

The recent surge in the number of litigants appearing before the Family Court without legal representation poses a challenge to the notions of justice and due process that underpin Australia's adversarial system.

This discussion draws, in particular, on the picture which emerged from the most recent study commissioned by the Family Court of Australia.

Meeting the needs of self-represented litigants in family law matters



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One of the most significant developments in family law in Australia in the last five years is one on which the statute books are (as yet) silent but which is nonetheless effecting a sea change in the way litigation in that jurisdiction is conducted. The rising tide of people appearing before the Family Court without legal representation¹ poses a direct challenge to the notions of justice and due process that underpin our adversarial system.

The debate, reflected in numerous studies and articles, in emerging case law and professional guidelines, has shifted from calling for specific external solutions to the "problem", such as increased legal aid funding, to a broader approach, including an analysis of the extent to which the *system itself* needs to change to ensure equal access to justice.

This article discusses the growth of self-representation, its impact on the family law system, and current and proposed initiatives to assist unrepresented parties navigate the litigation pathway.

Extent of self-representation

Increases in the numbers of self-represented litigants are occurring across the Australian justice sector. Of the superior courts, the Family Court has the greatest percentage, with a 1999 study showing 35 per cent of contested cases involved at least one party appearing without a lawyer (Smith 1999), a figure which varies across registries. This is compared to 28 per cent in the High Court and 17 per cent in the Federal Court (Farrar 2001).

Australian courts are not alone in struggling to find ways to accommodate the needs of this category of litigants. The situation in the United States is particularly dire. In 1990 an estimated 88 per cent of the parties in Arizona's Domestic Relation Court were without legal counsel, with both parties appearing unrepresented in 52 per cent of cases (Farrar 2001: 4).² While alarming, these figures do not include the hidden statistics of those with meritorious claims who decide not to pursue matters at all because of a lack of assistance, who abandon proceedings early on in the process for the same reason, or have them dismissed on technical grounds.

There have been a number of studies undertaken by the Family Court of Australia (Smith 1998; Dewar, Smith and Banks 2000), the Justice Research Centre (Hunter 1999), the Australian Law Reform Commission (ALRC 1996, 1997, 1999), and the Law and Justice Foundation of New South Wales (Hunter, Genovese, Chrzanowski and Morris 2002) that attempt to understand the causes and repercussions of this phenomenon.

This article draws in particular on the most recent report commissioned and published by the Family Court, conducted in conjunction with the Family Law Research Unit at Griffith University (Dewar, Smith and Banks 2000). The report, entitled *Litigants in Person in the Family Court of Australia*, involved a mix of qualitative and quantitative surveys involving questionnaires and in-depth interviews with judges and registrars (79 questionnaires completed, 17 interviews conducted) and litigants (49 interviews conducted), as well as observation of court proceedings in five registries. The study sought to profile those appearing in court without representation, their motivations for doing so, the effects they are having on the legal system, and how the court can best meet their needs.

Effects of increased self-representation

Before looking at the profile of litigants likely to represent themselves in family law matters, and the reasons underlying their decision to do so, it is important to understand the impact that large numbers of unrepresented parties in the Family Court has on all those involved in the litigation process – the parties themselves (including those who are represented), judges, registrars, other court staff, and practitioners appearing in the jurisdiction. The presence of unrepresented parties also has wider implications for the justice system as a whole, and brings with it both a public and a private cost.

Impact on the parties

While it may be difficult to generalise on the nature of the experience of appearing in person, there are some basic assumptions that Dewar and colleagues (2000) sought to test. The major concern is that in an adversarial system, which is based on the premise that two equally matched sides present their case to an impartial decision maker or umpire, the unrepresented litigant, without legal skills or experience, may be at risk of not getting a fair hearing.

Any lawyer will agree that there is much more to litigation than just understanding the law. To present a case effectively one should be able to identify the issues in dispute, assess the merits of the case, test the evidence, recognise and take advantage of settlement opportunities, and comply with procedural requirements and court etiquette. To do so in a rational manner with emotions in check is especially difficult when the witness you are cross-examining is your former spouse and the outcome of the case will determine the future of your children. Only 31 per cent of judges interviewed in the Family Court study thought that the unrepresented litigants in the sample cases participated in proceedings with competence; almost a third of the litigants interviewed said they were not confident at all in presenting their cases (Dewar et al. 2000: 55, 53).

