Exploring the impact of changes to language in B.C.'s Family Law Act

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Executive Summary

In March, 2013, B.C. replaced its existing 1978 *Family Relations Act* with a new statute, the *Family Law Act* (FLA; the Act). This research project explores the impact of particular aspects of FLA-related policy changes, such as differences in how concepts are described and defined. These include the preference for out-of-court consensual dispute resolution mechanisms, the definition of guardianship, and provisions for parenting arrangements and the best interests of children. B.C.'s Ministry of Attorney General, which is the institution responsible for the legislation, wishes to evaluate some aspects of the Act. This project represents an important step in that process.

The key research question for the project is whether changes to the provisions and language of the FLA have produced measurable or observable changes in the behaviours, perceptions, and attitudes of those working in or using the B.C. family justice system. Related questions focus on specific sections of the Act in which changes were made. Professionals from a number of groups were consulted and asked to share their experiences. The hope was that the findings would inform future evaluation activities and research on the Act's implementation.

Methodology

A qualitative approach using key informant interviews was used for the project. A purposive sample of fifteen participants was recruited from the family justice professions, including lawyers, community service providers, mediators, and Provincial Court judges. Interview data was analyzed using a thematic index, and both descriptive and analytic accounts were constructed. While the qualitative data is limited in scope, a number of important themes and sub-themes were uncovered through this process. Themes were cross-indexed and interactions between themes were noted.

Findings

Generally, participants were positive about the FLA and about the specific changes discussed. Each specific topic area elicited a diverse range of opinions on whether the statutory language functioned as intended and/or reflected a change in the wider culture. The key findings are as follows:

1. The FLA, as a modernization of the family justice legislation, reflects many changes which were already happening in practice.
2. Judges are using their powers under the Act to direct parties to out-of-court processes, but are not generally doing so in a consistent or concerted way.
3. Changes to the definition of guardianship are not widely known, but once explained have been very well received by both professionals and their clients.
4. The provisions around parenting responsibilities are sometimes helpful to guide parents towards resolution, but also sometimes hinder the process as parties fixate on certain concepts.
5. The provisions around the best interests of children are similarly helpful in some cases and problematic in others, although the inclusion of family violence in the definition is a welcome addition.
6. Whether the changes found in the FLA work as intended depends largely on the nature of individual conflicts (i.e. a certain number of high conflict cases are resistant to reforms).
7. The availability of personal resources has a significant impact on both process and outcome; it influences the dispute resolution process chosen and the character of the agreement reached.

1.0 – Introduction

1.1 – Context and Rationale

In March, 2013, B.C. replaced its existing 1978 *Family Relations Act* (FRA) with a new statute, the *Family Law Act* (FLA; the Act). While a significant amount of research and consultation was conducted in support of drafting the new legislation, evaluative work must be done in terms of gauging the FLA's impact. The B.C. Ministry of Attorney General, Family Policy, Legislation and Transformation Division (FPLTD), seeks to investigate the effect some of the policy changes reflected in the FLA have had on the perceptions, attitudes, and behaviours of those working in B.C.'s family justice system. Specifically, this research focuses on the degree to which changes to language in the Act have influenced outcomes in the areas of parenting after separation, encouraging resolution out of court, and producing a general shift away from traditional, adversarial behaviours.

This paper represents one piece of a larger evaluation of the FLA being conducted by FPLTD. While many of the changes in the Act have been discussed in committees and working groups and have been recommended in a number of reports over the past decade (B.C. Justice Review Task Force, 2005; Shaw, 2012; Action Committee on Access to Justice in Civil and Family Matters, 2013b), the cumulative modernization of B.C.'s family justice legislation is still a relatively recent event. The FPLTD is undertaking the work of engaging with its stakeholders to see how selected aspects of the Act are being read, used, and interpreted in the field. Although this paper focuses only on a portion of the legislation, the intent is to give the FPTLD a sense of how the Act is being used and to open up avenues for future research and discussion.

1.2 – Background

The introduction of the federal *Divorce Act* in 1968 brought family disputes and separations under the purview of Canada's court systems in greater numbers. The federal Act established a uniform statute which replaced a host of laws used across the provinces, many of them developed a century prior on an entirely different continent. Through the statute, spouses were to be considered equally with respect to legislatively established grounds for divorce, which included adultery, conviction of a sexual offence, bigamy, mental or physical cruelty, and the permanent breakdown of marriage through separation of at least three years. A 1986 amendment to the *Divorce Act* modernized rules around who could file for divorce and when, shortened the period of required separation, and recognized foreign divorces (among other changes).

While a unified statute was undoubtedly needed for the purposes of equal treatment before the law, especially for women, one of the practical effects of the *Divorce Act*'s application was to normalize the court as the default arena for the resolution of family disputes. Family law, as a branch of civil law, plays out in the courts according to an adversarial model. The court structure, along with the lawyers who represent clients, shapes and guides the conflict according to a specified set of rules and procedures. These procedures pit litigants against each other in a battle over individual rights and entitlements, or a pursuit of "truth" and "justice" which is rarely, if ever, cut and dry.

The literature questioning whether this adversarial model is appropriate with respect to family dispute resolution is vast. Many "alternative" dispute resolution tools and processes were developed as a reaction to this questioning, much of it championed by lawyers who felt they could not appropriately serve their clients through the traditional processes. The 1980s and 1990s saw the widespread adoption

of mediation, arbitration, collaborative law, and other consensual dispute resolution[1] (CDR) methods by legal communities, with governments generally approving of their use. Reform-oriented bodies, some of whose reports are referenced below, began lobbying for widespread systemic reform partially on the success of these models.

Carrie Menkel-Meadow describes the adversarial system as "inadequate" when it comes to meeting the intended goals of legal systems, especially with respect to civil disputes (Menkel-Meadow, 1996, p. 6). It is inherently confrontational, and encourages a set of beliefs and behaviours about justice which are not commensurate with real world problems in which "easy" solutions are elusive. For Menkel-Meadow, the issue is an epistemological one: humans have been trained for millennia to believe that the adversarial contest is a legitimate and effective way to arrive at truth (Menkel-Meadow, 2000, p. 908). Yet even the most basic experience with interpersonal conflict is enough to convince one that this is not so. Family separations, especially those involving children or a complex array of shared assets, liabilities, and financial dependencies elude a binary judgment on what is "right," "just," or "true" given that, in many cases, there is no "wrong" to be righted (1996, p. 6). For Menkel-Meadow, the courts are a less than ideal venue for such disputes due to their "limited remedial imaginations," or the relatively limited range of orders they can make (1996, p. 7).

The culture of adversarialism in modern societies is not limited to the courts – it extends far beyond their borders into all facets of life. Sports, politics, journalism, activism, labour relations, educational discourse, and race and gender relations are but a few of the realms in which an adversarial stance is the norm (Menkel-Meadow, 1996, p. 11). This is why, for Menkel-Meadow, the project of changing legal cultures is far more daunting than simply creating new rules or guidelines within existing systems, or even in promoting CDR-related reforms (1996, p. 40). But in terms of legal systems themselves, her suggested approach is to use the most appropriate tools for the job, which in the context of family law is the issue at the heart of modern reform initiatives.

While the culture of adversarialism embedded in the court system calls into question the appropriateness of the venue for settling family disputes, it is not the only factor which does so. The final report of the Family Justice Working Group (FJWG, 2013), which is discussed in more detail below, identifies cost, time, and complexity as cornerstone elements of an access to justice crisis (p. 1). Even in popular culture, divorce and family separation are often characterized as long, drawn out processes exacerbated by legal technicalities and financially-motivated lawyers. While the majority of family separations are resolved outside of court, the data on those that do utilize the court system supports the FJWG's assertion.

Findings from a 2011 Statistics Canada report on family court cases, which drew on the national 2009-10 Civil Court Survey, confirm that delay is a relevant and observable feature in the family system (Kelly, 2011). Across the data set, the author found that half of all family separation cases were still active over one year after they were first filed. Moreover, data for B.C. demonstrated that 20% of these cases were still active after four years (Kelly, 2011, p. 17). Bala, Birnbaum, and Martinson (2010) and the FJWG (2013) identify these protracted cases as being particularly resource-intensive. This effect is compounded by the fact that family justice has a comparatively lower funding priority than other areas of the court system (FJWG, 2013, p. 3).

[1] The term "consensual dispute resolution" is used throughout this paper in place of the more common academic term "alternative dispute resolution." This was done primarily to ensure consistency with the Ministry of Attorney General's own preferred wording.

In 2010, the Provincial Court of B.C. published a report called *Justice Delayed* which analyzed the state of the court system with respect to judicial resources. By way of addressing one of the recommendations in that report, the Provincial Court began publishing semi-annual "time to trial" reports which feature a variety of delay-related statistics from across the justice system, including family cases. The latest of these reports shows that post-filing delays for FLA-related court processes such as case conferences and single to multi-day hearings all exceeded the standards set by the Office of the Chief Judge (Provincial Court of B.C., 2017, p. 2). The average time to trial under the FLA is listed at 5 months for a hearing of less than two days, 6.5 months for a hearing of 2-4 days, and 7.6 months for a hearing of over 4 days. In communities such as Terrace, Port Hardy, and 100 Mile House, which have the longest time to trial, the average wait approaches one year, even for shorter hearings (2017, p. 6).

The financial costs of settling a family dispute in court further compound the costs associated with time and delay. The high price of litigation includes not only legal fees but also disbursements, in which everything from photocopying expenses to court filing fees, the hiring of process servers and agents, and reports by experts is tallied (Legal Services Society, 2015). While it is again worth noting that most family disputes are resolved prior to trial, Canadian Lawyer Magazine's most recent annual survey of legal fees provides a ballpark figure for estimating the associated financial burden. According to their 2016 report, the average cost of a five-day trial is over $36,000, while a two-day trial will run close to $20,000 (McKiernan, 2016, p. 53). Even a contested divorce, settled before trial, shows an average price tag of over $16,000. Additionally, these numbers reflect legal fees only and do not include disbursements, which can add hundreds or thousands of dollars per case (Johnson, 2013). They also reflect only the cost per party – the total cost to the separating family as a whole is doubled.

One of the most visible changes made in the FLA was to reorder the hierarchy of consensual dispute resolution processes. Whereas the court system has historically been the default mechanism for separating families, the FLA, at least structurally, attempts to characterize the courts as a last resort. Aside from the issues noted above, B.C.'s taxpayer-supported courts (Provincial, Supreme, and Court of Appeal) must continually strive to use make efficient use of their allocated budgets. If the courts are indeed a less efficient venue for these disputes which produces less durable outcomes, the calls for reform, discussed in the next section of this paper, are all the more resonant.

1.3 – Project Client

The FPLTD is responsible for the Ministry of Attorney General's contribution to legislation, policy, and reform in family law and family justice. The Division is charged with developing policy intended to improve access to justice services for British Columbians and continually engages with a variety of stakeholders to this end. Its mandate is to provide high quality policy advice and analysis on family law legislation and issues, and to look for opportunities for reform and transformation of the family justice system.

The Justice Services Branch of the B.C. Ministry of Attorney General in which the FPTLD is located includes the Policy and Legislation Division, Tribunal Transformation and Supports Office, Maintenance Enforcement and Locate Services, and the Family Justice Services Division. The latter oversees the province's Justice Access Centres, its Family Justice Counsellors, and its Parenting after Separation programs.

As the lead developer of the FLA, the FPTLD has a strong mandate to support evaluative research. The FRA stood for over 35 years, and although it was regularly amended, it was never comprehensively reviewed until 2006 (a process which ended with the new Act in 2011). As part of its ongoing work supporting this legislation, the FPTLD seeks to regularly evaluate it to ensure it is working as intended. This paper contributes to that work with a qualitative investigation, and looks to professional users of the FLA as its primary data source.

1.4 – Research Questions

As noted above, the researcher sought to explore the question of whether changes to the provisions and language of the FLA have produced measurable or observable changes in the behaviours, perceptions, and attitudes of those working in or using the B.C. family justice system. The overall objective of the project was to provide answers to this question (and the related sub-questions below) through a series of key informant interviews and to develop a thematic index through which to communicate the research findings. Through this process, the researcher uncovered the most salient themes found in the data with the aim of providing the client with recommendations for future evaluative work.

Further to the main research question, the researcher sought to gather some specific information through a series of sub-questions related to the Act's language on resolution out of court, parenting arrangements, and guardianship. These sub-questions directly informed the working list of research questions on which the interviews were based:

- What is the impact, if any, of the statutory emphasis on "resolution out of court preferred"? [2]
- Are expectations, attitudes, or behaviours moving away from the traditional, adversarial norm?
- To what extent have the courts exercised the powers given them under the Act to require parties to participate in consensual dispute resolution or to attend counselling, specified services, or programs? [3]
- How, if at all, have the legislative changes respecting parenting arrangements and guardianship influenced behaviours, perceptions, and attitudes? [4]
- Have parenting coordination and family law arbitration processes reduced reliance on the courts?
- How, if at all, has the shift from making the best interests of the child the "paramount concern" to the "only concern" impacted behaviours, procedures, or outcomes? [5]

A full list of interview questions was developed (see Appendix D) in order to guide interview participants in a semi-structured protocol. As the goal of the interviews was to explore the questions thematically rather than to solicit particular forms of answers, probing questions were also used.

1.5 – Methodology

Formal evaluation typically makes use of social science research methods to answer questions about how a program, initiative, or activity – or in this case, a piece of legislation – is working (i.e. its effectiveness). It is structured logically and designed purposively according to the requirements of the

[2] Family Law Act, Part 2, Division 1
[3] Family Law Act, Part 10, Division 5, Section 224(1)
[4] Family Law Act, Part 4, Divisions 2-3
[5] Family Law Act, Part 4, Division 1, Section 37(1)

topic under study. This research project involved using semi-structured key informant interviews to gather data on the research questions, and then analyzing that data using thematic analysis techniques. The data gathered was all qualitative, and the subjects recruited from a variety of family justice related professions.

The rationale for this methodology was two-fold. First, the researcher is experienced with the methods proposed and their use was feasible and achievable within both the timeframe available for the research as well as the guidelines established by the University of Victoria's School of Public Administration for its Master's Projects. Second, the resources available for this project were limited. Although a mixed-methods approach would have been preferable, the primary researcher and the FPTLD agreed that focusing solely on key informant interviews would allow both more qualitative data to be gathered as well as a greater number of interview subjects to be consulted. While adding a quantitative dimension to the research would have been valuable, the risk of a low response rate and an extended time frame for a project with limited resources was thought too great. With the resources at its disposal, the FPTLD is well positioned to conduct this sort of research in the future.

A more detailed account of the research methodology used for this paper can be found in Chapter 3.

1.6 – Structure

The paper follows a standard structure for qualitative research in the social sciences, minus the theoretical component. It begins with a four-part literature review (Chapter 2) which examines and synthesizes findings from government reports and other grey literature, two formal evaluations in similar jurisdictions (Australia and Alberta), academic commentary (gleaned primarily from law journals), and case law (recent, relevant cases from the B.C. court system). The key finding from the literature review is that there are gaps in terms of which elements of the FLA have been tested or interpreted to date. For example, there is broad discussion on the best interests language in the Act, but little on the judicial power to compel out-of-court dispute resolution processes.

Chapter 3 provides a detailed description of the methodology used in the research. The research methods, data collection, interview protocol, data analysis, and project limitations are each discussed in this section. The content and general findings of the key informant interviews (Chapter 4) are next summarized through responses aligned to the sub-questions noted above. Each sub-question is given its own treatment, with the range and frequency of responses discussed. This chapter is descriptive only, letting the raw accounts speak for themselves. Next, the results of the data analysis are provided (Chapter 5). The researcher used Ritchie, Spencer, and O'Connor's (2003) method of building a "thematic index" to uncover the invariant and salient themes occurring across the cases. This was done by transcribing and then coding the qualitative data gathered through the interview process. This chapter provides the critical analysis of the collected data summarized in the previous chapter.

Chapter 6 concludes the paper with a discussion of the research findings, tying them to the future work of the FPTLD. It summarizes ideas offered by participants, and also notes key considerations for the design of future evaluation or research projects.

2.0 – Literature Review

The following chapter considers reports, reviews, academic papers, and case law in illustrating both the history and present context of family law reform in B.C. Section 2.1 highlights a limited number of publications in which current research and best practices are examined with a view to providing recommendations about effecting systemic changes. The reports are the product of an ongoing series of working groups and committees on family law reform which have taken place at both provincial and national levels. Section 2.2 looks closely at findings from two formal evaluative projects from Australia and Alberta. While these evaluations were undoubtedly broader in scope than the research conducted for this paper, the changes to each jurisdiction's legislation were similar in content and purpose, and the evaluators asked similar types of questions concerning their impact. Section 2.3 moves to consider academic research on the changes presented in the FLA. This commentary was largely limited to publications in law journals, but a number of papers from social scientific sources were also identified. Finally, Section 2.4 looks at case law from across the B.C. court system since the FLA was formally enacted. While there have been a few notable decisions based on interpretations of the changes in the Act, there were also evident gaps in terms of the research questions.

To conduct the literature review, the researcher consulted both academic and non-academic databases using an array of search terminology in varying combinations. Strings included "B.C." or "BC" or "British Columbia" and "FLA" or "Family Law Act," "parenting arrangements," "best interests," "dispute resolution," "mediation," "collaborative law," "adjudication," "language changes," and so on. The only area in which this method proved somewhat difficult was in the academic literature, where no single best search item tended to produce desirable results. The researcher also used the reference lists of relevant publications to inform further searches.

The following databases were used:

- JSTOR
- HeinOnline
- Lexis Nexis Academic
- EbscoHost Academic Search Complete
- Google Scholar
- Sociological Abstracts
- Canadian Public Policy Collection
- CANLII

2.1 – Key Publications

2.1.1 – Reports and Reviews

The FRA, the statute which preceded the FLA, came into force in 1978. Since the late 1980s, efforts to reform various aspects of family law, both in practice and through legislation and regulation, have taken place. As part of such efforts, government, judges, lawyers, mediators, and other family justice professionals have collaborated through working groups and committees designed to share research and best practices. While a full history of this work is beyond the scope of this paper, the consolidated effort which eventually resulted in the FLA can be traced back directly to the Family Justice Reform Working Group (FJRWG)'s 2005 report, *A New Justice System for Families and Children*.[6] In this milestone report, the FJRWG laid out 37 recommendations for changing B.C.'s family justice system, and

[6] The FJRWG's 2005 report considered a large number of publications and studies conducted over the preceding three decades in order to synthesize its final recommendations.

invited the larger Justice Review Task Force of which its members were comprised to begin the groundwork for making these changes.

The FJRWG report noted immediately and up front that the vast majority of the research its authors had considered was in general agreement about the changes which needed to be made (2005, p. 5). Broadly considered, the recommendations given in the report concerned ways in which the family justice system could be made less adversarial, less court-centric, more accessible to the public, and more efficient. At the center of the recommendations were calls for more integrated public-facing services, a unified family court, mandatory mediation for separating families, and more focused specialization for family court judges. Many of these same recommendations would be echoed almost a decade later in the Action Committee on Access to Justice in Civil and Family Matters' Family Justice Working Group (FJWG) report, *Meaningful Change for Family Justice: Beyond Wise Words* (2013). The FJWG had a similar mix of professionals, scope, and mandate to the FJRWG, only at a national level. It is striking to see how similar these sets of recommendations are. The experts knew what was needed to reform the system – what remained was for government take up the challenge.

As part of its research process, the FJWG commissioned an updated meta-analysis of reports and studies on family law reform. Erin Shaw's (2012) research for the FJWG is divided into six parts. It examines why the traditional court system is not suited to family disputes, identifies common principles of family justice reform, reviews service delivery options, provides advice for high conflict cases[7], investigates how legislative reform can support the proposed changes, and considers what changes might be needed with respect to legal education, data collection, and research (p. 4). Through her synthesis of the work on reform undertaken to date, Shaw found that the court system with respect to family matters was complex and costly. The unpredictable, adversarial nature of the court process was failing separating families, many of whom with children caught in the middle. Shaw's work echoes the FJRWG's call for a "paradigm shift," or a widespread cultural change in how family separation and consensual dispute resolution is handled (p. 12).

In pursuit of this new paradigm, Shaw identifies six unifying principles with implications for substantive law, procedural law, and service delivery (2012, p. 13). These include prioritizing the best interests of children, emphasizing the value of family relationships, minimizing conflict, empowering families to resolve their own disputes, integrating services to improve information and access, and assuring the safety of all parties. These principles underscore the different service delivery options highlighted in the paper, which focus on access, information, triage, consensual dispute resolution, court processes, and post-resolution supports (p. 16).

Shaw's meta-analysis informs the FJWG's 2013 final report to the Action Committee on Access to Justice in Civil and Family Matters. This report takes roughly the same form as the 2005 FJRWG paper, providing a summary of current research and best practices before offering 33 recommendations proposing a variety of reforms. While the final report issued by the FJWG was not itself a catalyst for the legislative changes pursued by the FPTLD which resulted in the new FLA, the work of the group and the research it oversaw paralleled the consultation and development process. Some of the recommendations found in the report are reflected, at least in part, in the Act.

