Parent Information Program

custody unless a court order or separation agreement gives that right to one parent only. There are two main types of legal custody: sole custody and joint custody.

i. Sole custody: One parent is given the responsibility and authority to make decisions for the child. Both parents may see the child and both parents can have input into the decisions about the child but the final legal responsibility is with the custodial parent.

ii. Joint or shared custody: A joint custody arrangement is one where both parents participate in decision making about the child's care. It may be ordered if parents get along and if it is safe for parents to interact so closely. Joint custody is not appropriate where someone has been assaulted. It does not mean that the child must live half of the time with one parent and half of the time with another parent. It can also mean that the child spends more time at the residence of one parent than the other.

Access: A parent who does not provide the primary residence for their child will almost always have the right to spend time with them. A parent who does not have legal custody of the child still has the right to get medical and educational information about the child.

A judge can order supervised access if he or she has concerns about the parent who is asking for access, especially if there are concerns about the physical safety of the child or the custodial parent. We said earlier part that it is important for children to
Part A—Parent Information Program

C. Types of Orders Made by Courts (12 minutes)

<table>
<thead>
<tr>
<th>LEARNING OBJECTIVES</th>
</tr>
</thead>
<tbody>
<tr>
<td>(In relation to the umbrella goal of providing basic legal information)</td>
</tr>
<tr>
<td>► Understanding the legal rights and obligations of parents after separation (custody, access, support)</td>
</tr>
<tr>
<td>► Understanding court orders available in family court (such as interim orders, restraining orders, non-removal orders)</td>
</tr>
</tbody>
</table>

Costs: A word that judges and lawyers use to describe the contribution one parent may need to make to the other parent’s legal fees. The new rules set out a new system for costs in family law cases. You can be ordered to pay costs if you ask the court for something that you are very unlikely to get, and in fact you do not get. An example could be asking for custody when you have not been very involved in your child’s caregiving for a long time and the other parent has been providing good care for the child. Even when you get an order for the other parent to pay your costs, the amount doesn’t usually cover all of the lawyer’s account, and you will be required to pay the rest.

Restraining order: An order that a court makes where there has been violence or there is a threat of violence, to prevent contact between the victim and the person who has been violent or has threatened violence. This order may be registered with the police.

Custody: Custody means the right to make decisions about matters that affect your child, such as his or her religion, school, and medical treatment. Custody is not related to where the child lives. The law says that each parent has the right to
custody unless a court order or separation agreement gives that right to one parent only. There are two main types of legal custody: sole custody and joint custody.

i. **Sole custody**: One parent is given the responsibility and authority to make decisions for the child. Both parents may see the child and both parents can have input into the decisions about the child but the final legal responsibility is with the custodial parent.

ii. **Joint or shared custody**: A joint custody arrangement is one where both parents participate in decision making about the child's care. It may be ordered if parents get along and if it is safe for parents to interact so closely. Joint custody is not appropriate where someone has been assaulted. It does not mean that the child must live half of the time with one parent and half of the time with another parent. It can also mean that the child spends more time at the residence of one parent than the other.

**Access**: A parent who does not provide the primary residence for their child will almost always have the right to spend time with them. A parent who does not have legal custody of the child still has the right to get medical and educational information about the child.

A judge can order **supervised access** if he or she has concerns about the parent who is asking for access, especially if there are concerns about the physical safety of the child or the custodial parent. We said earlier part that it is important for children to...
Part A—Parent Information Program

continue to have a loving relationship with each parent provided this does not raise any concerns about the child’s safety. Supervised access is a way for courts to try to encourage a parent-child relationship in a safe environment. With supervised access, someone else, such as a relative or friend, must be there when the parent and child are together. One reason supervised access might be ordered is that the parent abused the child in the past, or threatened to take the child away from the parent who has custody. A judge usually refuses to grant any access at all in only the most extreme cases.

Non-Removal Order: Sometimes a court will order one or both parents not to take the child out of a certain area while the child is in their care. At other times, a judge may find that it is reasonable for a parent, for work or other purposes, to remove the child from the area. This may be particularly important when parents strong ties to other countries.

Support:

i. **Spousal support:** In some cases, one former partner may be required to provide financial support for the other. This is called spousal support. Generally, the amount of spousal support required to be payed will depend on the needs of the person asking for support and the financial ability of the other person to pay.

ii. **Child support:** Every parent is responsible for supporting their children, whether or not they have custody of or access to the children. The "child"
involved can be a biological child, a step child, or a child towards whom an adult has acted as a parent. Family Court judges use "Child Support Guidelines" when deciding how much child support must be paid. A copy of the guidelines information has been included in your take home materials. The materials give at least a ballpark figure of what people can expect their obligations to be. In order to get a rough idea of the amount of child support payable under the Guidelines, you need to look at the payor's annual income and the number of children for whom support is owed. This will give you a starting point. (REFER PARTICIPANTS TO THE TABLES AND GO THROUGH AN EXAMPLE)

The payor may also be required to contribute to special expenses. Examples of these would be child care expenses that the other parent must pay due to illness or work obligations, or expenses for some extracurricular activities. The Guidelines are not simple, and this may be one area where people consider getting legal advice if they are able to do so.

**Explain:** While some people think that their duty to pay child support is directly related to a right to have access to their children, this is not the case. The Ontario Government has established the Family Responsibility Office to enforce support obligations. For example, not paying support may lead to the garnishment of bank accounts, earnings, employment insurance payments, workers' compensation money, and the suspension of drivers' licenses.
D. Comments about Court "Manners" (2 minutes)

LEARNING OBJECTIVES
(In relation to the umbrella goal of providing information about courtroom formalities)
- Understanding the importance of appropriate demeanor with the judge
- Understanding the importance of appropriate demeanor with the other parent
- Understanding the importance of not bringing children to court where possible

Introduction: Judges expect people to behave in a courteous way in court. Here are some pointers. Your lawyer may tell you more.

