Submission to

MINISTRY OF ATTORNEY GENERAL

Justice Services Branch
Civil and Family Law Policy Office

PHASE 2

FAMILY RELATIONS ACT REVIEW

Issued by:

***FRA* Working Group**
Canadian Bar Association
British Columbia Branch
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PREFACE

The Canadian Bar Association nationally represents over 35,000 members and the British Columbia Branch (the "CBABC") itself has approximately 6,000 members. Its members practise law in many different areas and the CBABC has established 67 different Sections to provide a focus for lawyers who practise in similar areas to participate in continuing legal education, research and law reform. The CBABC also establishes special committees from time to time to deal with issues of interest to the CBABC.

This submission was prepared by a special committee: the *FRA* Review Working Group (the "CBABC *FRA* Working Group"). The comments expressed in this submission reflect the views of the CBABC *FRA* Working Group and are not necessarily the views of the CBABC as a whole.

The CBABC *FRA* Working Group was composed of the following members of the Family Law and Alternate Dispute Resolution (ADR) Sections and the Legislation and Law Reform Committee:

Family Law Sections

Kamloops

- David Dundee;

Nanaimo

- Kristin Rongve;

Okanagan

- Valerie Bonga;
- Cathie Heinrichs;
- Cori McGuire;

Prince George

- Richard Bjarnason;
- Richard Allan Tyo;

Westminster

- Don Boyd;
- Janet Clark;
- David Halkett;
- Jack Hittrich;

Vancouver

- John-Paul Boyd, also of the Legislation and Law Reform Committee;
- Veronica Franco;
- Ian Hayward;

Victoria

- Sandra Harper;
- Monique Shebbeare;

ADR Victoria Section

- Kay Melbye;
- Victoria Pitt; and
- Gwen Taylor.

SUBMISSIONS

BACKGROUND

In February 2006, the Ministry of Attorney General began a review of the *Family Relations Act,* R.S.B.C. 1996, c. 128 (the "*FRA*"). The review is to modernize the *FRA*. The *FRA* was first enacted in 1978.

The review is planned in three phases.

Phase 1 was from February to May 2007.

The following discussion papers were released in Phase 1:

- Chapter 1: Background and Context for the *Family Relations Act* Review;
- Chapter 2: Division of Family Property;
- Chapter 3: Division of Pensions; and
- Chapter 4: Judicial Separation.

Phase 2 was from June to September 2007.

The following discussion papers were released in Phase 2:

- Chapter 5: Programs and Services;
- Chapter 6: Parenting Apart;
- Chapter 7: Meeting Access Responsibilities;
- Chapter 8: Children's Participation; and
- Chapter 9: Family Violence.

Phase 3 is from September to December 2007.

The following discussion papers were released in Phase 3:

- Chapter 10: Legal Parenthood;
- Chapter 11: Spousal and Parental Support;
- Chapter 12: Co-operative Approaches to Resolving Disputes; and
- Chapter 13: Time Limits and Definitions.

The Attorney General intends to release its final discussion paper, Chapter 14: Relocation, at a later date.

In March 2007, for Phase 3, and related to parental support, the British Columbia Law Institute released a report recommending that the parental support obligation contained in section 90 of the *FRA* be repealed.[1] Section 90 of the *FRA* provides that a child is liable to maintain and support a parent having regard to the other responsibilities and liabilities and the reasonable needs of the child.

In Phase 1, the CBABC *FRA* Working Group filed detailed submissions and made specific recommendations to the Attorney General.

[1] British Columbia Law Institute, Report on the Parental Support Obligation in Section 90 of the *Family Relations Act.* (BCLI Report No. 48) (March 2007) (www.bcli.org/pages/projects/parentalsupport/Parental_Support_FRA_section_90_Report.pdf).

PHASE TWO SUBMISSIONS

These submissions of the CBABC *FRA* Working Group are restricted to Phase 2 of the *FRA* Review. As with Phases 1 and 2, the CBABC *FRA* Working Group intends to make submissions for Phase 3.

For Phase 2, the CBABC *FRA* Working Group's Submissions are in response to the five discussion papers released by the Attorney General:

- Chapter 5: Programs and Services;
- Chapter 6: Parenting Apart;
- Chapter 7: Meeting Access Responsibilities;
- Chapter 8: Children's Participation; and
- Chapter 9: Family Violence.

Where questions or issues set out in the discussion papers are not considered by the CBABC *FRA* Working Group in these Submissions, this does not mean that the CBABC *FRA* Working Group either accepts or rejects these matters, but that the CBABC *FRA* Working Group has no comment on these matters at this time.

FAMILY RELATIONS ACT REVIEW SURVEY

There are little survey data available in this area of law reform. The Phase 2 discussion papers do not contain survey data.

In August 2007, the CBABC *FRA* Working Group surveyed members of the CBABC and also members of the CBABC Family Law Sections. Responses were sought to matters in the Phase 2 discussion papers as well as other matters the CBABC *FRA* Working Group believed were important.

The *Family Relations Act* Review Survey is unique. This survey provides a wide range of data from practicing lawyers regarding their experiences and views working in the family justice system. A copy of the *Family Relations Act* Review Survey and its results are attached as Appendix A to these submissions.

CHAPTER 5: PROGRAMS AND SERVICES

The British Columbia Ministry of Attorney General's discussion paper, Chapter 5: Programs and Services, outlines current programs and services and new directions arising from recommendations of the Family Justice Reform Working Group and other initiatives. [2]

[2] British Columbia Ministry of Attorney General, "Chapter 5: Programs and Services" in *Family Relations Act* Review (May 2007)(http://www.ag.gov.bc.ca/legislation/pdf/Chapter5-ReformsandServices.pdf)("Chapter 5").

PRELIMINARY COMMENTS

After considering Chapter 5, the CBABC *FRA* Working Group has identified certain fundamental goals for an ideal family justice system:

- make the system more accessible;
- keep the focus on children and families;
- use available resources efficiently and effectively;
- promote early resolution of disputes;
- minimize conflict, by
    - encouraging cooperative settlement;
    - refining non-adversarial settlement processes; and
    - supporting trial only when others means are not appropriate or effective.

No one could argue with these goals – and we do not – however, the way in which a goal can be defined can often limit the ability to achieve it.

ANALYSIS: PROGRAMS AND SERVICES

With the greatest of respect to the Family Justice Reform Working Group, whose recommendations are referred to in Chapter 5[3], whose work we applaud, the Family Justice Reform Working Group recommendations are flawed by a few core assumptions that are present even in their formulation of the above goals. These include:

- the idea that family court only conducts "trials";
- that you can encourage cooperative settlement by making it mandatory; and
- that the most efficient use of the courts is to send clients outside of the civil justice system.

The Family Justice Reform Working Group said there was a lack of management data to show, among other things, what happens to the approximately 97% of cases that enter the court system but do not go to trial and Chapter 5 says the same.[4] This is significant, and this is where the CBABC *FRA* Working Group can help.

We *do* know what happens in these cases, both in court and out. Because of that, we have an idea of what works and what does not. And, while we support much of what has been discussed in the Family Justice Reform Working Group recommendations and in Chapter 5, we also see potential for interfering with the very goals the paper espouses, because of what we know.

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[3] The Family Justice Reform Working Group to The British Columbia Justice Review Task Force, "A New Justice System for Families and Children" (May 2005) (http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf).
[4] Chapter 5 at 6.

Most family cases settle. They settle for a variety of reasons, and with a variety of outcomes. For a significant number of litigants, however, these cases either settle or are abandoned because:

- the litigants ran out of money; or
- they became disillusioned with the family justice system, because it appeared:
    - too slow;
    - too cumbersome;
    - unable or unwilling to correct certain behavior, or address their problem.

These people represent the casualties of our current system. As lawyers, we worry that our experiences with such clients may not be heard, or may be swept aside in this well-intentioned rush to erect a kinder, softer system.

The bulk of the work in family files, the real work, is not reserved for trial. It is handled at the interim stages. The degree to which cases are well managed at this stage – how quickly issues are identified and contained; how efficiently order is restored to the families; and, yes, how ready the system is to encourage mediation, collaboration, and negotiated settlement – determines both how early and how satisfactory the ultimate resolution will be.

Those of us in family practice know that in almost every file a window of opportunity will open, when the clients are most open to settlement. If you catch them then, the deal is done – a little before or after, any amount of happy talk about the benefits of a consensual resolution can be a waste of time. The ability of our justice system to promote

that window of opportunity and, more importantly, to seize the moment when it arrives, is crucial.

The focus on mandatory mediation misses this point. Everyone should be exposed to the benefits of mediation and collaborative or consensual dispute resolution methods, we agree. But if we have limited resources, the timing of this exposure is key. Rather than force everyone into that room at the outset, we think it should be left to lawyers and judges to determine when the moment is ripe.

The same can be said for case management reforms. Generally, they are a welcome trend. But case management reforms can be driven by false assumptions. When Rule 60E of the Supreme Court Rules was first being proposed regarding Judicial Case Conferences, judges told us they wondered why so many family cases were dragging out. Files could be open but inactive for two or three years, with no final result. The truth is, many of these files were indeed languishing for lack of attention. But in many cases, too, the lawyers were being quite deliberate.

The truth is time can be the best healer: sometimes, the parties just need to cool down. Sometimes, they need time to come to grips with the new reality of living apart and sometimes the situation has stabilized in a place that the clients just have to get used to before they can move on. If you let clients get comfortable with the new access regime, for example, there is a good chance they can reach a settlement – fix whatever‘s not working, and leave the rest alone, and the deal is done. If you press for a final resolution,

the temporary truce can be lost, and the polarizing effect of preparing for trial just blows any chance of settlement out the window.

Finally, of course, the fact that there is no resolution apparent from the court file does not mean there is no resolution. There might be a separation agreement or the parties might be in mediation. There could be any number of reasons why the parties have chosen to give litigation a rest, for now.

Family lawyers also know certain other ~~"in~~convenient truths" about family justice services and the courts:

> *You can't teach clients who are not ready to learn*. People in crisis have a tremendous ability to filter what they read or hear. As with everything in family law, there may come a time when they will actually listen. Until then, one will be amazed what lessons they take from:
>
> - legal advice;
> - what judges tell them;
> - what they pick up from the library or legal information web sites; and
> - Parenting After Separation sessions.[5]
>
> *Mediation is a waste of time unless or until both parties are motivated to give it a try*. Like the Family Justice Reform Working Group, we do not believe it is

[5] See Ministry of Attorney General Parenting After Separation website, http://www.ag.gov.bc.ca/family-justice/help/pas/information.htm

impossible to mediate in cases involving family violence, or power imbalance, or linguistic or emotional barriers to communication. They can be challenging, to be sure; but they are not impossible. What is very nearly impossible is to conduct a mediation if one or both parties have no desire to reach a settlement. This could be either because:

- they already have everything they want;
- they have yet to see there is any risk they could lose in court;
- they have yet to see any value in improving relations with the other party; or
- it is just too soon.

Sometimes the best motivation can be exposure to the court. People can find it quite eye-opening to experience family court, even for a short while. They see how the court deals with similar issues to their own. They see that assumptions they regarded as unassailable are routinely dismissed by judges. Most importantly, they lose the sense all too many have, that there is no risk involved.

Sometimes a quick decision is the only medicine. The sooner some sense of order or normalcy is returned, the better for all concerned. Tempers cool, fears subside, and the idea of working things out in a way that serves everyone becomes, maybe for the first time, a real possibility. That‘s when consensual dispute resolution measures seem most attractive.

Until then, if the parties cannot be trusted to return some sense of normalcy – and often they can't – the court must. We all recognize that there is no point mediating restraining orders, or the abrupt move to the next country, or province. But there are other situations that need to be addressed urgently as well, and we should not require or expect parties to try to mediate these issues until some sense of order has been restored. These common situations are:

- support, when one party has no money, or insufficient money to maintain that party's own household, or children;
- access, when one party is denying or substantially frustrating contact with the children;
- interim exclusive occupancy, where the home is becoming a war zone or pressure cooker;
- the ability to collect sufficient belongings to operate outside the former family residence (such as clothes, some basic furniture and the like);
- where the safety of children is in question (supervised access, contact with some third party and so on);
- where one of the parties is suffering from a mental or emotional incapacity (bipolar disorder, depression, suicidal tendencies) or is on a ~~b~~bender" as a result of consumption of alcohol, drugs, gambling or other addiction.

FAMILY JUSTICE SYSTEM: GOALS

The CBABC *FRA* Working Group suggests that the ideal family justice system should:

- be responsive, by which we mean:
    - quick; and
    - having a bias towards early assessment, assistance, and, where necessary, intervention;
- proportionate: (the right medicine, at the right time, in the right dosage);
- involve children's views and, only where appropriate, children themselves in the process;
- promote early settlement by:
    - stabilizing situations as soon as possible;
    - introducing and promoting consensual dispute resolution methods at the earliest effective stage;
- have the right balance of persuasion and prescription (the carrot *and* the stick);
- encourage/reward constructive behavior and dissuade/punish obstructive behavior; and
- make the maximum use of public resources by:
    - modifying existing resources before creating new ones;
    - integrating all existing public resources; and
    - allowing for private, user pay resources.

As already mentioned, the bulk of the work in family law is at the interim stage. Trials will take care of themselves. The more effort we take in getting the files on the right track at the earliest stages, the fewer trials we will have to worry about.

Interim applications could be simplified and streamlined, and still be effective. Evidence could be more effectively focused. Where appropriate, orders could be available on submissions. Some orders could be imposed in case conferences, even when the parties do not fully agree.

The "views of the child" can be of significant assistance to both parents and to the court in making decisions affecting children. These views can include, where children are mature enough, their wishes. For younger children, they would primarily consist of their experience with and perceptions regarding the separation. This input can be obtained in many other quicker and cheaper ways than full custody and access reports, and can be nearly as effective.

We believe early settlement can most readily be achieved only when there is some stability in the parties' situations, especially in terms of safety, finances, and access to children. We must address those issues first, not turn parents away.

We believe there is already a feeling in the community that the family justice system is uncaring of, and unresponsive to, parents' real issues. Creating more institutional prerequisites (barriers) to court intervention will only deepen that distrust.

We worry that falling numbers in court may be misinterpreted as proof that disputes are lessening. It may be that: the disputes haven't been solved, rather people are giving up on the courts. Numbers went down when regional registries closed. The same occurred when reforms like Rule 51A of the Supreme Court Rules regarding limiting the time for court applications made litigation more expensive. It did not indicate people were finding better ways to solve their problems. In too many cases, what it really meant was that clients gave up trying.

We refute the notion that you can encourage dispute resolution by turning people away from the court, or erecting outside agencies – like Manitoba's failed Access Facilitation Program, or Colorado's Friend of the Court Bureau. Programs such as these are expensive, and they do not seem to work. There seems to be an assumption that outside agencies are more effective, or cheaper. We do not believe experience bears that out. In fact, we suspect that more cases settle quicker, using fewer resources at family court case conferences than they do at Family Justice Center or *Child, Family and Community Service Act* mediations. This is not to say that we do not see the utility of any of these. It is to say only that we believe the court has been unfairly over-looked as the true "hub" of our family justice system. We believe that the court's role should be refined and expanded, not abandoned or avoided.

We appreciate that many of the reforms we propose have as much to do with the

procedures and culture of the court as they have to do with statutory reform. Nonetheless, they are worth considering together.

RECOMMENDATIONS

In light of our submissions above, the CBABC *FRA* Working Group recommends that the following be adopted into family court procedures and practice and that sufficient resources be allocated:

- mandatory case conferencing, in both the Provincial and Supreme Courts of British Columbia;
- power to direct counseling or drug testing;
- expedited, show-cause type hearing for denial or frustration of access;
- special rule for *ex-parte* orders;
- mandatory follow-up hearings for supervised access orders;
- coordinated criminal and family files in cases of domestic violence, or alleged physical or sexual abuse of children;
- empowered courts so they can access the resources of the Family Justice Centers and, in limited cases, of the Ministry of Children and Family Development;
- special or expanded disclosure rules;
- clarified parenting coordinators‘ role;

- expanded resources for obtaining the views of children;
- harmonized court rules and forms so that they are both more user-friendly and more informative; and
- managed Family Duty Counsel in the same way as Crown Counsel.

MANDATORY CASE CONFERENCING, IN BOTH THE PROVINCIAL AND SUPREME COURTS OF BRITISH COLUMBIA

The CBABC *FRA* Working Group recommends that case conferencing be mandatory as the first point of entry for all family matters in both the Provincial and Supreme Courts of British Columbia. There will be exceptions for emergency matters, and some limited matters may not be best suited for case conferencing, such as Interjurisdictional Support Orders applications or perhaps even support generally.

The CBABC *FRA* Working Group also recommends a slightly different type of case conference. We see this first meeting as a sort of family justice triage, a chance to identify the real issues and begin to allocate the appropriate resources, right at the beginning of the dispute. Issues might be resolved at this stage, especially on an interim basis, but that would not be the primary concern. The focus would be on identifying the most appropriate next step.

If the parties need more information, they would be directed what information to exchange before they came back. Parties could be required to take mediation, or a form of Parenting After Separation session or counseling. The court could schedule a further

case conference. If the parties were entrenched, or high conflict, the court could direct a hearing, direct that one judge be assigned to all pre-trial matters, or appoint a parenting coordinator.

The court would also consider how best to prepare the parties, and the court, for the next stage in the proceeding. If the issue were drugs, for example, the court could direct a party to attend counseling for that issue, with a report to the court from the counselor. The court could order drug testing. That way, the court at the next stage would have the report or test results, and could assess whether there truly was a problem, and how serious it might be.

Likewise, if the issue were anger management, the court could direct counseling for that issue. If the issue were incompetent or inexperienced parenting, the court could direct a parenting course, or arrange for a third party (family friend or extended family member trusted by both) to attend at the subject‘s home and provide a report. If the parties could afford it, a counselor might be employed for this purpose. If not, we also think the court should be empowered, in appropriate cases, to direct a family court counselor or Ministry of Children and Family Development social worker to perform such a spot-check.

The court could order a ―views of the child report", at the request of a party, or on its own initiative. Or the court could arrange for a judicial interview of the child.

The idea is that the court would decide how to stream each case to achieve the optimum result. The court would also be free – somewhat like the Australian model – to make orders without the consent of the parties. These would be mostly administrative (case management) in nature, but could also address substantive issues, where an obvious need presents itself. If interim orders were required, especially to stabilize the family (for example, minimum access, interim living arrangements, letting a party collect his or her personal belongings from the home and so on) and the court could make them without serious prejudice to the position of either party.

The rules should be the same for the Provincial and Supreme Court. We prefer Rule 7 (Family Case Conference) of the Provincial Court (Family) Rules[6] with additional powers.

POWER TO DIRECT COUNSELING OR DRUG TESTING

The CBABC *FRA* Working Group recommends that the courts be given statutory power to direct counseling or drug testing. Where allegations of substance abuse are made and they seem *prima facie* valid, we see no reason why the court should not be empowered to use a direct method for finding the truth. We allow DNA testing for paternity, so we think we should also be able to use hair testing for drug use. The CBABC *FRA* Working Group also recommends, however, that the results of such tests could not be used to make or support a criminal charge. If a person says there is no problem, or the problem is under

[6] B.C. Reg. 417/98 under the *Court Rules Act*, R.S.B.C. 1996, c. 80.

control, we think the court should be able to test that proposition directly by having a counselor assess that person, and report the results of that assessment to the court. This statutory power could apply to matters involving: alleged addictions, anger management, mental health issues, parenting capacity or risk of sexual abuse of children.

EXPEDITED, SHOW-CAUSE TYPE HEARING FOR DENIAL OR FRUSTRATION OF ACCESS

The CBABC *FRA* Working Group recommends that there be an expedited, show-cause type hearing for denial or frustration of access matters. This hearing would be initiated by a complaint, supported by affidavit. A hearing would be mandatory within 21 or 30 days. The hearing would consist primarily of the alleged transgressor taking the stand and being asked essentially two questions:

- Do you agree you have denied, or are denying access, contrary to the order or agreement?
- Do you have a good reason for doing so?

Evidence would be limited, and the court itself could even ask the questions. Depending on the answers and the court‘s acceptance or rejection of them, the court could:

- find there is no valid complaint;
- make a corrective or punitive order on the spot;
- direct a further hearing or case conference, for which the presiding judge would be seized of the matter;
- direct the parties to Parenting After Separation, counseling, or mediation;
- assign a parenting coordinator;

- where there is a cost involved in any of the above, direct one or both of the parents to pay; and/or
- combine any or all of the above.

We envision the usual result where some denial is found to include a very interim remedial order – variation or make-up access – followed by a warning and a scheduled follow-up hearing with that judge in 60 to 90 days, with an invitation for the parties to avail themselves of mediation in the meantime. We envision the judge advising parties in words to the effect: ~~"~~If you can work this out between you, so much the better. Otherwise, I will see you both again in a few weeks and decide what else should be done here – including if appropriate, whether there should be some penalty."

If the court finds against a complainant twice, the court can bar the complainant from using the expedited procedure altogether, or without leave. Conversely, if the court finds two or more complaints valid it can, in addition to any other measure, immediately transfer primary custody until the next hearing.

Finally, the procedure would be available for recent complaints only. If the complainant cannot act within a month, there is little reason to require the court to do so.

SPECIAL RULE FOR EX-PARTE ORDERS

The CBABC *FRA* Working Group recommends that specific court rules, if not statutory rules, be made to address *ex parte* orders. We are particularly concerned where such orders concern custody, primary residence, return or police apprehension of children. We recommend that, for the benefit of the parties (and dare we say the presiding judge), these rules would expressly set out that:

- they must only be granted where the other party cannot be given notice, or that to do so would defeat the purpose for the order;
- the complainant has a duty to tell not only their story but also what they anticipate the other party will say;
- that evidence will be recorded, and that there will be consequences for giving the court false, misleading, or incomplete evidence; and
- that the relief granted will be strictly limited to whatever is necessary to address the reason an *ex parte* order is necessary in the first place, and not more.

Some jurisdictions automatically order a transcript of evidence for *ex parte* orders. That should be done province-wide. It is also helpful to include automatic expiry dates.

MANDATORY FOLLOW-UP HEARINGS FOR SUPERVISED ACCESS ORDERS

The CBABC *FRA* Working Group recommends that, where interim supervised access orders are granted, the order must include some specified means for following-up or investigating the need for the order. This follow-up or investigation could be a hearing or case conference. Or, it could be a short mediation, with a report to the court (successful or unsuccessful). It also could be mandatory counseling, with a report by the counselor. It would almost certainly include a report from the supervisor.

COORDINATE CRIMINAL AND FAMILY FILES IN CASES OF DOMESTIC VIOLENCE, OR ALLEGED PHYSICAL OR SEXUAL ABUSE OF CHILDREN

The CBABC *FRA* Working Group recommends that criminal restrictions be made expressly subject to any subsequent family court order, and that the criminal file then be directed to the requisite family court (Provincial or Supreme Court) to make such an order. As commented below in our submissions in response to Chapter 7, the overlap of jurisdictions in such cases can create serious confusion and delay. We have to balance the rights of the accused, safety of the alleged victims, and the needs of children and families to move on.

Where the charge is assault and bail or release conditions are set by the criminal court, too often the conditions have the effect of cancelling access rights. The criminal court won‘t address access and the family court can‘t change the conditions.

The CBABC *FRA* Working Group recommends that, where a criminal court makes contact restrictions in a bail or recognizance which would affect access to children, the

order should be made expressly subject to any subsequent order in family court. Then, the criminal file should be automatically forwarded to the appropriate family court to make an order concerning access. Further, where evidence is required from the accused, such evidence would be inadmissible in the criminal proceeding.

Where the allegations involve abuse of children, the family court must have the power to proceed, irrespective of the police investigation or criminal trial, if any. Otherwise, the matter can remain unaddressed or resolve for months, if not indefinitely. We recommend specialized teams for police and Ministry of Children and Family Development personnel to do a coordinated investigation, time limitations for such investigations, and the right of the family court to make its own inquiry after that. Again, evidence in the family preceding could not be used in the criminal proceeding – though of course the reverse would not be true.

EMPOWER THE COURTS TO ACCESS THE RESOURCES OF THE FAMILY JUSTICE CENTERS AND, IN LIMITED CASES, OF THE MINISTRY OF CHILDREN AND FAMILY DEVELOPMENT

The CBABC *FRA* Working Group recommends that the courts be empowered to access the resources of the Family Justice Centers and, in limited cases, of the Ministry of Children and Family Development. As discussed below in our below in our submissions in response to Chapter 7, there may be cases where the best way to discover the truth about allegations of harm to children would be to have someone do a random inspection of the parent‘s home. Where the parties do not have the resources to pay for such an inspection, we recommend the court have the power to direct a family court counselor or,

in appropriate cases, a Ministry of Children and Family Development social worker to do the inspection.

We appreciate that the Ministry of Children and Family Development is already pressed financially, and may rightly object to being side-tracked by extensive involvement in family disputes. We think that can be addressed by limiting workers‘ involvement to real child protection matters where no other comparable resources are available, and to limit their potential involvement as witnesses by restricting the parties‘ ability to subpoena or cross-examine such personnel. The main evidence, and for most interim purposes we suggest possibly the only evidence, would be a written report of the visit and what the social worker found, or did not find.

We also appreciate that the family justice counselors are mandated to stay away from court. We believe that is a mistaken view. Government resources work best when they work together, and there is a place for family justice counselors even in the court system.

SPECIAL OR EXPANDED DISCLOSURE RULES

The CBABC *FRA* Working Group recommends that there be financial disclosure rules tailored to recurring problems. These recurring problems include self-employed businesspersons or persons alleged to be working in the "grey market". For example, ―grey market”, where products are bought and sold outside of the manufacturer's authorized trading channels, are common in the trade for electronics or cigarettes.

The financial disclosure rules might include a reverse onus provision where a party's expenses are alleged to exceed income then there would be a requirement for an automatic and mandatory disclosure of banking records and the like. The CBABC *FRA* Working Group will expand on this issue in our response to Phase 3 of the *FRA* Review.

CLARIFY ROLE OF PARENTING COORDINATORS

The CBABC *FRA* Working Group recommends that parenting coordinators be involved earlier in the legal process rather than later. We strongly support the creation of parenting coordinators, but even here we emphasize the importance of involving them earlier rather than later. Helping parents actually model
cooperative parenting at an early stage will best ensure those lessons take hold. Our experience suggests the parenting coordinator is most effective when the role combines the functions of:

- *teacher* by teaching parents how to effectively communicate with one another (what works and what does not) and also teaching parents how to effectively communicate with children;
- *mediator* by encouraging parents to work through their differences collaboratively;
- *investigator*, when circumstances arise where one or other parent suspects something is going on because of what the children say or do not say, the parenting coordinator is assigned as the first line of inquiry. This allows the coordinator, based on the coordinator's mental health and counseling experience, to explain what is or is not going on with the children, what is or

is not significant and in many cases this manages to diffuse their fears or suspicions;

- *arbitrator*, particularly in areas of minor access disputes (for example, determining who is to pick the children up at what time). In such instances, the parties really need an independent decision-maker, not a protracted hearing;
- *expert*, when the parties cannot come to an agreement on all issues, the parenting coordinator provides a report to the court outlining what the parties have settled, what they have not, the expert's perspective on why they have not come to agreement on the final issue, and recommendations for what the court should order.

A typical order could look like this:

> THIS COURT ORDERS that both parties shall work with [Name of Parenting Coordinator], whose duties and powers will include the following:
>
> (a) working with the parents to mediate a parenting plan;
>
> (b) working with the parents to improve communications between them;
>
> (c) investigating, in the event either party has a complaint involving the children;
>
> (d) interviewing the children as the parenting coordinator deems appropriate;
>
> (e) arbitrating access disputes, with liberty to both parties to apply to court if time permits;

(f) providing a report to this Honourable Court, in the event the parties cannot reach an agreement, including the parenting coordinator's recommendations for custody and/or access.

EXPANDED RESOURCES FOR OBTAINING THE VIEWS OF CHILDREN

The CBABC *FRA* Working Group recommends that the government expand resources for obtaining the views of children. We believe speed is more important than completeness here. The views and experience of children can be extremely helpful, both to judges and to the parties. Most custody and access reports are too expensive and provide far more information than is typically required. Child advocates are also useful, though again very expensive. The best value for money is in supporting judicial interviews, or interviews by lawyers or duty counsel as is offered by the Legal Services Society of British Columbia.[7]

For those who can afford it, short, focused interviews and reports by private health care professionals are also valuable. Expert assistance should be the exclusive method of ascertaining the views and input of very young children.

[7] See Legal Services Society Family Duty Counsel page on its Family Law website, http://www.familylaw.lss.bc.ca/help/who_FamilyDutyCounsel.asp.

HARMONIZE COURT RULES AND FORMS AND MAKE THEM BOTH MORE USER-FRIENDLY AND MORE INFORMATIVE

The CBABC *FRA* Working Group recommends that court rules and forms be harmonized so that they are the same in all levels of court and that these rules and forms be made more user-friendly and more informative. In this regard, we are in agreement with the Family Justice Reform Working Group. We also believe that forms should be revised to be more readily understandable and to express more accurately just what the applicant is seeking.

For example, pleadings in both Provincial and Supreme Court refer to ~~"c~~custody" and ~~"g~~guardianship" without differentiating among:

- sole custody and guardianship;
- sole custody, joint guardianship;
- joint custody, primary residence; or
- joint custody, equal time with each parent.

The same can be said for applications for ~~"a~~access." In Provincial Court, in particular, it can sometimes take several court appearances before the parties even know exactly what – if anything – they are fighting about.

Receiving court documents can be a rude surprise at the best of times. Where the claim is unclear, people tend to fear the worst, and fear is what drives people to take extreme positions in response.

We also recommend that the court forms be bundled into specific, fill-in-the-blanks or check-the-boxes type forms for common applications. Support applications would be in one bundle, with related forms, like the financial statement, schedules for section 7 and 10, information sheets for the child support guidelines and the Spousal Support Advisory Guidelines, retroactive support, adult children at college, requirements for financial statements from both parents if undue hardship or special expenses and so on. Custody or access applications would include model parenting plans, information like parenting time guidelines, the availability of the family justice counselors, Parenting After Separation sessions and other community services, collaborative practice and mediation, parenting coordinators, and ways to canvass the views of children. Access, or access enforcement claims, would carry their own bundle, with information about enforcement measures and consequences.

FAMILY DUTY COUNSEL

The CBABC *FRA* Working Group also recommends that family duty counsel be managed in the same manner as Crown Counsel currently is, complete with similar financial compensation. We expand further on this recommendation in our submissions Chapter 7.

CHAPTER 6: PARENTING APART

The Ministry of Attorney General's discussion paper, Chapter 6: Parenting Apart, looks for ways that the *FRA* could promote child-focused decision-making that would help parents to meet their children's needs after separation. [8] Chapter 6 discusses parents' roles and responsibilities, children's interests, and parenting arrangements.

After considering Chapter 6, the CBABC *FRA* Working Group makes submissions on these matters:

- language reform;
- guardianship and children's property;
- allocating the incidents of guardianship;
- guardianship and non-parents;
- presumptions as to custody and guardianship;
- children's best interests;
- parenting after separation; and
- preventing and addressing parenting disputes.

Finally, we will provide answers to the questions posed in Chapter 6.

[8] British Columbia Ministry of Attorney General, "Chapter 6: Parenting After Separation" in *Family Relations Act* Review (May 2007)(http://www.ag.gov.bc.ca/legislation/pdf/Chapter6-ParentingApart.pdf)("Chapter 6").

LANGUAGE REFORM

The enactment of the *FRA* in 1972 served to coalesce a host of legislation bearing on family law issues, from the *Parents' Maintenance Act* to the *Wives' and Children's Maintenance Act* to the *Equal Guardianship of Infants Act* within a single law. Prior to 1972, the primary provincial legislation on parenting after separation, the *Divorce and Matrimonial Causes Act*, mirrored the federal *Divorce Act* in creating only one species of parental right, custody.[9]

Although the concept of access was introduced to the *FRA* in 1972,[10] the Act did not meaningfully discuss guardianship until 1978,[11] despite its earlier repeal of the *Equal Guardianship of Infants Act*. Formerly, guardianship was conceived as describing the bundle of rights and obligations a non-parent had with respect to a child in his or her care; with the 1978 Act, guardianship became a right to be fought about by parents.

While almost 30 years have passed since the *FRA* was last substantially amended, the law is still unclear as to how custody is distinguishable from guardianship, indeed the two principal lines of authority on the issue reach polar conclusions: one, typified by *Anson v. Anson*,[12] holds that custody is a subset of the rights connoted by guardianship; and the other, typified by *Abbott v. Abbott*,[13] holds that guardianship is a subset of the rights

[9] See *Divorce Act*, S.C. 1968, c. 24, s. 11(c) and *Divorce and Matrimonial Causes Act*, R.S.B.C 1960, c. 118, s. 20.
[10] *Family Relations Act*, S.B.C. 1972, c. 20, s. 12(c).
[11] *Family Relations Act*, S.B.C. 1978, c. 20, ss. 1, 25-33.
[12] (1987), 10 B.C.L.R. (2d) 357 (BC Co. Ct.).
[13] 2001 BCSC 323.

connoted by custody. Moreover, regardless of which line of authority is correct, the only parental right the public truly understands is custody, not guardianship.

Nevertheless, several things are clear from the case law to date:

- a parent without joint guardianship has only a limited right to obtain information from third parties about the child‘s education, health and general well-being under the *Divorce Act*;
- a parent without joint guardianship has no right to influence the custodial parent as to the child‘s upbringing; and
- there is no legal distinction between the rights enjoyed by parents with sole custody or joint custody, so long as the parents share joint guardianship.

The third point provides the best illustration of the popular confusion between custody and guardianship.

From the lawyer‘s perspective, a parent with sole custody who shares joint guardianship has no greater right or entitlement to the child than the other parent:

- the custodial parent cannot move without the consent or acquiescence of the other;
- the custodial parent cannot unilaterally select a health care regime for the child;
- the custodial parent cannot enroll the child in a new school; or
- the custodial parent cannot unilaterally dictate changes to access.

As a result, the rights of parents who share joint guardianship are roughly on par, regardless of whether the parents also share joint custody, or one of them has sole custody.

This is, however, is only the *legal* explanation of what it means to have sole or joint custody and joint guardianship. There are two other aspects that must be considered, the emotional implications of sole custody and its practical implications.

From a practical point of view, lawyers and judges might well grasp the relative emptiness of sole custody when parents have joint guardianship, but hardly anyone else, including parents, shares this understanding. Teachers, police (particularly with respect to the enforcement of orders), third-party caregivers and medical personnel rarely grasp the distinction and tend to bend to the side of the parent with sole custody, notwithstanding the terms of an order or agreement for joint guardianship, even where guardianship is defined on the popular Joyce model.

From an emotional point of view, parents who do not have custody often feel that they are somehow less of a parent, less important to the child‘s life and upbringing, or otherwise have some sort of status subordinate to that of the custodial parent, despite the efforts of their lawyers to explain the legal reality. The word custody itself promotes a win/lose mentality and encourages parents to battle over their children as if they were fighting about a property right.

These emotional and practical issues can lead parents to bitterly contest joint versus sole custody, even when both are prepared to share joint guardianship, despite the meaninglessness of sole custody being fully explained to the parent insisting on having sole custody, and the empowering qualities of joint guardianship being fully explained to the parent insisting on joint custody.

We are of the view that some change must be made, both to lessen the popular confusion between the meaning of custody and guardianship and to lessen the adversarial attitudes provoked by this language.

There are three options to solve this problem:

- replace custody, guardianship and access with new language along the lines of the deceased federal Bill C-22;
- provide a substantive definition of the distinctions between custody and guardianship in the body of the *FRA*; or
- delete the *FRA*'s provisions for guardianship, as they relate to parents, altogether.

In the *Family Relations Act* Review Survey, conducted by the CBABC *FRA* Working Group, the vast majority of respondents (78%) felt that *parenting responsibilities* best described the rights and obligations involved in custody and guardianship.

Parenting time, the *parent's time with the child* and *the child's time with the parent* were favoured to describe the meaning of access; 39% of all respondents to this question preferred defining access as *the child's time with the parent*, which characterizes parent-child contact as being of primary importance to the child rather than the parent, and, arguably, as a right of the child not the parent which has a value in and of itself.[14]

When asked whether some alternative language should replace custody, guardianship and access in the *FRA* however, our respondents were split, with only a bare majority of 51% favouring a change. Those favouring new language saw the existing language as ~~–a~~rchaic," ~~–e~~xclusionist," ~~–p~~rize labels to be fought about" and ~~–r~~ed button words." Those favouring the existing terminology, saw it as having a ~~–l~~egal historical meaning" which has already been ~~–j~~udicially defined" and already ~~–c~~onnotes aspects of the parent-child relationship," and worried that new language will become ~~–c~~harged with as much conflict as the present wording is now."

Despite this division among our respondents, the CBABC *FRA* Working Group is of the uniform view that custody and parental guardianship should be replaced with the term *parenting responsibilities*, and access should be replaced with the term *the child's time with the parent* for the following reasons:

- the distinction between custody and guardianship is not understood by the public at large, including parents and third parties involved in the care of parents' children;

[14] On this last point, see *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), ss. 16(10) and 17(9), and *Young v. Young* (1993), 84 B.C.L.R. (2d) 1 (S.C.C.).

- the existing language is either inherently loaded with issues of power, or has become loaded with issues of power through the passage of time, and thereby promotes conflict;
- the proposed language is inclusive and child-centric, and reframes the focus of argument from *rights to be possessed* by parents to parents' *obligations to their children*; and,
- the proposed language can be freshly defined in the *FRA*, and these new definitions can include a plain-language statement of the current legal meaning of custody and guardianship, the unlegislated but popular concept of "primary residence," and the core principles of the Joyce and Horn models of joint guardianship.

We are also of the view that the term "guardianship" should be retained, but only in reference to the rights and obligations of non-parents, and, to a limited extent, in reference to the rights of parents acting as trustees of children's property, discussed below.

GUARDIANSHIP AND CHILDREN'S PROPERTY

The results of the *Family Relations Act* Review Survey showed strong support for the proposition that the *FRA* should make express provision circumscribing the responsibilities of persons responsible for managing a child's property and the child's right to inquire into the management of that property. Results include:

- 72% thought that the *FRA* should address the rights and obligations of guardians of a child‘s estate;

- 32% thought that such persons should require court appointment in general, but if court appointment is necessary where the value of the estate exceeded a certain amount, 81% thought that the threshold should be at or above $10,000, with 54% of respondents selecting an amount above $10,000;

- although only a slight majority thought that guardians of a child‘s estate should be required to account to the court for their management of the property, 74% believed guardians should be required to account to the child.

The respondents to the *Family Relations Act* Review Survey generally viewed the responsibilities of estate guardians within the confines of traditional trust law: the guardian should be able to use the property for the benefit of the child during the child‘s minority; the guardian should manage the property guided by the child‘s best interests; and, the child should be able to seek an accounting after reaching the age of majority. Most respondents thought that while an accounting should not be mandatory, the child should be able to require an accounting as of right.

The CBABC *FRA* Working Group concurs and recommends that the *FRA* be amended to specifically provide for the appointment of persons to act as trustee of a child‘s estate.

These ―property guardians" should require judicial appointment where the trustee is a non-parent. Parents should be presumptively entitled to act as property guardians unless the child's estate has a value in excess of $10,000, above which the parent would require court appointment to act as property guardian. While accountings should not be mandatory, a child reaching the age of majority should have the right to demand an accounting.

ALLOCATING THE INCIDENTS OF GUARDIANSHIP

It is now settled law that the court may allocate specific incidents of parental responsibility between parents. However, this allocation has only occurred in situations where: the parents are both found to be good, worthy parents, but are nevertheless extremely disputatious; or, the parents have irreconcilable views about a fundamental issue on which no compromise is possible, such as religious instruction.

In the *Family Relations Act* Review Survey, 90% of respondents agreed that the *FRA* should specifically allow the court to allocate incidents of guardianship between parents. The CBABC *FRA* Working Group agrees with this consensus, subject to the caveat that the party seeking the allocation bears the burden of proof in demonstrating that:

- parental cooperation is impossible or near-impossible; and
- it is in the child's best interests that the parent be the one responsible for making decisions regarding the incident of guardianship.

GUARDIANSHIP AND NON-PARENTS

The respondents to the *Family Relations Act* Review Survey favoured the amendment of the *FRA* to provide for stand-by and temporary guardians, and to allow non-parent guardians to designate the appointment of future guardians in their will:

- 71% thought that such guardians should be able to designate future guardians in the event of their death;
- 74% favoured parental appointment of stand-by guardians; and
- 79% favoured parental appointment of temporary guardians.

The CBABC *FRA* Working Group concurs.

PRESUMPTIONS AS TO CUSTODY AND GUARDIANSHIP

Chapter 6 makes reference to sections 27 and 34 of the *FRA*. Section 27 provides that the mother and father of a child are joint guardians of that child subject to specific exceptions. Section 34 lists those persons who may exercise custody over a child.

The pragmatic, and eminently reasonable, purpose of the presumptions raised in sections 27 and 34 is to give parents, almost always mothers, presumptive control over a child where the other parent is unknown or only a brief visitor in the parent‘s life, without the parent having to track down the other parent and commence court proceedings in order to

gain that control. On the other hand, where the other parent is present and involved, he or she gains an automatic legal interest in parenting the child.

These provisions make abundant sense for parents in situations like these. They are also helpful for the purposes of the *Hague Convention on the Civil Aspects of International Child Abduction* which requires that a parent seeking the return of a child merely have a "legal right" of custody, not an *order* for custody. The CBABC *FRA* Working Group is of the view that British Columbia's uniqueness as to these presumptions does not mean that they are inappropriate or undesirable.

We did, however, identify a point of potential conflict where the child in question was conceived by assisted reproduction and the parent claiming the *de facto* right is a surrogate mother, and 61% of respondents to the *Family Relations Act* Review Survey thought that sections 27 and 34 should be revised to address this issue.

CHILDREN'S BEST INTERESTS

The assessment of children's "best interests" is a highly discretionary exercise of judicial authority that is always coloured by the unique set of facts that each family presents to the court. Chapter 6 makes reference to section 24 of the *FRA*. Section 24 provides that a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider specific factors listed in section 24(1)(a) through (e).

At present, the law on ~~–b~~est interests" does not confine or circumscribe judicial consideration to the factors enumerated in section 24(1) of the *FRA*, nor does the court treat section 24(1) as exhaustive, or as otherwise hampering its ability to consider the impact of such things as family violence in deciding the parenting arrangements for a child. Moreover, only a very small number of cases overtly determine parenting arrangements by an express examination of subsections 24(1)(a) through (e).

Slightly less than one-fifth of the respondents to *Family Relations Act* Review Survey believed that section 24(1) should not be amended or expanded upon. Some of these respondents worried that expanding the enumerated factors in this section would give parents additional ~~–li~~tigation avenues," ~~–in~~creasing opportunities for parents" to litigate by ~~–p~~roviding shopping lists for opposing parties." Others felt that additional factors are ~~–a~~lready captured" in the present wording of section 24(1). One respondent suggested a new subsection (f), ~~–a~~ catch-all phase: _any other factors relevant'."

Given that 78% of respondents to the *Family Relations Act* Review Survey said that a child's best interests was the ~~–p~~aramount" consideration in deciding parenting arrangements rather than the ~~–o~~nly" consideration, it is clear that most practitioners believe there are other factors at play in determining parenting arrangements than best interests as defined by section 24.

Nevertheless, a striking majority of 80% of these respondents believed that section 24(1) should be amended to include additional factors:

- 71% of all respondents favoured judicial consideration of family violence[15];
- 41% favoured consideration of cultural, linguistic and religious heritage;
- 73% favoured consideration of ~~"t~~he ability and willingness of a parent to cooperate with the other parent";
- 81% favoured consideration of ~~"t~~he benefit to the child of maintaining a relationship with a parent";

While the CBABC *FRA* Working Group agrees that the factors enumerated in section 24(1) could benefit from expansion, we are cautious about which factors should be included and we concur with those respondents who suggested that these factors might become a ~~"s~~hopping list" destined to aggravate parental strife. The proposed factor that strikes us as most problematic is family violence, given the rate of false claims identified by Professor Nicholas Bala in his paper *Sexual Abuse Allegations and Parental Separation: Smokescreen or Fire?*[16]. Family violence is also problematic based on our personal experience of the frequency of false claims and the fabrication of police

[15] We note that only a bare majority of respondents (51%) to the same question, *Should family violence be an enumerated factor in s. 24 of the FRA?*, in the Chapter 9 survey answered affirmatively, with 39% of respondents opposed.

[16] Published in the materials produced for the 2006 National Family Law Program by the Federation of Law Societies of Canada. See also, Bala, N., Mitnick, M., Trocmé, N., and Houston, C., "~~S~~exual Abuse Allegations and Parental Separation: Smokescreen or Fire?" in *Journal of Family Studies* (2007)(http://www.mcgill.ca/files/crcf/2007-Sexual_Abuse_Allegations_Parental_Separation.pdf).

complaints to achieve in the criminal context the equivalent of non-harassment, non-communication and exclusive occupancy restraining orders in the civil context.

As to the issue of ranking the section 24(1) factors, in the *Family Relations Act* Review Survey, a stunning 90% of our respondents said they should not be ranked and these comments were made:

- ~~"a~~ny one or more of the factors may be more significant than others in a particular case";
- ~~"e~~very case will be unique and ranking would be different in every case";
- ~~"r~~elative importance may vary from case to case" and
- ~~"it~~ should be left to the judge … to determine the appropriate weight to be given to each factor."

The CBABC *FRA* Working Group agrees that the factors in section 24 should not be ranked; the court's discretion in this regard should not be fettered in any manner.

PARENTING AFTER SEPARATION

The CBABC *FRA* Working Group is of the uniform opinion that parenting plans would be a useful tool to help settle parenting arrangements after separation and minimize future conflict.

Such forms could:

- help parents assess whether their proposed parenting arrangements are practical and workable (as in the case of a parent who plans on traveling from Richmond to Maple Ridge to see the children for two hours on Tuesday and Thursday evenings);

- help parents address themselves to the mechanics of their arrangement (who will do the picking-up and dropping-off, whether there will be mid-point exchanges);

- help parents address themselves to often overlooked subtleties (what will happen on holiday Mondays and Fridays, will there be special arrangements for birthdays, Mothers‘ Day and Fathers‘ Day and religious holidays);

- help parents plan for school holidays (extended or altered arrangements for the summer, winter and spring school breaks);

- address issues relating to the children‘s school and extracurricular events (attendance at parent-teacher meetings, attendance at special school events, taking the child to sports practices and attending games); and

- address issues relating to the children‘s wellbeing (taking the children to and attending at medical, dental and therapeutic appointments).

Such plans could also address, in advance, decision-making issues:

- guardianship issues described by the Joyce model;

- the allocation of guardianship issues for the purposes of third-parties, such as the right to travel with the child, direct the child‘s medical care and litigate on behalf of the child;

- the rights of access to information and records described by the Horn model of joint guardianship;

- allocating the incidents of guardianship where a parallel parenting regime is contemplated; and

- preferred out of court judicial decision-making mechanisms, such as mediation and parenting coordination, in the event of future conflict.

A majority of the respondents to the *Family Relations Act* Review Survey also approved of the use of parenting plans (69%). Respondents did not believe that parenting plans should be mandatory in all cases, such as where one parent is unknown or otherwise absent from a child‘s life, or the dispute is minor. Respondents thought that there should be an element of discretion: 16% of respondents felt that parenting plans should be

optional at the parents‘ discretion, while 58% said that parenting plans should be optional at the court‘s discretion.

