

Sampling of Research on Family Breakdown

Family Matters Sub-Committee
 CRD Victoria Family Court and Youth Justice Committee

Note: Direct quotations from the research are in italics. All emphasis in bold has been added.

In what sort of families do Victoria’s children live?

Just over half of Victoria households have children living in them – almost 50,000 families. Using Census 2011 data, these families can be broken down as follows:

	Number of children in these households		Percentage of total number of children		Average number of children per household	
Married	51710		65%		.8	
Common Law	7185		9%		.5	
Families with 2 parents in the home		58895		74%		.7
Female parent	16465		21%		1.4	
Male Parent	4225		5%		1.4	
Families with 1 parent in the home		20690		26%		1.4
All Families with kids		79585		100%		.8

Prevalence of divorce and its effects on children

“ *By age 15, 40% of children in the USA experience the dissolution of their parents’ partnership.*

Acrimonious divorces with ongoing levels of poorly resolved or uncontained conflict between parents constitute about one third of these separations.

The re-structuring 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.

These factors combine to elevate risks of poor outcomes for children of divorce, across psychological, social, health and academic domains, reaching through to adulthood, with increased risk of diminished emotional, economic and educational attainment.

Ongoing parenting conflict after divorce further increases the nature and magnitude of developmental risk for children.

□ ***Through its prevalence and the nature of risk it carries, parental separation may fairly be regarded as a public health issue for children.***” (Children’s Psychological Responses to Divorce and Parental Conflict, (2008) Mackintosh, Jennifer. www.flerproject.org)

Effects of conflict on children

“*Separation and divorce have the potential to disrupt vital parenting functions (Kelly, 2000). 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 (McIntosh, 2003). Recent reviews of the literature show that it has become increasingly clear that it is these family processes that contribute to determining children’s well-being and ‘outcomes’, rather than family structures per se (such as the number, gender, sexuality and co-habitation status of parents).*”

*The degree of parental conflict is a major risk factor associated with children’s adjustment to divorce. The association between intense marital conflict and children’s poor adjustment has been repeatedly demonstrated. **Children have more psychological problems when their parents are in conflict, either during marriage or following divorce** (McIntosh and Long, 2006, Amato & Keith, 1991a, 1991b; Grych, 2005; Grych & Fincham, 1990; Kelly & Emery, 2003). Such difficulties include higher levels of anxiety, depression and disruptive behaviour (Grych, 2005).”* (Parenting after Separation, Jennifer McIntosh, Susie Burke, Nicole Dour and Heather Gridley, 2009, The Australian Psychological Society Ltd.)

“□ ***Frequent, intense, threatening or poorly resolved conflict between parents pose the greatest risks to children.***

□ *Children’s development is profoundly influenced by the quality of their care-giving relationships; the “soil” in which they grow. Nothing grows well in toxic soil, and children are no different.*

□ ***Children’s distress is diminished as a direct function of whether divorce conflicts are resolved, and the degree of resolution.***

□ *When parent conflict post divorce is low, increased father involvement appears to be closely associated with better child outcomes.*

The findings summarized here about children’s responses to divorce are sobering and the challenge they throw down to the practice front is real. Mindfulness of the needs of children and the merits of child centered 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 practitioners assist parents to resolve their disputes can significantly impact children’s outcomes.” (Children’s Psychological Responses to Divorce and Parental Conflict, (2008) Mackintosh, Jennifer. www.flerproject.org)

“*Children of divorce have more aggressive behaviors, poorer self-esteem, lower academic achievement and **a general risk of problems more than twice as great (25% vs. 10%)** as children whose parents did not divorce.”* (Child Development and Appropriate Parenting Plans, Marsha Kline Pruett, Ph.D., M.S.L. www.flerproject.org)

Data on Family Cases in our Courts

Some data about family law cases in the Supreme and Provincial (Family) Courts is available through the courts' annual reports. The Supreme Court had around 12,000 new family law applications across B.C. It heard 210 trials, of which 17 were in Victoria. We can assume that a good portion of the total number would have been uncontested divorce 'desk' orders. The Provincial Court had about 8,000 family cases, but doesn't report the number of trials. Its annual report does however note that in Victoria it takes about twelve months between filing an application and getting to a hearing and about five months before a family case conference is held.