1. The judge should be addressed as “Your Honour”.
2. When you go into the courtroom, a clerk will tell you where to sit.
3. No matter how angry you are with the other parent, don't get involved in arguments with him or her in the courtroom. In the courtroom, it is the judge that you do your talking to.
4. Dress in an appropriate manner. Judges don't like to see T-shirts with slogans.
5. Don't chew gum in court.
6. Don't argue with the judge.
7. Don't swear in court.
8. Don't bring children to court.
9. Don't bring food to court.
10. You should wait until given direction from the judge or your lawyer to speak to the court.

STOP FOR QUESTIONS (5 minutes)
APPENDIX C

Excerpts from PIP Participant’s Manual
(ii)  *Children's Behaviour At Different Ages*

(Information adapted from *Positive Parenting*, by Phillippe Barrette and *Children of Divorce* by Mitchell A. Baris and Carla Garrity)

<table>
<thead>
<tr>
<th>Age</th>
<th>Typical characteristics</th>
<th>Separation issues</th>
<th>How they might show their stress</th>
<th>Suggestions for parents</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-2 years</td>
<td>*Infants are dependent on parents for meeting their needs</td>
<td>*Infants may feel the loss of contact with a primary caretaking parent</td>
<td>*Difficulty toileting or sleeping</td>
<td>*Attempt to allow both parents to bond with infant</td>
</tr>
<tr>
<td></td>
<td><em>They develop a sense of trust through having a predictable and consistent caregiver</em></td>
<td><em>Loss of familiar and comfortable environment</em></td>
<td><em>Slowing down in learning new skills</em></td>
<td><em>Meet infant's needs promptly and consistently</em></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><em>Afraid to leave parent; clingy with parent</em></td>
<td><em>Try not to separate the infant from his or her primary caregiver for long periods of time</em></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><em>General crankiness, temper tantrums, crying</em></td>
<td><em>18 month to 2 year old children can tolerate longer separations from their primary caregiver than infants, especially if an older sister or brother will be with them. Prepare the child for the separation by explaining what will happen.</em></td>
</tr>
<tr>
<td>2-4 years</td>
<td><em>Growth of a sense of independence</em></td>
<td><em>May have a sense of responsibility for the separation</em></td>
<td><em>Regression - returning to security blankets, old toys, lapses in toilet training</em></td>
<td><em>Reassure your preschooler by telling them you love them and by cuddling them</em></td>
</tr>
<tr>
<td></td>
<td><em>Are able to keep absent parent in mind to comfort themselves for extended periods</em></td>
<td><em>Are anxious about basic needs being met - food, shelter, visitation</em></td>
<td><em>Making up fantasy stories</em></td>
<td><em>Allow some regression</em></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><em>Anxious at bedtime,</em> sleeping fitfully, waking frequently*</td>
<td><em>Keep routines</em></td>
</tr>
</tbody>
</table>

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
<table>
<thead>
<tr>
<th>Age Group</th>
<th>Verbal Skills Develop for Expression of Feelings and Needs</th>
<th>May Fantasize About Reuniting Parents</th>
<th>Fear of Being Abandoned by Both Parents</th>
<th>Emotionally Needy, Seeking Physical Contact</th>
<th>More Irritable, Aggressive, Has Temper Tantrums</th>
<th>Consistent</th>
<th>Explain What Is Going to Happen to the Child and Role Play Future Events</th>
<th>Child Will Adapt to Longer Separations from One Parent Through Frequent Visits and Overnights with the Other Parent</th>
</tr>
</thead>
<tbody>
<tr>
<td>5-8 years</td>
<td>*Are Developing Peer and Community Relationships</td>
<td>*See the Separation as Their Problem</td>
<td>*General Sadness, Feeling Abandoned and Rejected</td>
<td>*Crying and Sobbing</td>
<td>*Fantasizing About Parents’ Reconciliation</td>
<td>*Conflicts of Loyalty; Feeling Physically Torn Apart; Problems with Impulsive Behaviour</td>
<td>*Try to Have Each Parent Spend as Much Time with the Child as Possible</td>
<td>*Allow the Child to Express His or Her Feelings</td>
</tr>
<tr>
<td>9-12 years</td>
<td>*Children of This Age Are Developing an Increased Awareness of Self, Evaluating Own Strengths and</td>
<td>*Although They See the Separation as the Parents’ Problem, They Are Often Angry About</td>
<td>*Intense Anger at Parent Blamed for Causing the Separation</td>
<td>*Physical Complaints Like Headaches and Stomach</td>
<td>*Parents Need to Try to Remain Involved to Be Honest, and to Avoid Blaming Each Other</td>
<td>*Pre-Adolescents Can</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Weaknesses as compared to others</td>
<td>the parents? inability to work the problems out</td>
<td>aches</td>
<td>spend vacations with either parent</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---------------------------------</td>
<td>-----------------------------------------------</td>
<td>------</td>
<td>----------------------------------</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>*Pre-adolescents are working at fitting in to the peer-level social order</td>
<td>*Likely to take sides, siding against the parent they think wanted the separation</td>
<td>*Become overactive to avoid thinking about the separation</td>
<td>*Children should be allowed to contact the other parent</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>*Feel ashamed of what's happening in the family and different from other kids</td>
<td>*Maintain a consistent routine</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>*Inform the child of what is happening and what will occur</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>*Keep teachers informed of any stress the child is feeling and get help for school problems</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>*Give children permission to continue loving both parents</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| 13-18 years | Teens are solidifying their identity and establishing a sense of self in relation to the rules and regulations of society | Embarrassment about family | Withdraw from family life and spend more time with peers |
|            | *Possible de-idealization of one or both parents | *Feel hurried to become independent | Be consistent about discipline and limits while allowing for normal adolescent behaviour |
|            | *Will place peer needs ahead of family and therefore may not want to visit with non-custodial parent | *Engage in trying out? behaviour such as sexual acting out, drinking, or drug experimentation | *Allow more freedom and choices |
|            |                                                 | *Worry about their own future loves and marriage | *Find time to be with the teen and be flexible with their schedules |
|            |                                                 | *Chronic fatigue and difficulty concentrating | *Give teens input about the visitation schedule, but don’t burden them with the responsibility of deciding on the visitation schedule |
APPENDIX D

Letter from Donner Canadian Foundation Dated May 14, 1997
APPENDIX E

PIP Phase 1 Questionnaire
PARTICIPANT EVALUATION OF
PARENT INFORMATION PILOT PROJECT SEMINAR

Please answer the following questions as best you can. The information you provide will be used for statistical purposes and evaluating the program. If there are any questions that you do not wish to answer, do not do so. Please do not write your name on this form. Ask the seminar instructor if there is something you do not understand in the questionnaire.

