Ending the Harm to Parents and Children from Ontario's Family Justice System by Transforming Family Law Culture

Reflections of a Family Law Lawyer

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2024-07-01

Abstract

This paper examines the harm to families and particularly children, caused by the litigation method of dispute resolution for making parenting plans. That this harm occurs in the area of law entrusted with promoting the best interests of children is morally, ethically, and legally unacceptable.

The litigation method was created for criminal and civil law matters. It was never intended to be applied to separating families. Family law matters are vastly different, the most significant difference being the involvement of children. Litigation reduces the complex dynamic of a separating family into the disembodied legal fiction of two opponents, one to become the "winner," the other the "loser." The exacerbation of conflict between separating parents arising from litigation places a child's needs and development at risk of serious harm and, amongst other consequences, violates the UN Convention on the Rights of the Child. That said, court orders and litigation may be necessary for the safety of family members in cases of serious violence, alienation, abuse, or mental health disorders.

An understanding of children's needs and development lies outside of the family law field, in what the writer refers to as the "Caring Professions" (i.e. child development specialists, psychologists, physicians, social workers, etc.). Research conducted by these professions established decades ago the serious risks that litigation's adversarial method poses for children.

The Law Society of Ontario (LSO) is failing its principal mandate to protect the public with regards to family law lawyers. While the LSO regulates the conduct of all Ontario lawyers, it has failed to address the unique nature of family law, which requires specific attention to and regulation of lawyers in this field. This has produced a broad spectrum of conduct within the family law culture with some lawyers, without facing sanctions, practicing in ways which damage separating families and children.

The problem of our Family Justice System is larger than "a few bad apples." Recognition must be given to the fact that all lawyers representing a parent owe a duty to both the client and the client's children, children being the beneficiaries of the duties owed to them by both their parents and their parents' counsel. Further, the way that a lawyer assists parents can significantly impact children's outcomes.

Beyond this, the system's adversarial core requires transformation. In the short-term, "child-centred advocacy" and several practice initiatives are proposed to initiate this transformation. Their principal aim is to reduce parental conflict and its corresponding

harm to children. In the long- term, structural change is proposed to transform our litigation system into a non-adversarial, multidisciplinary, problem-solving system.

All of these reforms will require lawyers and judges to collaborate with the Caring Professions who first recognized how litigation harms children. Without their assistance these harms will continue. These reforms cannot be delayed for several reasons, the most important of which is that increasing numbers of Caring Professionals refuse to work with “bad apple” lawyers and an adversarial system with its inherent stresses. If this trend continues, a trend given little notice, its results will be devastating for separating families in Ontario.

That said, real change to Ontario’s Family Court Justice System is possible with the necessary leadership, courage, and vision. Such change has occurred in Singapore’s Family Justice System. It has transformed its adversarial-based court into a non-adversarial, problem-solving, multidisciplinary court through the application of therapeutic jurisprudence, putting into practice and exemplifying much of what this paper proposes.

Questions or comments? Contact the author

If you have any questions or feedback about this document, I'd love to hear from you! Feel free to reach out to me via email at info@vincentramsaylawyer.ca. I value your input and appreciate your engagement.

Acknowledgements and thanks

Professor Nicholas Bala has been my mentor throughout the writing of this paper and has provided critical feedback as well as unwavering encouragement and support. I wish to express my sincere thanks and appreciation to him, Dr. Sian Phillips Ph.D., C.Psych. and Professor Michael Saini for their insight, knowledge, and patience in developing the vision of this paper and without whom it could not have been written. My particular thanks to Dr. Robert Rowe PhD., C. Psych., Dr. Barb Campbell MD, and Gord McDiarmid LLB for their thorough, critical reviews of this paper, as well as to Dr. Philip Carney Ph.D., C.Psych. (Retired) and Karne Kozolanka PhD. for their wise advice. Many thanks to Kenneth Pedlar Superior Court Justice Retired, Mr. Justice Marvin Kurz Superior Court of Justice, and Alfred A. Mamo for their support and reviews of this paper. I also wish to express my sincere thanks to the many colleagues and friends who have read one or more of the various drafts of this paper and provided valuable feedback including: David Hoffman, Judy Millard, Doug Caldwell, Trish Crowe, Leanne Wight, Karla McGrath, Sheila VanDerHorden, Steven Leitman, Mark Frederick, Christina Rorabeck, Sandra Kapasky, Kate Deveau, and Sharlene Weitzman. Many thanks to my assistant, Brenda Carew, for formatting several drafts of this paper and her invaluable research assistance, as well as to my daughter, Natalya Maksymec, for her detailed editing and for her assistance in clarifying some of the paper's key concepts. Further thanks to my friend and colleague, Mary-Alice Thompson, for her thorough editing and crucial assistance in the publication of this paper. My apologies to anyone whose name I may have neglected to include.

Finally, my thanks to my wife, Marta Maksymec, for her patience, rich insights, and enduring love, as well as to our three children, Natalya, Marika and Zorian for their wide-ranging interests, deep affection and love. And, of course, to Emma and baby Heather as well!

Some of the central ideas for this paper were from: Nicholas Bala, Patricia Hebert and Rachel Birnbaum "Ethical Duties Of Lawyers For Parents Regarding Children Of Clients: Being A Child-Focused Family Lawyer" (2017) 95:3 The Canadian Bar Review 557 and from the "Special Issue: Therapeutic Jurisprudence and Family Law", Family Court Review, 59:3, 409-533.

Any references to names and recognizable details in this paper have been changed to protect the privacy of the individuals.

About the author

Vincent Ramsay retired after 28 years of practice as a family law lawyer in Kingston, Ontario. He was a founding member of the local Kingston group of the Ontario Chapter of the Association of Family and Conciliation Courts (AFCC - an international, multidisciplinary family law organization) and has been its chairperson for the past 13 years. His contributions within Ontario's Family Justice System have been recognized at the provincial level by the Distinguished Service Award from AFCC Ontario, and at the local level by the Lou Tepper Award of Excellence from the Frontenac Law Association. This paper draws upon the writer's practice experience representing parents and children, his long-term membership in AFCC, as well as social sciences research and extensive discourse with many family law professionals and legal scholars.

Keywords

Harm; Damage; Adversarial; Litigation; System; Family Law; Family Court; Parents; Children; Best Interests; Separating Families; Ontario; Transformation; Change; Culture; Proposals; Reforms; Lawyers; Role; Judges; Legal Fiction; Exacerbation; Conflict; Origin; Needs; Development; Caring Professions; Psychologists; Physicians, Social Workers; Law Society; Failure; Protect; Public; Regulates; Conduct; Sanctions; Peacemaker; Hired Gun; Case History; Human Toll; Victims; Research; Child's Rights; Denied; UN Convention; Critical Link; Collaborate; Equal Partners; Child-Centred; Client-Centred; Advocacy; Beneficiaries; Duties; Parent's Counsel; Practice Initiatives; Parental Conflict; Non-Adversarial; Multidisciplinary; Problem-Solving; Collaborate; Leadership; Courage; Vision; Singapore; Model; Therapeutic Jurisprudence.

Table of Contents

Preface

> Following 2½ years of his separated parents' litigation in Family Court, I asked my 14-year-old child client, Frank: 'What was this like for you?'. He responded: 'I was afraid every day that what I said or did would wreck my family.' Upon reflection, I realized that Frank, for all intents and purposes, had been in Family Court those past 2 ½ years, we just couldn't see him.
>
> Vincent Ramsay

> Parents need to understand…that the message their children need to hear is along the lines of: 'I want you to have the best possible relationship with your dad/mom that you can. I care the world about you, and that means I care about everything and everyone that is important to you.' *Such reassurance about what the child wants…helps to ensure peace in the child's world and long-term stability in that parent's relationship with the child***.** The child sees that this parent (in the child's own King Solomon story!) does not want her/him to be cut in half. *Even if it means that this parent is sacrificing some of what they might prefer***.** [italics added]
>
> Dr. Philip Carney, Ph.D., C. Psych (Retired) p.41 of this paper

Now age 67, I practised family law for 28 years in Kingston, Ontario. Although no longer practising, I remain a member of the Law Society of Ontario. Most of my time in practice, in addition to representing parents, included the representation of children through the Office of the Children's Lawyer. These children were my greatest teachers in this challenging yet rewarding field. And they often made the work fun!

On many occasions, my parent clients also became my teachers. I was humbled by the extraordinary strength that some parents showed in the most difficult of circumstances. Those parents energized my work. I was privileged to serve them.

Other significant teachers included the mental health professionals, child development specialists, and social workers (all of whom I will refer to collectively in this paper as the "Caring Professions") whom I was privileged to work in my representation of children. Their insight, professionalism, and compassion made me a much better family lawyer.

The Kingston Family Law Bar has provided me with several highly skilled family law colleagues, as has the Kingston Family Law Bench. These jurists (i.e. lawyers and judges) maintained the highest ethical, moral, and professional standards even in the most difficult of cases. I am indebted to all of them.

My long involvement with the Association of Family and Conciliation Courts (AFCC, described below) at the local Kingston level, our Ontario branch, and our international body has greatly informed my awareness and understanding of the matters addressed in this paper.

In November 2020, I was diagnosed with Amyotrophic Lateral Sclerosis (ALS, or Lou Gehrig's disease), a terminal disease affecting the neuromuscular system. Such a time in one's life can lead to much reflection. For me, the ensuing time has included reflections on family law. On the one hand, these reflections have focused on what I learned through my career and the resulting changes in my practice over the course of almost 3 decades. On the other hand, I have engaged in research and conversed with my family law colleagues including lawyers, academics, and judges, as well as my colleagues in the Caring Professions. The product is this paper.

My intention is to identify certain problems within our Family Justice System[1] which are harming parents and children. These problems are so fundamental that they require nothing less than a transformation of our legal culture: first, by collaborating with the Caring Professions as equal partners and, second, by radically changing the practice of family law lawyers from "client-centred advocacy" to "child-centred advocacy".

My concerns about children and our Family Justice System are both professional and personal. While my childhood created lifelong scars through experiences other than parental separation, the periods of depression and anxiety that I have suffered as an adult are similar to the long-term effects which many children suffer from parental conflict and family law litigation. Surely no parent could knowingly wish such harm on their worst enemy, let alone their own child.

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[1] This paper defines Family Justice System broadly as "… all laws, programs and services that meaningfully contribute to the resolution of family law issues. This includes public institutions such as the courts, government ministries, and legal aid service providers, as well as non-government agencies, lawyers, mediators and other private professionals who help families during the separation process." Definition taken from: "Meaningful Change for Family Justice: Beyond Wise Words", Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters, in its Final Report of April 2013, https://www.cfcj-fcjc.org > files > docs > 2013 > R., 2.

Introduction

> Although many children and youth of separating or divorcing parents experience distressing thoughts and emotions, the overwhelming majority do not experience serious outcomes. However, even small negative effects *constitute a serious public health problem* when multiplied by the millions of individuals who experience separation or divorce. *According to research conducted in the 1990s, children of divorced parents scored significantly lower than children of continuously married parents on measures of academic achievement, conduct, psychological adjustment, self-concept and social relations*.
>
> More recent research continues to suggest an ongoing gap between children of divorced parents and continuously married parents. *The negative impact of divorce can reach into adulthood and even later into adult married life, with potential increases in poverty, educational failure, risky sexual behaviour, unplanned pregnancies, earlier marriage or cohabitation, marital discord and divorce.* [italics added]
>
> Canadian Paediatric Society "Position Statement," March 2, 2022[2]

This paper examines how our Ontario Family Justice System responds to families in their most fragile and vulnerable state. Its litigation method engages two separating parents as adversaries. Existing conflict between parents is exacerbated and their relationship can become deeply polarized, harming both parents and children.

Part A of the paper begins by examining the origins of our adversarial system that was developed centuries ago for criminal and civil matters. In the mid-1900s it was applied to family law despite the vast differences which separating families present from any other area of law.