[7] High conflict cases typically involve a number of indicators, including repeated, protracted court filings and long periods of time without adequate resolution. See Shaw (2012, p. 46) for a comprehensive definition.

Several recommendations brought forward by the FJWG are directly relevant to the research questions considered in this paper. Recommendation 25 (2013, p. 53) echoes a general call for emphasizing early intervention and out-of-court resolution:

> *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 be resolved at trial.*

Recommendation 29 (p.57) goes a little further, suggesting

> *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*.

This recommendation gets at the heart of culture change by seeking ways in which consensual, collaborative dispute resolution can become the default, rather than the "alternative" method for separating families to resolve disputes. While the FLA did not make mediation mandatory, as both the FJWG (2013, p. 36) and the FJRWG (2005, p. 42) had recommended, the hierarchy of processes was re-ordered in the Act and judges were given the power to compel parties to pursue out-of-court processes.

The focus on mandatory mediation is perhaps the most innovative recommendation made in these reports. Each proposes mandating participation in a minimum of one consensual dispute resolution session before allowing disputes to be filed in court. Safeguards and screenings would be in place for vulnerable parties, along with exceptions for cases where family violence was present, and the process would be subsidized for those unable to afford it. This type of reform has been introduced in Australia (Rhoades, 2010; Pidgeon, 2013), Hong Kong (Lee and Lakhani, 2012; Hilmer, 2013), Norway (Walker, 2010), and the United States (Kelly, 2004; Ricci, 2004). No Canadian jurisdiction has implemented mandatory mediation in the same way as yet, although Saskatchewan has introduced a bill that would allow judges to order parties into mediation which is similar to the power granted to judges under the FLA. Some groups remain critical of the idea of mandatory mediation because of a fear of the power imbalance they argue it could introduce, and question the possibility of added resource demands on vulnerable populations (West Coast LEAF, 2010).

The reports highlighted here, along with others which produced similar findings, effectively illustrate the intellectual and ideological climate under which the consultation and development process for the FLA occurred. The B.C. Ministry of Attorney General, through the predecessor to FPTLD, spent several years drafting discussion papers and consulting with the legal community, community groups, NGOs, and the public about what reform should look like. This process culminated in a White Paper, published in 2010, which laid out the legislative changes the Ministry would be recommending. The changes proposed in the White Paper, summarized in the following section, reflect the FPTLD's careful work of balancing public and professional opinions and experiences with the current research and best practices highlighted in the literature.

It is also worth noting here that changes to the federal *Divorce Act* are currently before the House of Commons. Bill C-78, which proposes the changes, recommends that "to the extent that it is appropriate to do so, the parties to a proceeding shall try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process" (C-78, s. 7.3). Also included are some

amendments to the best interests of the child test (C-78, s. 16.3). The forthcoming changes would alleviate some of the historical misalignment with the *Divorce Act* that provincial family justice reforms have had to contend with.

2.1.2 – The White Paper on Family Law Reform

As noted above, it was not until 2006 that the B.C. Ministry of Attorney General began the first comprehensive review of the FRA since its introduction in 1978. Faced with current research which pointed to the unique and changing needs of separating families and the documented problems with family law as a court process, the province resolved to find ways to modernize and update its family justice statutes. Those who began this process used the numerous and fundamentally consistent reports on family justice reform to develop policies on which the new statute would be based. These policies were focused on supporting early and proportionate dispute resolution, reducing emotional and financial costs to families, emphasizing collaborative, out-of-court processes, and protecting the best interests of children (B.C. Ministry of Justice and Attorney General, 2010, p.2). The hope was that undertaking this work and enacting reforms would begin a higher level cultural shift away from the traditional, adversarial models of litigation towards more co-operative and efficient paths to resolution.

In 2007, as part of the initial review process, the Ministry produced 12 discussion papers on different sub-topics related to family justice reform. Topics relevant to this paper included *Co-operative Approaches to Resolving Disputes*, *Legal Parenthood*, *Meeting Access Responsibilities*, and *Children's Participation* (B.C. Ministry of Justice and Attorney General, 2010, p. 8). The Ministry then used these discussion papers as the basis for extensive consultations with professional and non-profit communities throughout 2008. Groups consulted included the Law Society of B.C., the Family Law Advocates Group, Family Law, Collaborative Law, and Sexual Orientation and Gender Identity sections of the B.C. Branch of the Canadian Bar Association, the Law Courts Education Society, and the Social Planning and Research Council of B.C, who organized focus groups and face-to-face consultations with close to 150 people and surveyed a further 223 family advocacy and support organizations. Additionally, representatives of the Ministries of Aboriginal Relations and Reconciliation, Children and Family Development, Housing and Social Development, Public Safety and Solicitor General, the Office of the Public Guardian and Trustee, and the B.C. Vital Statistics Agency provided feedback (p. 9).

The B.C. Ministry of Justice and Attorney General's *White Paper on Family Law Reform*, published in 2010, synthesizes the feedback gathered throughout the consultation process and provides detailed recommendations about which sections of the statute should be revised and how. For each proposed policy change, it includes a summary of the recommendation, explains how and why the Ministry's conclusion was reached (often balancing opposing views), and provides a sample of the revised legislative wording. Of the 13 chapters which focus on distinct areas of the statute, four are directly relevant for the purposes of this paper and are summarized below.

2.1.2.1 – Non-Court Dispute Resolution and Agreements

This chapter of the *White Paper* contains a number of recommended policy changes with respect to processes. The chapter is divided into three sections. The first of these sections outlines policies which would support a wider range of consensual dispute resolution options for separating families. Recommended changes include a new section outlining the purposes of this change and new definitions for categories of family justice professionals, with subsequent additions narrowing on the duty of these professionals to both inform their clients of suitable dispute resolution processes, to disclose relevant

information through these processes in a timely manner, and to screen for family violence (B.C. Ministry of Justice and Attorney General, 2010, p. 13).

The second section of the chapter focuses on legislative supports for specific consensual dispute resolution processes. Parenting coordination is included among these, with definitions, scope of practice, and limited authority conferred to parenting coordinators (B.C. Ministry of Justice and Attorney General, 2010, p.16). Arbitration processes for family disputes are also amended (through a consequential amendment to the *Commercial Arbitration Act*), with rights of appeal introduced (p 18). Finally, a proposal for regulation-making power to set practice standards and qualifications for various consensual dispute resolution professionals is also included here, as well as a clarification for the scope of practice of government-employed family justice counsellors (p. 20-21).

The remaining section of the chapter looks at agreements and the important role they play in resolving disputes. The proposed changes seek to simplify agreements and limit judicial ability to set them aside, at least with respect to property division and spousal support. The section on agreements is re-worded to balance the desire to encourage collaborative agreements with the potential need to set them aside on specific grounds, such as procedural fairness or inadequate disclosure. This section also clarifies the purpose and enforceability of certain types of agreements such as parenting plans, which can be useful for parties but are neither mandatory nor equivalent to orders (B.C. Ministry of Justice and Attorney General, 2010, p. 25).

Interestingly, the *White Paper* makes a brief mention of what would eventually become s. 224(1) of the FLA within its section on conduct orders, which gave the courts the power to compel parties to participate in family dispute resolution or to attend counselling, specified services, or programs. There has been very little discussion or interpretation of this conduct order in the case law so far, which is discussed below.

2.1.2.2 – Legal Parentage

In the FRA, parental determination was only considered when disputed for the purposes of assessing child support, and the statute contained no authority for judges to declare parentage. Modernizing this part of the legislation would respond to technological advances such as assisted conception and to changes in the composition of families, and would contribute to the modernization of B.C.'s statute.

The new recommended policy laid out a "comprehensive scheme" for determining legal parentage (B.C. Ministry of Justice and Attorney General, 2010, p. 31). This scheme takes the above-noted factors into account and considers the place of birth mothers, partners of birth mothers, egg, sperm, and embryo donors, surrogates and intended parents, posthumously conceived children, and the child's right of information (p. 31-34). While the provisions in this scheme were not a direct focus of the research conducted for this project, they do bear upon the notion of cultural change as well as the practical issues concerning parenting arrangements and guardianship.

2.1.2.3 – Children's Best Interests

Both the federal *Divorce Act* and the FRA contain provisions emphasizing the best interests of the child when making orders in family separations, but there were discrepancies in terms of the applicable criteria for making these decisions (i.e. the legal test). Federal Bill C-22 (2002) would have added a list of 12 factors to consider for judges when conducting this test, but the bill did not achieve assent (as noted

above, an updated test is before the House of Commons). The FRA had a list of factors, but the consultations found that it needed to be updated in light of "current social values and research on issues such as the impact of family violence and the views of children" (B.C. Ministry of Justice and Attorney General, 2010, p. 42).

Three overarching themes are contained in the best interests recommendations. Foremost among these was that best interests become the *only* rather than the *paramount* consideration (B.C. Ministry of Justice and Attorney General, 2010, p. 43). Secondly, drafters looked to Alberta's modernized statute to emphasize the "greatest possible protection of the child's physical, psychological, and emotional safety." Finally, the best interests emphasis was extended not only to judges but to all "decision-makers," which would include parents, counsel, and all other family justice professionals.

The list of factors involved in the legal test to determine best interests was also revised. Some factors were re-worded, some deleted, and others added. The additional factors considered the history of the child's care, the child's need for stability taking into consideration their age and development, the impact of family violence, and the presence of any civil or criminal proceedings relevant to their safety (B.C. Ministry of Justice and Attorney General, 2010, p. 43-44). The addition of the family violence piece of the test garnered the most attention, and the drafters proposed a nuanced, comprehensive definition of the term commensurate with the latest research. This definition took many different types of violence into account and resisted a blanket approach which would define the term too narrowly (p. 45-46).

2.1.2.4 – Guardianship

The chapter on Guardianship makes significant changes with respect to terminology and language, which are central to the research questions outlined above. One of the more highly publicized changes seen in the FLA was the removal of terms such as "custody" and "access" in favour of "guardianship" and "parenting time." While guardianship was a term used in the FRA, it was included alongside custody, which complicated and confused the issue of legal responsibility. The drafters of the *White Paper* argued that "the terms 'custody' and 'access' in particular tend to encourage the perspective that there are winners and losers when it comes to determining how separated parents continue to be involved in their children's lives" (B.C. Ministry of Justice and Attorney General, 2010, p. 50).

A further change to terminology involved the language of "parental responsibilities" which, linked to both guardianship and parenting time, would outline specifically those responsibilities which would fall under the purview of each party. Taken as a whole, the changes to language with respect to guardianship were recommended with the intent of simplifying the job of interpretation. The Ministry looked to the formal evaluation of Alberta's statute, discussed below, for its rationale (B.C. Ministry of Justice and Attorney General, 2010, p. 51). Interestingly, the consultation feedback on these proposed changes was skeptical of their ability to assist in a wider cultural change towards a less adversarial system of resolving disputes, but respondents were nevertheless supportive (p. 50).

The change which favoured guardianship over custody was rooted in the idea that parents should be encouraged to continue to exercise parental responsibilities after separation. Whereas custody was typically granted to one party or the other, guardianship is seen as a shared responsibility. Parenting time becomes the mechanism through which these responsibilities are acted upon. Guardianship is granted as a default position for parents who lived together at the time of their child's birth and continues to be the position after they separate, absent a court order. Similarly, guardianship can be

granted by court order and is not limited to biological parents. The parental responsibilities of legal guardians are also linked in the statute to the best interests language (B.C. Ministry of Justice and Attorney General, 2010, p. 52).

Other proposed changes to the guardianship language involved provisions for testamentary guardians and standby guardians in situations where there is only one guardian, and a distinction between a child's guardian and a trustee of that child's property. Unlike the FRA, the new Act would not provide for the spouse of a guardian to become an additional guardian by default, nor would guardians automatically be considered trustees. Courts were also given powers to enable or prevent a child's relocation by a guardian by order (B.C. Ministry of Justice and Attorney General, 2010, p. 62).

2.2 – Formal Evaluations of Family Law Reforms in Other Jurisdictions

The background research for this paper considered two evaluations of similar legislative reforms. Rhoades, Graycar, and Harrison's (1999) Interim Report on Australia's *Family Law Reform Act*, which came into effect in 1996, provided a useful template in terms of planning and formulating research questions. MacRae, Simpson, Paetsch, Bertrand, Pearson, and Hornick's 2009 publication for the Canadian Research Institute for Law and the Family evaluated Alberta's 2005 *Family Law Act*. While these reforms differed from B.C.'s in some areas, both jurisdictions sought to modernize their statutes through similar means and were undoubtedly examined throughout the process of developing the FLA. The evaluations considered below, while much broader in scope, informed the research methodology undertaken.

2.2.1 – Australia

<u>Family Law Reform Act 1995</u>

Australia's *Family Law Act* came into force in 1975. The statute was reviewed several times over the course of its life, and was modernized through amendment in the mid 1990's. Many of the reforms brought forward in the country's *Family Law Reform Act* of 1995 were centered on the wellbeing of children in family separations, and were modeled on the UK's *Children's Act* (1989). These reforms were made up of the following objectives:

1. To "affect an attitudinal shift" in how separating parents encounter and experience the family justice system;
2. To reduce conflict between separating families by de-emphasizing the "proprietary" elements of parenting and the child's residence;
3. To emphasize the rights of children over and above the needs and wishes of their parents;
4. To encourage and prioritize processes leading to collaborative agreements over litigation; and
5. To ensure the safety of all parties to the separation with respect to family violence. (Rhoades, Graycar, and Harrison, 1999, p. 7-8).

These objectives bear a strong resemblance to several of the reforms proposed in the *White Paper* noted above, and tie directly to the research questions for this project.

The reforms enshrined a number of provisions and processes designed to realize these objectives. Among these were

- That children had a "right of contact" with both parents except when it would be contrary to their best interests;
- Terminology changes, wherein guardianship, custody, access, and contact were replaced with the single concept of "parental responsibility;"
- Changes to the functionality of court orders, wherein decision-making power, residency, and parental responsibility were all defined and given scope. The general effect of these changes was to unbind the notion of parental responsibility from fact of the child's primary residence;
- Revisions to the list of factors to be considered in the best interests test;
- Provisions designed to protect children and families from violence;
- Provisions aimed at promoting and encouraging "primary" dispute resolution mechanisms such as mediation and counselling;
- Provisions related to parenting plans wherein these can be made into enforceable orders (Rhoades, Graycar, and Harrison, 1999, p. 11-12).

The authors noted at the outset that, with respect to those reforms specifically targeting separation conflicts involving children, there was no "real mischief" to which the reforms were responding (Rhoades, Graycar, and Harrison, 1999, p. 6). Research is cited in the report which found no evidence supporting the argument that children were being harmed by the previous custody scheme. While calls for reform had been received by "aggrieved non-custodial parents" (the majority of them men), empirical evidence showed that Australia's Family Court "made orders in favour of fathers at twice the rate of those made by consent" (p. 6). Similarly, the authors found no "uncontested" research supporting a default position for shared parental responsibility.

Initial interpretations of the reforms were cautious, with judges finding that shared parental responsibility on day-to-day matters could be "impractical" while retaining a somewhat equal distribution of authority with respect to "major issues" (Rhoades, Graycar, and Harrison, 1999, p. 18). Additionally, the parent's "right of contact" was weighed against an appropriate consideration of "the caregiver's ability to provide adequately for the needs of the child," with judges interpreting the "unacceptable risk" test for family violence in a conservative manner (p. 18). This trend of interpretation is perhaps understandable given the relative lack of serious calls for reform, and the authors' note that judges' decisions did not differ significantly from the period before reform. This same trend is noted in the discussion of B.C. case law following the introduction of the FLA, discussed below.

While the analysis of initial interpretations was important for the purposes of the evaluating the reforms, the authors went further than this and used a mixed-methods approach to survey the opinions and experiences of solicitors, family court counsellors, community counsellors, and private and community mediators. While previous evaluative work on the legislation had focused on various aspects of the statute, the research in this case was guided by a series of five questions intended to address the reforms specific to children in separating families, albeit with a view to whether the intended objective of a change in mindset could be observed. The authors asked the following:

1. How (if at all) the advice given to separated parents differed before and after the reforms;
2. Whether "contact parents" were given more opportunities to spend time with their children under the reforms;
3. Whether "contact parents" were given the opportunity to exercise more responsibility for their children under the reforms;

4. Whether litigated disputes reduced or increased;
5. To what extent (if at all) orders for contact had been affected by the new provisions concerning both family violence and right of contact (Rhoades, Graycar, and Harrison, 1999, p. vi).

The authors' findings are presented by professional category within each question or theme. With respect to the first two questions, the authors found that solicitors were largely skeptical, with significant proportions (between 25 and 40%) typically responding that the reforms made little to no practical difference on their practice behaviours or their advice to clients (Rhoades, Graycar, and Harrison, 1999, p. 21). On the issue of terminology, approximately half of solicitors agreed that the changes were of at least some importance (p. 20-21), and comments from solicitors included in the report show that the changes to "right of contact" and "parental responsibility" language were better received, with respondents agreeing with the objective that family separation should not be a win/lose contest (p. 22). Nevertheless, on the balance, solicitors were confused as to the purpose of the reforms, with some even showing outright cynicism (p. 23).

Family court counsellors, who are state-employed advisers, were more supportive of the reforms. They were more attuned to the changes in the reforms than were solicitors, and responded more frequently to the various questionnaires used in the research. Those who responded felt the reforms would have an overall positive effect on children's experiences post-separation (Rhoades, Graycar, and Harrison, 1999, p. 27). Despite this enthusiasm, only a third of family justice counsellors noted changes in their practice behaviours, seeing the reforms instead as "embodying existing counselling practice" (p. 27). Family court counsellors also felt the reforms leveled the balance of power with respect to custodial and non-custodial parents, allowing for more equitable arrangements (p. 28). Counsellors blamed lawyers for perpetuating the "adversarial approach" the reforms sought to move away from, and felt the emphasis on collaborative processes was another positive step (p. 29).

Findings for the private and community counsellor group mirrored closely what the authors heard from the family court counsellors. While the majority had not changed their practice behaviours, many saw the reforms as a vindication of their established methods. The chief criticism from this group was that the "divergence between the theory and practical reality of shared parenting" presents a significant obstacle to meaningful change through legislation (Rhoades, Graycar, and Harrison, 1999, p. 30). Lawyers were again blamed for the continued use of "adversarial tactics," and were also charged with a failure to educate and advise their clients in a manner consistent with more collaborative outcomes (p. 30). Community groups were perhaps understandably also more attuned to issues surrounding legal aid and funding, with some nothing that this "huge issue" continues to disproportionately affect women, particularly those who are already impoverished (p. 31). However much they agreed with the legislation in spirit, the difference between "theory and practical reality" was more immediate for this group.

Private and community mediators were the most supportive of the reforms, with 84% seeing them as a "fundamental" change. They agreed widely with the changes in terminology and the implications of "parental responsibility" over and against the idea of residence. Most felt the reforms had a positive effect on their clients' attitudes and ways of thinking about separation involving their children, though some also noted an increase in fathers' feelings of "entitlement" in wake of the reforms (Rhoades, Graycar, and Harrison, 1999, p. 32). A smaller majority of mediators agreed that the reforms were having a direct, immediate impact on their disputes in terms of outcomes (p. 33). This group also echoed their community peers' feelings on legal aid and funding, and further criticised the legal professions' "failure to embrace" alternative processes (p. 33).

The other question which is directly relevant to B.C.'s reforms is the issue of whether the changes made resulted in a decrease in litigations and/or more attempts at resolution out-of-court. With respect to orders involving children, Family Court statistics for the two-year period following the reforms show a nearly 100% increase in applications (Rhoades, Graycar, and Harrison, 1999, p. 50). Solicitors noted that the majority of these applications were "trivial" or "technical," with the source of many of them being non-custodial parents whose expectations had been elevated by the reforms (p. 51). Judges agreed, noting that as many as half the additional applications were meritless and a "waste of the Court's time" (p. 52). Interestingly, the reforms seeking to reduce contested applications ended up increasing them, at least in the short term. It is possible to hypothesize that these numbers would stabilize over time as attitudinal change takes hold.

While a full investigation of outcomes is beyond the scope of this paper, Australia presents a valuable example of what to expect 20-years post-reform. The jurisdiction continues to evaluate and amend its family justice system, with additional changes brought forward in 2000 and 2006 (discussed below). This highlights the importance and value of the continuous, incremental review of legislation in light of ongoing systemic changes, research findings, and shared best practices.

Shared Parental Responsibility Act 2006

In 2006, Australia enacted a subsequent wave of family justice reforms which had many of the same goals as the 1995 FLRA. These reforms aimed to reflect a new generation of family law in the country and were intended to further the work of bringing about the "cultural shift" mentioned earlier (Australian Institute of Family Studies, 2009, p. 1). The 2006 amendment to the *Family Law Act 1975*, dubbed the *Shared Parental Responsibility Act* (SPRA), made several language-related changes in the statute and also significantly altered and bolstered the service delivery system around family justice disputes.

Legislatively, the SPRA made four key changes:

1. Presumption in favour of shared parental responsibility after separation.[8] While the language is different, this provision resembles the B.C. FLA's presumption of shared guardianship and the notion of parenting time;
2. Presumption against shared parental responsibility where there is evidence of intractable conflict, family violence, physical, sexual or emotional abuse, or any danger to the child;
3. Mandatory family dispute resolution for separating families, wherein one session must be attempted before applications are filed in court;
4. Legislative support for "less adversarial court processes" for cases involving children (Australian Institute of Family Studies, 2009, p. 4).

