



**AN INTERNATIONAL REVIEW OF
EARLY NEUTRAL EVALUATION PROGRAMS
AND THEIR USE IN FAMILY LAW DISPUTES
IN ALBERTA**

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1.0 INTRODUCTION

1.1 Background

Early neutral evaluation (ENE) is an expedited dispute resolution process that was developed in California 20 years ago (Brazil, 1990; Brazil, Kahn, Newman & Gold, 1986). Despite very positive program evaluations in the United States (Kakalik et al., 1996; Levine, 1989a; Pearson, 2006), its adoption in other jurisdictions has been somewhat limited. Recently, and likely in response to the need to improve access to justice in family law matters in an efficient and economic manner, ENE programs have been gaining in popularity; examples of ENE programs can now be found in other countries including the United Kingdom, Australia, New Zealand, Malaysia, and Singapore.

Given their limited use in Canada, the Canadian Research Institute for Law and the Family, with financial support from the Alberta Law Foundation, conducted this project to review and analyze early neutral evaluation processes in other jurisdictions and explore their possible utility for Alberta.

1.2 Purpose and Objectives

The purpose of this project was to review and analyze early neutral evaluation processes elsewhere and make recommendations regarding their possible use in Alberta to improve access to justice in family law disputes. Specifically, this project had the following objectives:

- to review the current literature on early neutral evaluation processes in Canada and elsewhere;
- to analyze early neutral evaluation models and identify the advantages and disadvantages of model characteristics; and
- to make recommendations regarding best practices for early neutral evaluation processes in family law matters in Alberta.

1.3 Methodology

This project involved an international literature review of ENE processes. The literature review was conducted using both academic databases and online search engines, yielding a combination of academic (published) and gray (informally published) material. Research studies were reviewed to examine emerging trends, issues, and best practices in ENE models in family law matters, and particular attention was given to programs that had been evaluated.

1.4 Organization of the Report

Chapter 2.0 of the report presents an overview of early neutral evaluation processes, including their development, comparisons with other forms of non-judicial dispute resolution processes, and advantages and disadvantages of ENE processes. Chapter 3.0 presents the findings from the literature review of early neutral evaluation processes in other jurisdictions, and Chapter 4.0 discusses various model considerations for ENE programs. Conclusions are presented in the final chapter, as well as recommendations regarding best practices for early neutral evaluation models in family law matters in Alberta.

2.0 AN OVERVIEW OF EARLY NEUTRAL EVALUATION PROCESSES

2.1 The Development of Early Neutral Evaluation Programs

In 1982, Robert Peckham, chief judge of the federal district court for the Northern District of California, appointed a task force to explore ways to reduce litigation costs for litigants (Brazil et al., 1986). Judge Peckham was concerned that the financial burdens litigation imposed on parties impaired access to justice, and he sought to explore new procedures that would make the system more economical for litigants. A subcommittee was formed to explore the then emerging field of non-judicial dispute resolution techniques and to analyze the cost of litigation. The subcommittee decided that the most money could be saved in the formative stages of litigation because “it is in those stages that patterns and expectations are set and thus it is in those stages where an infusion of intellectual discipline, common sense, and more direct communication might have the most beneficial effects” (Brazil et al., 1986, p. 279).

The subcommittee identified several sources of pretrial cost and delay, including: pleading practices that often overstated and, simultaneously, under-communicated the nature of legal disputes; the difficulty lawyers and their clients had in systematically and objectively analyzing the merits of their cases; the unrealistic expectations of litigants, as well as their lawyers; the alienation of litigants from the litigation process; and the reluctance of some lawyers and litigants to raise the subject of settlement for fear it will be perceived as a sign of weakness or vulnerability (Brazil, 1990). In reviewing the information they had gathered on non-judicial dispute resolution techniques, the subcommittee concluded that no one procedure would address all of the costs and delays they had identified. They consequently borrowed pieces of different procedures and, with their own creative ideas, “the subcommittee forged a truly unique, hybrid process that it labeled ‘early neutral evaluation’” (Brazil, 1990, p. 334).

2.2 What is an Early Neutral Evaluation Process?

An early neutral evaluation process is a dispute resolution mechanism alternative to litigation. It is simply defined in the 2014 Utah Code as “...a confidential meeting with a neutral expert to identify the issues in a dispute, explore settlement, and assess the merits of the claims” (UT Code § 6-2-202). Minnesota’s State Supreme Court Rule 114 defines ENE as:

...a forum in which attorneys present the core of the dispute to a neutral evaluator in the presence of the parties. This occurs after the case is filed but before discovery is conducted. The neutral then gives an assessment of the strengths and weaknesses of the case. If settlement does not result, the

neutral helps narrow the dispute and suggests guidelines for managing discovery.

The goals of ENE programs are to enhance direct communication between the parties and provide a “reality check” for clients and lawyers (United States District Court, n.d.). The neutral expert assesses the merits of the case, works with parties to clarify the central issues in the dispute, and assists the parties with discovery and motion planning. While settlement is not always an explicit goal of ENE programs, the process often leads to or promotes early resolution of the case.

ENE programs are non-binding case evaluation sessions that take place early in the litigation process and are attended by lawyers with their clients; all discussions are confidential and protected from disclosure at trial (Brazil, 1990). The session is conducted by a neutral, experienced and highly respected member of the local bar. A typical ENE session lasts more than two hours and begins with an opening statement from the evaluator explaining the purpose of the ENE session and the procedures that will be followed. Each party then makes a 15- to 30-minute presentation describing the facts and their position, including the evidence they have to support their preferred outcome, after which they are permitted to ask questions of each other. Presentations may be made by the parties, their counsel, or both. The evaluator asks questions to clarify arguments and the evidence to be adduced at trial from time to time, and tries to identify common ground. The evaluator then tries to define the disputed issues in the case, which is important because “a principal purpose of the ENE process is to help the parties understand more clearly what it is, exactly, that they disagree about, and then to appreciate what the legal significance might be of the different possible resolutions of these key points” (Brazil, 1990, p. 336). Once the disputed issues in the case have been identified, the evaluator provides an assessment of the relative strengths and weaknesses of each party’s arguments and evidence, and offers an informal and nonbinding evaluation of the case (Brazil, et al., 1986).

The evaluator may explore settlement possibilities at each stage of the process. However, if the parties are unable to settle, the evaluator will help them develop a plan that will position the case as efficiently as possible for disposition by further settlement discussions or by trial. In some cases, if the parties and the evaluator agree, a second ENE session may be scheduled.

2.3 Comparisons with Other Forms of Dispute Resolution

Early neutral evaluation processes are generally considered to be a preliminary step in a continuum of different non-judicial dispute resolution procedures that include mediation, collaborative processes, settlement conferences and arbitration (Shaw, 2014). In a mediation proceeding, a neutral and objective person helps to facilitate a resolution of the dispute by finding common ground between the parties, with the goal of reaching settlement and avoiding litigation (Garay, 2012). In addition, the mediator is

not required to have expertise in the subject matter, nor is the mediator expected to give advice or adjudicate (Santeramo, 2004), although family law lawyers with expertise in the area often conduct mediation in a more evaluative manner.

Collaborative settlement processes seek to take the threat of litigation out of the negotiation process by providing parties with the opportunities to explore their needs and interests without the threat of court. Both parties hire their own lawyers who have been trained in the collaborative process, and “all parties focus on negotiation from the outset in the form of open, positive, civilized four-way meetings where the clients participate equally with their lawyers toward the resolution of their disputes” (Vujnovic, 2008, p. 1). If negotiations fail and court is necessary, the parties are required to seek other counsel to represent them in court. If an ENE process does not result in settlement, parties are not required to retain alternate counsel.

In settlement conferences, a judicial officer helps parties to negotiate a settlement of all or part of the dispute (United States District Court, n.d.). The judge is typically a “generalist,” whereas an ENE evaluator must have expertise in the subject matter. Further, while an ENE process is highly structured, settlement conferences are somewhat amorphous and thus will be conducted in a manner that varies from judge to judge (National Arbitration Forum, 2007).

In arbitration proceedings, which can be binding or non-binding, parties agree to have their dispute settled by a neutral third party. Arbitrations are less formal than court proceedings, although they may follow similar rules of evidence and procedure. While desirable, it is not essential that arbitrators have subject matter expertise, although they should have training in arbitration techniques and be accredited (Department of Justice Canada, 2006).