The respondents did not, however, see a need for a reality-check and judicial confirmation that proposed parenting plans are in fact in the children‘s best interests, as 74% believed that parenting plans should not require the approval of the court.

The CBABC *FRA* Working Group is of the view that parenting plans should be available to all parents, whether involved in litigation or not. We also believe, however, that all parenting plans, particularly where the plan is or may become the subject of litigation, should require court approval as to whether the plan: (a) meets the needs of the children, (b) is in the children‘s best interests and (c) is feasible and practical.

We propose that parenting plans should also be forward-looking. In our view, one of the most significant problems of the Idaho and Oregon parenting plan forms referred to in Chapter 6 is that they are static and tacitly suggest that the parenting plan chosen by the parents (or imposed by the court) will always be suitable. In reality, parenting arrangements must and do change as children get older, to reflect their increasing intellectual and emotional maturity, the imposition of external constraints on their lives such as school and extracurricular activity schedules and developing social obligations. Parenting plans should, therefore, either contain review provisions or explicitly address how it they change as the children age and mature.

Parenting plans should also be enforceable. Parenting plans created at Family Case Conferences (–FCC") and Judicial Case Conferences (–JCC") should be pronounced as court orders. While parenting plans negotiated out of court should be able to be filed for enforcement purposes in the Provincial or Supreme Court, as separation agreements may currently be registered under sections 121 and 122 of the *FRA*, where an action to enforce the parenting plan is expected to be brought, the court must approve the parenting plan. In the *Family Relations Act* Review Survey, 67% of respondents believed that filed parenting plans should have the effect of a court order.

PREVENTING AND ADDRESSING PARENTING DISPUTES

The CBABC *FRA* Working Group proposes that parents should be given some form of explanation of both the meaning of parenting orders and the consequences of breaching those orders. Further, and that such explanations should be given by the court rather than by the parents' lawyers. While certain parents are pathologically disputatious and will be immune to reason, most parents would benefit from an –official" explanation of the order and a clear warning as to the consequences of its breach.

In the *Family Relations Act* Review Survey, 70% of respondents thought that parents would benefit from such explanations. Of all respondents, 49% percent believed that the explanation should come from the Bench, and only 23% thought that it should come from the parents' lawyers, followed by 13% who said that it should come from the registrar or another court official.

As to out of court decision-making mechanisms, the CBABC *FRA* Working Group uniformly supports the amendment of the *FRA* to give the court the discretion to require that all or a defined aspect of parenting disputes be resolved by a means other than further court appearances. We believe that the court will always remain relevant, both in a curative and punitive capacity, and that it must always be available as a last resort where an alternative dispute resolution mechanism has failed. Accordingly, any amendment to the *FRA* must not oust the ultimate jurisdiction of the court, and parents must be able to bring a dispute back to court providing that they have first made good faith efforts to exhaust the utility of the alternate mechanism.

While 66% of the respondents to the *Family Relations Act* Review Survey agreed with the proposed amendment of the *FRA*, some serious concerns were raised that should be addressed:

- the utility of the process for self-represented litigants;
- costs associated with the process;
- the availability of the process for those living in remote communities;
- the potential for abuse and bad faith recourse to the process; and
- the low likelihood that the present provincial government will provide adequate funding for the process.

The respondents supported the use of mediation, parenting coordination and other ~~"r~~ecognized" alternative dispute resolution mechanisms. One respondent specifically cautioned against the use of processes based on religious beliefs.

RECOMMENDATIONS

In light of our submissions above, the CBABC *FRA* Working Group recommends that the following amendments should be made to the *FRA*:

- language reform;
- guardianship and children's property;
- allocating the incidents of guardianship;
- guardianship and non-parents;
- presumptions as to custody and guardianship;
- children's best interests;
- parenting after separation; and
- preventing and addressing parenting disputes.

LANGUAGE REFORM

The CBABC *FRA* Working Group recommends that the *FRA* should be amended regarding these definitions:

- ~~"~~Parenting responsibilities";
- ~~"~~The child's time with the parent";
- ~~"~~Parent"; and
- ~~"~~Guardianship".

"Parenting responsibilities"

The CBABC *FRA* Working Group recommends that ~~"~~parenting responsibilities" should be defined to include:

- the right to play a full and meaningful role in a child's life;
- the right to direct the course of the child's upbringing, education, moral and religious instruction, medical, dental and mental health; and
- the obligation to provide the child with a nurturing home life, educational and recreational opportunities and the necessities of life.

Parenting responsibilities may be held by one parent alone, shared by both parents together, or allocated between parents as is currently done where the court orders a regime of parallel parenting.

Where both parents share parenting responsibilities, the Joyce model, less the clause about ultimate decision making authority, should be used to describe the parents' obligations to each other and to the child.

A parent without parenting responsibilities would have no right to participate in or direct decision-making concerning the child.

The allocation of parenting responsibilities must be made in contemplation of the child's best interests.

"The child's time with the parent"

The CBABC *FRA* Working Group recommends that ~~"t~~he child's time with the parent" should be defined simply as the time the child spends with a parent. This will require access orders to allocate time between both parents. Rather than saying ~~"t~~he child will be with the defendant every other weekend," for example, an order would say:

> Sally's time with her parents will be shared on a two-week rotation, with Sally being with the Plaintiff from Monday morning at the start of school in the first week until the end of school on Friday in the second week and with the Defendant from the end of school on that Friday until the start of school the following Monday morning.

"Parent"

The CBABC *FRA* Working Group recommends that "parent" should be defined to include:

- biological parents;
- step-parents;
- biological parents of children conceived by assisted reproduction; and
- persons who have arranged for the conception of a child by assisted reproduction where one of the persons is the genetic parent of the child and the persons have executed an assisted reproduction agreement with the donor of the genetic material.

"Guardianship"

The CBABC *FRA* Working Group recommends that "guardianship" should be returned to the meaning the term held prior to 1978. Where the right to direct the child's upbringing and day to day care must pass to a third party, as might be the case where a parent dies, is temporarily incapacitated or becomes permanently incapacitated, or where a child is apprehended, the person taking responsibility for the child would be said to have guardianship of the child.

Accordingly, the concept of "guardianship" should not apply to parents, except for the limited purpose of parents acting as property guardians of a child's estate. The court must, however, expressly allocate defined instances of guardianship for the purposes of:

- a parent's ability to secure a passport for and travel with the child;

- a parent‘s ability to make medical and educational decisions on behalf of a child; and
- a parent‘s ability to act as guardian *ad litem*.

CHILDREN’S PROPERTY

The CBABC *FRA* Working Group recommends that the *FRA* be amended to specifically provide for the court appointment of persons to act as trustees of children‘s estates.

Parents should be presumptively entitled to act as guardians of a child‘s estate, subject to a cap of $10,000, above which court appointment would be required.

In assessing the capacity of a person, including a parent, to act as a property guardian, the court should consider:

- the applicant‘s ability to manage property;
- the applicant‘s financial circumstances, including financial history and present debt load;
- the financial circumstances of the applicant‘s spouse;
- the wishes of the child‘s parents where the applicant is other than a parent;
- the wishes of the child where the child is at or over the age of 12, synchronizing the consent provisions of the *Adoption Act* and the consultative provisions of the *Child Family and Community Services Act*.

Upon reaching the age of majority, the child should have the right to demand an accounting of the management of his or her estate, whether the trustee acted as trustee by operation of the *FRA* or by court appointment.

ALLOCATING INCIDENTS OF GUARDIANSHIP

The CBABC *FRA* Working Group recommends that the *FRA* should be amended to allow courts to allocate some or all of the incidents of guardianship between parents. The parent seeking the allocation should bear the burden of proving that the allocation is necessary and will serve the child‘s best interests.

GUARDIANSHIP AND NON-PARENTS

The CBABC *FRA* Working Group recommends that the *FRA* should be amended to allow non-parent guardians to specify future guardianship in their wills.

The *FRA* should provide for the appointment of stand-by and temporary guardians where the other parent is incapable of appropriately exercising parenting responsibilities, or is unknown or otherwise absent from the child‘s life.

PRESUMPTIONS AS TO CUSTODY AND GUARDIANSHIP

The CBABC *FRA* Working Group believes that sections 27 and 34 of the *FRA* operate appropriately. Amendment is, however, needed to deal with situations in which the parent claiming the *de facto* right is a surrogate mother.

The CBABC *FRA* Working Group recommends that sections 27 and 34 contain an exemption which provides that, where the child is conceived through means of artificial reproduction, the persons who are presumed to have custody and guardianship are the persons designated as the child's "parents" under a valid assisted reproduction agreement.

CHILDREN'S BEST INTERESTS

The CBABC *FRA* Working Group recommends that the factors enumerated in section 24(1) should not be ranked in importance, and should be amended to include three additional factors:

- the ability and willingness of a parent to cooperate with the other parent;
- the benefit to the child of maintaining a relationship with a parent; and
- any other factor relevant to the best interests of the child.

PARENTING AFTER SEPARATION

The CBABC *FRA* Working Group recommends that a parenting plan form be created and made available at court registries and family justice hubs to all parents, including those not engaged in litigation.

The forms should be expansive and provide parents with the opportunity to turn their minds to the minutiae of their future care of the children, as discussed above. The form should address current parenting arrangements in as much specificity as the parents wish, and expressly lead the parents to contemplate how the ~~"b~~ig picture" arrangements may change in the future. Parenting plans generated in the course of litigation and parenting plans developed independently but submitted for filing should require court approval, on either summary review or at a JCC or FCC, as to whether the plan:

- meets the needs of the children;
- is in the children's best interests; and
- is feasible and practically workable.

Parenting plans reached at a JCC or FCC should be entered as court orders.

Parenting plans negotiated out of court should be registratable in the manner presently provided for separation agreements, but should only be enforceable with court approval of the plan. Court-approved parenting plans should have the effect of a court order.

PREVENTING AND ADDRESSING PARENTING DISPUTES

The CBABC *FRA* Working Group recommends that parents in litigation should receive an explanation about the contents and effect of a parenting order delivered by the Bench. The explanation should address the legal meaning of the order, how the order may be varied and under what circumstances a parent may apply to vary the order, and provide a general admonition to comply with the order together with an explanation of the consequences of breach of the order.

The CBABC *FRA* Working Group further recommends that the *FRA* should be amended to allow the court to temporarily delegate its authority over defined issues in a case to a third-party for the purposes of resolving present or future disputes outside of the usual court process using a defined dispute resolution mechanism. Such dispute mechanisms should be limited to: mediation, arbitration and parenting coordination.

In our view, it is imperative that the court, in delegating its authority, explain to the parents the purpose of the delegation, emphasize the importance of the parents addressing themselves to the dispute mechanism in good faith and explain that court remains available to resolve an issue in the event that the dispute mechanism fails or in the event the decision-maker‘s decision must be enforced.

The court should also be empowered to direct the means of payment of the third-party, including apportioning his or her costs between the parties.

Where the court has delegated its authority, the *FRA* should provide that the decisions of the third-party have the effect of a court order and be binding upon the parties until a parent applies for a review of the decision by the judge who ordered the delegation and the judge makes an order different than the decision.

The CBABC *FRA* Working Group strongly encourages the provincial government to provide adequate funding for low-income parents in litigation who seek to resolve a dispute by means of an alternative dispute resolution.

CHAPTER 6: ANSWERS TO QUESTIONS

Based on our submissions above, the CBABC *FRA* Working Group replies to the questions raised in Parts A, B, and C of Chapter 6 as follows:

1. Would changing the words used in the *Family Relations Act* to describe parenting roles and responsibilities help people resolve parenting disputes? Why or why not?

Yes, for the reasons discussed above.

2. What terms should the Family Relations Act use to describe parents' roles and responsibilities? [list not reproduced]

"Parenting responsibilities" in place of custody and guardianship and "the child's time with the parent" in place of access and referring to the time the child spends with both parents.

3. Do you have any views on what each term you selected in Question 2 should cover? This list may help you decide what you want to include. [list not reproduced]

Yes, for the reasons discussed above.

4. Do you think that detailed definitions in the *Family Relations Act* for words used to describe parenting roles and responsibilities would help people resolve parenting disputes? Why or why not?

Yes, for the reasons discussed above.

5. Should the *Family Relations Act* replace the words ~~"c~~ustody" and ~~"a~~ccess" with other terms, even if the Divorce Act continues to use them?

Yes. It would be preferable, of course, for the language of the *FRA* to be consonant with the *Divorce Act*, however the Working Group believes that these issues are too important to wait until the next time a federal government revives Bill C-22.

6. In describing parents‘ roles and responsibilities, are there other considerations that you think should be reflected in the *Family Relations Act*?

See the reasons discussed above.

7. Should British Columbia have a comprehensive law specifically authorizing a judge to appoint a parent or other person to be a trustee of a child‘s property?

Yes, on the Alberta model but with the property limit fixed at or above $10,000.

8. If so, what should judges be required to take into account when deciding whether to appoint a person as a trustee? [list not reproduced]

See the reasons discussed above.

9. If you answered Yes to question 8, what else should the law do? [list not reproduced]

The child should have the right to demand an accounting on reaching the age of majority.

10. Should the law in British Columbia be changed to add special provisions, like those in other provinces, to allow parents or other people to manage small trust funds for children?

See answer to Question 7 above.

11a. If so, what should be the maximum value of property covered? [list not reproduced]

At or above $10,000.

11b. Who should be allowed to receive the property on the child‘s behalf? [list not reproduced]

A parent as of right for property valued under $10,000 or a greater amount, or any person appointed by the court for all estates, subject to consideration of the wishes and capacities of the parents and the wishes of the child, as discussed above.

11c. Should a person be required to sign a form acknowledging receipt of the property, as in Alberta?

Yes.

11d. Should a person be required to sign a form accepting the responsibility to manage the property for the child‘s benefit, as in Alberta?

Yes.

11e. Should the person receiving the property be required to account to the child, when the child turns 19, for how the property was managed?

Yes, but at the request of the child.

11f. What role, if any, should the Public Guardian and Trustee play with respect to managing small trust funds for children?

None, except at the request of a child seeking an accounting.

12. When making decisions about parenting arrangements, should the best interests of the child be? [list not reproduced]

The paramount consideration.

13. Should the *Family Relations Act* say that parents must take into account their children‘s best interests when making parenting arrangements after separation?

Yes.

14. Should family violence be added to the factors listed in s. 24 of the *Family Relations Act*, that a judge must consider in assessing a child‘s best interests? Why or why not?

Family violence is taken into account in present analyses of children’s best interests. The CBABC *FRA* Working Group proposes that family violence not be made an express factor in section 24(1).

15. If you think that the list of factors for determining a child‘s best interests in s. 24 of the *Family Relations Act* should be changed, indicate what should be included [list not reproduced]

The majority of the identified factors are already taken into account in present analyses of children’s best interests. The CBABC *FRA* Working Group recommends the addition of three factors to section 24(1):

- **the ability and willingness of a parent to cooperate with the other parent;**
- **the benefit to the child of maintaining a relationship with a parent; and**
- **any other factor relevant to the best interests of the child.**

16. When it comes to deciding the importance of each factor in determining a child‘s best interests, how can the *Family Relations Act* best serve children‘s interests? [list not reproduced]

The factors enumerated in section 24 should not be ranked, and the court should continue to address children’s best interests on a case by case basis.

17. Should the *Family Relations Act* require that decisions affecting children: [list not reproduced]

Protection of children’s safety and wellbeing is already taken into account in present analyses of children’s best interests. The issue of the child’s “sense of time” requires an expert knowledge of children’s psychology and child development which cannot be reasonably demanded of the court, and should not be a consideration.

18. Should the rules in sections 27 and 34 of the *Family Relations Act* for determining parental guardianship and custody (where there is no agreement or court order that says differently) be changed? If so, how should they be changed?

Sections 27 and 34 function adequately and do not need to be amended, except to make provisions where children are born through assisted reproduction, as discussed above.

19. Would parenting plans make it easier for parents to agree on parenting arrangements? Why or why not?

Yes, for the reasons discussed above.

20. Would parenting plans result in arrangements that better meet children's needs? Why or why not?

Yes, for the reasons discussed above.

21. Should the *Family Relations Act* include provisions about parenting plans?

Yes, for the reasons discussed above.

22. If so, should parenting plans be mandatory or optional?

Optional for parents not in litigation, mandatory at the discretion of the court at an FCC or JCC.

23. Should the *Family Relations Act* require certain items to be covered in a parenting plan? If so, what should be required?

Discussed above.

24. Do you think parenting-time guidelines would help parents in B.C.? Why or why not?

Discussed above.

25. Should the *Family Relations Act* say specifically that judges may allocate aspects of parenting responsibilities between parents in a court order?

Yes, but subject to the burden of proof discussed above.

26. Should the *Family Relations Act* require that parents be given an explanation of the obligations created by a parenting order and the potential consequences of failing to meet those obligations, at the time an order is made?

Yes.

27. If so, should the explanation be part of the order?

No, unless a condensed version of the explanation and admonishments is either: (a) set out as an endorsement in the manner the consequences of contempt of personal restraining orders are endorsed in Supreme Court Form 134, or (b) the registry is provided with a standard form which it would be required to automatically attach to all parenting orders, in the manner that it currently provides information on the division of Canada Pension Plan credits with all divorce orders.

28. Should the *Family Relations Act* require other explanations to accompany parenting orders, such as an explanation of programs or services available to help if there is a problem in living up to the obligations set out in the order? If so, who should give the explanation?

No, but this information should be available at the court registry and family justice hubs.

29. Should the *Family Relations Act* include specific authority for judges to include in an order a process for resolving disputes about the order? If so, should judges be able to do this only if the parents agree to the process?

Yes, as discussed above.

30. Should the provisions relating to testamentary guardianship, now found in s. 50 of the *Infants Act*, be moved to the *Family Relations Act*?

Yes.

31. Should a guardian who is not a parent be able to appoint a testamentary guardian (that is, a person who will become a child‘s guardian when the appointing guardian dies)?

Yes.

32. Should the *Family Relations Act* allow a guardian to appoint a standby guardian who will assume joint guardianship during the appointing guardian‘s lifetime and continue as guardian after the appointing guardian‘s death? If so, what restrictions, if any, should there be on the situations in which a standby guardian may be appointed?

Yes, on the terms discussed above.

33. Should the *Family Relations Act* specifically authorize a guardian to appoint a temporary guardian? If so, what restrictions, if any, should there be on the situations in which a temporary guardian may be appointed?

Yes, on the terms discussed above.

34. Should a simple form be created for appointing a testamentary or standby guardian?

Yes.

CHAPTER 7: MEETING ACCESS RESPONSIBILITIES

The Attorney General's discussion paper, Chapter 7: Meeting Access Responsibilities, examines how to change the law to prevent access disputes, how to change the law to respond to access disputes and how to manage complex cases and inter-jurisdictional enforcement. [17]

[17] British Columbia Ministry of Attorney General, "Chapter 7: Meeting Access Responsibilities" in *Family Relations Act* Review (May 2007)(http://www.ag.gov.bc.ca/legislation/pdf/Chapter7-AccessResponsibilities.pdf)("Chapter 7").

THE EXTENT OF THE PROBLEM

Access disputes are among the most frustrating in family law. Emotions are high, and a clear perspective hard to come by. These issues take significant time and resources to address. They are often side-tracked or adjourned. The tools we have to address them often seem crude or inadequate to the task. The issues seem never to be fully resolved.

They come back into the system time and time again.

There is an overwhelming sentiment among the family law Bar that access issues cry out for legislative reform.

Fathers‘ groups have been lobbying the Canadian Parliament for years for reform in the areas of custody and access, so far with limited success. Perhaps their effectiveness has been spoiled somewhat by their more extreme proponents. But they have a point. Much has been done to address obtaining and enforcing fair support (such as the child support guidelines, Family Maintenance Program and Family Maintenance Enforcement Program). So far, governments have done nothing to address access enforcement – at least, not in British Columbia, or under federal law. That issue has been left with the courts.

Of course, support and access are two different issues, as the courts take great pains to tell us. Yet, in cases of extreme frustration, even the courts sometimes break their own rule.

Courts recognize the importance of access. They tell us access is the right of the child. No parent can deny it, or limit it unless the court considers that to do so is in the best interests of the child.[18] And yet, as judges will be among the first to admit, family law provides few resources for supporting this right. The SourceBook says, simply, "There is no way to enforce a right of access directly."[19]

As Lord Denning said, "whenever a man has a right, the law should give him a remedy." [20]This maxim, *ubi jus, ibi remedium*, has led courts in Britain and the United States to "find", or simply create remedies where none are expressly provided in statute or precedent (including *Brown v. Board of Education*). So far, courts in family matters have been less inventive. The *FRA* Review gives us our best chance to address that need.

So what can be done?

As noted above, courts can reduce or withhold support, but that is exceedingly rare. The same can be said for contempt powers. They exist, but are rarely used. Most commonly judges simply read the "riot act" to the offending spouse, and little more. This leaves the applicant wondering why he or she went to all that bother, and teaches the offending parent that she or he can re-offend with impunity.

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[18] See *Young v. Young*, [1993] 4 S.C.R. 3 1993(unofficial copy: http://scc.lexum.umontreal.ca/en/1993/1993rcs4-3/1993rcs4-3.pdf).
[19] Continuing Legal Education Society of British Columbia, Family Law Sourcebook for British Columbia (3ed) (2002).

[20] *Hill v CA Parsons & Co. Ltd.* (1972) 1 Ch 305, at 316.

We have no statistics for the use of the offence powers in section 128 of the *FRA*, but we suspect it is used even less often. The *Family Relations Act* Review Survey indicates that fewer than 10% had used it, or even heard of it being used.

The Provincial Court has no power to orders costs, or fines (other than for refusal to comply with financial disclosure rules in section 92 of the *FRA*), or to punish for contempt.

The court can order police assistance for denial of custody, but not access. Sometimes, this leads to joint custody orders, so the threat goes both ways. Still, a family has to be pretty far gone to need the police to exchange their children. Some think it can be a useful deterrent. Others think it's like burning down the house to treat a rodent problem.

The ultimate penalty is not jail, but loss of custody. Yet, here too, courts seem reluctant to pull this "trigger", with the result that such measures are reserved for only the most extreme cases – where they are often ineffective, or too late. Take, for example, the recent British Columbia Court of Appeal case in *A.A. v. S.N.A.*[21] In that case, the Court of Appeal appeared to punish a determined campaign of parental alienation by turning the child over to the innocent parent. The tragedy was that the child had already been effectively alienated from that parent and the experts noted that a difficult period of adjustment lay ahead.

[21] 2007 BCCA 364 (unofficial copy at: http://www.courts.gov.bc.ca/jdb-txt/ca/07/03/2007bcca0364err1.htm).

In many cases, the courts are just not prepared to take this step. Even while they deplore the actions of the offending spouse, they acknowledge they are too late and essentially refuse to do anything about it. Indeed, the result in *A.A. v. S.N.A.* might very well have been different if the child had been otherwise well adjusted in the mother's care. The determining factor in that case did not appear to be the mother's atrocious conduct, but her own dysfunctional home environment.

The only positive development is that courts, being alive to the problem, are more likely to be influenced now at the initial trial, if they have evidence that suggests one or other of the parents cannot be trusted to follow through with whatever access is ordered. At this stage, parents can lose custody if the court cannot trust them to respect the role of the other. After custody or primary residence has been established, however, the threat of taking it away can often be a hollow one, and unfortunately clients are now well aware of the fact.

No one denies these problems, yet some question whether the problems are widespread enough to warrant significant attention. Are these just a few isolated, albeit tragic stories or do they represent the tip of a much larger problem? We are convinced of the latter, which is the tip of a much larger problem.

The need for access reform can be found, in part, from the various jurisdictions which have now chosen to address it. Those are covered in Chapter 7: Australia, New Zealand, England, the United States and a few parts of Canada.

There are also data from British Columbia addressing the importance of access issues in the family justice system. For example, in 2006, an evaluation of the family services at the Legal Services Society was released.[22] That study concluded, among other things that:

- custody, access, and child support were consistently the three most difficult issues to resolve;[23]
- among those three, the first choice for services was some form of representation, rather than legal information or advice.[24] In other words, they could not resolve the problem themselves. They needed court;
- among the most common reasons for not being able to resolve their matter, clients noted:
    - systemic barriers;
    - relationship dynamics;
    - not being able to afford a lawyer;
    - being threatened or worn down by the other side; or
    - feeling it wasn't worth the hassle to continue;[25]

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[22] Focus Consultants, An Evaluation of Family Services of the Legal Services Society: Final Report (October 4, 2006) (http://lss.bc.ca/assets/about_lss/FamilyServicesFinalReport.pdf) ("LSS Report").

[23] LSS Report at 16.

[24] *Supra*, at 19.

- among the issues that tended to re-emerge, child support came first, followed closely by access, and then custody[26] and
- among the reasons why issues tended to re-emerge:
    - refusal to comply with court orders or agreements came first; and
    - needing to vary orders in changed circumstances came second.[27]

Those of us in family practice know that custody issues are often really access issues in disguise. A common refrain heard from clients is: ―She's not giving me reasonable access, so it's time I had control over the kids". As a result, the statistics collected by the Legal Services Society report noted above, may be under-weighted for access. Even so, those statistics are telling.

In the CBABC *FRA* Working Group *Family Relations Act* Review Survey, respondents said access issues were significant In terms of the time and resources needed to address access issues, over 80% of those that responded answered between ―moderately" to ―very". In terms of importance to clients, 88% of those that responded answered between ―somewhat" and ―very". For impact on children, 84% of those that responded reported between ―quite" and ―very". For the ability to resolve other issues, 76% of those that responded recorded between ―moderately" and ―very". The overwhelming majority of respondents that responded (80% versus 6%) said the current

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[25] *Supra*, at 34.

[26] *Supra*, at 17.

[27] *Supra*, at 39.

FRA, rules and procedures *did not* provide effective tools for preventing or resolving access issues.

Some of the comments from the CBABC *FRA* Working Group *Family Relations Act* Review Survey include:

- "Access is often the MOST important issue .... at least it is usually the most immediate and pressing one.";
- "Access problems can be the deal breaker.";
- "The inability to get a quick resolution on interim access has a snowball effect that impedes progress on all areas of the separation or divorce. Some of the most intractable positions are formed shortly after separation because parties perceive the other as being unfair, manipulative";
- "Ongoing participation and interaction between child and parent, and parent and parent informs many of the other issues. For example, the parent who has little involvement will likely not appreciate the importance of contributing to child support and special expenses."; and
- "Need more tools to enforce access".

THE NATURE OF THE PROBLEM

When parents break up, it can be a tumultuous time for all family members. Emotions are high, the future uncertain. Parents are feeling hurt, guilty, anxious, angry, and especially fearful. They fear for the loss of their family. They fear for the safety of the children. They fear for the loss of financial security. And they fear what the other parent may do to make things worse:

- withhold the children;
- move away;
- exaggerate or manufacture some kind of complaint;
- hurt or take the children in retaliation;
- recruit the children or inappropriately lean on them for support;
- alienate or scapegoat the other parent;
- bribe the children to take sides; or
- guilt them or freeze them out for having apparently done so.

In such an environment, fear tends to trump common sense and even experience. Former partners, once regarded as responsible, loving parents are now regarded as little short of monsters. Parents are moved to take preventative or pre-emptive steps, which in turn only increases the anxiety of all. It is a situation that all too easily can, and frequently does, spiral out of all control.

Family disputes are like migraine headaches. If you catch them early enough, it takes comparatively little medicine to hold them off. If you wait, they can grow too strong for any amount of amount of pain-killer to control.

The bad news is, the family justice system is not well equipped to catch these problems early. The court has built in safeguards, which, while well-intended, get in the way of an early appearance in court, in any form:

- time limits for filing;
- having to close pleadings before scheduling (most) court dates;
- mandatory JCCs or family justice center mediation; and
- amendments to Rule 60E of the Supreme Court Rules regarding JCCs, which delay the first conference further (having to file a financial statement 30 days before).

There are exceptions, but these are limited to extreme situations. Ironically, this tends to ensure that the court will see more extreme cases. Cases that never were urgent are unaffected; cases that are urgent and fit within our exceptions-restraining orders, absconding with the children or refusing to let them see a parent at all-get relatively quick attention. On the other hand, cases which seem urgent to the clients but not the court are told to wait (for example, interim support and access disputes).

Some conflicts are remedied but if not clients may perceive that the court either cannot or will not correct bad behavior or the situation may escalate, so that a problem which might

have been contained with relatively minor court intervention, now becomes a polarized, entrenched battlefield.

Of course, the idea of information services, or the Parenting After Separation program or mandatory mediation, is to try to give such parents the tools to help themselves, before they need to resort to a judge for a decision. But do they work?

There are significant barriers to the efficacy of such "soft" measures as a first line resource, especially where there is already some active dispute. First, parents in these situations rarely see themselves in an impartial or accurate light. Parenting courses are often perceived as a valuable to our clients, but when we ask them what they have learned, a different story emerges. Almost all report greater insight into the bad behaviors of the other parent. Almost none report any insight into their own behavior. Thus it tends to fuel the fight, rather than contain it.

Second, mediation is most effective where *both* parents are motivated to negotiate a solution. Where one parent already has most of what he or she wanted, especially where it is to deny or severely limit the other's contact with the children, they do not share this motivation. Mediation in these circumstances can serve only to delay resolution. Worse, it can lead to a perception that the court system is ineffective, or uninterested, in resolving these issues.

The *Family Relations Act* Review Survey results confirm these impressions. In terms of addressing access issues generally, such measures as collaborative practice and private mediation ranked as ~~–m~~oderately" effective, the family justice centers and counseling slightly less so, and the Parenting After Separation course only ~~–s~~omewhat" to ~~–in~~effective". In terms of addressing entrenched access disputes, these ratings dropped to only ~~–s~~omewhat" effective, and the Parenting After Separation course PAS was considered ~~–in~~effective".

The courts were considered roughly on a par with collaborative practice and private mediation in the first instance, and the Supreme Court only slightly more effective than mediation in the second. The results for the two courts were slightly different. The Provincial Court rated higher generally, and the Supreme Court was considered more effective in dealing with entrenched issues. We suspect the first is explained by the lower cost and lack of formality in Provincial Court and the second is due to the availability of costs and contempt orders in Supreme Court.

The courts appear somewhat biased toward a final resolution, not an early one. Judges tend to want complete evidence, full argument and the time and resources to make a comprehensive and reliable decision. As a profession, Bench and Bar are both wary of snap judgments, incomplete or unreliable information and procedural safeguards – and we should be. However, these concerns do have a tendency to limit our ability to act as soon as we could– or as we would argue, as soon as we *should*.

In cases of recent family breakup, speed is especially significant for a positive resolution. The longer the chaos endures, the more entrenched problems can become. The sooner some sense of normalcy is returned, the quicker fears abate, positions soften, parents become more amenable to negotiation and the negative effects on children diminish.

The same is true of access enforcement. If problems are to be corrected, they are best addressed early. Delay only magnifies the problem.

In the *Family Relations Act* Review Survey, the following factors were ranked in terms of their importance in addressing access disputes, in descending order:

- ability to get a decision;
- speed;
- education about access norms (what works best for children at various ages);
- feedback from children;
- cost; and
- ability to negotiate own solution.

All were considered important, with the first two almost tied. This tends to confirm our view that, for access issues at least, the ability to intervene early and decisively is key.

Speed is not something that can be comprehensively addressed in the *FRA*. Rules and procedures must be implemented to address the problem. But the *FRA* can set priorities and time lines, as with the *Child, Family and Community Service* Act.

RECOMMENDATIONS

In light of our submissions above, the CBABC *FRA* Working Group recommends that the following amendments should be made to the *FRA*:

- create a remand or triage procedure for family courts as the ~~"h~~ub" of the family justice system; The ~~"h~~ub" as a different vision from that created in the Nanaimo pilot project sponsored by the Legal Services Society and the Ministry of the Attorney General;
- manage Family Duty Counsel in the same way as Crown Counsel;
- have an expedited, show-cause type procedure for addressing allegations of frustration or denial of access;
- triage (family remand) for variation applications;
- follow-up hearing for supervised access orders;
- court power to order spot checks;
- prioritize investigations where violence alleged against or sexual abuse of a child;
- access reforms: what works (and what doesn't);
- (advisory) model orders and parenting time guidelines;
- court approval of consent access orders or parenting plans;

- imposing fines, compensation orders and costs in Provincial Court;
- consider views of the child;
- no government access agency should be created; and
- concerns about the piloted Nanaimo Hub not meeting needs.

TRIAGE (FAMILY REMAND) AS THE "HUB"

CBABC *FRA* Working Group recommends that the government create a remand or triage procedure for the family courts so that the family courts be and remain the "hub" of the family justice system.

The 2005 report of the Family Justice Reform Working Group recommended many promising reforms, some of which have already been implemented. A few that causes us concern, however, include:

- that a family services "hub" be established, as the front door to the court system;
- that litigants be required to complete mandatory collaborative dispute resolution before coming to court, with some exceptions; and
- that hub personnel be the ones to screen for those exceptions.

These recommendations emanate, it seems, from the overall conclusion that British Columbia should move away from a court-centered family justice system, to incorporate other resources and modalities of dispute resolution. The CBABC *FRA* Working Group supports the last objective, but respectfully disagrees that we should move away from a

court-centered family justice center. In fact, in our view, the ~~"h~~ub" of the system must be and remain the family courts.

We say this for a number of reasons. The first is that, as previously noted, for many family problems, purely persuasive or informational services are simply not very effective. Neither is mediation or collaborative practice, unless the parties are both motivated to find a compromise. One significant motivation for parties can be the perception that, if they do not reach agreement themselves, someone or something can and *will* make the decision for them. That something is the court.

If the court process is seen as something the parties can avoid – or something that is too slow, costly, or simply overburdened to have much real impact on their dispute – that motivation is significantly diminished.

The second reason is that, candidly, we do not trust non-lawyers or non-judicial officers to have the required legal skill or experience to screen candidates and accurately assess whether they will benefit from early contact with the court.

It is also represents a needless duplication. The first thing any litigant will have to do when they come before the court is tell the judge what they are doing there. If the hub screener passes them through, and the court thinks they should really be elsewhere, we have just wasted everyone's time. Far worse, what if the screener diverts someone the

court would have felt was appropriate for early court intervention? That opportunity is lost.

We are not saying send everyone to the court registry first. The hub can be a useful tool screening out parents who may not need court intervention. If they find sufficient tools there to address their problem, more power to them. But if people have a dispute they feel requires urgent attention, we should not second guess or dissuade them but let the court decide. Our experience with registries working under Rule 5 of the Provincial Court (Family) Rules[28] confirms that courts can efficiently screen for matters which should start in court and which should go elsewhere. As a result, we think the court should be involved, at the outset, in deciding how to direct litigants to appropriate resources. The court knows best what works and what does not, which cases can benefit from court intervention, and when and how much. To use the migraine analogy again, we believe the medicine cabinet should be controlled by a doctor or nurse and not the orderly in the anteroom.

As to just how the court should operate this triage function, we considered two ideas.

The first idea was a genuine remand court for family law. The second idea was mandatory case conferencing, in both courts. The second found more favor with the CBABC *FRA* Working Group, in part because it is already in place in Supreme Court. We are not recommending case conferencing in its present form, however.

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[28] B.C. Reg. 417/98 under the *Court Rules Act*, R.S.B.C. 1996, c. 80.

We propose two significant changes: first, that the conference be scheduled at the earliest possible time. There should be no procedural delays to the conference, such as that pleadings be fully closed, or that the parties have to exchange financial statements beforehand. That would be nice, but is not necessary to the primary function, which would be to assess the issues and assign the case to the appropriate track: advice and support services, mediation, scheduled hearing, expedited hearing or high conflict.

Second, we propose a more interventionist form of case conference, with both expanded options for case management and an ability to grant interim orders on the spot, where such are needed to provide stability to the situation (access, financial security, safety) until the next stage. This has also been discussed in our response to Chapter 5.

FAMILY DUTY COUNSEL

The CBABC *FRA* Working Group also recommends that family duty counsel be managed in the same manner as Crown Counsel currently is, complete with similar financial compensation. Legal Services pays family lawyers about one third of the private rates, without benefits, and requiring the lawyers to pay for their own insurance. Family duty counsel are highly trained family lawyers expected to work long hours, without breaks, without administrative staff, without computer equipment in some areas, without adequate conflict searches, record keeping, appointment sheets, and mediation waivers. Duty counsel often have too many clients with too little time and are thus susceptible to ~~l~~legal aid burn out". All areas are seeing a shortage of family law lawyers

willing to work for the Legal Services Society. In addition to the low tariff, low income clients can be more demanding as a result of lack of education, resources and an expectation that services ought to be free and limitless. There is an added concern that not enough young lawyers are becoming family lawyers. Family duty counsel is an essential part of an effective system to assess and direct litigants to the Parenting After Separation program, mediation, counseling, case conferencing, hearing, or even make some orders on the spot.

SHOW-CAUSE FOR ACCESS

For frustration or denial of access, the CBABC *FRA* Working Group recommends an expedited, show-cause type hearing. This recommendation is detailed in our submissions regarding Chapter 5 above.

TRIAGE (FAMILY REMAND) FOR VARIATION APPLICATIONS

As part of the family remand or triage system, courts would address variation applications, and would assign priority and resources according to how urgent and significant the problem is. A hot fix could be addressed on the spot. A less severe or urgent change could be assigned to a case conference, or mediation, or hearing. A situation which is not urgent at all could be assigned to the Parenting After Separation program and the family justice counselors.

Where allegations of potential harm to children are made they need to be assessed and acted on quickly. Too often, we do the latter and not the former.

Supervised access orders are a perfect example. All too often, courts hear of potentially serious complaints and have no time to properly investigate them. Accordingly, judges tend to err on the side of caution, guard against the worst and order interim supervised access.

Such orders are rarely followed up in a timely manner, for much the same reasons. There still isn‘t time much for a hearing. The fact a suspect parent behaves well under supervision does not prove much – only that the suspect parent is smart enough not to misbehave while being watched. The accuser still has a litany of ~~“f~~ears” – and, after all, the problem is now being addressed by the supervision order itself. So where is the urgency?

FOLLOW-UP HEARING FOR SUPERVISED ACCESS ORDERS

The CBABC *FRA* Working Group recommends that, where interim supervised access orders are granted, the order must include some specified means for following-up or investigating the need for the order. This was briefly discussed in our submissions in Chapter 5 above.

Specifically, this follow-up hearing could be a hearing or case conference. It could be a short mediation, with a report to the court (successful or unsuccessful). It could be mandatory counseling, with a report by the counselor. It would almost certainly include a report from the supervisor.

Counseling is rarely ordered in family court. Understandably, psychiatric assessments are rarely ordered by the court as parties often allege that the other side has psychiatric problems with little basis for the belief. Yet with allegations of drug or alcohol addictions, poor anger management or lack of specific parenting skills there is an obvious need for inter-personal counseling and/or counseling, to improve communications between parents.

The CBABC *FRA* Working Group recommends that, rather than shy away from such investigations or interventions, courts should be encouraged to use such tools to assist in resolving custody and access disputes. We dare to hope that if such methods were employed even the complaining parent may see measurable improvement, lessening the friction between them. Even if it does not satisfy the complainant, however, a report from a counselor may go a long way to satisfying the judge, or informing their decision.

Some allegations may fall short of convincing the judge supervised access is required, but still raise concerns of possible harm to the child. These allegations include:

- occasional drug use, or abuse of alcohol;
- inappropriate accommodations or partners/roommates; or

- irresponsible or deficient parenting.

COURT POWER TO ORDER SPOT CHECKS

For such cases in particular, but also where supervised access is ordered, the CBABC *FRA* Working Group recommends an additional option for the court: specific authority to direct a spot check by other government resources, such as Ministry of Children and Family Development social workers or family justice counselors.

Too often, such agencies step away from families who would otherwise attract their help *because* the matter is before the courts. That seems illogical to us. Why is a child protection matter any less about child protection because the parents are fighting over custody or access? Yet, the Ministry of Children and Family Development routinely refuses to investigate complaints if the matter is in family court.

Worse, social workers may often say, this to the parent: ~~"~~It is your job to protect the child. Cut off his access. If you won't do that, we will remove the child from *you*." This not only encourages denial of access and disobeying orders, it deprives the parent the primary means of verifying whether their fears are justified. For many families, they have no resources to investigate the other parent and neither they nor the court have resources to do a spot check – a very useful tool in child protection work.

The power would be used sparingly, but should be available. If the Ministry of Children and Family Development will not do it on its own, the court should be empowered to order it.

PRIORITIZE INVESTIGATIONS WHERE VIOLENCE ALLEGED AGAINST OR SEXUAL ABUSE OF A CHILD

Finally, a similar problem exists where the allegation is violence against or sexual abuse of a child. Often, these allegations lead to criminal charges, creating three layers of involvement in the same issue: the police, the Ministry of Children and Family Development and the family court. The court waits for the Ministry, the Ministry waits for the police, and sometimes the police take months or more. Some cases can drag on for a year or more and nothing is done. No decision is made to charge and yet the police file is still open. The Ministry, afraid to step on the toes of the police, continues to wait before doing their own investigation.

All too often, the impasse is only broken when the alleged offender pays for an expert report by a psychiatrist or child psychologist. Even when the allegations are proved false (or, more often "probably false") access has been cancelled or severely curtailed for months, even years, and the relationship between this parent and child is ruined. Too often the resolution to these cases is only because the children have grown up into adults.

But what if the alleged offender has no such resources?

The CBABC *FRA* Working Group recommends that that there be some priorities set for investigating such complaints in a timely and meaningful fashion. Maybe it requires a special team within the police force or the Ministry of Children and Family Development or both. It would be worth it, for the children if not the persons accused.

ACCESS REFORMS: WHAT WORKS (AND WHAT DOESN'T)

Access reforms are relatively new and it is hard to draw reliable lessons. Still, some initiatives have a longer history than others and the *Family Relations Act* Review Survey also contains some guidance for what might work and what might not.

Australia has undertaken massive, system-wide reforms and has committed huge funding for the project. Access issues are only part of it. Nonetheless, much can be taken from Australia's experience. Three points in particular seem significant lessons for us:

- getting clients to draft meaningful, practical access orders in the first place and to vary them when circumstances warrant, turned out to be as significant as getting clients to follow orders;
- monetary penalties are needed (costs, fines). They were left out of the original scheme, then added in two years later;
- the most effective catalyst for correcting bad behavior was feedback from the children. Parents actually took it to heart when they heard, from independent sources, how they were affecting their own children.

The *Family Relations Act* Review Survey supports the conclusion that parents do not devote sufficient time or attention to establishing a workable access regime from the outset. Of the issues that most needed to be addressed, the survey identified the following, in descending order of importance:

- providing remedies for frustration or denial of access;
- ensuring there is a workable access regime from the outset;
- assisting the parties to modify the regime when circumstances warrant;
- addressing friction at the access exchange;
- providing for sharing of access costs; and
- providing remedies for failure or refusal to exercise access.

The first issue of providing remedies for frustration or denial of access was ranked by far and away the most significant: 49% said the need to address it was "crucial" and 33% said "significant". The next three issues received strong support, while providing for sharing of access costs received moderate support, and responders seemed ambivalent about providing remedies for failure or refusal to exercise access. It was identified as "crucial" for 16% of responders, while 14% said it was "not at all" important.

(ADVISORY) MODEL ORDERS AND PARENTING TIME GUIDELINES

The CBABC *FRA* Working Group recommends the use of (advisory) model orders and parenting time guidelines.

COURT APPROVAL OF CONSENT ACCESS ORDERS OR PARENTING PLANS

The CBABC *FRA* Working Group recommends that the court should take some pains to review and approve consent access orders or parenting plans, to ensure the parties have created a workable regime and are alive both to the obligations they have agreed to and the consequences for failing to live up to them.

IMPOSING FINES, COMPENSATION ORDERS AND COSTS IN PROVINCIAL COURT

The CBABC *FRA* Working Group recommends that monetary fines be imposed, compensation orders granted and costs returned to Provincial Court. By ~~"c~~osts", we do not mean costs as contemplated in Supreme Court. We want judges to levy fines for egregious conduct, payable either to the court or to the aggrieved party. We anticipate such a power would be infrequently used and often in small amounts. Nonetheless, we think that even a small monetary penalty can have a salutary effect. A fine of even $20 can be significant for some of the parties we see in family court.

CONSIDER VIEWS OF THE CHILD

The CBABC *FRA* Working Group recommends that the court consider the views of children affected and to show parents how they are affecting their children. We also welcome any efficient method of providing objective feedback from children, to show parents that what they are doing (or failing to do) is affecting their kids. We do not think a full, forensic custody and access report is necessary for either.

NO GOVERNMENT ACCESS AGENCY SHOULD BE CREATED

The CBABC *FRA* Working Group recommends that no new agency be created to address access issues. It is partly an issue of cost. We know the government‘s resources are limited, so we do not want money spent on new agencies or programs when the courts are already crowded, judges in short supply and more can be done within the existing court system. It is also partly because experience in other jurisdictions suggests such agencies don‘t work. Manitoba shelved its Access Facilitation Program after four years and Colorado‘s Friend of the Court Bureau seems to have created as much backlash as it has positive results.

CONCERNS ABOUT "HUBS" NOT MEETING NEEDS

We are cautiously optimistic about the idea of bringing family services together in one place: the hubs. It creates visibility in the community and allows family clients to see the entire range of services available, at once. We will watch the Nanaimo Family Justice Information Hub experiment ("Nanaimo Experiment") with interest. We are already concerned about a few things, however, including:

- the possibility that the hub may become another institutional barrier to the courts, rather than a useful adjunct to, or resource for, the court;
- the potential for draining dollars away from an already under-funded court system. It may be coincidental but the Nanaimo Experiment coincides with the loss of a Master in Nanaimo. If it was a choice, we would have preferred to keep the Master;
- the Nanaimo Experiment is already losing its focus on family services. Instead it has become a hub for all civil court matters. This only deepens our fear that workers and bureaucrats at the hub will have little or no expertise to perform the gatekeeper role envisioned by the Family Justice Reform Working Group. Worse, the hub may lose all visibility for family law clients, who will fail to see that their problem has anything in common with, for example, a house construction dispute or a collections matter.

The consensus of the CBABC *FRA* Working Group is that, to be effective in getting parents to create and follow appropriate access orders or agreements, the family justice system must:

- be responsive (quick);
- be efficient (including making the best use of existing resources before creating new ones);
- strike the appropriate balance between prescriptive (court decision) and persuasive (information and mediation) measures;
- encourage and support productive behavior;
- correct and punish obstructive behavior; and
- involve feedback from the children affected.

We have already commented on the first three. What we mean by encouraging and supporting productive behavior and correcting and punishing obstructive behavior is that we must always be aware of the effect our legal system has on client behavior. In our view, institutional delays and limitations on coming to a quick decision tends to favor and therefore encourage, taking inflexible positions. Our family legal aid system limits referrals to cases of domestic violence – and so we actually reward and encourage complaints of domestic violence. The way we approach allegations of child violence or abuse is to punish first and investigate second. This only encourages unfounded allegations – especially as there are so few penalties for having been found out in making a false allegation.

We must be quick to protect children, to be sure. But we must be quick to follow up also. Many of us are aware of cases of alleged child abuse which were in fact preemptive (false) strikes by parents who had good reason to fear losing children

themselves, because of some real problem of their own: with drugs, or the new partner or with conflicts with the Ministry). There are certainly consequences for the children in cases of false complaints -- not to mention those falsely accused. There should also be consequences for the accuser who makes false accusations.

As to the last, more will be said in our response to Chapter 8.

