

The Unified Family Court — Ten Years Later

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I. INTRODUCTION

THE FAMILY DIVISION of the Manitoba Court of Queen's Bench was established over ten years ago.¹ At the time, its creation was seen as part of a trend spreading across Canada. A fragmented court structure with jurisdiction divided between several courts was seen as an obstacle to the reform of family law procedure. It was generally acknowledged that family law reform required a judicial process that was more efficient, timely, accessible and cost-effective than the status quo. The unified family court was seen as a way to achieve effective reform. In fact, the Law Reform Commission of Canada recommended a national network of Unified Family Courts across Canada.²

This article surveys the Manitoba family law bar a decade after the introduction of a unified family court into the province to determine whether the court has fulfilled its initial expectations. As the Chief Justice of the Court of Queen's Bench of Manitoba has indicated, the court system is fundamentally a "service provider"³

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¹ *An Act to Amend the Court of Queen's Bench Act* (1983), R.S.M. c.81, s.52(1) (amended R.S.M. 1988, c.C280 C.C.S.M. c.280). Section 1 of the Act was assented to on August 18, 1983. The remaining provisions came into effect upon proclamation on March 1, 1984 [hereinafter the *QB Act*].

² *Law Reform Commission of Canada, Working Paper No. 1, The Family Court* (Ottawa: Information Canada, January 1974) [hereinafter *Working Paper*].

³ "Annual Report of the Chief Justice of the Court of Queen's Bench of Manitoba for the Year Ending December 31, 1994" *Headnotes & Footnotes* (June 1995) Manitoba Bar Association at 20 [hereinafter *Annual Report of Chief Justice, 1994*].

and must, like all other institutions in today's climate, meet increasingly complex demands within the context of diminishing resources.⁴

The article concludes that, while challenges still remain, the cost benefit analysis strongly favours the unified family court system. The conclusion is inevitable that it is time for the national network of unified family courts recommended over a decade ago to finally be established across Canada.

II. THE HISTORY

THE DECADE BETWEEN 1975 AND 1985 was a time of great reform in family law. Not only were there fundamental and extensive changes in the substantive area of family law⁵ but attention was also focused on procedural reform. It was recognized

⁴ *Ibid.*

⁵ For an examination of legislative reform pertaining to maintenance awards and property regimes in Manitoba see: B.B. Sisler, *A Partnership of Equals* (Manitoba: Hignell Printing Ltd. 1995); F. Steel, "The Ideal Marital Property Regime" in *Family Law In Canada New Directions* (Ottawa: CACSW, 1985). Specific examples of legislative reforms in the late seventies regarding marital property vary to some degree. However, despite variations, every province in Canada reformed its matrimonial property laws to provide for statutory deferred sharing. In Manitoba, examples of legislative reform include s. 2(1) of the *Marital Property Act* R.S.M. 1987, c.M45 (also C.C.S.M., c.M45) which includes gender-neutral language and as such, applies to both spouses and the inclusion of cohabitees' right to maintenance under ss.14 and 4(3) of the *Family Maintenance Act* R.S.M. 1987, c.F20 (also CCSM, c. F20).

In Ontario, legislative reform followed proposals from the law reform commission for a new matrimonial property regime, and in 1978 the *Family Law Reform Act*, S.O. 1975, c.41, was introduced. This legislative scheme granted married persons the legal capacity of unmarried people, revoked the common law presumption of advancement and affirmed that married persons have the same rights to compensation for contribution of property as unmarried persons, Ontario Law Reform Commission, *Report on Family Property Law* (Toronto: Ontario Law Reform Commission). Further, in 1986, Ontario legislation introduced a new wave of reform of provincial family law with the *Family Law Reform Act*, 1986, S.O. 1986, c. 4, now R.S.O 1990, c.F3. The Act removes the distinction between "family assets" and other property, provides a comprehensive scheme for sharing the value of family property between spouses at end of marriage, and under it a spouse can apply for equalization of property accumulated during the marriage.

Alberta, like Manitoba, has legislated that spouses share in all property except for defined categories. For example, s. 8(a) of the *Matrimonial Property Act* R.S.A. 1980, c.M-9 states "the contributions made by each spouse to the marriage and to the welfare of the family, including any contribution made as homemaker or parent, will be considered by the court in the distribution of property."

British Columbia's *Family Relations Act*, R.S.B.C. 1979, c.121, and the *Married Women's Property Act*, R.S.B.C. 1979, c. 252, offer examples of reform made in the 1970s. In B.C., a non-owning spouse becomes entitled to share assets used for a family purpose, and business assets if he or she has contributed to their acquisition or operation includes a deferred community of property regime. See, for example, T. G. Anderson & M. Karton, *Family Property: A Study Paper Prepared for the Law Reform Commission of British Columbia* (B.C.: Canadian Cataloguing in Publication Data, 1985).

that substantive reform of family law was useless if the procedure was inefficient, time-consuming or prohibitively expensive. The most commonly suggested procedural reform at the time was the creation of a unified family court.⁶ Recommendations for its establishment began as early as 1974 when the Law Reform Commission of Canada published a working paper proposing a unified family court structure with comprehensive jurisdiction over all family matters.⁷

The reports indicated that a unified family court was needed to eliminate the overlapping and fragmented jurisdiction⁸ which resulted in several courts having responsibility for administering family law matters. This led to undesirable conse-

⁶ The Law Reform Commission of Canada endorsed the notion of establishing a national network of Unified Family Courts across Canada, *supra* note 2. See also, e.g. M. Adamache, "All Together Now: The Unified Family Court Project" (1979), 13 *The Advocate* 27; C. L'Heureux-Dube, "Family Law in Transition" in *Family Law Dimensions of Justice* (Toronto: Butterworths, 1983); B. Amren & F. Macleod, *The British Columbia Unified Family Court Pilot Project 1974-1977, Description and Evaluation*; L.K. Ferrier, "Working Paper 1, The Family Court" (1975) 7 *Ottawa L. Rev.* 247; *The University of Alberta Institute of Law Research and Report on Family Law, Eighth Annual Report—1974* at 10; *Civil Code Revision Office, Report XXVII—Report on the Family Court—1975* (Montreal: Quebec Official Publisher, 1975); J.A. MacDonald, "Family Court Reform in British Columbia" (1975) 18 *R.F.L.* 201 at 215.

The concept of the Family Court is not unique to Canada. The idea of a unified family court originated and was experimented with in other countries, including the United States, prior to its emergence here. In California "conciliation courts" have been in existence in some counties since 1939 and Australia has a well developed federal system of family courts. See J. & L. Waterhouse, "Implementing Unified Family Courts: The British Columbian Experience" (1983) 4 *Can. J. Fam. L.* 153 at 154.

⁷ Working Paper, *supra* note 2 at 7, 8 and 90.