Difficulty in navigating the litigation pathway increases the likelihood of unrepresented players achieving less favourable adjudicated outcomes, agreeing to a settlement that is not in their interests, or simply giving up. The converse risk is that if a judge is at pains to ensure a party without counsel is not disadvantaged by the process, the represented party may get a less favourable outcome than if both sides were represented. In the study conducted by Dewar and colleagues, judges felt that in 44 per cent of cases, the *represented* party was disadvantaged by the fact that the *other* party did not have a lawyer (Dewar et al. 2000: 56).

The stress, frustration and anger experienced by parties conducting their own case were evident in the responses of self-represented litigants. The resulting impact on their children is another hidden personal cost that is difficult to quantify. Frustration and disempowerment may leave the self-represented party feeling that the court is hostile to their interests, while represented parties may perceive bias in the assistance provided by the judge to their self-represented opponents. Both experiences may lead to increasing disenchantment with the legal system.

Self-representation often leads to more protracted and more frequent court appearances and greater

delays, resulting in more days off work and increased legal fees for the represented party. If successful, the self-represented litigant is unable to recover costs other than out of pocket expenses. Conversely, a represented party is less likely to be able to recover their legal costs against a self-represented opponent. This removes incentives for parties to settle matters.

Notwithstanding the above, differences in personal capabilities, the relative complexity of matters in dispute, and the attitude of the judge, registrar and other court staff mean that the experience of appearing unrepresented may not be universally negative. For some litigants there are definite advantages to appearing without a lawyer – including a sense of having greater control over the case, and a feeling that they have been truly heard and seen, been given more leeway in court and, of course, saved on legal fees.

Impact on the legal system

Overall, matters involving unrepresented parties are in the system for a shorter time, given that they are more likely to be dismissed or abandoned (ALRC 1999: 377; Hunter et. al., 2002). But they are also less likely to settle and therefore more likely to go to hearing. Lawyers tend to modify these two extremes by helping to keep a matter in the system and increasing the chances of it resolving. Anecdotal reports in the Dewar et al. study strongly indicate that, while in the system, these cases place a greater demand on court resources at all stages of the process.

With this occurring against a backdrop of reduced staffing levels³ the end effect reported by court staff and judicial officers is a clogging of the court system resulting in greater delays and costs. With less court efficiency comes less trial certainty which results in an inability of lawyers to provide accurate advice on the anticipated cost of proceedings.

Decreased court efficiency also helps to make a stressful experience for court users even more so. Often it is the front counter staff that bear the brunt of the court users' anger. However, increased stress was also clearly evident in the responses of judges and registrars who participated in the Dewar et al. study.

For judicial officers, adjudication in a matter involving unrepresented litigants often involves conflict between the competing duties of ensuring a fair trial and maintaining judicial impartiality. Judges in the Family Court have the added responsibility of making decisions that protect the interests of parties other than those appearing before them – that is, the children (when not separately represented). From the observation of court proceedings in the Dewar et al. study, it is evident that judges are employing different strategies in dealing with unrepresented litigants. Some judges treat unrepresented litigants in the same manner they treat legal practitioners appearing before them. Others will “lean over the bench” in varying degrees to assist unrepresented litigants to present their case. The end result is a lack of consistency that can have a direct bearing on the outcome of a case.

Testing the theory that “difficulty presenting your own case in court translates into actual disadvantage” is not easy. However, it is clear that in a common law system, poor quality evidence and argument put before a judge carries with it a greater likelihood of miscarriage of justice and therefore of more appeals.

Of the judicial officers interviewed, 63 per cent felt that the unrepresented parties in the sample were disadvantaged by their lack of representation (Dewar et al. 2000: 55).

In the family jurisdiction there is also the danger that an inadequately presented case prevents a judge from the proper execution of his or her duties under the Family Law Act – that is, making an informed decision that is in the best interests of the child. Judges and registrars in the study believed that in over half of the cases involving unrepresented parties “the best interests of the child” would have been promoted if the parties had been represented (Dewar et al. 2000: 56). Such a trend cannot help but have an adverse effect on the development of case law.