RESOURCES FOR PREVENTING ACCESS DISPUTES

The *Family Relations Act* Review Survey results are confirmation of Australia's experience that access disputes arise most often because too little care was taken in drafting the initial order or agreement in the first place. The *Family Relations Act* Review Survey also ranked the effectiveness of the following resources in avoiding access disputes, in descending order of importance:

- model orders or parenting plans;
- education about access norms (parenting time guidelines);
- mandatory court reviews or case conferences;
- court cautions about the seriousness of orders and the consequences for ignoring or disobeying them.

We recommend the use of parenting plans and parenting time guidelines. They should be part of the bundles of forms or information handouts available at the registry when applications are made involving custody or access. Parenting plans should not be

mandatory, but could be ordered by the court. They could also be voluntary, and form part of a consensual settlement.

We have a concern, however, about letting private agreements be filed with the court and enforced as if they were an order of the court. Our experience, and the experience in Australia, suggests parents cannot be trusted to make comprehensive, workable agreements without outside help. We do not think agreements or parenting plans need to be approved by the court in all instances. But if the parties wish to file them as a court order, then we do believe court scrutiny and approval is required. This could be done in open court, with the assistance of counsel or duty counsel or by means of a case conference.

We also support judicial admonishments, or cautions, when such orders are being filed or considered. Such could even be part of the court order or a standard attachment to such orders, added at the registry.

RESOURCES FOR RESOLVING ACCESS DISPUTES

The *Family Relations Act* Review Survey ranked the effectiveness of the following resources in *resolving* access disputes, in descending order of importance:

- fast track case hearing;
- fast track case conference;
- parenting coordinators;

- short, expedited feedback from child;
- counseling for offender;
- counseling for child; and
- full custody and access report fast track hearing.

RESOURCES FOR DETERRING ACCESS DISPUTES

The *Family Relations Act* Review Survey ranked the effectiveness of the following resources in *deterring or punishing* breaches of orders or agreements, in descending order of importance:

- loss of custody;
- make up time;
- costs;
- fines;
- judicial admonishment;
- community service; and
- imprisonment.

There was a fair bit of ambivalence about the last three.

IMPOSING CONTEMPT ORDERS IN PROVINCIAL COURT

The CBABC *FRA* Working Group recommends that the Provincial Court be given the power to punish for contempt, whether in the ~~"f~~ace of the court" or not. Imprisonment or fines are only going to be appropriate in a few cases, but for such cases the remedy should be available. Nor do we believe the criminal justice system should be burdened with such cases, as with section 128 of the *FRA*. The family court judge is in the best position to know whether the behavior warrants such measures or not.

Regarding restraining orders, the contempt power plays a part. There are different powers to obtain a restraining order in the Provincial Court versus in the Supreme Court. The reason is linked to the difference in the contempt powers as between the Provincial Court and Supreme Court. As a result, with providing the Provincial Court with the power to punish for contempt, there is an accompanying need to ensure that Provincial Court restraining orders are enforced as fully as Supreme Court restraining orders.

We have already said costs or fines should be returned to Provincial Court and we have commented on loss of custody in the context of the show cause hearing.

We also think there should be penalties for false allegations of child endangerment. Loss of custody is already possible in such cases, but not always appropriate because of the situation of the innocent parent or the child. A less drastic remedy, like a fine, or a bond, or community service, might be more appropriate – and consequently more often employed.

CHAPTER 7: ANSWERS TO QUESTIONS

Based on our submissions above, the CBABC *FRA* Working Group replies to the questions raised in Parts B, C and D of Chapter 7 as follows:

1. Should s. 128(3) of the *Family Relations Act* be retained? Why or why not? [Section 128(3) of the *FRA* provides that a person who, without lawful excuse, interferes with the custody of, or access to, a child in respect of whom an order for custody or access was made or is enforceable under this Act commits an offence.]

We believe there is no harm and possibly some good in retaining section 128(3) of the *FRA*. We recognize, however, that its use would be limited to only a very few, extreme, cases. We would prefer, however, that the Provincial Court have the power to punish for contempt, which would make section 128 unnecessary.

2. Should the *Family Relations Act* authorize the Provincial Court to fine or imprison those in contempt of its access orders? Why or why not?

We believe the Provincial Court should, like the Supreme Court, have powers to imprison or fine for contempt. We recognize again, however, that these remedies will be only rarely employed.

3. Should the *Family Relations Act* include specific access enforcement remedies? Why or why not?

We believe the *FRA* should include specific access enforcement remedies, most of which have already been discussed in our submissions for Chapter 7.

4. Should there be separate remedies for access denial and failure to exercise access?

Yes. We believe, however, that remedies for failure to exercise should not be directed to forcing the recalcitrant parent to exercise that parent's access. Forcing such a parent on children is likely to do more harm than good. Rather we think that such remedies should be directed at compensating the primary resident or custodial parent for any specific additional costs arising from this failure or possibly for providing counseling or assistance to the child.

5. Which remedies should be included? Possible remedies identified from Canadian and international jurisdictions are listed below. [list not reproduced]

See our submissions for Chapter 7.

6. Should the *Family Relations Act* make fines and imprisonment available only as a last resort, or where the breach of the access order is extremely serious?

Yes, although the *FRA* need not make that point. In practice, judges will be reluctant to impose such remedies unless the offence is extremely serious.

7. Should the *Family Relations Act* set out specific circumstances in which a denial of access is excusable? Why or why not?

8. If so, what circumstances should be included?

Questions 7 and 8: No. If there is a denial of access, we think the onus should be on the parent responsible to justify the parent's actions. If the parent cannot come up with a good reason, that alone is very telling. We do not want to make it easy for them and provide a checklist.

9. Should the *Family Relations Act* provide remedies even when there is a reasonable excuse for the scheduled access visit not going ahead?

Yes. Even if there is a reasonable excuse for a missed access visit, that should not preclude the court from addressing the real problem. It may be the access order needs to be varied. It may be that, justified or not, the missed visit should be made up and, depending on the primary resident parent's actions, it may be that costs may be justified (i.e., if they fail to give the other parent notice of whatever problem led the denial or refusal of access).

10. If so, which remedies should be included? [list not reproduced]

All remedies should be available to the court, though the most useful ones are most likely to be:

- **make up access;**
- **costs thrown away;**
- **mandatory counselling or mediation;**
- **case conference; and**
- **variation of the original order.**

11. Should the *Family Relations Act* specify a limitation period for making an access enforcement application? If so, how long should it be?

Perhaps so. As we have already argued, the hearing of such an issue should have some priority. We do not want the court to delay in addressing the issue. On the other hand, we don't want to encourage parents to resurrect old complaints or delay in addressing them themselves.

12. Should the *Family Relations Act* specify the kind of evidence (e.g. oral evidence only, unless leave is granted) that may be presented in an access enforcement proceeding?

13. Is it necessary to specify that only evidence that is directly related to the alleged breach or the reasons for the breach will be considered?

14. Should the *Family Relations Act* set out the timing of the hearing of an access enforcement application? If so, what should it be?

Yes, see answer to Questions 12 to 14 as set out in our submissions for Chapter 5, regarding our recommendation for an expedited, show-cause type hearing.

15. Should the *Family Relations Act* specifically address the issue of the creation, variation or enforcement of access orders involving older children?

16. If so, what should it provide?

Yes, see answer to Questions 15 and 16 as set out in our submissions for Chapter 7.

17. Do you think parenting coordinators would help families in B.C.?

18. Have you had any experience with parenting coordinators?

19. Do you have other suggestions for resolving or preventing access disputes in higher-conflict families?

Yes, see answer to Questions 17 to 19 as set out in our submissions for Chapter 5, Parenting Coordinators.

20. Is s. 18 of the *Supreme Court Act* (see above) adequate to deal with vexatious litigants in family cases?

Not by itself, although it is a useful tool.

21. Should the *Family Relations Act* include a provision permitting the court, on its own motion or on application by a party, to ban a litigant who brings unmeritorious or trivial complaints from further litigation without the express permission of the court?

We believe the court already has this power, though it is rarely exercised. It just does not arise that often.

22. If yes, should the leave requirement be automatically triggered after a certain number of applications are found to be either unsubstantiated or too trivial to warrant a sanction? How many?

No, it should be left to the discretion of the court. Sometimes 20 applications can be justified, whereas 3 might be superfluous. It all depends on the circumstances.

23. Should the *Family Relations Act* address access enforcement applications brought in bad faith? How?

Yes, we believe we addressed that in the fast track or show cause proposal.

24. Do you have any comments about the role of orders for costs in access enforcement proceedings?

Costs are an essential weapon in the court's arsenal, which was one of the reasons why we recommend returning costs to the Provincial Court.

25. Should the *Family Relations Act* include a specific provision aimed at preventing wrongful removal of children from B.C.?

Yes, see answer to Question 27.

26. If so, what type of provision do you think would be most effective? [list not reproduced]

See answer to Question 27.

27. Do you have any suggestions for dealing with the issues that arise once a child has been removed from B.C. or has been brought to B.C. from another province or country, contrary to a court order or agreement?

Yes, although this question deserves a far more in-depth answer than we can provide at this time. One of the ideas the CBABC *FRA* Working Group had considered was the problem of taking a British Columbia order for the return of the children and having it registered for enforcement in the jurisdiction to which the absconding parent had fled. We thought perhaps this function could be assigned to an agency such as the Inter-jurisdictional Support Order Agency within the Attorney General.

CHAPTER 8: CHILDREN'S PARTICIPATION

The Attorney General's discussion paper, Chapter 8: Children's Participation, examines the voice of the child in relation to: general reforms to the *FRA*, consensual dispute resolution family litigation and parenting disputes after an order has been made. [29]

THE VIEWS OF CHILDREN

The CBABC *FRA* Working Group unequivocally supports the proposition that the views of children should be considered by the court when making a decision about parenting arrangements. In the *Family Relations Act* Review Survey, the vast majority of respondents also supported this proposition.

The importance of securing the views of children has a great deal of currency at present. This is demonstrated among the Bar by the near universal demand for section 15 expert reports when parents cannot reach consensus on important parenting arrangements. It is demonstrated among the Bench by the willingness of many judges to:

- appoint children's advocates under section 2 of the *FRA*, despite the cancellation of funding for family advocate program several years ago;
- order the preparation of ~~"v~~iews of the child reports"[30] by independent lawyers or mental health professionals;

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[29] British Columbia Ministry of Attorney General, ~~"C~~hapter 8: Children's Participation" in <u>*Family Relations Act* Review</u> (May 2007)(http://www.ag.gov.bc.ca/legislation/pdf/Chapter8-ChildrensParticipation.pdf)(~~"C~~hapter 8").

[30] In the recent Kelowna pilot project orchestrated by the International Institute for Children's Rights and Development, these reports were called ~~"h~~ear the child interviews."

- otherwise creatively interpret sections 15(1)(b) and (2) of the *FRA;* and
- appoint children's counsellors and other persons as default decision-makers in the event of parental conflict.

There is an important distinction between discerning the child's *wishes* versus the child's *views*. While it may be important to elicit the child's ultimate preferences about his or her living arrangements when dealing with older children, for most children – including many older children – the information sought concerns the child's experience of parental separation, the child's perspective on his or her living arrangements, and the child's awareness of the conflict between the child's parents.

We believe that soliciting the views of children is important when decisions are being made about the children's care and control, major guardianship decisions and parenting schedules. In our opinion, consideration of children's views and actively involving them in the decision-making process:

- leads to more durable outcomes with which all participants are more satisfied;
- empowers and educates children;
- has positive effects on children's short- and long-term wellbeing;
- avoids the deleterious impact of excluding children's voices;[31]
- brings children's voices to the forefront of the dispute between combative parents and helps to refocus argument; and

[31] See Joan Kelly's "Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes," (2002) 10 Virginia Journal of Social Policy and the Law 129 at 149.

- reveals the children‘s responses to parental conflict.

Given the breadth of this general consensus on hearing the views of children – 76% of respondents to the *Family Relations Act* Review Survey thought that the *FRA* should be amended to specifically require the court to consider children‘s views where the child was able and wished to express them – the issue becomes not *whether* we should hear the voice of the child but *how* it should be heard and under what circumstances.

DETERMINING ABILITY

The ability of a child to express his or her views is a function of the intellectual and emotional maturity of the child and the skills of the person eliciting the child‘s views. Issues relating to the skills of the interviewer are discussed below.

We are of the view that, in order to encourage hearing the views of children, the *FRA* should mandate consideration of children‘s views where the child has reached a specific age. We realize that there is a tension between a desire to set the triggering age as low as possible and the fact that some children may not be able or willing to express an opinion no matter how high an age is set. Some 6 year olds are precocious and very much alive to their parents‘ separation and the potential consequences on their lives while some 14 year olds are developmentally delayed and lack a mature perspective on their circumstances. Accordingly, any triggering age cannot be absolute and must accommodate ability at an earlier age and inability at an older age.

The majority of respondents to the *Family Relations Act* Review Survey (43%) believed that ~~a~~bility" should be subjectively determined for each child, with a rebuttable presumption of ability once the child has reached a certain age. While 29% of respondents believed that ability should be assumed at a certain age, subject to proof of ability for younger children and proof of inability for older children, only 9% of respondents believed that there should be no reference to the age of the child, with ability being determined solely by the emotionally and intellectual maturity of the child.

When asked what the triggering age should be, the *Family Relations Act* Review Survey respondents replied as follows:

- 1% believed the age should be younger than 6;
- 7% believed the age should be 6;
- 22% chose age 8;
- 28% chose age 10;
- 38% believed the age should be older than 10.

In our view, however, the majority of our respondents may have erred somewhat on the side of caution. We believe that skilled non-specialists can effectively elicit the views of

children who are as young as age 9, while specialist mental health professionals can effectively interview children who are as young as age 6.[32]

WHEN CHILDREN'S VIEWS SHOULD BE OBTAINED

The CBABC *FRA* Working Group submits that steps should be taken to elicit the views of children only when parents have separated and a third-party-whether the court, a mediator, an arbitrator, a child's counsellor or a parenting coordinator-is being asked to make a decision that will affect the child's day-to-day routine and wellbeing. Accordingly, the *FRA* should be amended to provide that:

- mediators, arbitrators and adjudicators involved in resolving in parenting disputes be required to hear and consider the views of children; and
- a process to obtain the views of the children should be triggered when parents are litigating a dispute concerning the children.

While 9% of respondents to the *Family Relations Act* Review Survey thought that a process to obtain the views of the child should be mandatory whenever a claim is made involving custody, guardianship or access, other respondents thought that there should be some discretion and that such a process may not always be required:

[32] Kelly, *ibid*., at 158. See also Joan Kelly, "The Views of the Child: Interviewing Children in Mediation and Collaborative Practice," (July 6, 2005 seminar) (Vancouver, British Columbia).

- 1% stated that the process should be initiated by the court, but only with the consent of the parties;
- 21% believed that the process should be triggered at the request of a party;
- 44% said that the court should have the discretion to initiate the process, with or without the consent of the parents, in the context of a FCC or JCC.

HOW CHILDREN'S VIEWS SHOULD BE OBTAINED

The common preference among the Bar is for children's views to emerge through section 15 reports conducted by skilled psychiatrists. In general, we trust the expertise of the small roster of psychiatrists commonly used for this purpose (although certain psychiatrists are felt to have a pro-father or pro-mother bias) and we expect that their reports will be accurate, detect parental obfuscation and accurately state the optimal arrangements for the children.

These reports are, however, inordinately expensive. Their cost typically starts at about $5,000. This is a prohibitive sum for many parents, particularly for those who are also paying lawyers' fees. Also, these reports can take several months to complete.[33] Respondents from the *Family Relations Act* Review Survey commented that "the costs of getting the children's views in a matter are very prohibitive" which "most parents simply cannot afford."

[33] See, for example, the excoriating comments of Burnyeat, J. in *D.A. v. J.A.*, 2002 BCSC 607 at paras. 10-13 (unofficial copy at: http://www.courts.gov.bc.ca/jdb-txt/sc/02/06/2002bcsc0607.htm).

The common alternative to costly professional reports is to have the report prepared by Family Justice Workers (–FJW"). This is not a satisfactory option. First, FJW reports may take upwards of 8 months to complete; one of *Family Relations Act* Review Survey respondents said that FJW reports can take –8-10 months at present, due to lack of funding for adequate resources/staff."

Second, FJWs are not psychiatrists. As a consequence, FJWs do not have the expertise, insight and clinical background of psychiatrists.

Third, FJW reports are, to say the least, of a distinctly uneven quality.

There are three further alternatives which are arguably underutilized, two of which come at either no cost or a marginal cost to the parents. These alternatives are: judicial interviews, views of the child reports and children's counsel.

Judicial Interviews

Some judges are prepared to interview children in their chambers or in a closed courtroom. This is something many judges are not comfortable with, partly because of concerns about their capacity to accurately assess children's views, partly because of concerns about the transparency of the judicial process and the potential need for parents to reply to the children's views and partly because of concerns that the children will be too intimidated to frankly speak their minds.[34]

[34] See Peter Boshier, –Invisible Parties: Listening to Children," (2007) 45 Family Court Review 548 at 552.

Despite these concerns, judges are arguably well situated to hear what children have to say. Judges have heard or had the opportunity to hear the views of their parents and can ~~"re~~ality-test" the children's comments against the positions of the parents.

Views of the Child Reports

Views of the child reports, or ~~"h~~ear the child interviews" as they are known in Kelowna, are extremely short statements generally limited to a recitation of the child's expressed views and understanding of the dispute between his or her parents and the factual observations of the interviewer, with an opinion only as to the strength and consistency of the child's views and expressing no larger clinical opinion. These reports may be prepared by counsellors, social workers and lawyers who have had training in interviewing children. These reports are prepared after one or two meetings with the child and can have a turn-around time of as little as one week from the date of retainer.

These reports assist in putting the child's opinions and experiences squarely before the parents. They are not, however, a substitute for full section 15 reports. In addition, all parties involved must understand that they do not offer the same analysis and insight as section 15 reports. Views of the child reports cannot be relied upon to detect unobvious issues such as alienation because these reports primarily repeat what the child has told the interviewer. For the same reason, views of the child reports should not be relied upon as the sole factor in determining a dispute.

Anecdotal evidence from members of the Bench suggests that these reports are very useful to the court and to parents, may help to reorient parents' perspectives of their conflict and promote settlement.

As a result of the *Family Relations Act* Review Survey, 83% of respondents supported views of the child reports prepared by non-specialists, with 40% favouring a structured interview format, with fixed topics and questions, and an equal number favouring an unstructured format.

Children's Counsel

Independent lawyers are occasionally retained by parents to represent children.[35] This occurs in only a very small number of cases. Where children have counsel, the lawyer will express the child's views.

Where counsel is appointed for the child, it is critical to identify at the outset the role the lawyer is to play. Lawyers acting as traditional counsel are bound by the rules of solicitor-client confidentiality and can only act in accordance with their instructions. These instructions may, or may not, accord with the child's best interests. Lawyers acting in a less traditional and more therapeutic paternalist capacity will act to further the child's best interests, which may or may not accord with the child's expressed views. Lawyers

[35] It should be noted that the Legal Services Society does not fund lawyers for children who are the subject of family law disputes.

acting for the benefit of the court as *amicus* may be required to switch hats between expressing the child's views and arguing for the child's best interests.

While 82% of respondents *Family Relations Act* Review Survey stated that the appointment of counsel for children would help to ensure that children's views are heard, there was a difference of opinion on the role counsel should adopt:

- 10% thought that the lawyer should act as traditional counsel, advancing the child's *preferences*;

- 32% believed that the lawyer should act in a more subjective capacity, advancing the child's *best interests*; and

- 54% supported the view that counsel should act in a fact-finding, *amicus curiae* capacity, serving the wishes of the court and remaining neutral in the parents' dispute.

This option is, however, expensive. This option requires the consent of the parties and does not always serve to expedite settlement. In the *Family Relations Act* Review Survey, 82% of respondents thought that the *FRA* should be amended to allow the court to apportion the cost of child's counsel between parents, while other respondents felt that this financial burden should fall on the government, saying that ~~"p~~arents can't afford the court system" but also that the issue ~~"h~~as sufficient importance that it should be provided

by the state just as counsel is a right under the *Youth Criminal Justice Act*," and ~~t~~the public advocate should be available for this."

Forms

The CBABC *FRA* Working Group strongly recommends against the use of child-completed forms to elicit children's views. We are of the view that the Scottish form attached to Chapter 8 is singularly unhelpful and actually rather cruel. None of the respondents in the *Family Relations Act* Review Survey supported the use of ~~"~~fill-in-the-blank" forms.

THE EFFECT OF CHILDREN'S VIEWS

The court will usually receive evidence as to the children's views, provided that the evidence is reliable. The children's preferences, while of interest to the court, become increasingly influential as the children grow up and are often determinative once the child reaches age 14.

Only 31% of the respondents to the *Family Relations Act* Review Survey thought that children's wishes should ever be determinative of custody and access claims. This number increased to 50% where the child's views would determine the claim, subject to proof that complying with the child's wishes would result in actual physical, mental or emotional harm to the child. The respondents identified the relative maturity of the child

as another important factor: "the weight of the child's views has to be commensurate with the child's maturity," "each case must be determined by the specific child," and the child's wishes should "be given due weight in accordance with the child's age and intellectual and emotional maturity."

When asked to select the age at which a child's views should be wholly or partially determinative of a claim for custody or access, the *Family Relations Act* Review Survey respondents replied as follows:[36]

- none thought that the child should be younger than 10 years old;
- 9% chose age 10;
- 34% chose age 12;
- 38% chose age 14; and
- 13% thought that the child should be older than 14.

The CBABC *FRA* Working Group proposes that the *FRA* be amended to require the court to take into account, not only the views, but the wishes of children 12 years of age and older in making decisions concerning parenting arrangements. This threshold age mirrors the triggering age in the *Adoption Act* and *Child, Family and Community Services Act*, with the weight to be given to evidence of the child's wishes being assessed against: (a)

[36] A report prepared for the federal government suggests that children's wishes increasingly prevail as the children age, with 32% of children aged 10 to 12 having their wishes met, rising to 49% of children aged 13 to 15. See Heather Juby *et al.*, "When Parents Separate: Further Findings from the National Longitudinal Survey of Children and Youth," (2005), Department of Justice 2004-FCY-6E at 40. (http://www.justice.gc.ca/en/ps/pad/reports/2004-FCY-6/sum.html).

the reliability of the evidence, (b) the independence, strength and consistency of the child's views, (c) the child's maturity, intellectual and emotional development and (d) any other factor the court deems relevant.

HIGH-CONFLICT PARENTS

The CBABC *FRA* Working Group is unanimous in advising against any proposal that would see children directly involved in the litigation process, including child-friendly models such as in Australia.

The CBABC *FRA* Working Group does, however, support the amendment of the *FRA* to provide for the appointment of parenting coordinators by the court. Some 82% of the *Family Relations Act* Review Survey respondents supported this proposal. Respondents also expressed the following views about the role parenting coordinators should play:

- 81% thought that parenting coordinators should be directed or authorized to interview the child and ascertain his or her views and preferences; and
- 59% thought that parenting coordinators should be able to review the child's confidential information without first obtaining the child's consent.

Interestingly, 53% of respondents, with only 32% opposing, replied that the court should be able to delegate decision-making authority over future disputes to third-party lawyers and mental health professionals who are *not* parenting coordinators.

With respect to the authority of court-appointed parenting coordinators and other third-party decision-makers, 25% of the *Family Relations Act* Review Survey respondents believed that their role should be confined to mediation and 56% believed that they should initially adopt a mediative role and proceed to arbitrate the dispute where consensus cannot be reached. Finally, 60% believed (25% opposing) that the decisions of these decision-makers should have the effect of a court order where the court has expressly delegated authority to the decision-maker.

THE UNITED NATIONS CONVENTION

Chapter 8 makes reference to Article 12(1) of the United Nations Convention of the Rights of the Child ("Convention").[37] Article 12(1) of the Convention guarantees that the views of the child are to be given due weight in accordance with the age and maturity of the child.

Chapter 8 also makes reference to section 24(1)(b) of the *FRA*. Section 24(1)(b) requires a court to give paramount consideration to the best interests of the child including, if appropriate, the views of the child.

The CBABC *FRA* Working Group does not believe British Columbia is in compliance with its obligations under the Convention, given the contrast between the mandatory

[37] Unofficial copy at: http://www.unhchr.ch/html/menu3/b/k2crc.htm.

language in Article 12(1) of the Convention versus the permissive language in section 24(1)(b) of the *FRA* and the absence of a government-funded program to provide counsel to children. As one respondent put it, the province is "in breach of art. 12 and has been since the cuts to child advocates."

In the *Family Relations Act* Review Survey, 68% of respondents were of the belief that the current wording of section 24 does not capture British Columbia's obligation under the Convention and a larger number of respondents (75%) argued that even the *FRA* taken as a whole did not capture the British Columbia's obligation.

Some 54% of respondents to this survey stated that the *FRA* would meet the province's obligation if funding were restored to the family advocate program. However, many respondents felt that the family advocate program itself is inadequate: "funding for child advocates was always tight … the program should certainly be reinstated, but on its own cannot cope with the sheer volume of cases," and "the family advocate program would assist but not adequate on its own." One respondent commented that "the family advocate program was not effective," but, if it was effective, the province would then meet its Convention obligations.

RECOMMENDATIONS

The CBABC *FRA* Working Group recommends that the following amendments should be made to the *FRA* regarding:

- the views of children;
- determining ability;
- how children's views should be obtained;
- the effect of children's views;
- high-conflict parents and extrajudicial decision-makers; and
- the United Nations Convention.

THE VIEWS OF CHILDREN

The CBABC *FRA* Working Group recommends that the *FRA* be amended to provide that children's views must be elicited in all cases where a claim for custody, guardianship and access will proceed to a hearing and that a process to obtain the children's views be initiated at the discretion of the court with or without the parents' consent.

The CBABC *FRA* Working Group also recommends that mediators, arbitrators and adjudicators be required to hear and consider children's views when determining a parenting dispute.

DETERMINING ABILITY

The CBABC *FRA* Working Group recommends that children's ability to express their views should be presumed at age 9, subject to proof of ability at a younger age and proof of inability at or above that age.

The CBABC *FRA* Working Group further recommends that, where the views of children younger than 9 are sought, the services of a specially-trained mental health professional should be used.

HOW CHILDREN'S VIEWS SHOULD BE OBTAINED

The CBABC *FRA* Working Group recommends that the *FRA* be amended to provide that children's views may be obtained through one or more of the following mechanisms:

- a section 15 report prepared by a qualified psychiatrist or psychologist;
- a views of the child report prepared by a lawyer or mental health professional trained in interviewing children;
- an interview with the judge hearing a dispute between the child's parents; and
- an appointment of counsel for the child.

The CBABC *FRA* Working Group recommends, with respect to judicial interviews, that:

- judges receive training in interviewing children;
- interviews occur in the judges' chambers or in closed courtrooms;
- interviews be recorded; and
- transcripts of the interviews be provided to the parents.

The CBABC *FRA* Working Group recommends, with respect to children's counsel, that:

- the *FRA* specifically provide for the appointment of counsel for the child;
- such appointments should be made on an *amicus curiae* basis; and
- the court should have the authority to apportion the lawyer's fees between the parents.

The CBABC *FRA* Working Group further recommends that duty counsel receive training in interviewing children for the purposes of preparing views of the child reports.

THE EFFECT OF CHILDREN'S VIEWS

The CBABC *FRA* Working Group recommends that the *FRA* direct the court to hear the views of children generally. For children at or above the age of 12, the court should be directed to also consider the wishes of the children, and to expressly to take those wishes into account in making decisions affecting the child. The weight to be given to older children's wishes should be assessed against:

- the reliability of the evidence of the child's wishes;
- the independence, strength and consistency of the child's wishes;
- the child's maturity, intellectual and emotional development; and
- any other factor the court deems relevant.

HIGH-CONFLICT PARENTS AND EXTRAJUDICIAL DECISION-MAKERS

The CBABC *FRA* Working Group recommends that the *FRA* provide that a judge may delegate a defined issue or set of issues for determination by a third-party decision-maker who is a parenting coordinator, lawyer or mediator. Such third-parties should be obliged to hear the views of the children and should be empowered to make decisions in an arbitrative capacity.

The decisions of third-party decision-makers should have the effect of a court order and should be subject to a right of review to be heard by the judge who delegated the authority to the decision-maker.

THE UNITED NATIONS CONVENTION

The proposed amendments to the *FRA* will help to bring the *FRA* into compliance with British Columbia‘s obligations under the Convention.

We believe that the province‘s obligations will not be fully met, even with the proposed amendments, until the family advocate program is restored and fully funded. Accordingly, we recommend that such funding be provided in order to ensure that British Columbia is compliant with the Convention.

CHAPTER 8: ANSWERS TO QUESTIONS

Based on our submissions above, the CBABC *FRA* Working Group replies to the questions raised in Parts A, B, C and D of Chapter 8 as follows:

Questions

1. Should the *Family Relations Act* be amended to require any person making a major decision involving a child to consider the child's views, provided the child is capable of forming views and wants to share them?

Yes.

2. Does s. 24 of the *Family Relations Act* adequately reflect article 12 of the U.N. Convention on the Rights of the Child?

No.

3. If not, what is needed?

Amendments to section 24 which make hearing the child's views mandatory in all cases where a parenting dispute will be brought to a hearing and the restoration and proper funding of the family advocate program.

4. Should the views of mature children ever be determinative of custody, access or guardianship decisions under the *Family Relations Act*? If so, under what circumstances?

The wishes of children 12 years of age and older should be considered by the court, but not be determinative of a parenting dispute.

5. Have you had experience involving children in family mediations, and if so, how were they involved?

6. If you have had such experience, what worked about the mediation sessions? What did not?

For Questions 5 and 6, some members of the CBABC FRA Working Group have had this experience, however in no cases were children physically present during the mediation. The children were interviewed outside of the meetings between their parents and the children's views were expressed to the parents at the next mediation session.

7. Should the filing of an application for custody, access or guardianship under the *Family Relations Act* automatically trigger a child's right to have his or her views considered?

The process to obtain the children's views should be initiated at the discretion of the court at a JCC or FCC.

8. If so, what kind of practice would be helpful? [list not reproduced]

Children's views can be heard through section 15 reports, views of the child reports, judicial interviews and/or the appointment of children's counsel. Forms must not be used.

9. If so, when should it take place—for example, upon filing? before mediation is attempted? when a trial is scheduled?

Children's views should be heard at more than one point in the course of the parents' dispute. Ideally, the views of the children would be elicited following the first FCC or JCC, before trial, and before each contested hearing involving parenting issues.

10. Are s. 15 reports a valuable way of putting children's views before a judge?

With the general exclusion of reports prepared by FJWs, yes.

11. If you are a professional with experience using s. 15 reports, do you find them more useful in certain kinds of cases than in others? Please explain your answer.

They are most helpful where: issues of abuse, addiction, unfitness and alienation are raised, a parent suffers from a personal or mental disorder and the parents' views are deeply entrenched and irreconcilable.

12. Regarding publicly funded s. 15 reports, should the *Family Relations Act* be amended to leave it up to those providing the family justice services to determine which kind of report is most appropriate for a particular family or should this remain a decision for the judge?

This is a decision which must remain within the discretion of the court.

13. Is separate legal representation an effective way to ensure children's voices are heard in decisions that will affect them?

Yes.

14. If so, what role should these lawyers play? [list not reproduced]

***Amicus curiae*.**

15. Should the *Family Relations Act* be amended to permit courts to allocate the costs of children's legal representation between the parties, or to recover those costs from the parties?

Yes.

16. What is your opinion on Ontario's multidisciplinary approach to disputed custody and access cases (i.e. social workers and lawyers working together)?

We believe the multidisciplinary approach is useful, but recognize the high cost of the layering of services.

17. Would a less adversarial trial format for children‘s cases help to ensure that children‘s voices are heard in family disputes?

18. Would such a fundamental change in the format of a family law trial suggest a different approach to how children‘s voices ought to be heard, such as more direct participation?

19. Would you support the introduction of the Australian Children‘s Cases model in B.C.?

20. What are the most useful aspects of the Australian model?

21. What are the least useful aspects of the Australian model?

For Questions 17 to 21, we do not recommend any direct involvement of children in the litigation process.

22. Should the *Family Relations Act* be amended to set out a discretionary power on the part of judges to interview children to determine their views?

Yes, providing that judges willing to conduct these interviews receive additional training in interviewing children.

23. If the *Family Relations Act* were amended to address the appointment of parenting co-coordinators, what legislative guidance, if any, should be given about how these professionals should interact with the young people at the centre of a family dispute? For example, should parenting co-coordinators be authorized to interview young people? Should it be necessary for the parenting co-coordinator to obtain the young person‘s consent before accessing medical or school records?

Parenting coordinators should be expressly authorized, if not directed, to interview the children who are the subject of the dispute. Parenting coordinators should require the consent of children age 12 and over as a precondition to review children's confidential records.

CHAPTER 9: FAMILY VIOLENCE

PRELIMINARY MATTERS

The Attorney General's discussion paper, Chapter 9: Family Violence, discusses defining family violence, managing false allegations of violence and the impact of family violence.[38]

It is curious, in our view, in Chapter 9 the question was not asked as to whether violence should be included as an enumerated factor in section 24 of the *FRA* as part of the consideration of the best interests of the child. The CBABC *FRA* Working Group considers this issue to be central to the issues discussed in Chapter 9. As a result, we canvassed this issue in the *Family Relations Act* Review Survey, with interesting results.

[38] British Columbia Ministry of Attorney General, "Chapter 9: Family Violence" in *Family Relations Act* Review (May 2007)(http://www.ag.gov.bc.ca/legislation/pdf/Chapter9-FamilyViolence.pdf)("Chapter 9").

The question was asked twice, once in the context of Chapter 6, and again in the context of Chapter 9. For Chapter 6, the question was "yes/no". There was an opportunity for comment. Respondents were not asked to specifically, nor did they. The answers were significantly "yes" – 71% to 27% "no".

For Chapter 9, participants were asked the same "yes/no" question, but the follow-up question was "Why?" The "yes" vote was still predominant, but with a lesser margin – 52% to 38% "no". The comments were instructive and reflected the deep debate on this issue. As we expected, most who favoured inclusion cited the profound effect family violence can have on families and children. Comments include:

- "Patterns of conduct between spouses are the blueprint by which children and parents conduct themselves...Violence cannot be isolated. It is pervasive and corrodes all family relations."; and

- "Because it is often downplayed or its impact on the family is brushed aside.";

In the *Family Relations Act* Review Survey, respondents who opposed inclusion had a number of reasons for doing so:

- that it was already a factor in case law;
- that existing laws struck an appropriate balance already;
- that it might increase the number of false allegations, or divert the real inquiry; and

- that the range of behaviours that might be considered family violence was too broad and its causes and effects too diffuse, to support any hard and fast presumptions.

Comments from the respondents included:

- "The problem is ... studies show that violence in the family does affect children... However, one has to be careful not to take the approach the Ministry of [Children and Family Development] takes on these issues, which eventually ends up breaking up families and harming children even more.";

- "I agree with the present set-up where a person's behaviour is only relevant to the extent it affects that person's ability to parent. Family violence is poorly understood, and, in my opinion, that understanding is biased... there is a bias towards only seeing men as the perpetrators."; and

- "Violence is often a consequence of the relationship. It can be dependency, co-dependency. The focus should be on the children not the causes for the breakdown of the relationship."

The CBABC *FRA* Working Group was similarly torn. We all acknowledge that family violence can be a powerful, destructive force, with lasting consequences for parents and children alike. We are fearful, however, of the potential mischief that might result from

enumerating it as a factor in the statute. The most significant dangers, in our view, include:

- diverting the inquiry away from the needs of the child and the abilities of the parents to an argument about the parties‘ bad behaviour and the breakup of the relationship; this is something clients are all too prone to do already;
- increasing the incidence of false or exaggerated claims; and
- ramping up the volume on an already divisive process.

In our view, and notwithstanding the *Family Relations Act* Review Survey results, family violence should not be included as a factor in section 24 of the *FRA*, but if it were so included:

- it should be expressly subordinate to the main inquiry: the needs of the child, and the capacity of the parties to meet them; and
- false or exaggerated claims should also be listed as a factor.

Chapter 9 makes three following essential points:

First, family violence affects men, women and children. The nature and consequences are typically more severe for women. Children are profoundly affected by family violence, whether direct or indirect, and harm may be physical or psychological. Physical harm can be direct or indirect. There is a general 30-60% overlap between spousal abuse and child abuse. Psychological harm to children includes increased incidence of aggression, hyperactivity, anxiety, depression or behavioural problems. This

may create generational patterns of violence. Family breakup may cause or escalate family violence.

Second, family violence varies in intensity. This makes a difference as to the risk of continuing violence against a spouse or the children. Stalking or killing pets is far more serious than merely throwing a book at the other spouse. This requires a different response from police and other agencies.

Third, will including provisions dealing with family violence in legislation have unintended consequences such as intensifying conflict between former spouses or becoming the focal point of all decision-making regardless of the circumstances or future risk?

Several Canadian family laws include violence as a factor to be considered by judges in determining children‘s best interests in custody, access or guardianship disputes. Even where violence is not a specific factor in the best interests test listed in a family statute, there are cases where judges have considered it when making decisions involving children. The term "family violence" is not always defined in legislation or case law. Chapter 9 defines family violence as violence committed by adult members of the family. Children may be direct or indirect targets of violence, including "cross-fire" violence.

In Canadian family laws, only Alberta‘s recently updated *Family Law Act* includes a definition of family violence. Definitions of violence usually cover physical abuse,

including forcible confinement, and sexual abuse, or sexual assault. Fewer definitions include psychological or emotional abuse. Some include neglect, such as depriving a person of food or clothing or other basic necessities and financial abuse. Threats of violence or attempted violence may be included in the definition of violence in policy, draft legislation and legislation in other jurisdiction.

DEFINING FAMILY VIOLENCE

How broad should the definition be? "Family violence" can be defined as an attempt, an act or a series of attempts or acts by an adult person or persons to constrain the freedoms of the members of one's family through fear of injury or damage to themselves, their belongings or their family members. –Family violence" may include, but is not limited to, physical abuse, sexual abuse, emotional abuse, verbal abuse, physical or psychological confinement, neglect and threats thereof.

On the positive side, if a definition were formulated, application would be easier. Many laypeople are unaware what constitutes family violence or assault. A definition may assist in keeping honest people honest.

On the negative side, unless the definition is comprehensive and inclusive, those who are violent will be deterred from committing acts of family violence. Instead, they will continue to be violent and address their energy to finding loopholes in the definition, instead of stopping their violence.

If such a definition were made, it should be broad and inclusive. The court should have discretion to admit matters falling outside the strict definition of ~~"f~~amily violence" One reasons is that most violence takes place behind closed doors and evidence of family violence can be difficult in this "he said, she said" world.

The definition should be drafted in order to anticipate providing solutions to problems such as these: should a criminal conviction for assault of a spouse be determinative? what about where charges are stayed or plea bargained? what about where there are addictions involved or mental illnesses or disability? is fault always an important part of this process?

FALSE ALLEGATIONS

Some parents make false allegations of child abuse against the other parent to try to keep that parent from spending time with the children. How common are deliberately false claims and how many result from misunderstandings? Are the deliberately false claims common enough to include in the *FRA*? Do other forms of legislation deal with them such that they do not need to be dealt with except incidental to other claims? Should there be a remedy against false allegations in family legislation?

There may be criminal penalties for such false allegations and it may be possible for the falsely accused parent to bring an application for a finding of contempt of court (a fine, imprisonment or both).

The CBABC *FRA* Working Group believes that, ultimately, no judge wants to imprison a parent, particularly if imprisonment would impairs that parent‘s ability to support the child.

A falsely accused parent could sue for damages based on defamation, negligence, infliction of mental suffering or malicious prosecution. A judge hearing a family case may award costs, but only in Supreme Court and a significant number of family law cases are dealt with in Provincial Court where there is no provision for costs.

Parents have trouble with funding their family law cases unless they are in Provincial Court. They won't have the resources to pursue the other parent civilly and if they did, they would not qualify for legal aid under the current guidelines

IMPACT OF FAMILY VIOLENCE

Chapter 9 examines the impact of family violence regarding:

- court orders to ensure safety of spouses and family members;
- family violence and arrangements involving children; and
- family violence and collaborative decision-making.

Court Orders To Ensure Safety

Types of relief available to ensure safety of spouses and family members are:

- peace bonds (protection orders made in criminal court on application of the police, on criminal standard of proof); and
- civil restraining orders (protection orders made in family law proceedings, on civil standard of proof).

Of the latter, a court under the *FRA* can make orders to: prevent harassment (section 37), prohibit contact (section 38 and section 126) and to provide for temporary exclusive occupancy of the family home (section 124).

Preventing Harassment And Prohibiting Contact

Chapter 9 notes that some case law questions whether section 37 anti-harassment orders apply to people who are not making a claim for child relief (custody, guardianship or access) under the *FRA*. Should it? Should section 37 also apply to other types of relationships or to remedy spousal violence, particularly given that children may witness such violence?

Under section 38, a judge may make an order prohibiting a person from entering a place where a child resides. Section 38 also authorizes a judge to prohibit that person from contacting or trying to contact the child (or a person who has custody of or access to the

child), provided that a custody order is made at the same time or a custody order or separation agreement is already filed with the court.

Restraining orders under sections 37 and 38 are sent by the court registry to a central restraining order registry accessible by the police. These orders allow the police to arrest the subject of the order if he or she does not comply with it. If the court sees fit, the subject of the order can be made to post a surety to secure compliance, to report to a designated person, to deposit documents or transfer specific property (Supreme Court jurisdiction) to a trustee.

Section 126 allows a judge to make an order prohibiting one person from entering a place occupied by another person or a child in that person‘s custody. This is similar to one of the orders available under section 38, but section 126 applies only to separated spouses, regardless of whether or not they have children.

Temporary Exclusive Occupancy Of The Family Home

In certain circumstances, under section 124 of the *FRA*, a judge can allow one spouse and any children to live temporarily in the family home without the other spouse. This is the legal meaning of ~~–e~~xclusive occupancy.” Chapter 9 states that an exclusive occupancy order is available only in Supreme Court and this arises because property division is a matter that only the Supreme Court has jurisdiction over.

Although the *FRA* doesn't specify a test for the granting of an exclusive occupancy order, the case law establishes that the applicant must prove that sharing the home is a practical impossibility. This test may be met if family violence can be proven.

An exclusive occupancy order may not be very effective to protect against future family violence. Where there is a risk of future violence, a spouse may ask for an order under section 126 prohibiting contact, and an exclusive occupancy order under section 124 at the same time, for a greater measure of protection. Combined orders are meant to ensure that the family home is safe, but these orders do not address what happens outside of the home. In fact, if section 37 and 38 orders are made, there is protection for the vulnerable spouse outside the home.

The *FRA* does not have a simplified procedure for obtaining a restraining order without the need to go to court, as family violence laws elsewhere in Canada do. Nor does the *FRA* permit police officers or others to apply for protection orders on behalf of those at risk of family violence. Finally, the various interpretations judges have given the restraining order provisions in the *FRA*, as well as their overlapping nature, may complicate their use.

Some of the types of orders available under those other family violence laws are also specifically authorized under the *FRA*. And all of these orders, including those not specifically mentioned in the *FRA*, could be made by Supreme Court judges. However, Provincial Court judges can only make orders that are specifically referred to in the *FRA*.

FAMILY VIOLENCE AND COLLABORATIVE DECISION-MAKING

The 2005 Family Justice Reform Working Group report recommended that, unless exempted, people wishing to use the court to resolve a family dispute be required to have first attended one dispute resolution session. A number of jurisdictions employ mandatory consensual dispute resolution ("CDR") for contested custody and access cases, although this is not without controversy.

Family violence may make participation in CDR inappropriate due to safety concerns or power imbalance. Jurisdictions with mandatory CDR also make special provision for cases with family violence. Shuttle mediation, where the parties do not meet together with the mediator, may be one solution. Another possibility is the inclusion of a support person for an abused spouse for moral and emotional support. Exemption from mandatory mediation in cases of family violence against a spouse or children may also be an option.

RECOMMENDATIONS

The CBABC *FRA* Working Group recommends that the following amendments should be made to the *FRA* regarding:

- section 24 of the *FRA* and family violence; and
- false allegations.

FAMILY VIOLENCE SHOULD NOT BE AN ENUMERATED FACTOR IN SECTION 24

As noted above in our submissions, Chapter 9 does not ask the question, "Should family violence be an enumerated factor in section 24 of the *FRA*?" As discussed, while Chapter 9 does not actually ask the question, the CBABC *FRA* Working Group thought it was central to the issues discussed in Chapter 9 and sought data on this question in the *Family Relations Act* Review Survey.

As discussed, the CBABC *FRA* Working Group recommends that, notwithstanding the *Family Relations Act* Review Survey result, family violence should not be included as a factor in section 24 of the *FRA*, but if it were so included,

- it should be expressly subordinate to the main inquiry: the needs of the child, and the capacity of the parties to meet them; and
- false or exaggerated claims should also be listed as a factor.

FALSE ALLEGATIONS

The CBABC *FRA* Working Group recommends that the FRA be amended to permit Provincial Court judges to impose fines, compensation orders and costs against those persons making false allegations in Provincial Court.

Existing criminal and civil penalties are not adequate to address false allegations of violence or abuse raised in family law cases. As enumerated in our submissions for

Chapter 6 and 7, false allegations are a pressing problem. Resolving false allegation matters currently takes too much time and the resources for managing false allegations are not present.

As set out in our submissions to Chapter 9 above, also the law is inconsistent regarding family violence laws. Supreme Court justices are permitted by statute to impose fines, compensation orders and costs while Provincial Court judges are not.

CHAPTER 9: ANSWERS TO QUESTIONS

Based on our submissions above, the CBABC *FRA* Working Group replies to the questions raised in Parts A, B, and C of Chapter 9 as follows:

1. Should the *Family Relations Act* define family violence? Why or why not?

Yes and see our recommendation above regarding not including family violence as a factor in section 24 of the *FRA*.

2. If so, check below, all the elements that you think should be covered in a definition of violence:

The definition of violence should be inclusive with these following elements of violence to be included:

- **actual violence;**
- **attempted violence;**
- **threatened violence;**
- **physical abuse;**
- **forcible confinement;**
- **sexual abuse;**
- **psychological or emotional abuse;**
- **neglect; and**
- **financial abuse.**

3. Should a definition of violence exclude acts of self-protection or protection of others?

This could be an abuser's main loophole. Consider the abusive spouse that taunts the other spouse into assaulting the abusive spouse and then has the abused spouse charged.

4. Are existing criminal and civil penalties adequate to address false allegations of violence or abuse raised in family law cases?

In the CBABC FRA Working Group, there are mixed views on this matter but the general consensus is that existing criminal and civil penalties do not adequately

address false allegations of violence or abuse.

5. If not, should the *Family Relations Act* deal with false allegations? How?

We suggest that Provincial Court judges be given the ability to award costs summarily assessed if it can be shown that such allegations were deliberately made to subvert the administration of justice.

6. Should s. 124 of the *Family Relations Act* include specific factors, such as violence, to guide a judge‘s decision about making orders for temporary exclusive occupancy of the family home? Why or why not?

In our view, section 124 of the FRA should not include specific factors for exclusive occupancy orders. The test of continued cohabitation being a practical impossibility is a very onerous one, which rightly reflects on the fact that if such an order is made, one person will lose his or her residence, whether rented or owned. It is not easy to get such an order in the usual course but provable family violence (on the civil standard) carries substantial weight to the court application.

7. Should the *Family Relations Act* be amended to make it clear that family members, such as former spouses, may bring applications for restraining orders, even if they are not applying for anything else under the *Family Relations Act*?