In ENE processes, the evaluator helps the parties focus on issues of fact and law and provides an opinion as to what the likely result would be, and the subject matter expertise of the evaluator is thus essential (Garay, 2012). According to Brazil (2007, pp. 11-12):

The requirement that the evaluator have subject-matter expertise improves the likelihood not only that his or her evaluation will be sophisticated and as reliable as the circumstances permit, but also that the evaluation will be so perceived by the litigants. In short, evaluative feedback from a substantive expert is likely to have more credibility with the litigants and their lawyers than evaluative feedback from a process expert.

According to Blackman (2008), there is a certain amount of “baggage” associated with any dispute resolution process. In mediation, the baggage is primarily emotional in that it requires participants to acknowledge that they are there to settle the case, often

presenting a psychological barrier to its use. In arbitration proceedings, because arbitration is an adjudicative process, the baggage lies in the risk of reaching an adverse resolution. Blackman (2008, p. 7) describes neutral evaluation processes as having “neither the settlement baggage of mediation, nor the adjudicative baggage of arbitration.”

Brazil (2007) argues that ENE processes may be superior to mediation when the goal at a particular juncture is a credible evaluation of the merits of a case from an impartial and knowledgeable source. He states that mediators often concentrate more on the nature and spirit of the dynamic between the parties than on analysis of the evidence and law, whereas an ENE process “is structured to assure that the bases for the evaluative component of the process are systematically developed, fully visible to all parties, and as comprehensive as the parties’ knowledge permits” (p. 11). Santeramo (2004) further suggests that mediation is most effective when the parties are basically sensible and a continued relationship is mutually beneficial, which is often not the case in family law disputes where the parties are emotionally charged and are in the difficult process of ending their relationship.

2.4 Advantages and Disadvantages of Early Neutral Evaluation Processes

The literature suggests many advantages to using ENE processes, the primary benefit being that they encourage settlement, thus saving the parties time, money and emotional stress if settlement is reached (Department of Justice Canada, 2006; Maycock, 2001; Santeramo, 2004; Shaw, 2014). According to Maycock (2001), one of the main advantages of the ENE process is that it provides a reality check for parties and their lawyers early in the case, before clients have spent a lot of money on legal fees. She states that ENE processes are especially beneficial in complex cases because a skilled evaluator “can help the participants focus on the real issues, walk through the problems in their cases, and as one commentator said, ‘tear the veils from their eyes step by step’” (Maycock, 2001, p. 36).

ENE processes also allow parties to make admissions without damaging their position in court. Because the discussions in ENE processes are non-binding and confidential, parties can speak freely and begin negotiating without losing leverage (Santeramo, 2004). By involving clients in the process, they have an early opportunity to tell their stories and have their voices heard, and also be educated about their situation and their options by a neutral third party (Santeramo, 2004; Shaw, 2014). Further, if the process is successful, it allows parties to avoid the adversarial aspects of litigation, which is particularly useful when parties need to maintain an ongoing relationship such as would be necessary for parents involved in relationship breakdown (Department of Justice Canada, 2006).

Requiring the parties and their lawyers to participate in the process early has further advantages for both clients and lawyers. Lawyers need to be prepared for the

ENE hearing, which speeds up the ENE process, and clients have the opportunity to see their lawyers represent them at an early stage. Lawyers who are having difficulties explaining to their clients the limitations of their case will benefit from the realistic view of the evaluator, and clients will likewise be able to assess the advice they are receiving from their lawyers (Santeramo, 2004).

An early criticism of ENE programs, common to all forms of non-judicial dispute resolution, was a concern that they create a form of second-class justice for individuals who cannot afford to have their cases heard in court (Goldberg, Green & Sander, 1986). Critics also questioned whether ENE programs represented a delegation of the judicial function. However, as Brazil (1990) has noted, ENE processes developed by lawyers, not judges, and the results of ENE processes are not communicated to the court. Instead, “the judge retains the full scope of case management responsibilities that he or she would have even if no ENE program existed” (Brazil, 1990, p. 348). Santeramo (2004, p. 330) has also challenged that assumption that the resolution of disputes by trial constitutes “first-class justice” at all:

Considering the problems parties to a divorce case have retaining an attorney and paying for a trial and the amount of time and energy consumed going through a long, drawn-out litigation where clients have minimal control over the development of their case, perhaps this “first-class justice” is not truly “first-class” after all. “First-class justice” produces parents and children who are emotional wrecks.

According to the Department of Justice Canada’s *Dispute Resolution Reference Guide* (2006), another potential disadvantage of an ENE program is that it can be perceived as imposing an additional step in the process of going to court, thus delaying a trial and adding costs if settlement is not achieved. However, one of the advantages of ENE processes is that even if a full settlement is not reached, the process will better prepare the parties for other non-judicial dispute resolution processes (Shaw, 2014). As Brazil (1990, p. 344) states:

...the most important contribution ENE makes may well vary with different kinds of cases. Large, complex cases are not likely to settle at the first ENE session. Rather, in these kinds of cases we would expect ENE to contribute most to communication across party lines, issue clarification, and case development planning. In smaller, less complex matters, by contrast, ENE’s greatest contribution likely will be to helping achieve, or at least laying the groundwork for, an early settlement.

More recent opinion and practice supports the increased use of non-judicial dispute resolution mechanisms in family law disputes as a means of increasing access to justice. Canada’s Action Committee on Access to Justice in Civil and Family Matters has recommended that the family justice system offer an array of dispute resolution

options, judicial and non-judicial, to help families resolve their disputes (Action Committee on Access to Justice in Civil and Family Matters, 2012; 2013; Canadian Bar Association, 2013).

Another criticism of ENE processes, shared with other forms of non-judicial dispute resolution mechanisms, is that the quality of the evaluation depends on the skills and expertise of the evaluator (Santeramo, 2004). This limitation is discussed by Brazil (1990, pp. 350-351) in his article on a court-sponsored ENE program in the Northern District of California:

We have not built into the program, for example, an ongoing mechanism through which litigants and lawyers whose cases are compelled to participate in ENE can express their views about it. The court has established no direct means to learn if an evaluator inappropriately handles some aspect of an ENE conference. It is a virtual certainty that different evaluators set different tones and follow somewhat different formats in hosting sessions. Similarly, it is a virtual certainty that some evaluators will make errors of judgment in analyzing cases and in handling lawyers and parties – even with the public appointment process, of course, judges and magistrates make the same kinds of errors. Because there are real limits on the resources the court can devote to selecting, training and monitoring the performances of the evaluators, and because there are about 155 different human beings functioning in this capacity, there is more than a *de minimis* risk that, in some instances, the quality of evaluators' performances will be wanting.

Despite the absence of quality control oversight, an evaluation of the program found that 80% of the lawyers and 81% of the parties agreed that the evaluators made useful contributions to their cases (Levine, 1989a; 1989b). More specifically, respondents stated that the evaluators provided:

- new insights about the case (lawyers 54.9%; parties 61.9%);
- a fresh perspective on the case (lawyers 52.6%; parties 47.6%);
- a more complete understanding of the case (lawyers 46.5%; parties 52.4%);
- improved communications between the parties (lawyers 60.2%; parties 52.4%);
- identification of key issues (lawyers 75.4%; parties 47.5%); and
- improved prospects for settlement (54.9%; parties 58.5%).

Lawyers and parties were less likely to agree that the evaluators helped parties to enter into agreed statements of fact (lawyers 20.2%; parties 47.5%), plan discovery processes (lawyers 30.9%; parties 44.8%), or shape the future of the case through important motions (lawyers 33.4%; parties 31.6%). Levine (1989b) argued that while these mixed results could indicate that the ENE program did not meet these goals, it could also be true that these functions were not required by participants as over one-third of the cases studied were settled during the ENE process.

3.0 EARLY NEUTRAL EVALUATION PROGRAMS IN OTHER JURISDICTIONS

This chapter describes early neutral evaluation programs in jurisdictions including Australia, New Zealand, Malaysia, Singapore, United Kingdom, the United States, as well as Canada. Where available, evaluation results are summarized and funding structures are described, although the availability of this information is limited for most programs.