The greater argument of course is that equal access to legal services is fundamental to the continued legitimacy of the legal system and to democracy as a whole (Dewar et al. 2000: ch.1).

Demographic profile

In the Dewar et al. (2000) study, there were slightly more male than female litigants appearing in person. A disproportionately high number of unrepresented litigants were from a low socio-economic group with over half not in paid work. The median net income of those who responded to this question was \$15,000 – \$20,000. Over half of those who responded had not been educated beyond Year 12 at school.

Three quarters of respondents were Australian born. One tenth spoke a language other than English at home – this is less than the national average of 16 per cent (ABS 2002)⁴ and may well reflect the impediments of running your own case in a foreign legal system and in a language other than your mother tongue.

There was negligible difference between the percentage of those who had initiated proceedings and those who were responding to an application. However, other studies (Hunter 1999; Hunter et al. 2002) suggest that self-represented litigants are more likely to be respondents than applicants, and this accords with anecdotal reports from the judges and registrars in the Dewar et al. study.

Litigants in Dewar’s sample were overwhelmingly concentrated in matters involving children. This can be explained by the fact that an inability to fund a lawyer is likely to mean that there are negligible assets and that the children may be the only “capital” in dispute. Clearly parents are more likely to pursue or defend litigation which impacts on the future contact with their children, notwithstanding the impediments. Furthermore, where parties have property worth litigating over, they have the option of securing the services of a lawyer on a speculative fee basis.

Reasons for increase in self-representation

Barring legal incapacity, there is no legal impediment to appearing without counsel – on the contrary, section 78 of the Judiciary Act (Cwth) 1903 establishes a right to appear personally in courts exercising federal jurisdiction.

It is evident from empirical research that the reasons for appearing unrepresented are varied and complex. Similarly, the picture presented is not simply

one of full representation versus self-representation, but involves a number of patterns of partial representation. Some litigants may start proceedings with a lawyer and subsequently represent themselves. Others may initially appear unrepresented and retain a lawyer at a later stage of proceedings (Hunter et al. 2002).

For a minority of litigants interviewed by Dewar and colleagues, the decision to appear without a lawyer was a matter of choice. However, the majority indicated that it was simply a question of financial necessity. Three quarters of the litigants interviewed could not afford a private lawyer and/or had been denied legal aid (Dewar et al. 2000: 33). Thus, the prohibitive cost of legal fees is clearly a part of the picture but has been largely absent from the debate.

Dewar and colleagues explored the extent to which the increased numbers of unrepresented litigants could be said to have resulted from cuts in legal aid. Of 49 litigants interviewed, only 16 had applied for and been refused legal aid. Close to half of those were deemed ineligible on the grounds that their case lacked merit, according to the legal aid guidelines (a benchmark determined by the nature of the matter and its likelihood of success). None was refused legal aid on the basis that they had reached the monetary cap on grants on aid (\$10,000 to parties and \$15,000 to child representatives). The more restrictive merit test and the imposition of monetary caps on aid introduced into the guidelines in 1997 were the primary means of reducing legal aid spending in family law matters.

At first glance it would appear that only those refused aid on merit could be said to be affected by the 1997 cuts. However, as indicated by Dewar and colleagues, these figures cannot be said to be representative of the impact of reduced legal aid accessibility as they do not include the larger number of those who didn’t apply for aid at all due to direct advice and/or a perception that they would be ineligible. In addition, those who were granted aid received funding for discrete stages of litigation and were therefore unlikely to reach the \$10,000 limit.

Litigants may appear unrepresented at specific stages along the litigation pathway as part of a strategic use of legal services in order to conserve funds. They may be unable to find a lawyer to accept their instructions because the case is deemed to lack merit. They may ignore the problem in the hope that it will go away and then find they have no time to arrange representation. Or they may be ignorant of other services available to assist in the resolution of family law disputes. The range of motivations for appearing without a lawyer is reflected in the range of patterns of partial and full self-representation evident from the study by Hunter et al. (2002).

The remaining one quarter of respondents in the Dewar sample who chose to represent themselves were motivated by a range of reasons. Many expressed an overriding distrust of lawyers. Some expressed the belief that they could do as good, if not better, a job on their own. The simplification of forms and procedures in the Family Court did not appear to be a significant motivating factor, with only one respondent stating that simplified procedures and other available assistance influenced the decision to appear unrepresented.

