

The Practice of Family Law in Canada: Results from surveys for the 2018 National Family Law Program

INTRODUCTION

This report highlights some key findings of the 2018 National Family Law surveys of family law professionals in Canada. The data provide insights into the experiences, practices, and issues among legal professionals working in the Canadian family justice system.

Since 1998, the Department of Justice Canada (Justice Canada) has conducted biennial surveys of lawyers and judges working in family law in Canada.¹ These surveys aim to collect information on the characteristics of their family law cases, and to obtain feedback on family law issues based on their knowledge and expertise. This information can assist in the development of policy and programs related to family law in Canada.

The 2018 surveys were conducted with participants of the National Family Law Program (NFLP) conference and distributed through the Federation of Law Societies of Canada (FLSC) to Law Societies across Canada. The NFLP conference is a high profile biennial conference organized by the FLSC and attended by hundreds of lawyers and judges from across the country.

METHODOLOGY

Two versions of the survey were developed, one for lawyers and one for judges, and were administered through an online survey platform. The survey of lawyers was composed of ten parts, while the survey of judges had nine. Both surveys consisted of questions on the demographics of survey participants, the nature of cases, family law services, custody and access², child and spousal support, children's views, family violence, support enforcement, and Unified Family Courts (UFCs). The lawyers' survey had one additional section on limited scope retainers.

In order to broaden the pool of potential respondents, a second method of distribution was used for the 2018 version of the surveys. In addition to distributing the surveys to NFLP conference attendees, Justice Canada also shared links to the online surveys with the FLSC to distribute electronically to family law professionals across Canada through Law Societies.

¹ The surveys were not conducted in 2014. The COVID-19 pandemic delayed the 2020 surveys, which are planned to be administered in 2021.

² The surveys used terminology found in the *Divorce Act* prior to changes that came into force on March 1, 2021. As of that date, the Act no longer uses the terms "custody" and "access." The court now makes "parenting orders" in which courts will allocate "parenting time" and "decision-making responsibility."

KEY FINDINGS

Characteristics of respondents³

Of those who responded to the surveys, 612 were lawyers and 23 were judges. The majority of lawyers worked in private practice (82%), followed by a smaller share who worked for a government or agency (7%) or in a clinic (6%). The largest proportion of lawyers (39%) indicated that they have been practising for 20 years or more. Most lawyers reported working in Quebec (44%) or British Columbia (20%). Judges indicated that they had the most experience working in Western Canada (50%) followed by Central Canada (33%).

Characteristics of cases

Over two-thirds of lawyers (69%) and about four in 10 judges (42%) reported that between 75% and 100% of their caseload involves family law matters. The majority of lawyers (62%) indicated that the other party was self-represented⁴ in less than 25% of their caseload. Almost half of judges (45%) indicated that one or both parties were self-represented in 25% to 49% of the cases they saw in the past year. A slightly smaller proportion (41%) stated that parties were self-represented in 50% to 74% of cases. Over half of the lawyers (55%) stated that children are involved in 75% to 100% of their cases. Almost three quarters (74%) of lawyers reported that variations of previous orders/agreements take place in 25% to 74% of their cases.

Family justice services in Canada

Justice Canada provides funding through the Canadian Family Justice Fund (CFJF) to facilitate access to the family justice system for families experiencing separation and divorce. The majority of judges (78%) and slightly less than half of lawyers (43%) agreed or strongly agreed that the CFJF helps increase access to justice for families experiencing separation and divorce. Almost half of lawyers (49%) reported that using family justice services increases the likelihood of a case settling outside of court. Two thirds of lawyers (66%) indicated that family justice services are available in the official language of their client's choice.

The views of children

Almost half of lawyers (46%) reported that they occasionally seek children's views in their family law cases, with about one-third (31%) indicating that they often or always seek children's views. Of the lawyers who provided details about why they do not seek the views of children in family law cases, the most frequently reported concern was harm to the child/children because they may be involved in conflict between parents. Some of the additional reasons for not seeking the views of children related to the capacity of the child and inadequate resources. Seven in ten judges (70%) reported that a child's views are presented to them in less than half of their family law cases.

³ Questions were voluntary, so the number of respondents for each question is variable. The reported percentages are based on the total respondents for each individual question.

⁴ For all or most of the life of the case.

Relocation

Approximately two-thirds of lawyers (67%) and judges (65%) reported that relocation is an issue in less than 25% of their cases. The most common reason for relocation is for an employment opportunity, which almost one-third of lawyers (32%) reported in 50% to 74% of their cases. The next most common reason for relocation is to be with a new partner (31% of lawyers in 50% to 74% of their cases).

Custody and access

Almost all of the lawyers (93%) and judges (92%) reported that three-quarters of their cases involve shared physical custody arrangements.⁵

Almost half of lawyers (49%) reported that they often or always request or draft orders relating to children that use terminology other than “custody” and “access.” Almost half of lawyers (47%) reported that they often or always use terminology other than “custody” and “access” in agreements. Over half of judges (52%) reported that they use terminology other than “custody” and “access” in 75% to 100% of their cases.