1. How did you find out about the Seminar?
   1. Poster or brochure at a court location
   2. Poster or brochure at a non-court location
   3. Judge's recommendation
   4. Lawyer's recommendation
   5. Newspaper
   6. Radio
   7. Other (please specify) ____________________________

2. Have you hired a lawyer?
   1. Yes, I have a lawyer because I got a Legal Aid Certificate
   2. Yes, I have hired a lawyer but I do not have a Legal Aid Certificate
   3. I have not yet hired a lawyer but I plan to do so
   4. I have not yet hired a lawyer and I do not think I will do so.
   5. I previously hired a lawyer but that lawyer is no longer working for me.

3. Would you say the presenters of the seminar were
   1. Well organized and easy to understand
   2. Sometimes difficult to follow and understand
   3. Very difficult to follow and understand

4. Did the presenters understand the needs and problems of families going through separation?
   1. Very good understanding
   2. Some understanding
   3. Not much understanding

5. Were the instructors dynamic and did they hold your interest throughout the seminar?
   1. Very much so
   2. Most of the time
   3. Some of the time
   4. Not really

6. Was there enough class time?
   1. Too long
   2. Just right
   3. Not long enough
7. The program facilities (building, parking, classroom, security, etc.) were:
   1. Very good
   2. Good
   3. Fair
   4. Poor

8. Would you recommend the program to other separating parents?
   1. Yes
   2. No

9. Should parents entering the Family court process be required to attend a seminar such as this?
   1. Yes
   2. No

PLEASE RATE THE QUESTIONS 10-14 AS TO WHETHER THE PROGRAM PROVIDED HELPFUL INFORMATION IN THE FOLLOWING AREAS:

10. Understanding the needs and reactions of children of various ages to separation.

Not at all Helpful Not very Helpful Uncertain Somewhat Helpful Very Helpful
1  2 3 4 5

11. Understanding the benefits to children of parents working cooperatively with each other.

Not at all Helpful Not very Helpful Uncertain Somewhat Helpful Very Helpful
1  2 3 4 5


Not at all Helpful Not very Helpful Uncertain Somewhat Helpful Very Helpful
1  2 3 4 5

13. Understanding alternatives to litigation.

Not at all Helpful Not very Helpful Uncertain Somewhat Helpful Very Helpful
1  2 3 4 5

14. Understanding what to expect in court.

Not at all Helpful Not very Helpful Uncertain Somewhat Helpful Very Helpful
1  2 3 4 5
PERSONAL INFORMATION

15. What is your sex?
   1. Female
   2. Male

16. What is your age?
   1. 14-22
   2. 23-29
   3. 30-39
   4. 40-49
   5. 50 or over

17. What is your race/ethnicity?
   1. Asian
   2. White
   3. North American Indian
   4. Latino/Latina
   5. African
   6. Other

18. What is the highest level of formal education that you have completed?
   1. Less than 8 years
   2. Some high school
   3. High school graduate
   4. Technical training
   5. Bachelor's degree or beyond

19. Estimate your current annual household income from all sources: (Child support and spousal support payments should be added or deducted, depending on whether you pay or receive them)
   1. Below $20,000
   2. $20,000-$34,999
   3. $35,000-$49,999
   4. $50,000-$69,999
   5. $70,000 and over

20. What is/was the length of your relationship with the other parent?
   1. Under 3 years
   2. 3-7 years
   3. 7-10 years
   4. 10-15 years
   5. Over 15 years
21. How long ago did this relationship end?
   1. Less than 6 months
   2. 6-12 months
   3. 1-2 years
   4. 2-3 years
   5. Over 3 years

22. How many children do you have under the age of 18?
   1. 1  2. 2  3. 3  4. 4  5. Over 4

23. Please describe your child/children's living arrangement:
   1. All the children live with me MOST of the time.
   2. All the children live with the other parent MOST of the time.
   3. The time between parents is equally shared.
   4. The children are split in their primary living arrangement, such as 2 with one parent and 1 with the other parent.

24. Additional Comments:

_________________________________________________________________________
_________________________________________________________________________
_________________________________________________________________________
_________________________________________________________________________
_________________________________________________________________________

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
APPENDIX F

PIP Phase 2 Pre-test Questionnaire
Dear Participant:

We are asking for your help in evaluating the Parent Information Program, which is a project funded by the Donner Canadian Foundation and the Ministry of the Attorney General and operated out of Osgoode Hall Law School at York University. We are interested in determining whether the program is helpful to people involved in family law matters, and how it can be improved. You are not obliged to participate in the evaluation in order to be involved in the seminar. Also, you need not answer questions with which you are not comfortable. However, your views are very important, and we hope you will answer the questions. All of the information you share on the questionnaire will be confidential. Only summary form results, from which it is impossible to identify individual persons, will be included in the report discussing the utility of the project.

Your assistance with the evaluation of the seminar will help us to develop better programs in the future.

Please sign below to indicate your consent to participate in Part I of the questionnaire which is contained on the following pages and Part II of the questionnaire, which will be handed out at the end of the seminar.