The overall intent behind the legislative changes was to promote the idea that while children of separating families benefit from time with both parents, part of the "best interests of the child" (which is referred to as "paramount" in Australia's FLA) also involves their protection from harm in its various forms. The reforms seek to balance these provisions and to move family justice further away from

[8] This presumption was amended in 2011 (Family Law Legislation Amendment (*Family Violence and Other Measures Act,* 2011) to address cases where family violence was an issue. The amendments alter the way the best interests of the child test function and clarify that shared parenting does not always mean equal (50-50) parenting time. The current provision is found in the *Family Law Act* Part VII – Division 2, s.61DA

notions of custody and "ownership" which have been historically problematic. Mandatory CDR plays a part here by not only preferring resolution out of court but by compelling it, at least temporarily. While determined litigants can circumvent this process relatively easily, justice officers were given powers to order such cases back to CDR. In keeping with the family violence-related provisions in the SPRA, exceptions to mandatory CDR were put in place for cases involving family violence.

In terms of service delivery, the biggest change to come out of the 2006 reforms was the creation of 65 Family Relationship Centres (FRCs) across Australia. These centres provide frontline services for families seeking information on how to navigate the family justice system which are safe and inclusive. All planned centres were open by July 2008. Along with basic information, FRCs also provide direct services such as early intervention and counselling, CDR, parenting planning, step-family arrangements, and referrals to other services. The total cost of the rollout was AUD $147m (Pidgeon, 2013).

FRCs are part of the larger Family Relationship Services Program (FRSP), which was also established under the 2006 reforms. The yearly budget for the FRSP is around AUD $165m, which aside from the FRCs supports a host of other services such as a telephone advice line, telephone-based CDR, online information portals, CDR services from independent practitioners, the parenting orders program, counselling services, education services, and specialized family violence programs (Australian Institute of Family Studies, 2009, p. 5).

Alongside the reforms, the government of Australia commissioned the Australian Institute of Family Studies (AIFS) to evaluate the changes and report back. Planning and data collection for this work began immediately post-enactment. The AIFS evaluation, which focused on the first three years of data, was published in December of 2009. The evaluation project involved three separate streams, focusing on legislation and the courts, service delivery, and the experiences of families. Each stream incorporated data from a diverse array of sources, which are worth listing here:

- The Legislation and Courts stream: a qualitative study of legal system professionals, a survey of family lawyers, and analysis of court files, administrative data, and decisions from all family court levels;
- The Service Delivery stream: a qualitative study of FRSP staff, an online survey of FRSP staff, a survey of FRSP clients, and program data spanning the life of the program;
- The Family stream: a general survey of parents, a retrospective survey of family court users, a longitudinal study of separated families, and a study of grandparents in separated families (Australian Institute of Family Studies, 2009, p. 14).

The three-tiered, mixed-methods approach used by the AIFS provided a thorough and wide-ranging picture of Australia's family justice system. Although the differences in scope and the resources required differ tremendously from this research project, the key limitation is the same in that three years is a modest amount of time to affect cultural changes, which is acknowledged by the evaluation's authors (Australian Institute of Family Studies, 2009, p. 15). While a full and detailed summary would be excessive for the purposes of this paper, the key findings of the evaluation were as follows:

- Fewer disputes responded to through legal services, and more disputes responded to through family relationship services;
- Generally good ratings for FRC-related services;

- Further engagement and co-ordination required between family lawyers and the family justice system;
- Mandatory CDR was found to be "broadly" meeting the reform's objectives – approximately 40% of cases were eventually settled through this process, while approximately 20% were issued with certificates enabling the submission of court applications;
- The ordering of shared parental responsibility by the courts increased slightly, but did not differ markedly from the pre-reform trend;
- The ordering of shared care time continued to occur only in a minority of cases, but the proportion increased and such arrangements did not appear to negatively affect children's wellbeing;
- Some limited evidence supporting the legislation's objectives around the involvement of grandparents, with a small majority agreeing that their perspective had been taken into account during proceedings;
- Family violence screening processes were found to have improved the overall capacity of the system to identify relevant cases, but cases where "safety concerns" were present were no less likely to have shared care time ordered than were cases without these concerns;
- There was some evidence to suggest that the legislation's emphasis on out-of-court CDR has resulted in the inappropriate use of CDR, i.e. in scenarios where violence and harm were immediate risks;
- The presumption in favour of shared parental responsibility had in some cases resulted in a misconstrued expectation of shared care time, and has led to the belief among lawyers that the reforms favour fathers disproportionately;
- The general philosophy and objectives of the reforms were broadly supported by all respondent groups, but many non-professionals had trouble understanding the differences and distinctions (Australian Institute of Family Studies, 2009, pp. 361-366).

2.2.2 – Alberta

Alberta's modernized *Family Law Act* came into force on October 1, 2005. The statute replaced a number of previous statutes, including the *Domestic Relations Act*, the *Parentage and Maintenance Act*, the *Maintenance Order Act*, and the *Child, Youth and Family Enhancement Act*, each of which addressed various aspects of family law. The new Act sought to implement systemic changes to family justice in the province through

- The simplification of the legislation;
- Improvements to accessibility, particularly for self-represented litigants;
- The support for non-adversarial approaches to resolving family conflicts, including out-of-court processes;
- A streamlining process to enable both federal and provincial courts to hear most matters (MacRae et al., 2009, p. 1-2).

Of additional note are several changes to language and terminology featured in the legislation. B.C. modeled much of the FLA on Alberta's reforms, including its provisions concerning the best interests of the child, the removal of terms like "custody" and "access" with respect to court orders, the defaulting of guardianship to both parents under most conditions, and the recognition of changing social conditions with respect to family makeup (MacRae et al. 2009, p. 2-3). The evaluators in this case looked at both the procedural as well as the substantive changes found in the new legislation, reviewing each

on their own objectives. While both subsets of changes were assessed for their effectiveness, procedural changes were also reviewed in terms of efficiency and accessibility, while the substantive changes were reviewed for their overall fairness (p. 3).

The evaluators' research design included four main elements, with findings and recommendations presented accordingly:

- A legislative review comparing Alberta's reforms to similar statutes in other jurisdictions, with particular attention to six key substantive areas (best interests, guardianship, parenting orders, contact orders, child support, and spousal/partner support) (MacRae et al., p. 6);
- An analysis of caseflow and outcomes, which looked at changes to court workload and the use of out-of-court dispute resolution processes (p. 6);
- A survey of professionals who had "direct experience" with the Act (n=152 responses across three waves), a group which included judges, lawyers, mediators, dispute resolution officers, child support resolution officers, mental health professionals, First Nations legal services staff, and a host of others (p. 8);
- Telephone interviews with self-represented litigants (n=37), a group which the legislative reforms identified and sought to address directly given their ever-increasing presence in the family justice system (p. 10).

The legislative review found that the simplicity and cohesiveness of the new Act could be evidenced by its "uniform" application and interpretations by the courts in the intervening period (MacRae et al., 2009, p. 33). Despite this evidence, the authors point out a number of areas in which the language in the Act could be clearer. For example, while the best interests test was revised and codified as the sole consideration, the associated "fitness" test has a "higher threshold" by comparison, which could introduce possible confusion. Additionally, the authors highlight that changes to the language concerning spousal support orders in certain cases could create "a gap in the social safety net for vulnerable adult children" by virtue of a provision concerning destitute or out of work parties (p. 33). Despite these issues, the legislative review concludes that "the FLA clearly provides a comprehensive, equitable, and progressive approach to family law issues," adding that it could serve as a model for other jurisdictions in terms of its wording and structure (p. 33).

The caseflow data examined for the review highlights many of the same challenges presented in the reports advanced by family law reform advocates over the previous decades. It shows a court system experiencing ever-increasing numbers of cases and applications, often with self-represented litigants, with largely variable outcomes. It should be noted that a proper treatment of these findings would include some discussion of potential sociological explanations, and the authors do provide several educated guesses (MacRae et al., 2009, p. 36). While such discussions would serve to give better context to some of the following statistics, a selection of the findings is repeated here simply to illustrate change over the evaluation period:

- Provincial Court family law caseflow increased by 73% (October 2005 – December 2007) (MacRae et al., 2009, p. 36);
- Court of Queen's Bench family law caseflow increased by 31% (October 2005 – December 2007) (p. 37);
- Provincial Court Caseflow Conference applications increased 131% (Edmonton PC, December 2003 – November 2007) (p. 38);

- Family Justice Services' Family Court Counsellor program intake increased 62% (January 2004 – December 2007) (p. 39);
- Referrals to Family Justice Services' Mediation program experienced an increase in the wake of the Family Law Act only to stabilize by December 2007 (p. 40);
- Dispute Resolution Office sessions increased by 100% (January 2006 – December 2007) (p. 41);
- Self-represented litigants continued to vastly outnumber represented litigants in Edmonton Provincial Court caseflow conferences (December 2003 – November 2007) (p. 43), with adjournment to docket the most common outcome (p. 44);
- Outcomes data for caseflow conferences (p. 45), mediations (p. 45), judicial dispute resolutions (p. 46), and dispute resolution officer sessions (p. 47) were all encouraging with respect to the objectives outlined in the Act, with a majority of disputes reaching full or partial settlement in all four processes.

These findings serve to illustrate the limited capacity of renewed legislation to affect an immediate paradigm shift with respect to the attitudes and behaviours of both the professional community and the general public. Perhaps understandably, such ingrained beliefs and expectations may take longer than a handful of years to change. In assessing these findings, the authors note that no data exists for resolutions which occur before reaching a stage at which they are captured by the system, which makes estimating relative system use difficult. Moreover, the findings are also limited by both regional variations in the Provincial Court data as well as the fragmentary availability of the Federal Court data (p. 36; p. 51).

The most salient findings with respect to the current research are those associated with the survey of professionals, a strategy also used in the Australian evaluation. As noted above, the surveyed group included a wide variety of family justice professionals and was not fundamentally court-centric. Respondents were asked a variety of questions concerning both the procedural and substantive changes in the Act, which are presented separately.

With respect to the procedural changes, the evaluators found that:

- A majority of respondents (63%) felt their workloads had increased since the implementation of the Act (MacRae et al., 2009, p. 56);
- Court administration staff felt that the procedural changes did not better serve self-represented litigants, whereas lawyers and judges felt the changes did serve this group better (p. 57);
- Almost 70% of respondents agreed that Alberta's non-unified court structure created confusion and delay (p. 60);
- Most respondents felt positively about the array of out-of-court programs and services for separating families and that the number of options was sufficient (p. 65);
- Large majorities of respondents felt that the information and access services as well as the out-of-court processes available in their jurisdictions were "effective in improving the efficiency of the family justice system" to the extent available (p. 66).

These findings are reflective of general attitudes towards practices which, while not explicitly codified in law as such, were already being undertaken and normalized by most respondents. For example, out-of-court dispute resolution processes have been commonplace in family justice systems since the mid-1980s. For a large majority of respondents to affirm their effectiveness is encouraging, but perhaps

unsurprising, and is most likely not an effect of any changes to the law. More important are the procedural changes which sought to simplify information and access, the effectiveness of which was found to be contested and unclear. Any positive outcomes from these changes must also be balanced with the fact that workloads were found to have increased for a majority of the respondents.

The evaluators also asked questions concerning all the key areas in which substantive changes were made. Given the scope of this paper, only findings concerning the best interests of the child, guardianship, parenting orders, and contact orders are highlighted here:

- Best interests of the child: A large majority of the respondents felt that the modernized test was both important for the protection of children (94%) and that outlining the factors involved in the test explicitly was beneficial (75%). Responses were mixed on the question of whether some factors should be considered over others and whether the Act compared favourably to other legislation in terms of protecting the child's physical, psychological, and emotional safety (MacRae et al., 2009, p. 70).
- Guardianship: Support for the Act's guardianship provisions was strong. 80% agreed or strongly agreed that the Act does a good job balancing the interests of all parties when they do not live together, while 76% agreed or strongly agreed that the sections outlining guardianship in various family units where mothers and fathers live together were easy to understand and apply. 66% agreed or strongly agreed that sections outlining guardianship in family units where mothers and fathers do not live together were easy to understand and apply (p. 72).
- Parenting Orders: Large majorities agreed or strongly agreed that the parenting orders outlined in the Act provided flexibility for both parenting time (86%) and parenting responsibilities (82%). Smaller majorities agreed or strongly agreed that the orders helped minimize financial costs (56%), helped minimize emotional costs (59%), and were easy to understand and apply (69%) (p. 73).
- Contact Orders: Questions on contact orders were focused on whether new provisions in the Act helped to clarify and simplify the conditions under which these orders could be sought, which points to the large number of these applications in the system. 93% of respondents felt the Act was clear in this regard in terms of who may make applications, while a further 87% felt that the conditions that must be met for the court to consider applications were clear. 83% felt these provisions were easy to understand and apply (p. 74).

The responses to the substantive changes in the Act were strongly positive. The evaluators included comments throughout from respondents which clearly articulate that the changes are a step in the right direction, with many offering further opinions on how they could be clarified or modified further.

On the general topic of language changes, the evaluators asked specific questions about whether the Act could meet its objectives. Many felt that the language used was clear (79%), easy to understand (79%), and reflective of current thinking about children and family breakdown (81%). Interestingly, while 74% felt that the language in the Act would facilitate collaboration between separating parties, only 51% felt that doing away with "custody" and "access" improved the legislation. Moreover, only 43% felt this change had reduced the adversarial nature of the process (MacRae et al., 2009, p. 77). One respondent argued convincingly that, while language changes could have beneficial effects, "it is the services in place that will ultimately determine whether collaboration is achieved" (p. 78).

Taken as a whole, the responses to the changes in the Act were largely positive, with reservations and skepticism noted in some areas. Importantly, none of the changes elicited strong backlash, suggesting

that professional family justice communities were at least willing to give the changes some time to set in. As part of their work, the evaluators provided nine procedural recommendations and four substantive recommendations for additional changes (MacRae et al., 2009, p. 141). Relevant to the current discussion are the recommendation that "fitness" and "best interests" tests be clearly differentiated in the legislation and the recommendation that guardianship provisions be further clarified (p. 142).

2.3 – Academic Commentary

Publications from academic sources which focus on various aspects of the FLA have been scant in number since 2013. While this is somewhat understandable given that this is a relatively short period of time from an academic standpoint, it was expected that more material would have surfaced during the searches performed for this project. A total of 15 papers were consulted during the research process, covering only a portion of the scope of the reforms. These papers were concentrated on the topics of guardianship (Boyd, 2013a; Boyd, 2013b; Boyd and Ledger, 2014), parentage and family composition (Kelly, 2013; Kelly, 2014; Carsley, 2015; Morrison, 2015), and family violence (Boyd and Ledger, 2014; Boyd and Lindy, 2016; Martinson and Jackson, 2017; Treloar, 2016; Dalley, 2013). Single examples were found of commentaries addressing spousal support (Boyd and Whitehead, 2015), property division (O'Sullivan, 2017), system resource allocation (Treloar and Boyd, 2014), and the scope of the reforms in a general sense (Boyd, 2014). While topics such as the best interests of the child and out-of-court dispute resolution were absent in terms of titular focus, these topics intersected quite often with other elements in the literature. The family violence commentary, for example, makes frequent reference to the best interests provisions given the explicit mention of family violence among the factors taken into consideration. Similarly, guardianship issues correlate strongly with discussions on family violence and the best interests test. The biggest and most conspicuous absence from the academic literature is material referencing s. 224(1) of the Act, which gives the Courts the power to compel parties to attempt resolution out-of-court. The fact that few references to this part of the Act are found in the case law discussed below may provide a clue as to why.

2.3.1 – Guardianship

A pair of articles by Boyd (2013a, 2013b) work to differentiate and clarify the concept of guardianship under the FLA with respect to the previously used notions of custody and access. Through a short history of the legal use of the term, Boyd shows how the FLA terminology was designed to work against the idea that, through guardianship, full custody or possession of the child was the main goal (2013b, p. 361). While noting that guardianship has been vaguely defined historically at both the provincial and federal levels, Boyd concludes, despite some initial reservations (2013a, p. 56), that the wording in the Act, which presumes guardianship by default for cohabitating parents and assumes no particular allocation of parenting responsibilities is best, "is the pathway that will let us carve a space from the wider meaning of custody in which a rehabilitated concept of guardianship may flourish" (2013b, p. 367). A final point brought up here and elsewhere is that the FLA's use of guardianship in place of custody and access is somewhat at odds with the use of these terms in the *Divorce Act*. Despite this, Boyd notes that the two statutes are capable of co-existence in the same jurisdiction as they share a child-centered approach (2013b, p. 366).

Boyd and Ledger (2014) look at guardianship not from a historical or rhetorical angle but from an interpretive one, terming it an early "key battleground" for separating couples under the FLA (p. 318). Beyond noting the changes to guardianship provisions and the difference from custody and access, the authors identify three areas in which guardianship has proven contentious: appointment of guardianship, termination of guardianship, and the nature of guardianship rights.

The authors' analysis found that the Courts had thus far set a "relatively low bar" with respect to the appointment of guardianship, especially for birth parents not deemed guardians by default (i.e. birth parents who were either absent or not involved at the time of a child's birth but who later came to seek guardianship) (Boyd and Ledger, 2014, p. 320). In many cases, presumed good intentions and some evidence of heightened self-awareness and self-management was deemed sufficient for rights to be granted. By contrast, the authors found that the Courts had thus far set a "very high" bar for the termination of guardianship (p. 322), reserving it for only the most extreme cases. These authors noted that this held true even in cases where family violence had occurred previously (p. 323). Instead, the Courts have appeared to privilege the stability of the child's relationship to both parents, and have used the unequal allocation of parental responsibilities (e.g. retaining guardianship without allocating any significant decision-making authority) as an alternative to termination.

It is on the issue of parental responsibilities that the notion of guardianship rights hinges. As previously noted, no specific model of allocating parental responsibilities is deemed best in the Act, and Courts have approached the issue on a case-by-case basis. At the time of writing, this had resulted in the Courts exercising caution with respect to previous orders (Boyd and Ledger, 2014, p. 327) and seeking parenting coordination for new arrangements where possible (p. 328).

2.3.2 – Parentage and Family Composition

Kelly (2013) examined the current state of case law and legislation across Canada with respect to same-sex couples and single mothers by choice. Her key finding was that, despite a number of attempts at legislative reform and a few precedent-setting cases, Courts across Canada have historically privileged biological parentage over intended parentage. She notes that "in the absence of legislative guidance, judges typically resort to biology rather than the parties' pre-conception intentions" (p. 255). Perhaps the most common scenario in which these decisions arise is that of assisted conception for same-sex lesbian couples, in which the biological donor attempts at a later date to assert parentage rights. While the number of such cases is noted as low, Courts have tended to interpret the child's best interests in a way which considers the child's right of contact with both parents (most often, biological parents) over and above the pre-conception intentions of the parties as well as the wishes of the same-sex couple (p. 257). Relevant to this discussion are the reforms in the FLA, which seek to address this issue and include an "intention-based system of assigning parentage that diminishes the significance of biological connection" (p. 274). The Act (s. 29 and s. 30) differentiates between biological and intended parents, with the latter also mentioned in the singular to include intended single parents. The conclusion drawn here is that the Act appears to allow for as few as one and as many as three legal parents to a child, subject to a pre-conception written agreement (p. 275).

While Kelly's earlier article retained an air of optimism that B.C.'s new Act would advance the causes of same-sex couples wishing to conceive and/or be given exclusive rights of guardianship and parentage, her subsequent essay, which delved more deeply into the language presented on parentage and assisted reproduction, was far less positive (Kelly, 2014). Kelly advances a critique of FLA's multiple parent provisions in s. 30, arguing that the language creates an "all or nothing" scheme in which

"involved" known donors and surrogate mothers to same-sex couples can only be given full legal rights or none at all (p. 587). Kelly further criticizes the Act for limiting the provision only to couples who use assisted reproduction (p. 581) and to individuals possessing a biological link to the child (p. 583). The problem, Kelly argues, is that s. 30 stands in sharp contradiction to s. 24, s. 27, and s. 29 of the Act, all of which serve to clarify the importance of pre-conception intention in deciding parentage. Section 30 serves only to either exclude intended parents who do not meet certain requirements or to reinforce the primacy of biological and opposite-sex parenting (p. 568). While this article is undoubtedly at the progressive margins, it provides a strong argument that the s. 30 language lacks clarity and presents potential limitations for intended parents.

Morrison (2015), in examining Ontario's family law reforms with respect to cohabitating or "common law" couples, notes that the B.C. FLA adopted an approach which "seems to emphasize the protection of the vulnerable" by taking an "opt-out" approach to cohabitation and marriage-like relationships (p. 408). The author observes that the modernized Act acknowledges the existence of couples for whom marriage is not an option (i.e. in the case of personal reasons or beliefs), but still defaults to traditional common law protections in terms of property division and spousal support. The expanded definition of "spouse" in the FLA to include the term "marriage-like" serves, for Morrison, as protection for vulnerable parties in situations of power imbalance (p. 411). Couples cohabitating in marriage-like relationships are "opted-in" by default and enjoy the same protections as married couples. This is not a major change in the FLA, but the expanded definition does serve to recognize and clarify the law for the increasing number of common-law or unmarried couples living in long-term, marriage-like relationships.