⁸ One of the major hurdles to an efficient judicial system for resolving family law disputes has been *The Constitution Act 1867* R.S.C. 1985, Appendix II, No. 5. The Constitution presents two problems. First, the division of legislative powers between the provinces and the federal government produces an inability of any one jurisdiction to rationalize all of the laws affecting the family and produce a coherent social policy. Second, certain matters must be dealt with by federally appointed judges pursuant to s.96 of the *Act*. The division of powers between federal Canada and the various provinces and territories are still contained in the *Canada Act* and especially in sections 91 and 92 of the *Act* which allocate legislative powers. Specifically, s. 91 (6) allocates to the federal Parliament the power to make laws "in relation to marriage and divorce," while s. 92(12) gives provincial legislative power to make laws in relation to "the solemnization of marriage in the province." Further, s. 92(13) — "property and civil rights in the province" — encompasses property and contract law and other private law relations, ie matrimonial property, succession, support of spouses and children, adoption, guardianship, custody, etc. This split responsibility for the administration of the courts precludes any comprehensive jurisdiction being conferred on a single court, unless that court is superior. For further discussion of s. 96 jurisdictional problems see: P.H. Russell, *The Judiciary in Canada* (Toronto: McGraw-Hill Ryerson, 1987) chapter 9.

quences such as “forum-shopping” and the inability to deal with the family as an integrated and holistic unit in a multi-disciplinary setting.⁹

Consequently, in 1984 the Manitoba government established a unified family court in Winnipeg.¹⁰ The court contained the two features which were considered essential to the successful functioning of such a court.¹¹ It had comprehensive jurisdiction over all legal issues directly arising from the formation or dissolution of the family¹² and it had auxiliary social services available to the court and to the litigants to assist in the resolution of the conflict or to provide an alternative method of dispute resolution.¹³

The creation of the Family Division of the Manitoba Queen’s Bench over a decade ago was greeted with cautious optimism by this author.¹⁴ Given the passage of time, it seems appropriate to study the operation of the court and determine

⁹ For a more extensive discussion of the advantages of a unified family court system see F. Steel, “Recent Family Law Developments in Manitoba” (1983) 13 Man. L.J. 323 at 324.

¹⁰ QB Act, *supra* note 1. The Family Division of the Manitoba Court of Queen’s Bench was expanded to cover the province in October of 1989. At that point in time there were already a number of other unified family courts across Canada. A unified family court existed in Saskatoon, Saskatchewan; Hamilton-Wentworth, Ontario; St. John’s, Newfoundland and throughout the province of New Brunswick. Jurisdiction to hear family cases in Prince Edward Island had been unified in the Supreme Court, Trial Division (Family Section) since the mid-1970s. While this court handles all family law cases, no Justices are designated as exclusively responsible for such matters.

On 1 December 1994, the Unified Family Court which had operated in Saskatoon since 1978 was expanded to the Regina region.

At present, Manitoba, New Brunswick and Prince Edward Island remain the only Canadian jurisdictions with province-wide Unified Court system. See J. MacPhail, Q.C., “An Overview of Canadian Unified Family Courts,” presentation to Family Law conference, 21 April 1995.

¹¹ J. Payne, “A Conceptual Analysis of Unified Family Courts: A Canadian Perspective” (1982) 20 Conciliation Courts Review 52 at 54; and see also Justice R. Silverman-Abella, “Procedural Aspects of Managements for Children upon Divorce in Canada” (1983) 61 Can. Bar Rev. 443 at 467.

¹² The American experience has been similar. The more successful family courts have been those with comprehensive jurisdictional structure. Those courts “that have been somewhat less successful have had significant components of family-related controversies removed from their jurisdiction or they have remained fairly traditional courts with only limited access to alternative methods of resolving disputes.” See R.E. Shepard Jr., “The Unified Family Court: An Idea Whose Time Has Finally Come” (1993) Fall Criminal Justice 37 at 41.

¹³ There had been much discussion as to the level at which such a court should be established. Generally, there have been three alternatives suggested respecting the status and place of a unified family court in the judicial structure; a unified family court set up as a separate court of superior jurisdiction or as part or division of the existing superior court; a unified family court created as a division of the existing county or district courts or a unified family court created as a division of the existing provincial court system. Most of the literature favours the establishment of the court at a superior level. See Steel, *supra* note 9 at 326–27. See also Payne, *supra* note 11.

¹⁴ Steel, *supra* note 9 at 329.

whether it has fulfilled its creators expectations by making the resolution of family law disputes a less adversarial, more efficient as well as more humane experience.

III. METHODOLOGY

THIS SURVEY WAS AN ATTEMPT to ascertain the views of the family law bar, the lawyers who practised in the family court on a day to day basis. They are the ones most familiar with the operation of the court and the services it offers.¹⁵

The survey was intended as an informal canvass of opinion and the results are not presented as statistically accurate but rather as a snapshot of opinion. The questionnaire¹⁶ was sent to 50 lawyers and all five of the masters. Responses were received from all the masters and 33 lawyers, which is a response rate for the lawyers of over 60 percent. The choice of lawyers was random and taken from a list of lawyers whose names were listed on the mailing list of the Family Law section of the Manitoba Bar Association.

In order to obtain some data on the type of lawyers responding to the survey, two questions were asked— what was the lawyer's year of call and what percentage of their practice was devoted to family law. Tables 1 and 2 contain the results.

TABLE 1
YEARS OF CALL

1994 - 0	1990 - 2	1986 - 1	1982 - 4	1978 - 0	1974 - 1
1993 - 1	1989 - 1	1985 - 2	1981 - 3	1977 - 2	1973 - 1
1992 - 0	1988 - 1	1984 - 3	1980 - 1	1976 - 4	
1991 - 0	1987 - 1	1983 - 2	1979 - 1	1975 - 2	

¹⁵ The actual consumers of the "product" in this case would really be the clients of the lawyers. Court administrators of the Manitoba Court of Queen's Bench sent a written questionnaire to randomly selected members of the public who have had occasion to come into contact with and use the justice system. It is anticipated that the results of that questionnaire will be included in the Report of the Chief Justice of the Queen's Bench at the end of 1995. Unfortunately the limited scope and informal nature of this survey could not accommodate the inclusion of this group.

¹⁶ See Figure 1 — Questionnaire at the end of this article.

TABLE 2
PERCENTAGE OF TIME SPENT ON FAMILY FILES

100% – 10	90% – 4	80% – 5	33% – 1
95% – 8	85% – 5	50% – 1	No answer – 4

Thus, most of the respondents had at least ten years at the Bar and 22 out of the 33 had practised before the introduction of the Family Division of the Manitoba Court of Queen's Bench and could compare the court system before and after its introduction.

The respondents were for the most part specialists in the practice of family law. The vast majority of the lawyers indicated 100 percent or 95 percent of their practice was devoted to family law and only two individuals indicated they spent less than 80 percent of their time in family law. The Masters on the whole spend 30–40 percent of their time on family law matters.

In summary, the opinions expressed in the survey were from the experienced specialists who appear in the family court day in and day out.

IV. THE RESULTS OF THE SURVEY

A. Comprehensive and Exclusive Jurisdiction

When asked the question, "Do you agree with the concept of a specialized court for family matters?", *everyone* who answered the survey said yes — or to put it a different way, quoting one of the respondents,

The family division has brought the practise out of the mire. It took the practise out of the dark ages and the cesspools and gave it some class. It provided a focal point and a medium for change.

