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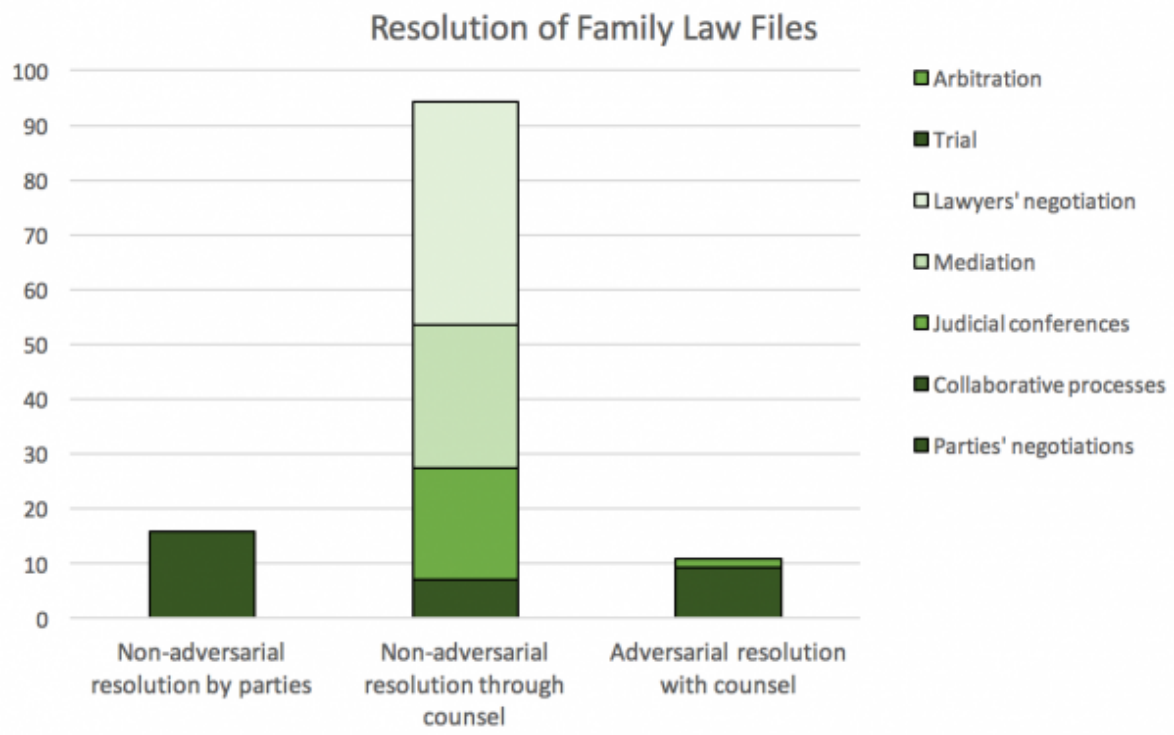
Mediation Works: Should Mandatory Mediation Be Expanded?