Finally, in a discussion of legislation and jurisprudence with respect to frozen embryo disputes, Carsley (2015) makes note of the new provisions in the FLA differentiating surrogacy contracts from ordinary commercial conflicts. She notes that, under the FLA, these agreements "are not legally enforceable and do not constitute valid consent to relinquish a child" (p. 78). As noted in Kelly's (2014) work discussed above, this presents a potential limitation for intended parents, who must obtain the surrogate's consent following the child's birth even in the presence of pre-conception agreements, and signifies a certain reluctance to dispense with provisions protecting biological parents even in cases where parentage is clearly intended. Carsley's discussion, while not focused exclusively on the FLA, nevertheless adds weight to Kelly's (2014) findings.

2.3.3 – Family Violence

The topic of family violence – from its expanded definition in the FLA to its weight with respect to the best interests test, guardianship rights, and parental responsibilities – is the most widely discussed reform in the literature. As noted in Boyd and Ledger's (2014) research, early jurisprudence considering family violence was both broad in its willingness to apply the definition, including for non-physical behaviours, but cautious in its approach to consequences for guardianship. The authors note accurately that, during the first year of the Act's interpretation, the provisions have "not always applied in a way that offers optimal protection of the safety of children and their caregivers, and a focus on maximum contact still appears to play a role, despite it not being mentioned in the legislation" (p. 352).

This early finding was confirmed two years later in follow-up research by Boyd and Lindy (2016). In examining the case law, the authors found that the Courts had continued to take a broad approach in interpreting the definition of family violence outlined in the Act and were willing to "recognize that several factors taken together may collectively amount to family violence, even where any one factor might not" (p. 105). Behaviours including (but not limited to) harassment through email or phone, late

or absent support payments, interfering with access, refusing to comply with orders, threatening to or actually reducing personal income, direct or indirect verbal abuse or disparaging remarks (including through children), and denial of parenting time have all contributed to decisions confirming family violence in one combination or another.

For these authors, the Court's willingness to apply the broad definition of family violence outlined in the Act is a positive development (Boyd and Lindy, 2016, p. 138). However, they identify a number of significant problems in how these findings are applied, or in the weight they are given in crucial decisions. The FLA gives the Courts broad discretion to determine how a finding of family violence may impact these decisions, and thus far they have been cautious in allowing such findings to strongly influence decisions, especially with respect to guardianship and parenting time (p. 111). Part of the reason for this comes down to evidence. Given that family violence, especially of the physical variety, often goes unreported when it occurs, judges have been faced with situations where each party contests the testimony of the other, forcing a decision on the balance of probabilities about whether the violence did, in fact, occur. It is here where the non-physical forms of family violence are valuable in that evidence often does survive the passing of time and can be used to corroborate testimony (i.e. emails, text messages). Yet even when finding that family violence did occur, and even where it was deemed physical, the Courts have still resisted stripping the violent party of guardianship or even parenting responsibilities. In some cases, the Courts have even compelled the recipient of the violence to consult with the violent party on major decisions (p. 122).

It should be noted that the authors did locate a number of case examples where judges added more weight to the family violence findings than the language supporting the guardianship presumptions. Some judges were unwilling to risk the safety of children when faced with a pattern of violence or abuse, and have given weight to the current research describing how cycles of violence are perpetuated and hidden (Boyd and Lindy, 2016, p. 114-115). Decisions in such cases included the ordering of supervised access, the reduction or elimination of parenting responsibilities, and the termination of guardianship rights. Yet for Boyd and Lindy, such decisions remain the exception and not the rule. They note that while many involved in the family justice system had hoped the FLA's provisions on family violence would "allow for better account to be taken of the realities of women's lives in making determinations about family violence and its impact on parenting decisions," their research "reveals that a number of problematic assumptions about family violence remain... [and that] many decisions tend towards an assumption that shared parental responsibility, and even parenting time, is an appropriate arrangement or goal" (p. 136).

Martinson and Jackson (2017) locate some aspects of the problems noted by Boyd and Lindy (2016) in the fact that the role of the family court judge is evolving, and that judges without specialized training or education may not be the preferred arbiters for cases in which family violence has or may have occurred. As these authors note, the generalist approach "raises systemic concerns about judicial competence; judges assigned to deal with family law cases may not have, nor be in a position to acquire, knowledge about substantive family law principles," and may lack "the professional experience and expertise required to deal with the multi-faceted nature of family violence and its complexities, using an equality-based analysis" (Martinson and Jackson, 2017, p. 13). These authors observe that family justice in general and family violence in particular require "specialized knowledge and skill" in terms how to recognize and deal with patterns of family violence which are often neither overt nor obvious (p. 19). Aside from arguing for judicial expertise, these authors recommend reforms which would introduce judicial oversight (in the form of a research-informed judicial case management process) as well as a

renewed investigation as to whether a unified family court system would better serve family court litigants (p. 68-69).

Treloar and Boyd (2014) offer a materialist critique of the FLA, arguing that the innovative aspects of the Act "may be thwarted" without "adequate resources to support families and improved access to justice" (p. 77). For these authors, the lack of direct investment in services tied to the reforms jeopardizes their overall potential impact. Moreover, the resource argument becomes compounded given that the system "places a burden on a parent who resists shared guardianship, especially given the normative climate in favour of shared parenting" (p. 89). For parents coping with histories of family violence, a number of effects (potential lack of resources, bias in favour of shared parenting, and a lack of access to justice) can thus combine in disastrous ways. For these authors, any move towards mandatory out-of-court resolution, especially in situations where a power imbalance exists, is even more problematic (p. 89).

Treloar followed up her initial research with a more expansive look at the FLA's family violence provisions, this time against the backdrop of the province's overall domestic violence strategy (Treloar, 2016). She again locates family violence as bound up inextricably with arguments about resources and access to justice, noting that the way family violence is defined bears upon how access and services are targeted and distributed in the public sphere (p. 112). The emphasis and promotion of collaborative, out-of-court dispute resolution processes are undoubtedly experienced differently by those who have been subject to family violence, and the financial implications of engaging in these processes, absent any subsidy, is noted as burdensome (p. 113). In a brief analysis of the jurisprudence, Treloar finds the same problems as did Boyd and Lindy (2016) in terms of the Courts appearing to add more weight to shared parenting or right of access than to the safety of both parents and children with respect to past family violence (Treloar, 2016, p. 117). Treloar's treatment of the FLA also questions the ability of family justice professionals to adequately screen for family violence (p. 121). Despite the critiques, Treloar's overall impression of the reforms is positive, with the reservation that the reforms will only be meaningful if the means to address the material realities of separation are appropriately considered (p. 124).

2.4 – Case Law

Two sources were used to locate relevant case law for this project. First, the published articles by Boyd and Ledger (2014) and Boyd and Lindy (2016) provided useful summaries of the first two years of jurisprudence under the FLA. These investigations are primarily interested in family violence, which relates to this project indirectly through both the best interests and guardianship provisions. Second, the author performed a manual search of B.C.'s section of the Canadian Legal Information Institute (CANLII) website. This primarily involved keyword searches of the Document Text field designed to match CANLII's tagging system (i.e. "best interests," "guardianship"). A second strategy involved sorting results from all searches by "most cited" in order to locate potentially precedent-setting decisions. Cases from the B.C. Supreme Court, Provincial Court, and Court of Appeals were gathered in the search, with a total of 31 individual decisions considered across all research questions. While the gathering and reading of these cases was broadly useful, the discussion below is limited only to those cases which seemed consequential or particularly relevant.

2.4.1 – Best Interests

A number of cases were located in which judges had to consider a child's best interests. In some cases, the courts had to examine past decisions or courses of action in light of the child's interests, and in others judges methodically considered each of the criteria under FLA s. 37(2) and provided reasoned assessments on a proposition. In *Hansen v. Mantei-Hansen* (2013), the B.C. Supreme Court (BCSC) judge was faced with deciding primary residence for the couple's two young children as the mother sought to move out of province. The separation between the couple was more or less amicable, but both parents argued for primary residence on similar grounds. While the judge acknowledged the paramountcy of the *Divorce Act*, she used the s. 37(2) criteria in order to aid her decision-making given the broad discretion afforded to judges with respect to best interests in the *Divorce Act* as well as the aligned intentions of both the *Divorce Act* and the FLA with respect to decisions involving children. The judge considered each of the criteria individually, but also considered language in both Acts which emphasized the importance and desirability for children to have contact with both parents. Also at issue in this case were the various minor incompatibilities with respect to the language on guardianship, custody, and access. In siding with the father in this case, the judge took all of the above into account and offered the opinion that the decision would be consistent if reviewed against either Act. In the end, stability and predictability were the deciding factors.

The BCSC judge in *LJR v. SWR* (2013) also applied the s. 37(2) criteria when deciding on an application to relocate. The applicant mother in the case argued that FLA s. 69(4), which permits a guardian who has the majority of parenting time to relocate under certain conditions, should apply. The respondent father disagreed, arguing that relocation (in this case, to the United States) would prove devastating to his ongoing relationship with the child given his inability to afford regular visitation. The judge found that, while the above-noted section of the FLA was applicable given the pre-existence of interim orders respecting parenting arrangements, s. 69(3), which notes that relocation decisions should reflect the child's best interests, was also applicable to the case. As such, the judge then had to decide whether the application to relocate was, first, made in good faith and with a reasonable plan to ensure continued parenting time for the non-relocating parent (s. 69(4)), and second, made in the best interests of the child (s. 69(3)). The judge did not find for the applicant in this case, deciding that the application was not made in good faith, nor was relocation in the best interests of the child. Criteria for both tests were discussed in depth in the decision, and interestingly, in this case the respondent's guardianship rights were also considered alongside the good faith test, potentially challenging the notion that the best interests of the child could be the "only" consideration. The application to relocate was also denied despite the fact that the applicant had already relocated.

In addition to considering best interests in light of relocation, the courts have also done so when deciding on parenting arrangements. *SJF v. RMN* (2013) involved a father petitioning for guardianship and parenting time despite the fact that, at the outset of proceedings, he was not considered a guardian due to having not lived with the child. Upon the father's successful application for guardianship, the BCSC judge assessed the criteria in s. 37(2) given that there was no pre-existing order for parenting arrangements. In this case, the judge had to weigh factors such as the availability of housing and education, the proximity of shopping and other amenities, the child's young age (16 months), and the proposed relocation of the mother to a larger city when determining an arrangement which would be in the child's best interests. The balance of these issues favoured the child's continued residence with the mother, and the judge found that the barriers presented by relocation (i.e. additional travel burden for the father) did not outweigh the benefits of relocation. Each s. 37(2) criteria was again considered individually in rendering the decision.

LAMG v. CS (2014) involved an applicant mother seeking the enforcement and extension of orders respecting supervision of all parenting time for her child's father, the respondent. The B.C. Provincial Court (BCPC) judge in this case had the task of weighing the child's best interests against the father's guardianship interests given his history of deviant sexual behaviour (not all of it legal), as well as possible untreated mental illness and a questionable parenting capacity. The respondent, for his part, sought the removal of the stipulations to his parenting time requiring supervision. The judge's decision considered the child's best interests on the whole rather than according to each of the criteria in FLA s. 37(2). Because some of the behaviours considered were paraphilic in nature and because the respondent had not taken steps deemed appropriate to meaningfully address his mental health issues, the judge found no cause to amend the orders. Moreover, the judge in this case took specific issue with the piece of expert testimony supporting the respondent, which found that the risk presented to the child was "relatively" low, an amount the judge found was intolerable. Despite some of the more sensational elements in this case, the judge was explicit in noting that the decision was made according to the best interests of the child only rather than representing a judgement on the nature of the respondent's behaviours.

Due to the broad discretion given to the Courts when determining the best interests of the child, decisions are usually upheld on appeal barring errors of fact or evidence not considered. In *Williamson v. Williamson* (2016), the B.C. Court of Appeal (BCCA) overturned a lower court decision to compel the four children of a separating couple to participate in an out-of-court counselling program. This decision also involved the interim suspension of the separating father's guardianship (two of the children were living with him) and also assigned all costs of the program to the father. The lower court judge's decision was based on a finding of parental alienation unattributed to either parent. The ruling was overturned on the grounds that the lower court judge had erred by both ignoring a previous dismissal of a similar application without a material change in circumstances as well as failing to reason that participation in the program, which had not been subjected to peer review, was in the best interests of the children involved. This second factor essentially hinged on the lower court judge failing to consider the *lack* of evidence supporting the program.

The best interests provisions in the FLA are considered as a regular part of all cases involving children in separations, and as such there are countless cases which make use of the test to varying degrees. Of the cases consulted, three typical and one atypical example are summarized here to illustrate the process by which that consideration can occur. Interestingly, in these cases and others, there are usually mitigating factors for judges to weigh, calling into question the FLA's language calling the child's best interests the "only" consideration. On the whole, the courts have appeared to favour consistency with the FRA and the *Divorce Act* rather than advance any radical interpretations of this language, which is not surprising given that the change from "paramount" to "only" is relatively minor. In practice this finding has been borne out, and although the practical effect may be similar, the FLA's provisions do appear to be aiding judges in their reasoning on best interests decisions.

2.4.2 – Guardianship

As noted in the academic literature, the re-definition of guardianship has presented some challenges for the courts in terms of clarifying guardianship rights in situations of family separation. While guardianship was assumed to be equally held in cases of separating parents who had resided with the child, how this notion of guardianship interacts with parenting time and parenting responsibilities has proven to be a topic of some debate. On the one hand, the intention of the FLA seems to clearly encourage the continuation of long-term involvement for both parents, whether the child resides with

them full time or not at all. On the other hand, when primary residence is contested, common notions confusing guardianship with terms like custody and access come to the fore. The simple matter of determining whether one is in fact a guardian of a child under the FLA has been interpreted as a separate issue from what rights that guardianship entails, decisions which vary considerably. At bottom, minimal guardianship rights would seem to include the duty to inform if not consult a party either from time to time or on major decisions. The research by Boyd and Lindy (2016) referenced above seems to suggest a significant disposition on the part of the courts to uphold these rights, even in cases where family violence has been documented.

McKenzie v. Perestrelo (2013) is a good example of an early guardianship-related case which spanned the transition timeframe covering both the FRA and the FLA. In this case, orders were made under the FRA under which the parties were deemed joint guardians with Ms. Perestrelo having full custody. Perestrelo sought sole guardianship under the FLA on the grounds that "only a guardian may have parental responsibilities and parenting time with respect to a child[9]." Since she had been granted full custody under the FRA, this must have seemed a logical course of action. However, as the judge noted, joint guardianship had also been granted under the FRA, and both parties met the definition of guardians under the revised FLA language. Despite some allegations of violence, the judge could find no reason to change the order respecting guardianship, and in turn allocated some parenting time and responsibilities to Mr. McKenzie.

While the courts have been reluctant to terminate guardianship status once established, there have been cases where guardianship established under the FRA was not extended under the FLA. The BCCA in *British Columbia Birth Registration No. 2004-59-020158* considered the issue of guardianship in a case where an appellant was granted sole custody of a child and subsequently sought for her new spouse to adopt the child and become its guardian. The separation agreement under the FRA gave the respondent guardianship rights and reasonable contact, and thus his consent was required in terms of the adoption. While the trial judge determined that it was not in the best interests of the child to dispense with the consent to adoption and failed to address the issue of guardianship, the Court found that it was not in the best interests of the child for the respondent to retain his limited guardianship rights (guardianship of the child's estate). The judges also declined to make an order for adoption given that under the FLA, the spouse was already a guardian of the child. Despite no longer being a guardian, the Court upheld the respondent's previous entitlement to contact as well as his right to receive information about important events in the child's life, which had previously been withheld. The various proceedings from this case have been widely cited due to the somewhat conflicting interpretations of guardianship across both Acts.

Part of the confusion surrounding guardianship undoubtedly originates from the fact that the FLA no longer uses "custody" and "access" to describe parenting and residency arrangements. As a result, parties have sought to obtain "sole guardianship" through the courts, which is not provided for in the FLA absent extreme circumstances. In an otherwise straightforward divorce involving children, the BCSC judge in *MAG v. PLM* (2014) clarified the concept of guardianship under the FLA and declined to remove guardianship rights from the claimant father as the respondent mother had sought. Instead, the Court simply allocated the vast majority of parental responsibilities and time to the mother, while retaining rights of contact for the father. In her decision, the judge cited *D v. D* (2013), a seminal case for guardianship also referenced in Boyd and Lindy (2016) in which an application was sought to strip a party's guardianship rights in light of previous family violence in a joint child protection / family law

[9] Family Law Act, section 40(1)

proceeding. Despite its concerns, the court in *D v. D* declined to terminate guardianship and instead simply allocated all parental responsibilities to the non-violent party. Following this precedent, the judge in *MAG v. PLM* declined to order otherwise.

A final point on guardianship involves the voluntary relinquishing of guardianship rights and, in one case, the attempt to reinstate guardianship once it had been given up. The father in *SM v. NE* (2015) relinquished his guardianship rights to his three children through a consent order. A self-represented litigant, the father thought that by doing so his estranged wife would grant him a divorce and allow him to restructure his life accordingly (he had lined up a new international job and was allegedly in a new relationship). Yet it is clear from reading the decision that the father had confused guardianship with custody when signing the order. FLA s. 39(2) subsection (1) does allow for such agreements to be made after or before separation, while s. 47 allows the court to change, suspend or terminate such orders in the event of "a change in the needs or circumstances of the child, including because of a change in the circumstances of another person." Faced with this language, the judge outlined the entire process for both guardianship via agreement and the process required for non-guardians to become guardians under the Act, which involves the filing of an affidavit and obtaining written consents. The judge declined to make an interim order granting the father guardianship in this case, but encouraged him to follow the process as outlined in the legislation, granting that his actions were "foolish in the extreme." Aside from serving to highlight the impact of the emphasis on guardianship in the Act and the move away from custody and access, this case serves as a cautionary tale for self-representation. The entire proceeding would likely been avoided had some basic legal advice been followed.

The brief examination of the case law on guardianship shows two trends. First, it shows that the concept was interpreted in different ways when the FLA was first enacted and, second, that enough time has now passed for the case law to become stabilized. While the utility of the language and the way it has been interpreted will likely continue to be criticized, especially from feminist and social justice corners, there are far fewer debates occurring now than there were in 2013 and 2014.

2.4.3 – Resolution Out-Of-Court Preferred

The search of case law conducted for this paper found few records citing or referencing s. 224(1) of the FLA, which gives the courts the power to compel parties to pursue resolution out-of-court. While the FLA did not ultimately mandate mediation, the possibility had been considered during the consultation process. As noted above, much of the family justice reform literature champions the idea of mandatory mediation. The version of the FLA that was brought into force leaves open the possibility that it could be implemented at a later date. Section 224(1) can be seen as somewhat of a compromise, allowing the courts to use their discretion to decide whether litigation is the best course of action in a given case.

Although this issue was discussed during the interview process, the case law reviewed below is limited to cases where the courts had to decide whether or not to uphold agreements reached through out-of-court processes. Such cases are nothing new and not particular to the FLA, except to note that the courts could now reference those sections of the Act which emphasize and promote the use of those processes. In most cases, the courts have continued to uphold decisions reached through processes such as mediation and arbitration and have been explicit in their support for the systemic reforms which favour them.

Unlike the highly regimented family court process, mediation is a largely informal encounter in which parties (ideally) work together towards a mutually agreeable decision with the assistance of a

professional facilitator, the mediator. In family mediations, lawyers are often present for support, and the mediators themselves are also lawyers. This can have a distorting effect whereby the mediation process is coloured in legal terms, with participants resorting to rights-based language and tactics. Sometimes this distortion does not set in until after an agreement is made, a phenomenon which could be termed "buyer's remorse." In *RGL v. SML*, one party to a mediation agreement argued afterwards that it should be voided on the grounds that they were pressured into the decision and that the agreement to mediate was not consensual. In this case, after a summary trial, the judge upheld the agreement. Despite a long affidavit outlining the respondent's interpretation of the events, the judge relied primarily on the agreement to mediate itself, which clearly outlined the conditions under which the agreement would become binding.