That point emerged with absolute clarity. Everyone agreed that a court with comprehensive jurisdiction over all family law matters was much better than the previous system. Comprehensive family law jurisdiction in a single court as opposed to the old three Court system meant a single set of forms, a single procedure and generally a single location. As many of the lawyers indicated, the benefits are many, including simplicity, convenience for counsel and clients and lower costs. Unification of jurisdiction in matters affecting families has provided a forum for comprehensive resolution of family law issues in a more holistic fashion.

B. Specialization of the Judiciary

A key element to the success of the court, along with the comprehensive jurisdiction, is the specialization of the judiciary. Only one person disagreed with the concept of specialized judges. The reason given for supporting the concept of specialized judges was based primarily on two factors. Specialized judges had an enhanced knowledge of the law, practice and procedures and greater interest in the area.

With respect to the issue of knowledge, the lawyers felt that the family judges are more familiar with the practical ramifications of their orders, and specific practice and procedures in such areas as child protection and maintenance enforcement.

Respondents to the survey indicated that the in-depth knowledge of the family division judges enhanced their ability to mediate, to encourage settlement and to generally move things along. Results tend to be more even and predictable and counsel are able to advise their clients accordingly. Not all lawyers agree that there is consistency between judges especially with respect to quantum on support and consequently, at least some suggested that guidelines be developed for the assistance of the judges.¹⁷ Several individuals also mentioned the decisions written by specialized judges were of a higher quality. Their specialization allowed for a better utilization of court time since it is that specialization that allows lawyers to argue difficult and complex fact scenarios in one hour without lengthy references to case-law.

As important as the intimate knowledge of the area that specialization brings is the interest and commitment to family law issues. It was obvious to many practitioners before the introduction of the Family Court (and continues to be the case in jurisdictions across the country where no family court exists) that some judges

¹⁷ At the present time, the federal government is seriously contemplating the introduction of formulas for child support, although it is unclear whether in the form of guidelines or otherwise, "Ottawa Delays Legislative Reforms on Child Support" *The Lawyer's Weekly* (30 June 1995) at 4. For further reading on the issue of child support guidelines see for example: E.B. Zweibel, "Child Support Policy and Child Support Guidelines: Broadening the Agenda" (1993) 6 C.J.W.L. 371; *The Financial Implications of Child Support Guidelines: Executive Summary* (Ottawa: The Federal/ Provincial/ Territorial Family Law Committee, 1992). For a review of child support guidelines in the USA, see for example: J.J. Crocker, "Current Issues in Child Support and the Use of Child Support Guidelines" (1994) Spring 57 Kentucky Bench and Bar 8; "Florida Child Support Guidelines and the High Income Parent" (1995) April 7 Divorce Litigation 94; N.S. Erickson, "Child Support Guidelines: A Primer" (1993) 27 Clearinghouse Review 734; M. Takas, "Improving Child Support Guidelines: Can Simple Formulas Address Complex Families?" (1992) 26 Fam. L. Q. 171; P. Tjaden, N. Thoennes & J. Pearson, "Will These Children Be Supported Adequately? The Impact of Current Guidelines" (1989) Fall The Judges' Journal 5.

do not like family law and do not wish to be assigned to hear these kind of cases.¹⁸ The survey results mentioned frequently that the area of family law requires a special judicial temperament and most importantly a desire to be in the family court. "The Judges we have in the Family Division are committed to the area of family law as an area of law and as a tool for justice."

The interest and commitment of the judges in the Family Court also translates into sensitivity to the non-legal and crucial social and emotional issues in family law. For example, protecting the interests of children is a major focus which requires non-legal expertise. The Family Division judges often stay abreast of social science knowledge along with the law. As one lawyer put it: "Very often, the type of people who are attracted to family law, whether judges or lawyers, are there because they have special social (not necessarily legal) skills that allow them to interpret or practice family law in a sensible and humane manner."

However, even though specialized judges are clearly preferred, the lawyers acknowledged that burn-out does occur. Judges, just like real human beings, get tired, burnt-out, stagnant, and jaded. Specialization in any field can sometimes lead to a narrowness, a lack of openness to new ideas. People settle into patterns and habits. They tire of hearing the same kind of cases and can sometimes be impatient. As in all courts, a process of stagnation takes place and this needs resistance.

Burnout is certainly not a problem unique to the courts, however it is a problem that has not been publicly discussed. For some time, the judiciary has been placed upon a pedestal as a species apart. Gradual recognition is now being given to the reality that common issues of professional development are present in this profession as in others. It may be that the terms of the sabbatical currently offered to the federal judiciary requires some changes to be more appropriate for specialized courts.¹⁹

Just as the preference was clear for specialized judges, the preference also seems clear for masters who are specialists at valuation in terms of a marital property reference. As one lawyer put it, "The Masters are skilled at their art and conduct themselves in a highly professional manner. They have become greatly experienced in valuation. Before when judges did the valuation, their lack of background in this area of valuation led to the necessity of adducing additional background evidence."

¹⁸ The reality of family law being treated as the poor relative of the law has been referred to several times, most recently by Bertha Wilson in her report on Gender Equity for the Canadian Bar Association. See The Honourable Bertha Wilson *et al.*, *Touchstones for Change: Equality, Diversity & Accountability* (Ottawa: CBA, 1993) at 209.

¹⁹ At present, a federal member of the judiciary may apply for a six month sabbatical once every ten years. The sabbatical must be taken at a law school in Canada. This is a policy set up in 1989 between the Canadian Judicial Council and the Council of Canadian Law Deans (Personal communication with the office of the Canadian Judicial Council, Ottawa — August, 1995).

Once again, in the opinion of the survey respondents, specialization leads to efficiency and a more effective operation — in this case the specialization of the Masters in valuing assets.

Given the very positive comments on the concept of specialized judges and Masters, it is not surprising that there were some negative comments on the present practice of rotating justices from the General Division into the Family Division on a regular albeit temporary basis.

Since the inception of the Family Division, some judges from the General Division of the Court of Queen's Bench have sat in the Family Division on a temporary basis when the demands of the family caseload were especially high. For the last few years such rotations have become commonplace and frequent. The survey indicated that this practice was not favoured by a vast majority of the survey respondents.

The criticisms of the Bar did not refer to any particular actions of one judge but rather to the difficulty of dealing with judges who were not specialists. It is clear that the increasing rotation of general division judges into the family division affects the fundamental concept of the family court as a court staffed by specialists.

The lawyers felt there was a difference between the civil side judges and the family court judges in terms of the depth of their grasp of family law issues and trends in the area. This is not to imply that the civil judges were not providing good service but it is not specialized service and specialization was a basic objective of the court.

The lack of specialization leads to a lack of continuity and predictability. One lawyer gave custody orders as an example of the different approaches. In the majority of cases, Family Division judges very often order joint legal custody at the interim hearing and set physical care and control. Civil side judges seem much more inclined to order sole custody with access at the interim hearing. Is this merely a legitimate difference of opinion or is it related to the experience of the family judges? Many family law lawyers and judges have come to the conclusion that the routine award of sole custody at the interim level feeds into the loser/winner syndrome and rewards the hardening of attitudes, particularly in light of the perception that the final order follows the interim. The Family Division may be indulging in semantics in its awards of physical care and control but, as Justice Hamilton recognized in *Abbott v. Taylor*,²⁰ semantics has an important psychological effect in these matters.