3.1 Australia

In November 2010, the Magistrates' Court of Victoria commenced an early neutral evaluation pilot program in Melbourne (Magistrates' Court of Victoria, 2010). The Court defined early neutral evaluation as "...a process in which a Magistrate investigates the dispute and provides a non-binding opinion on the likely outcome" and requires that "the Magistrate will have expertise in civil litigation" (p. 1). The program is offered as another form of non-judicial dispute resolution to parties involved in civil disputes where the court finds it suitable. The ENE hearing occurs within eight weeks of the filing of a defence to a claim and takes place before a magistrate in a courtroom. All parties, and their legal counsel if applicable, are required to attend, and must bring all relevant documents to the evaluation. The hearing occurs in private and does not exceed three hours. Each party is allotted up to 60 minutes to explain their case and answer questions by the evaluator, and the remaining time is devoted to the evaluator. The evaluator usually presents his or her evaluation orally, but it may also be given in writing. If a trial is necessary, the magistrate will advise the parties of the hearing date, and another magistrate will conduct the trial. According to Practice Direction No. 7 of 2012, the program was "proven successful" and was made a permanent feature of the court's range of dispute resolution processes as of July 1, 2012 (Magistrates' Court of Victoria, 2012).

The Law Society of New South Wales (2012) also offers an early neutral evaluation program. The Neutral Evaluation Program is designed to give parties a reasoned, non-binding evaluation of their case on its merits by a third party senior lawyer experienced in the subject area of the dispute. The model requires that the parties submit certain essential information to the evaluator and all other parties seven days prior to the evaluation session. The meeting takes place in a neutral location such as a court meeting room, and the parties must be accompanied by their lawyers. The evaluation session typically lasts for three hours, and is conducted by a practitioner with special training in dispute resolution who has been appointed to a Law Society panel. The evaluator may ask questions to help the parties identify the main issues in the dispute, as well as areas of agreement. Parties are encouraged to discuss settlement, and may explore other ways of narrowing the issues or otherwise prepare efficiently for trial. The process is confidential whether or not the dispute is settled.

The Law Society of New South Wales' *Dispute Resolution Kit* (2012)¹ contains a detailed description of the model, as well as an agreement form that outlines the role of the evaluator, the parties' commitment to cooperate with the process, the parties' obligation to maintain confidentiality with respect to communications made during the session, and that certain matters are privileged and may not be disclosed. The parties are required to pay \$825 AUD each (roughly the same in Canadian dollars), which covers a preliminary conference of up to one hour in duration and the three-hour evaluation session. The fee includes a Law Society administration fee.

3.2 New Zealand

The New Zealand Dispute Resolution Centre (n.d.) offers an ENE program that it advertises on its website as a quick, inexpensive and confidential process that allows an extraordinary amount of flexibility and informality by blending the advantages of a judicial settlement conference, mediation, and an independent expert determination of the dispute. According to the website, all types of disputes are suitable for the ENE process "provided that the parties and their representatives are committed to the prompt and cost effective resolution of the dispute and they are prepared and committed to participating in the process in good faith." However, the process appears to be most suited for commercial disputes because its fee structure is based on the dollar amount of the claim. A Family Dispute Resolution Centre opened in New Zealand in 2014, but it does not appear to offer early neutral evaluation as a service.

3.3 Malaysia

A recent study undertaken in Malaysia explored whether ENE and mediation processes were appropriate for resolving complex civil cases (Zakiyy, 2014; Zakiyy, Chow & Hassan, 2014). Zakiyy et al. (2014, p. 145) concluded that "mediation is not the ultimate problem solver for all disputes, especially civil disputes." They found that the ENE process is a better option in complex cases, especially for identifying the major issues and providing a reality check on the merits of a case. Further, they thought the two mechanisms could work together in a combined court-based dispute resolution program. Zakiyy (2014) reported that the ENE process is a viable mechanism that allows parties and their counsel to conduct pre-discovery much earlier than would occur by court order. It is most useful when parties are looking for guidance or direction towards settlement, or are preparing a complex case for trial. With the assistance of a qualified and experienced evaluator, the ENE process allows each party to explore the other party's case, narrow the points in issue, and avoid unnecessary expenses in providing admitted facts. Further, the ENE process enhances direct communication between the parties about their claims and supporting evidence, and allows them to clarify the issues in dispute.

¹ Available at: <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/675694.pdf>.

The Practice Directions contained in Malaysia's Rules of Court state that judges may encourage parties to settle their disputes at the pre-trial case management stage or at any stage and that the judge and parties may suggest or introduce any other modes of settlement (Zakiyy, 2014). Zakiyy (2014) recommended that, in complex cases, the court encourage the use of the ENE process as soon after the commencement of proceedings as possible. He further suggested that it is necessary for the court to determine a method for differentiating between complex and non-complex cases before integrating ENE mechanisms into the process of managing complex cases. In addition:

For Commonwealth countries that have not imported ENE into their legal system, it is recommended that further in-depth study and evaluation be embarked pertaining to its suitability in terms of application under its civil procedural rules. It is also recommended that an organised regulatory framework for ENE be introduced to the public in order to provide awareness of the dynamics of ENE. However, an upheaval task would then be in selecting the experienced senior counsels to act as neutral evaluator and providing them with appropriate training. (Zakiyy, 2014, p. 67)

3.4 Singapore

In 2011, a pilot project in Singapore introduced neutral evaluation as a further non-judicial dispute resolution option for general civil cases (Quek & Chi-Ling, 2011), and, in 2012, the Singapore Mediation Centre (SMC) announced that it would provide neutral evaluation as a new dispute resolution service (SMC, 2015). The SMC is a non-profit organization that provides mediation and other non-judicial dispute resolution services. Its website defines neutral evaluation as "an adjudicatory process by which parties to a dispute may obtain a reasoned opinion on facts, evidence and legal merits of specific issues within their case from an independent third party known as a Neutral" (SMC, 2015). SMC's current panel of neutrals include senior counsel, former Supreme Court judges, and a former judicial commissioner. The process is quick in that a decision can be reached in a month or less and, unlike other ENE programs, the parties can choose whether the neutral's opinion will be binding or not. Parties can also choose to have a documents-only evaluation or an evaluation with an oral hearing.

According to the SMC's website, all types of civil disputes are suitable for neutral evaluation if the parties are committed to the process and participate in good faith. The benefits of its neutral evaluation service are listed as (SMC, 2015):

Streamlines Issues. Assists in identifying, clarifying and focusing on the key issue and supporting evidence required to prove one's case.

Reality Check. Provides objective, independent and unbiased evaluation of the merits of the case by a respected, independent Neutral. This serves

as an indication for parties of a probable outcome and its costs should the dispute be heard by a court.

Speed and Economy. Resolves disputes faster and more economically. This avoids the destructive effect and delay of on-going litigation in resolving a dispute. ...

Facilitates Settlement Negotiations. When the Neutral's opinion is rendered, parties are in a better position to negotiate solutions.

Confidentiality. The Neutral's opinion is confidential and the information disclosed during the process is on a without prejudice basis.

Any party to a dispute can request a neutral evaluation by completing an application form. Once accepted, an agreement form is signed and parties are bound by the "Neutral Evaluation Rules." Parties are required to pay the neutral's professional fees and SMC's administrative fees ranging from SGD\$700 to SGD\$2,000 (the Singapore dollar is roughly equivalent to the Canadian dollar).

3.5 United Kingdom

ENE processes have been used in the United Kingdom as a non-judicial dispute resolution mechanism for many years. In the mid- to late-2000s, a pilot program in England tested the use of an abbreviated version of an ENE process in the Social Security and Child Support Tribunal to resolve administrative appeals without the need for a full tribunal hearing (Hay, McKenna & Buck, 2010). Following the pilot program, provisions for the use of ENE programs were provided for in the guides for the Commercial Court and the Technology and Construction Court (Clough, 2011). It is only recently, however, that ENE processes have been used in the UK for private law children disputes.

In 2014, in what is considered to be the first use of an ENE process in a case involving the care of children in the UK, a father filed an application for a child arrangements order to take the children to the United States, where he lived, for a holiday (Verdan, Nosworthy, Eaton & Kelsey, 2014). At the first hearing, additional issues were identified including the sharing of holidays and children's school holidays, the disclosure of details of third parties caring for the children, and the responsibility for and costs of drop offs and collections for contact. The parties were unable to resolve the issues, and agreed to hire an independent evaluator to evaluate the likely outcome of the case. A former judge was instructed to adjudicate the matter and provided an opinion in weeks instead of the months it would have taken had the case gone to court (Fenton & Carvalho, 2014). In this case, the parties agreed to be bound by the decision of the evaluator, which was then converted into a consent order and lodged with the family court.