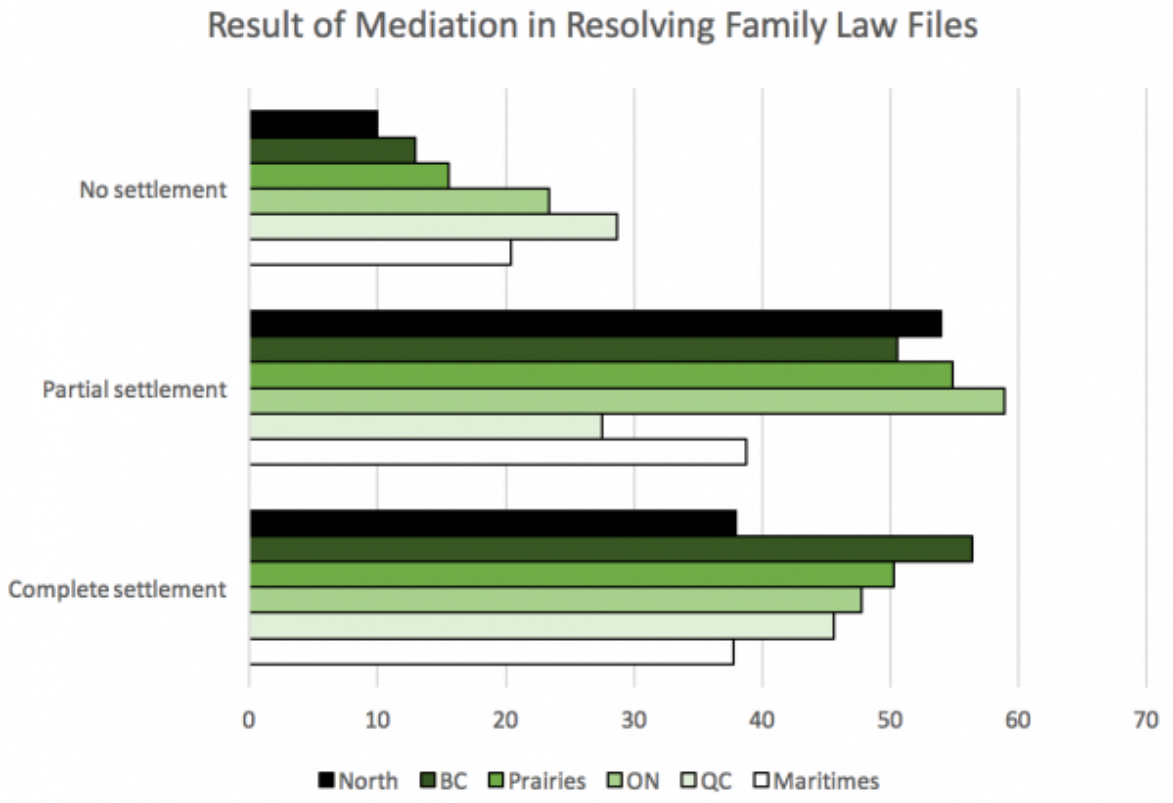
by John-Paul Boyd

The Canadian Research Institute for Law and the Family had the opportunity to survey the participants of the 2014 National Family Law Program in Whistler, BC, a popular and well-attended legal education program that attracts hundreds of judges and lawyers from across the country. Among other things, we asked lawyers how their files typically resolved and the results were astonishing.

Probably the most important conclusion to be drawn from the 176 responses to our survey was that less than a tenth of lawyers' files are resolved at trial (9.3%). The lion's share of our files are resolved through negotiation (40.7%) followed by judicial conferences (26.2%) and mediation (20%):



In the same survey, we also asked lawyers about how many of the cases they took to mediation resulted in: a settlement of *all* of the issues; a settlement of *some* of the issues; or, a settlement of *none* of the issues. This is what our respondents told us:



These numbers may not seem particularly significant at first – although frankly, a 50% rate of full settlement is still pretty impressive, considering the amount of money and court resources saved by resolving things short of trial – but when you aggregate the rate of full and partial settlement the results are impressive.

By region, lawyers said that the proportion of the family law cases they took to mediation that resulted in a *full* settlement was as follows:

- North (Northwest Territories, Yukon): 38.0%
- British Columbia: **56.4%**
- Prairies (Alberta, Manitoba, Saskatchewan): 50.3%
- Ontario: 47.8%
- Quebec: 45.6%
- Maritimes (New Brunswick, Newfoundland and Labrador, Nova Scotia): 37.8%

The proportion of cases resulting in a *partial* settlement was roughly the same, with more cases resulting in a partial settlement than a full settlement in the North, the prairies and Ontario, and fewer cases resulting in a partial settlement than a full settlement in British Columbia, Quebec and the Maritimes:

- North: 54%
- British Columbia: 50.6%
- Prairies: 54.9%
- Ontario: **59%**
- Quebec: 27.5%
- Maritimes: 38.8%

Bearing in mind that these numbers are based multiple response data and don't sum to 100, another way of

looking at things is based on what respondents reported when asked how many of their cases resulted in no settlement at all, and doing the math to figure out how many resulted in a settlement of some nature:

- North: **90%** of cases taken to mediation result a settlement of some sort
- British Columbia: 87.1% of cases result in a settlement
- Prairies: 84.5% of cases result in a settlement
- Ontario: 76.7% of cases result in a settlement
- Quebec: 74.3% of cases result in a settlement
- Maritimes: 79.6% of cases result in a settlement

Quebec and Ontario are the outliers here, with 25.7 and 24.6% of cases taken to mediation resulting in no settlement at all; in the territories and other provinces 20% or fewer cases result in no settlement at all. The North and British Columbia stand out with the lowest rates of complete failure, at 10 and 12.9% respectively.