Though most of the data reported is not broken down by city, we can assume that since the CRD represents about 10% of the Province by population, there are about 2000 families in the CRD that go to Court each year on family disputes.

The court-based process can escalate the conflict.

1. *"There is a fundamental contradiction in our approach to custody and access disputes. The statutes, case law, and scholarship all clearly proclaim that the best interests of the child are the only relevant consideration. This distinctive legal standard renders the parties' claims and needs irrelevant as ends in themselves. However, **the procedure by which we resolve disputes about parenting embodies the opposite philosophy.** As in all civil litigation, the parties have a great deal of control over the process. While children's evidence is a component of our system and while the material change threshold does effectively prevent some litigation which is not in children's interests, these are exceptions to **the general rule: a procedure which empowers the adult parties.**" (Semple, Eric, 287 (2010) 48 Osgoode Hall Law Journal)*
2. *"Although the adversarial system purports to focus on children's 'best interests,' **it more often discourages parental efforts to focus on their children's needs and diminishes the possibility of current and future civility, communication, and cooperation between parents.** Although fewer than 5% of custody disputes go to trial, the years leading to trial (or pretrial settlements) are economically and emotionally destructive for most families and do nothing to promote conditions that foster resiliency in children following divorce." (Children's Living Arrangements Following Separation and Divorce: Insights From Empirical and Clinical Research, Kelly, Joan, 2007)*
3. Another problem is the fact that so many people are now representing themselves in Court, rather than being represented by a lawyer, largely because they cannot afford legal representation. A national study in 2013 reported:

*"In British Columbia in 2011, **57% of hearings held under the British Columbia Family Relations Act included one or both SRL's [self-represented litigants]. In the British Columbia Supreme Court, self-representation was running at 35%.**" (The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Macfarlane, Julie, May 2013)*

4. As seen in the first section above, the majority of cases handled by family lawyers never get to a trial in which the judge hears from the parents. Most cases instead are resolved on the basis of negotiations between the lawyers and various interim appearances before a judge, which are almost always involve written (affidavit) evidence only. Even at a trial, judges are not permitted to conduct their own investigation but are largely passive recipients of the evidence put before them. Where only one party is represented by a lawyer, the other party is at a serious disadvantage since they will not have the same understanding of the legal rules of evidence and are typically overwhelmed by the procedure.

Options for the Way Ahead

*“In response to the failings of the adversarial process in family and custody matters, divorce education programs and custody mediation have been widely adopted as alternative dispute resolution interventions. Research indicates that such programs are effective along a number of dimensions. Parents in research-based divorce education programs, compared with parents without such interventions, have reported **increased parental awareness of their children’s needs as separate from adult needs; a greater willingness among residential parents to have their children spend time with the nonresident parent; a reduction in parental behaviors that put children in the middle of disputes; better communication; and greater willingness to settle custody and access disputes with their former partner** (Haine, Sandler, Wolchik, Tein, & Dawson-McClure, 2003; Kelly, 2002; Kramer, Arbuthnot, Gordon, & Hosa, 1998; Pedro-Carroll, 2001, 2005).”*

(Children’s Living Arrangements Following Separation and Divorce: Insights From Empirical and Clinical Research, Kelly, Joan, 2007)

“There is now sufficient experience with family law mediation and collaborative practice, both in Canada and in other jurisdictions, to confidently assert that, with the appropriate support and protections, they are a safe, fair and efficient way to resolve many family disputes. The fact that they are more affordable and better adapted to the needs of most separating families is behind the many reports that have recommended using them more. As well, they are widely experienced as “user friendly” and participants tend to report high rates of satisfaction.⁶⁰ Yet, rates of uptake are not as high as might be expected.