According to Verdan et al. (2014), the ENE process in the UK is flexible and within the control of the parties, making it attractive to parties looking for a speedy and discreet resolution of their cases. They list the advantages of the process as:

- (a) A determination or agreement is reached far more quickly than within court proceedings.
- (b) The parties' costs are likely to be reduced by having the issues determined at an earlier date.
- (c) The ENE is confidential, which provides many litigants with reassurance at a time when the court process is becoming more open and transparent, or may attract media attention.
- (d) The parties have control over the choice of tribunal, whom if agreed could determine/assist with any future dispute the parties may have. (Verdan et al., 2014, p. 2)

In an effort to improve access to justice, the Scottish government, in partnership with the Scottish Legal Aid Board, conducted an international literature review of non-judicial dispute resolution methods employed for the resolution of family issues (Scottish Civil Justice Council, 2014; Scottish Government, 2014). The review evaluated the most common forms of non-judicial dispute resolution mechanisms including mediation, arbitration, collaborative law and ENE processes in five jurisdictions: England and Wales, Canada, the United States, Australia, and New Zealand. The authors concluded that non-judicial dispute resolution methods "can have a positive role to play and value to add within the [Scottish] civil justice system, in resolving disputes early" (Scottish Civil Justice Council, 2014). While mediation had the most research evidence addressing its effectiveness, the report acknowledged that the optimal method depends on the the parties and the circumstances of the case. In regards to ENE processes, the review concluded:

Early neutral evaluation (ENE), an amalgam of mediation and non-binding arbitration, has not been subject to rigorous empirical testing, but a few published studies reported positive results. ENE sample groups took fewer days to complete than comparator groups, and reported high levels of satisfaction. Settlements rates were inconsistent, but settlement is not the primary purpose of ENE. (Scottish Government, 2014, p. 5)

In Ireland, a newsletter posted on the website for Mediate Ireland discussed the advantages of ENE processes as a non-judicial dispute resolution technique (Small, 2015). According to the author, one of the main reasons that cases do not settle sooner is that someone, a lawyer or a party, has misunderstood or misevaluated the case. "That leads to unrealistic ideas about the probable outcome which in turn leads to

unnecessary stubbornness, which in turn leads to maddeningly slow process....” (Small, 2015, p. 1). The author describes the ENE process as an extraordinarily flexible and beneficial process that goes beyond someone simply hearing the facts of a case and then attaching an outcome to it. Mediate Ireland has recently introduced a new nationwide neutral evaluation service that it promotes as cost effective and successful, and promises further analysis of the process in future newsletters (Small, 2015).

3.6 The United States

Most of the research literature is from the United States, where the early neutral evaluation process was initially developed. The Northern District of California began operating as an experimental ENE program to expedite dispute resolution in 1985 (Levine, 1987; 1989a; 1989b). Initially, the court assigned a small number of cases to the ENE program as a pilot study, and a qualitative assessment was undertaken. Levine (1987) attended the training session for the evaluators, observed six ENE sessions, conducted case file reviews, and interviewed 50 key participants. He found that many of the intended goals of the pilot ENE project were being met: parties were confronting the merits of their cases at an early stage; the matters of fact and law that were in dispute were identified; an efficient approach to discovery was developed; and a frank assessment of the case was provided by the evaluator. Levine (1987) identified some areas that needed improvement, including clearly communicating the evaluation to the parties, and recommended adopting early settlement as a goal and incorporating follow-up into the standard ENE process. Based on his findings, the court concluded that ENE process was sufficiently promising to warrant making the modifications recommended and expanding the pilot program to include a larger number of cases.

In the second experimental phase, 150 cases were assigned to the ENE program and 67 cases completed the process (Levine, 1989a; 1989b). Cases were assigned to the program by the clerk’s office of the district court based on subject matter, the most common including contracts, torts, civil rights and labour issues. The methodology for the second phase evaluation of the ENE program included questionnaire data from participants, observations of ENE sessions, case file reviews, and follow-up telephone interviews with participating lawyers several months later. Overall, the results of the evaluation were very positive and indicated that the ENE program was effective in helping to resolve cases without trial (Levine, 1989b). The process was found to have:

- made counsel and parties address themselves to their cases in a more systematic manner;
- enabled counsel and parties to exchange information and identified areas where additional information was needed;
- contributed to the parties’ understanding of the issues in their case;

- provided an efficient vehicle for communication;
- given parties a fresh perspective on their case and a frank assessment of the relative strengths of the competing positions; and
- created opportunities for settlement negotiations.

Parties and their counsel reported that the ENE process was fair and the evaluators were unbiased, and strongly endorsed expansion of the program (Levine, 1989b). As well, parties said they would be willing to pay a fee for the service, which was valued at approximately \$500 at the time.

Levine (1989b) also identified some areas for improvement. He reported that materials sent to parties must be as clear as possible, and evaluation sessions should be held within 100 days of commencement of the case. He also stressed that evaluators need to help the parties understand what they are told about their case, and to help them focus on case development planning. Based on the findings of the second stage evaluation, the court directed that the ENE program be made permanent in the Northern District of California (Levine, 1989b).

In an attempt to reduce delay and litigation costs in federal courts, the *Civil Justice Reform Act (CJRA) of 1990* amended the federal judicial code to require each federal district court to develop a case management plan to reduce costs and delay (Kakalik et al., 1996; Kakalik, 1997). The legislation also provided for an independent evaluation of ten pilot courts that incorporated different case management principles and ten comparison districts. To supplement the evaluation, Kakalik et al. (1996) assessed the implementation, costs and effects of mediation and ENE programs for civil cases in six pilot courts over a two-year period and compared them to cases without neutral evaluation in the previous year. The two ENE programs evaluated were in the Southern District of California and the Eastern District of New York.

The Southern District of California program is mandatory for all cases scheduled for a pretrial scheduling conference and is conducted by the magistrate judge. The typical session takes 2.5 hours over two days and is held about 124 days after commencement of the case. In one of the few studies to look at the impact of an ENE process on the length of time required to resolve a case, Kakalik et al. (1996) found that the median number of days to the conclusion of a case was 316 for the ENE program compared to 388 prior to implementation of the ENE program, and that lawyers' and litigants' satisfaction levels with the management of the program were higher for the ENE program compared to the satisfaction levels prior to implementation of the ENE program (lawyers: 84% compared to 71%; litigants: 73% compared to 66%).

The Eastern District of New York program involves mandatory referrals, made at the judges' discretion, to lawyers acting pro bono for neutral evaluation. The typical

session lasts 3.5 hours and takes place 377 days after commencement of the case. Kakalik et al. (1996) found that the median number of days to the conclusion of a case was 561 for the ENE program compared to 614 the previous year without the ENE program, and satisfaction with the program for both lawyers and litigants was comparable.

The researchers concluded that there was no strong statistical evidence that the mediation or neutral evaluation programs studied significantly affected time to disposition, litigation costs or lawyers' and litigants' satisfaction with case management (Kakalik, et al., 1996). However, they did not find that the programs had any detrimental effects. They suggested that since the programs are relatively new, refinements should be expected as time progresses. Indeed, they stated:

Since the time when the cases in our study were referred to ADR, a number of the study districts have changed the timing and method of the referral, the number and type of cases deemed appropriate for inclusion, or the length and timing of the ADR session itself. Perhaps most important, mediators and [neutral] evaluators have had time to acquire experience in conducting the sessions, and judicial officers have become more familiar with the types of cases that would be helped by a discretionary referral or by a firm suggestion to the parties to volunteer. The evolution and fine-tuning of these ADR programs is an ongoing process. (Kakalik et al., 1996, p. xxxv)

In 2002, Hennepin County Family Court Services (FCS) in Minnesota developed a pilot program to apply the ENE concept to custody and parenting cases. Known as a social ENE program, or SENE, the pilot was expanded to a full program in 2004 (Pearson, 2006). In this program, litigants receive feedback on the probable outcome of a case from two neutral experienced FCS staff, one male and one female. In a confidential two- to three-hour session, parties make brief case presentations, answer questions from the evaluators, and then receive their feedback. Time is provided for meetings with counsel, and settlement negotiations are attempted. In some cases, additional information is requested and subsequent meetings are scheduled. The process is completed within one month. If settlement is not reached, then the case proceeds to a traditional custody evaluation. Data from the pilot study indicate that of the 349 ENE cases completed, 51% reached full settlement and a further 12% reached partial settlement (Pearson, 2006). While data were not collected on the impact on the court system, it was suggested that the high early settlement rate helped the court close more cases within the one-year standard established by the Minnesota Supreme Court for civil cases.