________________________________________________________________________________

(Participant’s Name - Please Print)

________________________________________________________________________________

(Participant’s Signature)

Thank you very much for your assistance.

Shelley Kjerstead
Coordinator, Parent Information Program
PARENT INFORMATION PROGRAM EVALUATION – PART I

1. Which of the following best describes why you are attending the seminar?
   1. I found out about the seminar through a poster or brochure and thought it would be helpful to me.
   2. I found out about the seminar through a magazine or newspaper and thought it would be helpful to me.
   3. The package of court papers that I received included a notice advising me to come to the seminar.
   4. My lawyer recommended that I come to the seminar.
   5. I went to court and the judge asked me to come to the seminar.
   6. Other (please specify) ______________________________________________

2. Have you hired a lawyer?
   1. Yes, I have a lawyer because I got a Legal Aid Certificate
   2. Yes, I have hired a lawyer but I do not have a Legal Aid Certificate
   3. I have not yet hired a lawyer but I plan to do so
   4. I have not yet hired a lawyer and I do not think I will do so.
   5. I previously hired a lawyer but that lawyer is no longer working for me.

3. What is your relationship to the child/children?
   1. Mother
   2. Father
   3. Other (explain) _____________________________

4. What is your current relationship with the other parent or caregiver of your child/children?
   1. Separated
   2. Divorced
   3. Living together
   4. Other (explain) _____________________________

5. Were you and the other parent:
   1. Married?
   2. Living together?
   3. Dating?
   4. Other (explain) ______________________________________________

6. How long was your relationship with the child/children’s other parent?
   __ __ Years or __ __ Months

7. On what date did you last separate from the child/children’s other parent?
8. Which of the following best describes your current situation?
   1. Single and not dating
   2. Dating
   3. Living in a common law relationship
   4. Married or Remarried
   5. Other (please explain) _______________________________________________________

9. As far as you know, which of the following best describes the current situation of your child/children’s other parent?
   1. Single and not dating
   2. Dating
   3. Living in a common law relationship
   4. Married or Remarried
   5. Other (please explain) _______________________________________________________

10. How many children do you have UNDER the age of 18?
    ___ ___ (Please indicate the number of children)

11. Please describe your child/children’s living arrangement:
    1. All the children live with me MOST or all of the time.
    2. All the children live with the other parent MOST or all of the time.
    3. The time between parents is about equally shared.
    4. The children are split in their primary living arrangement, such as 2 with one parent and 1 with the other parent.

12. Which of the following best describes the type of contact that the child/children have with the parent that they do not live with most or all of the time? (Circle more than one item where appropriate)
    1. Regular access, once or more every week
    2. Regular access, every two weeks
    3. Regular access, once each month
    4. Irregular access, holidays only
    5. Irregular access, no set pattern
    6. Telephone or letter contact only
    7. No contact at all
    8. Other (explain) _______________________________________________________

368
13. In general, what is the level of conflict now between you and the other parent?  
   1. Very low  
   2. Low  
   3. Moderate  
   4. High  
   5. Very high

14. Over the past 6 months, has the level of conflict between you and the other parent:  
   1. Increased  
   2. Remained the same  
   3. Decreased

15. Please circle the response for each statement which best reflects your current experiences or feelings.  
Write NA (not applicable) only if the question cannot possibly apply to you. Please answer each question.

<table>
<thead>
<tr>
<th>Item</th>
<th>Almost none of the time</th>
<th>Some of the time</th>
<th>About half of the time</th>
<th>Much of the time</th>
<th>Almost all of the time</th>
<th>N/A</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. I try to avoid involving my child/children in any disagreements or conflicts between me and the other parent</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>b. My child/children's other parent and I argue in front of the child/children</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>c. I try to keep my child/children's other parent from seeing the child/children</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>d. My child/children's other parent tries to keep the child/children from seeing me</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>e. I encourage the child/children to have a good relationship with their other parent</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>f. My child/children get caught in the middle of conflicts between me and their other parent</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>g. I feel angry toward my child/children's other parent</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>h. My child/children's other parent feels angry toward me</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>i. I tell the child/children that the separation was not their fault</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>j. I ask my child/children to pass messages relating to the disputes between us from me to their other parent</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>k. I let my child/children know that I understand that they love their other parent</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>l. Conflict between me and the other parent occurs during pick-ups and drop-offs of my child/children</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td></td>
</tr>
</tbody>
</table>

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
16. Please circle the response which best represents your level agreement with each statement at this time. Write NA (not applicable) only if the question does not apply to you. Please answer each question.

<table>
<thead>
<tr>
<th></th>
<th>I am satisfied with the amount of time the child/children spend with their other parent</th>
<th>Disagree strongly</th>
<th>Disagree somewhat</th>
<th>Uncertain</th>
<th>Agree somewhat</th>
<th>Agree strongly</th>
<th>N/A</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td>I have a good knowledge of community resources where I can get legal information</td>
<td>1 2 3 4 5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>b</td>
<td>I have a good understanding of how children are affected by conflict between parents</td>
<td>1 2 3 4 5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>c</td>
<td>Our child/children have adjusted quite well to our separation</td>
<td>1 2 3 4 5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>d</td>
<td>I believe that the amount of access one parent has should be related to the amount of child support he or she pays</td>
<td>1 2 3 4 5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>e</td>
<td>All things considered I am coping quite well with my separation</td>
<td>1 2 3 4 5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>f</td>
<td>The courts are likely the only way to resolve issues around custody, access and financial support</td>
<td>1 2 3 4 5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>g</td>
<td>I have a good understanding of the needs and reactions of children to separation</td>
<td>1 2 3 4 5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>h</td>
<td>I have a good understanding of alternatives to court action for resolving disputes around custody, access and child support</td>
<td>1 2 3 4 5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>i</td>
<td>I have a good understanding of the court process.</td>
<td>1 2 3 4 5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