As Justice Kurz, a highly experienced Family Court Judge in Toronto, states in *Alsawwah v. Afifi*,[3] the litigation method is "… far too corrosive of once loving relationships and far too soul destroying for emotionally scarred litigants…."[4] And what of the impact of such an environment on children? A senior Kingston Family Court

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[2] Brenda Clark, "Supporting the mental health of children and youth of separating parents," Canadian Paediatric Society, Position Statement last updated: March 2, 2022, 2.

[3] *Alsawwah v. Afifi*, 2020 ONSC 2883 (CANLII).

[4] *Alsawwah v. Afifi*, *supra* note 5 at para 104.

administrator described to me the “child carnage” which she had witnessed over her many years.

An experienced Toronto lawyer, Michael Marra, relates that overly aggressive conduct by family law lawyers has led many potential clients to refuse to use their services.[5] The Law Society of Ontario is failing to meet its statutory duty to protect the public[6] by not responding to this serious problem. That said, responsibility for the problem extends outward to the entire Family Justice System.

Conflict creates stress. The inherent conflict and stress of Family Court is so great that many lawyers and members of the Caring Professions refuse to work in it. This conflict and stress subvert the court’s statutory duty to promote a child’s best interests.[7] In my view, Family Court can no longer legitimately contain the dichotomy of inflaming parental conflict and promoting a child’s best interest.

There are cases where the litigation method is necessary. These cases include separating families experiencing domestic violence, abuse, mental health disorders, addictions, and other such matters, as well as when parents are entirely unreasonable. These families can benefit from experienced counsel and the authority that the court can exercise. Further, the court must collaborate with the Caring Professions who have the necessary insight and understanding to meet the complex needs of these families. Ontario’s Family Court Clinics provide an excellent working example of such collaboration.[8]

Part B of the paper explores Family Law’s human toll on parents and children. The Position Statement by the Canadian Paediatric Society (CPS), quoted above, using

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[5] Michael J. Marra, "The Role of Family Law Counsel,” OBA Family Law, Articles 2023, https//www.oba.org/Sections/Family-Law/Articles/Articles-2023/April-2023/The-Role-of Family-Law-Counsel, 3.

[6] Law Society Act, RSO 1990, s. 4.2 3.

[7] Children's Law Reform Act, RSO 1990, c. C. 12, s 24(1).

[8] John Leverette, Trish Crowe, and Mary Dunbar, "Judicial Case Management and the Custody and Access Assessment: Melding the Approaches,” Volume 42, Issue 6, https://doi.org/10.1177/070674379704200612, Abstract. NOT online (since pre-1999) but it can be obtained from Bracken Medical Library at Queens University, Kingston, Ontario.

research by the Caring Professions dating back to the 1990s,[9] states that the psychological sequelae for children of divorce constitutes a serious public health problem; also, that the negative impact of their experiences can reach into adulthood.[10]

The Position Statement identifies several crucial factors that place these children at risk for both short-term and long-term negative outcomes, the first of which is parental conflict.[11] Most, if not all, of these factors are present in and exacerbated by Family Court litigation.

Dr. McIntosh, referred to above, worked with the Family Law Education Reform Project. She warns family law lawyers that their conduct in representing parent clients "… can significantly impact children's outcomes."[12] We jurists with only our legal training are ill-equipped to deal with the complex needs of separating families. To best serve children and families, we must break out of our legal silo and collaborate with the Caring Professions as equal partners. Albert Einstein's words are apt: "No problem can be solved by the same consciousness that caused it in the first place."

And what of the societal costs of this serious public health problem? A major health study in California suggests that the health costs alone are enormous.[13] Despite all of this, the transformation of Singapore's Family Justice System provides reason for hope. Its adversarial-based court has become a non-adversarial, problem-solving, multidisciplinary court through the application of therapeutic jurisprudence, putting into practice and exemplifying much of what this paper proposes.

Part C of the paper proposes several reforms to our Family Justice System. These reforms do not change the host of daunting challenges which we face nor presume to

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[9] Brenda Clark, *supra* note 2 at 2.

[10] Brenda Clark, *supra* note 2 at 2.

[11] Brenda Clark, *supra* note 2 at 3.

[12] Jennifer McIntosh, "Children's Psychological Response to Divorce," Family Law Education Reform Project, which was co-sponsored by the Association of Family and Conciliation Courts, Hofstra University School of Law Centre for Children, Families and the Law and William Mitchell College of Law, 6. Despite this writer's diligent efforts to locate a proper citation for Dr. McIntosh's article, none could be found.

[13] "Roadmap for Resilience: The California Surgeon General's Report on Adverse Childhood Experiences, Toxic Stress, and Health," (.gov) https:/him/osg.ca.gov > 2020/12H, 62.

offer a panacea for all separated, often angry and unreasonable, parents. No such panacea exists. Sadly, there will always be children profoundly damaged by such parents.

Instead, a number of changes to our Family Justice System are proposed -- some short-term and practice oriented and others long-term and system oriented -- to reduce conflict and encourage resolution as a means of promoting the best interests of children.

Finally, implicit throughout this paper is a distinction regarding the concept of “justice” within the family law context. As generally conceived, justice begins and ends with the rights of an individual, a group of individuals, or an organization. Family Law begins and ends with an entirely different entity, namely “the separating family.” This is a complex system of relationships between parents and children, each with their own needs, each with a history, and each with a future that will continue until the death of its members. Justice within this context is more appropriately a striving to achieve the healthiest outcome for that system of relationships, that post-separation family, if we are to promote the best interests of children.

Part A: The Litigation Method and the Role of Family Law Lawyers

> Having been required by the exigencies of this motion to closely and frequently review the materials filed in this motion, I feel constrained to offer a few words of caution to the parties, their counsel and to the profession.
>
> *Family litigation is far too corrosive of once-loving relationships and far too soul destroying for emotionally scarred litigants to be exacerbated by an unnecessary war of invective.* Yet far too often that is just what occurs. Litigants feel that they leave no pejorative stone of personal attack untilled when it comes to their once loved one. *Many lawyers, feeling duty bound to fearlessly advocate for their clients, end up abetting in raising their discord to Chernobyl levels of conflict.*
>
> Often those parties and their lawyers forget that once the war is over, the financially and emotionally drained family still has to pick up the pieces. *And the children whose best interests are ostensibly the central concern of their parents' struggle, can leave their field of battle scarred for life.*
>
> The role of lawyers in family law cases is a complicated one. That role involves a balancing act of duties towards the client, the administration of justice and even the child before the court.
>
> *Beyond the balance of those duties, many capable family law lawyers realize that if the cost of victory is too great, everyone loses.* Those lawyers realize that their role as advocate should often be as rational counsel not flame-throwing propagandist. Where the client wants to raise the emotional stakes with invective and personal attack, that lawyer must often counsel restraint… [italics added]
>
> Justice Kurz in *Alsawwah v. Afifi*[14]

Section 1

My Entry into Family Law

I experienced a sense that families were being harmed in the Family Justice System from the first days of my family law practice some 30 years ago. The conflict which too often characterized lawyers' interactions, supposedly on behalf of their clients, inflamed parents in a war realized most fully in a family law trial. As a result, I actively considered leaving family law during the first years of my practice.

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[14] *Alsawwah v. Afifi*, *supra* note 3 at para's 103-107.

My reaction was influenced by the several years which I had spent prior to my legal career, working with marginalized groups in a wide variety of settings. I worked with children with cognitive challenges in Indonesia, young offenders in therapeutic wilderness programs in Alberta and Ontario, and adult offenders as a probation officer in Calgary. My last position prior to entry into law school involved the creation and implementation of a vocational training program for young mothers and abused women in Hamilton, Ontario.

The individuals and groups with whom I worked often lived in states of humiliation, stress, and unwellness. The overarching objective of my work was to make people healthier. My initial and lasting impression of family law litigation has been that it actively makes family members less healthy, promoting pain, disunity, and brokenness. As Justice Kurz, a highly experienced Family Court judge states in the passage quoted above, it is "… far too corrosive of once loving relationships and far too soul destroying for emotionally scarred litigants…."

Nevertheless, because I was inexperienced and have a competitive nature, I was drawn into the adversarial process. The idea of "championing" my client's case and of coming out of the courtroom a "winner" attracted me, as I am sure it has for many lawyers. However, as I began to represent children and experienced certain watershed moments described below, I began to see the profound fractures and harms experienced by all family members through this process. My practice changed radically, as I will describe.

Over the past 28 years, some changes in family law have occurred. The discourse may generally be less harsh, the conferencing system has been introduced to promote settlement, Family Court has become a specialized court with specially trained judges, and recent legislative changes attempt to divert parents away from litigation and reduce conflict. Nevertheless, Justice Kurz's statement quoted above makes it clear that litigation's adversarial foundation remains fully in place. Anyone, represented or not, may continue to use it and they clearly do. The fact that changes to-date in Ontario's Family Justice System have been insufficient is buttressed by a 2012 report of the Law Reform Commission of Ontario and several other reports, which have suggested that

“while past reforms have been helpful, they have not been sufficient, and that change of a fundamental nature is still needed….”[15]

A further observation: from my earliest days I have heard concerns expressed about our Family Justice System from different members of the Caring Professions including my wife, a family physician. For example, many newly separated parents experience more physical and mental health issues.[16] Absent informed, clinical knowledge of these issues, Family Court judges cannot know if their decisions are likely to produce healthy or unhealthy outcomes for families.

Origins of the Litigation Method

The litigation method evolved in the courts of England centuries ago to address civil disputes and criminal matters. It is a method based on reason and logic. Two adversaries marshal the facts supporting their position, subject to cross-examination. Each then applies the relevant law to their facts in a manner supportive of their position. The trier of fact then determines which party’s position is superior to the other based on an application of the law to the facts.

The physical setting of litigation is the courtroom. My first-year criminal law professor stated that it was intended to evoke fear of and respect for the authority of the law. There are the state regalia on the walls, the formalized procedures and language, the black robes worn by jurists, the raised dais upon which the judge sits, etc. That same professor related that, despite her status and training, she experienced fear and anxiety every time she entered a courtroom. What feelings must stressed, separating parents, who have no legal status or training, experience when in a courtroom dealing with some of the most important matters in their lives?

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[15] "Meaningful Change for Family Justice: Beyond Wise Words", Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters, in its Final Report of April 2013, https://www.cfcj-fcjc.org > files > docs > 2013 > R., 8.

[16] E. Mavis Hetherington and John Kelly, *For Better or For Worse Divorce Reconsidered, (New York:* W.W. Norton & Company Inc., 2002), 59.

Well after the litigation method began, it was adopted for family law in Ontario and the other provinces (and, indeed, in many jurisdictions beyond Canada) in the 1950s and 1960s as family law became a recognized area of legal practice throughout Canada.[17] It is unlikely that the originators of the litigation method could ever have imagined its application to separating families.

Litigation's Application to Separating Families

There are vast differences which set family matters apart from any other area of law which should raise serious concerns from the very outset, about applying the litigation method to separating families. Parties in a family matter have engaged in intimate relations, resided in the same home, organized their finances, brought a child into the world, engaged in parenting, and generally shared their lives together. The court must determine highly subjective issues with enormous human consequences: will a child reside with one parent or the other or some combination of the two, to what extent is a parent's mental health affecting the quality of their relationship with a child, will a child benefit by relocating with one parent from their hometown to another province, etc.

Then there is the complex dynamic of family relationships that existed prior to separation. The parents are likely to form a post-separation relationship based on the children, to continue for the rest of their lives. The litigation method reduces this complex dynamic into a disembodied legal fiction. Two parties regarded as "opponents" enter the litigation arena, one to become the "winner" and the other the "loser." The children can become pawns and their experience of parental discord can increase significantly.

Justice Harvey Brownstone, an experienced Family Court Judge in Toronto, writes:

> *Most* couples who bring their disputes to Family Court do not enjoy, or ultimately benefit from, the experience… [I]n many cases, the parties' ability

[17] Julien D. Payne, "The Evolution of Family Law: Past, Present and Future: Reviewing the Past Fifty Years, 2018 CanLIIDocs 10869, 1.