It is reasonable to amend the *FRA* to clarify those classes of persons who are entitled to request a restraining order. It is reasonable to include in that class spouses, former spouses, persons taking on a guardianship role to children, whether or not

biologically or familially related and parents who did not live together or did not live together long enough to be termed spouses.

It is not reasonable to include persons in dating relationships as they do not or did not at any time form a family, although for the purposes of applications for restraining orders, it may be wise to allow any relationship with true cohabitation, regardless of duration, to qualify in the above class.

8. Should restraining orders under the *Family Relations Act*, which could help to prevent violence, be available to anyone in a domestic or family relationship, including people who are dating or those who are living together as a couple but who do not meet the legal definition of ~~"s~~pouse"?

See our submissions regarding Question 7 above.

9. Do the existing restraining orders available under the *Family Relations Act* adequately address violence against spouses? against children? If not, what kinds of relief would you suggest be added to the *Family Relations Act*?

Provided that the legislation is clarified to include the availability of restraining orders to a wider class than parents making applications for custody, guardianship or access orders in respect of children, the existing restraining orders available through the Family Courts address violence sufficiently.

The principal problem facing victims of family violence is proving, even on the civil standard, that the restraining order is warranted. The courts are currently quite wary of granting without notice restraining orders unless there are substantial allegations of potential harm. Vague fears are not sufficient to obtain such orders. Even when granted, the order typically provide either for an expiry of the order on a date certain (at which time the parties are to both appear in court to address the issues) or they provide that the person who is the subject of the restraining order is at liberty to apply to have the said order set aside.

10. Do you have any other suggestions as to how restraining orders under the *Family Relations Act* can be structured so as to best ensure the safety of family members in the face of family violence?

Because exclusive occupancy orders cannot be granted by the Provincial Court, section 6(1) of the *FRA* should be amended to reflect that these orders are not within the Provincial Court jurisdiction.

11. Should the *Family Relations Act* create a presumption that a violent parent ought not to be given custody of a child unless that parent can prove it would be in the best interests of the child to do so? Why or why not?

No. Although it is currently accepted that direct or indirect violence, including witnessing of spousal abuse, verbal, emotional and physical, is damaging to children in the short and long term, it is also clear that in practice, the courts are taking

parental violence into account in making custody orders. Given the broad range of factual situations faced by the courts in family law, we are of the opinion that there is no need to create a presumption of this sort.

A not uncommon situation occurs where a physically or emotionally abused spouse may turn on the violent spouse and commit a pre-emptive assault on that spouse, generating a police charge or even a conviction against the abused spouse for spousal violence. To include in the *FRA* such a proposed presumption would place the abused spouse under an increased burden of proof without consideration of that spouse's circumstances.

12. Should the *Family Relations Act* include presumptions with respect to access or parenting time if there has been family violence? Why or why not?

No. There is a common understanding in the courts and amongst members of the Bar that often when the parents are separated, the children no longer are placed in the middle of their parents' conflict. Limited exceptions may apply, for example possibly at times of access transfers or in telephone discussions relating to discussions surrounding the children, where the children may overhear angry discussions, albeit one-sided, between the parents.

This is not true for every family case. But, but rather than create presumptions that could impair one or the other parent's relationship with the children by virtue of the label without consideration of the circumstances, it would be preferable to limit or

eliminate physical or possibly "real-time" (in person or telephone) contact between the parents. At present, the courts are frequently recommending access books and emails as a means for parents hostile to each other to communicate in respect of the children.

13. If you think that violence ought to trigger certain presumptions with respect to access in the *Family Relations Act*, what should they be? Should the presumption depend on the type of violence at issue (For example, a presumption of no access in the case of sexual abuse; and a presumption of supervised access in the case of other forms of violence if there is a continuing risk?)

The courts have a broad discretion to consider factors relating to the best interests of the child in matters of custody, guardianship and access. In our view, the inclusion of such presumptions are not necessary as our courts have no particular difficulty restricting access where there is proof of violence or abuse within the purview of the *FRA*.

14. Should the *Family Relations Act* require that access orders include conditions on the parent found to have been violent, as Arizona's law does? If so, what conditions?

No. At this point, section 24 of the *FRA* gives our courts a broad discretion to consider various factors relating to the well-being of the child in making custody and access orders. Types of these orders include: supervised access, supervised access transfers and restrictions on overnight access. To create a presumption would be an attempt to fix legislation that is not broken.

In particular, compelling attendance at anger management courses or counselling cannot be effective. That is to say, a violent parent or spouse can attend such counselling on the order of the court, but unless that parent genuinely accepts that that parent is responsible for the violence, such an order is not practically effective to reduce violence.

Similarly, attendance at drug or alcohol counselling can be compelled but such an order may be complied with but without the desired effect. The current practice in the courts to prohibit the use of alcohol or drugs prior to and/or during access visits may keep honest people honest but does not take into account the fact that these addictions are a disease and not a willing choice on the parts of these parents. The best that can be hoped for is that if the parent does not live up to such an order, the other parent can obtain proof of the non-compliance sufficient to satisfy a court that access should be further restricted.

15. Should the *Family Relations Act* follow New Zealand's *Care of Children Act, 2004* (see above) and set out a list of factors judges are to consider when making orders involving children where violence has occurred? Why or why not?

No. The provision of such factors limits the court's discretion in making the broad range of orders it is presently empowered to make. In our view, the open-ended provisions of section 24 adequately protect children who are the direct or indirect victims of violence.

16. Should the *Family Relations Act* follow New Zealand's *Care of Children Act, 2004* and allow a judge to make any order to protect a child's safety, even if the judge has not been able to find that the allegation of violence is proved, so long as the judge is satisfied that there is a real risk to the child? Why or why not?

No. At present, where there is an apprehension of risk, our courts often make interim orders designed to protect children pending a final hearing, with or without notice to one party to the proceeding. The family court makes its determination on a civil standard of proof, that is, that it is more likely than not that there is a real risk to the child. A reduction of that standard of proof is not warranted, as it might be if the criminal standard were employed instead.

The *FRA* is not the only legislation protecting children in this Province. We also have the *Children, Family and Community Services Act*. The *Children, Family and Community Services Act* is child protection legislation whereby if a complaint is made about the parenting of children, social workers are deployed to investigate the circumstances and, if an apprehension is warranted, the matter is brought to the court under that legislation. In that process, the presentation hearing employs a much lower standard of proof, that being that the apprehending social worker had a reasonable apprehension of risk or harm to the child pending a temporary custody hearing.

In concert, the *FRA* and the *Children, Family and Community Services Act* serve to adequately protect our children.

17. If B.C. were to adopt mandatory CDR for contested custody or access disputes, should it develop exemptions similar to those jurisdictions that already have mandatory CDR, as discussed above?

At present, in the Supreme Court, we already have mandatory CDR for all family cases in the form of the judicial case conference. The mechanism provides that either party may apply for an exemption from attending such mediation. Over time, the JCC process has been shown to be very effective and in light of that, we are of the opinion that no further mandatory CDR is required for Supreme Court matters.

In the Provincial Court, family case conferences, the equivalent of the Supreme Court JCC, are scheduled at the request of one or both of the parties and are voluntary. In practice, these are made substantial use of, and in fact, there are substantial delays in obtaining FCC dates. Typically, it falls to counsel or to the judge at the fix date to determine if the case reasonably ought to proceed to an FCC. There may be some benefit from adopting the Supreme Court process in the Provincial Court in this regard.

There is great utility in continuing with the practice of having the initial mediation session held in the presence of a judge or a master. Where the parties may be

skeptical of what their lawyer or the opposing lawyer tells them, they tend to be far more open to the suggestions and guidance of the judiciary. They may not be as inclined to acceptance with a non-judicial mediator.

18. Who ought to decide if a case should be exempted?

In our view, the judge should make the determination. There are few situations that are so black and white that they can be automatically put in one category or the other.

19. Which three issues regarding family violence do you consider to be the most pressing?

Without enumerating the issues specifically, we are of the opinion that the issue of family violence is substantially dealt with in our legislation specifically because of the recognition that the legislation relating to children and the fact-specific nature of the cases require that the courts have a broad discretion. Therefore, although it appears that the issue of family violence in the *FRA* is not addressed, in fact, it is. While it may be emotionally satisfying to the public at large to see an inclusion of specific provisions directed at family violence in the *FRA*, we are running the risk of limiting our courts in ways that may have future unintended consequences.

20. Are there issues related to family violence and the *Family Relations Act* not covered in this paper that you would like to raise?

Ultimately, the courts are child-focussed. Beyond dealing with the court's ability to address family violence in the usual ways, it would be of great assistance were this government to provide increased access for children and victims of spousal violence to counselling services to deal with the emotional issues arising. This is a problem which must be resolved by a multi-disciplinary approach. Additionally, a judge should be able to order that a child attend counselling without the consent of one or both parents. Sometimes parents will refuse their consent to such counseling for their own reasons that are not in their children's best interests, for example, if they have fears that the children will disclose abuse at the hands of one or both of the parents or some other reason that the parents are unfit to parent them.

CONCLUSION

The CBABC *FRA* Working Group would welcome the opportunity to provide further input and dialogue with the Attorney General respecting these submissions.

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APPENDIX A

CANADIAN BAR ASSOCIATION
BC BRANCH

FAMILY RELATIONS ACT REVIEW

SURVEY RESULTS

August 28, 2007

Table of Contents

Preface

In February 2006, the Ministry of Attorney General of British Columbia announced a review of the *Family Relations Act*. The goal of the review is to modernize the law and support co-operative approaches to resolving disputes, in a statute that is easy to read.

Discussion Papers
In 2006, the first year of the review was devoted to research.
In 2007, the consultation stage began.

In 2007, the Ministry of Attorney General published discussion papers in three phases:

- Phase 1: February to May 2007
  - Chapter 1: Background and Context for the *Family Relations Act* Review;
  - Chapter 2: Division of Family Property;
  - Chapter 3: Division of Pensions;
  - Chapter 4: Judicial Separation;

- Phase 2: May to September 2007
  - Chapter 5: Programs and Services;
  - Chapter 6: Parenting Apart;
  - Chapter 7: Meeting Access Responsibilities;
  - Chapter 8: Children's Participation;
  - Chapter 9: Family Violence;

- Phase 3:September 2007
  - Chapter 10: Legal Parenthood;
  - Chapter 11: Spousal and Parental Support;
  - Chapter 12: Co-operative Approaches to Resolving Disputes;
  - Chapter 13: Time Limits and Definitions and
  - Chapter 14: Relocation (will be released by the Attorney General at a later date).

CBABC Family Relations Act Review Working Group
The Canadian Bar Association, British Columbia Branch (CBABC) was asked to make submissions to provide its perspective regarding the *Family Relations Act* Review.

In 2006, the CBABC formed the *Family Relations Act* Review Working Group (~~"~~CBABC *FRA* Working Group") to present submissions to government.

In 2007, the CBABC *FRA* Working Group made submissions to the Attorney General regarding Phase 1.

The response to Phase 2 is due to the Attorney General on September 7, 2007.

Methodology

To assist us in getting the widest possible perspective from our members, the CBABC *FRA* Working Group conducted a survey from August 13 to 27, 2007.

The survey was conducted using the CBABC website: www.cba.org/bc.

On August 13, 2007, a notice of the survey was emailed to all CBABC members using the email addresses provided by CBABC members. This notice was emailed to over 5500 CBABC members. This notice included all members of the 6 CBABC Family Law Sections. The membership for the 6 CBABC Family Law Sections is over 350 members.

In the email notice, CBABC members were given a separate weblink to each of these surveys:

- Survey Chapter 6: Parenting Apart;
- Survey Chapter 8: Children's Participation; and
- Surveys Chapter 7: Meeting Access Responsibilities and Chapter 9: Family Violence.

The survey asked specific questions arising out of the Phase 2 discussion papers. Questions included the same questions used by the government in Phase 2 for each of the discussion papers.

CBABC members were encouraged to include comments for each question posed in each survey.

The survey ended on August 27, 2007.

These complete responses were received:

- Chapter 6: 90 responses;
- Chapter 7: 49 responses;
- Chapter 8: 68 responses; and
- Chapter 9: 49 responses.

Comments were also received. The comments were anonymous.

Executive Summary

Survey data on the *FRA* Review is not widely available. The survey sought to strike new ground by providing data to find answers to the important law reform questions and issues raised by the *FRA* Review. The survey asked questions from all Chapters 6 through 9 in Phase 2 of the *FRA* Review. The survey asked questions on matters not arising out of Chapters 6 through 9.

Chapter 6 Parenting Apart

In Chapter 6, Parenting Apart, questions were asked of respondents in seven areas.

First, language was canvassed. For example, for 78% of the respondents, "parenting responsibilities" was the term which best described the rights and responsibilities normally connoted by custody and guardianship. For 39% of the respondents, "child's time with the parent" best described the rights the rights and responsibilities normally connoted by access. The terms "custody", "guardianship" and "access" should be replaced for 51% of those respondents that answered.

Second, children's property was examined. Among the questions, 78% of respondents believed that "parenting responsibilities" best described the rights and obligations involved in custody and guardianship. Defining access as the child's time with the parent was preferred for 39% of the respondents. When asked whether some alternative language should replace custody, guardianship and access in the *FRA* however, the respondents were split, with only a bare majority of 51% favouring a change. Regarding estate matters, 72% thought that the *FRA* should address the rights and obligations of guardians of a child's estate; 32% thought that such persons should require court appointment in general, but if court appointment is necessary where the value of the estate exceeded a certain amount. If parents were presumed to be the guardians of their children's estates, without court appointment but subject to a financial cap on the value of the estate, 81% of respondents thought that the threshold should be at or above $10,000. Some 74% believed guardians of a child's property should be required to account to the child for the guardian's handling of the property.

Third, children's best interests were reviewed. For example, 78% of respondents said that a child's best interests was the "paramount" consideration in deciding parenting arrangements rather than the "only" consideration.

Fourth, questions were given for parental roles and responsibilities. Of those responding, 54% believed that the presumptions regarding custody and guardianship set out in sections 27 and 34 of the *FRA* should be revised.

Fifth, a number of questions were provided regarding parenting plans. For instance, 69% approved of the use of parenting plans.

Sixth, in custody, guardianship and access orders, a number of questions were asked regarding requiring parents to be given explanations of these orders. For instance, of all respondents, 49% percent believed that the explanation should come from the Bench, while only 23% thought that it should come from the parents' lawyers.

Seven, issues of parenting responsibilities of third parties were raised. For example, 71% of those responding believed that where a non-parent has guardianship of a child, the non-parent should be to determine the future guardian of a child in his or her will.

Chapter 7 Meeting Access Responsibilities

In Chapter 7, Meeting Access Responsibilities, the survey looked for responses in three areas. First, in meeting access responsibilities, in terms of the time and resources needed to address access issues, over 80% of those that responded answered between "moderately" to "very". In terms of importance to clients, 88% of those that responded answered between "somewhat" and

–very". For impact on children, 84% of those that responded reported between –quite" and –very". For the ability to resolve other issues, 76% of those that responded recorded between –moderately" and –very".

Second, access disputes in terms of defining the nature of the problem were considered. For example, the overwhelming majority of respondents that responded (80% versus 6%) said the current *FRA*, rules and procedures *did not* provide effective tools for preventing or resolving access issues.

Third, possible court remedies were looked at. In descending order of importance, the respondents ranked the effectiveness of the following resources in *avoiding access* disputes:

- model orders or parenting plans;
- education about access norms (parenting time guidelines);
- mandatory court review or case conferences; and
- court cautions about the seriousness of the order and the consequences for ignoring or disobeying it.

In descending order of importance, the respondents ranked the effectiveness of the following resources in *resolving* access disputes:

- fast track case hearing;
- fast track case conference;
- parenting coordinators;
- short, expedited feedback from child;
- counseling for offender;
- counseling for child; and
- full custody and access report fast track hearing.

In descending order of importance, the respondents ranked the effectiveness of the following resources in *deterring or punishing* breaches of orders or agreements, in descending order of importance:

- loss of custody;
- make up time;
- costs;
- fines;
- judicial admonishment;
- community service; and
- imprisonment.

Chapter 8 Children's Participation

In Chapter 8, Children's Participation, the survey sought responses in seven areas.

First, regarding views of the child, for example, 76% of respondents supported the proposition that the views of children should be considered by the court when making a decision about parenting arrangements.

Second, 68% of respondents were of the belief that the current wording of section 24 of the *FRA* does not capture British Columbia's obligation under the UN Convention on the Rights of the Child. A larger number of respondents (75%) believed that even the *FRA* taken as a whole did not capture the British Columbia's obligation.

Third, for impact of mature children's views, 72% of respondents stated that wishes of children 12 years of age and older should be considered by the court.

Fourth, to ascertain children's views several questions were asked. While 9% of respondents thought that a process to obtain the views of the child should be mandatory whenever a claim is made involving custody, guardianship or access, other respondents stated that there should be some discretion and that such a process may not always be required:

- 1% thought that the process should be initiated by the court, but only with the consent of the parties;
- 21% believed that the process should be triggered at the request of a party;
- 44% said that the court should have the discretion to initiate the process, with or without the consent of the parents, in the context of a Family Case Conferences or Judicial Case Conferences.

Fifth, the matter of legal representation was examined. While 82% of respondents stated that the appointment of counsel for children would help to ensure that children's views are heard, there was a difference of opinion on the role counsel should adopt:

- 10% thought that the lawyer should act as traditional counsel, advancing the child's *preferences*;
- 32% believed that the lawyer should act in a more subjective capacity, advancing the child's *best interests*; and
- 54% supported the view that counsel should act in a fact-finding, *amicus curiae* capacity, serving the wishes of the court and remaining neutral in the parents' dispute.

This option is, however, expensive, requires the consent of the parties and does not always serve to expedite settlement. In the survey, 82% of respondents thought that the *FRA* should be amended to allow the court to apportion the cost of child's counsel between parents, others felt that this financial burden should fall on the government, saying that ~~"~~parents can't afford the court system" but also that the issue ~~"~~has sufficient importance that it should be provided by the

state just as counsel is a right under the *Youth Criminal Justice Act*," and ~~"t~~he public advocate should be available for this."

Sixth, for example, 60% of respondents believed that less adversarial hearings would help to ensure that the children's views are heard. Regarding support for the adoption of the Australian model in BC, there was no consensus: 10% would support this model, 26% would support the model with changes, 19% would not support the model and 44% of the respondents did not respond.

Seventh, and finally, the role of parenting coordinators was examined. For instance, 82% of respondents thought that the *FRA* should be amended to give the court the power to appoint parenting coordinators for high-conflict families. A further 81% thought that parenting coordinators so appointed should be directed or authorized to interview children.

Chapter 9 Family Violence

In Chapter 9, Family Violence, the focus was on family violence generally. Chapter 9 did not ask whether violence should be included as an enumerated factor in section 24 of the *FRA* as part of the consideration of the best interests of the child. The CBABC *FRA* Working Group considered this question to be central to the issues discussed in Chapter 9.

As a result, in the survey, this question was asked twice. It was asked in the context of Chapter 6. It was asked again in the context of Chapter 9. For Chapter 6, the question was "~~y~~es/no" and, while an opportunity to comment was given, respondents were not asked to specifically, nor did they. The answers were significantly "~~y~~es" – 71% to 27% "~~n~~o". For Chapter 9, participants were asked the same "~~y~~es/no" question, but the follow-up question was "~~W~~why?" The "~~y~~es" vote was still predominant, but with a lesser margin: 52% to 38% "~~n~~o". The comments were instructive, and reflected the deep debate on this issue. As expected, most who favoured inclusion cited the profound effect family violence can have on families and children.
Comments included:

- "~~P~~atterns of conduct between spouses are the blueprint by which children and parents conduct themselves...Violence cannot be isolated. It is pervasive and corrodes all family relations..."; and
- "~~B~~ecause it is often downplayed or its impact on the family is brushed aside.".

Those respondents who opposed inclusion had a number of reasons for doing so: that it was already a factor in case law; that existing laws struck an appropriate balance already; that it might increase the number of false allegations, or divert the real inquiry; and that the range of behaviours that might be considered family violence was too broad, and its causes and effects too diffuse, to support any hard and fast presumptions.
Comments include:

- "The problem is ... studies show that violence in the family does affect children... However, one has to be careful not to take the approach the Ministry of [Children and Family Development] takes on these issues, which eventually ends up breaking up families and harming children even more."
- "I agree with the present set-up where a person's behaviour is only relevant to the extent it affects that person's ability to parent. Family violence is poorly understood, and, in my opinion, that understanding is biased... there is a bias towards only seeing men as the perpetrators."; and
- "Violence is often a consequence of the relationship. It can be dependency, co-dependency. The focus should be on the children not the causes for the breakdown of the relationship.".

The CBABC *FRA* Working Group was similarly torn. The CBABC *FRA* Working Group acknowledge that family violence can be a powerful, destructive force, with lasting consequences for parents and children alike. The CBABC *FRA* Working Group is fearful, however, of the potential mischief that might result from enumerating it as a factor in the statute. The most significant dangers, in our view, include:

- diverting the inquiry away from the needs of the child and the abilities of the parents to an argument about the parties' bad behaviour and the breakup of the relationship (Something clients are all too prone to do already);
- increasing the incidence of false or exaggerated claims; and
- ramping up the volume on an already divisive process.

The CBABC *FRA* Working Group's view, and notwithstanding the survey results, family violence should not be included as a factor in section 24 of the *FRA*, but if it were so included,

- it should be expressly subordinate to the main inquiry: the needs of the child, and the capacity of the parties to meet them; and
- false or exaggerated claims should also be listed as a factor.

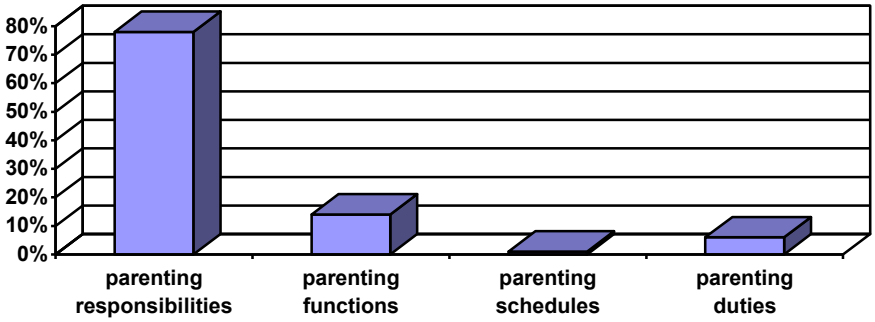
In conclusion, the survey provides a broad range of data. The survey results assist in finding answers to the important law reform questions raised in Chapters 6 through 9 in the *FRA* Review.

Chapter 6 – Parenting Apart

Language

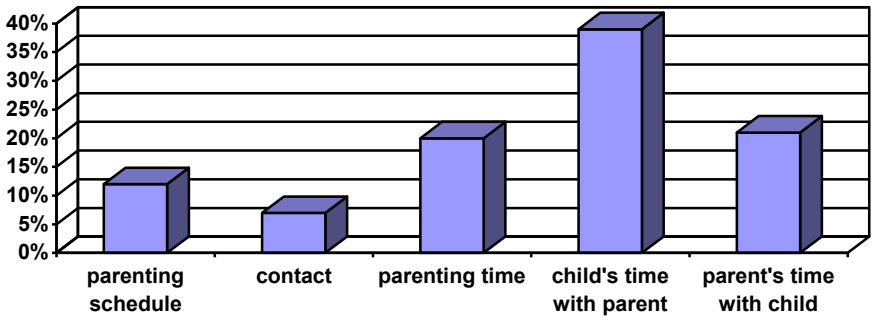
1. Select the term which describes the rights and responsibilities normally connoted by custody and guardianship:
   - parenting responsibilities **(70/90 = 78%)**
   - parenting functions **(13/90 = 14%)**
   - parenting schedules **(1/90 = 1%)**
   - parenting duties **(5/90 = 6%)**

   Note: Percentages do not total 100% due to rounding.



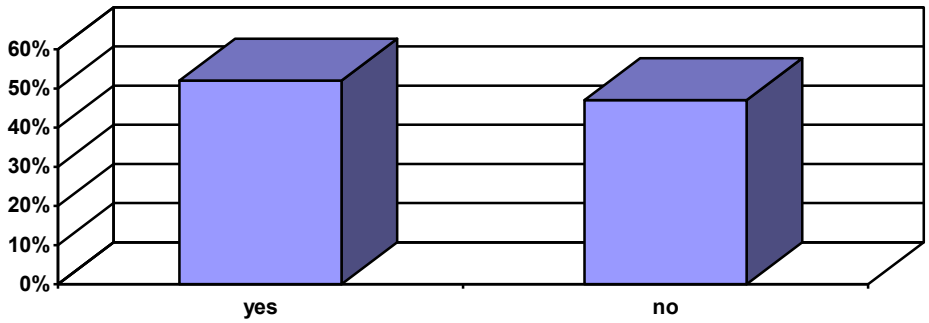
2. Select the term which best describes the rights and responsibilities normally connoted by access:
   - parenting schedule **(11/90 = 12%)**
   - contact **(6/90 = 7%)**
   - parenting time **(18/90 = 20%)**
   - the child's time with the parent **(35/90 = 39%)**
   - the parent's time with the child **(19/90 = 21%)**

   Note: Percentages do not total 100% due to rounding



3. Should the terms custody, guardianship and access be replaced with one of the above terms?

- yes **(46/90 = 51%)**
- no **(42/90 = 47%)**
- no response **(2/90 = 2%)** (not included in graph below)



Comments:

In my view the terms should be kept as is.

Parents get hung up on custody yet fully understand break down of Master Joyce definition of guardianship even if only parts of it are incorporated into an order.

Custody and access should remain as separate concepts, but the term "guardianship" needs to be removed from the Act.

My understanding is that these three terms have three distinct meanings: Custody = primary residence and supervision of child guardianship = decision making power over matters concerning child access = right of non-custodial parent to spend time with child While these meanings could be clarified in the legislation, I do not believe there is anything fundamentally wrong with these terms.

The words "custody" and "guardianship" are consistently interpreted as issues of power and control of the child. This so often becomes the sticking point in a separation agreement and leads to unnecessary court actions. Often despite the best efforts of lawyers to explain the practical realities of the concepts. Access should always be described as the right of the child. This would hopefully cut down on the "demands" of some parents to have the child in their care and control simply to reduce support to the other parent and the use of police enforcement clauses which have such a negative impact on families.

Custody and access should be replaced guardianship has legal historical meaning and should be retained.

Access - many women describe the non-primary caregiver as something other than parent (i.e. uncle/friend...).

Custody and access should be replaced. "Guardianship" still has a discrete legal meaning, which should be kept; although the baggage we attach to it (Master Joyce: duty to consult, etc.) should be severed and included elsewhere.

I agree that the terms custody and access should be changed, but I think guardianship is fairly clear already. We have more and more cases of shared or split custody where the term "custody" really doesn't mean anything and the terms "care and control" are essential. I find that the term "access" often implies to clients a lack of interest in being an involved parent and for many clients is inappropriate. Clients refer to "access" as his or her "time" or "parenting".

Anything - almost - to get rid of the nightmarish confusion and adversarialism often generated by THOSE outmoded words "custody" and "access" with all their exclusionist implications for the "other" parent!!!

"Custody", "guardianship", and "access" are terms that become prize labels to be fought about and won or lost. Elimination of these terms, replaced by "parenting responsibilities" and "parenting schedules" addresses the issues, namely the manner in which BOTH parents must look after THEIR children.

Rather than replace the above terms why not expand them to include that normally connoted by it.

It is not the language that creates conflicts. Adopting new language will over time cause the new words to be charged with as much conflict as the present wording is now. It is therefore preferable to stay with the language the people understand, and that is interpreted in the case law.

If you are suggesting that one term tack the place of the three terms, I think this would be confusing since they all mean different things.

There is already too much confusion in the lay world about what these terms mean, but I believe it is because they are changed so often. Continuity is more important than semantics.

The above terms are not broad enough to encompass all of what custody, guardianship and access mean.

Whatever term is used the rights of parents and of child would remain the same. The Act lays down the law, not social norms. It is not a document for making parties feel good

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Question is not clear.

Custody & access are archaic and are not specific enough to benefit the child - the words seem only to reinforce parties' needs to be in control or to give them a sense of power (or conversely, helplessness).

Parenting responsibilities (instead of custody); parenting time (instead of access); the incidentals of what we define guardianship to mean (Joyce model) should be incorporated into "parenting responsibilities".

Not by one but by both terms, in context.

I think that it is especially important to replace the term custody as parents often use that term in order to express that they have possession of or own the child. This leads to conflicts. This word is a red button word and just makes the problem worse.

The definitions have been judicially refined. Why embark on a whole new process of redefining terms?

Each term connotes an aspect of the parent-child relationship and to change them would serve no purpose.

But all of these terms should be defined in the Act using the above language - currently these terms are not substantively defined in the definitions section

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What is wrong with just using "parenting" to cover all of it? That is much preferable and most accurate.

Value neutral terms are more amenable to possible settlements. However, over time value neutral terms will be invested with value in any event and perhaps new terms will then have to be found.

Access is neutral, and acceptable if focused on the child's access to the parent. Custody and guardianship do not appropriately reflect the realities of nature of the parent-child relationship. "Parenting responsibilities" is much more fitting, and casts a focus on parenting as a responsibility to be shared (or not) as opposed to a right to be claimed.

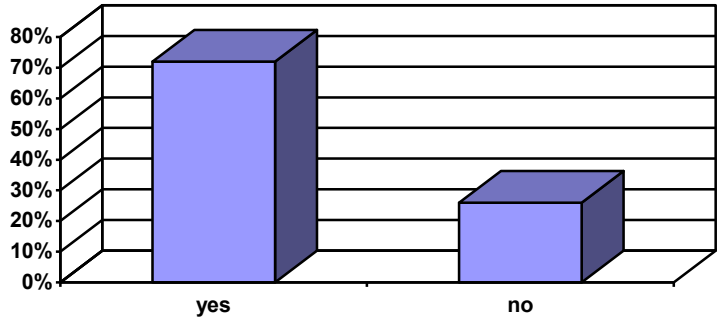
This question is not clear, however there does need to be either a combination of custody/guardianship or a definition of custody to clarify it as opposed to the guardianship rights (particularly where there are joint custody orders).

It is critical to move away from rights to shared responsibilities.

Children's Property

4. Should the FRA address the specific rights and obligations of persons acting as guardian of a child's estate?

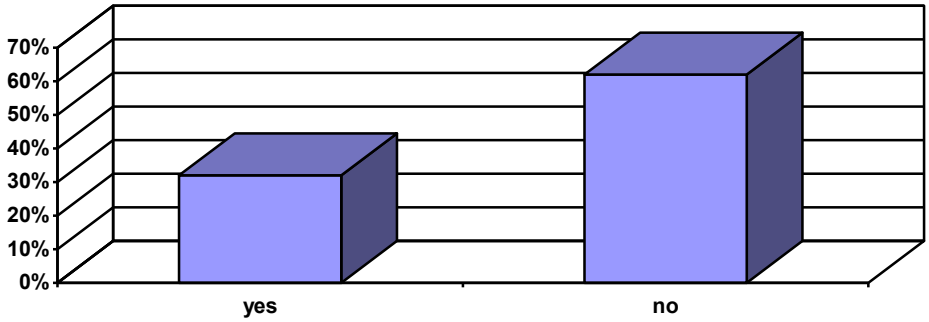
- yes **(65/90 = 72%)**
- no **(23/90 = 26%)**
- no response **(2/90 = 2%)** (not included in graph below)



5. Should court appointment be required to enable a person to act as the guardian of a child's property?

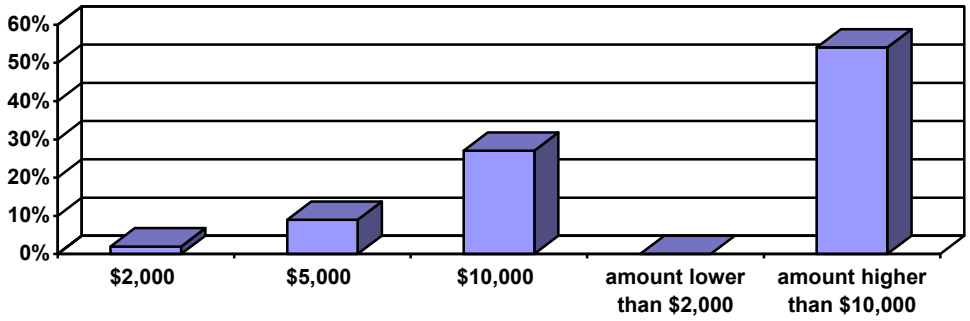
- yes **(29/90 = 32%)**
- no **(56/90 = 62%)**
- no response **(5/90 = 5%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



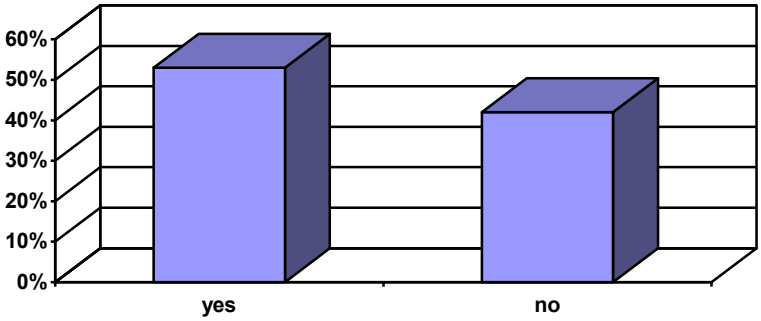
6. If parents were presumed to be the guardians of their children's estates, without court appointment but subject to a financial cap on the value of the estate, how much should the cap be?

- $2,000 **(2/90 = 2%)**
- $5,000 **(8/90 = 9%)**
- $10,000 **(24/90 = 27%)**
- an amount lower than $2,000 **(0/90 = 0%)**
- an amount higher than $10,000 **(49/90 = 54%)**
- no response **(7/90 = 7%)** (not included in graph below)



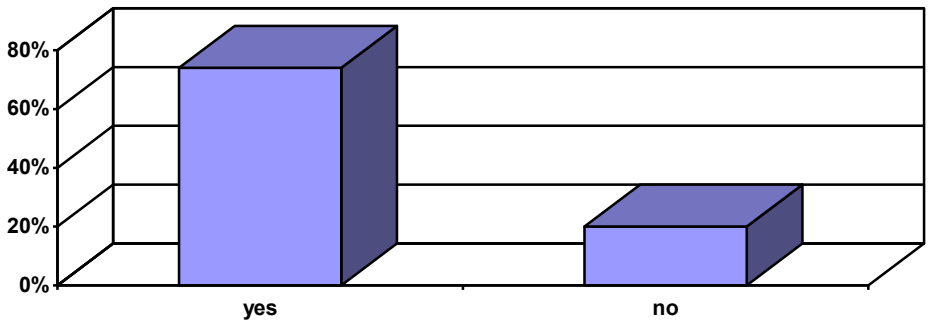
7. Should the guardian of a child's property be required to account to the *court* for his or her handling of the property?

- yes **(48/90 = 53%)**
- no **(38/90 = 42%)**
- no response **(4/90 = 5%)**(not included in graph below)



8. Should the guardian of a child's property be required to account to the child for his or her handling of the property?
   - yes **(67/90 = 74%)**
   - no **(18/90 = 20%)**
   - no response **(5/90 = 5%)**(not included in graph below)

   Note: Percentages do not total 100% due to rounding.



Comments:

In my opinion, the guardian's obligation to "account" to the child for his/her handling of the property should only arise in exceptional cases where the property in issue is of significant dollar value (i.e. a large inheritance) otherwise this will place an undue financial and time burden on the guardian.

Guardian should be free to make decisions in the best interests of the family, whether or not children approve. However, upon application to the court, a guardian should be held accountable for handling of child's property.

Mandatory court involvement would be unfeasible for many reasons and the court has jurisdiction to review in the appropriate case.

Question 8: Accounting to occur when child reaches age of majority. Prior to age of majority, court or special administrative office should oversee work of guardian. Suggest administrative offices be set up in different regions of province and encourage face to face interaction with guardians and children involved. Child should be able to ask questions of administrator.

My sense is there is no real need to interfere with existing law. We should, however, remind parents that guardians have some fiduciary duties -- they can't just do what they want. As to questions 7 and 8, I am uncomfortable with the choices. I think a guardian owes some degree of accountability to the child, but if it's too open-ended there could be great opportunity for needless litigation. There should perhaps be a requirement to periodically account to the court or to the public guardian (subject to the amount of the estate), or a voluntary account procedure, which would provide a shield for the guardian

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They should be required to provide an accounting to the child either upon request or upon the child reaching the age of majority. Also, it may be that the guardian of a child's property should account to the Public Guardian and Trustee, rather than the Court.

This should not be required in every case, but the court should have the power to order an accounting where the circumstances warrant it.

Guardian should be accountable to the child in the sense that guardian must act in his or her best interests. The court should still have the overriding power, but there should be a simpler process to begin with.

Court involvement should not be necessary except in extra-ordinary situations, but accounting to the child should be.

Court review should be available if the child or another interested party wants it

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The obligation to account should not be enforced as a right of a child, but only upon application. More would be destructive of parent-child relationships and fodder for inter-parent quarrels

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Upon majority

As in Alberta, a form should be completed to acknowledge receipt of monies and that the monies will only be used for the child's benefit; thereafter an accounting or report on how the monies are being managed; as for estates larger than $10,000, a judge should be allowed to appoint any person the trustee of those funds (as opposed to the Public Trustee assuming this role) with the judge required to take into consideration the 6 factors enumerated at page 6 of the Discussion Paper.

I am assuming in these questions that the parents are separated.

I think that there should be some form of accountability. The accountability to the child may only be meaningful after the child has reached the age of majority but should be available to the child.

Re: 7 and 8-undecided. I realize the potential mischief they are trying to prevent but they could end up creating a paper nightmare for parents, most of whom are honest. Why not make provision for applications to be made to court if needed. Parens Patriae and probably the current legislation.

I see the distinction here between legal accounting to the Court and moral accounting to the child. By moral I mean the type of accounting or explanation that a parent would provide a child for decisions made in that capacity.

Legal costs are so high, it's not practical to have parents account to a court unless the estate is very large.

To the Public Guardian and Trustee.

Court appointment is an inefficient process, and should be avoided unless court intervention is merited by a challenge to the conduct of the guardian or size of the estate (something considerably greater than $10,000).

Only if there is some reason to require it. I think the common law provides for an accounting anyway.

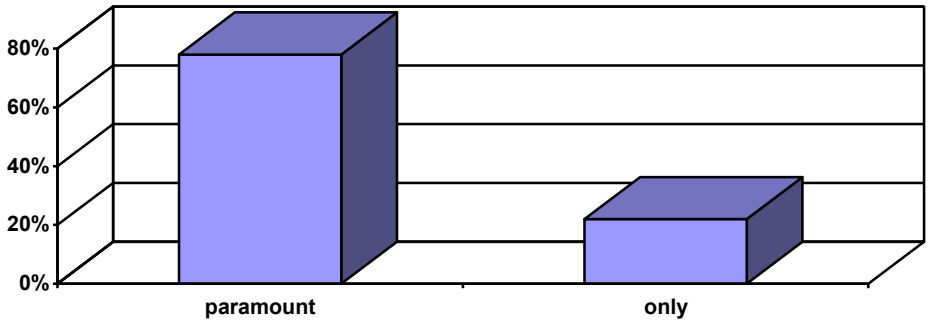
There should be a system of accountability, but it may be that it takes place through a government agency rather than the court system which is already overburdened.

But not below a certain age.

Children's Best Interests

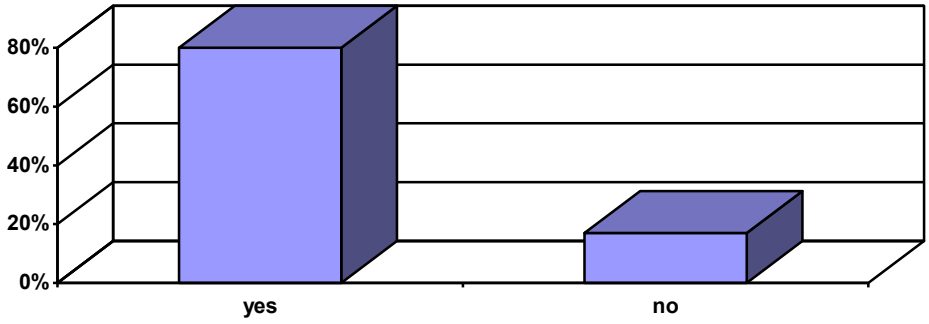
9. Are children's best interest the paramount consideration in making decisions about custody, guardianship and access, or are they the only consideration in making such decisions?

- paramount **(70/90 = 78%)**
- only **(20/90 = 22%)**



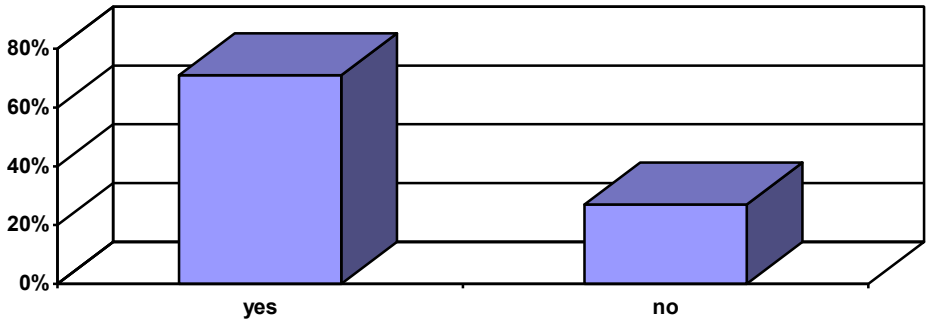
10. Should the list of factors enumerated in s. 24 of the FRA be expanded to add additional factors?

- yes **(72/90 = 80%)**
- no **(15/90 = 17%)**
- no response **(3/90=3%)** (not included in graph below)

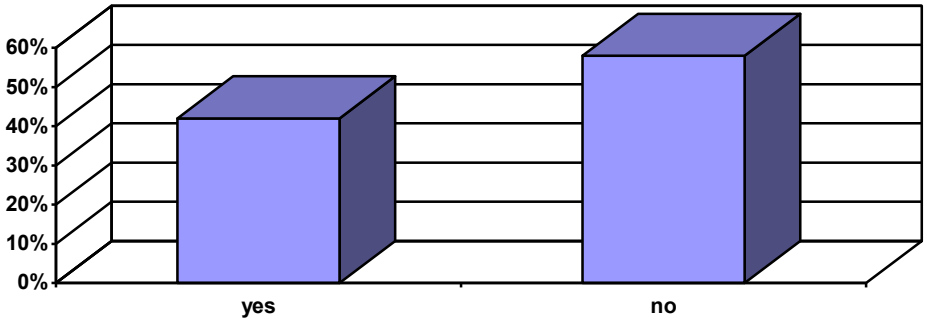


11. Should s. 24 be amended to include a history of family violence as a factor?

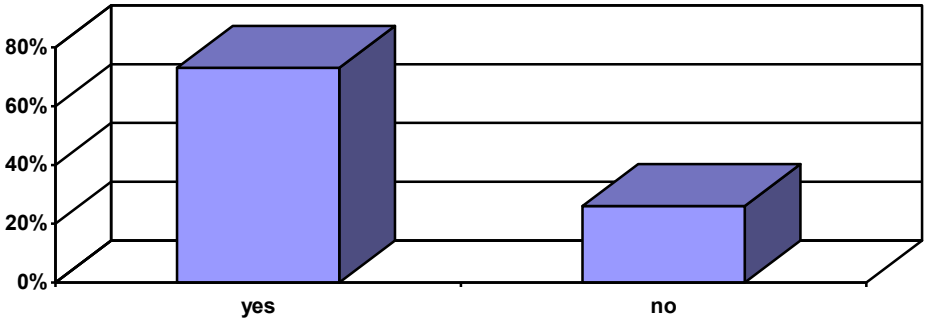
- yes **(64/90 = 71%)**
- no **(24/90 = 27%)**
- no response **(2/90=2%)** (not included in graph below)



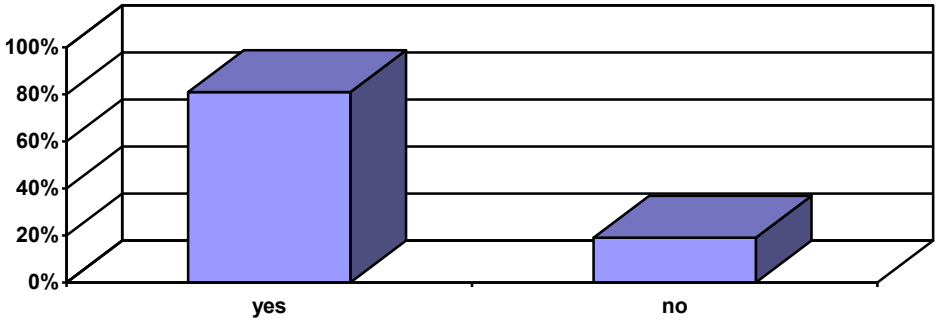
12. Should s. 24 be amended to include the child's cultural, linguistic and religious heritage as a factor?
    - yes **(37/90 = 41%)**
    - no **(52/90 = 58%)**
    - no response **(1/90=1%)** (not included in graph below)



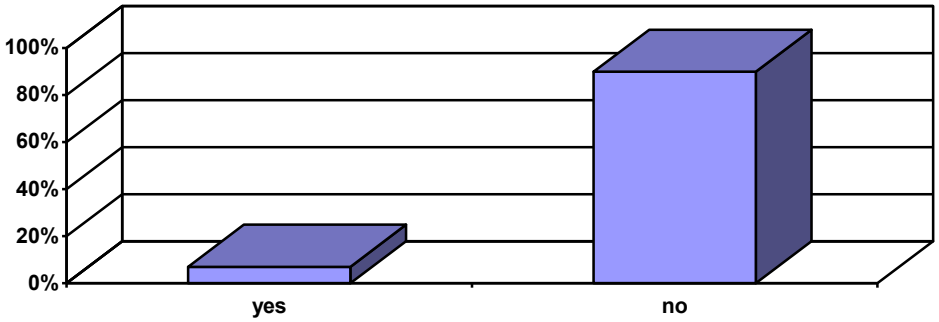
13. Should s. 24 be amended to include the ability and willingness of a parent to cooperate with the other parent as a factor?
    - yes **(66/90 = 73%)**
    - no **(23/90 = 26%)**
    - no response **(1/90=1%)** (not included in graph below)



14. Should s. 24 be amended to include the benefit to the child of maintaining a relationship with a parent as a factor?
    - yes **(73/90 = 81%)**
    - no **(17/90 = 19%)**



15. Should the factors enumerated in s. 24 be ranked in order of importance?
    - yes **(6/90 = 7%)**
    - no **(81/90 = 90%)**
    - no response **(3/90=3%)** (not included in graph below)



Comments:

One of the factors should include a consideration of who was the child's primary parent prior to separation. The person who has had primary responsibility for the child is generally more experienced as a parent and thus is likely and better equipped to meet the children's needs. Further this decision is one made by the parties, before they separate and before their own views about the parenting capacities of the other is tainted by the conflict. Children going through a separation benefit by continuity of primary caregiver. If this were a factor, courts may be less apt to dramatically change the children's status quo after separation and thus the parties themselves may be less likely to litigate this issue.

The criteria should focus on the needs and interests of the child. In my view, religious, cultural, and linguistic factors are already captured within the existing grounds in s. 24.

Any one or more of the above factors may be more significant than the others in any individual case.