THANK YOU
PARENT INFORMATION PROGRAM EVALUATION – PART II

17. Which of the following best describes the presenters of the seminar:

<table>
<thead>
<tr>
<th></th>
<th>Well organized and easy to understand</th>
<th>Sometimes difficult to follow and understand</th>
<th>Very difficult to follow and understand</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Social Worker</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>b. Lawyer</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
</tbody>
</table>

18. Did the presenters understand the needs and problems of families going through separation?

<table>
<thead>
<tr>
<th></th>
<th>Very good understanding</th>
<th>Some understanding</th>
<th>Not much understanding</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Social Worker</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>b. Lawyer</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
</tbody>
</table>

19. Did the instructors hold your interest throughout the seminar?

<table>
<thead>
<tr>
<th></th>
<th>Very much so</th>
<th>Most of the time</th>
<th>Some of the time</th>
<th>Not really</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Social Worker</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>b. Lawyer</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
</tr>
</tbody>
</table>

20. Was there enough class time?
   1. Too long   2. Just right   3. Not long enough

21. The program facilities (building, parking, classroom, security, etc.) were:
   1. Very good
   2. Good
   3. Fair
   4. Poor

22. Would you recommend the program to other separating parents?
   1. Strongly recommend
   2. Somewhat recommend
   3. Uncertain
   4. Would not recommend at all

372
23. Should parents entering the Family court process be required to attend a seminar such as this?
   1. Yes, all parents should be required to attend
   2. Only parents who have never been involved in the Family court process should be required to attend
   3. Uncertain
   4. Parents should not be required to attend

24. Please rate the following questions as to whether the program provided helpful information in the following areas:

<table>
<thead>
<tr>
<th></th>
<th>Not at all helpful</th>
<th>Not very helpful</th>
<th>Uncertain</th>
<th>Somewhat helpful</th>
<th>Very helpful</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Understanding the needs and reactions of children whose parents are separating or separated.</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>b. Understanding the importance of avoiding children being put in the middle of conflicts between parents.</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>c. Understanding the ways that children get caught in the middle of conflicts.</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>d. Understanding that it is important for parents to take care of themselves so that they will be better able to help their children adjust to the separation.</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>e. Understanding alternatives (ex. mediation) that can help people to avoid or shorten the court process.</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>f. Understanding legal terms.</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>g. Understanding what is involved in the court process.</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>h. Availability of community resources where people can get further legal information.</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>i. Availability of non-legal community resources that might be of benefit to me and my family.</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
</tbody>
</table>
25. What is your date of birth? __/___/___ (day, month, year)

26. What is your race/ethnicity?
   1. Asian
   2. White
   3. Aboriginal
   4. Latin
   5. African
   6. Other (specify) ________________________________

27. What is the highest level of formal education that you have completed?
   1. Less than high school
   2. Some high school
   3. High school graduate
   4. Technical training or college
   5. Bachelor’s degree or beyond

28. Estimate your current pre-tax annual household income from all people contributing to the household: (Child support and spousal support payments should be added or deducted, depending on whether you pay or receive them)

<table>
<thead>
<tr>
<th>Below $10,000</th>
<th>$10,000 - $14,999</th>
<th>$15,000 - $19,999</th>
<th>$20,000 - $24,999</th>
<th>$25,000 - $29,999</th>
<th>$30,000 - $39,999</th>
<th>$40,000 - $59,999</th>
<th>$60,000 and over</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td>6</td>
<td>7</td>
<td>8</td>
</tr>
</tbody>
</table>

29. If you were living with the other parent of the child/children involved in your current matter, has your present pre-tax annual household income (including child and/or spousal support) changed from the amount your household was receiving before your separation?
   1. Increased
   2. Remained about the same
   3. Decreased
   4. Not applicable - I was not living with the other parent of the child/children.

30. What did you like best about the program? ________________________________________

31. What did you like least about the program? ________________________________________
APPENDIX H

PIP Phase 2, Follow-up Questionnaire
PARENT INFORMATION PROGRAM
FOLLOW UP QUESTIONNAIRE

Between 3 and 6 months ago, you attended a Parent Information Program seminar which was aimed at providing you with information about the effects of separation on you and your child(ren) as well as information about the legal process, community resources and alternatives to litigation. At that time, you consented to participate in a follow up survey in relation to the seminar.

We would like to know whether the program has been useful to you, and would appreciate having you complete the questionnaire below and return it in the enclosed, stamped, addressed envelope. You are not required to participate in this part of the evaluation. However, your views are very important, and we hope you will answer the questions. All of the information you share on the questionnaire will be confidential.

A. GENERAL INFORMATION

1. Did you have a lawyer when you went to the Parent Information Program?
   1. Yes
   2. No

2. Do you now have a lawyer?
   1. Yes, I have a lawyer because I got a Legal Aid Certificate.
   2. Yes, I have hired a lawyer but I do not have a Legal Aid Certificate.
   3. I have not yet hired a lawyer but I plan to do so.
   4. I have not yet hired a lawyer and I do not think I will do so.
   5. I previously hired a lawyer but that lawyer is no longer working for me.

B. RELATIONSHIP INFORMATION

3. What is your relationship to the child/children?
   1. Mother
   2. Father
   3. Other (Explain) __________
4. What is your current relationship with the other parent or caregiver of your child/children?
   1. Separated
   2. Divorced
   3. Living together
   4. Other (Explain) ___________

5. Were you and the other parent:
   1. Married?
   2. Living together?
   3. Dating?
   4. Other (Explain) ______________________

6. How long was your relationship with the child/children’s other parent?
   ________________ Years or ________________ Months

7. On what date did you last separate from the child/children’s other parent?
   ________________ (Month) ________________ (Year)

8. Which of the following best describes your current situation?
   1. Single and not dating
   2. Dating
   3. Living in a common law relationship
   4. Remarried
   5. Other (Explain) ______________________
9. As far as you know, which of the following best describes the current situation of your child/children’s other parent?
1. Single and not dating
2. Dating
3. Living in a common law relationship
4. Remarried
5. Other (Explain) ____________________

10. How many children do you have UNDER the age of 18?
______________ (Please write in the number of children)

11. Please describe your child/children’s living arrangement:
1. All the children live with me MOST or all of the time.
2. All the children live with the other parent MOST or all of the time.
3. The time between parents is about equally shared.
4. The children are split in their primary living arrangement, such as 2 with one parent and 1 with the other parent.