Child support

Almost nine in ten lawyers (87%) and judges (88%) indicated that the determination of income is often the most contentious issue in child support cases. Almost nine in ten judges (88%) and three-quarters of lawyers (74%) indicated that income/financial disclosure was a contentious issue in their child support cases.

The most common reasons for non-disclosure of income included: incomplete or improper disclosure of self-employment income (lawyers = 88% and judges = 91%); failure to file income tax (lawyers = 73% and judges = 91%); and refusal to provide pay statement/income tax statement or other such financial information (lawyers = 64% and judges = 61%). Lawyers and judges were able to specify other reasons for non-disclosure of income in child support cases. While few other reasons were identified, respondents indicated that people may not disclose income information because they are intimidated by the process or there are differences of opinion regarding what constitutes income, for instance in cases where there are trusts.

One in four lawyers (25%) and over two in five judges (43%) reported that income is imputed in 75% to 100% of cases where there is non-disclosure of income. Three in ten lawyers (29%) reported that income is imputed in 50% to 74% of cases where there is non-disclosure of income. Over half of lawyers (54%) stated that in at least half of cases a party fails to comply with the continuing obligation to provide income information in the years following the making of a child support order.

Spousal support

Almost three-quarters (73%) of lawyers and almost two-thirds of judges (65%) reported that spousal support is an issue in less than half of their cases. One-third of lawyers (33%) and two in five judges (41%) stated that between 25% to 49% of their spousal support cases involve problems of income/financial

⁵ For the purposes of the surveys, “shared physical custody arrangement” was defined as being anywhere between a 50/50 to 60/40 division of the children’s time.

disclosure. Over half of judges (59%) and almost two in five lawyers (37%) stated that more than half of their spousal support cases involve problems of income/financial disclosure.

Lawyers and judges were asked questions about the Spousal Support Advisory Guidelines (SSAG).⁶ Over half of lawyers (56%) use the SSAG between 75% and 100% of the time. The large majority of judges (82%) use the SSAG in orders 75% to 100% of the time. When asked about the impact the SSAG had on the determination of spousal support in their family law cases, lawyers most frequently reported that the guidelines: offer a starting place; assist in negotiation; predict results; and encourage settlement by negotiation. Similarly, judges most frequently reported that the SSAG: offer a starting point; assist in case conferences; and help parties to settle spousal support issues.

Family violence

Half of lawyers (50%) indicated that they screened for family violence in 75% to 100% of their cases; however, a substantial majority of lawyers (63%) stated that they do not use a standard questionnaire or other tool. Over three in five lawyers (63%) and over half of judges (52%) indicated that family violence was an issue in less than 25% of their cases. Very small proportions of lawyers (10%) and judges (13%) reported that family violence is an issue in more than 50% of their cases. Almost nine out of ten lawyers (89%) reported that they are familiar with services available for clients in cases where there is family violence.

Support enforcement

For both lawyers and judges, the majority of their cases do not involve support enforcement issues. Seven in ten lawyers (71%) and almost nine in ten judges (89%) stated that support enforcement is an issue in less than half of their cases.

Limited-scope retainers

Limited-scope retainers refer to providing unbundled legal services, which is where lawyers may be retained to provide a specific legal service, or legal services for a specified purpose. For example, this may include: representing a person in court for all or part of a hearing; representing a client for all or part of a case conference or settlement conference; drafting documents for use in the litigation process; or providing legal advice on a separation or similar agreement. About half (51%) of lawyers offered services on a limited-scope retainer while the other half (49%) did not.

Unified Family Courts

Unified Family Courts (UFCs) are designed to allow families to resolve outstanding legal issues in a single forum, by providing a one-stop shop for family law services by unifying federal and provincial jurisdiction over family law into a single court. Some of the key characteristics of a UFC model include employing

⁶ Spousal Support Advisory Guidelines (SSAG) suggest appropriate ranges of support in a variety of situations for spouses entitled to support. The guidelines are not law, but may assist judges in their decisions about spousal support. Family lawyers may also use the guidelines when attempting to create spousal support agreements outside of court

simplified procedures, being user-friendly, having specialist judges, and providing a full range of professional and community support services.⁷

Over four in ten (43%) judges and one-quarter (25%) of lawyers indicated that they have experience in UFCs in their current role. Of the respondents who had experience in UFCs, slightly more than half of lawyers (54%) and the majority of judges⁸ indicated that they were satisfied or very satisfied with the overall quality of family dispute resolution services offered in UFCs.

⁷ Justice Canada. (2009). The Unified Family Court Summative Evaluation: Final Report. Available online: <https://www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/09/ufc-tuf/ufc.pdf>.

⁸ Numbers too low to publish.