The Pandemic and Family Justice: Unequal Outcomes and Access to Justice

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Today’s agenda

• Project overview

• Methodology

• Preliminary findings
  o High conflict separations
  o Family violence
  o Self-representation
  o Technology concerns

• Tentative conclusions
Project Overview

Claire Houston
The pandemic and family justice

• March 2020: physical closure of courthouses, remote “urgent” hearings, family professionals “pivot”

• Pre-existing access to justice concerns: cost, complexity, delay

• Research questions:
  o How has the pandemic impacted the family justice system?
  o How have these impacts been felt by different groups?
  o What can we learn that may improve the justice process?
Methodology

Rachel Birnbaum
Research
Mixed Methods Approach Informs One Another

Quantitative Data (survey data, caselaw)

Qualitative Data (interviews with self-reps, mental health professionals, lawyers, and judges)
Mixed-methods approach

1. Analysis of reported Ontario family law decisions
   a) “Lockdown” period: March-July 2020
   b) “Reopening” period: July 2020-March 2021

2. Surveys of professionals

3. Interviews with professionals and SRLs
Survey of professionals

- n = 91

- Lawyers (54%), MH professionals (21%), other (20%) (e.g. supervised access worker), judges (4%)

- 43% = 21 or more years in family justice

- 77% identify as female
“Lockdown” cases

• All reported Ontario family law decisions heard between March 17, 2020 – July 6, 2020

• n = 506

• N = 32 child protection, n = 474 domestic
Preliminary Findings: High Conflict

Nicholas Bala
Impact of the pandemic on “high conflict” families

• More “high conflict” families, and more conflict within HC families

• Access difficulties and “taking advantage” of the pandemic

• Concern about impact of limited access to court, especially on children
High conflict in “lockdown”: survey
HC in “re-opening”: survey

- Much more
- More
- About the same
- Much less
- No change
- I don't know
Significant HC in “lockdown” cases

- Judges use “HC” or similar language in 40% of cases
- More stress → more conflict: “This case has a long and acrimonious litigation history, which is exacerbated by these very concerning times amid the COVID-19 crisis” (Hermanus v Laurin, 2020 ONCJ 190)
- Most cases involved previous appearances (~ 75%)
- Smith v Smith, 2020 ONCJ 180: second urgent motion brought in “high conflict” case
More conflict in HC families: survey

- Existing conflict exacerbated and more sources of conflict

- “The pandemic has thrown gasoline on high conflict families.”

- “I think high conflict families have seen more conflict. Rules and restrictions about Covid and exposure or potential risks has become one more thing to fight about”.

- Impact on children: “Children witnessing more conflict as not in school.”
Access issues: cases and survey

- Majority (56%) of parenting cases involve access difficulties

- Allegations of other parent not following health guidelines

- Concern about “taking advantage” of the pandemic: “For some high conflict families, the pandemic was seen as an opportunity to restrict or prohibit parenting time” (survey respondent)

- *Ribeiro v Wright*, 2020 ONSC 1829: presumption that parent-child relationships should continue
Concerns re: limited court access

- Increased conflict but harder to resolve: “The stress of the pandemic has increased conflict levels but left parties less able to access timely resolution from the court” (survey respondent)

- Children exposed to more conflict, for longer: “Children will be in a ‘holding pattern’ waiting for parties to reach resolutions” (survey respondent)

- Judicial emphasis on cooperation: “Right now, families need more cooperation. And less litigation” (Pazaratz J., Ribeiro v Wright)
Family Violence

Claire Houston
The pandemic and family violence

- Concerns about more family violence, and increase in severity
- Barriers to leaving (including limited access to courts) and fewer supports
- Impact on child protection agencies
Intimate partner violence in “lockdown”: survey
IPV in “re-opening”: survey data
Child abuse and neglect in “lockdown”: survey

- Much more
  - 4

- More
  - 20

- About the same
  - 16

- Much less
  - 2

- No change
  - 3
Child abuse and neglect in “re-opening”: survey

- Much more
- More
- About the same
- Much less
- No change
- I don't know
Family violence in “lockdown”: cases

- IPV allegations in ¼ of lockdown cases, including ¼ of “triage” cases
- Child abuse and neglect allegations in 11% of family lockdown cases, including 11% of “triage” cases
- No relationship between finding of urgency and family violence allegations
Pandemic’s impact on IPV victims: survey

- Increased risk exacerbated by lack of supports and barriers to leaving

- Difficulty accessing courts: “There are more incidents [of violence] and little ability to get substantive help from the Court, for things like restraining orders there have been 5 to 6 week delays in getting motions heard. [I]t is a crisis.”