The lawyers commented not only on the difference in the depth of understanding of the issues but also the lack of interest sometimes exhibited by some of the civil justices. Use of general division judges in family pre-trial conferences was listed

²⁰ (1987) 11 R.F.L. (3d) 407, confirmed on appeal (1986) 2 R.F.L. (3d) 163 (Man. C.A.)

as being especially problematic. Perhaps the attitude of the lawyers can be summarized by this comment," civil judges are not quite on top of the issues being raised and appearing before them is like watching someone trying to reinvent the wheel."

One interesting suggestion was that the general division itself could benefit from more specialization, such as in the area of commercial litigation cases for example. The issue of specialization of lawyers is one that has been debated for many years and at least one province now certifies specialists in the practice of law.²¹ Within the judiciary, there is already some specialization within the areas of tax (at the federal level) and criminal law (at the provincial court level). Perhaps given the increasing complexity of law and the volume of new legislation and cases, increasing specialization within the judiciary should be considered.

Obviously, the increased use of civil judges is due to an increased workload and consequent shortage of judges in the family division which in turns affects the accessibility and effectiveness of the Division.²² One of the respondents to the survey indicated that over 50 percent of the Court filings are family matters but only 30 percent of the time of judges in the Queen's Bench are allocated to family matters.

Indeed, there have been rather dramatic increases in the number of files opened within the family division as indicated by the following tables:²³

²¹ Ontario presently has a system in place in which practitioners may refer to themselves as specialists once certified by a committee of the Law Society of Upper Canada. The certification process is a combination of experience and references. More recently, the *Civil Justice Review – First Report* (Toronto: Ontario Civil Justice Review, 1995) at 274 recommended that lawyers should be required to undergo specialized education in family law matters *before* they can be eligible for legal aid certificates for work in that area. Task Force member, Mary McConville, of the Toronto Regional Courts Management Advisory Committee, said the public has strong feelings that both lawyers and judges should have special training in order to work in family law areas: *The Lawyers Weekly* (24 March 1995) 9.

²² On 15 March 1995 the provincial government passed an Order-in Council increasing the number of Judges that may be appointed to sit in the Family Division by one. At a conference on 21 April 1995 Associate Chief Justice Mercier stated that, "we consider it imperative that the appointment should be made as early as possible in order to assist in dealing with the current delays." Report of Associate Chief Justice Mercier to "Family Law Conference" held on 21 April 1995, at 4 [hereinafter Mercier's Report]. Justice Sylvia Guertin Riley was appointed to the UFC and was sworn in August 24, 1995.

²³ *Supra* note 3 at 23.

TABLE 3
FAMILY AND CHILD PROTECTION FILES

YEAR	FAMILY DIVISION FILES OPENED	CHILD PROTECTION FILES OPENED
1991	3071	491
1992	3188	522
1993	3991	816
1994	4068	612
TOTAL	14,318	2441

TABLE 4
FAMILY AND CIVIL FILES OPENED BY JUDICIAL CENTRE

JUDICIAL CENTRE	CIVIL DIVISION FILES OPENED		FAMILY DIVISION FILES OPENED	
	1994	1993	1994	1993
Beausejour	9	11	25	12
Brandon	254	266	510	334
Dauphin	58	70	151	160
Flin Flon	30	27	59	43
Killarney	5	11	0	0
Minnedosa	24	40	44	34
Morden	50	40	89	42
Portage La Prairie	60	56	50	41
Russell	6	20	4	8
St. Boniface	412	430	49	36
Selkirk	23	19	128	162
Swan River	23	17	34	28

Continued on next page

TABLE 4 — *Continued*

JUDICIAL CENTRE	CIVIL DIVISION FILES OPENED		FAMILY DIVISION FILES OPENED	
	1994	1993	1994	1993
The Pas	64	42	129	109
Thompson	58	42	153	148
Virden	5	6	2	0
Winnipeg	9388	8831	4068	3991
TOTAL	10,469	9928	5643	5148

While the number of court filings does reveal part of the picture and does indicate the workload increase on the staff at the Court of Queen's Bench, it does not reflect the number of cases that settle before requiring any type of judicial intervention.

Rather than focus on court filings it might be interesting to analyze the utilization of court time between the Family and General Division and compare that to the number of matters that actually require some form of judicial intervention in order to determine whether the historical resource allocation in terms of judges, courtrooms and support staff is still appropriate. In any case, it would seem some study of the resource allocation between the Family and Civil Divisions is warranted.

C. Auxiliary Support Services

One of the two essential features mentioned as part of an effective unified family court was an adequate collection of auxiliary support services including information and intake services; counselling and conciliation and mediation services, investigative or assessment services and enforcement services.²⁴

1. Court Staff

There were very positive comments about the Court staff in the Family Division with respect to their hard work and attempts to facilitate the work of the court and counsel. While all support staff including court-staff, mediation and conciliation

²⁴ Payne, *supra* note 11.

services and enforcement were mentioned favourably, special appreciation was offered to the Queen's Bench personnel.

The court clerks were seen as knowledgeable, very professional and accommodating. The specialized court personnel were well versed and experienced in family matters.

2. Family Conciliation Services

Family Conciliation Services has been an integral part of the operation of the Family Division since its establishment. Without a well-funded and effective social services branch, the family court is no different than any other court. Its objective is to resolve as many disputes as possible in a non-adversarial fashion outside of the courtroom. The provision of free alternative dispute resolution forums such as mediation is a vital part of the court and the two areas should be seamlessly integrated with each other.

In Manitoba, Family Conciliation is a program operated under the Department of Family Services. The Winnipeg office of Family Conciliation provides services to Winnipeg and Portage la Prairie, as well as the Interlake and south east regions. It is also the Program Directorate for outlying regions.²⁵ The Winnipeg office has 15 staff positions while the Brandon office has four staff positions. The Brandon office also includes part-time staffing for Virden, Killarney and Neepawa. Dauphin, Flin Flon, and Thompson each have one staff position.

While Family Conciliation Services provides some information referral, conciliation counselling and children programming, its main mandated services are related to court ordered assessment reports and mediation services.

There is a difference in perception with respect to waiting periods for these services. Many lawyers felt that Family Conciliation Services, like other branches of court services, appears to be understaffed. Delays in obtaining custody assessments (or home studies as they are often called) mediation and the provision of services not offered but needed such as supervised access and reporting back on an interim basis were often mentioned in the survey responses.

Delays in obtaining home studies seemed especially troubling. Lawyers pointed out that a lengthy wait for an assessment can lead to the establishment of a status quo. The respondents to the survey indicated that reports often took more than six months to complete. Assessment reports can only be done upon order of the court and the lawyers found the family court very reluctant to order assessments as a result of what the judges perceived to be a backlog.

²⁵ Information on Family Conciliation services was obtained from a presentation made by Sandra Dean at the conference on the Family Division, Court of Queen's Bench on 21 April 1995 and the fact sheet prepared by her and distributed at the conference at 1 [hereinafter Family Conciliation Fact Sheet].