One of the reforms made by the FLA was to distinguish family law arbitrations from commercial arbitrations under the *Arbitration Act*. Part of this distinction allowed the appeal of family law arbitrations "on a question of law or on a question of mixed fact and law."[10] *McMillan v. McMillan* (2015), a protracted separation decided at arbitration, came before both the BCSC as well as the BCCA in order to decide whether the arbitration decision could be appealed. In a very detailed decision, the BCSC judge dismissed all five grounds for appeal in the case, citing the decisions of the arbitrator as reasonable under the circumstances (the judge noted that a factual review of the arbitrator's findings was out of scope). The BCCA subsequently also dismissed the appeal, the grounds for which by then were slightly different, for similar reasons. Despite a rigorous challenge in this case, the court upheld the decisions made at arbitration on a significant number of individual points and backed the assertion that out-of-court processes intended to resolve family disputes should carry a similar conclusive weight as the courts themselves, lest they be misused as simply another step in the chain of litigation. From the BCSC decision, at paragraph 42:

> *By incorporating family arbitrations into the* Arbitration Act *surely the intention was to retain the benefits of arbitration. Those benefits include not only the presumed savings in legal fees by avoiding a full trial but the aftermath of arbitration as well, including any appeal. To be otherwise would undermine the whole purpose of alternate dispute resolution, one of which is finality. As noted it should not simply be one more step in the litigation process.*

A similar case in which an arbitration award was contested can be found in *McLaren v. Casey* (2016). The parties in this case elected to forego the court process in favour of med-arb, where the parties attempt mediation first and agree beforehand to proceed with arbitration in the event of an impasse. When mediation could not resolve the dispute, the parties proceeded with arbitration under an agreement which contained a "last, best offer" provision. This involved each party agreeing to provide a final offer to the arbitrator prior to the rendering of a decision. After the arbitrator's award, the respondent in the referenced case sought and obtained orders enforcing parts of the award. The claimant brought forward an application seeking to set aside the arbitration award based on a series of "arbitral errors." Although the BCSC judge in the case declined to rule on the merits of these submissions (noting that there was no reason to set aside the previous orders), the decision clarifies the purpose and value of consensual dispute resolution, with the intention behind it being to alleviate the very sorts of systemic burden seen in cases of repeated, unsuccessful applications on negligible matters of private law. Paragraph 35 of the judgement reads as follows:

[10] Arbitration Act, Section 31

> *Though the court may have discretion to overlook this issue in the circumstances, I would not. In my view, and considering the intention for the arbitration to have been a final determination of the issue and the substantial deference to decisions made in arbitration; the need for the orderly administration of justice; the fact that the litigation surrounds a financial dispute rather than a public law issue; and my view of the lack of merit to the proceeding, it is not appropriate for the matter to proceed.*

The above statement is directly quoted and its general attitude repeated in a more recent BCSC decision, *Geary v. Geary* (2017). This case saw a similar appeal lodged against an arbitration award on several grounds. The respondent in the case alleged that, first, the rules of procedural fairness were contravened through the "last, best offer" provision, second, that the award was based on insufficient evidence, third, that the award contravened federal child support guidelines, and fourth, that it contravened s. 37 of the FLA in that the parenting arrangements in the award were not in the best interests of the child involved. The claimant in the case sought to vary the arbitration award in light of a material change in circumstances with respect to the respondent. The judge in the case again had to consider whether the arbitrator made errors of law or errors of mixed fact and law. As in *McMillan v. McMillan* (2015), the decision reviewed each potential ground individually and cited a large volume of case law with respect to the *Arbitration Act* as well as to both attempted appeals and variances of arbitration awards. Although a full summary of the events in this case is beyond the scope of this paper, the judge had to decide, first, whether there were sufficient grounds for an appeal of the award, and second, whether to vary the award in light of the claimant's application given the court's power to do so under FLA s. 30(4).

Through an examination of the evidence, the court found that the respondent had "undermined the rationale for the Arbitration Award" by failing to disclose an important change in circumstances (an international relocation) which was known before the agreement was made. As a result, the judge found the Award had to be varied in order to adequately address the division of parental responsibilities and the best interests of the child. This finding essentially required the judge to resolve a series of ten distinct issues ranging from the allocation of parenting time and responsibilities to the determination of spousal support and court costs. While the court in this case did not uphold the Arbitration Award, to do so would have run counter to the principles of natural justice. The court acknowledged and upheld the spirit of the out-of-court process, and but for the willful misuse of the process by one of the parties would likely have had no cause to vary the Award.

As shown in these examples, the courts are uniformly supportive of out-of-court processes, which are well established in B.C. and have been in use now for several decades. However, the effect of the FLA with respect to its goals concerning out-of-court processes is unclear. Whether the reforms it contains are enough to change the status of these processes from an "alternative" to a true default position remains to be seen.

2.4.4 – Parenting Coordination

Parenting coordination is a new process included in the FLA which provides for a family justice professional, in a specialized role, to assist consensus building on matters related to the division of parenting time and parenting responsibilities. In *Fleetwood v. Percival* (2014), the BCCA noted that the statutory scheme surrounding parenting coordinators was relatively new and thus worthy of review in terms of how and when it could apply. It is here where one of the only direct references to s. 224(1) of the FLA is found, with the court noting that parenting coordination is included among the processes

available with respect to ordering parties to attempt out-of-court resolution. *Rashtian v. Baraghoush* (2013) is an oft-cited early case wherein the court, faced with parties who were found to be incapable of coordinating their own parenting arrangement, were compelled to retain a coordinator. While the general context of such orders were not at dispute in *Fleetwood v. Percival*, the court had to determine whether a previous BCSC judge had erred in declining to make such an order. The BCSC decision was based upon the fact that, first, the couple involved had previously demonstrated their ability to work collaboratively, and second, that retaining a coordinator was an unnecessary and undue financial imposition on the respondent party given that the process of allocating parental responsibilities had already occurred through earlier proceedings. The BCCA noted further that the parenting coordination-related provisions in the FLA (of which s. 15 is noted in addition to s. 224) essentially allow for the discretion of the judge to guide applicable orders. As such, the BCCA found no error with the BCSC judge's decision not to make orders for parenting coordination given that court's due consideration of the circumstances. It is clear from this interpretation that the FLA did not intend to prescribe the creation of orders for parenting coordination or any other consensual dispute resolution process but rather sought to enable such orders in the broadest way possible on a case-by-case basis.

A second case relevant to the parenting coordination provisions in the FLA is *DEE v. WLE* (2015), in which it was the scope and authority of parenting coordination rather than its place which was at issue. The case involved a high-conflict marital dispute in which the parties had undertaken a parenting coordination process via a consent order, after which a final order was to be specified. Under FLA s. 15(4), the authority of a parenting coordinator to act is limited to a term of two years, as the process is not meant to be open-ended. The respondent in *DEE v. WLE* sought to stay the use of the coordinator on the basis that the role lacked certain authorities, which prompted the review of the circumstances under which a parenting coordinator may act, and what the scope of those actions should be.

The respondent in *DEE v. WLE* maintained that the couple had erred in retaining a parenting coordinator at the outset because they lacked a formal separation agreement which would legitimate the process. While such an agreement was forthcoming at the time the coordinator was retained, it was not yet signed. The respondent further alleged that the parenting coordinator had exceeded their authority by stipulating or otherwise suggesting what the parenting arrangements should be, which is outside the generally agreed scope of what a parenting coordinator should do (which is limited to assisting the parties to come to their own agreement). The claimant's position was that the consent order for parenting coordination should have been sufficient to enable the process and that, despite lacking the authority to make orders, the parenting coordinator's role was to "make recommendations to the parties through a determination, and that it is up to the court to determine if it will enforce that recommendation" (para 32).

The BCSC judge in this case ruled for the respondent. The judge agreed with the respondent's interpretation of the FLA language in s. 15 which noted that the coordinator's role is to assist the parties in coming to an agreement, rather than to propose an agreement in part or in whole. Moreover, the judge concluded that the parenting coordinator "does not have the authority to act in the absence of an agreement or order regarding parenting arrangements" (para 49), despite the consent order. Since the lack of such an order was not in dispute, the judge had no choice at that point but to side with the respondent. An examination of the proceedings from the parenting coordination process revealed that the coordinator was mistaken as to the scope of their authorities with respect to making determinations about parenting arrangements, and erred in stipulating parenting arrangements. As a result, the judge set aside the determinations which were enforced at a previous hearing.

Although the parenting coordination provisions have not appeared regularly in the case law, the discussions which have surfaced are valuable in terms of clarifying the purpose of the reforms. Early-stage contesting of the language is to be expected, and these cases have hopefully set precedents which will prevent errors such as those seen in *DEE v. WLE* from happening again.

3.0 – Methodology and Methods

The following outlines the research methods used to gather and analyze data for the project. The methodology and methods were selected for both their appropriateness to the research questions and their familiarity to the researcher. It should be noted that the research methods used were not exhaustive, and that future research on the same research questions using additional methods would undoubtedly give richer dimension to the findings.

3.1 – Methodology

As this project is largely evaluative, it uses a methodology proper to evaluation frameworks. Formal evaluation typically makes use of social science research methods to answer questions about how a program, initiative, or activity – in this case, a piece of legislation – is working (i.e. its effectiveness). It is structured logically and designed purposively according to the requirements of the topic under study. For this research project, semi-structured key informant interviews were used to gather data on the research questions. The data was then processed and subjected to thematic analysis techniques. The data gathered was qualitative in nature, and subjects were recruited from a variety of family justice-related professions.

The rationale for this methodology is two-fold. First, the researcher has experience with the methods proposed and their use was feasible and achievable within both the timeframe available for the research as well as the guidelines established by the University of Victoria's School of Public Administration for its Master's Projects. Second, the resources available for this project were limited. Although a mixed-methods approach would have been preferable, it was agreed in discussion with the FPTLD that focusing solely on key informant interviews would allow both more qualitative data to be gathered as well as a greater number of interview subjects to be consulted. While adding a quantitative dimension to the research would be undoubtedly valuable, the risk of a low response rate and an extended time frame for a project with limited resources was thought too great. As previously noted, this leaves open the opportunity for future research which further analyzes the research questions.

3.2 – Methods and Tasks

3.2.1 – Key Informant Interviews

The primary goal of using interviews as a data collection strategy is to gather rich, "thick" description. The hope was that the accounts gathered would "reveal in linguistic terms the nature of [the] phenomena" of subjects' experiences with the *Family Law Act* and the role it plays in decision making, evaluation of options, and interactions with the family justice system (Holloway and Todres, 2003, p. 350). In choosing a style of interviewing, it seemed likely that a semi-structured technique would provide a healthy compromise between the rigid controls of standardized interviewing and the potentially loose direction of narrative interviews. Semi-structured interviews are flexible, adjustable, and allow room for digression, diversion, and probing questions.

The manner and order of the questions was partially pre-determined. Taken together, the questions were designed to cover the scope of the inquiry (i.e., all the research questions). However, the flexibility of the semi-structured interview allowed for the researcher to re-formulate or re-frame questions as necessary, to change wording or emphasis, to re-arrange the order of the questions given digressions taken by participants, and to insert additional questions as needed. The initial list of questions

established were primarily essential questions, that is, those which are most related to the research questions (see Appendix D). As interviews progressed and subjects spoke about what was most important and pertinent to them, probing questions (not listed) sought to "draw out more complete stories from subjects," or to clarify and elaborate on points already made (Berg and Lune, 2012, p. 121).

Informed consent was obtained from all participants, and each was afforded the opportunity to withdraw that consent at any time, either during the interview or at any phase of the research (see Appendix C). All data is anonymously reported and hard copies will be destroyed on completion of the project. Findings will be disseminated to subjects upon request.

3.2.2 – Sampling Criteria

As key informant interviews were used, it was essential for the researcher to recruit subjects who were currently both professionally engaged in the family justice system and familiar with the state of that system both before and after the changes represented in the new Act. Subjects were thus purposively recruited through the professional contacts of the project supervisor and client, as well as through a B.C. Provincial Court internal process. A total of 15 interviews were conducted with family justice professionals belonging to the following groups:

- Family Lawyers (n= 6)
- B.C. Provincial Court Judges (n= 4)
- Mediators (n= 2)
- Family Justice Counsellors (n=1)
- Community Service Providers (n=2)

Interview subjects were recruited from throughout B.C., with the majority (n= 12) from either the South Island or the Lower Mainland. The B.C. Supreme Court was contacted to participate, but declined.

All but one interview was conducted over the phone, with subjects in the South Island given the choice to conduct the interview in person at a mutually agreeable site. All interviews lasted between 30 and 50 minutes, and were recorded and transcribed. Transcriptions underwent minor editing for clarity and did not include extraneous speech-based data (e.g. laughter).

3.2.3 – Data Analysis

From the interview transcriptions, the researcher followed Ritchie, Spencer, and O'Connor's (2003) method of building a "thematic index" to uncover the invariant and salient themes occurring across the cases. This strategy involved, for each transcript, constructing a hierarchical and categorical thematic framework which organized themes and ideas into a manageable index (see Appendix E).

Through an initial scan, the main themes uncovered in the interview process were highlighted, with sub-topics and areas of importance nested within them. Areas of divergence and convergence with these themes were noted. Transcripts were labelled to reflect the specific heading and subheading corresponding to the index, which were then sorted according to the regularity and context of their occurrence. A count of each thematic tag was conducted in order to gain a preliminary idea of which themes each participant emphasized the most. Throughout this process the thematic index was refined further, resulting in a synthesis of the most common and important themes.

A descriptive account was developed primarily from the explicit statements of the participants (see Chapter 4, below). Throughout the data analysis process, explanatory accounts were constructed on a limited basis by finding “patterns of association within the data and then attempt[ing] to account for why those patterns occur” (Spencer, Ritchie, and O'Connor, 2003, p. 215). At bottom, the method of analysis aided the researcher’s endeavour to reproduce subjects’ responses as accurately and honestly as possible in written form.

4.0 – Descriptive Account

The following summarizes the general findings from key informant interviews conducted with participants between July and September, 2018. Participants were provided with a semi-structured list of questions in advance of the interviews (see Appendix D). The interviews themselves were conducted informally, with diversions and probing questions added in response to the various paths taken by participants. This flexibility allowed the researcher to pursue different lines of questioning for each participant according to their professional background and experience.

The majority of the interviews provided rich, detailed descriptive accounts. While some had more to say about certain questions than others, participants provided responses to all questions. While findings were generally aligned with the researcher's expectations following the literature review, there was nevertheless a significant amount of viewpoint diversity within and across professions. This variability underscores the fact that the consulted professions themselves are quite diverse, even within a small, purposive sample.

The remainder of this chapter is divided into sub-sections corresponding to the three main topic areas outlined in Appendix D. Each topic had one or two key structured questions, with a variety of associated probing questions used as required.

4.1 – Family Law Resolution Out-of-Court

This topic area focused on two main questions. First, there is the question of whether the perceptions, expectations, and/or behaviours of those working in or using B.C.'s family justice system have changed since the FLA came into force. This question probed further into the general idea of a culture change, and how fast (if at all) these changes might be permeating the wider culture. A second question on this topic focused on whether judges are using their powers under the FLA to direct parties to participate in consensual dispute resolution processes, such as mediation, counselling, or other specified services. Responses to this question varied greatly and focused mainly on the various types of consent orders heard at the Provincial Court level.

4.1.1 – Culture Change

The majority of participants concurred with the general idea that consensual dispute resolution processes have become increasingly common options for resolving family disputes since the 1980s. As such, most were also hesitant to suggest any sort of causal relationship between the FLA and culture change in general. Instead, the most common response to the question of whether the wider culture is shifting towards out-of-court processes was to state that the FLA was simply reflecting a trend which was already occurring.

> *… since I've practised since about '95, perceptions expectations and attitudes were changing already the entire time I've been practising but for different reasons. So I think it's sort of a continued trend towards the collaborative, co-operative, or non-adversarial approach in terms of people being more open to that and more likely to use those processes, and think more highly of those processes. But I think the ball was already rolling before the FLA came in, and I can't say the FLA was the reason, but it was definitely consistent with that movement and I think it's helped as well.* – Lawyer

In terms of the pace of culture change, participants also tended to differentiate between professionals and users in the system. Lawyers were identified as a group for which the adoption of collaborative, out-of-court approaches was very much based in both workplace culture and a regional professional culture. For example, the legal communities of the South Island and Lower Mainland were both noted as being particularly open to collaborative practices.

> *I would say most of the lawyers that practice in any significant capacity in family law in the South Island, their go-to process these days is not court, but mediation to resolve things, or arbitration. I think it's become, the courts are more alternative to the dispute resolution process than the reverse, and my impression is that mediation is becoming more popular and a go-to process in Vancouver as well.* – Mediator

Despite a general agreement that increasing numbers of lawyers are embracing these collaborative practices, a subset remains committed to an adversarial approach and a "litigious" style of practice. While most professionals acknowledged that these approaches are enduring, those who work primarily with marginalized or disadvantaged clients were more likely to speak at length on the topic, and for some it coloured their perception of any culture change taking place.

> *Overall, I don't see a philosophy, or any ideological shift, that's occurred from necessarily the family law bar or people in the process, clients, feeling that it's less adversarial by the language. In some cases, I know there's other questions about it, but in some spaces the legislation encourages, is a site of more litigation.* – Lawyer

In other cases, the difference is also generational.

> *… because the lawyers say a generation older than me that were very much more court-oriented, I dealt with some older family lawyers who were excellent, but everything went to court. Even if it was consent, they wanted a consent order. I think now, the move is much, much the opposite direction. Let's get a separation agreement, let's do this out of court and that out of court.* – Provincial Court Judge

Although several respondents were more skeptical of the notion in general, the majority tended towards the opinion that a wider culture change was occurring, albeit slowly. There has been no paradigm-shifting revolution in the family justice system as yet, but a slow and measurable change has been observed nonetheless. The FLA is generally seen as reflecting and supporting the various changes which predate it and the best practices which informed the policy development surrounding it, and it was widely seen by participants as a positive step among many.

4.1.2 – Judicial Powers

When participants were asked about whether judges have been using their powers under the FLA to direct parties towards consensual dispute resolution processes, there was again a variety of responses. Since the FLA gives judges a fairly wide latitude and discretion in how to steer cases, participants interpreted the question about judicial powers in different ways. Some referred primarily to conduct orders, where judges would place limits on or otherwise direct contact between separating parties. Others commented on the level of judicial knowledge about locally available resources, such as programs for parents. While there was a general awareness of the judicial powers provided under the Act, most participants observed no concerted use of the powers available on the part of judges.

According to participants, the powers granted under the conduct orders section of the Act (s. 222-228) seem to be used widely, but few participants focused their responses specifically on s. 224, which gives judges the power to compel parties to attend family dispute resolution, specified services, or other programs.

Despite the general lack of consensus about how judges are using their powers, some participants with a longer history of experience with both the FRA and FLA noted some key differences.

> *… under the* Divorce Act *and under the old FRA, particularly as it relates to parenting, the statutes both say in different locations effectively this – when making an order, read concerning parenting, the court may impose terms and conditions. That's all it said. It's a general authorization, you can add terms and conditions to whatever order you make. And some of us argued until we were blue in the face that this entitled the court to require certain behaviours or ban certain behaviours or curtail certain behaviours, and it may even allow the court to impose conditions like go to counselling, go to anger management, take a parenting course. But judges were hugely reluctant to do so. So now that we've got these conduct orders, starting with section 222 and proceeding to I think 227 or 228, laying out specific things you can impose as terms and conditions, judges feel much more empowered now, they're not as afraid to go out on a limb and require all these things, because there it is in black and white. And as lawyers we no longer have to argue strenuously that not only should you do this but you can, you have permission, even though it doesn't specifically say order them to take counselling, you can do that.* – Lawyer

This comment also speaks to the idea that the changes introduced by the FLA will take time to disseminate, even amongst judges. While a legislative change may provide new legal authority, it still demands a change in the way one practices. Some judges who may have been accustomed to taking a conservative approach on imposing terms and conditions when making orders would not begin to do so overnight. Resources are also a consideration. Although there is a general awareness of the new provisions, some judges are reluctant to make orders for participation in processes that parties may not be able to afford.

> *Judges are well aware, at least in my court, of the making orders, to make people go to mediation or go back to family justice* [counsellor] *if it's a new issue… So what you'll see is a big buy-in from the courts, on out of court resolution, and attending counselling, specified services or anything like that. So a big buy-in, but again we have to be given options for those services. Because as you well know from doing this work, 95% of our clientele can't afford to spend $140 an hour to go to a marriage therapist, or to somebody who could give them a child-centered parenting plan if their child has some special needs. They can't afford that. They can't afford a lawyer to help them draft the pleadings, so unless family justice can solve it they have to come to court.* – Provincial Court Judge

Personal and systemic resources were themes echoed throughout the responses and are highlighted further in Chapter 5, below. The subject of conduct orders was one area where many of these issues came to light repeatedly. Several respondents, the most vocal of whom work with a more marginalized clientele, echoed the idea that one of the most important aspects of the court system is that it is venue in which decisions can be made when one is ultimately required. This can also affect the sorts of orders the courts are willing to make.

I think they are having limitations, because again, one of those issues around the new legislation is that they have a lot more rights about what they can do, but they also know that the clients who are coming before them, the parties who are coming before them, there's a limitation of where they're going to go to. So they can have all these grand ideas of what, they have a great legislation, the wording of the legislation is really great, there's a lot of really good things in it, the problem is there's nowhere to actually implement it out in the practical world of family law. I think judges can have a lot of say in that, but when you have under-resourced, multi-barrier, limited income, many challenges in front of you, possibly self-repped, to then say I want you to go and get counselling. Where? Who's going to provide it? Is there a waiting list? There's already a waiting list for me to get to court. How much does that cost? Where's the daycare for this? Where are the locations? Who does it? What languages? So I think that there's a lot of limitations. – Lawyer

Apart from resources, another aspect of the appropriateness of orders respecting consensual dispute resolution processes is awareness on the part of the courts.