> to communicate and cooperate with each other as co-parents became worse, not better, as a result of Family Court litigation. [italics in original][18]

In the state of Connecticut, a study of 41 recently divorced parents by Marsha Pruett and Tamara Jackson[19] reported that 71% stated that their feelings of anger and hostility were more extreme as a result of the legal process.[20] Further, 75% "indicated that the process intensified their negative perceptions of the other parent by pitting them against each other and replacing direct communication."[21]

What is amongst the greatest needs of separating children – conflict resolution. Drawing upon the research of Dr. Jennifer McIntosh, a psychologist, researcher and author, the Victoria Family Court and Youth Justice Committee reports that:

> The major protective factors that facilitate children's adjustment to divorce are low inter- parental conflict, effective and constructive resolution of conflict between the parents, the quality of the parent-child relationship, nurturing, authoritative parenting from at least one parent, and cooperative co-parenting with good communication… Children have more psychological problems when their parents are in conflict, either during marriage or following divorce.[22]

United States figures provide some indication of the prevalence of divorce which children experience and the related levels of conflict. By age 15, 40% of American children have experienced their parents' separation with approximately one third of these separations characterized as acrimonious divorces "… with ongoing levels of poorly resolved or uncontained conflict between parents…" [23]

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[18] Harvey Brownstone, *Tug of War: A Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court* (Toronto: ECW Press, 2009), 19.

[19] Marsha Kline Pruett and Tamara D. Jackson, "Lawyer's Role during the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys", (1999) 33 Fam. L. Q., 283

[20] Marsha Kline Pruett and Tamara D. Jackson, *supra* note 19 at 298.

[21] Marsha Kline Pruett and Tamara D. Jackson, *supra* note 19 at 298.

[22] "Sampling of Research on Family Breakdown", Victoria Family Court and Youth Justice Committee https://www.victoriafamilycourt.ca › 2019/11 › F..., 2.

[23] "Sampling of Research on Family Breakdown," *supra* note 22 at 1.

The concerns raised above are taken so seriously within Australia's *Family Law Act* that it provides that in all proceedings in the country involving children:

> … the first principle is that the court is to consider the needs of the child concerned and *the impact that the conduct of the proceedings may have on the child* in determining the conduct of the proceedings. [italics added][24]

And what do lawyers think of family litigation? John-Paul Boyd, KC, cites a 2017 study by the Canadian Research Institute for Law and the Family which surveyed 166 family law lawyers in Alberta, BC, Ontario, and Nova Scotia.[25] The study surveyed their views on mediation, collaborative negotiation, arbitration, and litigation. Litigation was the process they least preferred, finding it the most expensive, the most time-consuming, the least durable, and the least likely to be in the interests of the clients and their children.[26]

One experienced lawyer told me that she vomited the night before every trial. Another lawyer related that he quit litigation the day that he was in trial and turned to his client only to see that she had become ill on account of the stress of the trial. I know of lawyers who have left Family Court to work in family mediation or other unrelated areas of law due to its adversarial nature and resulting stress.

Dr. Robert Rowe, a psychologist at Kingston's Family Court Clinic, conducted two surveys in 2013[27] as part of a task force regarding the provision of Family Court services by Ontario psychologists.[28] In the first survey, only eight percent of the

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[24] *Family Law Act 1975* (Cth.), s. 69ZN(3) [*Family Law Act 1975]*.

[25] John-Paul Boyd KC, "The Need for a Code of Conduct for Family Law Disputes, Part 2" (posted February 8, 2019) Justice Issues Practice of Law, Slaw, https://www.slaw.ca > the-need-for-a-code-of-conduct-for-family-law-disputes-part-2/, 3.

[26] John-Paul Boyd KC, *supra* note 25.

[27] Robert Rowe, "Custody and Access Task Force Report," The College of Psychologists of Ontario, The e-Bulletin, April 2015, 6:2.

[28] Prepared by the Custody & Access Task Force, Dr. Barbara Fidler (Chair), Drs. Sharon Francis-Harrison (Ottawa), Rob Rowe (Kingston), Marlies Sudermann (London). Mr. Barry Gang, Director of Investigations & Hearings, assisted the Task Force, "Information for Consideration by Members Providing Psychological Services in The Context of Child Custody Disputes & Child Protection Proceedings" 1 January 2014, https://cpo.on.ca/cpl_resources/information-for-consideration-by-members-providing: psychological-services-for-child-custody-disputes-child-protection-proceedings/.

psychologists indicated any interest in Family Court work.[29] Fifty-six percent of those psychologists who were qualified and had experience identified that they were not interested in further Family Court work "… under ANY circumstances…."[30] Experienced psychologists who had left Family Court work in this group identified the two principal reasons for ceasing work: change in practice focus and stress.[31]

In the second survey, seventy-three percent of the psychologists either had past Family Court experience or were currently working in this area.[32] For those psychologists with no experience, the most common reason to not work in the Family Court area was fear of complaints to the College of Psychologists of Ontario.[33] For those psychologists with experience who had left the work, the most common reasons were stress and legal issues.[34]

Dr. Rowe reported that many young psychologists are warned by their senior colleagues to avoid Family Court work because of its adversarial, stressful environment which often leads to formal complaints by parents in the litigation. The result is that Dr. Rowe is one of the few psychologists still working in the area and he receives calls from across the province for Family Court related work.

There appears to be a similar trend with Ontario social workers. A senior Kingston lawyer recently related that fewer and fewer social workers are choosing Family Court work. Due to their falling numbers, the lawyer has a case in which the Office of the Children's Lawyer (OCL) social worker appointed for the child is from Timmins. For many of this lawyer's files and those of colleagues in her firm, applications for an OCL social worker are rejected because of the scarcity of available social workers and/or OCL funding cuts.

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[29] Robert Rowe, *supra* note 27 at 12.

[30] Robert Rowe, *supra* note 27 at 13.

[31] Robert Rowe, *supra* note 27 at 14.

[32] Robert Rowe, *supra* note 27 at 20.

[33] Robert Rowe, *supra* note 27 at 21.

[34] Robert Rowe, *supra* note 27 at 22.

Having worked with many OCL social workers over the years, I am aware of their falling numbers. Like psychologists, they are choosing less stressful work settings which generate fewer complaints to their professional bodies. Yet while their numbers decline, there is little, if any, recognition of the problem, let alone attempts to address it. Given that so many professionals cannot cope with the stresses of litigation, how can we possibly expect separating parents to?

Some 60 or 70 years after family law adopted the litigation method, we have the benefit of many changes: our understanding of child development, the social sciences, and mental health has increased enormously. We also have decades of litigation experience, and the insights of female jurists. Our responsibility is to learn from these changes and to apply this knowledge to our Family Justice System. A child's right to health should not be jeopardized by their separating parents choosing a system not equipped to meet their needs.

Section 2

The Law Society of Ontario's Failure to Protect the Public

Justice Kurz, quoted above, states:

> … Many lawyers, feeling duty-bound to fearlessly advocate for their clients, end up abetting them in raising their discord to Chernobyl levels of conflict….[35]
>
> … And the children whose best interests are ostensibly the central concern of their parents' struggle, can leave their field of battle scarred for life.[36]

Michael Marra, an experienced Toronto family law lawyer, agrees with Justice Kurz.[37] He comments that despite the many substantive and process reforms in Ontario's Family Justice System[38] intended to address this 'duty-bound fearless advocate'

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[35] *Alsawwah v. Afifi, supra* note 3 at para 104.

[36] *Alsawwah v. Afifi, supra* note 3 at para 105.

[37] Michael J. Marra, *supra* note 5 at 1-3.

[38] Michael J. Marra, *supra* note 5 at 3.

'gladiator' style,[39] the problem remains. Indeed, many potential clients have told him that they want nothing to do with family law lawyers, choosing instead non-lawyer mediators.[40]

Marra identifies the problem as being "… underpinned by the framing of the role of counsel as an advocate for the client in Rule 5.1-1 of Rules of Professional Conduct of the Law Society of Ontario."[41] That Rule states:

> In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law.[42]

He concludes that family law lawyers are left with the dilemma of navigating between the Law Society obligations to act as zealous advocate for the client in accordance with their instructions and the expectations of the court.[43] To be clear, the Ontario *Rules of Professional Conduct* require that this principle of zealous advocacy be balanced appropriately with several other provisions. The problem is that in practice, Justice Kurz and Marra illustrate that too frequently, this balancing does not occur in family law cases. The other provisions include:

> 3.2-4: the lawyer is to encourage compromise or settlement and considered the use of alternative dispute resolution;
>
> 5.1-1: the lawyer acting as an advocate is to do so "resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect; and, the next provision being the one provision addressed specifically to family law lawyers amongst, literally, hundreds of provisions in the Rules; and,
>
> 5.1-1[4]: in adversarial proceedings that will likely affect the health, welfare or security of a child, a lawyer should advise the client to take into account the

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[39] Michael J. Marra, *supra* note 5 at 2.

[40] Michael J. Marra, *supra* note 5 at 3.

[41] Michael J. Marra, *supra* note 5 at 3.

[42] Law Society of Ontario, "*Rules of Professional Conduct*," at Commentary 1 to Ch 5.1-1.

[43] Michael J. Marra, *supra* note 5 at 5.

> best interests of the child, if this can be done without prejudicing the legitimate interests of the client.[44]

John-Paul Boyd, KC, of the B.C. Family Law Bar, provides a scathing critique of a provision in the federal Model Code of Professional Conduct with almost the same wording as 5.1-1[4][45]:

> A lawyer *should*, not must, advise the client to *consider*, not accommodate, the interests of her children, and then only if such consideration will not prejudice the client's legal position. Not only is this direction permissive rather than mandatory, the threshold it sets for the exercise of counsel's discretion is ridiculously high.[46]

The health of Ontario parents and children is placed at risk by too many family law lawyers acting as zealous advocates. The Law Society of Ontario is failing its principal obligation to protect the public, particularly, vulnerable children.

There are many available resources for change: the *Best Practices for Family Law Lawyers* from the Law Society of British Columbia[47] and the American Bar Association's *Model Rules of Professional Conduct* have been supplemented by many state and local bar associations with professionalism codes focused on family law practice.[48] There is also the example of the American Academy of Matrimonial Lawyers:

> Noting that existing ethics codes provided inadequate guidance to the matrimonial lawyer, the American Academy of Matrimonial Lawyers issued its *Bounds of Advocacy* in 2000. The goal was to elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be preserved. These guidelines mark a clear break with the traditional view that a matrimonial lawyer's only job is to win. Instead, the

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[44] Law Society of Ontario, *supra* note 42, at Commentary 4 to Ch 5.1-1.

[45] Federation of Law Societies of Canada (FLSC), "Model Code of Professional Conduct" (Ottawa: FLSC, 2014), at Commentary 4 to Ch 5.1-1 [Model Code].

[46] John-Paul Boyd KC, *supra* note 26 at 2-3.

[47] "Best Practice Guidelines for Lawyers Practising Family Law" (15 July 2011), *Canadian Bar Association*, *British Columbia Branch*, online: <www.cbac.org/Publications-and-Resources/Resources/Practice-Guidelines/Best-Practice-Guidelines-for-Lawyers-Practising-Fa> ["Best Practice Guidelines"].

[48] M.R. O'Connell, "The Family Law Education Reform Project Final Report", Family Court Review, 44:4, October 2006, 562.

> guidelines encourage other models lawyering and goals of conflict resolution in appropriate cases.[49]

In light of those Ontario family law lawyers acting as zealous advocates, the following section illustrates the spectrum of roles currently played by family law lawyers and the harmful impact of some of these roles, most often with no resulting sanctions upon the lawyer. They are drawn from my own observations as well as accounts shared by other lawyers, judges and members of the Caring Professions.