Sandra Dean, Director of Family Conciliation Services, confirmed the time frames mentioned in the survey. However she views the delay in obtaining an assessment report as an inherent part of the process which would not necessarily be speeded up by increased staffing. She states that on average there is presently a two month waiting list depending on the influx of referrals from the Court at a given point in time. The process itself, once begun, takes approximately three months. The time frame is governed by such factors as complexity of the issues, involvement of other agencies and client unavailability and resistance. An assessment is a highly specialized and involved process which follows a definite procedure in which there are few shortcuts.²⁶

There is agreement as to the effect of a thorough home study as a powerful and decisive tool in contested custody and access matters. The statistics compiled by Family Conciliation Services indicate that in approximately 80 percent of cases where assessments were completed, settlement occurred and matters did not return to court.²⁷ In the 1994-95 fiscal year, Family Conciliation counsellors in the province completed 200 assessment reports.²⁸

Given the above success rate, there should be no reluctance on the part of the Court to order child custody assessments in appropriate cases. Consideration should be given to allowing the assessments to be done upon consent within certain parameters rather than only upon court order. This would inevitably increase the number of assessments done and require increased staffing, however the result would be less matters proceeding to court and consequently less expense to the system.

A similar debate arose with respect to the issue of supervised access. Supervised access provides another example of the symbiotic relationship between the two arms of the family court. Many lawyers in the survey argued that with supervised access provided early on in the history of the marital dispute and reliable reporting back to the parties and the court, many of the issues which take months and years to resolve in family law cases could be resolved much earlier. On the other hand, counsellors from family conciliation services felt that the issue of supervised access was often more complicated than initially conceived by the lawyers, was difficult

²⁶ Personal conversation — April 21, 1995.

²⁷ Family Conciliation Fact Sheet, *supra* note 25 at 2. The high settlement rate is similar to that found in other provinces. H. Sachs, "The Dejudicialization of Family Law: Mediation and Assessments" in E. Sloss, ed., *Family Law in Canada: New Directions* (Canadian Advisory Council on the Status of Women, 1985) 94.

²⁸ *Ibid.*

to implement and ultimately, was often not necessarily in the best interests of the child.²⁹

It should be noted that the Manitoba Bar and judiciary³⁰ are not the only ones who see the need for such a program. In February of 1995, the Saskatchewan Unified family court began offering a supervised access program. Participants must be referred by court order. The services are offered free of charge and a social worker attached to the Court supervises access. There are also volunteers who provide direct access supervision.³¹

As well in 1994, in British Columbia, the Family Justice Reform Project (a community-based delivery of family law services and supports underway in four communities) commenced a supervised access service in two of those four communities. The supervised access service involves a small fee which can be waived when the circumstances of the family warrant.³²

It is clear that a closer liaison between the family law bar and family conciliation services might resolve the different perceptions held by the two groups as to the process and viability of certain services.

Mediation is at present an unregulated profession. The survey results suggested some uniformity in the background and training of the mediators on staff would be useful. In addition some follow-up on the effectiveness of mediation services offered was thought to be helpful.

D. Improving the Process — What Comes After the Unified Family Court?

Within the basic concept of a unified family court with specialized judges, comprehensive jurisdiction and auxiliary support services there is much room for additional procedures to be instituted that would enhance the objective of minimizing the emotional and financial toll taken by marital disputes. The first report of the Civil Justice Review in Ontario issued in March, 1995, identified particular concerns in family law such as lengthy delays, the very high cost of family law proceedings, a

²⁹ Conversation with Jean Boyce of Family Conciliation Services, 21 April 1995.

³⁰ In his report at the Family Law Conference, Associate Chief Justice Mercier indicated there was a need for a supervised access program and called upon the actors involved in this area to take the initiative in developing such a program: Mercier's Report, *supra* note 22.

³¹ MacPhail, *supra* note 10 at 5.

³² *Ibid.* at 8.

significant increase in motions, the damaging effects of the contents of affidavits, the need for education and for early judicial intervention.³³

All these concerns were duplicated in the survey of the Manitoba family law Bar. Comments were made about the delay, the length of affidavits, the increase in motions and the subsequent increase in costs as a result of these problems.

1. Moving the Judiciary from an Adjudicative Role to a Manager and a Mediator

As a result of these concerns, the judicial system is attempting to incorporate more alternative dispute resolution techniques into the court process rather than simply divert cases to the mediation arm of the court. For the most part these attempts have met with positive responses from the lawyers. While these techniques can be useful when used appropriately, they require different skills from the judiciary. In the past, the function of the judiciary was primarily adjudicative, a function that often came quite naturally to someone who had spent many years practicing law. At present and, increasing in the future, the skills required of the judiciary will be more that of a mediator and a manager, skills that are quite distinct from the adjudicative mode.

One procedural attempt that was on the whole viewed very favourably was pre-trial conferences. They allow settlement to be explored and input to be received in an informal and inexpensive manner. However, the success of the pre-trial conference was very much dependant upon the manner and skill of the presiding judge. It is obvious from the survey responses that the lawyers want the judges to offer opinions. They want an active involved judicial mediator who uses the pre-trial conference to promote settlement. That does not always occur. From the comments of the lawyers, it appears that the variation in technique is quite substantial. For example, one of the lawyers indicated; "Pre-trial conferences can be a wonderful case management when the lawyer wants it, but you must get one of the judges who are really good. If you don't, this would be on my bad list."

One area that is ripe (some would say overdue) for the introduction of alternative dispute resolution techniques is the area of marital property references. Typi-

³³ Ontario established a Civil Justice Review project, a joint initiative of the Chief Justice of the Ontario Court of Justice and the Attorney General of Ontario, to address complaints about long delays, backlogs, lack of access and costs, and general scepticism about the efficiency of the civil justice system. It released its first report on 9 March 1995. It recommended major changes to the system including a concerted effort to wipe out the existing backlog, team-oriented caseload management, and increased emphasis on alternate dispute resolution, *supra* note 21, at 24, 25, and 28. The backlog in the province was the major impetus for the review, a problem not present in such an exacerbated form in Manitoba. The recommendations in the report are based on a "multi-door" concept which includes the traditional courtroom, but also encourages parties "to develop tailor-made procedures for tailor-made solutions." *The Lawyers Weekly* (24 March 1995).

cally in family law, certainly in this province, it is custody or access disputes in which mediation is attempted but not property matters.

Mediation techniques in custody and access disputes have been quite successful. The mediation process begins with an orientation seminar which contains a significant educational element with gives parents information about mediation as well as presenting them with options regarding decision surrounding their children after marital breakup. In 1994, 700 parents attended this seminar and a more extensive Parent Education Program is being developed.³⁴ In the 1994–95 fiscal year, Family Conciliation counsellors handled over 500 mediations. Of the cases that proceeded with mediation, approximately 70 percent resulted in partial or full agreements.³⁵ All cases proceed through a screening process to determine whether mediation would be appropriate in the circumstances.

Yet, with respect to property matters, no screening process presently takes place. No diversion or intake is attempted and no free mediation services are provided. As a result the five Masters presently staffing the Court of Queen's Bench have full calendars with significant waiting lists. Moreover, many of the matters that come to their attention are exactly the type of matters that other areas of law have diverted to mediation or arbitration for years.³⁶ It is surprising to discover that Masters spent significant time dealing with the division of household effects and furniture. Property disputes should go through a form of intake so that certain

³⁴ Family Conciliation Fact Sheet, *supra* note 25 at 2. The Minister of Family Services has approved an 18 month Pilot Project to implement a Parent Education Program: "The focus of the program will be on the needs of children and how parental behaviour during this critical time can influence children. Under the program, parents would attend separate three hour information sessions. The sessions will cover topics such as the developmental and emotional needs of children and the influence of parental behaviour on children of families experiencing separation or divorce. The success and impact of the program will be evaluated at the end of one year. It is anticipated that the program will be operational in the early fall of 1995": Mercier's Report, *supra* note 22 at 7.