Although its good, the FLA having that section giving that legislative authority, I think the mechanics part is missed, in that how do the judges actually then have information about different programs, and what intake or other types of processes can help decide whether that's an appropriate referral to make or not, or an appropriate order to make… Because there's not a lot of information for judges about what age children can participate, and that's something we should, as an organization, pick up and make available, not sure of the format, but the fact that that's lacking, it puts people into a little upset when they call and they're told your child is too young or you just recently separated. But they've been ordered to do this, so now what? – Community Service Provider

While responses varied on the sorts of conduct orders being used and their general appropriateness across unique contexts, most participants had either heard of or witnessed the courts using their powers as prescribed. The variation seems to stem primarily from the circumstances of each case. Judges may be reluctant to order clients to participate in some dispute resolution processes if they lack the resources to do so or have already attempted free options. There may also be issues of appropriateness for some programs, or a lack of awareness of local options. It was widely acknowledged that both in- and out-of-court processes have an important place in the family justice system, with court driven conduct orders being very much made according to the specifics of the conflict at hand.

… if parents can't afford $40 or $50 an hour to pay for supervision services, they're certainly not going to pay for private mediation if they can't even see their kid. And if there are services that are out there that we don't know about it, it would be nice for the judiciary to be informed. Judges want these people to get the help in family court, we really do. In child protection court we've got social workers who can plug people into the community, but as a judge all I can do is ask a lot of questions… If those services are out there, judges will gobble that up. We recognize the damage that happens in family court every single week, and we want to find ways of getting around that. – Provincial Court Judge

4.2 – Parenting Arrangements

As with the questions focused on culture change, the main path of inquiry on parenting after separation was whether legislative changes respecting parenting arrangements within the FLA had affected people's perceptions, expectations and/or behaviours. Here the focus was primarily centered on the

changes to the guardianship provisions as well as the degree to which people are still thinking in terms of custody and access. Responses to these questions were the most aligned across professions of any general topic area. However, there was some divergence from participants in terms of how they felt the enumerated list of parental responsibilities (FLA s. 40) could impact conflicts.

Participants were universally positive about the new definition of guardianship in the FLA and the default assumption of guardianship for both parents under most conditions. Some early interpretation of the definition in the early days of the FLA did create some issues (for example, when parents had not lived together prior to the child being born) but these were relatively quickly sorted out in the case law as judges more routinely ruled that in most cases, both parents were considered guardians. This is an area in which the intent of the FLA lined up very well with how conflicts play out in practice.

> *… folks are coming in and, a lot more often have an understanding that, look, you know in most cases that starting point is that both parents are guardians under the FLA. And so there's not necessarily a fight over that, or any ideas that they shouldn't have guardianship, or shouldn't make decisions a lot more, so it's definitely having a bit of a starting point, in most cases it's a non-starter. They understand that look, yeah, we're both guardians, given that looking forward let's figure out the arrangements.* – Mediator

Mediators spoke especially positively about the guardianship change, which in one case was referred to as having transformative power over the conflict as it forces those involved to consider their situations differently.

> *People believe, especially higher conflict people or younger people maybe, is that it's about making sure things are equal. They have this sense that if it's not even, it's not fair. The legislation has very clear language saying there's no presumption that someone should get or not get equal. It's really nice language, and extremely helpful, and I believe that once explained to people, that this is about what is best for your child and making sure its balanced, as opposed to making sure the two of you are equal. And once they catch that and understand that, it really changes their perspective. I think that's a marvelous piece of legislation and very important to, as I say it's embraced when people understand it.* – Mediator

In most cases it was acknowledged that separating families were not keenly aware of the new guardianship language and were still thinking in terms of custody and access. Once they are told of the changes, however, most are receptive.

> *I think the language changes are fantastic. Moving to parenting responsibilities and parenting time as opposed to custody and access, sole custody. And when you explain them to people, it's, the language seems to de-escalate some of the ideas people might have when they're first starting to consider a separation, maybe just based in things they've seen in movies or the news, oh I want sole custody, or a statement like I don't want to lose my access rights. One area that still complicates it is that the* Divorce Act *and the child support guidelines still use shared custody or the term custody, so people definitely are getting confused, and when I'm explaining both I find that the provincial statute language is much easier to explain and perhaps more intuitive.* – Lawyer

Several participants noted that differences between the language used in the FLA and language used in other legislation (e.g. the *Divorce Act)* or institutions (e.g. customs and immigration) cause some confusion for parties. For example, while the FLA may focus on guardianship and parenting time, the

passport office still wants to know whether a parent has custody of their child (as do a number of other institutions and services).

> *… I think with the* Divorce Act *maybe once the terminology, they're looking at changing that, and then if it's changed for I don't know how many, X amount of years, then you've built that culture. But right now, sometimes people are still applying in their orders guardianship under the FLA but custody for the* Divorce Act*, right? And then when you're looking at outside sources, like the school, border services, the passport office and stuff, they're still using the language of who has custody, who has access, right? So when they're going to the doctor, all the other places where it would kind of affect their everyday life, the question they're being asked is do you have custody orders.* – Community Service Provider

While these factors are understandably outside the purview of the FLA, they do somewhat frustrate the Act's ability to foster culture change through language. As noted by the above participant, changes to the *Divorce Act* which would do away with the custody and access language have been proposed (Bill C-78, 2018). In any case, the wider cultural shift in many areas will need to involve more than just a single piece of legislation.

As noted at the outset of this chapter, there was one question related to parenting after separation which did provoke some interesting responses. Some participants expressed that the enumerated list of parental responsibilities, in some cases, simply gave parties in conflict material on which to dig in and defend. The result for these parties was intensification, rather than diminishing, of the conflict.

> *Now, with laying it all, it's all pulled out into small pieces, the light shines brighter on things. Now, people can spend a lot more time, and say OK I want to drill down on parental responsibilities, I want to drill down on parenting time, and I want to drill down on all of the different pieces. So I think its opened up, for them its opened up what in essence would have been similar rights you would have gotten over here, its opened it up much more for them to now look through and discuss and argue over. So I don't know, it's made it more complicated to figure out agreements, for sure. Because a lot of debate goes back and forth you know, everyone's guardians, but you have these parental responsibilities and this parenting time to figure out, and no one is going to want to reduce any of that. Whereas before, you could have had conversations that satisfied people, saying that OK, everyone's getting the right to make these big ticket items, like religion and education and medical issues, but there can still be the main one making the day-to-day decisions. I think that's off the table now completely. Now everyone is having a lot of debate back and forth around all those decisions*. – Lawyer

Were this a common occurrence, it would represent a significant departure from the FLA's intent. However, as with many aspects of conflict, the utility of the language is highly context-dependent. Participants frequently noted that certain parties will always find something to fight over due primarily to their mental state and their distress over the situation.

> *I believe that if somebody is high conflict, then they will only try to get the other to change. That's the whole idea of high conflict. They're in a kind of a permanent grief process, and that grief requires them to not change and get the other to change. However, when they run into something that they recognize as being unchanging, then they will negotiate… When those people finally accept that the other is not going to change, then they will negotiate, then they look at how they can adapt to their circumstances.* – Mediator

Again, the positive outlook on this type of reaction is that it can transform the conflict.

> *I suppose it depends on whether you're a glass half full or a glass half empty person. I think what the language has done and the listing of responsibilities, has allowed for people to maybe find greater areas of dispute, but also has produced a more nuanced view of what being a parent is all about. One of the aphorisms people use is that people negotiate under the shadow of the law. So if the law provides for a laundry list of things you have to take into account as a parent, on the one hand it gives people things to fight about, but on the other hand it actually serves as an education piece and a nuance piece. And if it gets to court it gives judges a more nuanced ability to thread through resolving a dispute or determining a dispute. So I think, from my point of view on balance, it is a good thing.* – Mediator

4.3 – Child's Best Interests

On the provisions around the best interests of the child, questions focused primarily on the usefulness of FLA s. 37(2), but also asked as to whether changes to that section (as well as the "only concern" language) had affected people's perceptions, expectations and/or behaviours. Following this line of inquiry, the robustness of outcomes was also considered. While most participants had at least some experience with the best interest provisions, the responses varied across cases significantly in terms of how the s. 37 criteria are interpreted and used within dispute resolution processes (including in court).

The relatively minor change in FLA s. 37, which states that the child's best interests is the "only" concern, as opposed to the FRA'S "paramount" concern, when making orders and agreements, was seen by all participants as primarily a semantic issue. Participants were universally positive about the change, noting that it reflected existing practices, but were fairly clear that best interests were already being treated with that level of importance before the FLA came into effect.

> *I think in family justice we've always had a focus on the best interests of children, it's subtle, it's an important change in terms of the language, but I don't know that we've noticed it as much, because we've always put the best interests of children first and foremost. What is nice is the, now that it is built into the legislation, and the legislation actually says what are the different criteria we're looking at, you can say this is the only consideration, the factors we're thinking about.* – Mediator

The judges interviewed, who were all experienced with family disputes, also concurred with this view. Each noted the child-centeredness of the courts, both pre and post-FLA. While judges are, on the one hand, a cohort with some variability in how they practice, the general outlook of the Provincial Court in these matters was described as being particularly focused on the impacts on children in separating families. This is one area in which the research has caught up to and transformed the court process, but one which began decades ago.

> *I don't think it's made any difference, in terms of how most people approach, the paramount vs only concern is 'tomayto–tomahto.' I don't find I approach the issue any differently, I've always been child centred. I think having the factors actually listed is certainly helpful, illustrating to people what does that actually mean. Those are when you start going through things, I think that's helpful, just like with parenting responsibilities. People will look at you and say what does that mean, you can say this is the kind of thing we're looking at, so it puts it in context for them. Sometimes, certain*

legal tests, like when you're looking at a relocation case and you have to consider best interests, you have to actually spend some time going through those factors. – Provincial Court Judge

The "factors," or criteria listed under s. 37(2), list considerations when weighing the child's best interests such as the child's health and emotional wellbeing, the child's views (if appropriate), the history of the child's care, and the impact of family violence (if any), among others. Ten concepts are enumerated, which function to both provide disputants and their counsel with a framework for negotiation and to provide judges a legal, analytical tool with which to make decisions. Much like the enumerated list of parental responsibilities, some participants felt that the criteria gave high conflict disputants more to fight about, while others saw the list as a useful way to sort through the issue.

… it's a lot easier to describe to people when you actually have an enumerated list, to say here are some of the things that best interests include, like the considerations. So I think it helps to be able to point to something in black and white, to say this is part of the best interests analysis. And, it helps to describe to someone what they need to focus on or what they need to understand, or if you're looking at best interests of a child and talking about the ability of each person to impact various things. The fact that domestic violence is involved in the description I think, it's easier to point out to people and they have a better ability to understand it. – Lawyer

One issue raised by several participants is that separating parents tend to naturally identify the best interests of their children with their own best interests. Determining what the best interests actually are typically requires some re-framing of the issue to center it more squarely on the child and to encourage parties to see the conflict from the child's point of view.

…my impression is that, to the extent that one can point to that language and say, because a lot of people come to you or come to a mediation and say I have a right to X, I have a right to spend time with my child, I have a right to parenting time or custody or whatever, and you can point to the legislation and say no, you don't actually. The legislation says the only consideration is the best interests of the children, you don't have any rights. You have some responsibilities, and you have to exercise those responsibilities for the best interest of the kids, but you don't have any rights. That's actually helpful. – Mediator

A final theme on this topic has to do with how the best interests provisions are interpreted. It is understandable that disputants will require some education on how the s. 37 criteria are generally interpreted, this being a job which typically falls to family justice professionals. However, as per the very nature of legal questions, interpretation involves a subjective dimension. The utility of the criteria and the legal test can be measured in terms of how professionals make use of them.

Sometimes I've done it actually point by point, and even where I don't as I'm making general comments, I always refer to it. Everything from health to importance of relationship stability, I think although it's common sense, a lot of those things, it's really important to lay it out… the decisions may be a little more thoroughly written from my perspective. I think we were a little more general […] under the old Act, but it gives you a little more focus with sub 2, which can make for a better judgment. And there's specific references to family violence, and often these files intersect in Provincial Court… I guess I'd say there's a greater focus on what best interests means because of that section. – Provincial Court Judge

But while judges felt positively about how the provisions helped them make decisions, others working in the system noted that they can be interpreted in a way that might run counter to the FLA's intent. As noted in Chapter 2 above, the case law does show that in some cases, an observer could read a decision as considering factors other than child's best interests only. Some participants brought up the issue of interpretation and commented on such decisions.

> *… I think judges still focus on parents' rights to see the kids versus the best interests of the kids. There are often cases, and the ones I've experienced have been about fathers seeking access or parenting time with their children, the focus will be on the rights of the father to have as much maximum contact and then they default to the* Divorce Act*. So a lot of times when you say you really need to look at the best interests of the child, some judges I've been in front of have said well I have the authority to go into the* Divorce Act*. And, the* Divorce Act *says this. So even though its mitigated by best interests, even under the* Divorce Act*, that maximum contact can happen with either parent without looking to best interests.*[11] *There's still a desire to say that each parent has a right to see their kid, and that sort of trumps the best interests.* – Lawyer

This was not the only comment along these lines, and as such it is clear that so long as the FLA remains misaligned with the *Divorce Act* on certain concepts there will remain issues with inconsistency.

4.4 – Additional Questions

A number of uncategorized questions were included in the interview protocol under the general heading of "resolution out-of-court preferred." These questions focused more narrowly on the degree of legal literacy of disputants, access to information about service options, and the availability of both personal and system-level resources. These lines of questioning probed as to the impact of these various factors on conflicts and outcomes, and provided valuable insight as to where participants see the gaps in the system.

While the amount of information available to separating families about available services and options has increased substantially in recent years, literacy about the legal system in general and procedures around family law in particular remain highly variable. Participants noted that some parties take advantage of the availability of information and do substantial amounts of research while choosing their options. By contrast, others are far less educated about the system and often still assume the court process is the first and only avenue by which to deal with the dispute. According to participants, parties with lower levels of systemic literacy tend to fall on lower end of the income and education scales. This does not mean that these parties will not be open to mediation as an option, but rather that the resources one has available with which to pursue the dispute often dictates the path taken.

Lawyer participants who tend towards a more affluent client base were generally quite positive about the levels of literacy they encountered in people who retain their services. They noted that clients frequently do their own research about the process and come to consultations primed with many questions. Some even shop around to get the best fit with counsel.

> *Internet research, books, them being savvy. Some of them, they've interviewed, I don't know where its stated, but it's become more trendy to interview several lawyers, to see if you have a fit with a*

[11] The *Divorce Act* does not contain a maximum contact provision.

lawyer, and so I've seen that as well. It's the same as going to the doctor. They may not get it quite right, but they're asking way better questions now than they ever did in the 90s. – Lawyer

Even when they do not have a fulsome picture of what consensual dispute resolution processes involve, this group of clients has the resources required to keep an open mind and to undertake the education piece required to make the best choice.

Most people have certainly heard of mediation, some have heard of collaborative law, seldom do they really understand what it means… often, they've only really heard the term, and you do get people who say they want to go to mediation so the mediator can decide, this kind of thing. So there still needs to be an awful lot of education, less so now but a few of years ago when collaborative law was newer, an awful lot of people in my experience asked me about collaborative law, not because it was an alternative to court but because it was cheaper. – Lawyer

Clients with fewer resources available tend to be just as open to mediation or other processes conceptually, but may be far more hesitant to spend money on these services if they perceive that they will not go far enough in terms of a lasting outcome. The idea that a judge decides the outcome, and that the judge's decision is legally binding and carries the weight of the law, remains very attractive for many parties. Family Justice Centres do provide free mediation services and those services are being used by these clients, but with limited resources (or a power imbalance) it becomes very easy for one party to frustrate proceedings and drive the conflict into court or draw it out over a long period of time.

I think once people enter the dispute resolution process, they have committed time, energy and likely some money to have some counsel either review documents or be present, that it's very likely they will make that work. I do see that once they're in the dispute resolution process, and again, in some cases it's looking at what the other alternative is, now they've invested in the dispute resolution process. The parties that continue to have more money, consistent counsel, and know that they can exhaust someone out, or have some more power and control issues, they will continue to have a lot of power in terms of walking away from that process. And the person who has less power in that process is going to want to make a decision, or have some finality. It doesn't meet the underpinnings of what dispute resolution at its core is supposed to be, equal parties coming together at the table, meeting of minds. Sometimes it's just about, I can't leave this mediation or collaborative table because from here, I will now have less to try and pursue this externally, and go back into the court system. – Lawyer

This comment ostensibly calls into question how meaningful an agreement reached through mediation might be if one client participates in that process in a way that is less than 100% consensual. For example, if a low-resource participant invests time and money into a process, they will feel compelled to see that process out because they do not have the financial capacity to start over in a different process. A related issue here pertains to eligibility for the free services which are available. Some clients may be screened out of these processes and steered towards court anyways, whereas wealthier clients with similar disputes could afford private options.

Most people would like the idea of mediation, resolving it through mediation, but many of our clients would not qualify, like the clients we work with are usually low income, with some kind of family violence or power imbalances, so they couldn't afford to hire a mediator in most cases, and so they would be relying on the free service, and they wouldn't be eligible for the free service because of domestic violence or some power imbalance. And then sometimes the free services

aren't available in their language. Sometimes we do have clients who have limited resources to hire a lawyer or a mediator, but then they're thinking if I have this limited resource, I'll put it towards hiring a lawyer and getting into court and getting some resolution, rather than paying that money to hire a mediator and there may or may not be a resolution. [12] – Community Service Provider

At the end of the day, the fewer the resources one has, the fewer options one has, even as the number of options available increases and the legislative emphasis on out-of-court resolution changes. If any overarching theme was identified in the research, it is this unfortunate reality. As the previous participant noted, consensual dispute resolution "at its core" is a participatory and voluntary activity. Resource constraints are currently threatening the FLA's emphasis on and preference for these processes.

Judges too noted that client literacy and client choice was very closely tied to resources. Only Provincial Court judges chose to participate in this research, and of those, all but one made it clear that the majority of disputes in their court involved lower-income or marginalized families. The issues facing these families are markedly different from those with higher incomes. Another factor worth noting here is the significant proportion of clients who self-represent because they cannot afford counsel. For judges, this presents a major challenge when clients do not have the necessary literacy to effectively represent themselves.

What I see is that they have a really hard time getting across to the judge. It's easier because I did family law and I advised people who were self-represented litigants as duty counsel, for years. So I have a better idea of what they're getting at, I think. But for judges who never did family law, they must have a hard time explaining, trying to translate what they've been told by someone else to tell a judge, and some of it is lost in translation, I think… So I have one where the guy said, I think the argument is the child has withdrawn from his care, so he shouldn't have to pay child support because she's 19. But it was like just half a sentence. But I was like OK, that's where he's coming from. – Provincial Court Judge

On the whole, participants felt that clients were largely better informed than in the past about the options available. Many people are familiar with dispute resolution processes in other contexts, such as through workplace standards or as a provision in a contract. What has not yet permeated the wider culture is the idea that these processes are the default or most preferred option. When combined with a lack of resources, this becomes problematic. People are open to alternative processes and are often able to resolve all or part of their conflict once engaged, but the idea that access to these procedural options is anywhere near equitable is some ways off.

Participants spoke at length on the above topic areas and often went on tangents not covered here. The impact of family violence was one area which evoked many comments from participants, most of which were positive observations about how the concept was included the Act. Participants also commented on the provisions related to relocation, as these so often intersect with those on the child's best interests. Finally, many participants offered ideas and potential solutions for future action. These ideas are discussed in Chapter 6, below.

[12] While there are situations where a power imbalance or history of domestic violence could result in the parties being screened out of a particular dispute resolution process, parties would still be eligible to receive other publicly subsidized services.

5.0 – Thematic Analysis

From the interview transcriptions, the researcher followed Ritchie, Spencer, and O'Connor's (2003) method of building a "thematic index" to uncover the invariant and salient themes occurring across the cases. This process involved multiple readings of the transcripts for a number of purposes. First, an initial read-through of all transcripts was undertaken in which a preliminary list of themes was produced in short-hand form. These initial themes were very much taken straight out of the text at face value, reflecting the angle, opinion, or perception in evidence. From this initial list, themes were grouped together to form the core of the thematic index (see Appendix E). A total of six major themes were identified through the responses, each with between four and nine sub-themes. Second and third readings of the transcripts were undertaken in order to identify connections between themes. Areas where themes repeatedly intersected were noted and explicitly identified. Below are summaries of the six most salient themes and intersections.

5.1 – Access to Justice

The notion of access to justice is tied closely to how people go about resolving their disputes, whether it be through the court system or through alternative means. While participants were asked directly about whether parties are better informed than they used to be through the services which run parallel to the statute's modernization, a number of other sub-themes which touch on the access issue were also noted. These included the following:

- Access processes: a modest amount of discussion centred on *how* people access information. Duty Counsel services and Family Justice Centres were the most discussed here.
- Availability of information: Distinct from how people access information is how much information is available and where. The most salient idea here is that, compared to before the FLA, there is far more information available which is more accessible (from a literacy standpoint) and easy to access. Participants frequently noted the work of J.P. Boyd (cited in this research, below) and others who have worked to render the Act in plain language for those entering the system for the first time.
- Pilot Projects: A few participants talked at length about pilot projects they are or were involved in which have contributed to their understanding of the issue or which have provided valuable insight for future study. These projects are included under this theme because in each case the project functioned to increase access to consensual dispute resolution services, effectively levelling the playing field for those with few resources.
- Court or Systemic Delays: A serious issue impacting access to justice is the current wait times for hearings. Statistics show that in B.C. it is not uncommon to wait as long as six months' time for a trial date, which does not take into account motions for continuance or other delays.
- Ancillary court processes: New child support guidelines, the changes to the family court rules, and intersections with child protection and criminal court proceedings were all mentioned as factors impacting access.