Reasons for this include, but are not limited to:

- *As the BC report goes on to observe, “although more and more families are aware of ADR, public awareness of these options still competes with a lifetime of exposure to the court system.” Put another way, the inertia of doing things the way they have always been done is a powerful force.*
- *The court process continues to be the central framework, and litigation the primary format around which family dispute resolution is organized. That is, in many respects CDR processes are add-ons to a more fundamentally adversarial framework.*
- *For many litigants, including for example self represented parties, it is difficult for services such as mediation, for which the parties often have to pay, to compete with “free” services like the courts.” (Meaningful Change for Family Justice: Beyond Wise Words, Action Committee on Access to Justice in Civil and Family Matters, April, 2013, pp. 33,34)*

Family Justice Working Group of Action Committee on Access to Justice in Civil and Family Matters (<http://bit.ly/1cqZ1fV>)

Note: The Working Group's recommendations are listed below and grouped into three categories: **1) justice system culture**; **2) services and admin** and; **3) law and procedure**. Emphasis in bold and italics has been added. "**CDR**" stands for "Consensual Dispute Resolution" -- a process in which the parties are personally and directly involved in a mediation-like process, usually with the assistance of a skilled mediator or facilitator.

Guiding Principles for Recommendations

Minimize conflict - Programs, services and procedures are designed to minimize conflict and its negative impact on children.

Collaboration - Programs, services and procedures encourage collaboration and CDR is at the centre of the family justice system, provided that judicial determination is readily available when needed.

Client Centred - The family justice system is designed for, and around the needs of the families that use it.

Empowered families - Families are, to the extent possible, empowered to assume responsibility for their own outcomes.

Integrated multidisciplinary services - Services to families going through separation and divorce are coordinated, integrated and multidisciplinary.

Early resolution - Information and services are available early so people can resolve their problems as quickly as possible.

Voice, fairness and safety - People with family justice problems have the opportunity to be heard and the services and processes offered to them are respectful, fair and safe.

Accessible - The family justice system is affordable, understandable and timely.

Proportional - Processes and services are proportional to the interests of any child affected, the importance of the issue, and the complexity of the case.

Recommendations re: Justice System Culture

Recommendation 1:

That stakeholders across the system, led by law schools, collaborate on a study of family law curricula and make recommendations for changes that would better prepare students with the unique knowledge and diverse skills needed to assist children and families through the contemporary family justice system.

Recommendation 2:

That changes to the family law curriculum be accompanied by a greater emphasis on *CDR skills and knowledge* across the entire law school curriculum.

Recommendation 3:

That Cdn law schools hire and develop more FT professors with an interest in family law.

Recommendation 4:

That Law Societies recognize the unique knowledge and skills needed to practice family law by accepting training in these areas for continuing professional development; and, that continuing legal ed organizations develop courses to support needed skills

Recommendation 5:

That Law Society regulation of family lawyers explicitly address and support the non-traditional knowledge, skills, abilities, traits and attitudes required by lawyers to optimally manage family law files.

Recommendation 6:

That the family law Bar in each jurisdiction review and consider adopting guidelines similar to those promulgated by the BC branch of the Canadian Bar Association for lawyers practicing family law.

Recommendation 7:

That ministries of justice, Bar associations, law schools, mediators, collaborative practitioners, PLEI providers and, as appropriate, the judiciary, contribute to and advocate for enhanced public education and understanding about the nature of *collaborative values* and the availability of CDR procedures in the family justice system.

Recommendation 8:

That the family justice system offer an array of *dispute resolution options* to help families resolve their disputes, including information, mediation, collaborative law, parenting coordination, and adjudication.