Based on the success of the pilot project in Hennepin County, a financial ENE (FENE) pilot was launched to address property and financial issues (Minnesota Judicial Branch, 2010). An Ad Hoc Working Group on Family Court Early Case Management

(ECM) created Best Practices Guidelines, and in 2004 the Minnesota Supreme Court authorized the creation of ECM/ENE pilot projects throughout the state, declaring that the Best Practices Guidelines superseded other rules of court where they were inconsistent with those rules (Minnesota Judicial Branch, 2010). As of November 2011, SENE and FENE programs are available in all 10 judicial districts and in nearly 60% of counties in Minnesota (Minnesota Judicial Branch, 2012).

According to Minnesota's Best Practices Guidelines, every family court case should be scheduled for an initial case management conference within three to four weeks from the date of filing the first pleading (Minnesota Judicial Branch, 2012). The ENE program is a component of early case management, and is introduced as a voluntary option at the case management conference. The ENE program is described as a "confidential, settlement-oriented, accelerated alternative dispute resolution process that moves families through court as quickly, fairly and inexpensively as possible" (Minnesota Judicial Branch, 2012, p. 1). If the parties choose to participate in an ENE program, it is scheduled within three weeks of the initial case management conference.

SENEs are conducted by a male and female team to avoid any appearance of gender bias, and often pair a lawyer with a mental health provider. They typically take three hours. FENEs, on the other hand, are conducted by one evaluator, and usually take six hours. Additional sessions may be required, and a report informing the court of any full or partial settlement agreements is provided within 30 days of the initial session. According to the Minnesota Judicial Branch (2012), overall settlement rates in the state range from 60% to nearly 100%.

Rosters of trained evaluators are maintained by the programs. Evaluators are not employees or contractors of the government; rather they are self-employed and as such bill and collect payments independently. Most of the programs in Minnesota charge for services on a sliding-scale basis (Minnesota Judicial Branch, 2010). For example, in Hennepin County, the fee per case for a SENE ranges from \$0, if the family's combined income is less than \$60,000, to \$500, if the combined income exceeds \$100,000. The fee for a FENE ranges from an hourly rate for the evaluator of \$0, if the gross annual family income is less than \$25,000, to an hourly rate of \$300, if the family's income exceeds \$250,000.

The ENE process is also being used in the family law context in Colorado (Colorado Judicial Branch, n.d.). In that state, the Early Neutral Assessment (ENA) program helps parents reach informed agreements about parenting plans for their children. Similar to the SENE in Minnesota, the ENA team is provided by a mixed gender team of evaluators, in which one evaluator is a lawyer and the other is a mental health professional. Both evaluators are experienced in working with families and the legal system.

The program is voluntary and confidential, and provides parents with a realistic expectation of what the likely outcome would be if they went to court. The cost of the program is \$400 per party, although low-income parties may qualify for state-sponsored subsidies. The ENA takes four hours and is held at the courthouse. A judicial officer meets the parents briefly at the start of the session to explain the value of the program and to convey to them that it is the court's desire to assist them in reaching their own decision. If an agreement is reached during the session, the participants go directly into the courtroom to put the agreement on the record. Each parent expresses his or her concerns and views about the parenting plan and any other non-financial issues. After a break, the ENA team "offers feedback and options to the parents to consider, given the parents' specific circumstances, the ages of the children, what child-development research says, and what is likely to occur if the case were to go to a hearing" (Colorado Judicial Branch, n.d., p. 2). The parents take another break to consult with their lawyers, if any, reflect on the team's feedback and reconvene with the ENA team to develop a parenting plan for the children. According to the Colorado Judicial Branch (p. 2):

ENA has been extremely successful in Minnesota, where it began, and in the Colorado counties where it has been introduced. When parents participate in shaping the solution for their children, they are more satisfied with the outcomes and more able to collaborate about future parenting decisions. Having experienced, neutral, professional assistance in building the parenting plan increases the likelihood of establishing a child-focused pattern early in the process, and avoiding expense and anger down the road.

New York County Supreme Court (2012) provides another example of an ENE program in the family law context. The Matrimonial Neutral Evaluation Program offers parties free access to a qualified evaluator to assist them and their counsel in reaching a resolution on one or more issues, including child custody, visitation, child support, and financial and property issues. The process is confidential and non-binding, and the evaluator, who has expertise in the subject matter of the dispute, provides an assessment of the likely outcome if the parties were to go to court.

In this program, parties' counsel exchange and submit to the evaluator at least five days prior to the session a brief summary of the issues, relevant facts and applicable law, as well as a sworn statement of their client's net worth. During the session, each party makes a brief presentation, and the evaluator may ask questions. Parties are required to attend the session with their lawyers. The program is not considered appropriate in cases of child abuse or if there is a severe power imbalance, such as in cases of domestic violence.

3.7 Canada

Despite the popularity and widespread use of ENE programs in the United States, their use in Canada has been very limited. The Department of Justice Canada's *Dispute Resolution Reference Guide* (2006) describes the ENE process, but reports that it is not a court-ordered process and is used on a limited basis through private arrangements between the parties.

The First Choice program in Winnipeg, Manitoba is an example of a Canadian ENE program operating in the family law context (Manitoba Family Services, n.d.). First Choice is a free, confidential evaluation service designed to help separating parents resolve parenting issues in a timelier manner. It is intended to be an alternative to formal court-ordered parenting assessments, which are longer and more involved, and require a counsellor to have a number of office and home visits, observing the children with both parents, as well as consulting with other people involved with the family.

Parties are referred to First Choice by a judge, and both parties must agree to the process. A male and a female counselling team conduct intake interviews with each parent by telephone, and then conduct an in-person three-hour assessment session with both parents and their lawyers, if applicable. The team actively asks questions throughout the session to ensure they understand the issues in dispute, and the team may also interview children or other professionals involved with the family. The team's feedback is provided to the parties and their lawyers, but not to the court. Following the session, parents may negotiate parenting plans, access other services, or return to court if there is no resolution.

An evaluation of the First Choice Program by Finnbogason in 2011 (as cited in Shaw, 2014) found that 31% of cases reached full settlement, and a further 51% reached partial settlement. Most parties (82%) reported that they were satisfied or very satisfied with the program. Almost three-quarters of the parties (71%) said the process helped prevent a lengthier dispute, and 79% said it would help them to better manage and resolve parenting issues in the future. The program has since expanded to two other communities in Manitoba.

In Alberta the Dispute Resolution Officer (DRO) program presently offered in Calgary and the Child Support Resolution Officer (CSRO) program in force in Edmonton share many similarities with an ENE program. According to Family Justice Service's website,² the DRO program is mandatory for parties applying for or varying child support in the Court of Queen's Bench in Calgary, and is voluntary for individuals making applications for child support in the Provincial Court. The CSRO program is mandatory for self-represented parties applying for or varying child support in the Court of Queen's Bench in Edmonton. Both programs are offered at no charge to the

² <https://www.albertacourts.ca/resolution-and-court-administration-serv/family-justice-services/mediation-dispute-resolution-processes#csrp>.

parties and allow parties to meet with a senior family law lawyer. Once parties have made financial disclosure, the lawyer will meet with them to discuss the issues and describe the requirements of the Child Support Guidelines. The lawyer will help the parties to resolve their dispute using interest-based mediation techniques and, if an agreement is reached, a consent order is prepared by Family Justice Services staff. If an agreement is not reached, the lawyer will explain to the parties the likely outcome if the matter proceeds to court. Meetings with the lawyer are limited to one hour, and are held on a without prejudice basis.