It's important to remember that these numbers reflect only those cases counsel took to mediation, and counsel don't see every case as suitable for mediation. In fact, according to our survey, lawyers in British Columbia and Ontario took about a quarter of their files to mediation compared to lawyers in the North and the Maritimes who took only a tenth of their files to mediation. However, when mediation is attempted, it is fully or partially successful four times out of five.

With respect to the cases that counsel don't take to mediation and can't resolve in some other non-adversarial manner, there's a fair amount of anecdotal data suggesting that involuntary mediation works almost as well as the voluntary variety. (Dorcas Quek has written an interesting article on the subject in the *Cardozo Journal of Conflict Resolution*.) Colleagues of mine in British Columbia who use the province's Notice to Mediation Regulation to trigger a course of mediation in family law disputes tell me that compulsory mediation often results in full or partial settlement, despite the general view that mediation is wholly predicated on the willing participation of the parties. I have heard the same from practitioners in other jurisdictions with similar programs for civil disputes, such as those offered in Ontario and New York. In light of the savings realized from even partial settlement, it seems to me that mediation should be attempted more often than it is, even if the process is forced upon an unwilling party.

The success of mediation is heartening — the resolution of family law disputes through the courts has always struck me as an option of truly last resort — however mediation generally comes at a cost, whereas litigating in the provincial court is usually free. (Hence the extraordinary participation rates of litigants without counsel in our provincial courts.) The fact that we fully subsidize litigation, while offering scant support to less adversarial dispute resolution processes, strikes me as a wrong-headed choice of priorities in the allocation of public dollars; it is peculiar, and probably an artifact of older values and priorities, that we direct 95% or more of our justice system funding toward the dispute resolution mechanism that is the most destructive, most expensive, least efficient and least expeditious.

I wonder whether legal aid programs shouldn't channel a lot more of their money into providing people with mediators to mediate rather than lawyers to litigate. Even if only 10% of family law disputes resulted in settlement, that one-in-ten success rate would provide extraordinary savings to the justice system in terms of court administration, sheriff's services, internal costs and materiel, and judicial resources, never mind the benefits to the parties themselves and to their children of minimizing conflict, achieving resolution earlier than trial would allow, and reducing the amount spent on lawyers' fees.

A note about the data

The greatest number of responses to this question were received from Alberta (about 30 on average), British Columbia (about 34) and Ontario (about 13); all other provinces and territories yielded 10 or fewer responses, and no responses were received from judges and lawyers in Nunavut or Prince Edward Island. As a result, I have lumped the data together by region in an effort to produce more meaningful numbers, giving responses as follows:

- North: 5 respondents
- British Columbia: range of 32 to 53 respondents
- Prairies: range of 34 to 42
- Ontario: range of 10 to 14
- Quebec: range of 5 to 6
- Maritimes: range of 13 to 15

We followed this survey up with a survey of participants at the 2016 National Family Law Program in St. John's, NL. The Institute will be reporting on the results of that survey in the late fall; keep an eye on the publications section of our website at www.crilf.ca/publications.htm.

The Institute also used data from the 2014 survey to create the report "Comparing the Views of Judges and Lawyers Practicing in Alberta and in the Rest of Canada on Selected Issues in Family Law: Parenting, Self-represented Litigants and Mediation," available for download from the Institute's website. If you're curious, the report notes some striking differences between the views and experiences of Alberta practitioners and those from elsewhere in Canada. Alberta practitioners are more likely to: have cases resulting in shared custody or shared parenting; support the amendment of the *Divorce Act* to use terms such as parenting responsibilities and parenting time; have cases involving self-represented litigants; support mandatory information programs for self-represented litigants; and, support the use of paralegals to improve access to justice for self-represented litigants.

John-Paul Boyd is the executive director of the Canadian Research Institute for Law and the Family. The Institute is a federally-incorporated charity established in 1987 and is affiliated with the University of Calgary.

Comments

Agnes Leung
August 29th, 2016 at 10:53 am

Hi John-Paul,

I am a registered collaborative professional specializing in guideline income calculations and corporate assets valuation. I take great delight in reading your articles. Through the Dispute Resolution Network Conference in June 2016, I met lots of mediators working at Alberta Justice that are non-lawyers. As the survey was taken at the National Family Law Program attended primarily by lawyers and judges, I suspect the cases resolved by mediation will be even higher if mediators were surveyed. As you are probably aware, the mediation program is available through public dollars for those who meet particular guidelines but should probably be broaden to mediators and collaborative professionals outside of Alberta Justice.

Thank you for your great articles and sharing your insights!

Agnes