Recommendation 9:

That before filing a contested application in a family matter (but after filing initial pleadings), *parties be required to participate in a single non-judicial CDR session*. Rules should designate the types of processes included and ensure they are delivered by qualified professionals. Appropriate safeguards should be in place and exemptions should be available where the parties have already participated in CDR, for cases involving family violence, where there is real risk of an unfair agreement or where it is otherwise urgent for one or both parties to appear before the court. Free or subsidized CDR services should be available for those who cannot afford them.

Recommendations re: Services and Administration

Recommendation 10:

That the provision of early, front-end services in the family justice system be expanded. (Victoria's Justice Access Centre is offered as an example) This means:

- Making front end services (assessment, triage, linkages with and referral to external family-serving agencies, legal info, parenting and children's info programs; self-help resources; CDR services; legal advice, financial advice) highly visible, easy to access and user-friendly
- Coordinating and integrating the delivery of all services for separated family whether provided by lawyers, governments or NGOs and;
- Allocating new resources and/or rebalancing and reallocating existing justice system resources in support of expanded front-end services

Recommendation 11:

- Make available in plain, neutral language details on early information services (impact of separation and conflict on children; how to parent when going through separation and divorce; what resources are available to help manage legal as well as non-legal problems; what legal issues arise; what the law says about parenting, support and property division; options for responding to problems relating to violence, finances or housing; what procedural options are available to resolve legal issues and; how procedural options are accessed, how long they take and how much they cost)
- Ensure info responds to the needs of self-represented litigants and is available in multiple formats (in-person, law info centres, phone, on-line printed guides)

Recommendation 12:

- With some exceptions, make information sessions mandatory. Sessions to cover, at a minimum: how to parent after separation and the effects of conflict on children; basic legal info; info about mediation and other procedural options; info about non-legal family services

Recommendation 13:

That triage services, including assessment, information and referral, be made available to people with family law problems.

Recommendation 14:

That legal aid be re-defined for the purpose of both funding and service delivery to include:

- Full range of legal representation
- Legal info and guided self-help
- Programs or services linking or coordinating legal help with non-legal services

Recommendation 15:

That funding for family law legal aid be increased.

Recommendation 16:

That professional Codes of Conduct and court rules in all jurisdictions be reviewed to authorize and support the use of limited scope retainers.

Recommendation 17: Expand reliance upon properly trained and supervised paralegals, law students, articling students, and non-lawyer experts to provide a range of services to families with legal problems.

Recommendation 18:

Recognizing the scale of unmet family law need, the individual and social cost of failing to meet that need and the existence of programs and services that have demonstrated their value to separating families, that funding be significantly enhanced for all family justice programs and services.

Recommendations re: Court Organization, Procedure and Substantive Law

Recommendation 19:

Each jurisdiction adopt its own version of the *unified court model* (A single, specialized court that has legal authority to hear all and only, family matters, offers a range of *dispute resolution methods* and operates not just as a court of law, but also as one of the hubs in a network of legal, community and social services for families and children) and; that the two levels of govt. cooperate in the completion of unified family courts for all of Canada.

Recommendation 20:

That a unified family court retain the benefits of provincial family court and that it have its own simplified rules, forms and dispute resolution processes attuned to the distinctive needs and limited means of family law participants.

Recommendation 21:

That family courts adopt simplified procedures for more limited family law disputes.

Recommendation 22:

Expand the use of simplified, interactive court forms and easy to follow instructions

Recommendation 23: Appoint specialized judges to hear family cases and ensure these judges have, or are willing to acquire: substantive and procedural expertise in family law; willingness and ability to bring *strong dispute resolution skills* to bear on family cases; training in and sensitivity to the psychological and social dimensions of family law cases (in particular, family violence and the impact of separation and divorce on children); and awareness of the available range of family justice services

Recommendation 24:

That one judge preside over all pre-trial motions, conferences and hearings in family cases.