The Canadian Research Institute for Law and the Family conducted an evaluation of the DRO and CSRO programs in their pilot phase (Gomes, Paetsch, Bertrand, & Gee, 2003). Based on feedback from the program personnel, court officials, family law lawyers, family court judges, community representatives and clients, both programs were found to be effective in assisting parties to settle or narrow family law disputes. DRO program data indicated that issues were settled or narrowed over 80% of the time, and the number of court applications scheduled into Family Law Chambers or Domestic Special Court in Calgary decreased by 6.7% from 2001 to 2002. Interestingly, over half of the key informants thought that the one-hour time limit was not sufficient time to deal with the issues, and over half thought the scope of the projects should be expanded to include other family law issues.

A recent report prepared for the Law Foundation of British Columbia (Shaw, 2014) explored the potential use of ENE processes in family cases in British Columbia. Shaw concluded that "Early Neutral Evaluation has potential to be another tool that, if used at the right time and in the right way, could support families in achieving fair and affordable outcomes" (p. 19).

4.0 MODEL CONSIDERATIONS FOR EARLY NEUTRAL EVALUATION PROGRAMS

The ENE programs described in the previous chapter demonstrate that although there are many variations amongst models, the basic concept of the program is consistent. This chapter discusses various alternative structures of ENE programs and presents research evidence where available.

4.1 Are Family Law Cases Appropriate for Early Neutral Evaluation Programs?

ENE programs were initially developed in the United States as an effective mechanism for addressing non-family civil disputes, and Levine (1989a) found in his evaluation of the Northern District of California's ENE program that the most common types of cases that went through the ENE process included contracts, torts, labour, and civil rights disputes. The original program was not created to handle divorce cases as it was a federal court-organized program, and federal courts in the United States do not handle divorce (Santeramo, 2004). Many of the international ENE programs also deal with non-family civil disputes, and the ENE process is often used in commercial and business contexts. Its success as a non-judicial dispute resolution method, however, led some jurisdictions to use ENE processes in the family law context. According to Maycock (2001, p. 37):

One of the primary problems in representing some clients in divorces is their persistent but unfounded belief that the goal of a divorce is to determine which party is the better person. Divorcing parties often have difficulty in accepting their attorneys' advice that the court in a divorce attempts to dissolve their financial partnership, provide for support and make determinations about the best interests of children, not to decide which spouse caused the divorce. ENE can provide a means to reinforce their attorneys' counsel by allowing the parties to hear from an objective third party that their attorneys are in fact focusing on the issues that a judge would focus on. The parties may then be prepared to consider settlement, taking into account the evaluator's opinions as to the likely outcome of their case.

As cited in Shaw (2014), Wayne Brazil, the California judge who was instrumental in developing the ENE process, has reservations about its suitability for family cases as the ENE process was not designed to deal with personal and emotional issues. However, Santeramo (2004) proposed the ENE process as a valuable option to settling the financial issues in divorce cases because it can operate to decrease conflict between the parties. In Minnesota, social ENEs deal with custody and parenting time issues, while financial ENEs address financial and property division issues (Minnesota

Judicial Branch, 2010). The program has proven to be highly successful, with the majority of cases reaching an early settlement. According to Pearson (2006, p. 672), “the ENE program reduces the stress and expense of custody disputes for clients, expedites judicial case management, maximizes Family Court Services staff efficiency, and focuses subsequent evaluations on critical issues.”

In general, the research suggests that ENE processes can be used in any dispute, although some authors question their efficacy with self-represented litigants and others suggest that there may be special considerations in cases involving domestic violence (see Sections 4.2 and 4.3).

4.2 Are Early Neutral Evaluation Processes Appropriate for Self-Represented Litigants?

The increase in the number of self-represented litigants in family law cases has been well documented in the literature, and one of the challenges for the family justice system is how to improve access to justice for this particular population (Action Committee on Access to Justice in Civil and Family Matters, 2012, 2013; Boyd & Bertrand, 2014; Macfarlane, 2013). In his first evaluation of the Northern District of California’s experimental ENE program, Levine (1987) concluded that the process was less productive with *pro se*, or self-represented, parties than it was with those who had legal representation. His sample included two cases in which clients were acting *pro se*, and his interviews with them indicated that they did not fully comprehend the relationship between the ENE program and the court proceeding. Consequently, they did not appreciate what the evaluator was doing, nor did they understand how to use the evaluation outcome. On his recommendation, the ENE program decided to exclude *pro se* cases.

The ENE program for custody and parenting time cases in Hennepin County, Minnesota, however, does allow *pro se* parties to participate in the process. According to Pearson (2006, p. 680), *pro se* parties may be confused about the legal process, and therefore “evaluators may then have to provide more explanation to the parties regarding custody labels, information that should be presented in light of statutory considerations, how ENE fits into the legal process, and the steps the parties need to take at the completion of the ENE.” Santeramo (2004) agrees that *pro se* parties can benefit from ENE programs. She states that the answer to the large number of *pro se* litigants lies not in providing partial legal assistance, but in court-mandated non-judicial dispute resolution programs, like ENE programs.

An article by Mosedale (2010) addressed the issue of whether ENE programs are appropriate for victims of domestic violence, particularly those who are self-represented. Initially, cases were not referred to the Hennepin County ENE program if there were allegations of domestic violence. However, some victims wanted to participate in the process, and procedures were revised to allow cases involving

allegations of domestic violence to be referred to the program. Mosedale (2010, p. 4) quotes Tanja Manrique, a lead judge for the statewide Early Case Management/Early Neutral Evaluation Initiative, who argues that since most domestic violence victims cannot afford a lawyer, it is unfair to exclude them from the process:

“How is a *pro se* victim going to effectively represent him or herself at a trial involving custody or parenting time or child support or spousal maintenance or who gets the house? If there have been power and control issues in the marriage, is it reasonable to infer that a *pro se* victim is going to be better off at a trial? Or is that person more likely to feel that justice has been served, that they’ve been heard, that the outcome is thoughtful, that they had their chance to put everything on the table, if they go to an ENE with two very highly qualified evaluators?” Manrique asked. For Manrique, the answer to that latter question is an unqualified, Yes.

4.3 Should Early Neutral Evaluation Programs Be Mandatory or Voluntary?

Santeramo (2004) argued that ENE programs should be mandatory to ensure that parties make an effort to participate in at least one ENE session to assess their case, with no requirement that they attend additional sessions if the differences between them are too wide. Making the program mandatory also addresses the problem of lawyers’ reluctance to participate. In an early evaluation of an ENE program in the Northern District of California, Rosenberg and Folberg (1994) found that even though over 80% of the lawyers who had participated in the program said they would select the ENE program in other cases if it were available, none did so voluntarily. Similarly, very few of the lawyers whose cases were assigned to the ENE program chose to opt out, leading the researchers to conclude that “litigants and their attorneys often follow the path of least resistance, simply staying on the track into which they were initially slotted regardless of their judgments about the suitability of that track for their case” (Rosenberg & Folberg, 1994, p. 1538).

According to Santeramo (2004), the most persuasive argument against mandatory dispute resolution processes in divorce cases is concern that there may be power imbalances if there is a history of domestic violence in the marriage. However, she does not favour opt-out rules to allow parties to avoid the process and instead offers alternatives such as parties having a support person present during the session, or having parties see the evaluator separately.

The Minnesota Judicial Branch (2012) policy on best practices for ENE programs states that parties’ participation in the ENE process should be voluntary because successful outcomes are more likely if the parties voluntarily select the process. In addition, the policy recognizes that the process may not be appropriate for all cases, and “a victim of domestic violence may be excused from an ENE process previously agreed to if he or she is no longer comfortable with the process” (Minnesota Judicial Branch,

2012, p. 9). The Minnesota Judicial Branch recommends that ENE evaluators screen all cases for domestic violence in case alternative logistical arrangements need to be made and to ensure that the process is appropriate, free of coercion, and any agreements reached are voluntary.

In British Columbia, the *Family Law Act* requires family dispute resolution professionals to assess for the presence of family violence to determine the extent to which the family violence might affect the safety of the party, as well as the choice of dispute resolution process (Shaw, 2014). Shaw (2014, p. 19) asks, “if this is the approach underlying the use of dispute resolution processes in family law in BC, including mediation and parenting coordination, is there any reason not to take the same approach with ENE?”