³⁵ Family Conciliation Fact Sheet, *supra* note 25 at 3. This success rate is similar to that found in other jurisdictions. See, for example, "Mediated Custody Settlements Produce Less Conflict, Happier Clients" *The Lawyers Weekly* (25 August 1995) 6 where Dr. Joan Kelly, head of the Northern California Mediation Centre referred to a variety of research studies on mediated settlements. Dr. Kelly indicated that in California between 60 percent and 85 percent of all custody battles now settle at some point during the mediation process and that only two percent of contested cases actually go to trial. For further discussion of mediation in family law see: D.T. Hubley, "Mediation at the Crossroads" (1992) *Can. Fam. L. Q.* 73, and D. Singer, "Mediation: A Growing Means for Settling Divorce Conflicts" (1992) 47 *Arbitration Journal* 21.

³⁶ Mediation Services in Winnipeg has a long standing tradition of mediating small property offences. The construction industry, businesses and employers and trade unions have long used mediation and arbitration to resolve property disputes.

disputes could be offered the possibility of mediation in a less formal, less adversarial, less expensive forum.³⁷

Another example of the incorporation of alternative dispute resolution techniques into the court process is the trend toward case management. Several lawyers in the survey commented on this trend. Case management is now in effect in Toronto and a number of other jurisdictions. Evaluations have shown that such a system has significantly reduced delay and increased real savings to the litigants by assisting them to narrow the issues in dispute or to settle their cases before substantial monies are expended.³⁸

The Court of Queen's Bench has approved a recommendation that a pilot project on case management in the Family Division take place. It is proposed that the project begin in November, 1995. Generally, case management would be initiated when an answer has been filed and no prior proceeding has taken place, upon setting time for the first contested motion and where 90 days have passed after the filing of a petition and nothing has happened.³⁹

Opinions tended to vary on the efficacy of a more judge-driven court. One point that should be noted is that the case management techniques developed in civil courts cannot be automatically transferred to a family law setting without some considerations for the different influences in this area of law. For example, one lawyer asked the Bench to remember that the delay in having a matter dealt with was not always a disadvantage. As she put it, "The Court has to accept that there is an emotional process driving the legal process and time is a factor in bringing parties to a reasonable settlement."

2. *Less Paper and Better Rules*

For the most part, the Manitoba Court of Queen's Bench procedures are still highly labour-intensive and paper-based making access to information cumbersome and costly. Several lawyers talked about drowning in paper and questioned whether a motions brief and a pre-trial brief was necessary in simple cases. Some changes have recently been introduced in an attempt to improve the process.

For example, the new rules with respect to affidavits⁴⁰ are an attempt by the court to bring the paper wars under control. The profession was as concerned as

³⁷ For an example of in court mediation of money and property issues in a family court context, see, G. Davis, "Mediation Appointments on Money and Property in the Bristol County Court" (1991) 21 Family Law 130.

³⁸ Annual Report of Chief Justice, *supra* note 3.

³⁹ Mercier's Report, *supra* note 22 at 8.

⁴⁰ New rules with respect to expungement of affidavits were introduced on 1 December 1994. See rule 70.3 2.3 (1-4), *The Court of Queen's Bench Act*, C.C.S.M. c.C280.

the Bench with the content and length of some affidavits. As a result of these rule changes, the Masters are dealing with approximately six to ten applications to expunge affidavits each week. The lawyers in the survey are pleased that the Masters are hearing the motions for expungement as it saves costs. The Bar is also particularly pleased that the Masters are applying the law vigorously, striking inappropriate affidavits and awarding costs where necessary.

Senior Master Goldberg indicated that costs are being awarded in approximately one-half of the applications.⁴¹ This increase in the number of cases in which costs are awarded has also been received favourably, especially since the survey respondents indicated that the family court judges were sometimes reluctant to award costs at appropriate levels.

Although this reluctance is understandable since most family clients have little money, costs can be a very effective method of controlling behaviour and promoting adherence to the rules, especially if costs are to be paid by the lawyers themselves in especially egregious occasions. In this context, the Masters habit of awarding costs made payable in any event was seen as an effective practice and the reluctance of Judges to award reasonable costs in family matters was seen as promoting abuse of the system.

However some concerns were expressed with regard to the new rules. First, lawyers suggested that when new rules are introduced more advance notice should be given. For example, the new rules with respect to affidavits were introduced in December which is often the busiest time of the year for family law practitioners. Another concern was the fact that the new rules set up some difficult time constraints and the new rules for filing deadlines do not work well with the new rules for expungement of affidavits. Parties are required to have all material filed and served four days before hearing date but the responding party often files affidavits exactly four days before thereby not allowing time for a “reply” by the other party as allowed for in the rules. These filing deadlines also make it difficult to bring expungement motions.

The new rules with respect to affidavits are one attempt to bring the paper monster under control but several lawyers asked whether a very simple one page application and a summary procedure could be established for simple cases. One innovative suggestion asks whether it would not be simpler to simply bring one's client down and give *viva voce* evidence and have interim motions limited to the evidence of the parties. This procedure would alleviate the difficulty of making credibility findings based on affidavits and, with the aggressive involvement of judges, could be kept short. The Bench is presently considering further rule changes

⁴¹ Mercier's Report, *supra* note 22 at 6.

including limiting the length of affidavits unless leave was granted by the presiding Judge.⁴²

Another area for streamlining that was identified in the survey was the area of the marital property reference. New forms were introduced into the process as of 1 May 1995 in an attempt to provide clear and consistent procedures as well as to reduce the number of costly appearances by counsel before the Master and thereby expedite the process.⁴³ As a result of these new forms, it may be that some of the lawyers criticisms will disappear, and it should be noted that the survey responses pre-date the new forms.

The survey comments indicate that the reference procedure would benefit if everyone spent a little more time defining the issues. For example, ordinarily a very general reference is made by the Justice to the Master. Once the reference is before the Master it appears that in order to complete the evaluation, he or she must make decisions on shareability and categorization; questions of law. Yet, in some cases, it would be helpful if judicial decisions on issues of law were made first, before the reference was sent to the Master (such as the date of separation if that is in issue). The issues should have been defined more carefully by the lawyers before asking for the reference. It is true that most marital property references settle. However, perhaps they could settle sooner and quicker if the terms of references were defined more specifically earlier in the game. Perhaps the rules should be changed to require a detailed reference in each case listing the issues to be determined.

Additionally, lawyers mentioned that it is helpful to have initial short appearances before the Master to review the issues and determine the documents still required to be exchanged. However, sometimes counsel appear in front of the Master after waiting for the initial meeting for months and nothing has been done. No documents have been exchanged. No appraisals have been ordered. The issues have not been defined. This simply delays matters even further.