According to the responses of participants, access to justice issues most frequently converged with individual disputant themes such as the personal resources one has available and how one tends to perceive how the system works (e.g., how easily one is frustrated by the system). Those with more resources will have better access to justice, and as such are less likely to encounter serious barriers leading to frustration. While access to services and the amount and availability of information was said

to be increasing, participants were clear that there is more work to be done, especially for those with fewer resources and/or a lower level of system literacy.

5.2 – Conflict Dynamics

A second theme focused on the dynamics of individual conflicts themselves, and how the context underlying any given conflict can be partly or wholly determinative of the best way to go about resolving it. This context is extremely important as family separations can sometimes involve physical, mental, or sexual abuse, and/or severe imbalances in power or resources between the two parties. Participants also noted that, beyond these factors, the conflict itself impacts children and families. This is well-known by virtually all family justice professionals and remains a key factor in the resolution process. Sub-themes here included:

- High conflict disputes: Participants across all groups noted that some parties, for whatever, reason, remain committed to drawing out their conflict regardless of what resolution process is employed. These high conflict cases consume a highly disproportionate amount of systemic resources (FJWG, 2013). As such, judges tended to bring up this theme the most. High conflict disputants pose a particularly thorny problem if there is a power imbalance, and participants agreed about the place of the court system as the backstop to these cases as they can provide finality and closure as well as an enforcement mechanism.
- Family violence: Almost all participants were eager to talk about the impact of family violence and the ways it is addressed in the FLA. Although out of scope for this research, it is noted here because of how frequently it was raised and how it can fundamentally alter the dynamics of a conflict. Future research would benefit from a stronger focus on this.
- Mental health and substance use: Another key element in conflict dynamics is substance dependency issues on the part of either or both parties. Participants spoke about this theme generally as a common issue in many court-based conflicts, and it is included here for its potential to impact the overall dispute resolution process and in turn the resulting outcome (for example, such cases are often steered away from out-of-court processes and dealt with in the court system).
- Power imbalance: The court system is often seen by the public and by professionals alike as a great leveller. Alternative processes such as mediation on the other hand are sometimes criticized for a perceived lack of ability to deal with this sort of dynamic. Mediators have ways to address power imbalances, and a degree of this depends on the parties to the conflict and the issues at dispute. Nevertheless, this idea was raised often by participants, especially those who work primarily with marginalized populations.
- Impact to children and families: As noted above, separating parties with children generally try to minimize the negative impact on children resulting from conflict and from the separation process. Mediation tended to be viewed more favourably than court by participants in terms of its ability to mitigate negative impacts, but the involvement of children in the conflict (and their potential participation in the resolution process) remains a point of debate.

Themes related to conflict dynamics tended to intersect in participants' responses with the various process-level sub-themes, including how the FLA is interpreted, and the appropriateness of a given venue for particular conflicts. It was also raised in conjunction with the utility of particular FLA-driven language or tools applied in the resolution process. While judges tended to note particular conflict dynamics, such as the problems posed by high conflict cases, mediators and family lawyers tended to focus more on ways in which their professions have to deal with multiple barriers. One mediator raised

the idea that education on conflict dynamics is not central to a typical legal education, even for those specializing in family law. Understandably, family mediators seeking tools and tactics to address even the toughest cases are at the forefront of these education pieces.

5.3 – Disputants

This theme focused on the people at the centre of the conflict, the disputants. While the general theme of culture change, addressed below, did include the views of participants on change amongst non-professionals, the sub-themes uncovered here focused more squarely on individuals' experiences with system users, and what sorts of factors have an impact on their conflicts. In some cases, these were psychological factors such as expectations, frustrations, or the role of emotions in driving conflict. In others, factors were more tangible, such as the disputant's level of knowledge about the system, or whether or not they chose to self-represent:

- Frustration: A key theme throughout was the ways in which people become frustrated with systemic processes. The court process was by no means singled out for criticism, as it was frequently noted that people become frustrated with CDR processes as well. These frustrations were tied frequently to a lack of resources, both personal and systemic, which cause conflicts to be drawn out or made more complex.
- Expectations: It was frequently noted that parties' expectations about a process, and how those processes are actually designed or play out, were sometimes at odds. While parties are perhaps most familiar with the court process, it remains clear that the actual mechanics of that process are new to most people navigating the system. Matters such as jurisdiction, judicial powers, and procedure remain poorly understood. With CDR processes, discussion centered more around decision-making power and enforceability.
- Receptivity to CDR: Tied closely to expectations was the theme of receptivity. Responses varied widely as to parties' initial receptivity to CDR processes, but mediators especially put forward the view that once engaged, even parties with no foreknowledge or experience with mediation were well served by the process.
- Sophistication: As expected, participants noted that parties have a wide range of education, experience, and knowledge about the family justice system and the various options available within it. While not suggested to be causal of any given preferences, the level of the parties' sophistication was said to have an impact on how conflicts are resolved. People with higher levels of knowledge are able to make decisions more quickly about which options they want to pursue, and once engaged, are better able to navigate processes.
- Self-representation: Although specifically out of scope in terms of the questions designed for this research, the theme of self-representation is significant and was a key topic for judges and lawyers. A large proportion of litigants in family cases are self-represented, either because they are unable or unwilling to retain counsel. This is tied closely to the resource theme, below.
- Role of emotionality: It was found through the responses that emotion plays a highly significant role in a disputant's view and experience of the conflict. Family separations are stressful and often traumatic events, and parties do not always act reasonably or even ethically when faced with their situations. Participants often felt it important to note emotions as a key psychological element underlying conflict.

The largely internally-focused sub-themes listed above most frequently interacted with the themes of culture change and resources. It is perhaps unsurprising, for example, that people with higher levels of

systemic literacy and with more available resources tended to be more receptive to alternative processes and were thought to be more aligned with the intent of FLA reforms in terms of culture change. On the other hand, lower levels of knowledge intersected frequently with lower levels of receptivity to alternative processes, more frustration with the system, and the view that the wider culture has not yet changed significantly.

5.4 – Resources

When considering all the interview findings as a whole, the single biggest theme uncovered was access to resources. Personal resources, as in how much money, time, and effort one can devote to resolving a conflict, were frequently discussed. Systemic resources, as in what services are available to people, how easy it is to access them, and how much they cost were also seen as being vitally important. Along with these two sub-themes, it was observed that the availability of resources frequently plays a role in determining both the process(es) eventually chosen as well as the character of any agreements reached through those processes.

- Personal resources: Every participant mentioned cost being a factor in how people pursue dispute resolution options. While there is a common belief that since mediation costs less than going to trial, more people will opt for it, in practice this is complicated by other issues. If one has limited resources and perceives mediation to be capable of only resolving some issues, or of not producing an enforceable outcome, one may opt for the more conventional route of going to court, rightly or wrongly.
- Systemic resources: While not discussed to the same degree as the impact of personal resources, many participants lamented a lack of subsidized options for those with fewer personal resources. Family Justice Centres were celebrated as widely used free services which made a key difference for many families. However, some participants felt access to the services provided (i.e. during regular business hours) can be difficult for many families, and other low- or no-cost community options are not always well publicized or communicated. [13]
- Resources determining processes: As noted above, a lack of available personal or systemic resources often determines one's path through the system, regardless of which process might be the best option for the conflict if circumstances allowed.
- Resources determining the character of agreements: On a more granular level, a lack of resources can determine what people are willing to agree to in an out-of-court process. If one cannot afford to continue to pay a mediator, for example, one may be effectively coerced to agreeing to unfavourable terms to get even a partial resolution. If the alternative is to face the court process, after investing time and money in mediation, there may be very little choice for some parties but to settle.

As noted above, all participants, regardless of professional background, echoed the central impact of available resources on their experience with family conflict. These experiences were echoed more strongly by participants who work primarily with marginalized populations, including the Provincial Court judges. The resource issue is highly constraining systemically, and threatens the purpose and intent of many FLA-driven changes. Going forward, this will be the key issue that gets repeatedly raised and for which, unfortunately, there are likely to be the fewest solutions.

[13] Most Family Justice Centres do have evening appointments available.

5.5 – Culture Change

Given the objectives of the FLA, the theme of culture change was an important one for this project. The central research question has to do with how, if at all, changes introduced in the FLA are making an impact on the wider culture, both inside and outside the family justice system. As a result, several of the questions asked participants directly about whether they have noticed changes (inwardly, in the form of perceptions and expectations, and outwardly, in the form of behaviours) post-FLA. The results of this questioning uncovered several sub-themes, including differences in the perceived impacts on professionals on the one hand and non-professionals on the other, the speed at which changes are happening, regional or community-level differences in culture change, and finally whether out-of-court is actually becoming the "preferred" venue as per the intent of the legislation.

- Professionals: Generally, most participants felt that the FLA reflected trends which were already happening, and this feeling was consistent with respect to professionals such as lawyers and judges. While several participants made reference to a generational gap in which older, more entrenched practitioners were more likely to favour a traditional, adversarial approach, most concluded that the legal professions generally now favour a collaborative approach.
- Non-professionals: As noted elsewhere in this research, opinions on whether the type of culture change envisioned by the FLA is permeating to the general public were mixed. Savvy, well-informed disputants are accessing the available information and researching their options, which tends to result in a preference for out-of-court options. Those with fewer resources and less knowledge about the system (or less time to acquire that knowledge) were perceived not to have changed much as a group.
- Pace of change: Virtually all participants were hesitant to ascribe a causal relationship between the FLA and culture change, especially with respect to the pace of that change. Most saw the paradigm shift as being slow and constant over time, a trend which began in the 1980s as mediation became more common in family disputes. Despite this hesitancy, there was also a universal recognition that the FLA better reflects the outlooks and practice styles of the majority of professionals. Again, most saw the FLA as bringing legislation up to date with practice.
- Regional differences in approach: Several participants made reference to the fact that there tend to be regional differences in the degree to which the culture has changed. Certain pools of professionals, for example those in the South Island, were singled out as being particularly amenable to collaborative, out-of-court approaches. By the same token, it was noted that a well-defined minority of professionals in the lower mainland still take a traditional approach, and further, that this minority is less defined by age than by practice style.
- Out-of-court preferences: It is arguable that the degree to which the culture has shifted could be measured by how often the preference for collaborative, non-adversarial approaches is put into practice. The FLA prescribes that family justice professionals must discuss the range of out-of-court options with parties. In practice, responses from participants identified the variable degree to which such provisions have met their goal in terms of a wider acceptance of out-of-court options.

One area in which culture change can be observed is in judicial orders. As previously noted, most groups found that judges did make use of provisions encouraging parties to engage in consensual dispute resolution processes, if not in a totally consistent way. The judges themselves all voiced a willingness and a preference for many (but not all) of their cases to proceed to out-of-court settings, and some also spoke to regularly ordering parties to do so. While mediation, for example, was not thought to be the

ideal process in every case, most participants voiced a genuine preference to avoid court as much as possible, with the important caveat that it has an important place, especially in high conflict cases, cases with a history of family violence, and where there is a clear and observable power imbalance. It should be noted that a portion of participants still favoured CDR processes even in these cases, but all recognized the importance of the court system for when other processes break down.

5.6 – Processes

The final set of themes uncovered were those which are based primarily at the process level. How judges are making their orders, how they are interpreting the FLA, and what tools they are using were all discussed. Participants also discussed the types of cases they felt were best dealt with in both in-court and out-of-court settings, and stressed the importance of early intervention. These themes speak to how fundamentally different each dispute resolution process is, both in terms of how they are designed and in terms of the theory of conflict which underpins them.

- Judicial orders: The various types of conduct orders, how useful they are in practice, how they lead to particular outcomes, and the degree to which they are being used. This theme is primarily about judges and the changes undergone on the bench since the FLA came into effect.
- Judicial case conferences: Although not specifically referenced in the interview questions, many participants noted the use of case conferences by judges both pre- and post-FLA. This remains a frequently used tool on the part of judges, especially in the early stages of an initially court-based conflict.
- Cost-saving: It is widely believed that resolving disputes through out-of-court processes tends to be cheaper than resolving them through the trial process. Participants did bring this up, despite the previously mentioned problem of limited resources. Those with the financial capacity to do so are continuing to choose out-of-court processes because they are cheaper.
- Court appropriateness: Again, this is the idea that certain conflicts either belong in court (i.e. due to the nature of the conflict) or are best resolved there (i.e. due to the attitudes of the parties to the dispute). While all participants agreed that the courts have an important place in the hierarchy of family dispute resolution mechanisms, opinions varied on which cases should be diverted to court and when.
- CDR appropriateness: Similar to the court appropriateness, participants noted the types of cases they felt were most appropriate for out-of-court settings. These tended to align with cases where parties had more personal resources, were better educated about processes, and where no power imbalance or history of family violence was in evidence.
- Usefulness of FLA-driven tools and language: An important and widely discussed theme centered on how professionals are making use of some of the language changes in the FLA (participants were asked directly about guardianship, parenting arrangements, and best interests provisions). A wide range of opinion was observed from participants on the latter two changes, but there was wide recognition that the new guardianship provisions were useful and positively received.
- Early intervention: Many participants took the opportunity to discuss early intervention with respect to consensual dispute resolution processes. The reality of systemic delays in the court system ensures that those who remain in court for the duration of their conflict will have it drawn out over a long period of time, which can cause frustration and disillusionment among parties. Early intervention with respect to CDR processes presents an opportunity to both avoid the long and expensive court process, but to reach parties at the right time.

- Judicial awareness of local programs: A theme brought up by several participants was that judges are not always aware of local options for separating families, such as counselling or child-focused services. Additionally, when they are aware of these services, they do not always know the eligibility requirements before ordering families to try them. One judge echoed this sentiment and felt that information about programs could be better communicated within the courts.
- Interpretation: The nature of legal opinion is that it is a product of interpretation. Participants found that, especially early on, the FLA was being inconsistently interpreted by the courts. While these issues have now largely abated, there remains some perceived issues with how the courts interpret, for example, the best interests provisions. As more cases set precedents, these issues are expected to decrease.

The process-level themes were the most discussed of all the themes uncovered in the research, and intersected with all other thematic groups. As the process is the central venue of dispute resolution, this is understandable and expected. Among the sub-themes discussed, participants had the most to say about whether they thought the changes referenced were useful. While participants universally recognized the intent behind the changes, they disagreed somewhat on how the changes played out in practice. Some participants felt that certain changes created problems for high conflict parties, where the strategy often involves using every possible means of prolonging or exacerbating the conflict, including the features of the process itself. Despite this, the general outlook among participants was highly optimistic that the changes would continue to have a net positive effect over time. No participants felt the system worked better pre-FLA, and all tempered their individual criticisms with overall praise.

6.0 – The Path Forward

This research project represents one piece in the evaluative work required to assess the impact of the FLA. With that said, it is limited in scope and applicability. The objective was to pursue a tentative and purposeful survey of professionals' experiences with the Act through the gathering of qualitative information. This objective was satisfied as participants were eager to share their experiences, and they frequently pointed out areas in which they thought the intent of the FLA was not reflected in their professional realities. The content of the accounts provided a number of ideas and suggestions for how these might be better aligned. Additionally, the research process and findings uncovered provided the researcher with a number of considerations for those whose job it will be to undertake future evaluation activities with respect to the Act.

The Canadian Bar Association (CBA), which represents some 36,000 lawyers, judges, notaries, law teachers and law students from across Canada, passed a resolution in support of family law research at its most recent annual general meeting. The CBA is urging governments at all levels to allocate sufficient resources to family law research, noting that "[one] of the keys to ensuring that the people needing access to justice in family law get it is adequate research that enables us to tell when a program is working and what else needs to be done" (Covert, 2019). As previously noted, this research is envisioned as one step in that process, depending at least partially on future research projects which will give further context and dimension to the findings.

6.1 – Ideas and Suggestions from Participants

Although the participants were not asked directly for ideas and suggestions to improve the family justice system, some were more outspoken than others with their opinions on future changes. They are noted here in the concluding section of this paper primarily as a means of reflection, but also in the interests of acknowledging the participants' ideas and relaying them to the project client. They are conveyed more or less as recorded.

1. One participant, a lawyer, noted some potential changes to the Provincial Family Court Rules which would put the legislative preference for consensual dispute resolution into practice, making it required at the outset.

> *It's basically putting consensual dispute resolution right at the forefront, so that that is mandatory at the outset. There's full disclosure, which is really important for it, and then mediation at the outset, and then only the ones that can't settle or the issues that can't be settled proceed to a court action. And then there's ways even along there to potentially resolve the file. I'm hoping when those come in that it becomes the norm that you try to settle it first, and it's only a last resort going to trial. I think for the average person, over time that would change their perception.* – Lawyer

Making mediation (or another type of consensual dispute resolution process) mandatory is one of the key policy issues implicit in the FLA. The legislature did not implement mandatory family mediation in 2011 but, importantly, the legislation does retain the option for the Lieutenant Governor in Council to decide to prescribe it by regulation in the future. The pending Provincial Court (Family) Rules Reform Project, slated for implementation in 2019, will feature an Early Resolution Prototype in Victoria, B.C. Once implemented, a precondition to filing a claim in the Victoria registry will be an early needs assessment at the Justice Access Centre and participation in one consensual dispute resolution session

(with a family justice counsellor or private mediator). Matters involving Protection Orders or urgent parenting matters will be exempted from the pre-conditions and fast tracked. A Family Management Conference, which replaces the current first appearance, will provide early case management, addressing some procedural and administrative matters in order to prepare for and effectively use the court process.

> *I think it's an excellent policy choice. And you'll hear some people say that you can't do that because, you know, there's violence concerns and that kind of thing, but a really good mediator has that violence training and can screen for that, and quite often, the highly violent cases where there's awful violence can be better solved in mediation, in my experience. It's just how you craft the mediation. It may not be at the same location and it certainly wouldn't be in the same room, and it would be with counsel, and that sort of thing. I'm a huge proponent of mediation and mandatory mediation.* – Lawyer

2. Although a somewhat less developed idea, another lawyer suggested that the courts should be given the powers to take additional steps to deal with the impact of family violence, or to consider its impact not just on children but on the whole family.

> *I think they can do more, I think there needs to be a companion piece in the legislation frankly that then deals with, if you are the subject of violence, if you are the parent experiencing violence, there should have been a separate provision about how that plays out in decision-making for parenting that's separate from the best interests. Because right now its just focused on the kids. But there should have been something as well. And I know that the family violence definition is really good, the protection order legislation is really good, but outside of those two pieces, there's nothing separate if you are surviving violence in a relationship, that deals exclusively with any kind of analysis the court needs to take about you. It's only if you have a kid. If you don't have a kid, none of that really follows through, right? It doesn't deal with the overall objectives, to deal with what we know to be gendered impacts of violence in family law matters. That's the missing piece for sure.* – Lawyer

3. The same participant noted that despite the powers given to the judiciary to compel parties to pursue out-of-court processes, the legislation stops short of holding lawyers accountable for failing to live up to its ideals.

> *I would say that lawyers still, for the most part, if they're lawyers that start litigation they will continue to do that. I've been on several files where we're trying to get to resolution, we have a draft separation agreement, and then I'm served notice of family claims. So I think that's a model of business that I think the government really needs to look at, because that's a structural thing. If you're going to come to this firm, we're going to start an action. If you settle, that's great, but we're going to start an action. Which means that all of this initial money and time goes into dealing with that before you can deal with the settlement issue. So I think there needs to be a greater, another level of accountability or direction given by the judiciary, to sort of say, you know, before I'm even willing to hear this, have you actually done anything? Or what's been discussed? There's no kind of accountability on that, in terms of people still starting actions right away, without even beginning to see settlement conversations.* – Lawyer

4. Participants spoke often about the important education pieces they felt were missing across the family justice professions. While lawyers and judges are able to access a wide variety of

supplementary training which would give them an increased knowledge base when dealing with separating families in conflict, for one participant there are important gaps with respect to education on family dynamics.

> *… the FLA and the regulations requires mediators and others to take training in family dynamics, but it does not require lawyers to take training in family dynamics. And I say that because as I read the FLA, lawyers are expected to put the best interests of the child ahead of their own clients' best interests. And I can't say that I have seen that in practice as much as I would like… What I see is lawyers still push that there are other reasons other than the best interests of the child which should be paramount, their clients' interests, should be, should still be given a great deal of respect even when that contradicts the best interests of the child… And I'm thinking part of the problem is that judges and lawyers are not expected to learn family dynamics. They're expected still to focus on the assumption that this is a trial between the rights of mom and the rights of dad.*
>
> *The reason people behave the way they do with each other is about their relationship and not because of who they are as individuals… it's more important to have a bad relationship than none at all, right? Its more important to react to the other than it is to move on. And until lawyers and judges learn how to help people move on, they are exacerbating the problems. They are not dealing with the dynamic. They are only dealing with one person's right to have an apology or some satisfaction over an error made by the other*. – Mediator

5. Lastly, an idea was offered by a participant that would introduce a process for the courts to follow-up on referrals made to out-of-court services. This participant noted that judges sometimes refer parties to programs for which they are not eligible, or for which there is some other barrier to participation (for example, a program targeted to children of a different age group than the parties' children). This participant suggested that some kind of system is required to track referrals to ensure parties are accessing them in a timely fashion.