4.4 Who Should Act as the Evaluator?

When ENE programs were first developed in the Northern District of California, the subcommittee tasked with designing the program considered whether the evaluators should be judges or magistrates, or private lawyers (Brazil, 1990). The subcommittee concluded that private lawyers should serve as evaluators for several reasons:

- it was recognized that judges or magistrates were not likely to be in a position to devote the necessary amount of time to the program, estimated to be five hours or more per case;
- it was thought that private lawyers, serving as evaluators in no more than two cases per year, would bring an increased level of enthusiasm and commitment to the role;
- there was concern that judges would not be able to be as candid with the parties about the strengths and weaknesses of their case given their training to exhibit impartiality at trial, and likewise that the process might adversely affect the impartiality of judges hearing the same case at trial;
- there was concern that parties might not be as forthcoming with a judge as with a private lawyer; and
- it was thought that private lawyers would bring considerably greater subject matter expertise to the table than would a generalist judge.

Based on these factors, the subcommittee recommended that “experienced, highly regarded private attorneys, rather than judicial officers, host the ENE sessions” (Brazil, 1990, p. 347). However, the extent to which concerns about the ability of judges to

communicate their views frankly or the relative expertise of judges, particular those sitting in unified family courts, are relevant in the Canadian context is unclear.

Evaluations of ENE programs indicate that the success of the programs largely depend on the quality of the evaluator (Levine, 1987; Minnesota Judicial Branch, 2010; Pearson, 2006; Rosenberg & Folberg, 1994). It is essential that the evaluator have expertise in the subject matter of the dispute, although Santeramo (2004) acknowledges that the evaluator's expertise is not the only factor to consider, as a lawyer with 20 years' experience may not have a good reputation among the bar, and a young lawyer with the right personal qualities to be a good evaluator may not know enough about the subject matter to make a reliable evaluation.

Therefore, the evaluator should have enough experience to ensure that they know the law and probable outcomes. Considering the large volume of cases expected in divorce cases, using Nassau County, New York's program as a model, requiring five years of substantive experience in matrimonial law coupled with demonstrated expertise in the subject area (proven through reputation and reference evaluations) and proper training should be sufficient. (Santeramo, 2004, p. 334)

The Minnesota Judicial Branch's best practices policy states that each ENE program in the district "should develop minimum qualifications for neutrals that include completion of state-approved ENE training and minimum years of family experience" (2012, p. 9). Most programs in the judicial district require neutrals to have been practicing law for at least 10 years, with substantial emphasis on family law in the last 5 years, including family law trial experience, and they must complete a three-day specialized ENE training course. Some programs also require neutrals to have mediation training and certified training in domestic abuse issues (Minnesota Judicial Branch, 2010).

In British Columbia, the Family Law Act Regulation sets out minimum training and practice standards for family dispute resolution professionals wishing to help people resolve family law disputes. Family law mediators, family law arbitrators and parenting coordinators are required to have specialized training, in addition to which arbitrators and parenting coordinators are required to have 10 years of family-related practice and training in a wide range of psychosocial disciplines relating to family dynamics, children and separation and divorce.

In some jurisdictions, such as in Minnesota and Colorado, the ENE session is conducted by a team of one male and one female, and a lawyer is often paired with a mental health provider (Colorado Judicial Branch, n.d.; Minnesota Judicial Branch, 2012). According to Minnesota's best practices policy, the male-female composition of the social ENE team is crucial because it alleviates "parental concerns about gender bias on custody issues in the family court system" and results in a "more comprehensive

and holistic view of the case” (Minnesota Judicial Branch, 2012, p. 10). In addition, the team approach:

enhances the ability to track the often complicated dynamics of the session. When one member is speaking, the other can collect their thoughts or observe the parents’ non-verbal communication or dynamics between the attorneys; these observations often provide cues as to how to structure subsequent aspects of the session. The team can make strategic decisions regarding which member should say what to whom while delivering the evaluative opinion and making recommendations; this can be critical to how the parties react to the feedback. (Minnesota Judicial Branch, 2012, pp. 10-11)

Minnesota recommends that rosters for social ENEs include mental health or child development professionals to allow parties the opportunity to select an evaluator with a particular skill set appropriate for their case. For example, an evaluator with expertise in child development might be desirable in a case involving an infant or toddler, and a mental health professional might be helpful in a case where there are substance abuse issues, personality disorders, or other mental health problems (Minnesota Judicial Branch, 2012). Non-lawyer neutrals are required to have the equivalent of a master’s level degree in social work or psychology, as well as at least 5 years’ experience working with families and children (Minnesota Judicial Branch, 2010).

According to the Department of Justice Canada’s (2006) *Dispute Resolution Reference Guide*, parties are advised to consider the following factors when selecting a neutral evaluator: impartiality; reputation for good judgement and fairness; experience in litigation; and expertise in the subject matter.

4.5 When Should Early Neutral Evaluation Processes Occur?

Most proponents of ENE programs state that the process should occur either at some point early in the process or before the filing of the first motion (Brazil, 1990; Santeramo, 2004) as the purpose of the ENE process is to give parties a realistic view of the merits of their case and encourage early settlement. According to the Minnesota Judicial Branch (2010, pp. 54-55), if an ENE session is not scheduled within the early days after filing, it defeats the purpose of early intervention since “much of the value in the process that contrasts with a traditional path through family court is in the early opportunity to engage parties in resolving their conflicts before they become protracted.” In addition, Santeramo (2004) makes the point that the later the ENE process is initiated, the less cost effective it is.

In its best practices policy, the Minnesota Judicial Branch (2012) recommends that, following the Initial Case Management Conference order, social ENEs be completed within 45 days and financial ENEs be completed within 60 days, unless the

court extends the deadline upon request by the parties, their counsel, or the evaluator. The Branch believes these timelines promote early resolution of the issues.

Shaw (2014) states that while court rules can require ENE processes to take place within prescribed timelines for court-connected programs, enforcing timelines is more complicated for programs that take place outside of court. While guidelines for timelines could be developed, Shaw acknowledges that a more flexible approach might be preferable for a pilot program, although it is important to remember that the primary purpose of the ENE process is to provide an early examination of the case and should be held close to the commencement of conflict.

4.6 Who Should Attend the Early Neutral Evaluation Session?

ENE sessions should be attended by both parties and their lawyers, if they are represented, in addition to the evaluator(s). One of the best practices recommended by the Minnesota Judicial Branch (2012, p. 11) is that “attorneys of record should attend all ENE sessions.” The participation of parties’ lawyers is viewed as critical to any resolution of a case in an ENE session because lawyers can guide and advise their clients during the process, and then take responsibility for drafting any agreements resulting from the ENE session.

The presence of counsel is also required in New York County’s Matrimonial Neutral Evaluation Program (New York County Supreme Court, 2012), and unless granted an exemption by the evaluator for good cause, the parties must also be present during the session. According to the program’s management, participation by the parties not only increases the likelihood of settlement, but also improves compliance with any agreements reached and enhances parties’ satisfaction.

Parties not represented by counsel generally need additional resources to help them prepare for the ENE process. Consideration should be given to the skills and training that evaluators would need to deal effectively with self-represented litigants (Shaw, 2014). Pearson (2006) also states that when parties do not have legal counsel, evaluators need to be more active in providing education and giving more reality checks during the ENE process.

4.7 How Long Should Early Neutral Evaluation Sessions Last?

As originally conceived in the Northern District of California, a typical ENE session “lasts for more than two hours” (Brazil, 1990, p. 334). In their evaluation of ENE programs, Kakalik et al. (1996) found that the typical session in the Southern District of California lasted 2.5 hours over two days, and the average session in the Eastern District of New York lasted 3.5 hours in a single session.

In Minnesota, a typical social ENE session conducted by two evaluators takes three hours and financial ENE conducted by one evaluator usually takes six hours, although additional sessions are occasionally required (Minnesota Judicial Branch, 2010). The First Choice Program in Manitoba involves a three-hour initial assessment session (Manitoba Family Services, n.d.), and the Colorado Judicial Branch (n.d.) schedules four-hour meetings.