With respect to the rules and procedures of the Family court generally, negative mention was made several times of the non-application of the civil rules in family court. For the most part, the lawyers would prefer if the judges applied the rules of procedure more stringently than is presently the case, especially with respect to rules of evidence and hearsay.

On the whole, it was felt that sometimes things got a little *too* informal and unprofessional. There was a feeling that the standard of advocacy demanded was not as high as in the general division. The lawyers want the rules applied and applied consistently, particularly with respect to affidavits.

⁴² *Ibid.*

⁴³ *Ibid.*

Lawyers who commented on the application of the civil rules understood the need for sensitivity to the unique nature of family law. However, rules of procedure level the playing field for everyone. By ignoring them, equity might be done in that particular case but the general standard of practice at the family bar would eventually suffer.

3. More Use of Technology — The Computerized Courtroom

Beyond procedural rule changes, there are many other areas where process could be improved by the use of technology.⁴⁴ There are many areas that would benefit considerably from an introduction of basic technological advances. The court personnel and the court as a whole could benefit from “the computer-integrated courtroom.”⁴⁵ Appropriate use of technological aids could streamline the flow of information, improve access to systems, assist diversion attempts and generally allow for more effective and efficient performance by both judicial and administrative personnel. Although an initially expensive outlay for the purchase of equipment and training, it will prove cost effective in the streamlining of procedures.

For example, if the schedule of the Masters and the Judges were on computer and the computers were networked, every time there was a cancellation, individuals could call up the schedule on the computer and check availability. If one Master or Judge had a cancellation, that would be immediately obvious on the computer and could be filled.

As well, if the trial list were put on computer and the computer networked, several lists could be heard at once and Tuesday morning family docket with its lengthy waiting lists might no longer be referred to as the “Zoo.”

There is already a committee in force to consider the ways in which technology could be used to improve the operation of the court. One concept being considered is that of electronic filing, something which will increase effectiveness substantially. The court might also wish to consider the expanded use of telephone conference calls. At present, telephone conference calls are only used when one counsel is outside the city. This seems an unnecessary restriction in minor matters which

⁴⁴ See, for example, J.C. Lasmanis, “Electronic trials are here to stay: technology empowers litigators” (1995) 213 N.Y.L.J. 7; M.S. Turner & K.B. Posner, “Technology in the Courtroom: Preparing for the 21st Century” (1993) 210 N.Y.L.J. 5; R.G. Strand, “The Computer-Integrated Courtroom Harnessing Technology to Enhance the Justice System” (1991) 5 Yearbook of Law Computers & Technology 1; R.G. Strand, “The Courtroom of the Future,” (1989) Spring The Judges’ Journal 9; D. Weinberg, “Computers are talking in America’s courts” (1989) Spring The Judges’ Journal 5. These articles envision the use of computers and other technological advances to file documents electronically, produce instant transcripts, scan court pockets via computer, maintain electronic bulletin boards for court announcements, utilize computer conferencing and computer-assisted legal research to name just a few examples.

⁴⁵ F. Andrews, “Computer-integrated Courtrooms: Enhancing Advocacy” (1992) 28 Trial 37.

would only require short periods of time. There is no need to come to the courthouse when the matter could be resolved in less time and with less expense through a telephone conference call. Reforms which allow lawyers to preform more of their functions in their offices instead of in the courthouse should result in cost savings to the system as a whole and the client in particular.

Perhaps we are past the point of piece meal advances. What is being suggested in many jurisdictions is more than incremental change, more than electronic filing of documents or more use of telephone conferencing, but rather a "co-ordinated, inter-connected and compatible technology infrastructure to support the management and processing of cases in the civil justice system."⁴⁶ The Ontario Civil Justice Review project recommended the incorporation of all currently available technology into the justice system including "electronic filing of documents, electronic imaging, E-mail, video-conferencing and teleconferencing of people in different locations, automation of schedules and data, touch-screen public information facilities, and computer-aided transcription."⁴⁷

E. Delay

The issue of delay was mentioned nearly as often as the rotation of civil judges into the Family Court. Delay was mentioned in all areas of the court: interim matters, pre-trial conference and the setting of trial dates. Mention has already been made of the concerns with delay in matters related to Family Conciliation Services.

The lawyers recognize that the delays result from a lack of judges and other resources but that does not make them any happier. It was acknowledged that child protection proceedings receive some priority but unacceptable delays still occurred. Examples were given of a date for a two week child protection case set in January, 1995 but heard in June, 1995 — a delay of five months; an eight day contested custody set in January, 1995 to be heard in November, 1995 — a delay of 10 months; and a one day trial set in the middle of February, 1995 for the middle of September — a delay of eight months.

The delay is particularly bad for oral hearings at Christmas and the long summer vacation of July and August. The suggestion was made that the court should plan for these rush times well in advance and ensure that the judge time is doubled. More particularly, it may be necessary to reconsider the tradition of the long summer vacation, a concept that is becomingly increasingly problematic. Not only can trials not be heard during this period of time but the month of June is consumed with rushing on applications for summer access. The custom of the long summer vacation developed in a different, gentler time. On this point, one of the

⁴⁶ Ontario Civil Justice Review project, *The Lawyers Weekly* (24 March 1995).

⁴⁷ *Ibid.*

respondents to the surveys commented, "It is no longer possible to expect people to put their lives on hold for two months because Judges are on holidays."

Once a judge hears an interim motion, they often consider themselves seized of the matter. Many counsel cited matters that were seized as being especially bad for delay. Although having a judge seized of a matter does allow for continuity and continuing knowledge, the disadvantage in terms of delay can be significant. In some cases, the delay can amount to months. This can be quite a problem and in some cases very unjust in maintaining a status quo that may be detrimental to children and/or the applying party (at least in the opinion of counsel for the applying party). Another counsel mentioned a wait of five weeks for a 30 minute appointment. Consequently, judges may wish to think carefully as to whether it is necessary to seize themselves in a particular matter.

V. CONCLUSION

AN EXTENSIVE STUDY OF FAMILY COURTS across the United States identified six important principles and characteristics that should be manifested in any family court structure. They are:

1. have carefully selected, trained, and experienced judges and staff;
2. assign the same judge to hear all legal matters involving a particular family;
3. maintain an aggressive case processing and management system, so as to keep all related matters together and to give cases the sort of priority that family court systems are mandated to provide.
4. maximise the use of non-adversarial methods of family dispute resolution, such as counselling, mediation, and other creative techniques (e.g. educational workshops or programs for separating parents);
5. provide maximum access to all members of society regardless of income or legal representation, sex, race, creed, or place of residence; and
6. maximize the use of community services and trained volunteers such as court-appointed special advocate programs, volunteers in probation and neighbourhood dispute-resolution committees, and volunteer attorneys serving pro bono.⁴⁸

Those family court systems that have been most effective are the ones that best address these elements. The Manitoba court must fall within those family courts that have been seen to be especially effective.

It is true that the results of the survey with respect to the operation of the Manitoba unified family court are not unanimously positive. There are problems and issues that still need to be addressed. Yet, the court has been successful in terms of many of the above factors listed and is presently in the process of introducing case management programs and parent education workshops that will introduce

⁴⁸ R.W. Page, "Family Courts: An Effective Judicial approach to the Resolution of Family Disputes" (1993) 44 *Juv. & Family Ct. J.* 25 as discussed in Shepard Jr., *supra* note 12 at 42.

several of the factors that, as of yet, have been absent. Even given its present operation, it is clear that the Manitoba unified family court is much preferable to the fragmented system in place in most of the rest of North America.