- “There is also a fear to begin the court process as the delay is enormous and this can leave a woman in a dangerous situation for much longer”
Impact on IPV victims, cont.

• May be region specific: “I am pleased to say that the triage/urgent motion process has been responsive enough to seek and secure important safety-focused parenting/restraining orders”

• Barriers beyond limited access to justice: “No where to go”, financial insecurity, reduced services

• Different impacts on different groups: increased risk for victims of color, Indigenous victims
Pandemic’s impact on child protection agencies: survey

• Fewer opportunities to assess risk: “not being able to have eyes on the child at school or in the community puts kids at greater risk”

• Mixed reports on number of referrals
  • Increase due to pandemic-related stresses (more IPV, more substance use, etc.)
  • Decrease due to children “hidden” at home
Impact on child protection, cont.

• Some recognition of greater challenges: “an impossible-to-do job for child protection and no one has acknowledged that to date”

• Concerns around initial suspension of access: “This was an extremely difficult time for families with access being cut off”
Self-Representation

Nicholas Bala
Self-represented litigants in “lockdown”: survey

- Much more
- More
- About the same
- Much less
- No change

[Bar chart showing the distribution of responses]
SRLs in “re-opening”: survey

- Much more
- More
- About the same
- Much less
- No change
SRLs in “lockdown”: cases

- Majority of parties have lawyers

- Self-representation slightly higher among men than women (approximately 25% vs. 15%)

- Tension between cases and survey responses (e.g. “There are more self-represented litigants because there haven’t been enough family lawyers to accept [Legal Aid] certificates”)

Mostly negative impact on SRLs: survey

• Limited access to legal information and advice: “the lack of [the Family Law Information Centre] and duty counsel has hurt”

• Added complexity: “frankly, the number of practice directions that have been issued were… overwhelming to me and my office. I cannot imagine how a self rep would navigate the constantly changing rules”
Impact on SRLs, cont.

- Technology mixed: “I think for some, the digital world is easier for them and accessing resources and documents online has worked. For many, [limited] access to internet and devices has left them without access to justice at times”

- Special concern about SRLs in child protection matters
Technology Concerns

Claire Houston
Technology and family violence victims: survey

- Pros: safety benefits of avoiding in-person hearings
- Cons: hearing perpetrators’ voice in home, perpetrator seeing victim’s home, perpetrator discovering victim’s phone number, other safety issues

“*In some cases the judges ordered virtual access to be facilitated by [the residential parent] even though a no-contact order exists. In a couple of cases this has led to more allegations of IPV*"
Technology and family violence, cont.

- Access to justice dependent on access to technology: “A lack of technology such as access to computers could make it almost impossible for [victims] to speak with counsel and attend court appearances”

- Concerns around privacy: “We’ve had clients call from cupboards in the basement, trying to find privacy within the home”
Tentative Conclusions

Rachel Birnbaum
Pandemic impacts

• Concerns about negative impact on high conflict families, and especially children, exacerbated by limited access to courts

• Perceived increased risk to family violence victims, some pandemic-related innovations may increase risk (i.e., remote hearings)

• Concerns about self-represented litigants, including family violence victims, accessing legal services and court
Moving forward?

- Negative impacts of the pandemic felt more by those with fewer resources, same in family law

- Technological innovations also have disparate impacts

- Improving access to technology may help to mitigate disparate impacts: “Access to justice now means access to technology”

- Ensuring essential in-person services, i.e., supervised access, child protection services, summary legal advice/information, court-connected mediation