We need either 13 or 14, not both. Of the 2, I prefer 13, because it gets to the heart of the difficulty, where the contest is between parents -- though I can see needing 14 if the contest includes non-parents. Okay, I've gone in a circle. Include both.

I believe that the fundamental problem with the current legislation and the courts' application of it lies in the very fuzzy notion of what is the child's best interests and the logical starting point would be determining what that means on a policy basis, and then deciding what factors are required to inform that policy. My view is that a child's best interest is to be parented, and that being parented includes not only financial and physical needs being met, but the right to receive affection and intellectual, social and emotional guidance. Any legislation should recognize that a child has an interest in being parented by both parents, and that this interest should only be limited or pared back where the parent is unable to parent due to factors such as violence, substance abuse and the like. The current system is too divisive as it focuses too much on who the parents are and what they say about each other, rather than the starting point of a child's interest and right to be parented by both.

Catch-all phrase: any other factors relevant.

Statutory recognition of a wide range of factors enumerated in s. 24 will assist lawyers and Judges in determining just what constitutes "the best interests of children".

Every case will be unique and ranking would be different in every case.

Re: 15, every case is different, but any indication of the usual important factors would be helpful.

I think in highly contested custody cases, it should be left to the judge in each situation to determine the appropriate weight to be given to each factor.

Limit litigation 'avenues'; don't increase opportunities for parents to continue acting out their interpersonal issues.

The health and emotional well-being should be indicated as the first factor, then the capacity of the person i.e. parenting skills, time to parent, and interest in participating in the lives and parenting of the kids; followed by the views of the child, and then the other factors at page 10-11 of the Discussion Paper would be listed thereafter.

It should be left to the court re: ranking.

I would prefer not to rank them as each case is different and I think that the relative importance may vary from case to case.

If an order of ranking were included, it might conflict with the appropriate considerations in an individual case.

All of the factors after best interests are secondary - they can all be related to the factors currently listed which are more inclusive than the very specific factors listed in questions 10-15.

Even though I did answer the questions: still see comments.

In high conflict relationships, which are the ones which end up in court, providing shopping lists for opposing parties persuades them to find those things significant, where they may not have come up with them on their own.

The importance of the factors will vary depending upon the circumstances of the family.

Enumerating the mandatory criteria is strong enough guidance for the decision maker. Ranking in order of importance could serve to overly constrain the decision maker‘s role in balancing the many factors that may appropriately be considered.

There may be some benefit in adding additional factors under s. 24 such as stability and maturity - the wording can be adjusted

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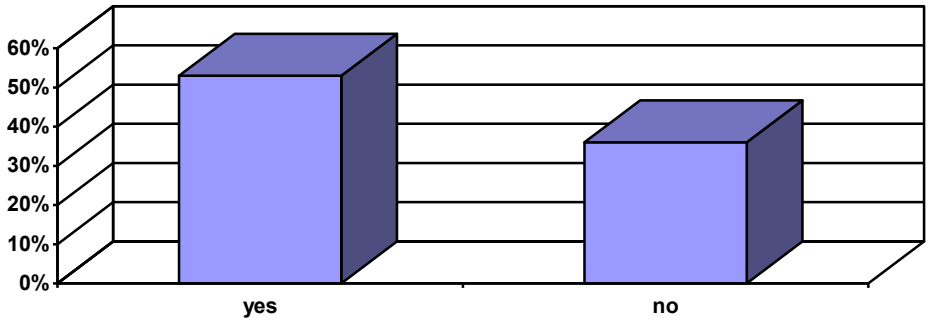
In a pluralistic, cosmopolitan jurisdiction, where biological parents are often of different or mixed race or religion, it is important that kinship, and the importance to a child of exploring and developing her culture, is distinguished from primary care-giving relationships. The assumption that a child‘s ethnic or cultural ties are best nurtured by biological parents may not be a suitable legal presumption.

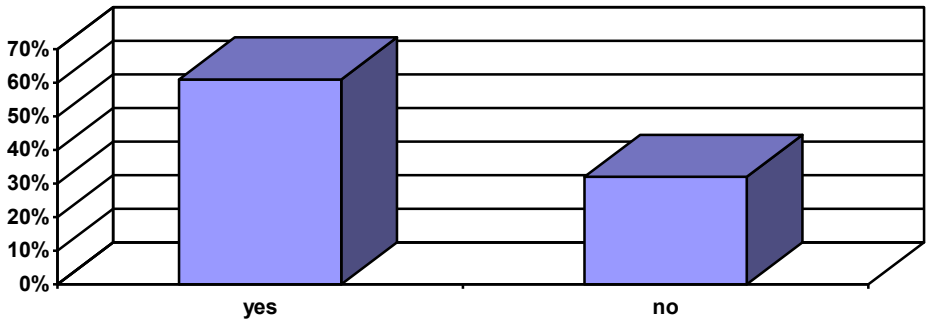
Parental Roles and Responsibilities

16. Should the presumptions regarding custody and guardianship set out in ss. 27 and 34 of the FRA be revised?
    - yes **(48/90 = 53%)**
    - no **(32/90 = 36%)**
    - no response **(10/90=11%)** (not included in graph below)



17. Should ss. 27 and 34 be revised to address the circumstances of parties who have a child through some means of assisted reproduction and may escape the current presumptions?
    - yes **(55/90 = 61%)**
    - no **(29/90 = 32%)**
    - no response **(6/90=6%)** (not included in graph below)

    Note: Percentages do not total 100% due to rounding.



Comments:

The presumptions can lead to outcomes that are not consistent with the best interests of a child.

If persons choose to use assisted reproduction, they should be required to enter standard agreement to deal with these issues - will force parties to discuss prior to completing assisted reproduction process.

This is a very delicate issue. It is hard to reconcile the fact that a woman may need a donor and that donor is responsible for child support. That certainly does not seem to meet the child's interest, particularly if the mother never meets that donor and she has a family of her own and the child knows that family only. Even if the mother knows the donor but this donor does not become involved in the life of the child by choice and consent of both parties, of course, why should this donor be drawn to the life of the child who has his or her own family? It certainly does not meet the child's interest (i.e. psychological well-being). This is a very hard point. I say this despite the recent decision of the Supreme Court of Canada, as in that case the parties lived together.

This is a very delicate issue. It is hard to reconcile the fact that a woman may need a donor and that donor is responsible for child support. That certainly does not seem to meet the child's interest, particularly if the mother never meets that donor and she has a family of her own and the child knows that family only. Even if the mother knows the donor but this donor does not become involved in the life of the child by choice and consent of both parties, of course, why should this donor be drawn to the life of the child who has his or her own family? It certainly does not meet the child's interest (i.e. psychological well-being). This is a very hard point. I say this despite the recent decision of the Supreme Court of Canada, as in that case the parties lived together.

Presumptions are not helpful and at times parents have engineered situations so as to rely upon presumptions, e.g. a dominant parent "hoards" time with an infant so that he/she can later argue that the best interests of the child are best served by recognizing the close "ties" between that parent and the child.

Re: 17, other than a sperm donor who has donated but not otherwise participated in the process.

Presume that joint guardianship of the estate/property of the child continues post-separation; presume shared parenting responsibilities upon separation, unless the court orders otherwise.

I would like to see a specific reference that the non-bio parent has the same rights and responsibilities as a bio parent. I would also like to see wills law be amended to include a provision like this.

Uncertain: legislative changes in my opinion will do little to resolve the complex problems created by family breakdown.

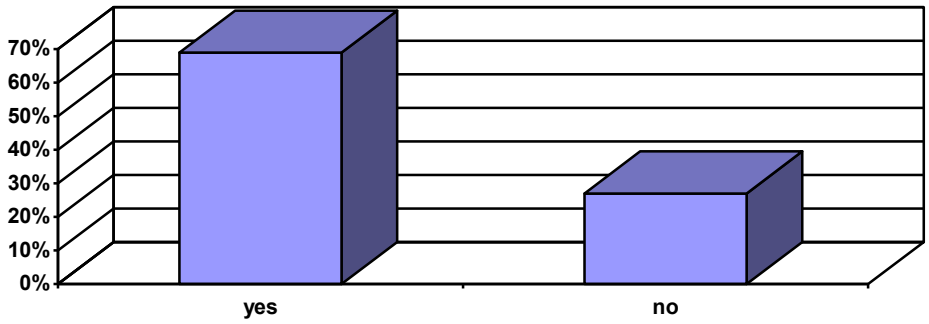
This cannot be done piecemeal, a clear definition of who/what "parent" is, and how many a child can have, is required.

I think that assisted reproduction is dealt with already.

Parenting Plans

18. Should the FRA provide for parenting plans?

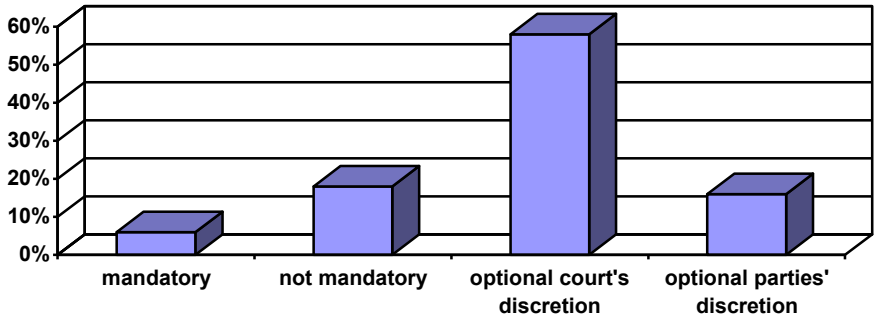
- yes **(62/90 = 69%)**
- no **(24/90 = 27%)**
- no response **(4/90 = 4%)**(not included in graph below)



19. Should parenting plans be mandatory on all parents or be required at the discretion of the court or the parties?

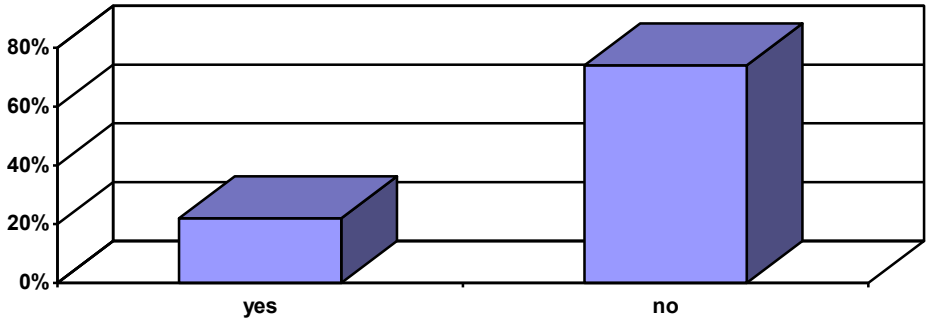
- mandatory in all cases **(5/90 = 6%)**
- not mandatory where other parent is unknown, absent from child's life or deceased **(16/90 = 18%)**
- optional at the court's discretion **(52/90 = 58%)**
- optional at the parties' discretion **(14/90 = 16%)**
- no response **(3/90 = 3%)**(not included in graph below)

Note: Percentages do not total 100% due to rounding.

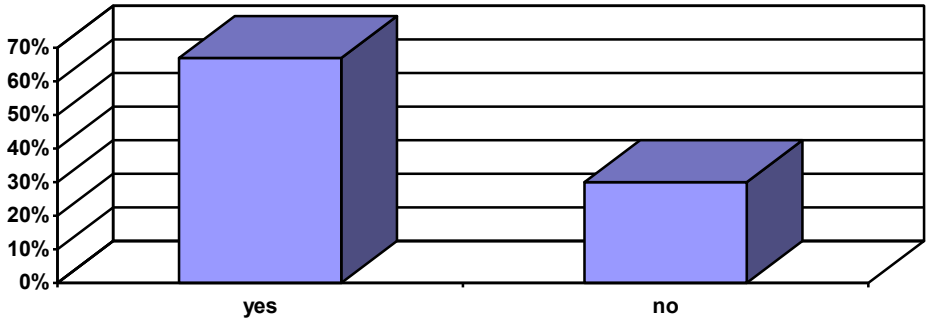


20. Should parenting plans completed by the parties require the approval of the court?

- yes **(20/90 = 22%)**
- no **(67/90 = 74%)**



21. Should filed parenting plans completed by the parties have the effect of a court order?
    - yes **(60/90 = 67%)**
    - no **(27/90 = 30%)**
    - no response **(3/90 = 3%)**(not included in graph below)



Comments:

Many people can agree on parenting plans, without the court's assistance. They should not be forced to go to court where they can agree. It is not a good idea for parenting plans to have the effect of a court order. Again, people can often agree on parenting plans. However they may be hesitant to agree to something that is as formal as a court order.

There should continue to remain an element of flexibility in the scheduling of access between parents provided they act like reasonable adults. Where one or both parties refuses to cooperate with the other, then the court should have the discretion to impose an access schedule in keeping with the goal of what is in the best interests of the children.

The court should not interfere where the parties have come to an agreement. To do so is a paternalistic approach that disempowers the rights of adults to make decisions about their own lives and those of their children. The parties are always in a better position to determine what is best in the circumstances. However, when the parties have filed a plan, there should be a less onerous right of review if one or both finds it is not working and they cannot agree on an amendment.

Court assistance may be required for parent(s) in preparing and revising the plans.

But only if specified in the document that the parties wish that "Plan" to become part of the order, pretty much like a separation agreement.

But only if specified in the document that the parties wish that "Plan" to become part of the order, pretty much like a separation agreement.

Parenting plans can be a useful tool in resolving custody or access disputes, but they can be overkill where there is no dispute, or the dispute is minor. If parents want to do them at their own instance, fine; but I don't think they should be elevated to the level of an order unless approved by the court. If that sounds like I don't trust parents to do a thorough or competent job by themselves, you're right. I don't. Some of the filed agreements I see, including some that were mediated through the FJC or private, non-lawyer, mediators would make your hair stand on end.

While I believe the parenting plans should have the effect of a court order, there should be a simple and timely mechanism for amendments.

Parents, with capable assistance and advice of counsel and other resources, can and should create parenting plans. Most Judges I know would rather see the parents create parenting plans than have to dictate them "from above".

They should be considered by the court if there is a dispute over the terms, but should not have the formality of a court order.

Filed parenting plans should have the same effect as any other filed written agreement.

Re: 20 and 21, the court should have a summary power to approve a plan and then it would have the effect of a court order.

This a very important area. One should be able to have effect of court order if filed with court.

This is flavour of the month/window dressing. The underlying issues of whether people are mature enough to recognize that child's interests can be different from theirs, and are willing to put child first are not being dealt with directly. Require program such as Edmonton Queen's Bench re: high conflict files, court appointed psychologist, video used in that programme.

Parenting plans could be reviewed by parenting coordinators and a "review stamp" could be placed as evidence it was reviewed by the coordinator and discussed with the parties. Parenting Plans may be too cost prohibitive / cumbersome to require of low income / self-represented parties in provincial court.

A "fill in the blanks" format might assist in matters where parties are self-represented so that enough detail can be provided for the following: the allocation of each parent's responsibilities, setting out with whom the child will live, the time a child will spend with the other parent / extended family, and the process to be used for resolving disputes.

This has worked well in many jurisdictions in the United States. I think that the US plans that the FJWorker here use are very useful as they give the parties an idea of what would be a good care regime for a child of their child's age.

You are guilty of contempt if you breach a court order.

See prior comment more law makes more work(and cost for clients) with often little practical results!

If the parties can work it out on their own the courts should stay out of it.

Only where the parents agree.

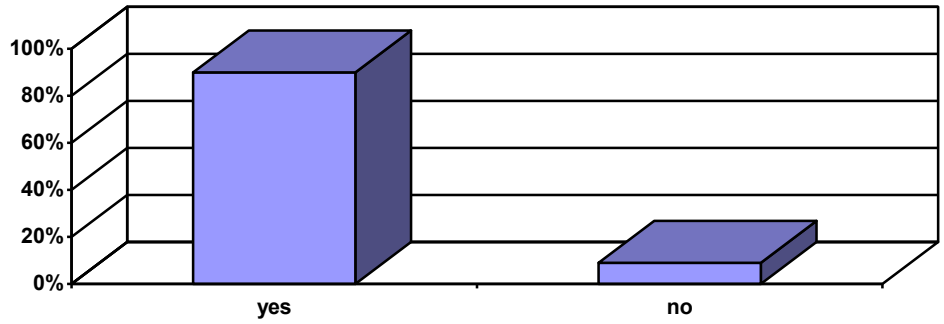
Approval would lead to additional litigation and it is also a subjective matter.

Flexibility is key.

Order for Custody, Guardianship and Access

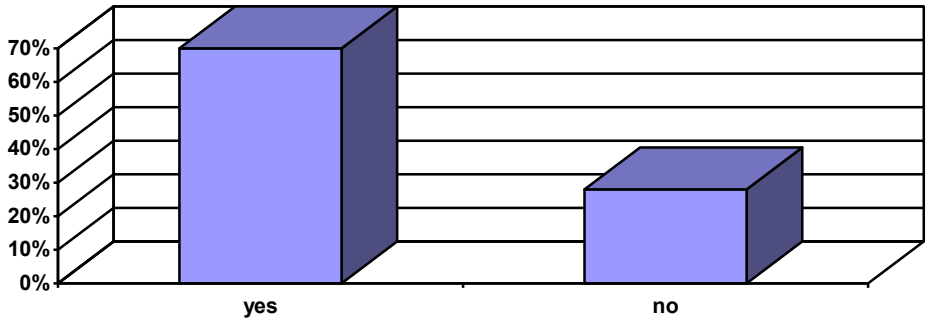
22. Should FRA allow the court to allocate specific incidents of guardianship between parents?

- yes **(81/90 = 90%)**
- no **(8/90 = 9%)**
- no response **(1/90 = 1%)**(not included in graph below)



23. Should the FRA require that parents be given an explanation of the meaning of orders for custody, guardianship and access and the consequences of breaching such orders?

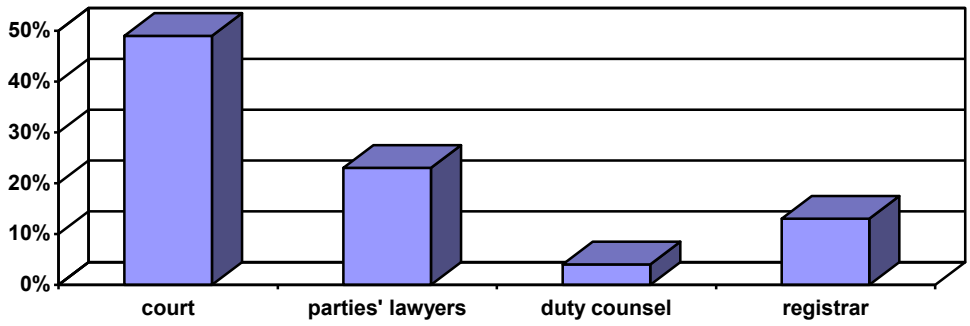
- yes **(63/90 = 70%)**
- no **(25/90 = 28%)**
- no response **(2/90 = 2%)**(not included in graph below)



24. If the FRA required that parents be given such explanations, should the explanation by given by:

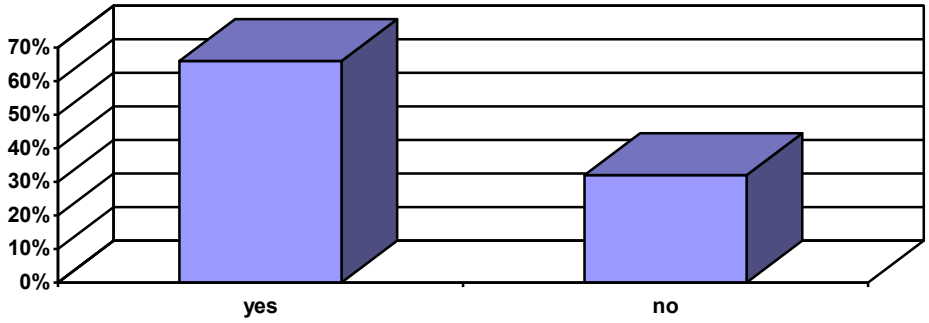
- the court **(44/90 = 49%)**
- the parties‘ lawyers **(21/90 = 23%)**
- duty counsel **(4/90 = 4%)**
- the registrar **(12/90 = 13%)**
- no response **(9/90 = 10%)**(not included in graph below)

Note: Percentages do not total 100% due to rounding.



25. Should the FRA allow the court to require parties to use a specified out-of-court process for resolving disputes about orders for custody, guardianship and access?

- yes **(59/90 = 66%)**
- no **(29/90 = 32%)**
- no response **(2/90 = 2%)**(not included in graph below)



Comments:

People able to agree will seek out a process to assist. Those who cannot may use it as a further obstacle (and expense) for the weaker party.

All of the options listed in para. 24 should be made available. Many litigants are self-represented and the legislation needs to take that into account. There could be a court form and/or a website tutorial to provide a general explanation, translated into different languages.

If government funded, the process will become overburdened and also unavailable in remote communities and if parent funded, most do not have funds to pay for it, i.e. legal aid clients.

With respect to question 25, those requirements should be view in the light of the parties' circumstances, especially if family violence is present.

Mediation is far more effective at resolving disputes of this nature than other methods.

Yes, but only recognized dispute resolution mechanisms like mediation, etc. But not for a system that is based on religious beliefs.

I'm uncomfortable about the possible interpretation of 25. Should a court be allowed to send the parties to an outside agency (mediator, FJC, parenting coordinator)? Absolutely. But the court must not abdicate authority over the matter. Make an interim order, and send them off to work on the problem before coming back, sure. But don't leave the parties without an interim order or the prospect of getting an order if the third party doesn't work.

Some parties just have to have the decision made for them and cannot come to any kind of agreements. They tell me that if the Judge/Court tells them to do a thing, then they will, but they will not if we are simply recommending it.

However, the cost of doing so must be considered.

Explanations about the meaning of custody and access orders should ideally be given by lawyers, but not everybody has lawyers, so the Court Registry would be the most reasonable alternative.

Some cases are not appropriate for alternative measures and are subject to abuse by the party who wishes to delay or obfuscate or who is harassing the other party by gaining access to them through alternative measures.

Parenting coordinators should be required as a first recourse for parties in the event of a dispute about orders.

Parenting coordinators are now being used in Ontario and Alberta to mediate disputes post - final order, and to arbitrate where parties cannot agree through mediation. The court should be allowed to require parties to attend to a parenting coordinator instead of filing applications to resolve their disputes.

How will poor parents pay for that? I can't see the Liberals properly funding out of court processes, they are not even properly funding family court.

#25 - yes but as a first attempt - something like they have to first attempt mediation through the FJW or another mediator as approved by the parties. The parties always have to have the ability to go back to court if the mediation fails.

Re: #25: Only if the specific out-of-court process is available at no or a low cost to individuals who could not pay.

See comments above-who's going to pay for all these good ideas?

Mandatory out of court process, such as mediation, is a good idea in theory. The problem is the government is not going to put any more money into the system and the FJCs are not effective with high conflict families.

The information should be available in writing.

Those who can mediate, do already.

Temporary mediation should be a option which could be selected by either party for a period of time and if the parties are unable to settle the Court should have the final say

---

Additional comments:

The guardianship options above should only apply where a person or parent is the sole guardian.

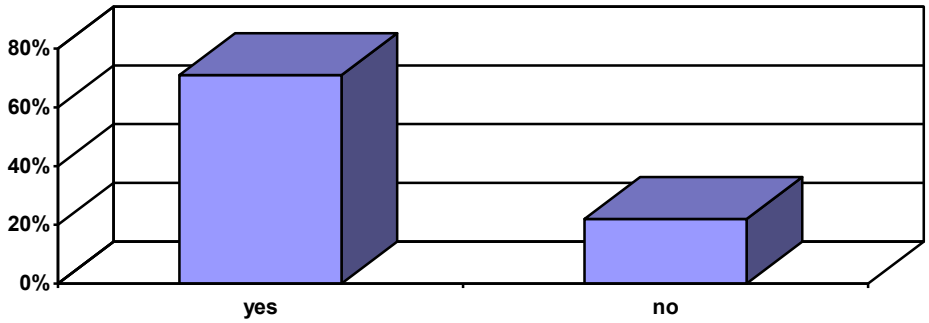
As long as the temporary guardians appointment can be changed by request of the parents and it is not made difficult by the courts to vary that term. Common sense would have to be used as opposed to the usual significant change of circumstances.

Parenting Responsibilities of Third Parties

26. Where a non-parent has guardianship of a child, should that party be able to determine the future guardian of a child in his or her will?

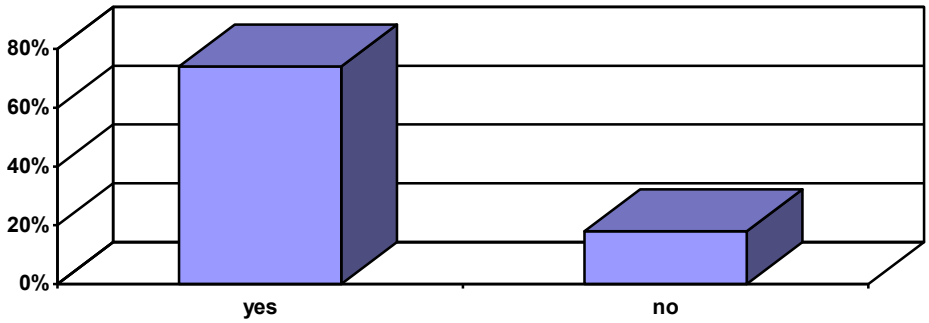
- yes **(64/90 = 71%)**
- no **(20/90 = 22%)**
- no response **(6/90 = 6%)**(not included in graph below)

Note: Percentages do not total 100% due to rounding.



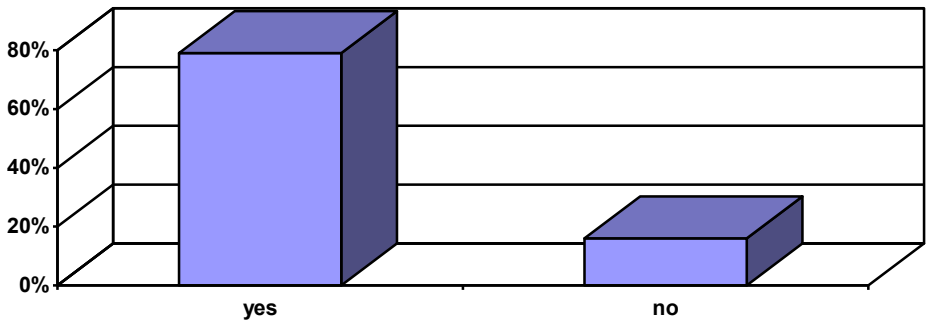
27. Should the FRA allow for the appointment of standby guardians to provide for the future incapacity of a parent?

- yes **(67/90 = 74%)**
- no **(16/90 = 18%)**
- no response **(7/90 = 8%)**(not included in graph below)



28. Should the FRA allow for the appointment of temporary guardians to provide for the anticipated temporary incapacity of a parent?

- yes **(71/90 = 79%)**
- no **(14/90 = 16%)**
- no response **(5/90 = 5%)**(not included in graph below)



Other [Comments:]

The guardianship options above should only apply where a person or parent is the sole guardian.

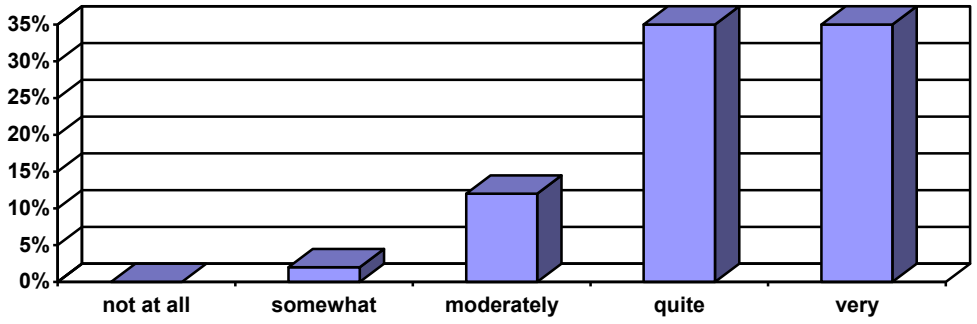
As long as the temporary guardians appointment can be changed by request of the parents and it is not made difficult by the courts to vary that term. Common sense would have to be used as opposed to the usual significant change of circumstances.

Great in theory but see comments I don't mean to "shoot the messenger" Also once a box was clicked it couldn't be unclicked.

Chapter 7 – Meeting Access Responsibilities

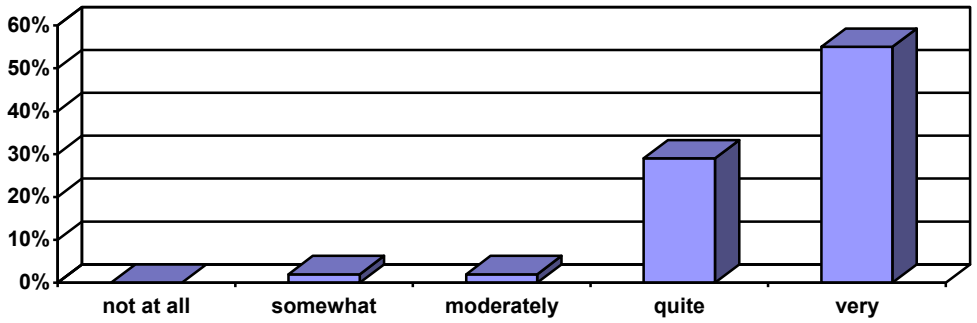
Access Disputes: Defining the Scope of the Problem

1. How significant are access issues in family law:
   (a) in terms of the time and resources needed to address them?
   - not at all **(0/49 = 0%)**
   - somewhat **(1/49 = 2%)**
   - moderately **(6/49 = 12%)**
   - quite **(17/49 = 35%)**
   - very **(17/49 = 35%)**
   - no response **(8/49 = 16%)** (not included in graph below)



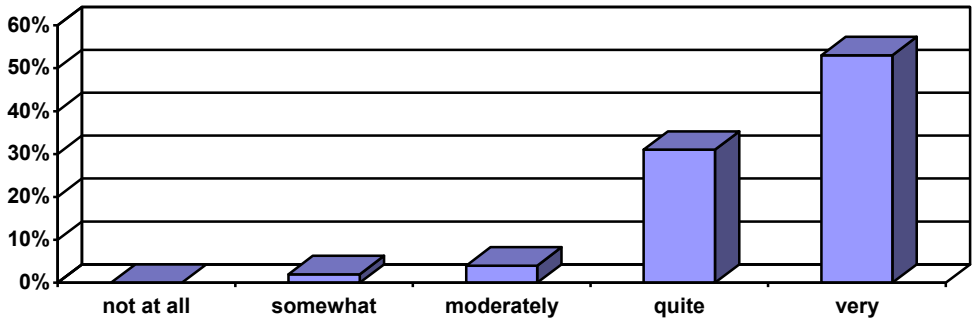
   (b) in terms of importance to the clients?

   - not at all **(0/49 = 0%)**
   - somewhat **(1/49 = 2%)**
   - moderately **(1/49 = 2%)**
   - quite **(14/49 = 29%)**
   - very **(27/49 = 55%)**
   - no response **(6/49 = 12%)**(not included in graph below)



(c) in terms of impact on the children?

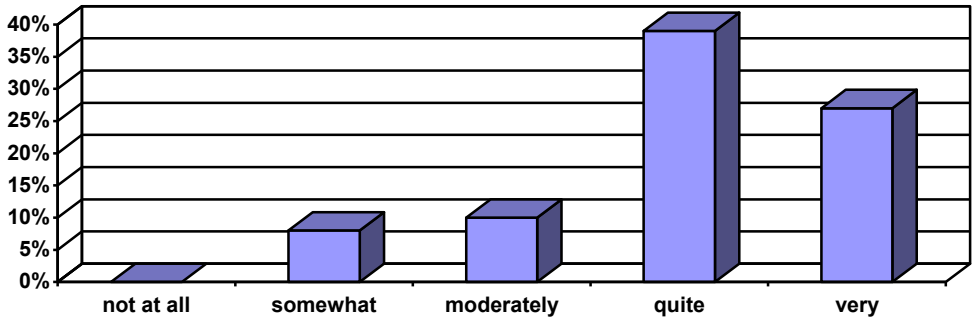
- not at all **(0/49 = 0%)**
- somewhat **(1/49 = 2%)**
- moderately **(2/49 = 4%)**
- quite **(15/49 = 31%)**
- very **(26/49 = 53%)**
- no response **(5/49 = 10%)**(not included in graph below)



(d) in terms of the effect on ability to resolve other issues (i.e. custody; primary residency; mobility; support; etc.)?

- not at all **(0/49 = 0%)**
- somewhat **(4/49 = 8%)**
- moderately **(5/49 = 10%)**
- quite **19/49 = 39%)**
- very **(13/49 = 27%)**
- no response **(7/49 = 14%)**(not included in graph below)

Note: Percentages do not total 100% due to rounding.



Comments:

Need more tools to enforce access.

Many times, custody disputes are REALLY about access.

Clients often cannot differentiate between custody, access and child support. They see those issues as being completely inter-related and do not understand how they can be separated or viewed separately.

Ongoing participation and interaction between child and parent, and parent and parent informs many of the other issues. For example, the parent who has little involvement will likely not appreciate the importance of contributing to child support and special expenses

---

Each case is different. Can‘t generalize.

Access is often the MOST important issue.....at least it is usually the most immediate and pressing one.

Reasonable people can work it out and do most of the time, then there are those with personality disorders...there may be disputes at the start but most parents resolve them over time...

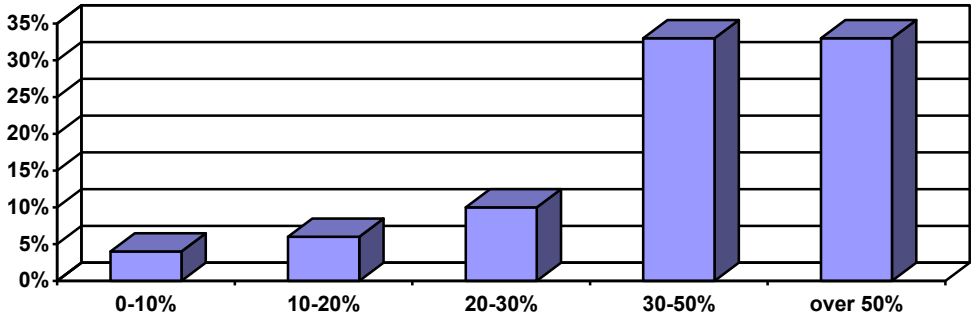
Access problems can be the deal breaker.

The inability to get quick resolution on interim access has a snowball effect that impedes progress on all areas of the separation or divorce. Some of the most intractable positions are formed shortly after separation because parties perceive the other as being unfair, manipulative.

---

2. In your experience, both as advocate and as observer of the system, what percentage of family files include a dispute over access?

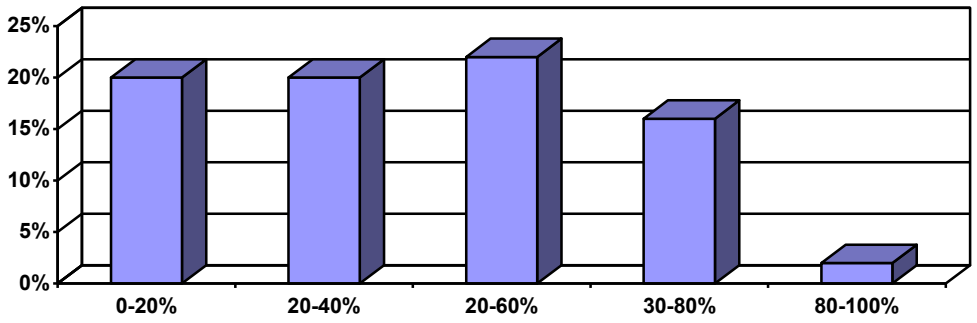
- 0 - 10% **(2/49 = 4%)**
- 10 - 20% **(3/49 = 6%)**
- 20 - 30% **(5/49 = 10%)**
- 30 - 50% **(16/49 = 33%)**
- over 50% **(16/49 = 33%)**
- no response **(7/49 = 14%)**(not included in graph below)



3. Of those cases,

(a) in what percentage was access the primary issue?

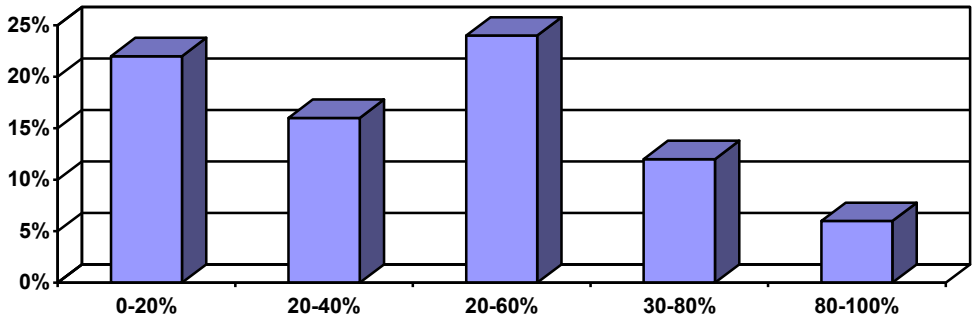
- 0 - 20% **(10/49 = 20%)**
- 20 - 40% **(10/49 = 20%)**
- 20 - 60% **(11/49 = 22%)**
- 30 - 80% **(8/49 = 16%)**
- 80 - 100% **(1/49 = 2%)**
- no response **(9/49= 18%)** (not included in graph below)



(b) in what percentage was the issue frustration or denial of access?

- 0 - 20% **(11/49 = 22%)**
- 20 - 40% **(8/49 = 16%)**
- 20 - 60% **(12/49 = 24%)**
- 30 - 80% **(6/49 = 12%)**
- 80 - 100% **(3/49 = 6%)**
- no response **(9/49 = 18%)** (not included in graph below)

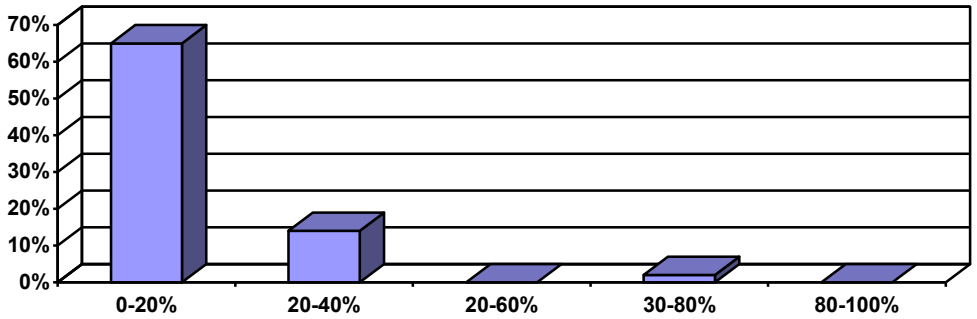
Note: Percentages do not total 100% due to rounding.



(c) in what percentage was the issue failure to exercise access?

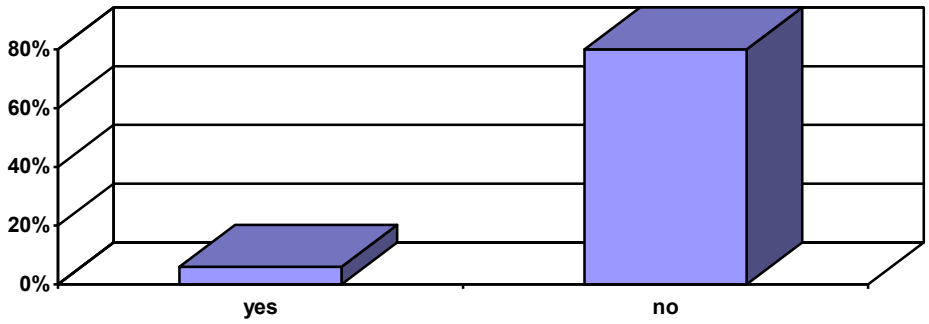
- 0 - 20% **(32/49 = 65%)**
- 20 - 40% **(7/49 = 14%)**
- 20 - 60% **(0/49 = 0%)**
- 30 - 80% **(1/49 = 2%)**
- 80 - 100% **(0/49 = 0%)**
- no response **(9/49 = 18%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



Access Disputes: Defining the Nature of the Problem

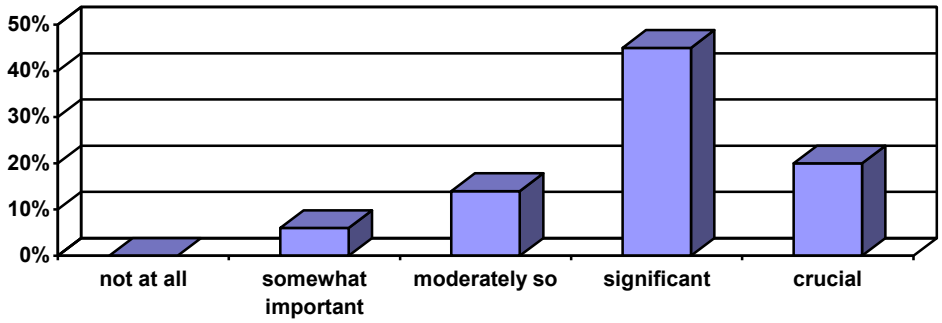
4. Do the existing Act (FRA), rules, and procedures provide effective tools for preventing or resolving access issues?
   - yes **(3/49 = 6%)**
   - no **(39/49 = 80%)**
   - no response **(7/49 = 14%)** (not included in graph below)



5. If not, which of the following most need to be addressed:

   (a) ensuring there is a workable regime from the outset?
   - not at all **(0/49 = 0%)**
   - somewhat important **(3/49 = 6%)**
   - moderately so **(7/49 = 14%)**
   - significant **(22/49 = 45%)**
   - crucial **(10/49 = 20%)**
   - no response **(7/49 = 14%)** (not included in graph below)

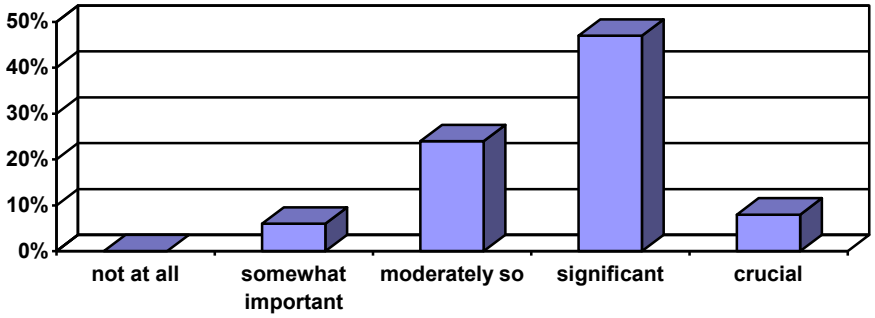
   Note: Percentages do not total 100% due to rounding.



(b) assisting the parties to modify the regime when circumstances warrant?

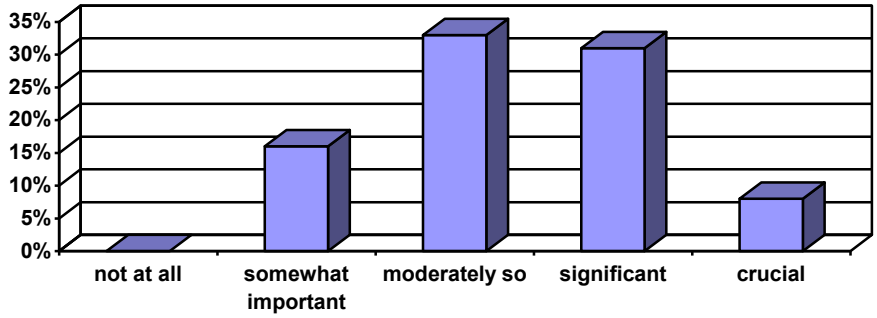
- not at all **(0/49 = 0%)**
- somewhat important **(3/49 = 6%)**
- moderately so **(12/49 = 24%)**
- significant **(23/49 = 47%)**
- crucial **(4/49 = 8%)**
- no response **(7/49 = 14%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



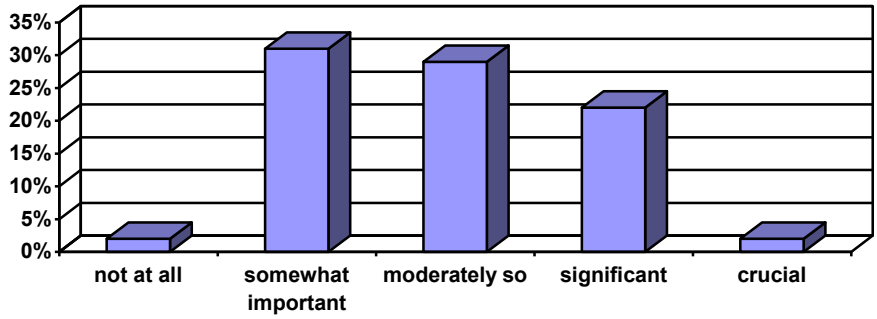
(c) addressing friction at the access exchange?

- not at all **(0/49 = 0%)**
- somewhat important **(8/49 = 16%)**
- moderately so **(16/49 = 33%)**
- significant **(15/49 = 31%)**
- crucial **(4/49 = 8%)**
- no response **(6/49 = 12%)** (not included in graph below)



(d) expressly providing for sharing of access costs?

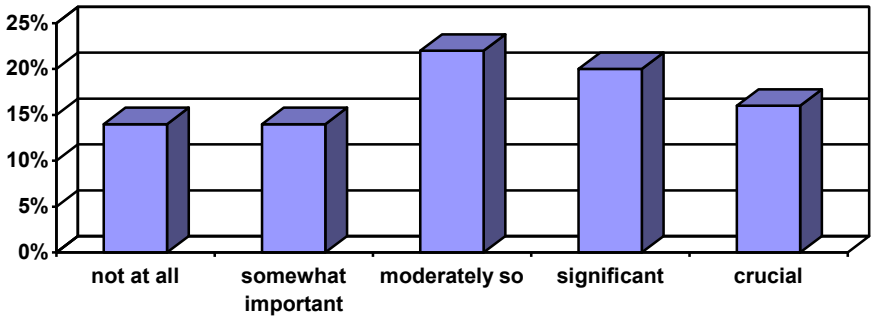
- not at all **(1/49 = 2%)**
- somewhat important **(15/49 = 31%)**
- moderately so **(14/49 = 29%)**
- significant **(11/49 = 22%)**
- crucial **(1/49 = 2%)**
- no response **(7/49 = 14%)** (not included in graph below)



(e) providing remedies for failure or refusal to exercise access?

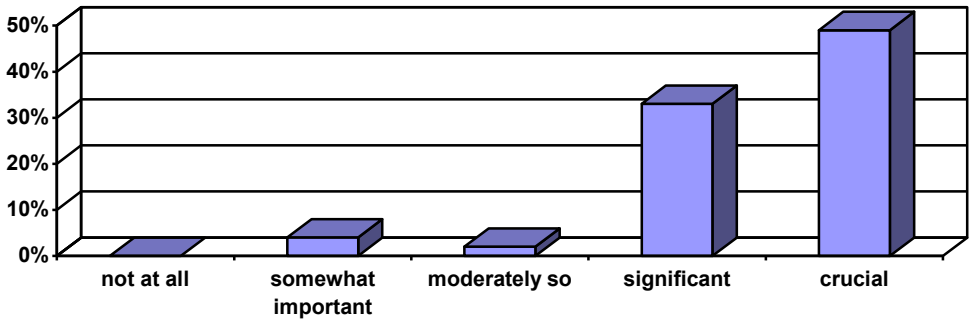
- not at all **(7/49 = 14%)**
- somewhat important **(7/49 = 14%)**
- moderately so **(11/49 = 22%)**
- significant **(10/49 = 20%)**
- crucial **(8/49 = 16%)**
- no response **(6/49 = 12%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



(f) providing remedies for denial or frustration of access?