Section 3

"Peacemaker" to "Hired Gun"

Lawyers hold a special status in society. Highly educated and exercising power on account of this knowledge, they are trusted by the public who rely upon their advice for countless matters. The stakes for families are extremely high regarding how this power is used in family law.

In a spectrum of roles ranging from what I refer to as "peacemaker" to "hired gun," the conduct of a parent's lawyer significantly influences the outcome for the separating parent and their family. The peacemakers are those lawyers who strive in the most professional manner to reduce the conflict between the parties, keeping the family out of court wherever possible. These lawyers encourage their clients to seek outcomes that take into consideration the entire family in the short-term and long-term, thereby maintaining a judicious focus on the "most reasonable outcome." These lawyers act with integrity, serving the public good, and should be commended.

The peacemaker is likely to take seriously the advice of the judge who recounted how, when she was a lawyer, she followed a routine for almost all new clients served with Family Court Applications. She would call the other lawyer, if the other party was represented, and ask how the matter could be resolved without the need for litigation.

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[49] M.R. O'Connell, *supra* note 48 at 562.

The hired guns are those lawyers whose high conflict style is rooted in the concept referred to by Nicholas Bala, Patricia Hebert, and Rachel Birnbaum as “client-centred zealous advocacy”[50] in their excellent article addressing the ethical duties of lawyers towards children. These lawyers use their power to inflame conflict between parents. They focus solely on their own client’s instructions and short-term objectives, frequently recommending litigation over out-of-court negotiations. They seek to “champion” their client’s wishes with little or no consideration for short-term or long-term psychological and financial impacts on family members.

The clients of hired gun lawyers have much more to lose than to win. While their conduct is entirely consistent with our adversarial culture, it directly contravenes our principal statutory objective. Further, their harmful impact is disproportionately large for their numbers. Other competent lawyers and many members of the Caring Professions refuse to work with them or leave family court work altogether. Families are denied needed services in our communities as a result.

And then there is that dark underbelly, that small minority of lawyers, who intentionally inflame conflict between parents and advise litigation because it is more lucrative. One would be naïve to believe that in some high conflict litigation matters, the lawyer’s own financial interests are not involved.

Our litigation-based method makes us vulnerable to lawyers who abuse the process and their role in it. The Law Society of Ontario must fulfil its responsibility by establishing appropriate rules of conduct for family law lawyers. Lawyers who inflame conflict should be subject to greater scrutiny. Education and training can develop greater self-awareness of the harm caused by “following the instructions” of clients experiencing feelings of anger, betrayal, fear, and grief following the end of their spousal relationship.

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[50] Nicholas Bala, Patricia Hebert, and Rachel Birnbaum, "Ethical Duties of Lawyers for Parents Regarding Children of Clients: Being A Child-Focused Family Lawyer" (2017) 95:3 The Canadian Bar Review, 562.

A 15-year-old London, Ontario boy, whose parents' acrimonious litigation lasted three and a half years, had the following to say about lawyers in a letter which he wrote to his lawyer:

> Finally, and I say this very carefully because it's not true of them all, but the lawyers are the problem. Throughout this entire experience I've had the good fortune of meeting a number of lawyers who are good, kind people that represent the altruistic embodiment of the profession. Unfortunately, there are also lawyers who are in this for the money and unfortunately, they also usually give good first impressions, so, if you're an adult in this situation it's usually unfortunately important that you don't consider your lawyer to be your friend. You must remember that regardless of what they tell you, you will not win this.[51]

The following case history illustrates some of the concerns raised above about lawyers' roles.

A Case History

Mary was the mother of a 10-year-old child, Johnny. Mary had a history of drug abuse, so Johnny had resided with his father, Bill, for the past two years. This arrangement was based on a final order obtained after bitter and protracted Family Court proceedings between Johnny's parents. The order also provided for joint parental decision-making. Mary had alternate weekend parenting time. The child was uncomfortable with his mother's behaviour at some of those visits. Mary met with a lawyer and told the lawyer that she wanted to start a court action to increase her time with Johnny to a 50-50 shared arrangement. The lawyer told Mary that she needed to enter a drug assessment and rehabilitation program. If she ever wanted to increase her time with Johnny, she would have to seriously address her addiction.

Mary complied, completing the assessment and attending a six-month residential program. She received a glowing report from the program. She then commenced counselling and met with her doctor frequently. Nine months later, she met with the lawyer again. Mary was stable, healthy, and very motivated to increase her time with

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[51] Letter from 15-year-old London boy, a complete copy of the letter may be obtained from Alfed Mamo at: alf.mamo@mckenzielake.com.

Johnny. Her weekends with Johnny had improved significantly. He now wanted more time with his mother. Mary's lawyer wrote a letter to Bill expressing Mary's wish to increase her time, detailing the significant work that she had done to become a better parent.

Bill took the letter to a lawyer. Bill's mother, who did not like Mary, paid the lawyer's retainer. Bill, with encouragement from his mother, told the lawyer that Johnny did not like the weekends with Mary. Bill emphasized Mary's long drug history and asked the lawyer if Mary's time with Johnny could be reduced. Bill's lawyer advised him to commence litigation immediately, seeking sole parental decision-making and supervised parenting time for Mary. The lawyer emphasized that this matter would likely need to go to trial to ensure that all of Bill's concerns were fully and properly placed before the court.

The litigation lasted three years. Johnny had a lawyer through the OCL. Although Mary's lawyer produced evidence of Mary's participation in the drug assessment and residential program and its glowing report, as well as supportive reports from Mary's counsellor and physician, Bill's lawyer maintained to his client that a trial was required. His correspondence to Mary's lawyer frequently referred to Mary in insulting terms and referenced historical incidents of Mary's drug abuse. In court on several occasions, the presiding judges cautioned Bill's lawyer for his overly aggressive conduct. Mary's lawyer maintained a calm and professional manner throughout the entire case.

At trial, Johnny's lawyer from the OCL expressed to the court that due to the hard work that Mary had done to improve her relationship with Johnny, their relationship had grown significantly, and Johnny now wanted to live with his mother primarily. Further, it was apparent that Bill was unable to see the benefit of Mary's relationship with Johnny and that, indeed, Bill had discouraged it. In the end, the court ordered that Johnny reside primarily with Mary subject to alternate weekend parenting time with Bill and sole parental decision-making to Mary. The court ordered Bill to pay all of Mary's costs.

The harmful consequences to Johnny of the aggressive conduct of his father's lawyer and the litigation were numerous. They included: Johnny being forced to experience his parents' lengthy litigation again, parents who were less available to meet his

developmental needs and became further embittered. As a result, and most significantly, Johnny was placed at increased risk of the harmful sequelae for children of divorced parents identified above in the Position Statement of the Canadian Paediatric Society.[52]

[52] The harm to families from our Family Justice System may be mitigated somewhat in smaller centres. I recall one experienced social worker who had worked in both Ottawa and Kingston. That professional clearly preferred Kingston's smaller, more collegial Family Law Bar, having found too many Ottawa family law lawyers much more aggressive. I encountered fine lawyers in both cities, but the conduct of the most aggressive Ottawa lawyers would not have been acceptable to the Kingston Family Law Bar or Bench. For most of my career, Kingston had only two or three Family Court judges and a relatively small Bar. Smaller numbers led to greater familiarity amongst its membership and generally recognized norms of conduct. Overly aggressive conduct could be corrected by “feedback” from other lawyers, the court staff, and even the Bench. Some lawyers whose conduct fell too far outside the acceptable norms may have found it difficult to practice. The higher numbers of lawyers and judges in larger centres, with less familiarity among their membership, may make establishing and maintaining such norms more problematic. Hence, Justice Kurz’s severe reprimand to some Toronto family law lawyers, quoted above, may be somewhat less applicable to their counterparts in smaller Ontario centres. That said, engaging separating parents in an adversarial system be that in larger or smaller centres, is harmful to separating families.

Part B: Family Law's Human Toll

If any branch of the law were to harm children, it would be a grave injustice. That the very branch of law charged with the statutory responsibility of promoting a child's best interests is harming children, is a travesty.

Section 4

The Newly Separated Parent

Consider a newly separated mother, just served with her spouse's court application. Her spouse claims sole parental decision-making, reduction of her time with the children to alternate weekends, and child support. Separation between spouses, remember, is the second most stressful experience in a person's life, second only to the death of a spouse.[53] How would she likely reply?

Her partner has turned on her. Her child is being pulled from her. Her competence as a mother is being attacked. Her financial security is threatened. She is likely to experience fear, the most primal and powerful of emotions:

> … fear of losing one's children; fear of not been able to survive after the failed relationship, whether emotionally or financially; fear because one's self-identity itself is threatened. Anxiety, fear, and other emotions affect one's capacity to make good, rational decisions.[54]

She may say and do things which she would never have imagined before. And the battle is on!

Family law clients may well be the most challenging and difficult of any area of law. The separation itself has likely been preceded by months or years of discord which can produce a toxic living environment. By the time the parent retains a lawyer or proceeds

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[53] *The Holmes-Rahe Stress Inventory*, https://www.stress.org/holmes-rahe-stress-inventory.

[54] Debbie Ong, "Singapore Family Justice Courts Work Plan 2020: Today Is a New Day," Family Court Review, 59:3, Family Court Review, 59: 3, 415.

to court unrepresented, they can be extremely unreasonable, emotional and/or unable to think beyond their own needs.[55]

Mavis Hetherington's 20-year longitudinal study[56] of separating families identified that in the first year following separation, doctor visits tripled among women and almost doubled among men. Separating parents experienced increases in colds, headaches, stomach and intestinal upsets, sleep disorders, pneumonia, mononucleosis, and hepatitis.[57] Hetherington asked why these recently divorced parents were so vulnerable to illness? The answer she discovered was stress. Separation-induced stress can weaken the immune system, leaving the parent more vulnerable to infection and disease.[58]

Hetherington concludes: "Post-divorce vulnerability to physical and psychological distress is a hazard not only for adults but also for their children. *These problems may sideline parents at the very moment when the children most need their support."* [italics added][59] Hetherington's study group was comprised of families who both had and had not experienced family law litigation. Given litigation's significant additional stresses, the study's findings of illness would likely have been significantly higher, both in number of parents experiencing illness and the degree of their illness, if the study group had been comprised solely of litigating parents.

Adding to Hetherington's concerns, Noel Semple addresses "the financial and time costs of parenting litigation".[60] While paid directly by parents, children pay for these costs indirectly in two ways. First, once expended, they are no longer available to the

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[55] Bill Eddy's work includes the following two books: *5 Types of People Who Can Ruin Your Life: Identifying and Dealing with Narcissists, Sociopaths, and Other High-Conflict Personalities* and *BIFF Quick Responses to High Conflict People*. His work on how to deal with the most difficult of these clients is extremely valuable for lawyers and judges.

[56] E. Mavis Hetherington and John Kelly, *supra* note 16 at 59.

[57] E. Mavis Hetherington and John Kelly, *supra* note 16 at 59.

[58] E. Mavis Hetherington and John Kelly, *supra* note 16 at 59.

[59] E. Mavis Hetherington and John Kelly, *supra* note 16 at 60.

[60] Noel Semple, "Who's Best Interests?: *Custody* and Access Law and Procedure", Osgoode Hall Law Journal (2010) 48.2, 323.

children. Second, they add to the separating parents' physical and psychological stresses highlighted by Hetherington.

According to the Canadian *Centre for Addictions and Mental Health*, 20 percent of us have struggled with mental illness,[61] manifested in many forms including anxiety, depression, eating disorders, or addiction. You may know first-hand the exhaustion of managing dark thoughts, despair, impulsivity, or a sense of hopelessness that things will not ever get better. Given this prevalence of mental illness in our society, it is incumbent on us as professionals in the family law field to practice in a manner that does not exacerbate the inherent stresses of separating families.