A strong belief in the merit of a case, notwithstanding advice to the contrary and a sense of moral

obligation to their children, may compel some litigants to pursue litigation without representation. Also included in these figures is an undefined percentage who could be deemed serial litigants – who pursue litigation to maintain negative contact with their former partners, or to express their disaffection with the system. This category will always retain a presence in the system.

How is the challenge being met?

As the American experience has shown, lawyer-dependent justice systems are faced with three choices in dealing with the challenge posed by unrepresented litigants. One is to ensure greater subsidised access to lawyers; a second is to transform all litigants into lawyers; and a third involves changing the system so that lawyers are not essential. To these should be added the option of reducing legal fees to make them more affordable to more people. With legal aid levels unlikely to be increased to achieve the first outcome, at least in the short term, the second being impractical, and the reduction of fees highly unlikely, the only real option is to modify the system to make it more accessible to non-lawyers. For the authors of the Dewar study the appropriate benchmark is to ensure that self-represented parties are provided with a “meaningful opportunity to be heard.”

The measures being taken by the courts, the legal profession and community agencies to assist litigants unable to secure representation are evidence of a system in flux and give some cause for optimism. However, as Dewar and colleagues found, there is little consistency regarding the availability of support provided either by external agencies or from within the court. It is clear from the study and from the recommendations of the Family Law Pathways Advisory Group (2000) that a more coordinated, and holistic approach is required.

Courts

The Family Court is tackling the problem on a number of fronts, and the support of the outgoing Chief Justice has ensured that the issue has been addressed nationally to date.

The court has recognised the importance of understanding the nature of the problem before proposing effective measures to address it, and has been proactive in research. In 2000 it announced the implementation of the Self-Represented Litigants Project, the goals of which are: “to develop a consistent national approach to providing services to litigants that are sensible, effective and understandable, and conscious of the requirements of self-represented litigants; to improve current court services in practices and procedures, protocols and proformas; and in parallel with the previous objectives, to evolve deliveries that are clear, consistent and understandable to litigants of average ability.”

This project complements the pre-existing trend to make the court more user-friendly by simplifying forms, providing forms online, producing do-it-yourself kits, and refining case management initiatives.

The court is also becoming increasingly aware of the need to play more of an educative role beyond that of the information sessions currently being provided. Dewar and colleagues recommended, among other

things, the provision of more customised information with more detailed material being made available at various stages of proceedings.

Individual registries have come up with their own solutions. Initiatives such as the Court Support Project at Dandenong (a model most closely resembling the self-help centres in the United States), and the Integrated Client Services project at Parramatta, both of which seek to work closely with other service providers in resourcing the unrepresented litigant, provide models for assistance that are in accord with the recommendations of the Pathways Advisory Group (2001). More generally, there is recognition of the need for the court to move from a culture of “form-checking” to a more client-focused approach. To that end, the training of court staff and the development of protocols for dealing with self-represented litigants was one of the recommendations of the Dewar et al. (2000) report.

There have been calls for increased funding to expand the duty lawyer services provided by the Court – that is, lawyers on call at the court to assist those without representation. It has also been argued that the court needs to be more flexible in its attitude to the use of other forms of non-legal representation and assistance by way of specialist para-legals and/or “McKenzie friends” – people without legal qualifications who may, with the consent of the court, assist the litigant from the body of the court, without necessarily speaking on the litigant’s behalf.

Judges

With the variance in judicial approaches to parties appearing unrepresented evident from the Dewar study, it is clear that greater guidance for judges is required to achieve greater consistency. The full court of the Family Court has gone part of the way in formulating a set of rules to ensure that unrepresented parties are afforded procedural fairness. However, the rules outlined in *Johnson v Johnson* (1997) FLC 92-764, and *Re F: Litigants in Person Guidelines* (2000) 27 Fam LR 517, do little to resolve the inherent contradictions in distinctions between information provision and advice and are rather limited in their scope.

One recommendation arising from the Dewar et al. report was that the court develop clearly articulated policy to assist judges to move between the more interventionist role required for unrepresented parties and their more traditional role, as the case demands.