- not at all **(0/49 = 0%)**
- somewhat important **(2/49 = 4%)**
- moderately so **(1/49 = 2%)**
- significant **(16/49 = 33%)**
- crucial **(24/49 = 49%)**
- no response **(6/49 = 12%)** (not included in graph below)



Other Comments:

It is rare that a person simply refuses to exercise access, it is usually a situation where access is denied.

If there is no mechanism to force compliance with orders, or at least force the "offender" to go to court to change an order in a timely way, then months can pass without any real remedy. Judges and Masters rarely punish an "offending" parent.

I cannot answer any of your percentage questions, because they are not asked properly. You have overlapping values.

An expedited remedy for denial of access, I believe, would be exceedingly helpful.

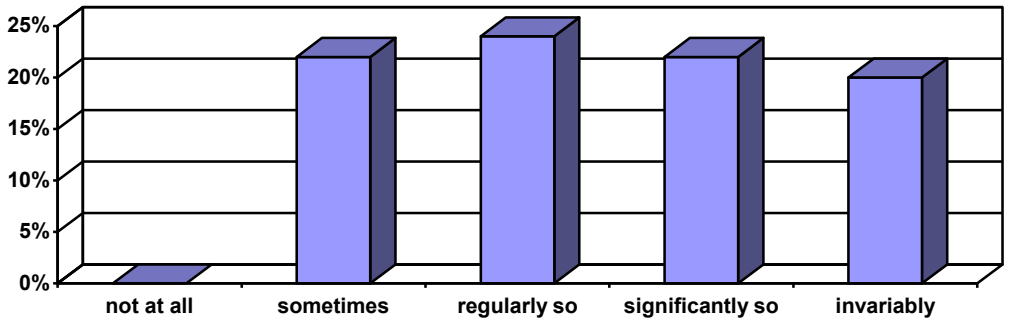
---

6. Of the following complaints about the current system, which do you consider most frequent or valid:

(a) too slow

- not at all **(0/49 = 0%)**
- sometimes **(11/49 = 22%)**
- regularly so **(12/49 = 24%)**
- significantly so **(11/49 = 22%)**
- invariably **(10/49 = 20%)**
- no response **(5/49 = 10%)** (not included in graph below)

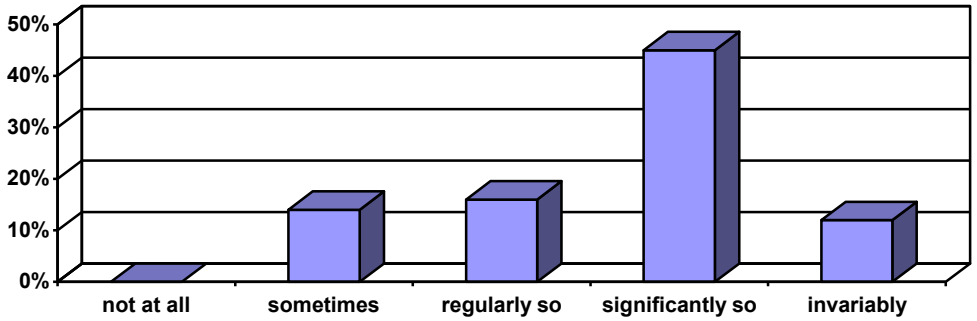
Note: Percentages do not total 100% due to rounding.



(b) too expensive

- not at all **(0/49 = 0%)**
- sometimes **(7/49 = 14%)**
- regularly so **(8/49 = 16%)**
- significantly so **(22/49 = 45%)**
- invariably **(6/49 = 12%)**
- no response **(6/49 = 12%)** (not included in graph below)

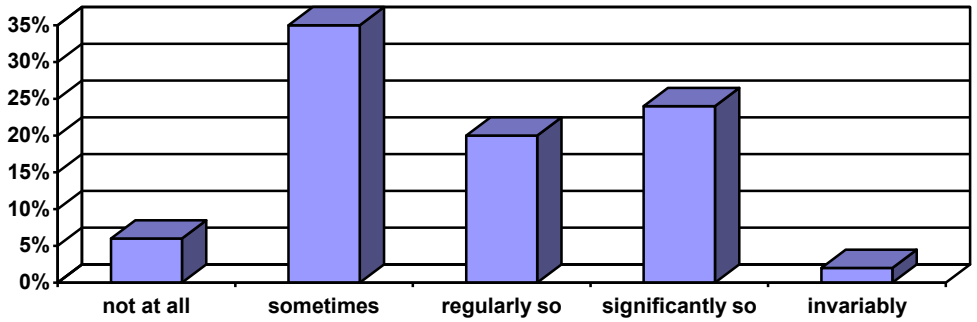
Note: Percentages do not total 100% due to rounding.



(c) too clumsy (not enough options/tools)

- not at all **(3/49 = 6%)**
- sometimes **(17/49 = 35%)**
- regularly so **(10/49 = 20%)**
- significantly so **(12/49 = 24%)**
- invariably **(1/49 = 2%)**
- no response **(6/49 = 12%)** (not included in graph below)

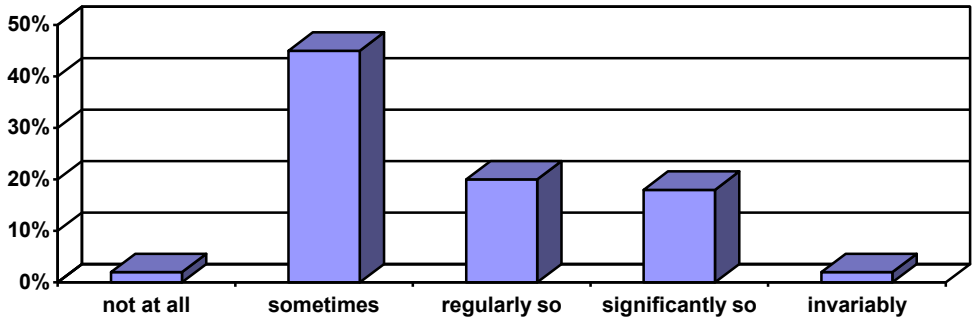
Note: Percentages do not total 100% due to rounding.



(d) ineffective

- not at all **(1/49 = 2%)**
- sometimes **(22/49 = 45%)**
- regularly so **(10/49 = 20%)**
- significantly so **(9/49 = 18%)**
- invariably **(1/49 = 2%)**
- no response **(6/49 = 12%)** (not included in graph below)

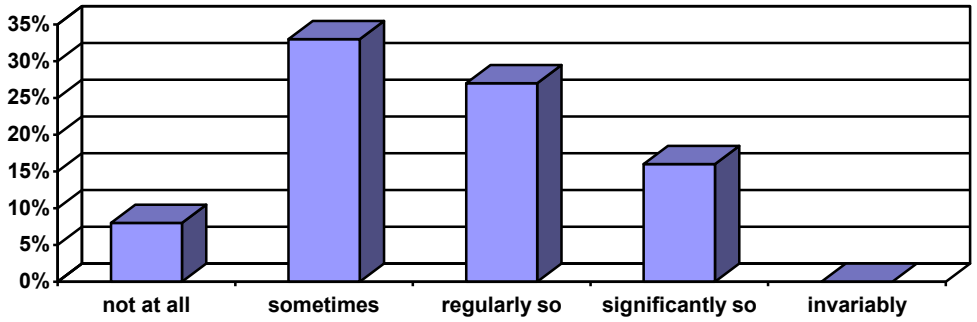
Note: Percentages do not total 100% due to rounding.



7. Rate how effective the following resources are in addressing access disputes generally:

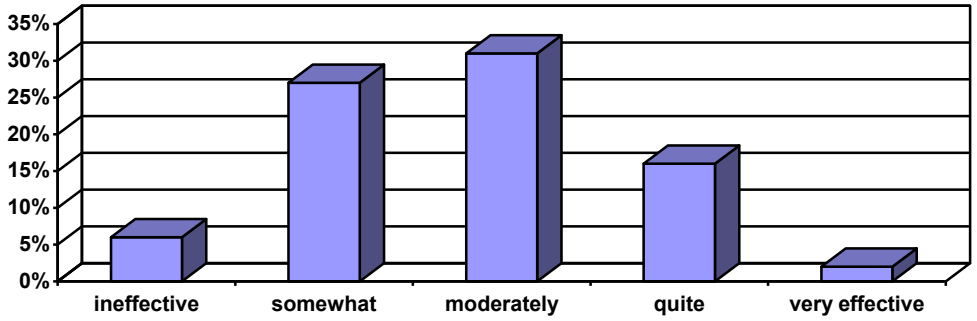
(a) the Supreme Court

- ineffective **(4/49 = 8%)**
- somewhat **(16/49 = 33%)**
- moderately **(13/49 = 27%)**
- quite **(8/49 = 16%)**
- very effective **(0/49 = 0%)**
- no response **(8/49 = 16%)** (not included in graph below)



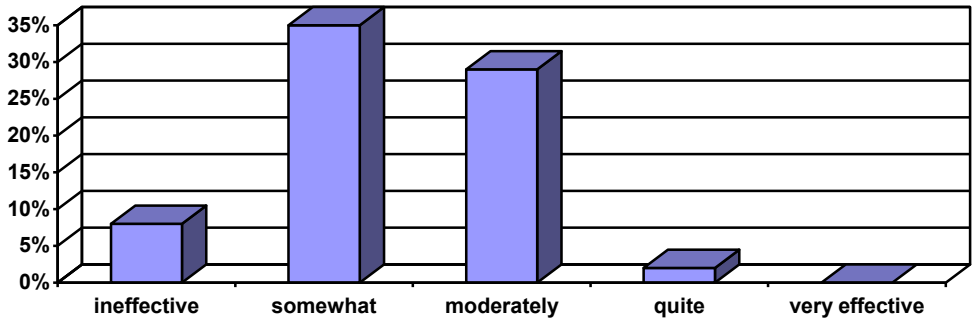
(b) the Provincial Court

- ineffective **(3/49 = 6%)**
- somewhat **(13/49 = 27%)**
- moderately **(15/49 = 31%)**
- quite **(8/49 = 16%)**
- very effective **(1/49 = 2%)**
- no response **(9/49 = 18%)** (not included in graph below)



(c) Family Justice Centre

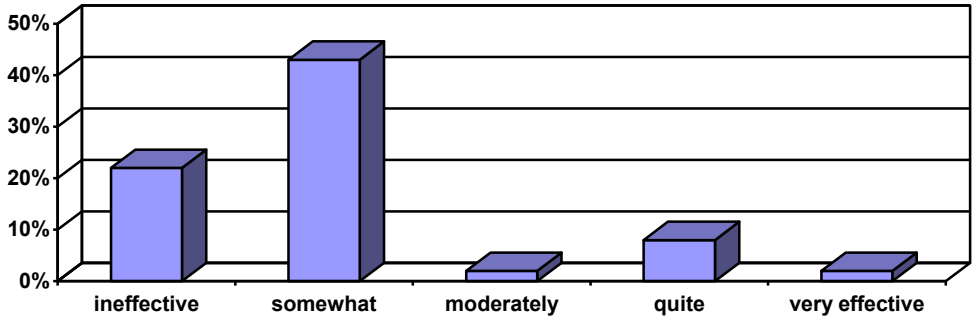
- ineffective **(4/49 = 8%)**
- somewhat **(17/49 = 35%)**
- moderately **(14/49 = 29%)**
- quite **(1/49 = 2%)**
- very effective **(0/49 = 0%)**
- no response **(13/49 = 26%)** (not included in graph below)



(d) parenting after separation

- ineffective **(11/49 = 22%)**
- somewhat **(21/49 = 43%)**
- moderately **(1/49 = 2%)**
- quite **(4/49 = 8%)**
- very effective **(1/49 = 2%)**
- no response **(11/49 = 22%)** (not included in graph below)

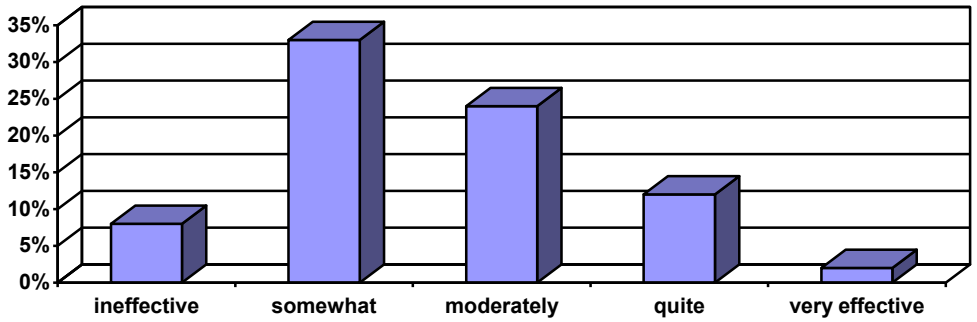
Note: Percentages do not total 100% due to rounding.



(e) counseling

- ineffective **(4/49 = 8%)**
- somewhat **(16/49 = 33%)**
- moderately **(12/49 = 24%)**
- quite **(6/49 = 12%)**
- very effective **(1/49 = 2%)**
- no response **(10/49 = 20%)** (not included in graph below)

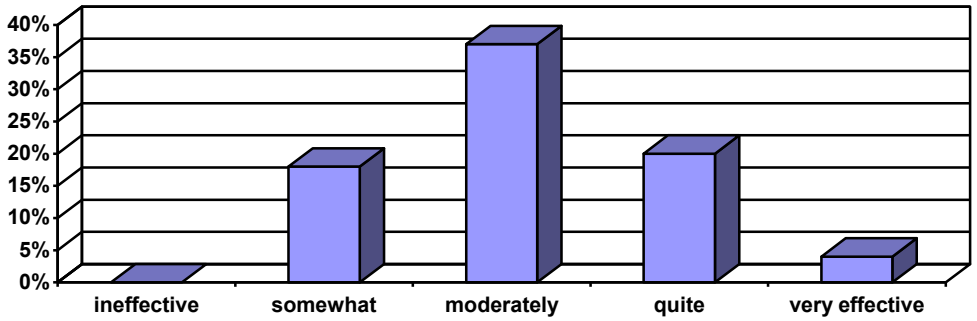
Note: Percentages do not total 100% due to rounding.



(f) private mediation

- ineffective **(0/49 = 0%)**
- somewhat **(9/49 = 18%)**
- moderately **(18/49 = 37%)**
- quite **(10/49 = 20%)**
- very effective **(2/49 = 4%)**
- no response **(10/49 = 20%)** (not included in graph below)

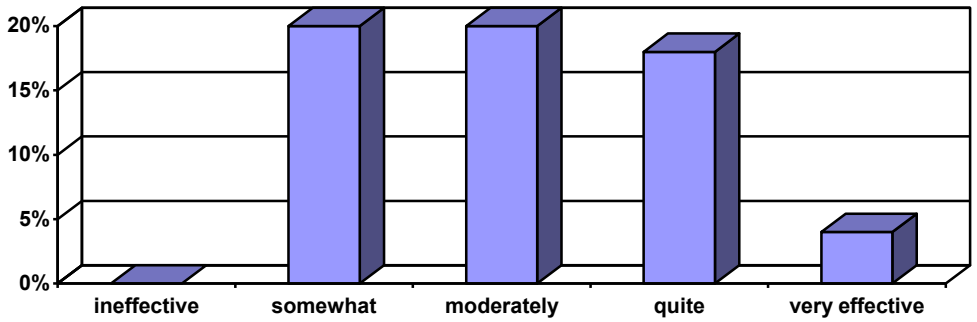
Note: Percentages do not total 100% due to rounding.



(g) collaborative practice

- ineffective **(0/49 = 0%)**
- somewhat **(10/49 = 20%)**
- moderately **(10/49 = 20%)**
- quite **(9/49 = 18%)**
- very effective **(2/49 = 4%)**
- no response **(18/49 = 36%)** (not included in graph below)

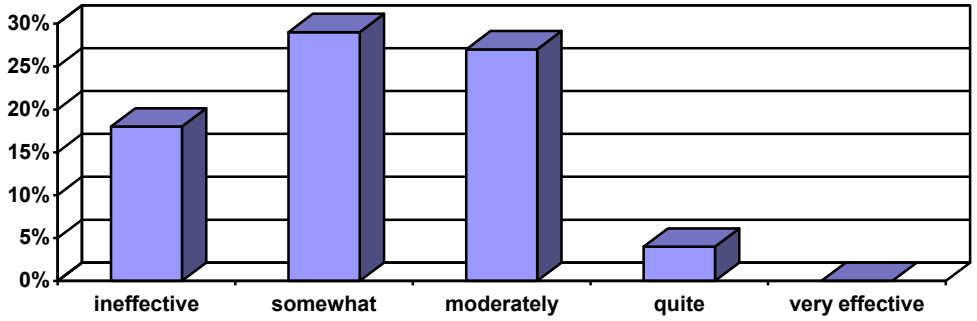
Note: Percentages do not total 100% due to rounding.



8. Rate how effective the following resources are in addressing entrenched access disputes (i.e. allowing no access and/or persistently failing or willfully refusing to follow orders or agreements):

(a) the Supreme Court

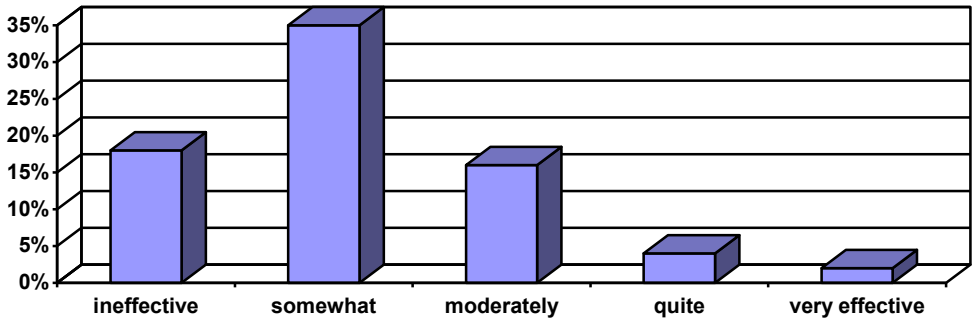
- ineffective **(9/49 = 18%)**
- somewhat **(14/49 = 29%)**
- moderately **(13/49 = 27%)**
- quite **(2/49 = 4%)**
- very effective **(0/49 = 0%)**
- no response **(11/49 = 22%)** (not included in graph below)



(b) the Provincial Court

- ineffective **(9/49 = 18%)**
- somewhat **(17/49 = 35%)**
- moderately **(8/49 = 16%)**
- quite **(2/49 = 4%)**
- very effective **(1/49 = 2%)**
- no response **(12/49 = 24%)** (not included in graph below)

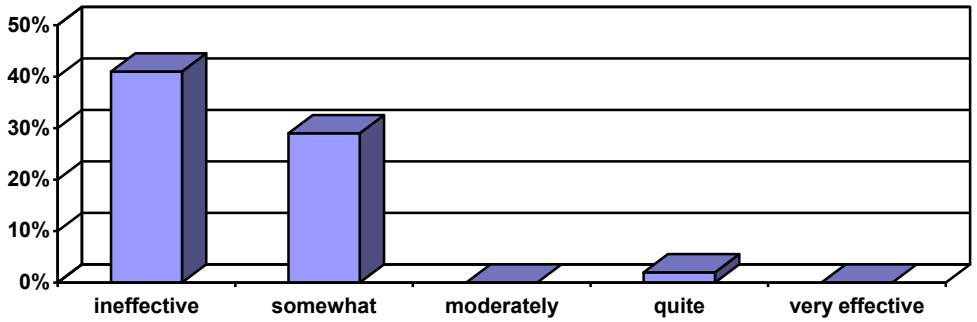
Note: Percentages do not total 100% due to rounding.



(c) Family Justice Centre

- ineffective **(20/49 = 41%)**
- somewhat **(14/49 = 29%)**
- moderately **(0/49 = 0%)**
- quite **(1/49 = 2%)**
- very effective **(0/49 = 0%)**
- no response **(14/49 = 28%)** (not included in graph below)

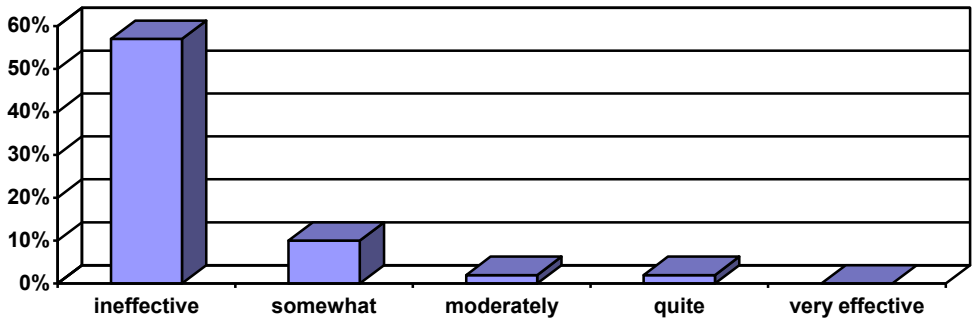
Note: Percentages do not total 100% due to rounding.



(d) parenting after separation

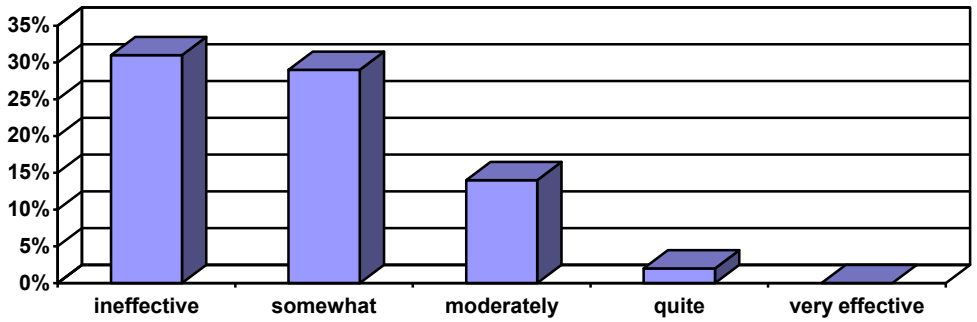
- ineffective **(28/49 = 57%)**
- somewhat **(5/49 = 10%)**
- moderately **(1/49 = 2%)**
- quite **(1/49 = 2%)**
- very effective **(0/49 = 0%)**
- no response **(14/49 = 28%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



(e) counseling

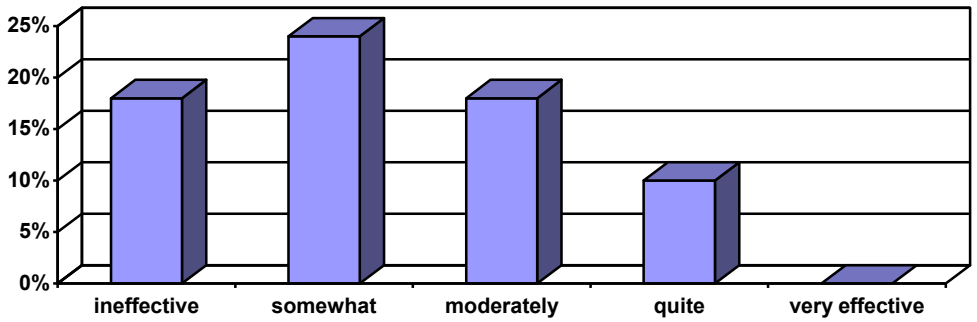
- ineffective **(15/49 = 31%)**
- somewhat **(14/49 = 29%)**
- moderately **(7/49 = 14%)**
- quite **(1/49 = 2%)**
- very effective **(0/49 = 0%)**
- no response **(12/49 = 24%)** (not included in graph below)



(f) private mediation

- ineffective **(9/49 = 18%)**
- somewhat **(12/49 = 24%)**
- moderately **(9/49 = 18%)**
- quite **(5/49 = 10%)**
- very effective **(0/49 = 0%)**
- no response **(14/49 = 28%)** (not included in graph below)

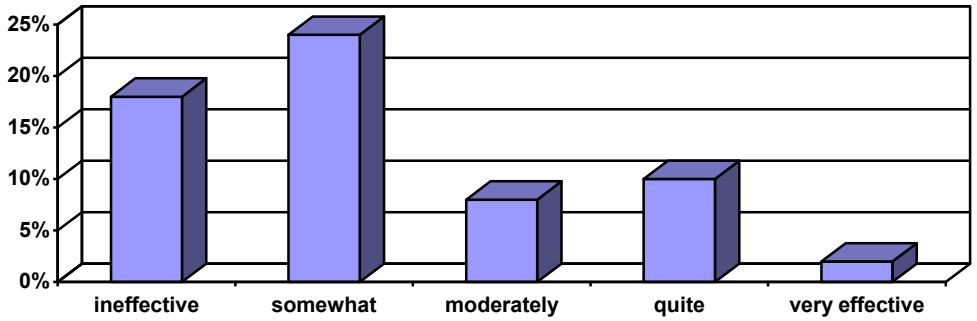
Note: Percentages do not total 100% due to rounding.



(g) collaborative practice

- ineffective **(9/49 = 18%)**
- somewhat **(12/49 = 24%)**
- moderately **(4/49 = 8%)**
- quite **(5/49 = 10%)**
- very effective **(1/49 = 2%)**
- no response **(18/49 = 36%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.

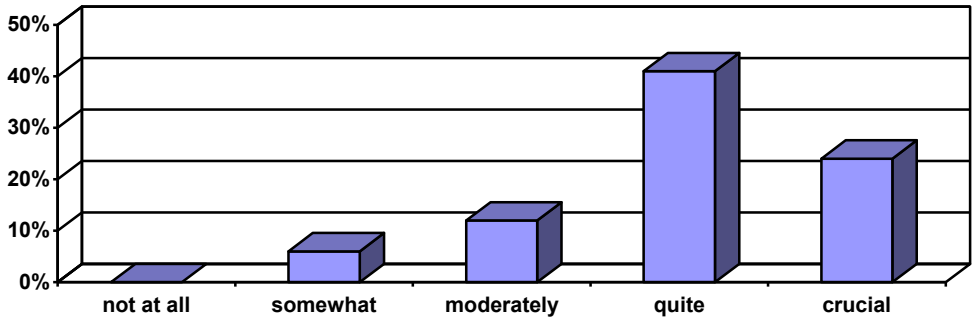


9. Rate how important the following elements are in addressing access disputes:

(a) speed

- not at all **(0/49 = 0%)**
- somewhat **(3/49 = 6%)**
- moderately **(6/49 = 12%)**
- quite **(20/49 = 41%)**
- crucial **(12/49 = 24%)**
- no response **(8/49 = 16%)** (not included in graph below)

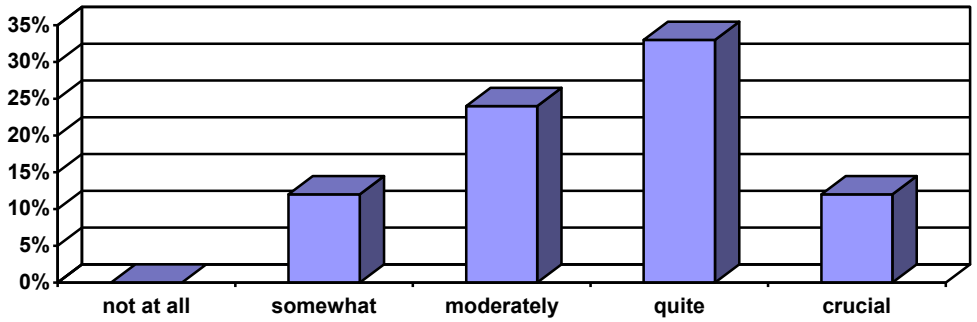
Note: Percentages do not total 100% due to rounding.



(b) cost

- not at all **(0/49 = 0%)**
- somewhat **(6/49 = 12%)**
- moderately **(12/49 = 24%)**
- quite **(16/49 = 33%)**
- crucial **(6/49 = 12%)**
- no response **(9/49 = 18%)** (not included in graph below)

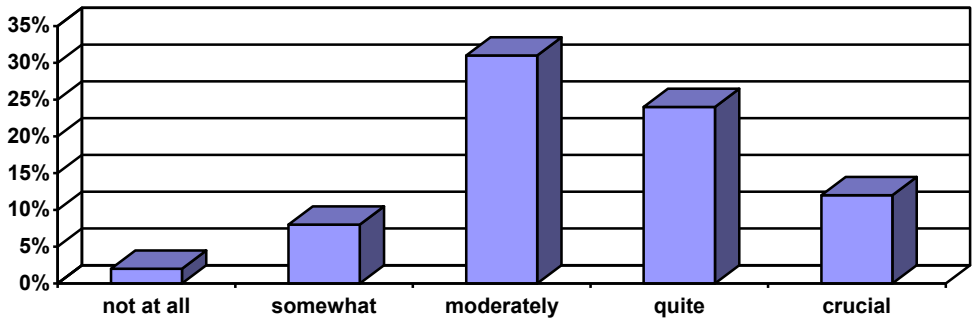
Note: Percentages do not total 100% due to rounding.



(c) ability to negotiate own solution

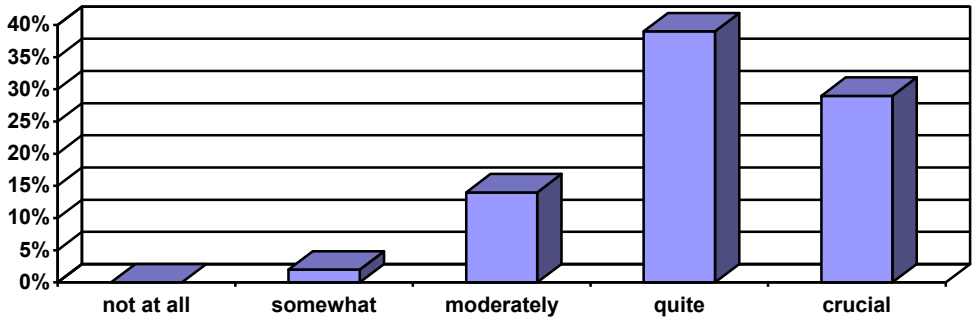
- not at all **(1/49 = 2%)**
- somewhat **(4/49 = 8%)**
- moderately **(15/49 = 31%)**
- quite **(12/49 = 24%)**
- crucial **(6/49 = 12%)**
- no response **(11/49 = 22%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



(d) ability to get a decision

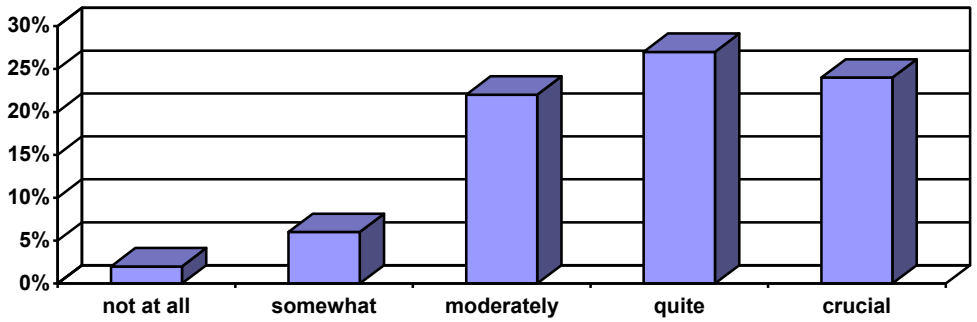
- not at all **(0/49 = 0%)**
- somewhat **(1/49 = 2%)**
- moderately **(7/49 = 14%)**
- quite **(19/49 = 39%)**
- crucial **(14/49 = 29%)**
- no response **(8/49 = 16%)** (not included in graph below)



(e) education about access norms (what works best for children at various ages)

- not at all **(1/49 = 2%)**
- somewhat **(3/49 = 6%)**
- moderately **(11/49 = 22%)**
- quite **(13/49 = 27%)**
- crucial **(12/49 = 24%)**
- no response **(9/49 = 18%)** (not included in graph below)

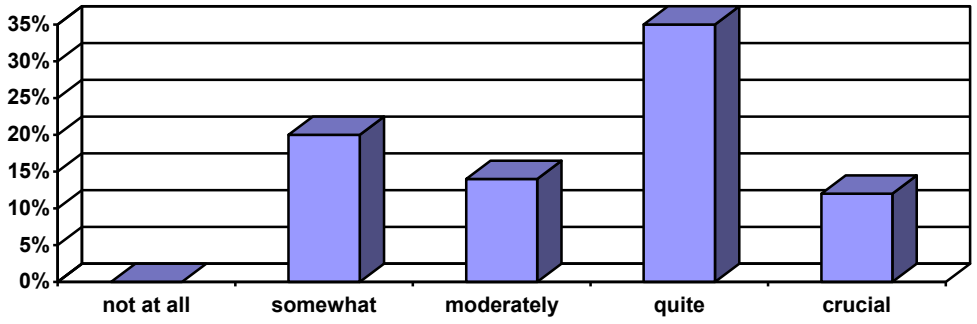
Note: Percentages do not total 100% due to rounding.



(f) feedback from the children (what they want; how they are effected by dispute)

- not at all **(0/49 = 0%)**
- somewhat **(10/49 = 20%)**
- moderately **(7/49 = 14%)**
- quite **(17/49 = 35%)**
- crucial **(6/49 = 12%)**
- no response **(9/49 = 18%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



Comments:

In my experience, judges have very different biases concerning access - especially for younger children and fathers.

It is my view that the parties and the courts would benefit from a hearing from experienced child psychologists about what parenting regimes are best for children at various ages.

Many clients complain about the cost of getting the access order in the first place only to have to return to court to deal with frustration of access.

Experienced Family Court Judges, Masters and experienced S.C. Justices at FCCs and JCC can accomplish a great deal and gently pressure parties to be reasonable

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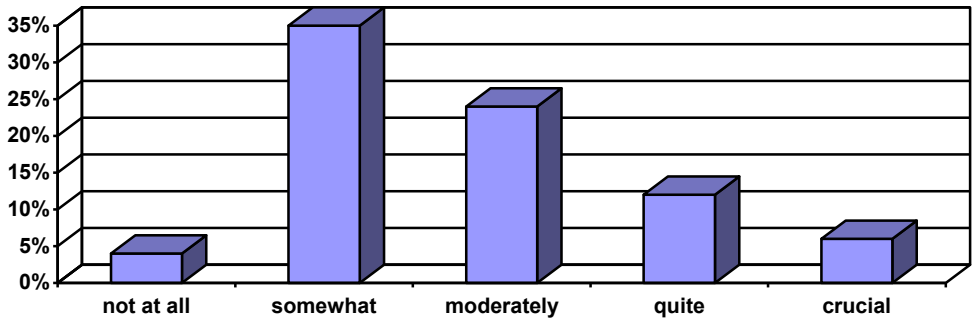
Possible Remedies

10. If the court had the ability to impose the following, how effective would they be in preventing access disputes:

(a) education about the effect on children (PAS)?

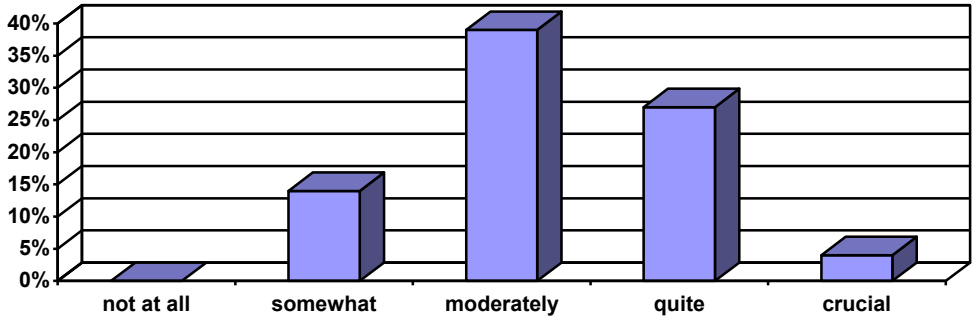
- not at all **(2/49 = 4%)**
- somewhat **(17/49 = 35%)**
- moderately **(12/49 = 24%)**
- quite **(6/49 = 12%)**
- crucial **(3/49 = 6%)**
- no response **(9/49 = 18%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



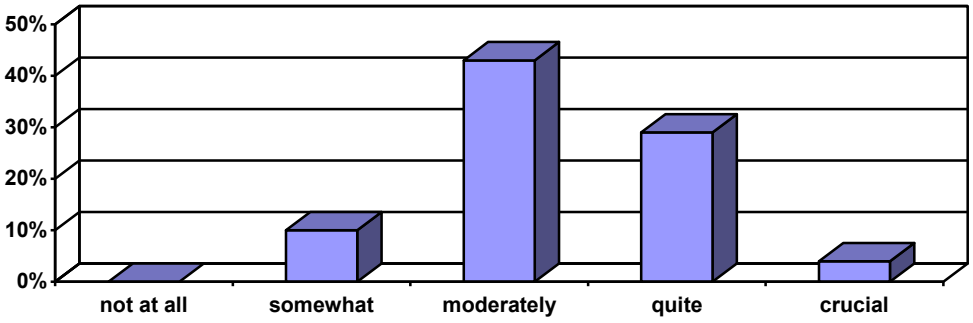
(b) education about access norms (parenting time guidelines)?

- not at all **(0/49 = 0%)**
- somewhat **(7/49 = 14%)**
- moderately **(19/49 = 39%)**
- quite **(13/49 = 27%)**
- crucial **(2/49 = 4%)**
- no response **(8/49 = 16%)** (not included in graph below)



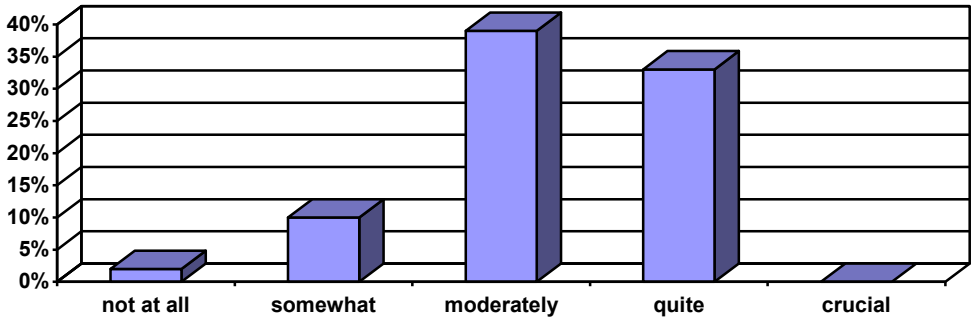
(c) model orders/parenting plans?

- not at all **(0/49 = 0%)**
- somewhat **(5/49 = 10%)**
- moderately **(21/49 = 43%)**
- quite **(14/49 = 29%)**
- crucial **(2/49 = 4%)**
- no response **(7/49 = 14%)** (not included in graph below)



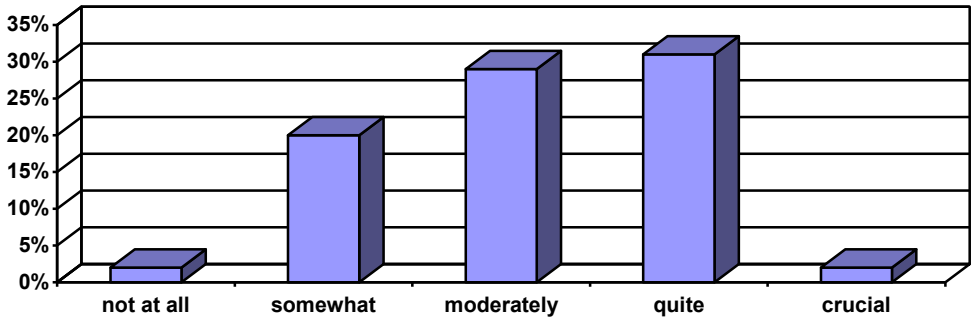
(d) mediation?

- not at all **(1/49 = 2%)**
- somewhat **(5/49 = 10%)**
- moderately **(19/49 = 39%)**
- quite **(16/49 = 33%)**
- crucial **(0/49 = 0%)**
- no response **(8/49 = 16%)** (not included in graph below)



(e) counseling to reduce friction or improve communications?

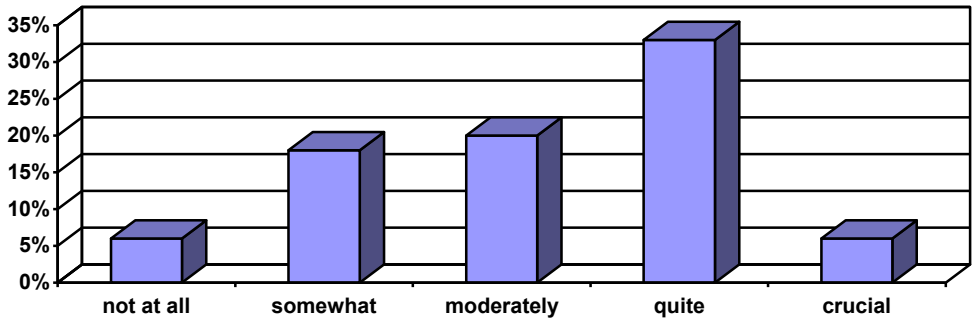
- not at all **(1/49 = 2%)**
- somewhat **(10/49 = 20%)**
- moderately **(14/49 = 29%)**
- quite **(15/49 = 31%)**
- crucial **(1/49 = 2%)**
- no response **(8/49 = 16%)** (not included in graph below)



(f) counseling to address alleged deficiencies (substance abuse; anger management; parenting or attachment issues; etc.)?

- not at all **(3/49 = 6%)**
- somewhat **(9/49 = 18%)**
- moderately **(10/49 = 20%)**
- quite **(16/49 = 33%)**
- crucial **(3/49 = 6%)**
- no response **(8/49 = 16%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



Comments:

Many parents going through a separation are remarkably ill-informed about which parenting regimes best meet the needs of their children.

Many access disputes are informed by underlying and permanent issues such as personality disorders, history of spousal violence and substance abuse.

The more options and tools the better but contested hearings have to be preserved for difficult cases.

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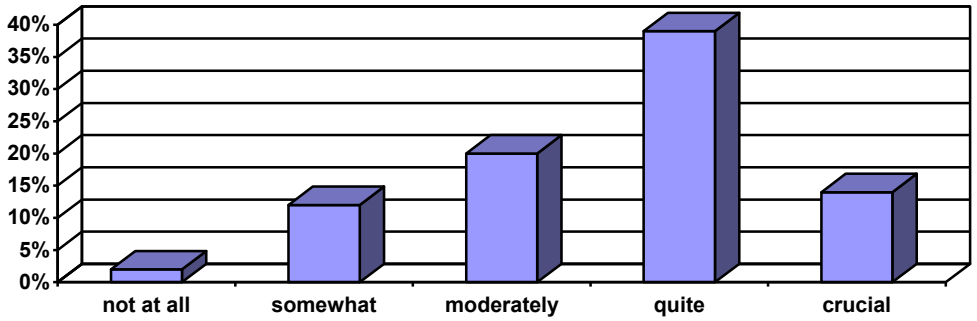
11. If the court had the ability to impose the following, how effective would they be in resolving access disputes:

(a) fast-track hearing (i.e. similar to a show cause hearing)?

- not at all **(1/49 = 2%)**
- somewhat **(6/49 = 12%)**
- moderately **(10/49 = 20%)**
- quite **(19/49 = 39%)**
- crucial **(7/49 = 14%)**
- no response **(6/49 = 12%)** (not included in graph below)

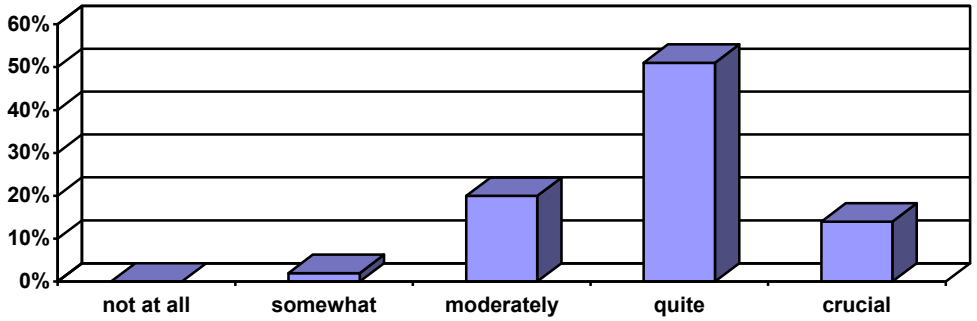
Note: Percentages do not total 100% due to rounding.



(b) fast-track case conference?

- not at all **(0/49 = 0%)**
- somewhat **(1/49 = 2%)**
- moderately **(10/49 = 20%)**
- quite **(25/49 = 51%)**
- crucial **(7/49 = 14%)**
- no response **(6/49 = 12%)** (not included in graph below)

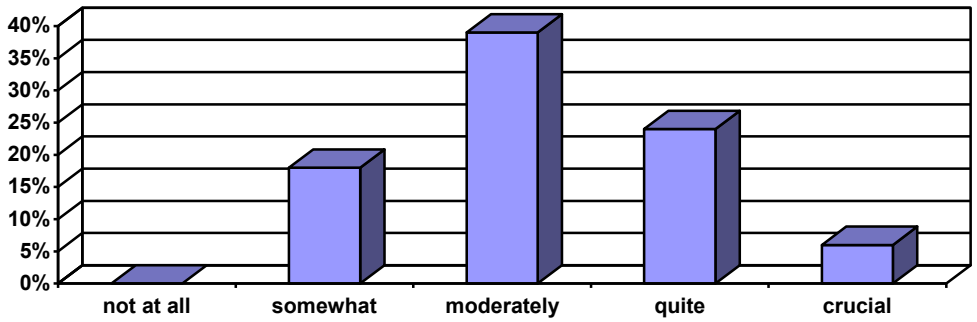
Note: Percentages do not total 100% due to rounding.



(c) mediation?

- not at all **(0/49 = 0%)**
- somewhat **(9/49 = 18%)**
- moderately **(19/49 = 39%)**
- quite **(12/49 = 24%)**
- crucial **(3/49 = 6%)**
- no response **(6/49 = 12%)** (not included in graph below)

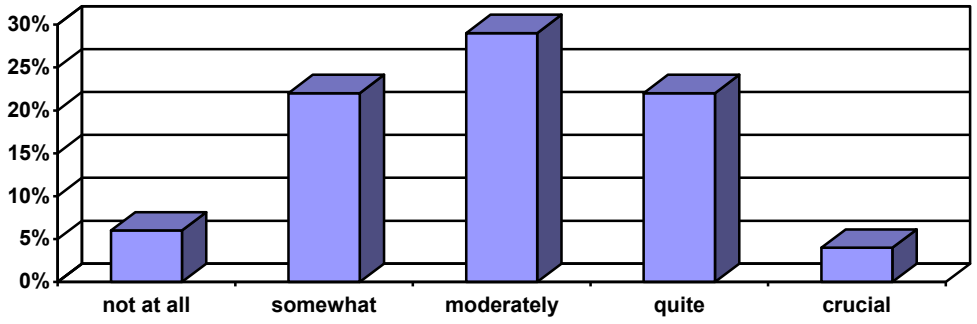
Note: Percentages do not total 100% due to rounding.



(d) counseling for offender?