Section 5

Litigation's Child Victims

Certain watershed moments in my career permanently changed my view of family law. The first occurred over fifteen years ago. I acted for Frank throughout his parents' litigation, commencing when he was twelve years old and ending when he was fourteen and a half years old. It was a bitter dispute between his two young parents. The mother, Susanne, was on social assistance. The father, Michael, maintained some limited employment. Susanne was represented, Michael was not. Susanne suffered from anxiety and frequently used marijuana to calm herself.

Susanne's anxiety and drug use resulted in her neglecting Frank's needs, sometimes daily, leaving him to fend for himself. Michael sought the involvement of the Children's Aid Society, but given Frank's age, they did not find a protection issue.

In the end, Michael and Susanne consented to a Final Order providing for joint custody and equal shared parenting time. This was primarily a product of the parents' mutual exhaustion from the litigation rather than coming to a mutual understanding of what was best for Frank.

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[61] *Mental Illness and Addiction: Facts and Statistics,* Centre for Addiction and Mental Health (CAMH), https://www.camh.ca/en/driving-change/the-crisis-is-real/mental-health-statistics, at "Prevalence."

At the time of the Final Order, I asked Frank what his parent's two and a half years of litigation had been like for him. He responded, "I was afraid every day that what I said or did would wreck my family." Upon reflection, I realized that Frank, for all intents and purposes, had been in Family Court those past two and a half years, we just couldn't see him.

I discussed this case with a psychologist colleague. She said that Frank had watched his parents' drama unfold from a position of dread, powerlessness, and confusion while seeking to stay connected to both parents. As the litigation dragged on, Frank experienced entirely unfounded feelings of guilt for his parents' separation while being forced to choose between the two most important adults in his life. All of this created an enormous amount of fear and insecurity. Frank existed in a state of suffering which would continue for some indeterminate time thereafter.

The second watershed moment in my career occurred when I read the letter cited above from the very insightful fifteen-year-old boy from London, Ontario about his parents' litigation. The following are portions of his letter:

> I suppose the biggest problem as the child in such a divorce was my inability to identify and deal with emotions I was having. Using my own case as a reference, when parents begin a divorce proceeding, the overriding emotion between the two of them tends to be hurt. These are two people that were linked together for years, perhaps even decades, and for whatever reason have now found each other to be incompatible. What the parents may not understand, or if they do understand may not act on, is the fact that the children involved are also hurt, but they do not share your hurt.
>
> Worse yet is the anger and that is by far the worst emotion to go into a divorce case with. It is the anger that will get you to spend thousands on legal bills over things valued in the hundreds…
>
> Parents will naturally seek the support of the children during this entire scenario, and that is the worst thing they can possibly do to them. Even if the child has picked a side, they will most likely not want to discuss it with either parent, least of all on the parents' terms. As the adult, but more importantly as a co-cause of the problem you must do your best to concede to the children's terms. It's important to also note if the parent feels, and they probably both will, that they are not the cause of the problem, I'm sorry to say in most cases they are…
>
> It didn't really matter that the judgement wasn't based on which parent we loved more (just like parents are not supposed to pick a favourite child,

> children shouldn't be expected to pick a favourite parent) but determined by which one had taken care of us more before the divorce and would be best suited to take care of us afterwards. In the end that parent was so mad with me and my siblings, which it took about a year before we even re-established a relationship…
>
> I can't describe how tough that was and how tough that still is.[62]

The devastating stories of Frank and the London boy, together with my research addressed below, influenced my role as a family law lawyer including my courtroom submissions. When representing children, I regularly provided informed warnings to parents about how court could harm their children. My concerns were never expressed by other counsel or by a judge, except on one occasion. This needs to change.

Section 6

Research into "Litigation's Children"

The experiences of Frank and the London boy led me to research the impact of family law litigation on children. The research, including work by Holly Uphold-Carrier and Rebecca Utz,[63] made it evident that litigation placed children at risk in several different respects, including serious harm to their mental health.

The lengthy quotation from the Canadian Paediatric Society (CPS) in the Introduction to this paper points to the "serious public health problem" presented by children and youth in separating families.[64] Their *Position Statement* identifies eight key factors that place these children at risk:[65]

1. ongoing conflict between parents (especially if it is abusive and/or focused on children);
2. diminished capacity to parent or poor parenting;
3. lack of monitoring children's activities;
4. multiple family transitions;

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[62] Letter from 15-year-old London boy, *supra* note 51.

[63] Holly Uphold-Carrier and Rebecca Utz, "Parental Divorce Among Young and Adult Children: A Long-term Quantitative Analysis of Mental Health and Family Solidarity," Journal of Divorce and Remarriage, 2012, 53: 261.

[64] Brenda Clark, *supra* note 2 at 2.

[65] Brenda Clark, *supra* note 2 at 3.

5. parent mental health problems;
6. chaotic, unstable household;
7. impaired parent – child relationships; and,
8. economic decline.

Most, if not all, of these factors are present in and exacerbated by Family Court proceedings. The *Position Statement* raises significant concerns about these children as the negative impact of these factors can extend into adulthood "… with potential increases in poverty, educational failure, risky sexual behaviour, unplanned pregnancies, earlier marriages or cohabitation, marital discord and divorce."[66] These concerns were based upon an extensive review of research by the Caring Professions dating back to 1990s.[67]

The CPS *Position Statement* references the benefit of "promoting resilience"[68] in reducing the risks to children who are exposed to some or all of the eight key factors above. The *Centre on the Developing Child* at Harvard University states that:

> The single most common factor for children who develop resilience is at least one stable and committed relationship with a supportive parent, caregiver, or other adult. These relationships provide the personalized responsiveness, scaffolding, and protection that buffer children for developmental disruption. They also build key capacities – such as the ability to plan, monitor, and regulate behaviour – that enable children to respond adaptively to adversity and thrive. This combination of supportive relationships, adaptive skill-building, and positive experiences is the foundation of resilience.[69]

Hetherington's 20-year study strongly suggests that parent-child relationships are placed at significant risk by Family Court litigation.[70] This, in turn, can undermine the child's resilience, thereby harming harm a child's healthy development with the

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[66] Brenda Clark, *supra* note 2 at 2.

[67] Brenda Clark, *supra* note 2 at 9-10.

[68] Brenda Clark, *supra* note 2 at 2-3.

[69] Centre on the Developing Child, Harvard University, *Key Concepts Resilience*, https://developingchild.harvard.edu/science/key-concepts/resilience/, 2. I

[70] E. Mavis Hetherington and John Kelly, *supra* note 16 at 60.

significant short-term and long-term negative consequences identified in the CPS *Position Statement*.[71]

Dr. McIntosh states:

> … The restructuring of family life necessitated by divorce involves multiple and complex adjustments for children, including transitions of home and school, change in parent and extended family contact, economic strain, periods of diminished parenting, parent conflict, sadness and grief…
>
> *Separation brings substantial complexity for infants and pre-school children. It is their 'developmental response' as much as their emotional response that concerns current researchers*…
>
> Disruptions to primary attachment and patterns of care brought about by separation can destabilize important segments of an infant's developmental pathway. *Ongoing, inflammatory and poorly contained conflict between parents, while emotionally overwhelming for parents, can be developmentally overwhelming for the infant.* Parents need to be supported to manage these risks, to continue to provide a nurturing, steady presence within developmentally appropriate care arrangements that evolve at the infant's developmental pace… [italics added][72]

Holly-Uphold Carrier and Rebecca Utz reported in 2012*:*

> In sum, experiencing parental divorce appears to have a long-lasting effect on the child's mental health and family solidarity: Those who experienced parental divorce exhibited a significantly higher risk for depression, as well as lower levels of family solidarity during midlife and older ages, compared to those children whose parents' marriage was intact through their childhood and adult lives.…[73]

The American *National Institute of Mental Health* found that people suffering with depression "… have an increased risk of cardiovascular disease, diabetes, stroke, pain, and Alzheimer's disease…"[74]

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[71] Brenda Clark, *supra* note 2 at 2.

[72] Jennifer McIntosh, *supra* note 12 at 2-3.

[73] Holly Uphold-Carrier and Rebecca Utz, "Parental Divorce Among Young and Adult Children: A Long-term Quantitative Analysis of Mental Health and Family Solidarity," Journal of Divorce and Remarriage, 2012, 53: 261.

[74] *Chronic Illness and Mental Health, Recognizing and Treating Depression*, National Institute of Mental Health, NIH Publication No. 21-MIH-8015, Revised 2021, nimh.nih.gov, 4-5.

The word “depression” is not simply a word on a page to me. It is a state of suffering, a part of my adult life. In its more extreme state, I experienced despair from moment to moment, hour to hour, week to week. It was utterly debilitating. I take medication daily to stay healthy but I live with the reality that depression may someday return. That any person or institution should knowingly put a child at risk of such a lifelong trajectory is morally and ethically unconscionable.

Finally, the “serious public health problem” identified in the CPS *Position Statement* does not come without a price tag. What are the financial costs to children caused by the Ontario’s Family Justice System? The answer is not directly available, however the information which is available suggests that the societal costs, financial and otherwise, are enormous. In Canada, the Centre *for Addictions and Mental Health* states that:

> The annual economic cost of mental health illness in Canada is estimated at over $50 billion per year. This includes healthcare costs, lost productivity, and reductions in health-related quality of life.[75]

The major US public health investigation into *Adverse Childhood Experiences* (ACE), explored these costs further.[76] Over several decades, ACE studied the leading causes of illness, disability, and death as well as poor quality of life in the United States. Its findings suggest that adverse childhood experiences are a major risk factor for all of these outcomes.[77] ACE ranks “parental separation/divorce” as one of the top 10 adverse childhood experiences, making it a major contributor to these negative health outcomes.[78] The costs of health consequences related to ACE are enormous, with an annual estimated total of $748 billion in Bermuda, Canada, and the United States.[79] Public Health Ontario, in its August 2020 study of the prevention and mitigation of the

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[75] *Mental Illness and Addiction: Facts and Statistics, supra* note 49 at "Costs to society.”

[76] Robert Anda, *The Adverse Childhood Experiences Study: Child Abuse and Public Health*, Prevent Child Abuse America. https://preventchildabuse.org/images/docs/anda_wht_ppr.pdf.

[77] Robert Anda, *supra* note 76 at 2.

[78] Robert Anda, *supra* note 76 at 4.

[79] "What are adverse childhood experiences?” Centres for Disease Control and Prevention, Violence Prevention, Fast Facts, Last Reviewed June 29, 2023, https://www.cdc.gov/violenceprevention/aces/fastfact.html.

impact of ACE in Canada, proposed that early intervention to prevent ACE can positively impact physical and mental health and health-related behaviours.[80]

Section 7

A Child's Rights Denied

The Ontario Family Justice System denies two fundamental rights guaranteed to children under the UN *Convention on the Rights of the Child,* to which Canada is a signatory.[81] The first right is the child's right to health,[82] which Ontario family courts place at significant risk as identified above.

The second right is that of children capable of forming their own views to express those views, including in any judicial proceedings affecting them, and for the child's views to be given due weight in those proceedings.[83] Ontario children are given no opportunity to express their views as to where their parents' separation will be addressed; namely, inside Family Court or outside through Alternative Dispute Resolution (ADR). If you were the child and understood the potential consequences of that choice, which would you choose?

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[80] "Adverse Childhood Experiences (ACEs), Interventions to Prevent and Mitigate the Impact of ACEs in Canada, Public Health Ontario, August 2020, https://www.publichealthontario.ca/-/media/documents/a/2020/adverse-childhood-experiences-report.pdf.

[81] United Nations Human Rights Office of The High Commissioner, "Convention on the Rights of the Child," adopted 20 November 1989, ratified by Canada December 12, 1991.

[82] United Nations Human Rights Office of The High Commissioner, *supra* note 81 at Article 24.

[83] United Nations Human Rights Office of The High Commissioner, *supra* note 81 at Article 12.

Part C: Transforming Ontario Family Law Culture

Family Court cannot legitimately contain the dichotomy of inflaming parental conflict and promoting children's best interests.