Legal profession

There is a strong tradition in the legal profession of provision of services on a pro bono or volunteer basis. Increased numbers of litigants appearing in court unrepresented has placed a greater demand on these services. Most of the free advice sessions (offered by community legal centres and citizen’s advice bureaus) are staffed by volunteer lawyers and practitioners present in the court on other business are often called upon to assist unrepresented parties. While some lawyers engage in cutting corners to run a legally aided matter within budget, others will continue to assist their clients to pursue a case in the Family Court even after legal aid funding has been withdrawn (Caruana 1998).

Legal practitioners have also needed to reconcile the ethical concerns of dealing with unrepresented parties.

When appearing opposite a person who is unrepresented, lawyers are faced with the conflict between their competing duties to their client and to the court. While the overriding duty of practitioners is to achieve the best possible outcome for their client, they are also obligated to a certain degree to assist the court in ensuring a fair hearing and, at the very least, not to take advantage of their non-legally trained opponents.

They must also be mindful to ensure that the requirements of *Johnson v Johnson* are met by the court or risk an appeal on the grounds of non-compliance. Guidelines developed by the New South Wales Bar Association have gone further in developing detailed protocols for barristers, on issues ranging from negotiating with a self-represented litigant to how to speak to a judge to avoid a perception of familiarity and therefore bias.

Lawyers may also need to consider different ways of delivering legal services, including the notion of providing unbundled services – that is, accepting retainers for discrete portions of legal work rather than having carriage of a matter until resolution. As recommended in the Family Law Pathways report (2000), greater flexibility in legal aid funding arrangements would be necessary to allow this to happen.

Other services

A range of volunteer, government and community-based organisations also provide invaluable services to unrepresented litigants both in and outside the court. These include mediation agencies, which offer an alternative to litigation; self-help initiatives established by legal aid offices, including the workshops for unrepresented litigants run by Victoria Legal Aid; community legal centres that provide advice and support to people navigating the litigation maze; and organisations such as Court Network whose volunteer workers offer emotional and practical assistance on-site at a number of courts.

Summary

It appears that the presence of fully and partially unrepresented parties in the family law jurisdiction is a growing phenomenon which is unlikely to change in the short term.

The unrepresented family law litigant is most likely to be poor, poorly educated and be involved in litigation concerning the care of their children. Three quarters appear without a lawyer because of financial necessity. Reduced accessibility to legal aid has contributed to the problem.

Large numbers of unrepresented parties have a predominately negative effect on the administration of justice in that jurisdiction, causing delays, increased costs, trial uncertainty, and increased stress for court staff and judicial officers. Unrepresented parties remain in the system for a shorter period but represent a greater drain on court resources.

Poorly presented evidence and argument carries with it the risk of a miscarriage of justice for the unrepresented party, and affects the judge's ability to make a decision which is in the best interests of the child. Lack of representation also has a personal cost for the parties involved, including heightened stress, frustration, and feelings of disempowerment.

A number of initiatives to attempt to meet the needs of unrepresented parties have emerged in the Family Court, from case law, the legal profession, and a range of community-based and government agencies.

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Endnotes

- 1 Although recent studies show a high number of litigants appearing in person in the Family Court, the lack of statistical data kept by the court on this point prior to 1997 meant that evidence of the growth in numbers was largely anecdotal. However, a recently released report by the Law and Justice Foundation of New South Wales found that while the majority of unrepresented litigants are partially, rather than fully unrepresented, there has been a consistent increase in fully unrepresented litigants between 1995 and 1999 (Hunter et al. 2002). The timing of the release of this report precluded comprehensive analysis and comment in this article. The extent to which this trend extends to the Federal Magistrate's Service is not explored in this article and requires further study.
- 2 It should be noted however that the American figures include family violence applications, whereas the Australian figures do not. The issue is of such concern that a national conference on self-represented litigants was held in Arizona in 1999.
- 3 According to Foster (2002: 4), staff levels are down 30 per cent since 1990, with 200 fewer staff members than three years ago.
- 4 Note however that no comparison is drawn with the percentage of divorces amongst people from a non-English-speaking background as these figures were not to hand (ABS figures on marriage and divorce refer only to people who nominate a country other than Australia as their country of birth).

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