12. Which of the following best describes the type of contact that the child/children have with the parent that they do not live with most or all of the time?
1. Regular access, once or more every week
2. Regular access, every two weeks
3. Regular access, monthly
4. Irregular access, holidays only
5. Irregular access, no set pattern
6. Telephone or letter contact only
7. No contact at all
8. Other (Explain) ____________________
13. In general, what is the level of conflict now between you and the other parent?
   1. Very low
   2. Low
   3. Moderate
   4. High
   5. Very high

14. Over the past 6 months, has the level of conflict between you and the other parent:
   1. Increased
   2. Remained the same
   3. Decreased

C. NEEDS OF PARENTS AND CHILDREN

15. Please circle the response for each statement which best reflects your current experiences or feelings. If the statement cannot possibly apply to your situation, write NA (not applicable). Please answer each question.

<table>
<thead>
<tr>
<th></th>
<th>Almost none of the time</th>
<th>Some of the time</th>
<th>About half of the time</th>
<th>Much of the time</th>
<th>Almost all of the time</th>
<th>N/A</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. I try to avoid involving my child/children in any disagreements or conflicts between me and the other parent</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>b. My child/children’s other parent and I argue in front of the child/children</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>c. I try to keep my child/children’s other parent from seeing the child/children</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>d.</td>
<td>My child/children’s other parent tries to keep the child/children from seeing me</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>e.</td>
<td>I encourage the child/children to have a good relationship with their other parent</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>f.</td>
<td>My child/children get caught in the middle of conflicts between me and their other parent</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>g.</td>
<td>I feel angry toward my child/children’s other parent</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>h.</td>
<td>My child/children’s other parent feels angry toward me</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>i.</td>
<td>I tell the child/children that the separation was not their fault</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>j.</td>
<td>I ask my child/children to pass messages from me to their other parent</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>k.</td>
<td>I let my child/children know that I understand that they love their other parent</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>Conflict between me and the other parent occurs during pick-ups and drop-offs of my child/children</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>---</td>
<td>-------------------------------------------------------------------------------------------------</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
</tbody>
</table>

**D. CURRENT SITUATION AND OPTIONS**

16. Please circle the response which best represents your level agreement with each statement at this time. Write NA (not applicable) only if the question does not apply to you. Please answer each question.

<table>
<thead>
<tr>
<th></th>
<th>Disagree strongly</th>
<th>Disagree somewhat</th>
<th>Uncertain</th>
<th>Agree somewhat</th>
<th>Agree strongly</th>
<th>N/A</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td>I am satisfied with the amount of time the child/children spend with their other parent</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>b.</td>
<td>I have a good knowledge of community resources where I can get legal information</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>c.</td>
<td>I have a good understanding of how children are affected by conflict between parents</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>d.</td>
<td>Our child/children have adjusted quite well to our separation</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>e.</td>
<td>I believe that the amount of access one parent has should be related to the amount of child support he or she pays</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>f.</td>
<td>All things considered I am coping quite well with my separation</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>g.</td>
<td>The courts are likely the only way to resolve issues around custody, access and financial support</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>h.</td>
<td>I have a good understanding of the needs and reactions of children to separation</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>i.</td>
<td>I have a good understanding of alternatives to court action for resolving disputes around custody, access and child support.</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>j.</td>
<td>I have a good understanding of the court process.</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
</tbody>
</table>
E. USE OF INFORMATION PROVIDED AT THE PARENT INFORMATION PROGRAM SEMINAR

17. Did you read the take home materials provided at the seminar?
   1. I read all or almost all of the materials.
   2. I read about half of the materials.
   3. I read some of the materials.
   4. I read none of the materials.

18. Please circle any of the services that you have made use of as a result of the Parent Information Program seminar.
   1. Lawyer Referral Service
   2. Dial-a-Law
   3. Duty Counsel (at court sites)
   4. Advice Clinic (located at various community centres)
   5. Advice Lawyer (Etobicoke and Scarborough Legal Aid offices)
   6. Mediation Services (311 Jarvis Street)
   7. Other (Please specify) ______________________

19. Have you attended court since attending the Parent Information Program seminar?
   1. Yes, Go to Question 20
   2. No - my next scheduled attendance has not come up yet, Go directly to Question 23
   3. No - I am not involved in a court matter, Go directly to Question 23

20. Did the information provided at the Parent Information Program help you to know what to expect in court?
   1. Not at all
   2. Somewhat
   3. Uncertain
   4. Very much

21. Has your court matter now been concluded?
   1. Yes
   2. No
22. If your court matter has been concluded, which of the following best describes your situation?
   1. The matter was settled with the assistance of a mediator.
   2. The matter was settled through the negotiation of lawyers.
   3. The matter was settled through negotiations between myself and the other parent.
   4. The matter was settled after we received an assessment or report of a social worker for the Children’s Lawyer.
   5. The matter was settled after a settlement conference with a judge.
   6. The matter went to trial and a judge made a final decision.
   7. Other (please explain) ______________________

23. Did the seminar help you to find ways to avoid placing your child(ren) in the middle of the conflicts between you and your partner?
   1. Not at all
   2. Somewhat
   3. Uncertain
   4. Very much

24. Did the seminar help you to understand your legal rights and obligations in relation to your family law matter?
   1. Not at all
   2. Somewhat
   3. Uncertain
   4. Very much

25. If you have been involved in a family court matter, how would you describe your experience with the court process?
   1. Helpful
   2. Helpful but frustrating
   3. Not helpful
   4. Other (please explain) ____________________________

26. If you have used mediation services, how would you describe your mediation experience?
   1. Helpful
   2. Helpful but frustrating
   3. Not helpful
   4. Other (please explain) ____________________________
27. What additional information could have been provided at the Parent Information Program seminar that would have been useful to you?