> *Because there's not a lot of information for judges about what age children can participate, and that's something we should, as an organization, pick up and make available, not sure of the format, but the fact that that's lacking, it puts people into a little upset when they call and they're told your child is too young or you just recently separated. But they've been ordered to do this, so now what. So it would be nice to have more information front end, or a way of companioning people, to follow up with the referral. And if it turns out that, like in our case,* [the program] *may not be appropriate, but we have a lot of other individual programs that can work with children of any age, it doesn't have to be a group format. But they've been given a specific referral to* [the program]*, and we're not really in a position to say well now, you can do something else here, because that's not part of the order that they've got. It could be modified, if it turns out that once they're given the order and they connect here and it's not appropriate, they can avail themselves of other services we feel might be helpful to them, or we make other referrals. So there could be some clean-up, in how the conduct order part could be more useful in terms of overall outcomes.* – Community Service Provider

6.2 – Considerations for Future Research

Due to the limitations inherent in the research design, the limited scope of the research questions, and the limited resources of the researcher, a number of considerations for future research are provided.

These are offered partly in line with the original intent of the research project, which was to undertake an initial exploration of professionals' experiences with the FLA. The Ministry of Attorney General will, as part of its mandate, undertake further evaluation activities on both the implementation of the Act as well as on its intended outcomes. While this research provides some useful initial findings, there remain more ways these and other questions could be fruitfully explored.

- Mixed methods: Including some quantitative analysis in this research, even with a limited scope, would have been valuable. The formal evaluations undertaken in Australia and Alberta (discussed above) provide some ideas about what sorts of data to look at. Some of this data can be provided by the courts, such as the numbers of cases referred to out-of-court processes, cases referred out-of-court which end up back in the courts, settlement statistics, and so on. Surveys could also be designed and distributed to a much wider sample than is possible with in-depth interviews.
- Expanded qualitative sample: The sample size of this project was limited by the time and resources available to the researcher and the nature of the research project (i.e. a Masters project). A more fulsome evaluation would benefit from a wider sample of professionals (more of each group) which is more representative of the wider BC population (more representation from outside the South Island and Lower Mainland). It would also be a benefit to cast a wider net in terms of professional communities (i.e. attempt to include participants whose practices do not align as nicely with the intent of the FLA, or who are more litigious in their outlook). Additionally, the sample should also be expanded to include non-professionals, namely, ordinary people who have gone through or are going through separations. Getting feedback from these participants would provide some insight into how specific provisions of the FLA (e.g. improved access to information and services) are playing out on the ground. This sub-sample should include representation from key groups, including recent immigrants and indigenous people.
- Expanded scope of inquiry: This research project was narrow in scope, focusing primarily on how changes to language in the Act (specific definitions, new provisions, emphasis on out-of-court processes) had played a role in changing perceptions, attitudes, and behaviours. In order to properly gauge the impact of the FLA, the scope of inquiry will need to be widened. Future research should include other important changes introduced by the Act, such as the definition, role, and impact of family violence in conflicts, relocation provisions, child support, and a number of provisions related to finances.
- Improved interview protocol: The interview protocol used for this project was adequate in terms of soliciting rich, descriptive data from participants. However, a number of challenges were encountered with the structure of the questions which introduced some confusion or conflating of answers on the part of participants. This is an issue with the design of the questions. Future research would benefit from incorporating lessons learned from the design and execution of the interview protocol.

6.3 – Conclusion

The research on impact of language changes in the FLA has uncovered a number of important themes for participants. Despite several new provisions focused on access to justice, separating families are still experiencing the family justice system inequitably. Those with more personal resources continue to experience a system with more options and choices through which to resolve their disputes, whereas those with fewer resources are highly constrained. Coupled with additional barriers, such as limited

systemic resources, an overburdened court system, and the costs associated with private dispute resolution, the intended vision of the FLA will require additional work to see out.

Acknowledging the challenges voiced by participants, there was universal positivity about many elements of the Act. The intent behind the language changes surrounding guardianship, parenting arrangements and the best interests of children was universally applauded, recognizing that these were big improvements over the FRA. Part of the equation for culture change in these areas will simply be allowing enough time to pass for the changes to have an impact on a larger proportion of society. The process to develop, draft, and implement the FLA took a great deal of time and involved a large number of stakeholders. While that process is complete, the paradigm shift towards a less adversarial, more collaborative legal culture contemplated by the Act, which began decades ago, is an ongoing process without an end point. The pace at which this is realized is uncertain, but the FLA supports continued movement in that direction.

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Appendices

A. Invitation to Participate – Lawyers, Mediators, Community Service Providers

Dear [CONTACT],

You are being invited to participate in a research project evaluating some recent changes to B.C.'s *Family Law Act*. I, Brendan Stewart, am a graduate student in Dispute Resolution (MA) at the University of Victoria. I will be conducting this research under faculty supervision, with the B.C. Ministry of Justice, Civil Policy & Legislation Office, acting as client.[14]

The purpose of this project is to explore the question of whether changes to the provisions and language of the *Family Law Act* and related legislation have produced measurable or observable changes in the behaviours, perceptions, and attitudes of those working in or using the B.C. family justice system. The project will look specifically at outcomes in the areas of parenting after separation, encouraging resolution out of court, and producing a general shift away from traditional, adversarial behaviours. Semi-structured interviews will be used to gauge feedback from professionals in the field, with questions intended to focus on these key areas.

Should you agree to participate in this research, the commitment would involve a single interview of approximately one hour with the researcher, the transcript of which you will be able to review. Research of this kind is important because when long-standing legislation is modernized, it needs to be evaluated to ensure it is working as intended. This research represents only a small, initial first step in that process and will aid the B.C. Ministry of Justice with planning future evaluation projects.

You are being asked to participate in this study because of the unique perspective you bring to these questions in your professional capacity. While they are not the only perspectives on these issues, the views of professionals working in the B.C. family justice system who have experienced the transition from the prior legislation are vital in assessing whether the legislation is working as intended.

If you would like to participate, or have any questions about the research process, please contact me at bss@uvic.ca, or by phone at [redacted].

Thank you,

Brendan Stewart

[14] Previous name of the project client's Ministry and Office

B. Invitation to Participate: Judges

[BC Provincial Court]

I am writing today to request your participation in a research project examining specific changes introduced in the Family Law Act. Brendan Stewart, a University of Victoria graduate student (Masters in Dispute Resolution, School of Public Administration), will be conducting this research under the supervision of Jerry McHale, QC, of the Faculty of Law, with the Ministry of Attorney General acting as client.

The purpose of this project is to explore the question of whether changes to the provisions and language of the Family Law Act and related legislation have produced measurable or observable changes in the behaviours, perceptions, and attitudes of those working in or using the British Columbia family justice system. The project will look specifically at outcomes in the areas of parenting after separation, encouraging resolution out of court, and producing a general shift away from traditional, adversarial behaviours. Semi-structured interviews will be used to gauge feedback from professionals in the field, with questions intended to focus on these key areas.

Participation would involve a single interview of approximately 30-60 minutes with the researcher, the transcript of which would be able for review. Research of this kind is important because when long-standing legislation is modernized, it needs to be evaluated to ensure it is working as intended. This research represents only a small, initial first step in that process and will aid the Ministry of Attorney General with planning future evaluation projects.

The sample size of this particular piece of research is small and includes judges, lawyers, mediators, and others who work in the family justice sector in the province. While we would be pleased to speak with whomever is interested and available, some names have been suggested as potentially offering rich perspective in this area including: Judge Meg Shaw, Judge James Wingham, and Judge Cathie Heinrichs.

There is potential for building upon this work at a future date. We also request permission to return to you and request further judicial input should the opportunity arise to expand our sample size.

The anonymity of those who participate will be protected, with data kept confidential and responses not attributed to participants.

Please contact me at Nancy.Carter@gov.bc.ca should you require further details and to advise as to next steps.

Sincerely,

Nancy Carter
Executive Director
Family Policy, Legislation and Transformation Division
Justice Services Branch
Ministry of Attorney General

[BC Supreme Court]

I am writing today to request your participation in a research project examining specific changes introduced in the Family Law Act. Brendan Stewart, a University of Victoria graduate student (Masters in Dispute Resolution, School of Public Administration), will be conducting this research under the supervision of Jerry McHale, QC, of the Faculty of Law, with the Ministry of Attorney General acting as client.

The purpose of this project is to explore the question of whether changes to the provisions and language of the Family Law Act and related legislation have produced measurable or observable changes in the behaviours, perceptions, and attitudes of those working in or using the British Columbia family justice system. The project will look specifically at outcomes in the areas of parenting after separation, encouraging resolution out of court, and producing a general shift away from traditional, adversarial behaviours. Semi-structured interviews will be used to gauge feedback from professionals in the field, with questions intended to focus on these key areas.

Participation would involve a single interview of approximately 30-60 minutes with the researcher, the transcript of which would be able for review. Research of this kind is important because when long standing legislation is modernized, it needs to be evaluated to ensure it is working as intended. This research represents only a small, initial first step in that process and will aid the Ministry of Attorney General with planning future evaluation projects.

The sample size of this particular piece of research is small and includes judges, lawyers, mediators, and others who work in the family justice sector in the province. While we would be pleased to speak with whomever is interested and available, some names have been suggested as potentially offering rich perspective in this area including: retired Justice Jacqueline Dorgan, Justice Heather MacNaughton, and Justice G. Bruce Butler.

There is potential for building upon this work at a future date. We also request permission to return to you and request further judicial input should the opportunity arise to expand our sample size.

The anonymity of those who participate will be protected, with data kept confidential and responses not attributed to participants.

Please contact me at Nancy.Carter@gov.bc.ca should you require further details and to advise as to next steps.

Sincerely,

Nancy Carter
Executive Director
Family Policy, Legislation and Transformation Division
Justice Services Branch
Ministry of Attorney General

C. Participant Consent Form

PARTICIPANT CONSENT FORM

Given your role as a professional working in B.C.'s family justice system, you are invited to participate in a research project entitled **Evaluating changes to law and language in the B.C. *Family Law Act*** that I, Brendan Stewart, am conducting.

I am a graduate student in the School of Public Administration at the University of Victoria and you may contact me at any time if you have further questions at bss@uvic.ca, or by phone at [redacted].

As a graduate student, I am required to conduct research as part of the requirements for a degree in Dispute Resolution (MA). This project is being conducted under the supervision of Professor M. Jerry McHale, Q.C. You may contact Jerry at the University of Victoria Faculty of Law, Access to Justice Centre for Excellence at mjmchale@uvic.ca, or by phone at [redacted]. The client for this project is Nancy Carter, Executive Director, Family Policy, Legislation and Transformation Division, B.C. Ministry of Attorney General. Nancy can be contacted at Nancy.Carter@gov.bc.ca.

The purpose of this project is to explore the question of whether changes to the provisions and language of the *Family Law Act* and related legislation have produced measurable or observable changes in the behaviours, perceptions, and attitudes of those working in or using the B.C. family justice system. The project will look specifically at outcomes in the areas of parenting after separation, encouraging resolution out of court, and producing a general shift away from traditional, adversarial behaviours. Semi-structured interviews will be used to gauge feedback from professionals in the field, with questions intended to focus on these key areas.

Research of this kind is important because when long-standing legislation is modernized, it needs to be evaluated to ensure it is working as intended. This research represents only a small, initial first step in that process and will aid the B.C. Ministry of Attorney General with planning future evaluation projects.

You are being asked to participate in this study because of the unique perspective you bring to these questions in your professional capacity. While they are not the only perspectives on these issues, the views of professionals working in the B.C. family justice system who have experienced the transition from the prior legislation are vital in assessing whether the legislation is working as intended.

If you consent to voluntarily participate in this research, your participation will include one interview with the researcher lasting approximately 30 minutes to an hour in length, with the transcript available for your review. This interview will take place at a location and time which is convenient for you, either in person or by phone. Interviews will be audio-recorded for the purposes of transcription, or notes will be taken as an alternative (also with a copy available for your review).

There are no known risks to you for participating in this research. The potential benefits include providing the Ministry of Attorney General with valuable insight for future projects, programs, or legislative initiatives.

Your participation in this research must be completely voluntary. If you do decide to participate, you may withdraw at any time without any consequences or any explanation. If you do withdraw from the study, your data will be destroyed and will not be referenced in written form.

Your anonymity will be protected through the use of pseudonyms and no direct reference to your age, gender, ethnicity, or other characteristics (i.e. anything other than your profession and experiences) will be made. The confidentiality of your data will be protected through password protection and encryption on the host computer as well as by lock and key.

It is anticipated that the results of this study will be shared with others through the submission and defence of a paper of approximately 50 to 75 pages. This paper will eventually be available online through the University of Victoria library and potentially elsewhere.

All data collected during the research will be kept for six months following the completion of the project and subsequently destroyed. Digital copies will be deleted securely, and paper copies such as transcripts will be shredded.

In addition, you may verify the ethical approval of this study, or raise any concerns you might have, by contacting the Human Research Ethics Office at the University of Victoria (250-472-4545 or ethics@uvic.ca).

Your signature below indicates that you understand the above conditions of participation in this study, that you have had the opportunity to have your questions answered by the researchers, and that you consent to participate in this research project.

Name of Participant	*Signature*	*Date*

D. Interview Protocol

INTERVIEW QUESTIONS

As a reminder, the main research question identified in the proposal reads as follows:

> *This project will seek to explore the question of whether changes to the provisions and language of the Family Law Act and related legislation have produced measurable or observable changes in the behaviours, perceptions, and attitudes of those working in or using the B.C. family justice system.*

We are looking for evidence of the extent to which some of the broad policy objectives behind the FLA have or have not been achieved. One of these objectives is to enhance collaborative attitudes and non-adversarial behaviors in the resolution of family disputes.

The interview questions below are given here as an example of the sorts of questions one could ask in order to answer the main research question. They are formulated to be part of a semi-structured interview, meaning they could be re-worded or expanded on-the-fly during the individual interviews. Further, these are primarily "essential" questions which relate directly to the research questions, and in an interview they would be supplemented with additional prompts aimed at elucidating or clarifying one path of inquiry or another.

Topic: Family law resolution out of court

1. **Are behaviours, perceptions, and attitudes moving away from the traditional, adversarial norm?**

a. *In your experience, have **perceptions, expectations, and/or attitudes** shifted since 2011 away from the traditional, adversarial approach to resolving family disputes to become more collaborative, cooperative or non-adversarial?*

b. *In your experience, have **behaviours** shifted since 2011 away from the traditional, adversarial approach to resolving family disputes to become more collaborative, cooperative or non-adversarial?*

2. **To what extent have the courts exercised the powers given them under the Act to require parties to participate in family dispute resolution or to attend counselling, specified services, or programs?**

a. *In your experience are judges using their powers under s.224 to require parties to participate in family dispute resolution or to attend counselling, specified services, or programs?*

Topic: Parenting arrangements after separation

3. **How, if at all, have the legislative changes respecting parenting arrangements and guardianship influenced behaviours, perceptions, and attitudes?**

a. *Have the legislative changes respecting parenting arrangements and guardianship influenced **perceptions, expectations, and/or attitudes**?*

b. *Have the legislative changes respecting parenting arrangements and guardianship influenced **behaviours**?*

Topic: Best interests of the child

4. **How, if at all, has the shift from making the best interests of the child the "paramount concern" to the "only concern" impacted behaviours, procedures, or outcomes?**

*a. Have the legislative changes respecting the child's best interests (the "only concern" language and s37.2 criteria) influenced **perceptions, expectations, and/or attitudes**?*

*b. Have the legislative changes respecting the child's best interests (the "only concern" language and s37.2 criteria) influenced **behaviours**?*

*c. Have the legislative changes respecting the child's best interests (the "only concern" language and s37.2 criteria) influenced **outcomes**?*

Topic: Resolution out-of-court preferred

Now, as compared to before the coming into force of the FLA:

a. **Are parties to a family law dispute better informed** as to the various methods available to resolve their dispute?

b. Are **parties** more inclined to resolve their dispute through agreements and appropriate family dispute resolution before making an application to a court?

c. Are **parents and guardians** more inclined to resolve conflict other than through court intervention?

d. Are **justice professionals** more likely to encourage out-of-court resolution of family disputes?

e. Is there anything else you wish to add?

E. Thematic Index

STEWART / DR 598 / THEMATIC INDEX			Participant & Group														
Theme		**Sub-theme**	**1-L**	**2-A**	**3-F**	**4-L**	**5-M**	**6-L**	**7-L**	**8-M**	**9-L**	**10-A**	**11-J**	**12-J**	**13-J**	**14-J**	**15-L**	**Occurs with**
1.0 Access level	1.1	Access processes							✓	✓		✓	✓					1.2, 5.1, 5.5
	1.2	Access to / availability of information	✓	✓				✓	✓	✓	✓	✓	✓	✓			✓	1.1, 1.4, 3.4
	1.3	Pilot projects for DR processes					✓			✓								4.2
	1.4	Court or systemic delays	✓	✓								✓	✓					1.1, 2.5 , 3.1, 4.1, 6.3, 6.5
	1.5	Ancillary court processes	✓					✓	✓	✓	✓		✓				✓	4.2, 5.3
2.0 Dispute level / Conflict Dynamics	2.1	High conflict disputes	✓	✓			✓					✓	✓		✓	✓		3.1, 6.1, 6.4, 6.5
	2.2	Family violence	✓	✓					✓		✓		✓			✓		2.4, 6.5, 6.6, 6.9
	2.3	Mental health / substance use		✓								✓						
	2.4	Power imbalance		✓					✓							✓		2.2
	2.5	Impact to children and families	✓						✓		✓					✓		1.4, 6.5
3.0 Disputant level	3.1	Disputant frustration with processes	✓	✓			✓			✓			✓					1.4, 2.1, 6.1, 6.4
	3.2	Expectations about process	✓	✓							✓	✓	✓					3.3, 3.4
	3.3	Receptivity to DR	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓				✓	3.2, 3.4, 3.5, 4.3, 5.1, 5.2, 6.1, 6.7
	3.4	Level of sophistication	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	1.2, 3.2, 3.3, 5.2, 6.1
	3.5	Self-representation	✓						✓		✓		✓	✓	✓		✓	3.3, 4.1, 6.4
	3.6	Role of emotionality	✓				✓					✓		✓			✓	6.4
4.0 Resource level	4.1	Personal Resources	✓	✓	✓	✓	✓	✓	✓			✓	✓	✓		✓	✓	1.4, 3.5, 4.3, 6.1, 6.3, 6.6
	4.2	Systemic Resources			✓		✓		✓			✓	✓	✓		✓	✓	1.3, 1.5, 5.3, 6.1, 6.6, 6.7, 6.8
	4.3	Resources determining processes		✓	✓	✓	✓		✓			✓	✓	✓		✓	✓	3.3, 4.1, 4.4
	4.4	Resources determining character of agreements		✓					✓			✓		✓		✓		4.3
5.0 Culture Change	5.1	Professionals	✓		✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	✓	✓	1.1, 3.3, 5.2, 5.5, 6.1, 6.6
	5.2	Non-professionals	✓			✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	3.3, 3.4, 5.1, 5.5
	5.3	Pace of change / trend	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓	✓	✓	1.5, 4.2, 5.5, 6.6
	5.4	Regional / community level differences in approach			✓	✓	✓	✓	✓	✓				✓				1.1, 5.1, 5.3, 6.5
	5.5	Out of court preferences		✓			✓	✓		✓	✓		✓	✓	✓	✓	✓	5.2, 6.6
6.0 Process level	6.1	Judicial orders	✓	✓	✓	✓	✓		✓	✓		✓	✓	✓	✓	✓	✓	2.1, 3.1, 3.3, 3.4, 4.1, 4.2, 5.1, 6.2, 6.4, 6.6
	6.2	Use of judicial case conferences				✓			✓		✓		✓			✓	✓	6.1, 6.6
	6.3	Cost-saving	✓			✓		✓	✓			✓					✓	1.4, 4.1
	6.4	Court appropriateness	✓				✓			✓		✓	✓	✓	✓	✓		2.1, 3.1, 3.5, 3.6, 6.1, 6.5
	6.5	DR appropriateness	✓			✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	1.4, 2.1, 2.2, 2,5, 5.5, 6.4, 6.7
	6.6	Usefulness of FLA-driven tools / language	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	2.2, 4.1, 4.2, 5.1, 5.3, 6.1, 6.2
	6.7	Early intervention						✓				✓	✓			✓	✓	3.3, 4.2, 6.5
	6.8	Judicial awareness of local programs	✓									✓	✓			✓	✓	4.2
	6.9	Interpreting the FLA		✓					✓				✓					2.2
7.0 Future state	7.1	Ideas					✓		✓		✓	✓						