The harm to families which our Ontario Family Justice System is responsible for, creates an ethical, moral, and legal imperative to not only change, but transform it. In the long term, this transformation will require a fundamental restructuring of the system to one which is non-adversarial and multidisciplinary, such as that adopted by Singapore's Family Justice System addressed below.

In the short-term, family law lawyers and judges have an obligation to alleviate this harm and set us on a path towards that systemic transformation. This path begins by recognizing that family law requires us to extend our duty to clients further, to the children of our clients. Dr. McIntosh views lawyers who represent parents as having a duty that shapes the lawyer's advice to their parent client:

> … [the lawyer] looks at their role in creating resilient outcomes for children, by assisting parents to diminish their acrimony, effectively manage their dispute, build effective parenting alliances and establish child centred parenting plans tailored to the development needs of each child.[84]

The Code of Conduct for the American Academy of Matrimonial Lawyers recognizes that family law lawyers may have obligations to the child of their parent client which, in some instances, will justify subordinating the express wishes of their parent client.[85] Bala et al give high praise to the Law Society of British Columbia for its *Best Practices Guidelines for Family Lawyers*, which recognizes duties for family law lawyers that are owed to children by both parents and parent's counsel:

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[84] Jennifer McIntosh, *supra* note 12 at 6.

[85] American Academy of Matrimonial Lawyers, "The Bounds of Advocacy: American Academy of Matrimonial Lawyers Standards of Conduct" (1992) 9 J Am Academy Matrimonial Lawyers 1 at 27: "The lawyer must represent the client zealously, but not at the expense of children. The parents' fiduciary obligations for the well-being of the child provide a basis for the attorney's consideration of the child's best interests consistent with traditional adversary and client loyalty principles. It is accepted doctrine that the attorney for a trustee or other fiduciary has an ethical obligation to the beneficiaries to whom the fiduciary's obligations run. To the extent that statutory or decisional law imposes a duty on the parent to act in the child's best interests, the attorney for the parent might be considered to have an obligation to the child that would, in some instance, justify subordinating the express wishes of the parent."

> ‘As counsel for a parent, the lawyer owes a duty not only to the client, but also to the children of that client. The children are the beneficiaries of the duties owed to them by their parents and those owed to them by their parents’ counsel.’
>
> In our view, this statement is foundational for the practice of family law, not just in British Columbia, but throughout Canada, and indeed in other countries where post-separation parenting laws are based on the best interests of the child. [86]

What are the duties which a family law lawyer has to the child of their parent client? If a parent’s fundamental duties to their child include keeping them safe from harm and promoting their healthy development, then those same duties are owed to children by their parent’s counsel. But how can these duties be put into practice? It is clear from the above that collaborating with the Caring Professions is one necessary step. “Child-centred advocacy”, presented below, is the other. Together, they minimize a child’s exposure to the risk factors identified by the Canadian Paediatric Society.

Section 8

The Critical Link – Collaborating with the Caring Professions as Equal Partners

The first statement made by the lawyer who taught the family law section of my 1993 Bar Admission Course was to the following effect:

> You will be dealing with clients frequently who will be in the first year of their separation. They will be in the least capable state of making sound decisions, yet at this very time they will be seeking your advice to make some of the most important decisions of their lives.

Then, nothing. Nothing in the balance of that course, nor in my legal training over the following 30 years, served to fill that vacuum – to adequately address the enormous challenges of serving clients who are in a state of emotional turmoil, let alone to understand the precarious position which this places the child in. Only through my work, first with children and social workers from the OCL and later with the AFCC was that vacuum filled, the critical link made.

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[86] Bala et al, *supra* note 50 at 566.

Working with OCL and children expanded my understanding of children's needs and development. As my child representation became more effective, there was a spillover to my parent representation. I was better equipped to recognize the nuances and complexities of separating families; the human dynamics became more apparent. I grew more empathetic and supportive. My professional and personal satisfaction from the work increased significantly.

The AFCC introduced me to an interdisciplinary discourse in family law. Amongst its many functions, it hosts conferences, gathering into one room social workers, judges, mediators, lawyers, psychologists, child development specialists, and other related professions. We shared one objective: improving the delivery of family law services to our communities. The ticket for entry into the room was humility, the recognition that the multifaceted problems presented by separating families required our collective response. I developed a network of relationships and resources with other jurists and members of the Caring Professions both in and beyond my own community. As my understanding of the problems facing these families expanded, I became a better advocate for my parent and child clients. It was a wonderful and enriching experience!

If the Caring Professions are the critical link, the pejorative bias held by some family law lawyers against them must be overcome. In the article cited above, Bala et al relate how some lawyers practising as zealous advocates emphasize that they are not **"**social workers."[87] I heard this reference repeated in a derogatory manner by lawyers on many occasions. The message: social workers address issues which are "soft" or "warm and fuzzy," subordinate to the "more important" issues which lawyers address. Social workers shared with me instances of being treated by lawyers with disrespect and condescension. Such conduct discredits our profession and denies us the critical guidance which the Caring Professions can provide. Education about the critical role of the Caring Professions is one important step in overcoming this problem.

Ontario's Family Court Clinics provide a working example of the significant benefits to jurists and separating families offered by collaborating with the Caring Professions as

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[87] Bala et al, *supra* note 50 at 563.

equal partners. These clinics are located today in Kingston, London, Durham, and Ottawa, staffed by psychologists and social workers. Initially established to provide clinical assessments to the court for custody, access, and child protection matters, they were diminished when government funding cuts in the 1990s eliminated custody and access assessments in Kingston, Durham, and Ottawa. London would also have lost these assessments, but it has maintained them by shifting funding to a retainer basis.

A 1997 study of the Kingston Family Court clinic demonstrated the critical service that these assessments can provide to the court. The study found that fifty percent of cases referred to the Clinic settled in under five months without trial.[88] The study concluded that: "Combining legal and mental health efforts can result in more efficient use of resources and the substantial diversion of cases from continuing litigation."[89]

A much more recent Ontario multidisciplinary initiative is the *Parenting Plan Guide* and the *Parenting Plan Template.*[90] They were developed by a team of academics, mental health professionals, child development specialists, and jurists led by the Ontario AFCC. They provide excellent guidance to the public, lawyers, and judges in making informed decisions about parenting time for separated parents, with a particular focus on children's developmental stages. Their benefit to families in Ontario and beyond cannot be overstated.

Section 9

Child-Centred Advocacy: Duties to Children, Peacemaking, and Problem-Solving

In "*Children's Psychological Responses to Divorce",* Dr. McIntosh writes:

> *Mind*fulness of the needs of children and the merits of child centred dispute resolution are at the core of current practice developments in family law, with *a growing body of research showing clearly that the way in which*

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[88] Leverette et al, *supra* note 8. Regarding child protection assessments, see: Bala, Nicholas and Leschied, Alan, "Court Ordered Assessments in Ontario Child Welfare Cases: Review and Recommendations for Reform*,"* Canadian Journal of Family Law, vol 24, January 2008.

[89] Leverette et al, *supra* note 8 at Abstract.

[90] AFCC Ontario, "Parenting Plan Guide" and "Parenting Plan Template."

> *practitioners assist parents to resolve their disputes can significantly impact children's outcomes.*
>
> Legal practitioners who represent mother and father respectively in a divorce dispute each have a silent, second client, the child at the centre of the dispute. Wise practitioners with a good grasp of the divorce literature don't rely on the idea that "kids are resilient." *They look instead at their role in creating resilient outcomes for children, by assisting parents to diminish their acrimony, effectively manage their dispute, build effective parenting alliances and establish child centred parenting plans tailored to the development needs of each child.* [italics added][91]

The Law Society of Ontario requires that a lawyer's role be one of "client-centred advocate", essentially: listening to the client relate the facts; advising the client how the law applies to those facts; then following the client's instructions as a zealous advocate, subject to several other considerations set out in the Rules of Professional Conduct, as identified above.

This role is unsuited for family law for several reasons: it fails to recognize the special needs of this client group who are experiencing life's second most stressful experience[92] with the corresponding potential for impaired decision-making, nor does it sufficiently recognize or promote family law's principal statutory objective. How many Ontario parents are left with lifelong regrets, having made decisions and conducted themselves in ways during Family Court that damaged their children and their relationship with their children?

Andrew Schepard writes:

> [Litigation] puts a premium on parents finding fault with each other… [P]arents who participate in adversary procedures focus on the weaknesses of the other parent, rather than focusing on how to reconstruct their post-divorce or separation relationship for their children's benefit."[93]

A radical change to a more complex, expanded form of advocacy is required, which I call "child-centred advocacy," This approach is non-adversarial and avoids litigation

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[91] Jennifer McIntosh, *supra* note 12 at 6.

[92] The Holmes-Rahe Stress Inventory, *supra* note 53.

[93] Andrew Schepard, "Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective" (1998) 32 Family L.Q, 105.

except where it may be necessary for the safety of family members in cases of serious violence, alienation, abuse, or mental health disorders. It begins by recognizing the duties owed by family law lawyers to the child of their parent client. As next addressed, this expands the family lawyer's role to address a client's emotional state where needed. It applies peacemaking and problem-solving skills, and, further, utilizes the Practice Proposals addressed in the next section of this paper.

Dr. Robert Emery, a renowned psychologist, examined the anger of separated parents in the days, weeks, and months before or after separation as a reaction to pain.[94] Dr. Emery argues that this pain fuels much of the anger in separations,[95] numbing a parent and hiding the deeper, more honest pain of rejection.[96] He points out that parents need a safe place to recognize and admit the pain behind their anger as a precondition to understanding themselves. In that place, the counsellor or lawyer can empathize with the parent's pain and perhaps provide the insight the parent was lacking into their need to grieve.[97] It can also be "… *the start of the parent refocusing outward to their child, their child's pain and what their child needs…."* [italics added][98]

A critical goal of child-centred advocacy is to assist the client to the point where this refocusing occurs. The lawyer addresses the client's distress, collaborating with members of the Caring Professions where needed, if it impairs the client's decision-making. Law Professor, Katherine R. Cruz, writes that lawyers need to avoid:

> "… the legal objectification of their clients and the narrow construction of client [and] objectives in terms of legal interests and client values"[99] and the need to engage in "client value clarification … to curb impulsive client decision-making that may be distorted by anger, fear or insecurity and ensure

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[94] Robert E. Emery, *Renegotiating Family Relationships*, second edition (New York: The Guilford Press, 2012), 21.

[95] Emery, *supra* note 94 at 21.

[96] Emery, *supra* note 94 at 25.

[97] Emery, *supra* note 94 at 23.

[98] Emery, *supra* note 94 at 23.

[99] Katherine R. Kruse, "Beyond Cardboard Clients in Legal Ethics" 2010 23 Geo J Leg Ethics 103 at 154.

> that legal representation furthers the client's deeper and more fundamental values." [100]

Child-centred advocacy strives to curb impulsive client decision-making by using peacemaking and problem-solving skills. Peacemaking commenced at the very outset of the lawyer-client relationship rejects the zealous advocate mindset and its associated vocabulary rich in terms like "winning" and "losing." In its place, peacemaking seeks to reduce turmoil by encouraging conciliation over anger, forgiveness over retribution, and compromise over rigid positions. In so doing, it encourages an environment conducive to problem-solving. Its vocabulary is rich in terms like "compassion," "conciliation," "child-focused," "healthy child development" and "healthy child outcomes."