Thank you very much for participating in the Parent Information Program. PLEASE RETURN THIS FORM IN THE ENCLOSED, STAMPED, ADDRESSED ENVELOPE.
APPENDIX I

PIP Court File Survey Form
COURT REVIEW FORM

DATE FORM COMPLETED __ / __ / ___

1. Code Number __ __ __

2. Moving party’s relationship to child/children
   1. Mother
   2. Father
   3. Other (Explain) ______________________

3. Responding party’s relationship to child/children
   1. Mother
   2. Father
   3. Other (Explain) ______________________

4. Number of children under 18 at issue in case
   ___ (indicate number)

5. Age(s) of child/ren at issue in case
   1. Date of Birth ____/ ____/ ____ (d,m,y)
   2. Date of Birth ____/ ____/ ____ (d,m,y)
   3. Date of Birth ____/ ____/ ____ (d,m,y)
   4. Date of Birth ____/ ____/ ____ (d,m,y)
6. Nature of Application

1. Original ➔ Go to 6a
2. Variation ➔ Go to 6b

6a. Was original application discontinued and then recommenced?
1. Yes 2. No

6b. Which party sought the variation?
1. Original applicant
2. Original respondent

7. Case management judge assigned to case
1. Judge Hatton
2. Judge James
3. Judge Main
4. Judge Jones
5. Judge Bean
6. Judge King
7. Other (please specify) ____________________

8. Length of parties’ relationship

___ ___ ___ (Number of months)

9. Date of separation

___ / ___(m,y)

388
10a. Moving party attended seminar?
   1. Yes
   2. No → Go to 11a

10b. Date moving party attended seminar
     ___ / ___ / ___(d,m,y)

11a. Responding party attended seminar?
     1. Yes
     2. No → Go to 12

11b. Date responding party attended seminar
     ___ / ___ / ___(d,m,y)

12. Date of first court appearance.
     ___ / ___ / ___(d,m,y)

13. Was moving party represented at any point in proceedings?
    1. Yes  2. No

14. Did moving party use Duty Counsel services?
    1. Yes  2. No
15. Was responding party represented at any point in proceedings?

1. Yes 2. No

16. Did responding party use Duty Counsel services?

1. Yes 2. No

17. Issues raised on application.

<table>
<thead>
<tr>
<th>Issue</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Sole Custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>b. Joint Custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>c. Access to children</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>d. Restriction of other party’s access to children</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>e. Child Support from other party</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>f. Reduction/termination of child support obligation</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>g. Spousal Support</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>h. Non-Removal</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>i. Restraining order</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>j. Other</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>
18. Issues raised in Answer/Counterclaim

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Sole Custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>b. Joint Custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>c. Access to children</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>d. Restriction of other party's access to children</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>e. Child support from other party</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>f. Reduction/termination of child support obligation</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>g. Spousal support</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>h. Non-Removal</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>i. Restraining order</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>j. Other</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>
19. Interim orders sought by party bringing current application (Moving Party)

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Interim sole custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>b. Interim joint custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>c. Interim access to children</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>d. Interim restriction of other party's access to children</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>e. Interim child support from other party</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>f. Interim reduction/suspension of child support obligation</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>g. Interim spousal support</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>h. Non-Removal</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>i. Restraining order</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>j. Other</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>
20. **Interim orders obtained by party bringing current application (Moving Party)**

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Interim sole custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>b. Interim joint custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>c. Interim access to children</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>d. Interim restriction of other party’s access to children</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>e. Interim child support from other party</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>f. Interim reduction/suspension of child support obligation</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>g. Interim spousal Support</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>h. Non-Removal</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>i. Restraining order</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>j. Other</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

21. **Total number of motions commenced by Moving party (including motions for extension of time).**

a. ___ (total number of motions)

b. ___ ___ (number of motions for extension)
22. Interim orders sought by party responding to application (Responding Party).

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Interim sole custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>b. Interim joint custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>c. Interim access to children</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>d. Interim restriction of other party's access to children</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>e. Interim child support from other party</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>f. Interim reduction/suspension of child support obligation</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>g. Interim spousal support</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>h. Non-Removal</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>i. Restraining order</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>j. Other</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>
23. Interim orders obtained by party responding to application (Responding Party)

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Interim sole custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>b. Interim joint custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>c. Interim access to children</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>d. Interim restriction of other party’s access to children</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>e. Interim child support from other party</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>f. Interim reduction/suspension of child support obligation</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>g. Interim spousal support</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>h. Non-Removal</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>i. Restraining order</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>j. Other</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

24. Number of motions commenced by Responding party (including motions for extension of time).

a. ___ ___ (total number of motions)
b. ___ ___ (number of motions for extension)
25. Did the parties attend mediation?
   1. Yes  2. No  3. Parties were referred to mediation but no agreement to mediate was reached.

26. If parties attended mediation, which issues were mediated?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>b. Access</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>c. Child Support</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>d. Spousal Support</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>e. Non-Removal</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>f. Other</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

27. If parties attended mediation, which issues were resolved?

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>b. Access</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>c. Child Support</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>d. Spousal Support</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>e. Non-Removal</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>f. Other</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

28. Date case reached final resolution
   ____ / ____ / ____ (d,m,y)
29. How was matter resolved?
   1. Minutes of settlement incorporated into consent order
   2. Separation agreement
   3. Memorandum of agreement incorporated into consent order
   4. Hearing
   5. Trial
   6. Discontinued/Dismissed

30. If matter proceeded to trial, how many hours did the trial last?

   ___ ___ (number of hours)

31. Which issues were litigated at trial?

<table>
<thead>
<tr>
<th>Issue</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Sole Custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>b. Joint Custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>c. Access to children</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>d. Child support</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>e. Spousal Support</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>f. Non-Removal</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>g. Restraining order</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>h. Other</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
32. Final orders in favour of Moving party.