- not at all **(3/49 = 6%)**
- somewhat **(11/49 = 22%)**
- moderately **(14/49 = 29%)**
- quite **(11/49 = 22%)**
- crucial **(2/49 = 4%)**
- no response **(8/49 = 16%)** (not included in graph below)

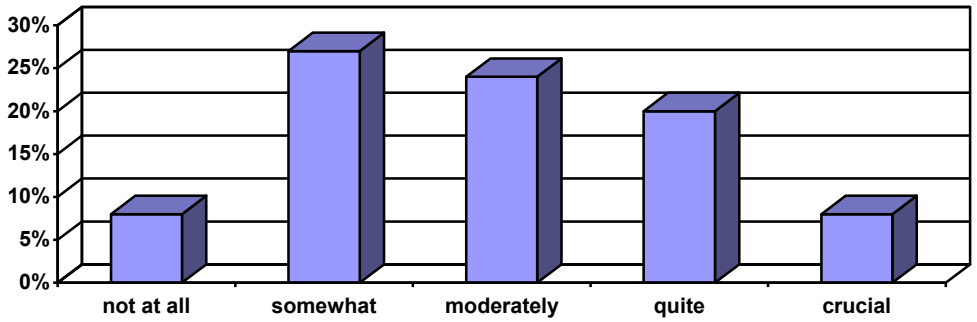
Note: Percentages do not total 100% due to rounding.



(e) counseling for child?

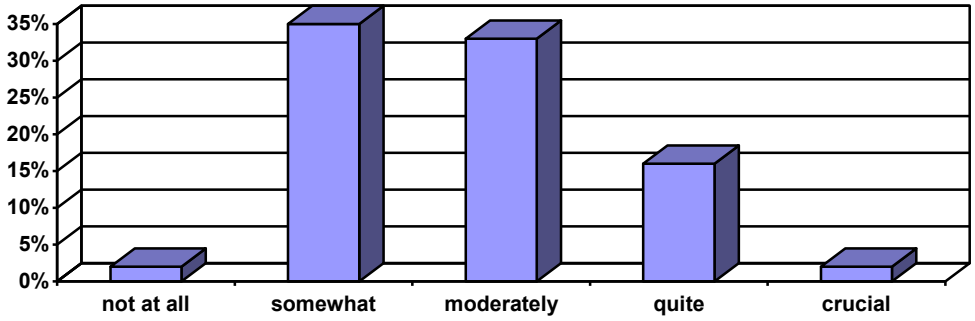
- not at all **(4/49 = 8%)**
- somewhat **(13/49 = 27%)**
- moderately **(12/49 = 24%)**
- quite **(10/49 = 20%)**
- crucial **(4/49 = 8%)**
- no response **(6/49 = 12%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



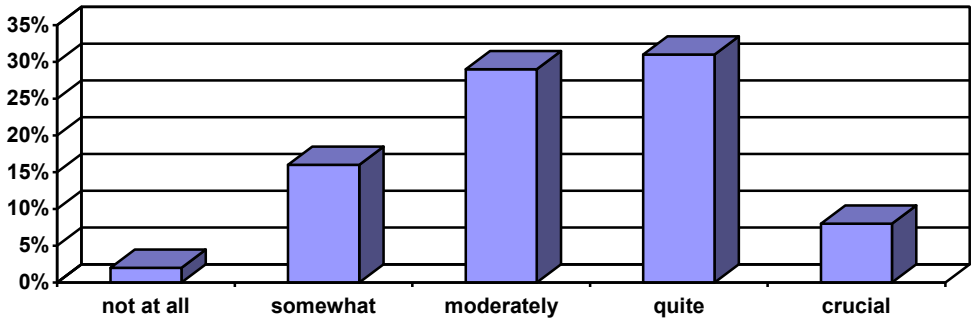
(f) full custody and/or access report?

- not at all **(1/49 = 2%)**
- somewhat **(17/49 = 35%)**
- moderately **(16/49 = 33%)**
- quite **(8/49 = 16%)**
- crucial **(1/49 = 2%)**
- no response **(6/49 = 12%)** (not included in graph below)



(g) shorter, more expedited, feedback from child (interview or views-of-child report)?

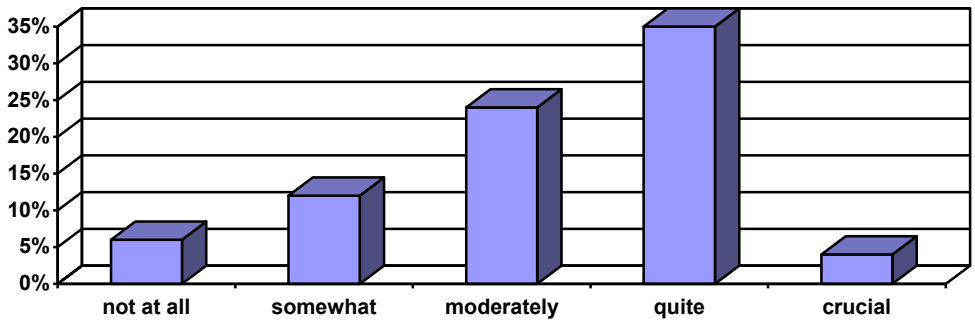
- not at all **(1/49 = 2%)**
- somewhat **(8/49 = 16%)**
- moderately **(14/49 = 29%)**
- quite **(15/49 = 31%)**
- crucial **(4/49 = 8%)**
- no response **(7/49 = 14%)** (not included in graph below)



(h) parenting coordinators?

- not at all **(3/49 = 6%)**
- somewhat **(6/49 = 12%)**
- moderately **(12/49 = 24%)**
- quite **(17/49 = 35%)**
- crucial **(2/49 = 4%)**
- no response **(9/49 = 18%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



Comments:

Parents going through separation are often hostile towards the other parent. They have a hard time separating their own need (for separation) from those of their children. They may have an overly negative view of the other parent, which may affect how they approach parenting. For example, a stay at home parent may unreasonably limit the working parent's access or the working parent may think the stay at home parent is no longer fit to care for the children. Such negativity often subsides with time but much damage can be done in the interval. Further, there is some inherent tension between the child's need for both continuity of primary care giving and maximum contact with both parents. These issues are best addressed by the parents with the firm help of a child psychologist and/or by a Judge who is well informed about what parenting arrangements are most appropriate for age of the children.

Section 15 reports either cost thousands of dollars, or take a year to complete. Neither is workable.

There needs to be better access to useful information and resources on parenting plans and access matters - mandatory mediation on a temporary basis could also be considered in this area.

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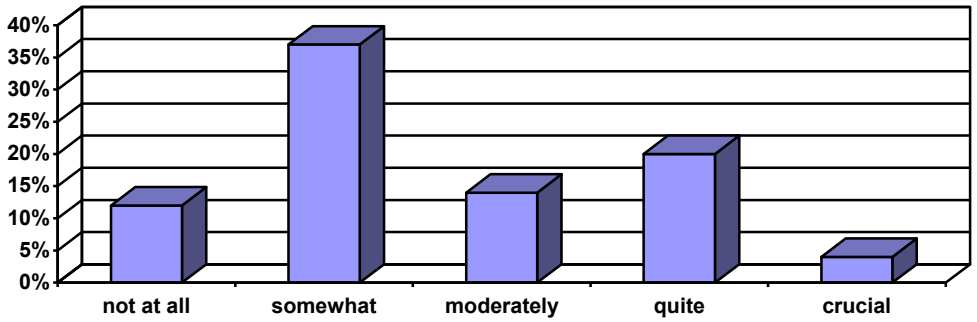
12. If the court had the ability to impose the following, how effective would they be in deterring access disputes:

(a) judicial admonishment?

- not at all **(6/49 = 12%)**
- somewhat **(18/49 = 37%)**
- moderately **(7/49 = 14%)**
- quite **(10/49 = 20%)**
- crucial **(2/49 = 4%)**
- no response **(6/49 = 12%)** (not included in graph below)

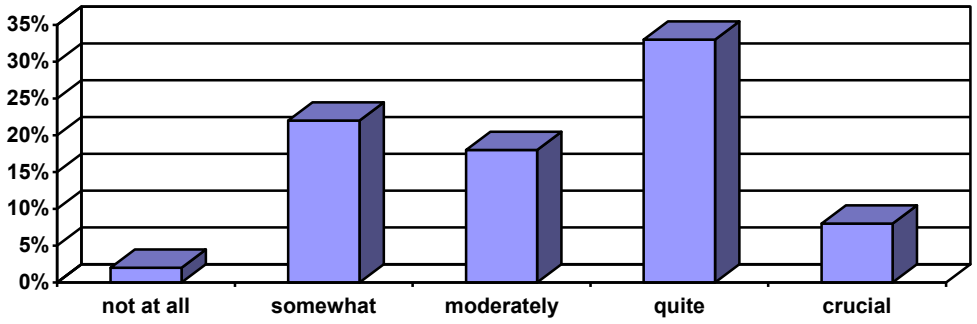
Note: Percentages do not total 100% due to rounding.



(b) make up time?

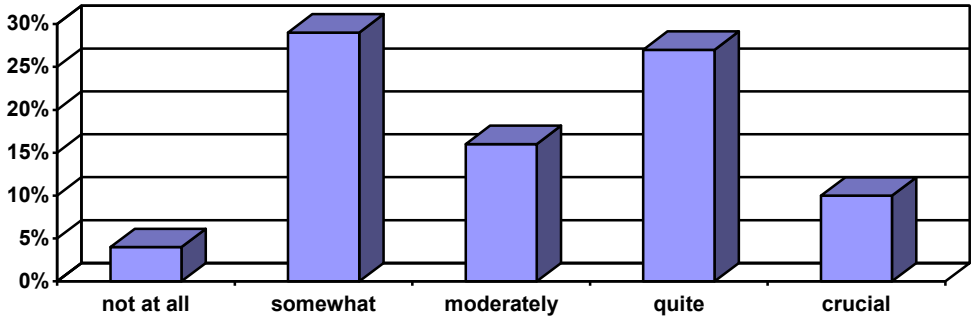
- not at all **(1/49 = 2%)**
- somewhat **(11/49 = 22%)**
- moderately **(9/49 = 18%)**
- quite **(16/49 = 33%)**
- crucial **(4/49 = 8%)**
- no response **(8/49 = 16%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



(c) order for costs?

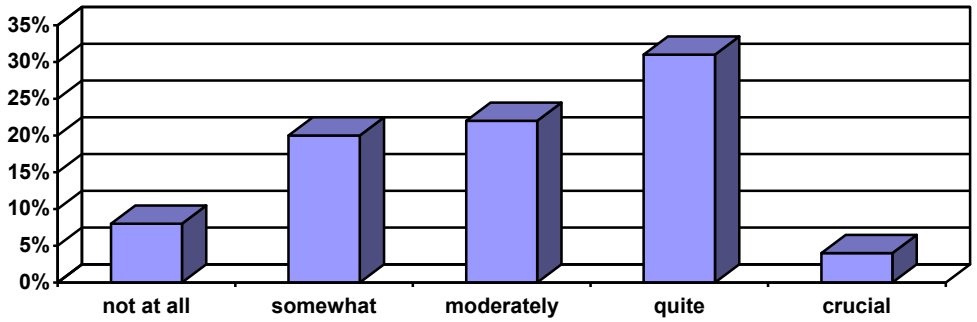
- not at all **(2/49 = 4%)**
- somewhat **(14/49 = 29%)**
- moderately **(8/49 = 16%)**
- quite **(13/49 = 27%)**
- crucial **(5/49 = 10%)**
- no response **(7/49 = 14%)** (not included in graph below)



(d) fines?

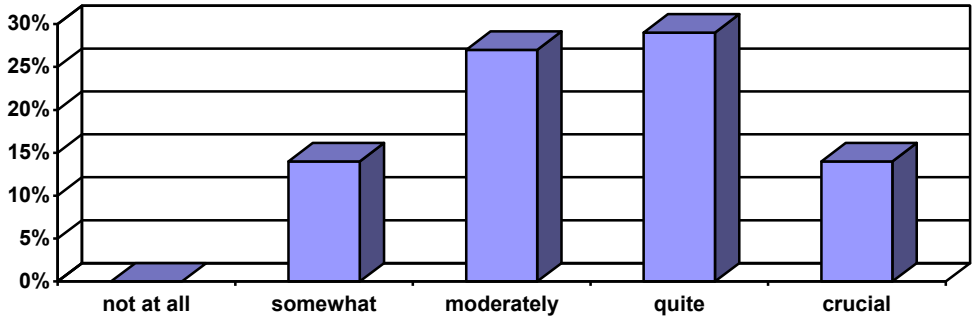
- not at all **(4/49 = 8%)**
- somewhat **(10/49 = 20%)**
- moderately **(11/49 = 22%)**
- quite **(15/49 = 31%)**
- crucial **(2/49 = 4%)**
- no response **(7/49 = 14%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



(e) reimbursement of expenses of access parent (cancelled visit or trip)?

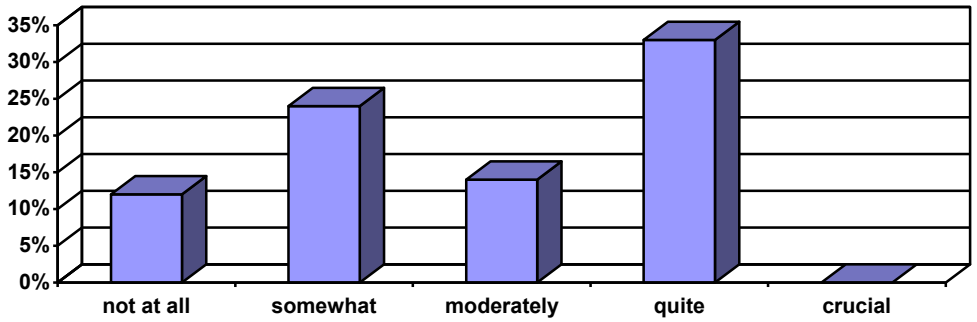
- not at all **(0/49 = 0%)**
- somewhat **(7/49 = 14%)**
- moderately **(13/49 = 27%)**
- quite **(14/49 = 29%)**
- crucial **(7/49 = 14%)**
- no response **(8/49 = 16%)** (not included in graph below)



(f) bond or surety?

- not at all **(6/49 = 12%)**
- somewhat **(12/49 = 24%)**
- moderately **(7/49 = 14%)**
- quite **(16/49 = 33%)**
- crucial **(0/49 = 0%)**
- no response **(8/49 = 16%)** (not included in graph below)

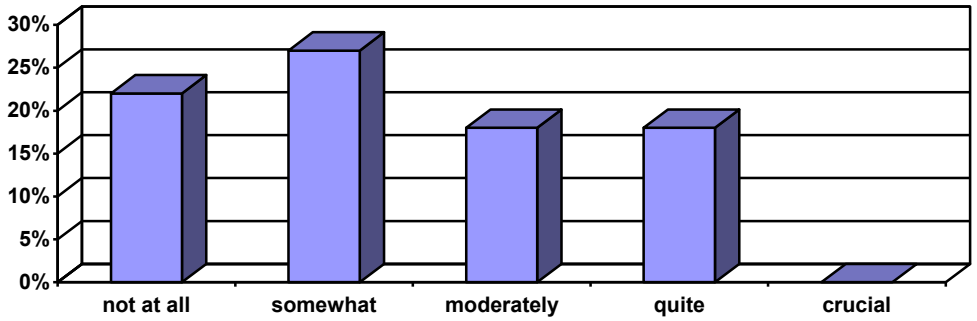
Note: Percentages do not total 100% due to rounding.



(g) community or unpaid service?

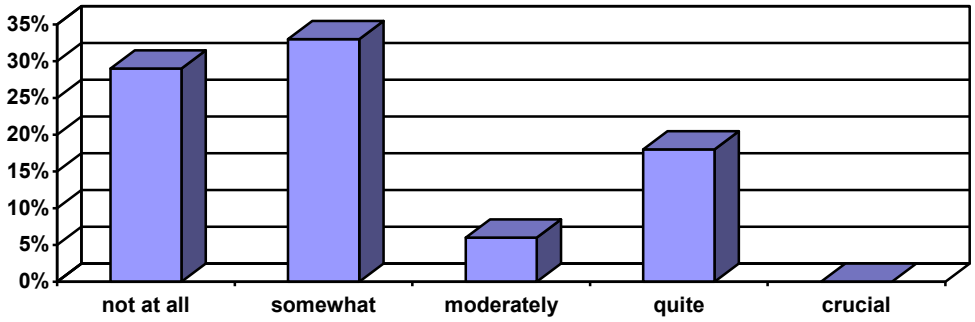
- not at all **(11/49 = 22%)**
- somewhat **(13/49 = 27%)**
- moderately **(9/49 = 18%)**
- quite **(9/49 = 18%)**
- crucial **(0/49 = 0%)**
- no response **(7/49 = 14%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



(h) imprisonment?

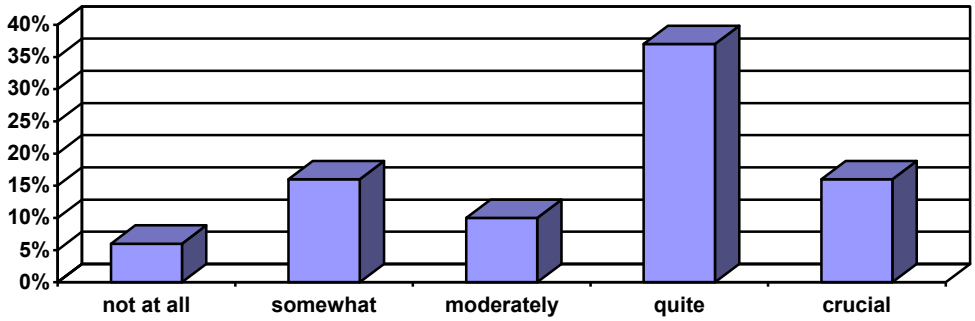
- not at all **(14/49 = 29%)**
- somewhat **(16/49 = 33%)**
- moderately **(3/49 = 6%)**
- quite **(9/49 = 18%)**
- crucial **(0/49 = 0%)**
- no response **(7/49 = 14%)** (not included in graph below)



(i) loss of custody?

- not at all **(3/49 = 6%)**
- somewhat **(8/49 = 16%)**
- moderately **(5/49 = 10%)**
- quite **(18/49 = 37%)**
- crucial **(8/49 = 16%)**
- no response **(7/49 = 14%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



Comments:

The challenge with the monetary punishments is that it presumes a person has money to pay. Many single parents do not.

The above may be appropriate only where it is crystal clear that a parent is consistently and unreasonably denying access. The problem is that access problems arise mainly where there is high conflict between the parents and both are responsible for it. The above remedies may simply be new weapons which are used to escalate the dispute rather than resolve the problem.

Many of my answers above denote my opinion about how ineffective being punitive can become in the long run and how that may affect the child's well-being.

Financial sanctions only work if the parties have the funds in the first place.

I am not adequately informed to comment, but I am hesitant to use economic sanctions in situations where one parents may already be under economic strain.

Why I think that loss of custody would be effective, I don't think that it should ever be employed. That is visiting the parent's behaviour on a child.

Denial of access needs to be spelled out better and the tremendous psychological and emotional damage it can cause for children and in fact on parents

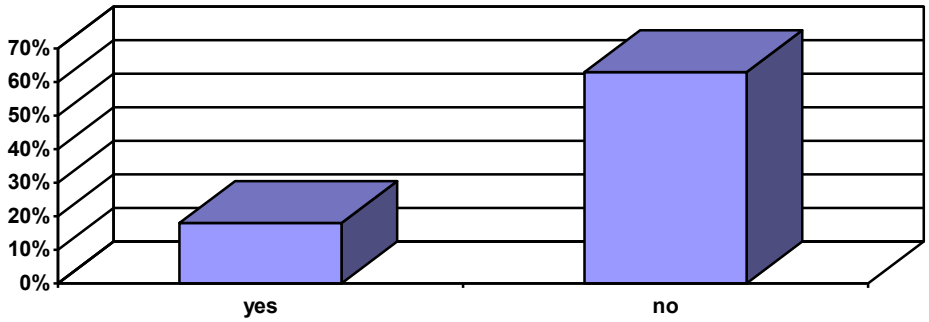
---

I strongly disagree with imprisonment, fines or like for addressing access problems. Such judicial action would only cause more conflict and distrust with the Court system.

---

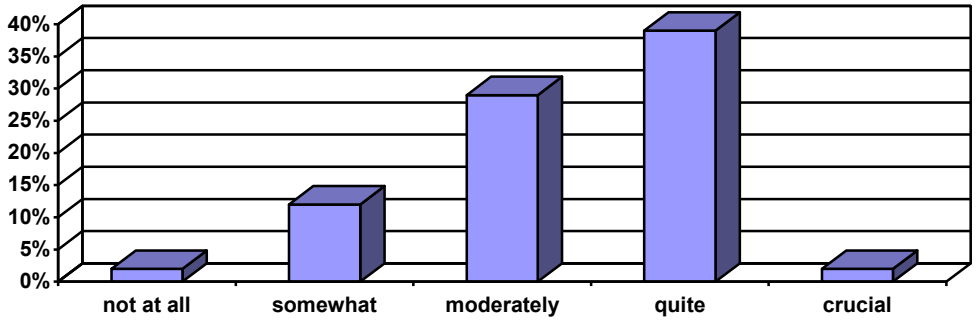
13. Do you think parties take enough time or care in crafting initial access orders or agreements?
    - yes **(9/49 = 18%)**
    - no **(31/49 = 63%)**
    - no response **(9/49 = 18%)** (not included in graph below)

    Note: Percentages do not total 100% due to rounding.



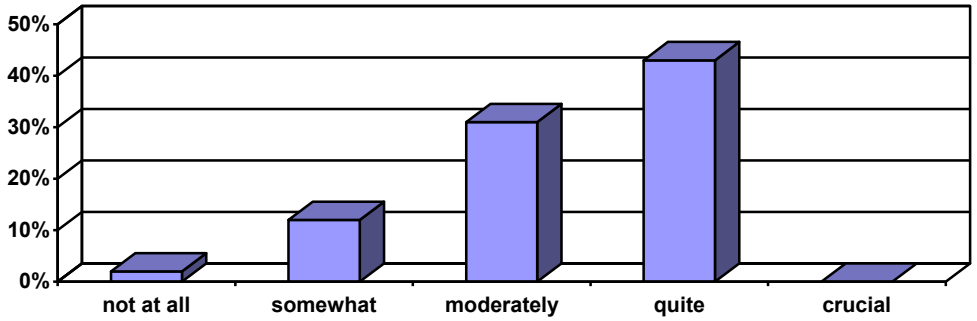
14. If not, how effective would the following be in addressing this problem:

    (a) model orders or parenting plans?
    - not at all **(1/49 = 2%)**
    - somewhat **(6/49 = 12%)**
    - moderately **(14/49 = 29%)**
    - quite **(19/49 = 39%)**
    - crucial **(1/49 = 2%)**
    - no response **(8/49 = 16%)** (not included in graph below)



(b) parenting time guidelines?

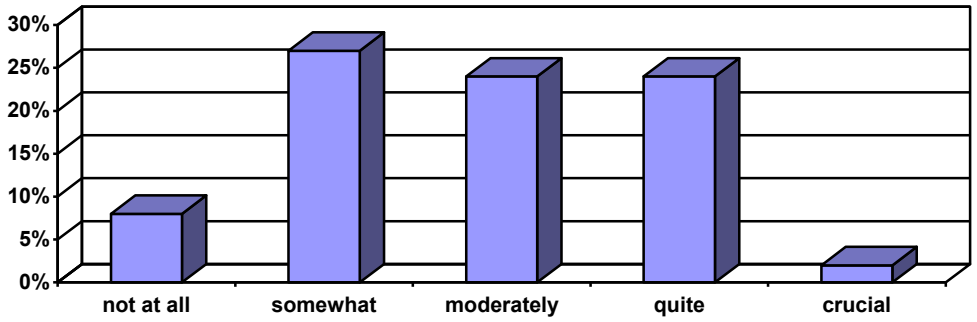
- not at all **(1/49 = 2%)**
- somewhat **(6/49 = 12%)**
- moderately **(15/49 = 31%)**
- quite **(21/49 = 43%)**
- crucial **(0/49 = 0%)**
- no response **(6/49 = 12%)** (not included in graph below)



(c) mandatory legal advice?

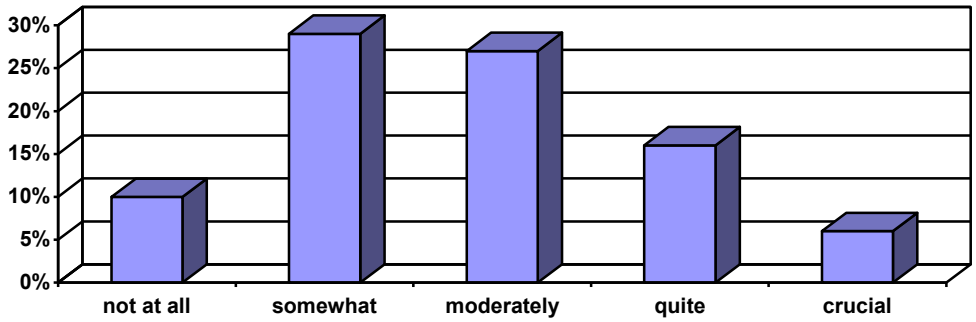
- not at all **(4/49 = 8%)**
- somewhat **(13/49 = 27%)**
- moderately **(12/49 = 24%)**
- quite **(12/49 = 24%)**
- crucial **(1/49 = 2%)**
- no response **(7/49 = 14%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



(d) mandatory legal education (PAS or FJC)?

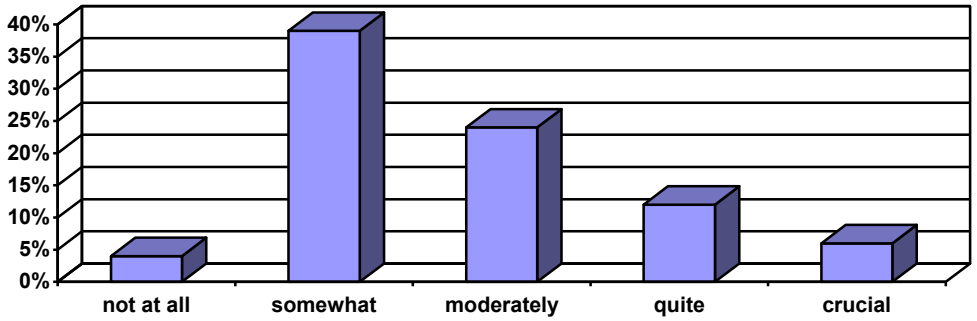
- not at all **(5/49 = 10%)**
- somewhat **(14/49 = 29%)**
- moderately **(13/49 = 27%)**
- quite **(8/49 = 16%)**
- crucial **(3/49 = 6%)**
- no response **(6/49 = 12%)** (not included in graph below)



(e) judicial warning or caution (i.e. These are serious matters, and you must consider them carefully. These are terms you will have to live with, and there can be significant consequences if they turn out to be impractical, or if they are not followed)?

- not at all **(2/49 = 4%)**
- somewhat **(19/49 = 39%)**
- moderately **(12/49 = 24%)**
- quite **(6/49 = 12%)**
- crucial **(3/49 = 6%)**
- no response **(7/49 = 14%)** (not included in graph below)

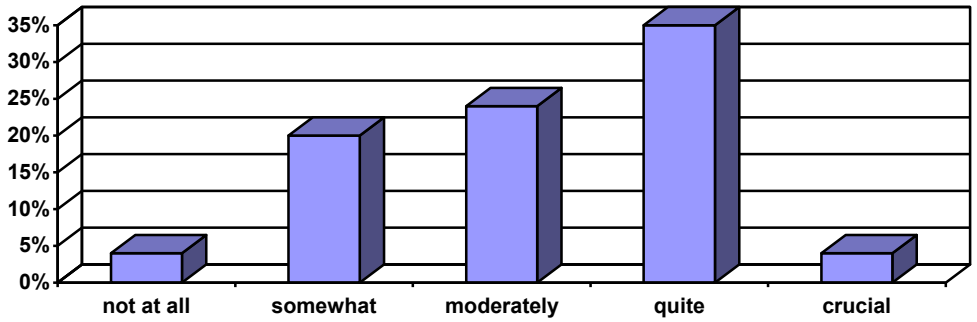
Note: Percentages do not total 100% due to rounding.



(f) mandatory case conference, with judge?

- not at all **(2/49 = 4%)**
- somewhat **(10/49 = 20%)**
- moderately **(12/49 = 24%)**
- quite **(17/49 = 35%)**
- crucial **(2/49 = 4%)**
- no response **(6/49 = 12%)** (not included in graph below)

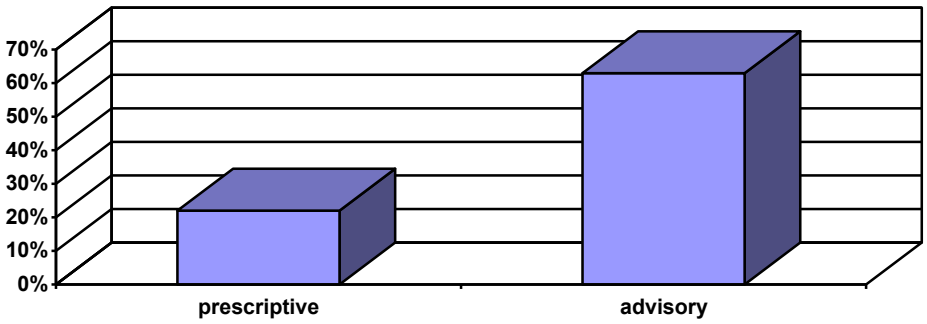
Note: Percentages do not total 100% due to rounding.



15. If model orders, parenting plans, and/or parenting time guidelines are used, should they be

- prescriptive (i.e. default: this will be the order unless you show why not) or **(11/49 = 22%)**
- advisory (i.e. these are the issues a well-crafted order or agreement should address)? **(31/49 = 63%)**
- no response **(7/49 = 14%)** (not included in graph below)

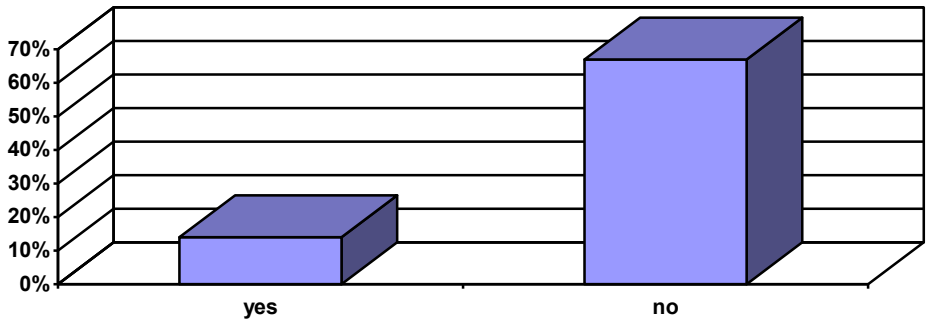
Note: Percentages do not total 100% due to rounding.



16. Have you ever used, or heard of anyone using s. 128 of the FRA?

- yes **(7/49 = 14%)**
- no **(33/49 = 67%)**
- no response **(9/49 = 18%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



Comments:

Section 128 is ineffective.

Many years ago and it related more to no contact than access

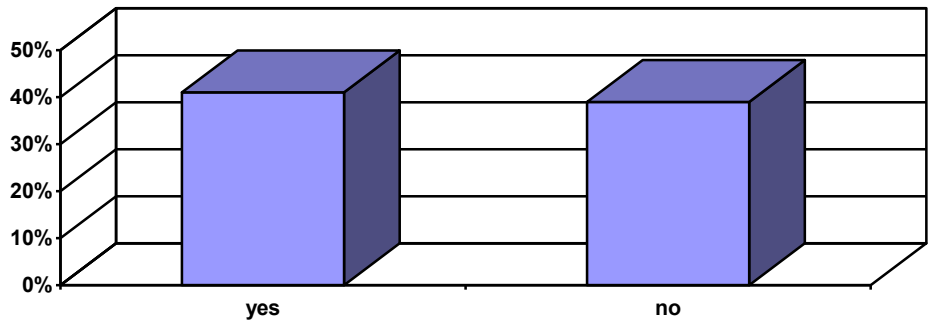
I tried to use section 128 - and no one - including the courts, wanted to assist or could assist in using that section or the section under the Offence Act.

Parents must "buy in".

---

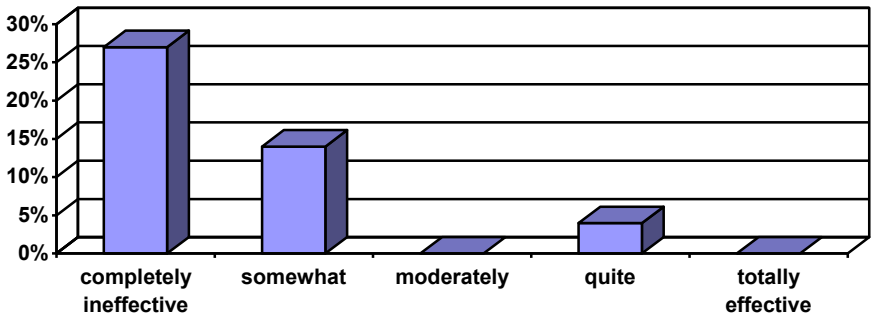
17. Have you used Rule 56 (contempt) to enforce access?

- yes **(20/49 = 41%)**
- no **(19/49 = 39%)**
- no response **(10/49 = 20%)** (not included in graph below)



18. If so, how effective was it in resolving the problem?

- completely ineffective **(13/49 = 27%)**
- somewhat **(7/49 = 14%)**
- moderately **(0/49 = 0%)**
- quite **(2/49 = 4%)**
- totally effective **(0/49 = 0%)**
- no response **(27/49 = 55%)** (not included in graph below)



Comments:

The Courts consistently shy away from punishing a parent who breaches access orders. Why, is a mystery to me. Those intent on thumbing their noses, are admonished and continue on with their conduct.

Contempt of Court is very expensive, complicated and generally ineffective.

Court not prepared to impose punishment for contempt.

Too much reluctance in the court's to use this remedy.

I find contempt applications in family law generally completely ineffective.

Rule 56: contempt order: almost an impossible order to obtain.

Expensive pain

Chapter 7: Additional Comments

Some of your questions are not properly framed and should be re-done especially the percentage ones.

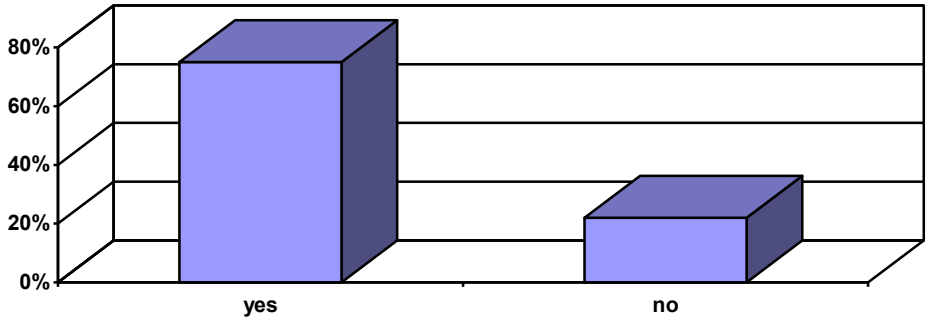
Chapter 8 – Children's Participation

Views of the Child

19. Should the FRA be amended to require that the court consider a child's views when making decisions about custody, guardianship or access, providing that the child is able to express and wants to express his or her views?

- yes **(52/68 = 76%)**
- no **(15/68 = 22%)**
- no response **(1/68 = 1%)** (not included in graph below)

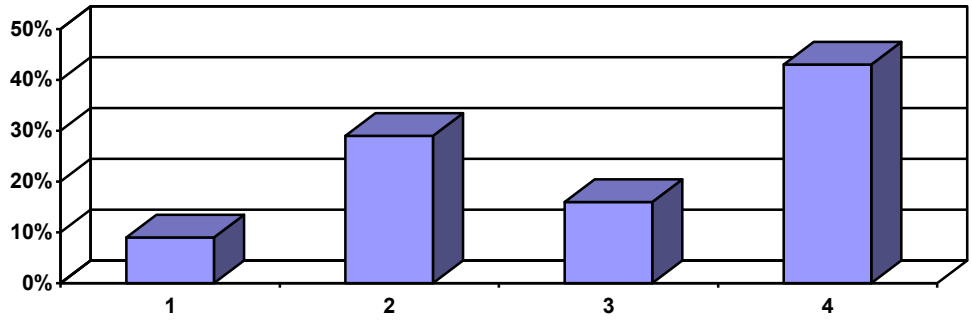
Note: Percentages do not total 100% due to rounding.



20. If consideration of children's views was mandatory but subject to the child's ability to express them, how should the child's "ability" be determined?

1. with "ability" presumed by a fixed age, subject to proof of inability **(6/68 = 9%)**
2. with "ability" presumed by a fixed age, subject to proof of inability *or* proof of ability for younger children **(20/68 = 29%)**
3. subjectively, without reference to age, based on the emotional and intellectual maturity of the particular child **(11/68 = 16%)**
4. subjectively, without reference to a *minimum* age, but with a rebuttable presumption of ability at a specific age **(29/68 = 43%)**
5. no response **(2/68 = 2%)** (not included in graph below)

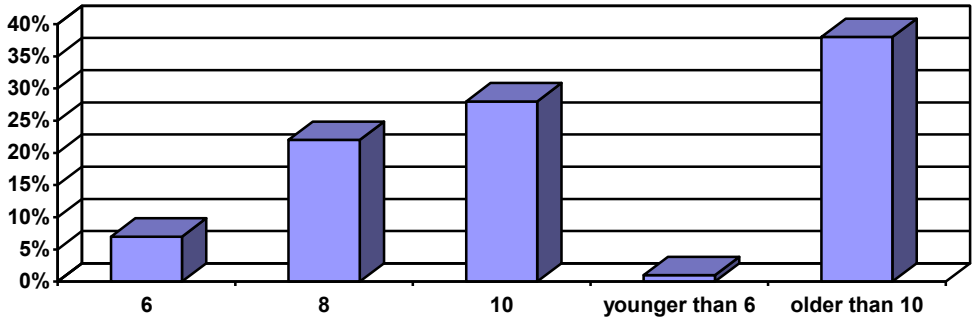
Note: Percentages do not total 100% due to rounding.



21. If presumptions of "ability" were to be based on the child's age, what should the threshold age be?

- 6 **(5/68 = 7%)**
- 8 **(15/68 = 22%)**
- 10 **(19/68 = 28%)**
- younger than 6 **(1/68 = 1%)**
- older than 10 **(26/68 = 38%)**
- no response **(2/68 = 2%)** (not included in graph below)

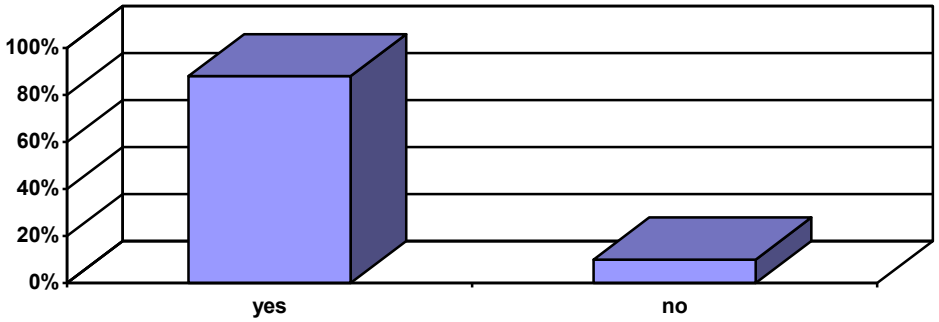
Note: Percentages do not total 100% due to rounding.



22. Should the FRA be amended to give the court a discretionary power to interview children to determine their views?

- yes **(60/68 = 88%)**
- no **(7/68 = 10%)**
- no response **(1/68 = 1%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



Comments:

I do not think you need to amend the Act just to give the court the power to interview children. The court already has that power. Nevertheless, if various methods of ascertaining a child's views were spelled out in the Act, including an interview by the court, courts might be more inclined to do interviews where appropriate. At present, I think practice in this area is very varied.

The cost of getting the children‘s views in a matter is very prohibitive. There needs to be a simplified process as the children often have very strong views about access and the parent with day to day care is left in a position of not being able to express the children's views because it is suspect and hearsay and not having the funds to allow an independent investigation.

Children has a difficult enough time in family breakdown without having the fear of being seen as favouring a parent or requesting access to a parent contrary to the other parent. My view is that children should be consulted only where one parent is seeking to remove or limit the other parent's access to less than 50%. This consultation should be used to determine whether there is any reason from a safety perspective to deny the child's interest in being parented by both parents.

I'd like to see a child advocate, experienced in interviewing children, determine the children's views.

Section 15 reports take far too long to generate, often up to 8-10 months at present, due to lack of funding for adequate resources/staff numbers at FJC level - unless funding is greatly enhanced, s. 15 reports generally cannot fulfill any legislated requirement for child consultation

---

There should be direction as to when this discretionary power is to be implemented

---

This should be only for older children.

With strict guidelines of when and when it is not appropriate to do so- make it a last resort.

None of that is required, the court already has the ability to interview children, it should not be promoted because of the pressure it puts on the child. As one who has acted for children on many occasions, in my experience, children who want to make their preferences known will, but most do not want to be put in that position.

Courts can consider child's view now. What the system needs is more Family Justice Counsellors, and Family Advocates, not more rules and legislation!

Where parents consent, children's views should be canvassed by an independent party (not the judge). As well, where the court deems it necessary (based on issues put forward by the parties), it should have the discretion to order a child be interviewed. If Views of the Child reports were done on consistent basis, then it should not be necessary for the judge him/her self be take on the role of child interviewer.

However, the views of the child should always be looked at in the context of the possibility that a parent or other person may influence the child and it should be the court's job to canvass that possibility. For this to happen, the judiciary must receive effective training on these matters. The manner this power is to be exercised by the courts of most importance if the law is to protect children's interests. After all, we all have our own biases.

The more tools the better.

#3: age 12

Yes to # 4, if the answer to #1 is no.

The UN Convention

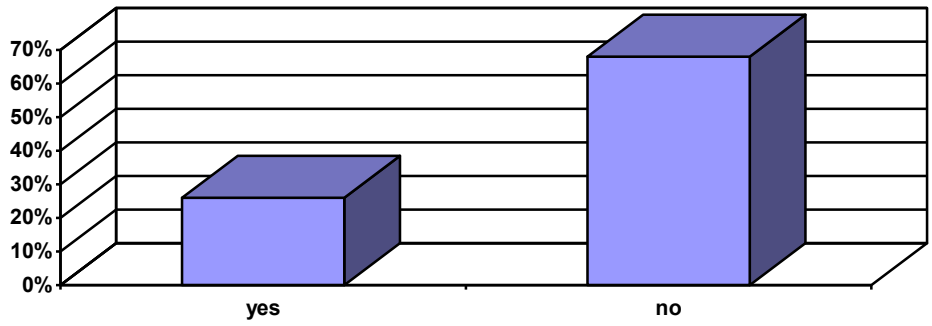
23. Art. 12, UN Convention on the Rights of the Child – to which Canada is a signatory – provides that:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Does s. 24 of the FRA adequately capture British Columbia's obligation under art. 12 of the UN Convention?

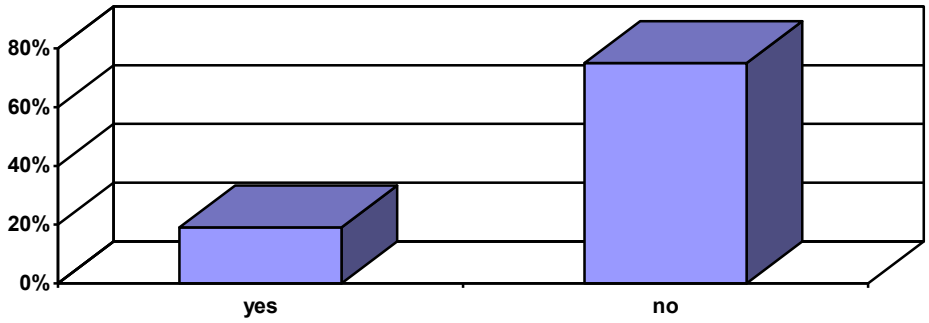
- yes **(18/68 = 26%)**
- no **(46/68 = 68%)**
- no response **(4/68 = 5%**) (not included in graph below)

Note: Percentages do not total 100% due to rounding.



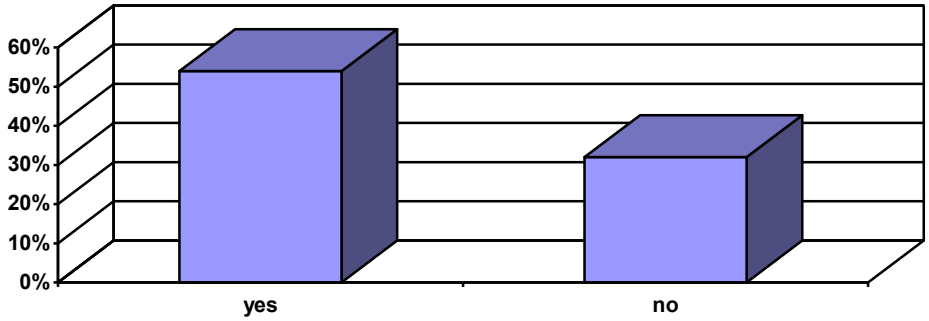
24. Does the FRA, taken as a whole, capture British Columbia's obligation under the UN Convention?
    - yes **(13/68 = 19%)**
    - no **(51/68 = 75%)**
    - no response **(4/68 = 5%)** (not included in graph below)

    Note: Percentages do not total 100% due to rounding.



25. Would the FRA capture British Columbia's obligation if funding were restored to the family advocate program referenced at s. 2 of the FRA?
    - yes **(37/68 = 54%)**
    - no **(22/68 = 32%)**
    - no response **(9/68 = 13%)** (not included in graph below)

    Note: Percentages do not total 100% due to rounding.



Comments:

The family advocate is an expensive way to address the issue. I think we can do as or more effective a job through other means -- like judicial interviews, duty counsel interviews (with training), having family justice counsellors in court for on the spot interviews, that sort of thing. Legal aid might extend referrals for limited scope representation of children, or duty counsel services. Full time representation is expensive and, in most cases, overkill.

Funding for child advocates was always tight, even when the program was in place. The program should certainly be reinstated, but on its own cannot cope with the sheer volume of demand for such services.

It would depend on if certain children would be excluded under the advocate program -- what would the criteria for eligibility be? If only high-conflict, then my answer is no.

The family advocate program would assist but is not adequate on its own.

See comments above

I have not been involved in family law long enough to know how the family advocate program worked.

---

7 - don't know

The current FRA wording might be acceptable if family advocates could be available in all cases where it was deemed necessary or appropriate to hear the child (especially 8-16). But funding may prohibit its widespread availability (as was my experience in the past when the family advocate was available). The better way would be to amend the FRA to make it mandatory that a child's views be considered in all cases affecting their custody or access (right now it is not automatic). As well, the Kelowna pilot project is optional; the parties must agree to have their children interviewed. In all court cases, the Views of the Child report should be mandatory.

BC is in breach of art. 12 and has been since the cuts to child advocates.

Would be well on its way to meeting its obligation

Restoration of funding for the family advocate would be beneficial, but it still does not make it mandatory for the court to consider the child's views as is provided for in the UN Convention.

Funding is only one part of it though.