Dr. Philip Carney, a retired psychologist and colleague who reviewed a draft of this paper, adds the following advice:

> In my mind, the "child-centred concept" is crucial to our work with separating families. But, as a parent, I might respond: 'Well of course I want what is better for my child. It just happens that I am what is better for my child!'. Parents need to understand instead that the message their children need to hear is along the lines of: 'I want you to have the best possible relationship with your dad/mom that you can. I care the world about you, and that means I care about everything and everyone that is important to you.' *Such reassurance about what the child wants (whether the child's "wishes" are explicitly known or not, and they often will NOT be because the child is afraid to express them!) helps to ensure peace in the child's world and long-term stability in that parent's relationship with the child.* The child sees that this parent (in the child's own King Solomon story!) does not want her/him to be cut in half. *Even if it means that this parent is sacrificing some of what they might prefer.* [italics added]

The long history of lawyer as "peacemaker" is illustrated by Abraham Lincoln's words quoted below, at the start of the Conclusion. This role is exemplified today in ADR work. David Hoffman is a practising lawyer voted Boston's number one 2020 mediator and he is a Lecturer of Ethics at Harvard Law School. His TED Talk, "Lawyer as Peacemaker"[101] explores his transition from a litigator of 31 years to a full-time

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[100] Katherine R. Kruse, *supra* note 99 at 150.

[101] Hoffman, David, "Lawyers as Peacemakers. Really?!? Yes, Really." TedxNorthernIllinoisUniversity, June 21, 2016.

peacemaker through his roles in mediation and collaborative law. He speaks of the heightened sense of professional satisfaction that he and many of his litigator colleagues experienced through such a transition. He also states explicitly that the role of litigator remains necessary in certain cases.

Child-centred advocacy teaches problem-solving skills to the client to further promote settlement:

> While the lawyer must remain respectful and empathetic, he or she also needs to turn the client from the rearview mirror back to the road ahead. The lawyer's job may be to listen to the client anger and pain, and to acknowledge their validity, but the conversation cannot stop there.[102]

Disagreements are reframed into problems requiring resolutions. The client is motivated by learning that parental conflict can harm their child, and that putting their child's needs first benefits their child in both the short-term and the long term.

The pragmatic goal of child-centred advocacy may be summarized in the following statement by Dr. Katherine Lee and Karen Bax:

> Experts advise parents to set aside their own negative feelings, and develop a collaborative and cooperative business type relationship with the person they considered to be the source of great personal distress. [103]

None of this work is easy. On the contrary, it is exceedingly difficult and challenging. It requires a deep commitment and often requires the insights of the Caring Professions. The goal of leading your client to a position where they can see beyond their own emotional turmoil and focus on their child will not always be attained.

Once we have fully advised our client, we have a duty to follow their instructions. However, those instructions should only be followed if they comply with the statutory objective of promoting the child's best interests and our professional duties to the client's child. What if your client takes your advice but the other party, represented or not, refuses to respond in kind? In that case, the lawyer's role is to continue to strive through negotiation to avoid litigation as much as is reasonably possible (except in

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[102] M.R. O'Connell, supra 48 at 564.

[103] Katherine M. Lee and Karen A. Bax, "Children's reactions to parental separation and divorce", Paediatric Child Health, 5:4, May/June 2000, 1.

cases of abuse, mental illness, etc.). If your client has understood your advice, they will presumably agree with this approach. If the other party still insists on litigation, you will have met your professional obligations and litigation will proceed.

My comments in this Section have been directed to family law lawyers. I regard child-centred advocacy as being equally beneficial to family law judges.

Section 10

Practice Proposals

The following three practice proposals for family law lawyers provide some concrete steps to realizing principal goals of this paper.

A. Retainer Letter "Additions"

The following additions should be made to the family law lawyer's Retainer:

1. In the course of representing you, fees may be payable to your lawyer for obtaining advice and assistance from members of the Caring Professions (i.e. mental health professionals, social workers, child behaviour clinicians, etc.) Further, there may also be fees payable by you directly to a member of the Caring Professions for counselling/therapy services, etc.
2. Your lawyer and your separated spouse's lawyer may recommend that you and your spouse attend together to see a professional if they believe that this may be beneficial for several reasons including: improving communications, the resolution of issues, and understanding the effect of conflict on your children.
3. These measures are intended to promote a healthy outcome for you and your child, and specifically, to assist you in attempting to avoid court. Research has established that the conflict and stress associated with Family Court poses health risks to parents and children. Avoiding court may also save you significant amounts in legal fees.

4. In cases where abuse, violence, mental illness, addictions, and other such issues are present, litigation may be required in order that the court may exercise its authority and ensure the safety of all family members.

B. “Full Disclosure”

In the initial one or two appointments with parent clients, they are presented with a detailed review of the various ADR processes available to negotiate out-of-court settlements with their separated spouse. These include mediation, collaborative family law, lawyer to lawyer negotiation, and arbitration.

“Full Disclosure” of the alternative to ADR, namely, Family Court litigation, is presented next. “Full Disclosure” makes clear that litigation is extremely serious and should be considered as a last option, used only in a limited number of instances given its harmful consequences to the client and the client’s child. Full Disclosure consists of two parts. The first part advises the client of nine concerns about litigation:

1. Health risks to parents and children. Research demonstrates that the significantly increased stress levels for parents engaged in litigation increases their risk of physical and mental health problems. Litigation generally increases parental conflict which exposes children to serious short-term and long-term physical and mental health risks. The long-term harms to the child can reach into adulthood and even later into adult married life, with potential increases in poverty, educational failure, risky sexual behaviour, unplanned pregnancies, earlier marriage or cohabitation, marital discord, and divorce. [Source*: Position Statement of the Canadian Paediatric Society, 2022*[104]]
2. Counselling. Separation is the second most stressful life experience. The best decisions are made when we are the least stressed. Consequently, all clients are advised to draw upon their own support systems and to consider counselling, emphasizing this even more for clients considering litigation.

[104] Brenda Clark, *supra* note 2.

3. Financial cost. Litigation almost always produces a significantly higher legal bill than ADR. This is due to the numerous additional tasks a lawyer must perform for the client including: explaining court procedures, preparing court documents, gathering evidence, preparation for and attendance at conferences, as well as motions and trials, etc.

4. "Pouring gas on a fire!" Whatever the degree of conflict with the other parent prior to court, the client can be almost certain that it will increase because litigation makes parents into adversaries.

5. Loss of decision-making. The client surrenders decision-making over the most important areas in their life including their child and their wallet, to a stranger – a "Judge."

6. "In a canoe in rapids without a paddle" and "running out of money." Clients often have insufficient funds to pay their lawyer for protracted litigation, leaving them without a lawyer in the middle of it. It's like being caught in a set of rapids without a paddle. They are trying to understand and navigate a complex court process on their own, the consequences of which are extremely serious.

7. The "loser" pays the "winner." At trial, and for many steps prior to trial, the court may order the loser to pay some or all of the winner's legal costs, leaving the loser to pay for both parties' lawyers.

8. The client loses their privacy. A client's private life, their relationship with their former spouse, etc., is open to public scrutiny through a state-controlled process.

9. "Buying a shirt" and "knowing the cost." One usually does not enter a store and decide to purchase a shirt before knowing its price. The client is provided with detailed cost ranges for each of the major steps in litigation: commencing proceedings to case conference, motions, settlement conferences, trial preparation conferences, and trial.

I note that I was only able to set these cost ranges after many years in practice. I ensured that the "high-end" of these ranges was indeed high, providing for a worst-case scenario. I regarded this as a necessary "reality check" for the client, generally avoiding the possibility of a client later saying that: "I had no idea how much this would cost!" I would strongly recommend that lawyers with little experience who wish to set cost ranges consult with more experienced lawyers.

The second part of Full Disclosure is an educational package consisting of three items. First, the letter written by the 15-year-old London boy.[105] Second, the article which I have cited on child development by Dr. McIntosh.[106] Third, an article identifying those separating parents who get it right by prioritizing their children's needs over their own, by Stefanie Peachey, R.S.W. an accredited mediator.[107] Full Disclosure led most of my clients who were considering litigation to reject it. Those few who chose it, did so fully advised of the risks and the gravity of their decision.

Any client proceeding to Family Court in Ontario without this type of Full Disclosure from their lawyer has arguably not been properly advised. It should be provided prior to the lawyer's opinion as to their client's prospects of "winning" or "losing" in Family Court.

I provided Full Disclosure to all clients, including those who first presented as cooperating with the other parent and, who in some instances, brought with them terms of an agreement which they had made. These clients benefited by having a realistic appreciation of Family Court litigation if their cooperative attitude began to erode, and litigation became a consideration. This may occur for many reasons, perhaps the first being their lawyer's advice about family law's numerous obligations and entitlements.

C. "Informed Consent"

The concept of "Informed Consent," is commonly used by mental health professionals. Their professional obligation is to have their client advised of and confirm the risk of

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[105] Letter from 15-year-old London boy, *supra* note 51.

[106] Jennifer McIntosh, *supra* note 12, 1-8.

[107] Stefanie Peachey, "What is Positive Co-Parenting? And How You Can Achieve it," Today's Parent, July 10, 2023, https://www.todaysparent.com/family/parenting/what-is-co-parenting/,1-10.

harms they may experience in treatment or therapy including re-traumatization, anxiety, and depression. Litigation poses health risks to parents and children as well as the risk of significant legal costs, therefore clients choosing litigation are required to sign an "Informed Consent" clearly identifying those risks.

This Consent includes advice that, prior to commencing litigation, the client should engage the services of mental health and child development specialists who are informed about the impact of protracted stresses on the health of parents and children arising from post-separation conflict. The concept of "Informed Consent" should also be explained by judges to unrepresented litigants who are attending court for the first time.

Section 11

Further Proposals for Change

The Duty to Warn

Clear warnings in simple language should be placed on all court documents, to the following effect: "**FAMILY COURT PROCEEDINGS CAN HARM YOUR HEALTH AND THE HEALTH OF YOUR CHILDREN. Contact the following website for further information…."**

Re-envisioning "Best Interests"

"Best Interests of the Child" should be re-envisioned by lawmakers, judges, and lawyers, in collaboration with the Caring Professions, if it is to serve that objective. Its current amorphous state leaves it meaning everything and nothing. A basic premise of this paper is that a child's best interests are rooted in meeting their developmental needs and promoting healthy outcomes. Central to those needs is the need for a strong relationship with at least one healthy parent.

A Code of Conduct

The LSO, in collaboration with the Caring Professions, should create a new Code of Conduct for family law lawyers or, at a minimum, add a detailed section to its existing Code. The following materials may provide important assistance: *The Model Code of*

Canada,[108] British Columbia's Law Society *Best Practice Guidelines for Family Lawyers,*[109] the above-cited articles by Bala et al,[110] Boyd,[111] and Marra,[112] The Final Report of the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters,[113] and the American Academy of Matrimonial Lawyers' *Bounds of Advocacy.*[114]

A College of Family Mediators and Triage over Mandatory Mediation

Mediation and other ADR processes for separating parents are critical alternatives to litigation. The *Divorce Act Amendments* create obligations for lawyers to advise separating parents to attempt to resolve matters through ADR except where clearly not appropriate.[115] Court-connected mediation services are available throughout Ontario and separating parents are encouraged to make use of them.

A problem that exists in Ontario is the lack of a regulatory body for mediators which would serve such essential functions as overseeing the practitioners and creating professional standards. The establishment of such a regulatory body is long overdue, particularly given that federal and provincial statutes now direct the public to mediators.

Whether Ontario should proceed or not with mandatory mediation (i.e. all parents commencing Family Court litigation must first attend court-serviced mediation except in cases of violence or spousal abuse) has long been an issue in Ontario and other jurisdictions. The American experience of many courts shifting from mandatory mediation to Triage processes can provide us with helpful lessons. Generally stated, Triage processes screen parents commencing litigation and direct them to services that

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[108] Federation of Law Societies of Canada (FLSC), *supra* note 40.

[109] "Best Practice Guidelines for Lawyers Practising Family Law", *supra* note 47.

[110] Bala et al, *supra* note 50.

[111] John-Paul Boyd KC, *supra* note 26.

[112] Michael J. Marra, *supra* note 5.

[113] "Meaningful Change for Family Justice: Beyond Wise Words", *supra* note 15.

[114] M.R. O'Connell, *supra* note 48.