Recommendation 25:

That court rules committees, justice policy analysts and court administrators review legislation, rules, procedures and administrative mechanisms for ways to encourage a *broader problem-solving approach to dispute resolution*, especially in early stages, while minimizing the predisposition to manage all family issues as if they will go to trial

Recommendation 26: That the following measures be considered:

- each case be assessed and placed on different procedural track that is proportional and appropriate to the needs of the case;
- enhance judicial discretion to impose proportional processes on the parties;
- all court appearances be meaningful;
- parties be required (where possible) to agree on a common expert witness;
- both courts and parties be encouraged, where appropriate, to engage in a short, focused hearing under oath and without affidavits or written briefs to allow the court to hear oral evidence and, thus, reduce the cost and time of preparing legal materials;
- jurisdictions explore using non-judicial case managers to help the parties move their cases forward and, where appropriate, narrow and resolve many issues in a proceeding;
- case managers should have and use the powers, in appropriate circumstances, to limit the number of issues to be tried and the number of witnesses to be examined;
- judges should use costs awards more freely and more assertively to contain process and encourage reasonable behavior.

Recommendation 27:

That jurisdictions explore the use of *less adversarial hearing models*, and, if appropriate, pilot and evaluate such alternative models in Canada.

Recommendation 28:

Explore the potential for info technology to make justice more affordable and accessible.

Recommendation 29:

That Canadian family law statutes encourage *consensual dispute resolution* processes and agreements as the norm in family law, and that the language of substantive law be revised to reflect that orientation. (e.g., replace “custody” and “access” with “parental responsibility”, “contact”, “time” and “schedules”).

Recommendation 30:

That substantive family laws provide more support for early and complete disclosure by providing for positive obligations to govern all stages of a case and serious consequences for failure to comply.

Recommendation 32:

That existing post-resolution programs be expanded and that justice system policy-makers continue to explore additional ways to provide post-resolution support to families.

Recommendation 33:

That universities, ministries of justice, judicial and bar organizations, and non-government organizations cooperate in generating more and better empirical research into the operation and administration of the family justice system, particularly with respect to access to family justice.

TRADITIONAL AND PROBLEM SOLVING APPROACHES: A COMPARISON⁷

Traditional approach	Problem-solving approach
The goal is the resolution of the dispute	The goal is the resolution of the underlying problem
The focus is on a legal outcome	The focus is on a therapeutic outcome
Uses an adversarial process	Uses a collaborative process
Claim- or case-oriented	People-oriented
Rights-based	Interest- or needs-based
Emphasizes adjudication	Emphasizes post-adjudication, alternative dispute resolution
Interpretation and application of law	Interpretation and application of social science
Judge acts as an arbiter	Judge acts as a coach
Backward-looking	Forward-looking
Precedent-based	Planning-based
Few participants and stakeholders	Many participants and stakeholders
Individualistic	Interdependent
Legalistic	Commonsensical
Formal	Informal
Efficient	Effective
Success is measured by compliance	Success is measured by remediation of underlying problem

B. What is the Family Justice System?

The FJWG gives the term “family justice system” a correspondingly broad definition. It is taken to comprise any program or service which meaningfully contributes to the resolution of a family law issue, including:

- public institutions such as the courts, government ministries, and legal aid service providers;
- individual professionals, including judges, lawyers, mediators, social workers, counsellors and administrators who work in these public institutions; and
- non-government agencies and private services that help families by providing advice, information, assistance or orientation designed to assist in the resolution of issues arising out of separation or divorce.

The family justice system also includes the laws that govern marriage, cohabitation, separation, divorce, parenting responsibilities, financial obligations flowing from marriage or relationship breakdown, property division, and child protection.

The following graphic illustrates the broad array of services and organizations that constitute the family justice system. At the same time, it previews one of the FJWG’s conclusions – that separating families should be exposed to a number of services and procedural options designed to help resolve their dispute before turning to the courts.