It would be wonderful if we could get the family advocate position back

---

It would be a good step.

Section 24 of the FRA is permissive rather than mandatory, as provided in the UN Convention. As to #7, while the family advocate program played a significant role in making the views of the child known to the Court for the purposes of section 24, there has to be "stronger language" in s. 24 before the objectives of the Convention can be met.

The family advocate program was not effective. If it was, then my answer to #7 would be yes.

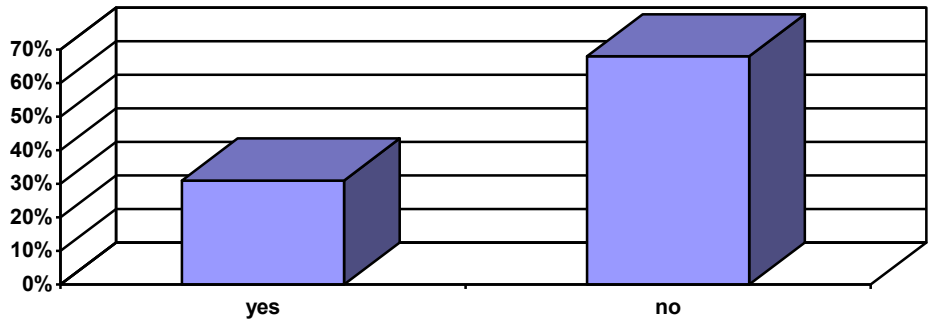
Answers to 6 & 7 is: really "maybe" as so much is judge dependent in custody access matters.

Without a government funded resource for Children (i.e. a lawyer to represent the child), it is unlikely that such a provision in the FRA would work. Section 15 reports provide this service now to a limited degree already, which could be considered falling under the FRA for the purpose of fulfilling the UN Convention.

Impact of Mature Children's Views

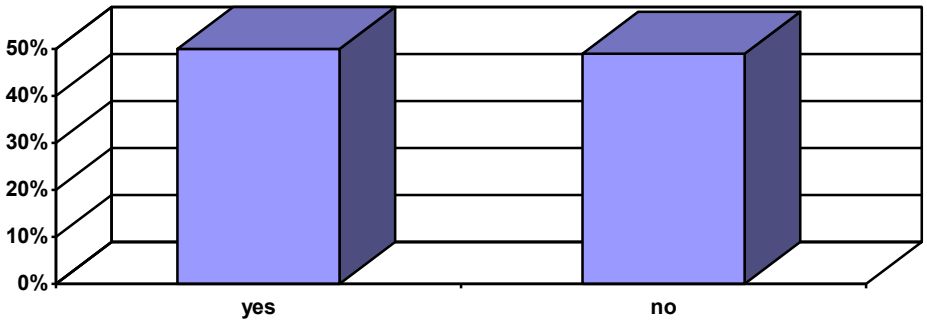
26. Should a child's views, on their own, ever be determinative of custody and access?

- yes **(21/68 = 31%)**
- no **(46/68 = 68%)**
- no response **(1/68 = 1%**) (not included in graph below)



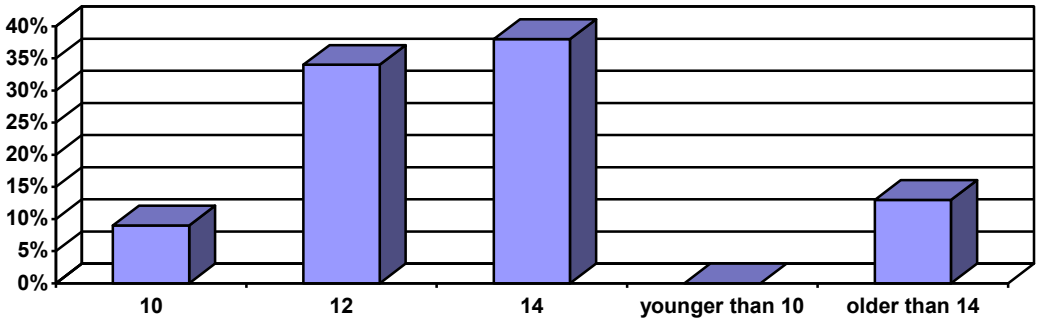
27. Should a child's views ever be presumptively determinative of custody and access, subject to proof that following the child's preferences would result in actual physical, mental or emotional harm to the child?

- yes **(34/68 = 50%)**
- no **(33/68 = 49%)**
- no response **(1/68 = 1%)** (not included in graph below)



28. If a child's views were to be partially or wholly determinative of custody and access by a particular age, what age is most appropriate?

- 10 **(6/68 = 9%)**
- 12 **(23/68 = 34%)**
- 14 **(26/68 = 38%)**
- younger than 10 **(0/68 = 0%)**
- older than 14 **(9/68 = 13%)**
- no response **(4/68 = 6%)** (not included in graph below)



Comments:

I think the weight of a child's views has to be commensurate with the maturity of the child, which can vary widely regardless of whichever age you choose.

Each case must be determined by the specific child. You can't set an age for all children

---

Not all children are developed cognitively to determine their own interests and apply the idea of continuity. Age must be commensurate with appropriate developmental stage. Teenagers will make decisions based primarily on self-centered concerns (e.g.: the most permissive parent) and not necessarily based on their long-term interests and developmental needs

---

10 is subject to determination of child's maturity, etc.

See above, any presumption puts too much pressure on the child, but if the child makes her/his wishes known they should be respected unless it‘s not in her /his best interests to do so.

All depends on the circumstances the FRA allows the court to do a lot(and Parens Patriae enhanced in Supreme Court).

The child's views should be heard but rarely determinative.

A report should be given due weight in accordance with the age and the child's intellectual and emotional maturity. Perhaps the 14 year old's views could be partially determinative of custody or access, subject to evidence that the child's maturity is suspect such that his or her views should not be relied upon in partial determination of the issues before the court.

We must be careful to ensure that the child does not become the sole decision maker as to custody and access, as this would obviously motivate parents to further coerce the child into taking a side.

Maturity of the child is the key.

There is a real danger in formally involving children in the court process. The danger is that each side will bring pressure to bear on the child to support one parent over the other. Children should not be made to feel responsible for whatever decision the Court makes.

There is much research to confirm the view that if the views of the child are determinative, that is most harmful to the child as it inevitably places the child in a conflict between both parents. Amendment to the FRA based upon positive responses to #8 and 9 would, in my view, be harmful. However, participation of the child in informal discussions/mediation, so that the views of the child can be heard, understood, and considered, is essential.

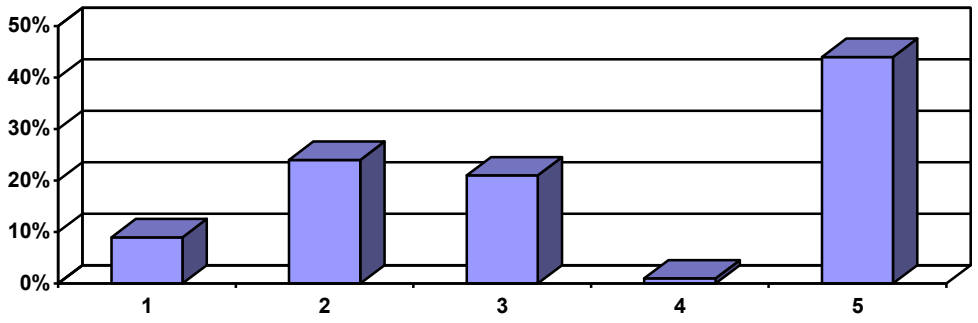
I don't think presumptions are particularly helpful in family law.

This is subject to maturity level.

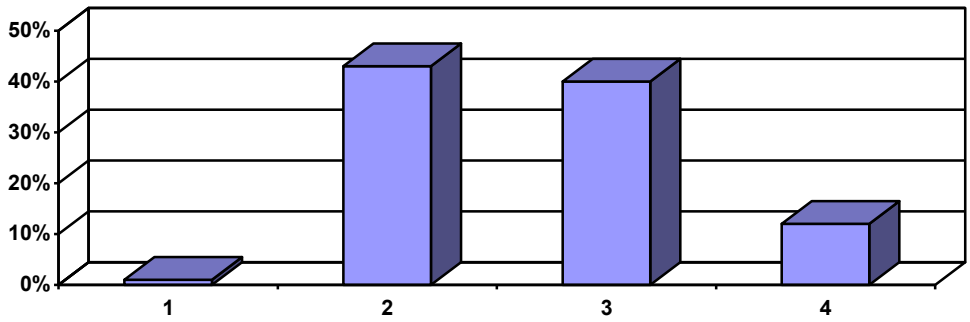
My kids also want chocolate cake for breakfast...

Ascertaining Children's Views

29. Should the filing of a claim for custody, guardianship or access trigger an automatic process to ascertain the views of the child?
    1. automatic process in all cases **(6/68 = 9%)**
    2. automatic process triggered when the child has reached a specific age **(16/68 = 24%)**
    3. process triggered at request of party **(14/68 = 21%)**
    4. process initiated by the court at a FCC or JCC but only with consent of parties **(1/68 = 1%)**
    5. process initiated by the court at a FCC or JCC at discretion of court, with or without parental consent **(30/68 = 44%)**
    6. no response **(1/68 = 1%)** (not included in graph below)



30. What should this process consist of?
    1. a fill-in-the-blanks form for the child **(1/68 = 1%)**
    2. a form completed by a family justice worker/lawyer/mental health professional during a structured interview with the child **(29/68 = 43%)**
    3. a report addressed to the court prepared by a legal or mental health professional following unstructured interview(s) with the child **(27/68 = 40%)**
    4. a full, detailed s. 15 report prepared under specific direction to gather and report on the child's views **(8/68 = 12%)**
    5. no response **(3/68 = 4%)** (not included in graph below)



Comments:

Question 11: I do not think this is an either-or proposition. There should be an automatic trigger, but there should ALSO be discretion for the court to order, whether requested by a party or on its own initiative -- and, I agree, the court should be allowed to make such an order even in a settlement-like setting such as a JCC or FCC. 12: Full reports are usually superfluous, and I hate forms. They usually get in the way of, rather than assist in identifying and addressing the real question -- no matter how thoughtfully they are drafted.

See above – section 15 reports begin at $5,000 and most parents simply cannot afford this.

The process needs to be as simple and least intimidating to a child as possible.

See above comments re: section 15 reports.

Whoever does the interview should conduct the interview based on knowledge of the child's developmental stage, and should not have access to detailed allegations by either party; the more complex the circumstances and needs, the greater the training required for the

professional. Of utmost concern is the ability to conduct these reports quickly. There should also be more than on interview with the child.

The second option is also feasible.

No, see above. No presumptions or automatic processes which drag the child into the parent‘s dispute.

Question 12 depends on the circumstances.

All options are not included in #12. The process should consist of a report addressed to the court, prepared by a legal or mental health professional following a structured interview with the child.

Notice to a child in a form received by process server seems daunting to me. Perhaps children should be involved earlier than the JCC and FCC, so that parents are on notice that the child's views will be required, alongside a mandatory mediation component -then the Views of the Child report could be fed into the mediation process - prior to seeing a judge. I do not like the idea of the Scottish Form F-9 (notice to child) - rather notice should be to the parents.

Appoint a child advocate is the best solution.

Questions do not have responses which make sense.

Need flexibility but there need to be safeguards.

All other suggestions could result in undue delay.

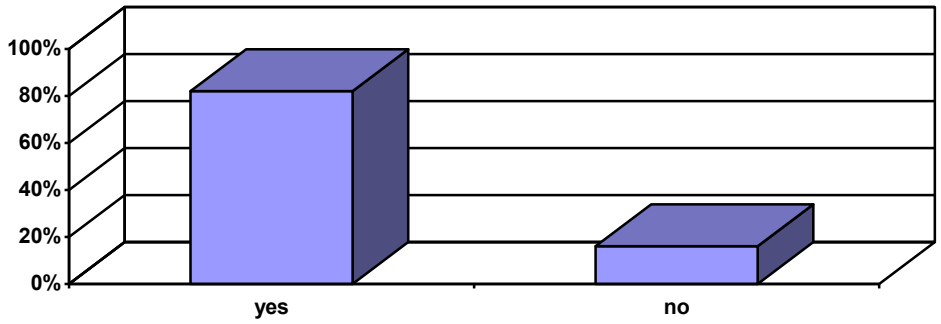
I don't know that a family justice counselor, etc. are qualified to assess or determine if the child's views are being manipulated.

Legal Representation

31. Would the appointment of counsel for children help ensure that the children's views are heard in custody, guardianship and access disputes?

- yes **(56/68 = 82%)**
- no **(11/68 = 16%)**
- no response **(1/68 = 1%)** (not included in graph below)

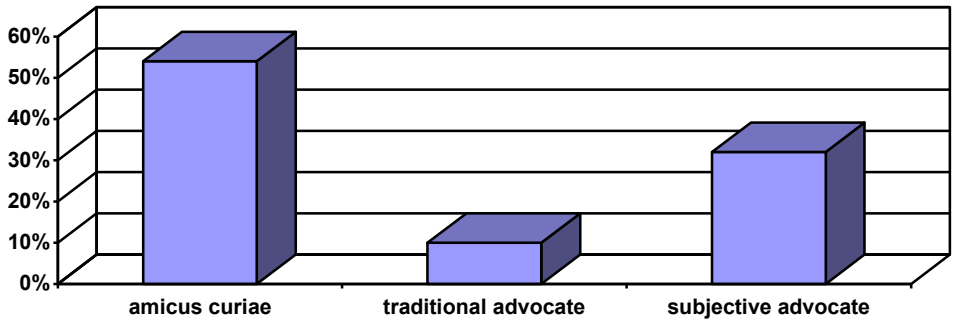
Note: Percentages do not total 100% due to rounding.



32. What role should children's counsel play?

- *amicus curiae*, neutral in the parents' dispute **(37/68 = 54%)**
- traditional advocate, arguing for the child's *preferences*, which may not align with the child's best interests **(7/68 = 10%)**
- subjective advocate, arguing for the child's *best interests*, which may not align with the child's preferences **(22/68 = 32%)**
- no response **(2/68 = 3%)** (not included in graph below)

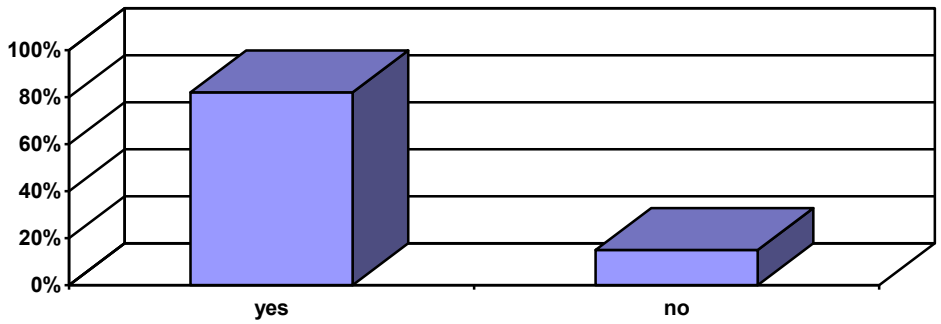
Note: Percentages do not total 100% due to rounding.



33. Should the FRA be amended to allow the court to allocate responsibility for the fees of children's counsel between parents?

- yes **(56/68 = 82%)**
- no **(10/68 = 15%)**
- no response **(2/68 = 3%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



Comments:

While child advocates can be helpful, they are enormously expensive, and should be appointed with caution. In appropriate cases, it would be very beneficial to have the parents pay -- nothing discourages bad behaviour like being beaten over the head with your own wallet.

Parents' fees are already problematic even without this additional burden.

Question 14-at times all of the above 15-be if you had a rich parent causing problems.

The notion of children's legal representation should make the parents think twice about litigating; but if they do litigate then they have to share the costs of the child's lawyer. As well, Australia's decision Re K. provides guidelines when a legal representative may be imperative: alleged abuse, intractable conflict between parents and alienation cases (and perhaps mental health issues, as in England). The child must be able to provide have sufficient understanding and intellectual maturity to be able to properly instruct his/her lawyer (i.e. 12 or older; younger in certain cases).

Public advocate should be available for this.

This has sufficient importance that it should be provided by the state just as counsel is a right under the Youth Criminal Justice Act

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Parents can't afford the court system anyway. My experience with child advocates is that they are not generally effective and increase the cost of litigation and prompt decisions being made.

Yes, but one must be mindful that most parents cannot afford legal fees let alone the fees of their child's advocate. There should be a fair system to determine the ability of a parent to contribute to the cost of the advocate. If the parents cannot afford it, there should be funding available to access the resources parents who have the financial means can access.

This last idea is terrific - it would help parties greatly in certain types of disputes.

The appointment of counsel would result in the direct involvement on the child(ren) in the dispute, which would not necessarily be in their best interest.

I would hope however that this would be limited to cases that are extreme and not simply throwing another lawyer into the mix.

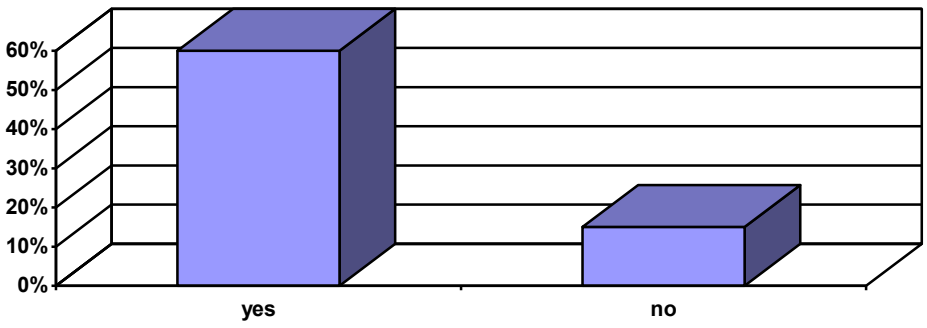
"Less Adversarial Hearings: The Children's Cases Model"

This section requires you to have read discussion point 8 of the discussion paper.

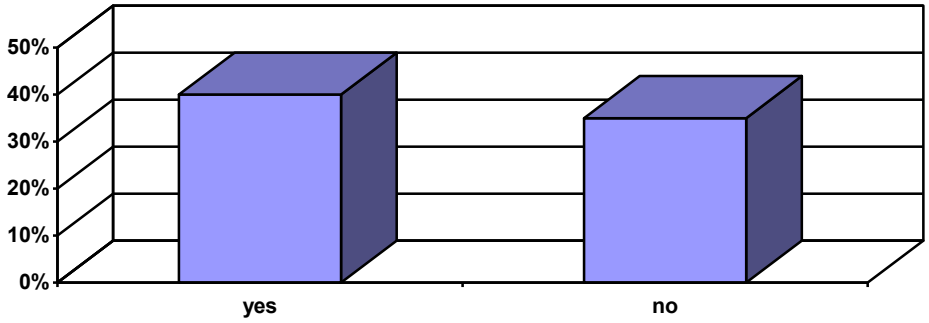
34. Would a less adversarial trial format for children's cases help to ensure that the children's views are heard in custody, guardianship and access disputes?

- yes **(41/68 = 60%)**
- no **(10/68 = 15%)**
- no response **(17/68 = 25%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.

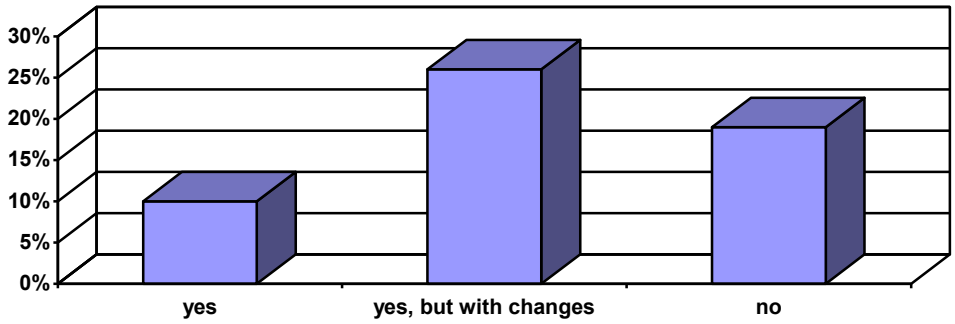


35. If such a change were made, should children participate more directly in the trial process?
    - yes **(27/68 = 40%)**
    - no **(24/68 = 35%)**
    - no response **(17/68 = 25%)** (not included in graph below)



36. Do you support the adoption of the Australian model in BC?
    - yes **(7/68 = 10%)**
    - yes, but with changes **(18/68 = 26%)**
    - no **(13/68 = 19%)**
    - no response **(30/68 = 44%)** (not included in graph below)

    Note: Percentages do not total 100% due to rounding.



Comments:

While I think the child's views should feature in any custody or access dispute, I am very leery of involving the child directly in the process -- no matter how "soft" or child-friendly that process might be. Perhaps in mediation. But court is a place where parties come for a decision. Sometimes the best thing a court can do is call it like they see it, and speak some hard truths to parents. That is not something children need to witness, or be party to. This, too, is my worry about the Australian model. To change behaviour (which is often what we hope to accomplish in family law) you need a combinations of incentives and disincentives. Mediation, PAS, FJC and legal information services are the carrot. Court is the stick. If we

make court too soft, it loses some of the stick. Finally, I am also leery of making family matters inquisitorial rather than adversarial. That is a huge philosophical shift for lawyers and judges, and I worry that we will lose some of our checks and balances. Experienced family judges can often get a good take on a problem in short order -- but they can sometimes get a completely wrong one, too. I would have more confidence in correcting the problem under our current system than trying to flag off a runaway judge in an inquisitorial environment. Having said all that, there is much from the Australian system we could readily adapt for use in our system -- like allowing (limited) orders at FCCs and JCCs, and being able to make interim orders in mid-hearing, where appropriate (limited, interim access orders; disclosure orders; yes, you can go the parent-teacher meeting, or the doctor's appointment; yes, you can go to Disneyland -- that kind of thing.

If a parenting dispute ends up in court these days then it‘s going to be adversarial, responsible parents avoid court, if one of them is personality-disordered then full court protection is required.

If I could have accessed #8 from this survey I would have read it and answered the questions.

The focus should be on making our justice system restorative, with mandatory mediation at the outset, Views of the Child at the outset, child inclusive mediation, and use of parenting coordinators (even before proceedings are commenced, not just post-order or agreement). Alongside these changes, the trial process should be changed from the traditional hearing format to make proceedings more child-focused and less party driven. The family mediator or parenting coordinator present to assist the parties throughout is a great idea - in a trial setting, the PC would not be able to arbitrate, but could "report" back to the court (at any time during the hearing that a judge sees an issue that could be resolved through mediation, or at the parties' initiation during proceedings).

I think judges are not mediators and they lack the skills possessed by a trained mediator. Most mediators used the interest based, non normative approach to dispute resolution. Judges tend to use the normative method and this is seen by the parties as another way by the courts to impose its view and disregard the parties' interests. So one must be careful how this is to be done. The Australian model says the Judge runs the show. The mediator should be doing it not the judge really. The Judge should be there only to monitor and assist in the judicial process.

I do not know what this is so I can't comment.

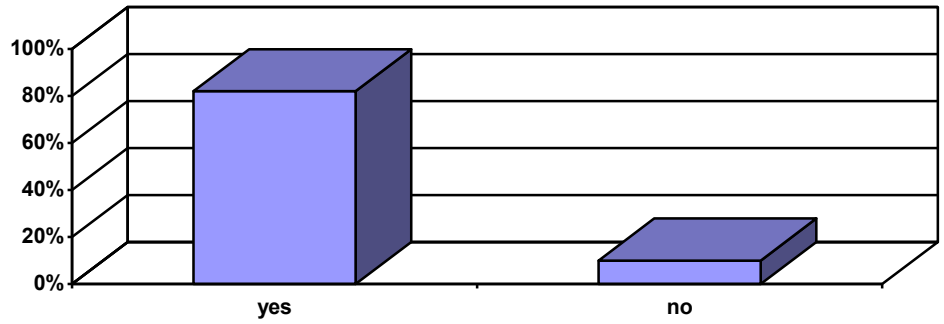
It looks very much like a JCC or FCC. High conflict families need to have orders in place quickly but also need an opportunity to have them reviewed if the judge has played a much more active role. Also, the judges would have to be very carefully selected and specialized in family law and children's matters.

Parenting Coordinators

37. Should the FRA be amended to give the court the power to appoint parenting coordinators for high-conflict families?

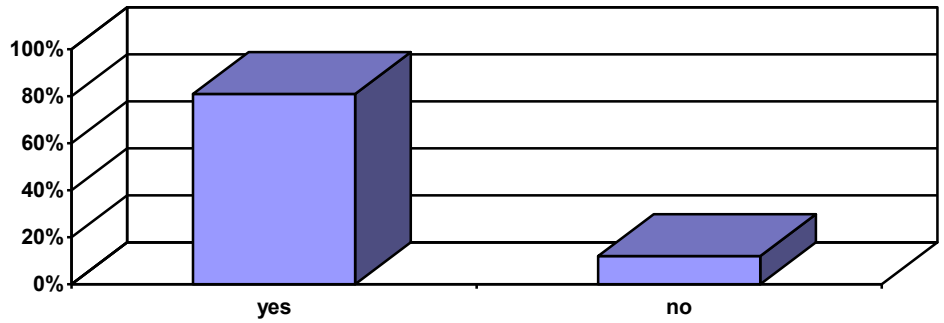
- yes **(56/68 = 82%)**
- no **(7/68 = 10%)**
- no response **(5/68 = 7%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



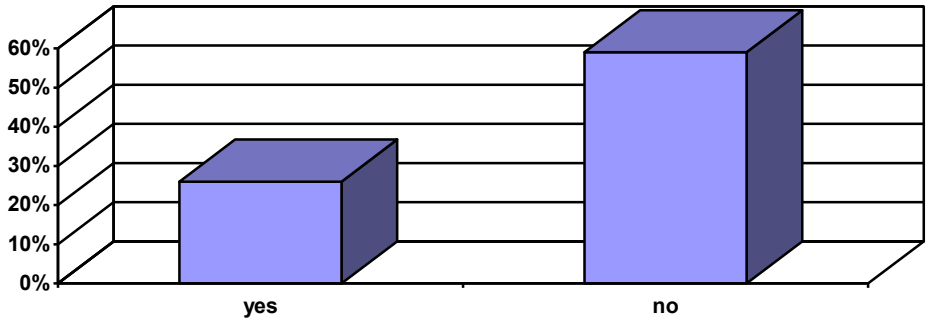
38. Should parenting coordinators appointed by the FRA be directed or authorized to interview children?

- yes **(55/68 = 81%)**
- no **(8/68 = 12%)**
- no response **(5/68 = 7%)** (not included in graph below)



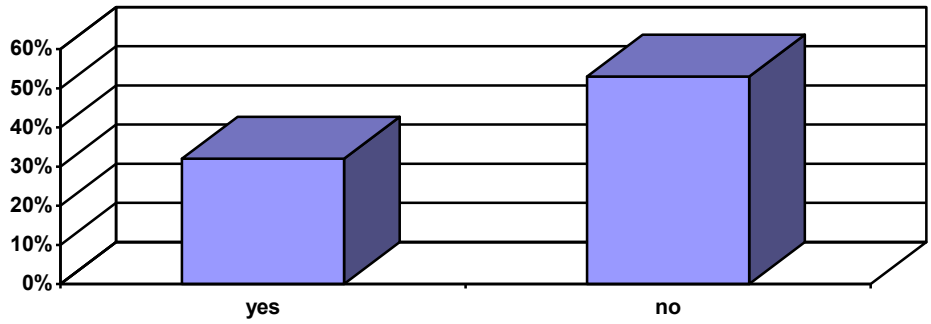
39. Should parenting coordinators require the consent of the child to access otherwise confidential records concerning the child?

- yes **(18/68 = 26%)**
- no **(40/68 = 59%)**
- no response **(10/68 = 15%)** (not included in graph below)



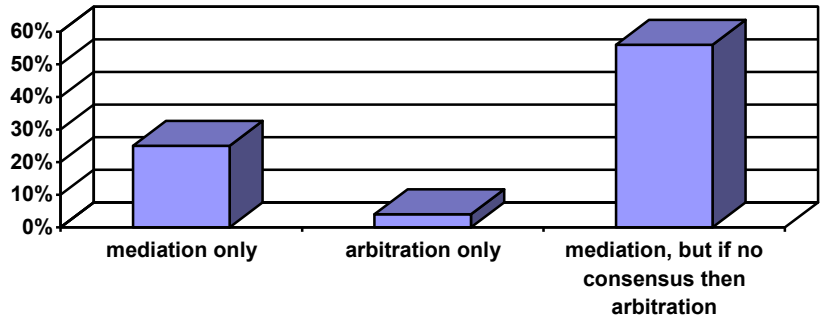
40. Should the FRA be amended to give the court the power to delegate future decision-making about parenting conflicts (but not the child's fundamental living arrangements) to other third parties such as counsellors and lawyers who are not parenting coordinators?

- yes **(22/68 = 32%)**
- no **(36/68 = 53%)**
- no response **(10/68 = 15%)** (not included in graph below)



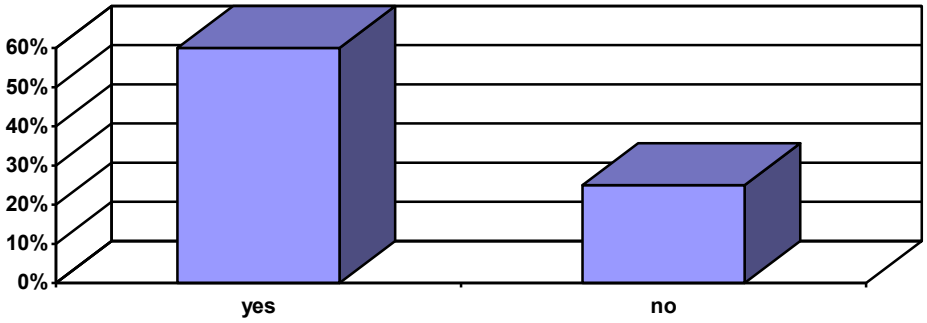
41. Disregarding the provisions of s. 2 of the Commercial Arbitration Act, should delegated decision-makers resolve parenting conflicts as mediators between the parents, arbitrators, or both?

- mediation only **(17/68 = 25%)**
- arbitration only **(3/68 = 4%)**
- mediation but if no consensus then arbitration **(38/68 = 56%)**
- no response **(10/68 = 15%)** (not included in graph below)



42. Should the decisions of such decision-makers have the effect of a court order where the court has expressly delegated decision-making authority to the decision-maker?

- yes **(41/68 = 60%)**
- no **(17/68 = 25%)**
- no response **(10/68 = 15%)** (not included in graph below)



Comments:

It is not always necessary for parenting coordinators to interview children, or have access to information about the children, in order to do their job. Where such is required, though, the parenting coordinator should have the power to decide, not be limited by needing consent, unless it is the consent or direction of the court. The coordinator answers to the court, not the parties. Likewise, where the coordinator has the power to decide or arbitrate, it must always be subject to the overriding jurisdiction of the court (which I am sure will not interfere or overrule unduly).

In a minority of cases this process might be counter-productive.

A process for review of parenting coordinators should be available to parents for certain types of decisions.

The courts can‘t bail on their ultimate responsibility to decide parenting disputes if there is no other way.

Question 21-depends on age of child. Questions 22-23 FJC can fulfill a lot of these roles now but they aren't used much because neither judges nor lawyers have confidence matters can be dealt with in a timely way. Just leave the law and rules alone and Fund the family Justice Centers

---

Ultimate decision should be with the court.

But there should be a mechanism for judicial review but the grounds for such a review should be specified.

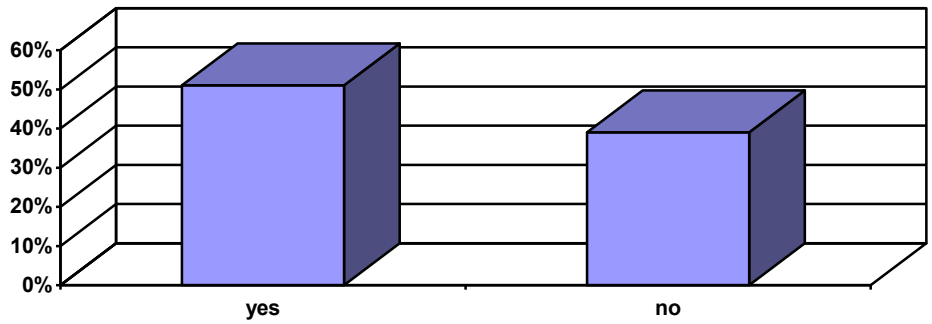
This is important for enforcement and legitimacy.

#21 would have to depend on the age of the child.

Danger - how do you review if it‘s a wrong decision. What rules do the arbitrators follow? Evidence?

Chapter 9 – Family Violence

1. Should family violence be an enumerated factor in Section 24 of the FRA?
   - yes **(25/49 = 51%)**
   - no **(19/49 = 39%)**
   - no response **(5/49 = 10%)** (not included in graph below)



2. Why?

family violence is already a factor in the case authorities of the child's best interests

---

Because "family violence" is an amorphous term. I am concerned that people may be encouraged to exaggerate this as a factor.

If it affects the child's psychological and/or physical well-being, then it should be a factor for the court to take into consideration. The problem is that studies show that violence in the family does affect children one way or another. Then, it has to be a factor the courts should look at. However, one has to be careful not to take the approach the Ministry of Child, Family and Community Services takes on these issues, which eventually ends up breaking up families and harming children even more.

The remedies available under criminal and civil law are quite sufficient.

It distracts from the real issues, which are the child's needs and the parents' abilities to address them.

It is too subjective a topic for the most part and it would likely not address the issue of female on male violence.

Because it is often downplayed or its impact on the family is brushed aside.

Witnessing family violence is a harm to the child and not always recognized as such.

Patterns of conduct between spouses are the blueprint by which children and parents conduct themselves in their relationships with each other. If a child is aware of psychological or physical abuse, their conduct and choices are going to be formed by that context. For example, by not revealing certain behaviors of a parent, or not asserting themselves when they are threatened because they fear further confrontation or retaliation toward another family member. Violence cannot be isolated. It is pervasive and corrodes all family relations. We fear the bully and find ways to accommodate them, to avoid further disruption. While some violence is situational, the more damaging is an ongoing or chronic pattern. Some parents pursue access as a form of harassment. If the courts are going to intervene with private relationships, they must consider violence as a factor in determining both parents' capacity and the children's best interests.

Because the consequences of family violence on children.

Although somewhat abstract, I agree with the present set-up where a person's behaviour is only relevant to the extent it affects that person's ability to parent. Family violence is poorly understood, and, in my opinion, that understanding is biased. Whereas evidence exists that women are just as likely to be the perpetrators of violence, it seems there is a bias towards only seeing men as the perpetrators. The current s. 24 allows the courts to take the issue of family violence into consideration.

It is in the best interests of the child to be protected from violence, as violence has nothing to do with being parented.

I am concerned that it will cause increased false reporting. The Act already empowers the Court to consider conduct.

Whatever the cause of family violence, it MUST be included as a factor in section 24.

Because I understand that it has a significant impact on children...children see/children do, by definition an abusive parent is not a parent who acts in the best interests of his/her child...

In some homes it can be a very significant issue affecting many of the decisions to be made.

Family violence and safety for the child from violence and the presence of violence is an important factor in custody and access arrangements.

Existing parameters in my view permit the court to make a decision that takes family violence into account although some judges seem reluctant to do so - doesn't take a rocket scientist or a psychologist report to determine that this has an emotional impact on the child and his/her development whether directed at the child or a parent.

It would create additional reasons to heat up access disputes even more - the Courts can and do often take violence into account and therefore there is no need to "add fuel to the fire".

Very prevalent

Violence is often a consequence of the relationship. It can be dependency, co-dependency. The focus should be on children not the causes for breakdown in the relationship. The violence issue will be one more area for the parents to argue.

Clients should be aware of the significance of the problem and reading such a section to them may assist.

This will cause parties to fabricate situations of family violence where they otherwise might not be described as violent.

Family violence impacts significantly on children, and should definitely be a consideration. If one parent is violent or abusive to anyone, the Court should consider this.

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I believe it would only generate more allegations. Obviously if family violence is a factor, it will be considered where appropriate. I generally find that there are many more unfounded violence allegations than there are genuine.

I see parents making poorer choices as they are factoring it into their decisions.

False allegations

Some options are foreclosed in this situation.

Family violence can be such a major factor between parties and children where it exists, I believe it is essential for the Court to address this issue one way or the other, however, in doing so I do not believe that the Court's discretion should in any way be reduced.

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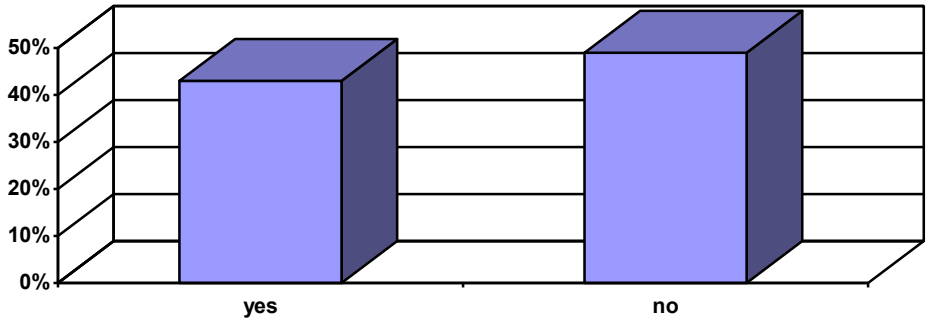
3. Accepting that family violence clearly has the potential to affect both the capacity to parent and the safety of the child, should we also expressly list the following factors:

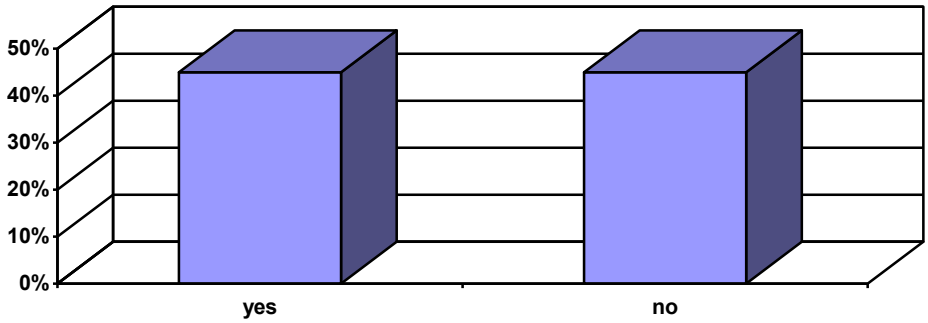
(a) alcoholism or other addictions?

- yes **(21/49 = 43%)**
- no **(24/49 = 49%)**
- no response **(4/49 = 8%)** (not included in graph below)



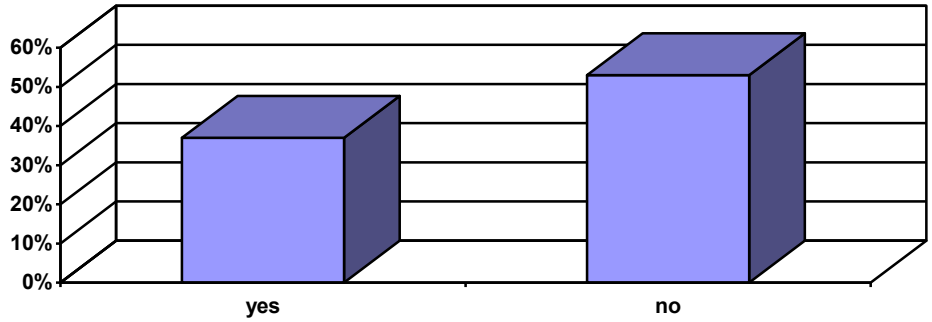
(b) substance abuse?

- yes **(22/49 = 45%)**
- no **(22/49 = 45%)**
- no response **(5/49 = 10%)** (not included in graph below)



(c) mental health?

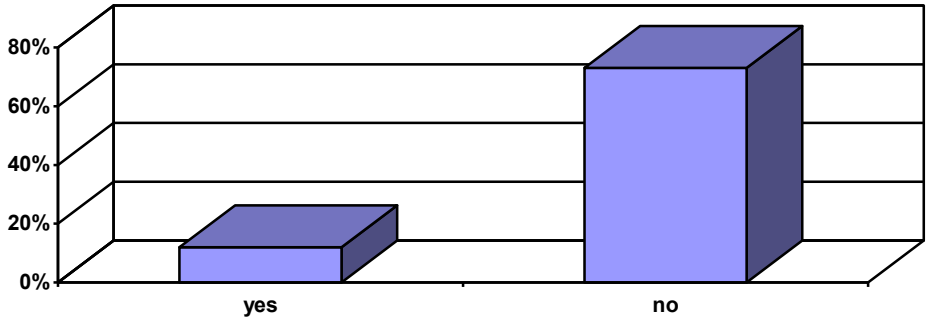
- yes **(18/49 = 37%)**
- no **(26/49 = 53%)**
- no response **(5/49 = 10%)** (not included in graph below)



(d) physical limitations or disabilities?

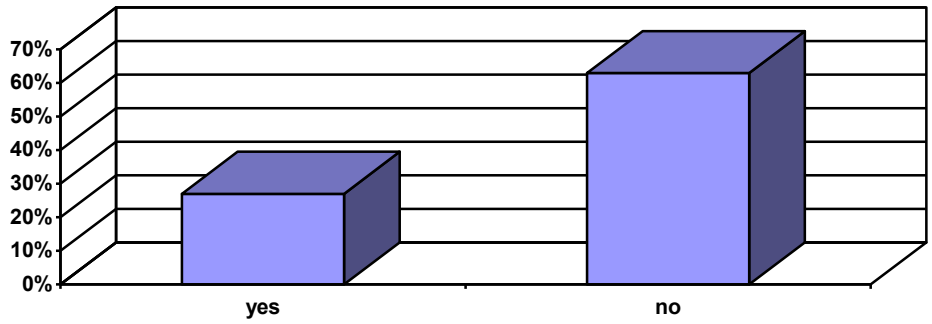
- yes **(6/49 = 12%)**
- no **(36/49 = 73%)**
- no response **(7/49 = 14%)** (not included in graph below)

Note: Percentages do not total 100% due to rounding.



(e) dysfunctional parenting styles or attachment issues?

- yes **(13/49 = 27%)**
- no **(31/49 = 63%)**
- no response **(5/49 = 10%)** (not included in graph below)



Comments:

Many parents are concerned about substance/alcohol abuse of other parent. Perhaps by discussing the issue in mediation/settlement conference/ court, parents will come to view their addictions in a different light and be a more aware parent. Parents are not perfect. However, it appears not always aware of how their actions affect children.

When parents separate, they often see each other in the worst possible light - an amalgamation of intensely negative traits which caused the marriage to end. Over time such views generally soften and each party is eventually able to see the other parent as an imperfect human being who is still a decent human being and a loving, capable parent. If they are encouraged to fixate on the other parent's traits, it may make matters worse.

The only problem I see here is how do you prove this? There are always two or more views about something and one can always have different experts‘ opinion about someone's mental health for example.

Here, too; these are factors that may AFFECT the core issues, but they are not core issues themselves.

Those are already covered by section 24 under the "ability to exercise custody and access rights" section.

Those are factors already often addressed by judges and s. 15 reporters and vary as to significance in a particular case.

Again, I agree if only these are persistent factors.

The Court already has the ability to consider all of these factors. Why delineate them?

Enumeration of specifics always helps to define/interpret the general topic.

Family violence is almost too vague/open to abuse already, and there are circumstances where parents with addictions and /or disabilities are quite able to function as good parents.

Same as response re: family violence.

We have to be very careful what grounds are actually mentioned - sophisticated counsel and Judges do not need too many rules and specified grounds

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These can be addressed under the other headings of s. 24.

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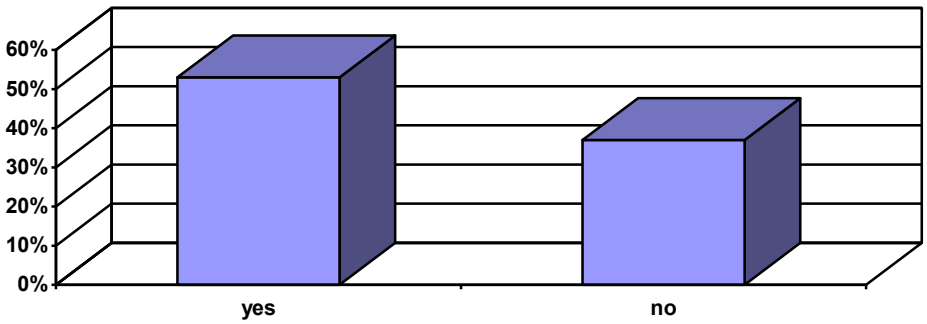
4. Is there something that sets family violence apart?
   - yes **(26/49 = 53%)**
   - no **(18/49 = 37%)**
   - no response **(5/49 = 10%)** (not included in graph below)



5. If so, what is it? [Comments:]

   Impact on all members of family, most notably those who aren't usually participants in the violence: the children.

   The effect it has on society not only the family unit.

   Long terms negative effects on children

   There is something that sets family violence apart, but it is not a real thing. It is the degree to which family violence elicits an automatic, visceral response -- "OF COURSE family violence is a significant factor" -- without ever examining just why it is so important, or what makes it more or less significant than other factors. In the present political climate it seems almost heretical to question whether family violence could be present in any degree and yet have no or little determinative or predicative effect on an acceptable parenting regime.

The emotional intimidation that may not allow victims or witnesses to express the effect on them.

Because it is hidden and protected in the private sphere of the family and is often difficult to prove due to the ages and roles of the witnesses and victims. At the same time, it continues to be sanctioned by the courts when they will not consider violence when ordering parental access to a child who has witnessed abuse, particularly older children.

The potential for continuing (generational) violence within families, as well as the impact it can have on the children who witness/experience violence from their caregivers.

See comments above.

"Sets family violence apart" from what? There are many causes of family violence, ranging from the pathological/incurable to the "loss of compass"/"loss of judgment" as a result of anger/jealousy/fear. The fact that family violence occurred must be discussed/understood/interpreted as part of the "whole picture" when trying to create a situation that will be safe and appropriate for children.

Courts have historically had a tendency to minimize the impact of violence on the victims, if they recognized it at all, they may be getting better but there is still a tendency to see it as an issue between the parents rather than something which affects parenting and affects the children who witness it.

The serious long term effects upon the child.

It is easy to allege and easy to exaggerate and difficult for a court to assess. It may become another "weapon".

Evidence suggests that family violence creates a higher prospect of the behaviour being repeated in future by the child. In addition the child's safety both physical and emotional is at risk where there is a presence of family violence.

It is eminently possible to do something about one's violent tendencies - a child may be able to forgive and recover from a parent's alcoholism or other substance abuse as a weakness of the parent but never be able to understand why they or their other parent was a victim of violence.

Its lasting impact and its complex nature. It is an area that is not properly understood and there should certainly be better educational resources from high school onward warning about the intense psychological and emotional costs of family violence.

Serious risk of physical or emotional harm to children. Should be considered in all cases where evidence suggests it exists.

As stated above

The impact on the child is immediate and direct.

It is the ultimate danger to children.

It is hidden by both the offender and the victims and therefore its destructive influence is exacerbated. By not making it a listed factor we are in away doing enough.

Family violence exists in every relationship practically - emotional abuse.

Physical safety

Family violence harms children. The other factors listed have the potential to harm children but do not necessarily do so because they may exist in a family.

END