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Sole Custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>b. Joint custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>c. Access</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>d. Restriction/termination of other party’s access</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>e. Child support</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>f. Reduction/termination of child support obligation</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>g. Spousal support</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>h. Non-removal order</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>i. Restraining Order</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>j. Other</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>
33. Final orders granted in favour of Responding party.

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Sole Custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>b. Joint custody</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>c. Access</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>d. Restriction/termination of other party’s access</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>e. Child Support</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>f. Reduction/termination of child support obligation</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>g. Spousal Support</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>h. Non-removal order</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>i. Restraining Order</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>j. Other</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>
APPENDIX J

PIP Part B – Lower Conflict “I” Statements Overview
"I" Statements Overview

An "I" Statement is a positive communication tool. It’s a way to bring up an issue or concern, which helps the other parent (or anyone else e.g. your boss, a coworker, family member or friend) - to hear or listen to you.

So, what goes into an “I” Statement? First, an “I” Statement gives you the chance to state your feelings. This is a good way to begin and keep communication going because you are talking about how you are feeling. It’s not likely that the other parent will find this something to argue with you about.

Second, an “I” Statement will allow you to bring up an issue without blaming or criticizing the other parent. This is especially helpful because the other parent won’t feel the need to defend him or herself, which then can sidetrack communication. (A very good way to keep from using a blaming or critical statement is to not use the word “you”).

And third, an “I” Statement also lets you ask for a change in behavior. This too is helpful because you are focusing on the present or future and ways or ideas to make things better.

An “I” Statement has a basic formula. It always begins with I feel/ when/ because/ I wonder if we could? It always ends with “What do you think”? This last question is also very helpful because you’re asking the other person for his or her ideas. Asking a person for ideas gets away from
the feeling that someone is trying to tell them what to do, which is often not well received.
Bibliography

Legislative Authorities


An Act Respecting the Appointment of Guardians and the Custody of Infants, Consolidated Statutes of Upper Canada, 1859, c. LXXIV.

Australia (Family Law Act, 1975 (cth) as am. by Family Law Reform Act, 1995 (cth.).

Bill 32, The Queen’s Bench Amendment Act, 2001 (Saskatchewan).


Child and Family Services Act, R.S.O. 1990, c. C.11, as am.


Child Support Guidelines, SOR/97-175 as am.


Child, Family and Community Service Act, R.S.B.C. 1996, c. 46.


Children and Family Services Act, S.N.S. 1990, c. 5.

Children’s Act, R.S.Y.T. 1986, c. 22.


Constitution Act, 1867, 30 & 31 Victoria, c. 3.

Custody Jurisdiction and Enforcement Act, R.S.P.E.I. 1992, c. 15.

Divorce Act R.S.C. 1985 (2d supp.) c. 3.


Family Relations Act, R.S.B.C. 1996, c. 128.


Maintenance and Custody Act, R.S.N.S. 1989, c. 160.

Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66 (U.K.).

The Infants Act, R.S.O. 1960, c. 187.

The Infants Act, S.O. 1970, c. 222.


Jurisprudence


Children's Aid Society for Owen Sound & Grey (County) v. T. (J.), [2003] CarswellOnt. 6268 (Ct. J.) (eC).


405


Re Agar-Ellis (1883), 24 Ch. Div. 317.


Texts, Reports, Dictionaries and Theses


Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.


Bacon, B. *Evaluation of the Saskatchewan Justice Parenting After Separation/Divorce Program* (Saskatchewan: Department of Justice, 2004).


Black’s Law Dictionary, 8th ed., s.v. “parens patriae”.


Cathcart, Mary R. and Robles, Robert E. *Parenting our Children: In the Best Interests of the Nation* (1996).


Gilmour, Glen A. *High-Conflict Separation and Divorce: Options for Consideration* (Ottawa: Department of Justice, 2004).


McKenzie, B. and Guberman, I. “For the Sake of the Children” - A Parent Education Program for Separating and Divorcing Parents: Evaluation of the Pilot Project of Family Conciliation, Manitoba Family Services in conjunction with Manitoba Justice and Court of Queen’s Bench Family Division (December 1996).


Parliament of Canada, Special Joint Committee on Child Custody and Access, “For the Sake of the Children” (December, 1998).


Zemans, Frederick, H. and Monahan, Patrick J. *From Crisis to Reform: A New Legal Aid Plan for Ontario* (North York: York University Centre for Public Law and Public Policy, 1997).

**Articles and Conference Presentations**


Fuller, Lon L. “Mediation – Its Forms and Functions” (1971) 44 S. Cal. L. Rev. 305.

412

Gangel-Jacob, Phyllis. "Without Lawyers, Mediation Sacrifices Justice" (1997) 33 Trial 44.


Kuhn, Jeffrey A. "A Seven-Year Lesson on Unified Family Courts: What we have Learned Since the 1990 National Family Court Symposium" (1998) 32 Fam. L. Q. 67.


416


Websites

Attorney General of British Columbia: www.ag.gov.ca.bc.ca.

Attorney General of Ontario: www.attorneygeneral.jus.on.ca.

Federal Department of Justice: www.gc.ca.

Legal Aid Ontario: www.legalaid.on.ca.

Manitoba Family Conciliation Services: www.gov.mb.ca/fs.

Ministry of the Attorney General: www.attorneygeneral.jus.gov.on.ca.

Nova Scotia Supreme Court: www.courts.ns.ca/supreme.


Vanier Institute of the Family: vifamily.ca.