[115] *Divorce Act,* RSC 1985, c 3 (2nd Supp), s 7.7 (2).

are available to meet the family's particular needs. These services may include mediation, confidential conflict resolution conferences, and issue-focused or comprehensive evaluations.[116]

Articles by Bill Ezzell, Peter Salem, and A. Davis & Michael Saini[117] serve collectively as a longitudinal survey in the United States, of Family Courts establishing mandatory mediation in the 1960s and 1970s, followed by the emergence of Triage processes (or "differentiated case management") as a preferable option in many of their courts.

Examining three different American Family Court jurisdictions, A. Davis and Michael Saini describe how, in large part, Triage processes succeed because they are responsive to the circumstances of these jurisdictions, addressing their particular needs, available court and community resources, and other factors.[118] Significantly, Salem, in observing that dispute resolution processes have expanded beyond mediation, states that this has "… rendered the mediation/adversarial litigation dichotomy obsolete."[119]

Such creative initiatives have produced a more efficient use of American court resources and have received significant recognition. Salem references an extensive two-year study of Triage processes in New York state which concluded: "Through early screening and identification of a wide array of dispute resolution options and direct linkages to services, court could provide a more holistic response to the needs of families than is presently available."[120] In Canada, Triage initiatives have taken place in locations including British Columbia, Nova Scotia and Ottawa.[121]

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[116] Peter Salem, "The Emergence of Triage in Family Court Services: The Beginning of The End for Mandatory Mediation?" Family Court Review, 47:3, https://doi.org/10.1111/j.1744-1617.2009.01262.x, 314.

[117] Bill Ezell, "Inside the Minds of America's Family Law Courts: The Psychology of Mediation versus Litigation in Domestic Disputes", 25 LAW & Psychol. REV. 119 (2001), 119-143: Peter Salem, *supra* note 99 at 371-388; A. Davis and Michael Saini, "Pathways Through the Pandemic: An Application of Family Justice Pathways in Three Courts," NCSC Trends in State Courts, 29-34.

[118] A. Davis and Michael Saini, *supra* note 117 at 29-34.

[119] Peter Salem, *supra* note 116 at 391.

[120] Peter Salem, *supra* note 116 at 390-391.

[121] "Final Report: Evaluation of the Family Justice Registry (Rule 5) Pilot Project," November 2002. More information is available in the full report at http://www.ag.gov.bc.ca/justice-services/index.htm; "Summary of Activities for the Child-centred Family Justice Fund 2003-2009 - Family Justice Initiatives (Part 3),"

A Mental Health Division of Family Court

A Mental Health Division of Family Court should be created for parents suffering from mental health issues. Such parents have special needs and pose special challenges in Family Court. Elevated levels of conflict, issues of abuse and resulting trauma are frequently present in such cases. These cases would benefit from lawyers and judges with specialized training collaborating with members of the Caring Professions. The best interests of children living in these exceedingly difficult circumstances would be much better served. Ontario criminal courts have had mental health divisions in several jurisdictions for decades.

Section 12

The "Singapore Model of Transformative Family Justice" – Therapeutic Family Law and the Non-Adversarial Family Court

No transformation of Ontario's Family Justice System, such as that proposed in this paper, should proceed without a thorough review of the "Singapore Model of Transformative Family Justice."[122] it has put into practice and exemplifies much of what this paper proposes.

Therapeutic jurisprudence has been the engine for change in transforming Singapore's Family Justice System from a traditional adversarial system to a non-adversarial, problem-solving, multidisciplinary system. Therapeutic jurisprudence:

> … provides a perspective or a "lens" through which to examine the impact of the law and the psychological and emotional well-being of justice system participants, with the aim of making the law and its application as therapeutic as possible without offending other traditional legal values, such as due process. As such, it humanizes the law and focuses attention on previously

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https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/ccfjf-fdfae/p3c.html, 1; Rachel Birnbaum, Michael Saini, and Mark MacAulay, "Ottawa Coordinated Case Management Project for High Conflict Custody and Access Cases: Lessons Learned," Canadian Family Law Quarterly 36:291-307.

[122] An excellent review of the "Singapore Model" and Therapeutic Jurisprudence is presented in the two papers: Debbie Ong, *supra* note 49 at 414-422 and Yarni Loi and Susanne Chin, "Therapeutic Justice – What It Means for The Family Justice System in Singapore," Family Court Review, 59:3, 423-423.

> under-appreciated aspects of the law, that is, the human, psychological and emotional aspects. [123]

Therapeutic jurisprudence explicitly recognizes law as a social force which can have helpful or harmful consequences.[124] Justice Debbie Ong, Presiding Judge of the Family Justice Courts of Singapore and an advocate of therapeutic jurisprudence, highlighted the harmful consequences of an adversarial Family Justice System given, "…the presence of children…" [125] and the fact that "… parental conflict is very harmful to children."[126]

Justice Ong, who has played a critical leadership role in her court's transformation, has stated that the adversarial model is no longer acceptable and that:

> Our system should ensure that the whole divorce journey allows for healing from hurts and does not allow the opposite – the aggravation of hurt. A kind act usually begets a kind response. A nasty act inflames the other.[127]

This transformation, commenced in 2018, is an incredibly ambitious multi-year program commencing each year with a new "Work Plan". It has required the engagement of all system stakeholders including: "… law and policymakers, universities, academics and teachers of family law, judges, lawyers, psychologists, counsellors and other allied mental health professionals who operate within the family justice eco-system…."[128]

Courageous leadership with enormous vision has been required. Education has been essential in reorienting all system members to an entirely different perspective in working with separating families and building a structure responsive to that new perspective. Singapore Family Justice Courts today, using a multidisciplinary approach, make counselling, therapy, mediation, and adjudication available based on need. Problem-solving rather than litigation is its core focus.[129] Triage and mediation are also

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[123] Yarni Loi and Susanne Chin, *supra* note 122 at 424.

[124] Yarni Loi and Susanne Chin, *supra* note 122 at 424.

[125] Debbie Ong, *supra* note 54 at 416.

[126] Debbie Ong, *supra* note 54 at 416.

[127] Debbie Ong, *supra* note 54 at 416.

[128] Yarni Loi and Susanne Chin, *supra* note 122 at 439.

[129] Yarni Loi and Susanne Chin, *supra* note 122 at 438.

crucial elements. New roles for Family Court judges and lawyers have also played a crucial role in this change. One court decision stated: “If both parties’ counsel can work as a team in problem-solving their client’s parenting matters, they would have played a critical role in the delivery of therapeutic justice in our family justice system.”[130]

[130] Yarni Loi and Susanne Chin, *supra* note 122 at 438.

Conclusion: Abraham Lincoln, Phil Epstein, And Reforming Ontario Family Law

> Discourage litigation. Persuade neighbours to compromise whenever you can. Point out that the nominal winner is often the real loser in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of becoming a good [person].
>
> – Abraham Lincoln

At an international AFCC conference in Toronto in 2013, Phil Epstein spoke of family law's long history of excluding women from its practice in the Bar and on the Bench. Mr. Epstein, Canada's highest profile family law lawyer at the time and a long-term AFCC member, acknowledged the fundamental changes and progress in family law resulting from women's entry into the field. He pointed out emphatically that systemic barriers to a woman's right to full participation in one of society's most fundamental institutions had been wrong: morally, ethically, and legally. What we could not have imagined fifty years ago is today's reality – the significant proportion of female jurists and their enormous contributions to family law.

And so today it is morally, ethically, and legally wrong that our Ontario Family Justice System continues to harm parents, and, more importantly, children. The lack of knowledge about this tragedy amongst jurists must end. Nothing less than a transformation in our family law culture is required.

To address this problem, I propose the following fifteen reforms to our Ontario Family Justice System. Many are practice-oriented reforms for lawyers and judges which can be adopted immediately. Some of these reforms could enter the Ontario Family Law Rules and others, the LSO Code of Conduct, and still others are systemic and will only occur if we, as a body of family law professionals, and the LSO advocate for them with our lawmakers. The proposed reforms are as follows:

1) All Family Court forms to contain a warning to parents in plain language of the risks which litigation poses to the health of themselves and their children.
2) The establishment of professional standards and guidelines for child-centred advocacy for Ontario family law lawyers, utilizing the Retainer Letter "Additions,"

Full Disclosure and Informed Consent set out above, with certification and mandatory annual CPD requirements.

3) The establishment of a Code of Conduct for family law lawyers by the LSO in collaboration with the Caring Professions, or significant additions to the current Code, including the requirement of maintaining standards of conduct through educational programs and required certifications.

4) (a) Attention needs to be paid to the minority of lawyers who misuse the Family Court process, encouraging litigation of family cases that should be settled, and indirectly allowing parents to harm their children. This issue requires education and training, starting in law schools but certainly including the LSO and other legal organizations.

   (b) Mechanisms to address this misuse should include formal Law Society discipline proceedings and judicial actions through a more effective use of costs awards, including against counsel personally. There is also a role for increased self-awareness of individual lawyers, supported by more effective mentoring, and more informal supports within the Family Law Bar.

5) Service of an Application should not necessarily trigger litigation when parties are represented. Counsel for the Respondent, at the very outset, should call the Applicant's lawyer to determine whether litigation can be avoided with timelines being extended in recognition of this obligation.

6) The requirement of a "Full Disclosure Certificate" reflective of the Full Disclosure set out above, signed and filed with the court by all parents commencing Family Court actions.

7) The requirement of an "Informed Consent Certificate" reflective of the Informed Consent set out above, signed and filed with the court by all parents commencing Family Court actions.

8) As early as possible in proceedings, usually the Case Conference, judges to share with parents, both represented and unrepresented, the information set out

in the Full Disclosure and Informed Consent, to educate them as to the gravity of choosing litigation and the benefits of a non-adversarial resolution.

9) Jurists to engage with members of the Caring Professions in re-envisioning “best interests of the child” with the emphasis on healthy outcomes for children.

10) The establishment of mentoring programs between lawyers and the Caring Professions focusing on child development and health concerns for separating parents and their children.

11) The establishment of formal rules and regulation for mediation in family law matters, including the establishment of a College of Family Mediators.

12) The implementation of Triage processes in Family Court.

13) The creation of a Mental Health Division of Family Court.

14) (a) The creation of an interdisciplinary body in Ontario to include: the Ontario Association of Paediatricians, the Ontario College of Family Physicians, the College of Psychologists of Ontario, the Ontario College of Social Workers, mediators, the Law Schools, the Senior Judge of the Ontario Family Court, the Family Law Branch of the Ontario Bar Association, and the Law Society of Ontario.

(b) This interdisciplinary body to focus on coordinating efforts between the Caring Professions and the Ontario Family Justice System to promote the best interests of children through ongoing education, with dialogue and communications commencing in law schools and continuing thereafter with certification requirements for both lawyers and judges.

Replacement of the litigation method with a child-centred, multidisciplinary, problem-solving Family Justice System, which draws upon the transformative model of Singapore’s Family Court, except where litigation may be necessary for the safety of family members in cases of serious violence, alienation, abuse, or mental health disorders.

15) involving abuse, domestic violence, addictions, and other such matters. “Triage” processes are to be utilized for all cases, diverting the above-stated exceptions to litigation which would utilize the Family Court Clinic concept.

These proposed reforms are not the last word. Rather, they are intended to initiate long overdue change. The critical question is: will you work with your family law colleagues starting today to end the ongoing harm to separating families in Ontario’s Family Justice System?

Postscript

Fatigue is the current defining symptom of my ALS. As a result, some of my proposed reforms are only briefly sketched out. Nevertheless, based on my experience and my investigations, I believe that each such proposal has promise and should be seriously considered.

I ask all interested members of the Family Justice System to examine these proposals, determine their strengths and weaknesses, and look for other changes as well. To those of you who do so, I offer my strongest encouragement and thanks. I suggest that a prerequisite for such work is a willingness to “look outside the box” to bold and innovative ideas that will take our Ontario Family Justice System family beyond the 1960s and into the current century.