The establishment of the Family Division of the Court of Queen's Bench in 1984 was seen as an attempt to address some serious flaws in the operation of the family court system. Given the success of the unified family courts that preceded the Manitoba experiment,⁴⁹ it was thought by many to be just the beginning of the establishment of unified family courts across the country. Instead, the Manitoba court has stood with only a few of its peers across the country⁵⁰ as an example of what could be accomplished given the willingness of individuals and the resources of government.

At present there appears to be a tacit assumption that the costs of a national network of unified family courts would be prohibitive. Regrettably, no concerted effort has been made to ascertain the cost-effectiveness of unified family courts as compared with that of existing courts that exercise fragmentary jurisdiction over Family Law matters within the framework of the traditional adversarial process⁵¹

⁴⁹ See, for example, the study of the unified family court in Saskatoon, *Team Work: Saskatoon's Unified Family Court Project 1978-1981*, which concluded that "the unified family court concept offers the most sophisticated attempt to date to provide a forum capable of regulating and reallocating the familial obligations following from breakdown": *ibid.* at 209. See also *Royal Commission on Family and Children's Law, Supplementary Report of the Royal Commission on Family and Children's Law: Summary of Recommendations* (Vancouver: The Commission, January 1976), which recommended province-wide access to a Unified Family Court given the favourable assessment of the pilot project (recommendation 25). Instead, economic restraint policies implemented by the provincial government led to cutbacks in the Unified Family Court project rather than its expansion. See, J. Payne, "Family Law Reform and the Law Reform Commission" (1985) 4 Can. J. Fam. L. 355 at 357.

⁵⁰ Ontario, Saskatchewan and Newfoundland each have one UFC operating in a particular city or district. New Brunswick has UFCs in eight locations to serve the entire province. Prince Edward Island established the first fully-unified family court in Canada in 1975. British Columbia has one unified family court in operation in Richmond although the concept is different. The separate courts remain separate but are all located in the same building and the registry, services and support staff are shared.

In the United States, courts referred to as "family courts" have variety of jurisdictions with no one single pattern adopted by all. The first unified family court in the United States was established in Cincinnati, Ohio in 1914. A state-wide comprehensive family court system was established in Rhode Island in 1961, Hawaii in 1966, South Carolina in 1968, District of Columbia, Delaware and Louisiana in the 70s; New Jersey in 1984 and Florida, Vermont and Nevada in the 1990s. As of 1993, several other states have become involved in pilot family court projects and Virginia has enacted legislation that was to take effect in 1995. See Shepard Jr., *supra* note 12.

⁵¹ Payne, *supra* note 49 at 357.

However, ten years after the establishment of the Manitoba court, there does seem to be some movement occurring in other jurisdictions.⁵² Ontario, which for many years had only one unified family court in the Hamilton-Wentworth area,⁵³ has recently announced an expansion of the unified family court to four other sites in the province,⁵⁴ and hopes to eventually expand the court across the province.

However, in many places across Canada, the problems with the family court process studied and reported upon over twenty years still exist. As recently as February, 1994, the Canadian Advisory Council on the Status of Women in their brief to the federal/provincial/territorial family law committee on child custody and access policy again repeated their recommendation made in 1974 expressing strong support for a unified family court system. They described the family court system across Canada in the following terms:

Most jurisdictions have lengthy waiting lists for family court motions and appearances. One Ottawa lawyer reports that it is easier to get into court to deal with civil matters such as construction liens than it is to deal with family matters ... A unified family court would have comprehensive jurisdiction over matters related to family law, overseeing matters now split between federal and provincial courts, such as divorce, division of property, support, custody, access, child protection, and adoption. It would create a bench of family law specialist, and offer a range of services. A unified family court would also adopt a case management system which would enable a judge to follow a particular file and deal efficiently with urgent matters and abuses of process by harassing spouses. This kind of fundamental, structural change in our family court system would provide better and more targeted results in access enforcement cases, than, for example, legislative attempts to link access and support.⁵⁵

⁵² For an review of the services being offered and the structures of unified family courts across Canada, see MacPhail, *supra* note 10. American lawyers are also looking to a unified court system on a wider scale. A report issued in July 1993 by the ABA Presidential Working Group on the Unmet Legal Needs of Children and Their Families recommended a unified court system in each state with jurisdiction over all cases involving children and families. See "America's Children at Risk, (catalog number 5490241). For a discussion of the American Bar Association's recommendation, see D.

Bailey, "Unified Family Court Applauded as a Concept" (1993) 139 Chicago Daily Law Bulletin 1, and J.G. Shoop, "Unified Family Court System Proposed to Help Children" (1993) 29 Trial 87.

⁵³ The Unified Family Court in Hamilton was established in 1977 as a pilot project and the "family law Bar has been virtually unanimous for at least a decade that the UFC should be expanded province-wide in order to permit both federal and provincial family law matters to be determined in a single forum": *The Lawyers Weekly* (10 February 1995). It should be noted that this court was established at the county court level.

⁵⁴ On 1 August 1995 the Unified Family Court in Ontario will be expanded to four other centres in the province; London, Barrie, Kingston and Napanee. See MacPhail, *supra* note 11 at 4.

⁵⁵ *Child Custody & Access Policy: A Brief to the Federal-Provincial-Territorial Law Committee* (Toronto: Canadian Advisory Council on the Status of Women, 1994) at 35.

Everything points in the same direction. While not a panacea for all the problems in family law dispute resolution, the unified family court concept is a significant improvement over the alternative. We knew that twenty years ago. We know it today. However, now the impetus for action is even more acute. The increasing diversification of family structures has led to a more complex and increasing number of family law disputes. These disputes present themselves for resolution in a legal system which is more expensive than twenty years ago while litigants are less able to pay given the current economic climate. Obviously it is time to re-think and perhaps restructure the justice system if we are to do our duty.⁵⁶

While public expectations with respect to the resolution of family disputes may exceed the realistic potential of any court of law regardless of what systems are put into place, those provinces that have introduced unified family courts offer their family law litigants significantly better access to better justice. While the initial outlay may be high in terms of financial resources, the ultimate benefits are incalculable.

There are no easy recipes nor are there neat compartments in which to rely, as families and family relationships are not simple. But there are few matters more important before the courts, given the repercussions on the future of the parties themselves and, in particular, their children.⁵⁷

⁵⁶ See *Annual Chief Justice's Report*, *supra* note 3.

⁵⁷ *Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.) at 390.

FIGURE 1
QUESTIONNAIRE

Year of Call to the Bar.	_____
Approximate Percentage of Practice in the Family Law area.	_____
Do you agree with concept of a specialized court for family matters?	_____
Name the two best features of the Family Division (these may include issues of jurisdiction, procedure, personnel, support services or other) and explain why.	_____ _____ _____ _____
Name the two worst features of the Family Division (these may include issues of jurisdiction, procedure, personnel, support services or other) and explain why.	_____ _____ _____ _____
General Comments.	_____ _____ _____ _____