4.8 How Are Early Neutral Evaluation Programs Funded?

Santeramo (2004) recommended a cost-recovery model for funding ENE programs drawn from a general surcharge on court filing fees, thereby spreading the cost of ENE programs among all litigants. A cost-recovery model reduces the cost to taxpayers, and removes potential perception of bias on the part of evaluators because no one party is paying for the service. Santeramo (2004) also recommended that a pro bono system be in place for very poor litigants, which should be easy to determine in divorce cases where parties are required to disclose their incomes.

The Minnesota Judicial Branch (2012) recommends that programs in its judicial districts have a sliding fee scale to promote access by all parties and to provide appropriate compensation to ENE neutrals where parties have greater means. A review of programs in Minnesota indicates that most programs have adopted a sliding scale, although some still charge a flat rate of \$600, to be split between the parties, and one program requires parties to pay their own lawyer's rate, with a sliding scale for unrepresented parties. The fees for programs with sliding scales typically range from \$200 per party for incomes below \$25,000 to \$800 per party for incomes between \$125,000 and \$250,000 (Minnesota Judicial Branch, 2010).

In British Columbia, attempts to use a sliding scale for the Distance Mediation Pilot Project failed because the mediators did not think it was appropriate for them to determine the parties' income, especially if incomes were in dispute, as is often the case when support is at issue (Shaw, 2014). In addition, mediators were concerned that assigning different fee levels to the parties might impact their perceived neutrality, as well as the power imbalance between the parties. Shaw (2014) suggests that sliding scales might be easier to implement when a program is administered centrally and the dispute resolution professionals are not determining the amount. Another option suggested by Shaw (2014) is to have parties pay evaluators a set fee, which would be determined in consultation with potential evaluators and would take into account their qualifications, as well as other available funding.

In Alberta, family justice services are funded in a variety of ways.³ Some programs, such as Parenting After Separation, Caseflow Conference, the Calgary Dispute Resolution Officer program, and the Edmonton Child Support Resolution

³ See Family Justice Services' website at: <https://albertacourts.ca/resolution-and-court-administration-serv/family-justice-services>.

Officer program, are funded by the government and are provided at no cost to the parties. Other options, such as Parenting Intervention and Parenting Assessment available through the Court of Queen's Bench, are paid for by the parties themselves. Lastly, some programs are subsidized by the government, such as the Family Mediation and Brief Conflict Intervention programs provided by Family Justice Services, which are provided at no cost to qualifying families if there is at least one dependent child under the age of 18 and one or both parties have an income of less than \$40,000 per year.

4.9 Who Should Be Responsible for Early Neutral Evaluation Programs?

Santeramo (2004) states that ENE programs should be court-mandated and run by the judiciary, arguing that in addition to lending credibility to the program, she believes making the judiciary responsible will ensure that the evaluators are properly trained and accredited. She also recommends that an independent and experienced coordinator with knowledge of ENE processes be hired to run the program and assist the judicial staff.

Pearson (2006) similarly identifies a strong cooperation between the judiciary and evaluators as one of her critical considerations for success, arguing that "a successful ENE program can only be provided through a partnership between the judiciary and the evaluators" (p. 675). She further suggests that this partnership will help to ensure that the process runs smoothly, and the cooperation within the justice system presents a positive model for the parties. According to Pearson (2006), judges and other referees can enhance the program by informing litigants about the advantages of the ENE program and explaining how it compares to other forms of non-judicial dispute resolution programs, that it can save them time and money if they do not fight over custody, and that it offers a flexible approach to issues that often become stumbling blocks for people.

In a paper exploring the ENE process for family cases in British Columbia, Shaw (2014) points out that while the American courts have taken a central role in promoting dispute resolution, in BC the development of non-judicial dispute resolution programs has taken place outside the courts. She states that the most likely source of referrals for ENE programs would be the bar and justice system intermediaries, and suggests that a pilot ENE program might focus on working with these groups to generate referrals to the program.

Manitoba's First Choice Program is run by Family Conciliation Services in the Department of Family Services, and parties are referred to the program by a family court judge. In Alberta, a variety of programs and services for individuals with family law issues are offered through Family Justice Services, a department of Alberta Justice and Solicitor General, in collaboration with the courts. Programs are available at little or no cost, and FJS offices are located throughout the province. Family law programs are

also provided through legal clinics such as Calgary Legal Guidance and Edmonton Community Legal Centre. These organizations might be appropriate hosts for a pilot ENE program in Alberta.

Regardless of who has responsibility for the ENE program, it has been the experience in Minnesota that while some programs were designed to require little or no staffing by dedicated individuals, “programs benefit from dedicated staff who handle coordination and scheduling tasks” (Minnesota Judicial Branch, 2010, p. 55). Scheduling mechanics were identified as a problem in Levine’s (1987) evaluation of the Northern District of California’s pilot ENE program. He found there were time delays for evaluation sessions because of the difficulties involved in coordinating the schedules of five or six people, and recommended that the court provide additional administrative support. In their analysis of an ENE program, Rosenberg and Folberg (1994, p. 1542) concluded “any ADR program should include highly qualified and knowledgeable professional personnel.”

5.0 CONCLUSIONS AND RECOMMENDATIONS FOR EARLY NEUTRAL EVALUATION PROGRAMS IN ALBERTA

The Canadian Research Institute for Law and the Family conducted this project to review and analyze early neutral evaluation programs in other jurisdictions and explore their possible utility for family justice processes in Alberta. Specifically, this project had the following objectives:

- to review the current literature on early neutral evaluation processes in Canada and internationally;
- to analyze early neutral evaluation models and identify the advantages and disadvantages of model characteristics; and
- to make recommendations regarding best practices for early neutral evaluation processes in family law matters for Alberta.

To meet these objectives, an international literature review was carried out to examine emerging trends, issues, and best practices in ENE models in family law matters. The Canadian Research Institute for Law and the Family conducted this project with funding support from the Alberta Law Foundation.

5.1 Conclusions

The following conclusions regarding early neutral evaluation programs are supported by the research literature.

- (1) ENE programs facilitate settlement, and save litigants time, money and emotional stress as a result.
- (2) ENE programs provide a useful reality check for litigants, and their lawyers, early in the process through an objective, independent and unbiased evaluation of the merits of the case by an experienced and respected evaluator who is usually a lawyer.
- (3) ENE processes enhance direct communication between litigants and improve their understanding of the case.
- (4) Even if settlement is not reached, ENE programs help to identify the issues in dispute and help prepare litigants for further dispute resolution processes both in and out of court, also saving litigants time and money.

- (5) The discussions held in ENE programs are confidential, and offers and admissions made during the process are communicated on a without prejudice basis.
- (6) ENE programs yield high satisfaction rates for participants, including litigants, their lawyers, and the evaluators.
- (7) Although data have not been collected on the impact of ENE processes on the overall efficiency of the court system, research suggests that high early settlement rates help the court close more cases in a timely manner, thus saving money for the courts.
- (8) There is some evidence that when parents participate in shaping the post-separation parenting arrangements for their children, they are more satisfied with the outcomes achieved and are better equipped to resolve future parenting disputes without resorting to litigation.
- (9) ENE processes are common in non-family civil disputes, but have been successfully used in family law disputes to deal with custody and parenting time issues, as well as financial and family property issues.
- (10) ENE processes have been used with self-represented litigants successfully.
- (11) Special considerations must be taken into account when ENE processes are used in cases involving domestic violence.

5.2 Recommendations for Alberta

In Alberta, proceedings under the *Divorce Act* and the *Matrimonial Property Act* are heard in the Court of Queen's Bench, and most proceedings under the *Family Law Act* can be heard in either court. Regardless of which court documents are filed in, dispute resolution processes can occur at any time during the justice process. The provisions of the Alberta Rules of Court (AR 124/2010) regarding dispute resolution processes state:

- 4.16 (1) The responsibility of the parties to manage their dispute includes good faith participation in one or more of the following dispute resolution processes with respect to all or any part of the action:
 - (a) a dispute resolution process in the private or government sectors involving an impartial third person;
 - (b) a Court annexed dispute resolution process;
 - (c) a judicial dispute resolution process described in rules 4.17 to 4.21;

(d) any program or process designated by the Court for the purpose of this rule.

The rule describing the purpose and intention of the Rules of Court states, in part, that:

- 1.2 (1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
- (2) In particular, these rules are intended to be used
 - (a) to identify the real issues in dispute,
 - (b) to facilitate the quickest means of resolving a claim at the least expense,
 - (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,
 - (d) to oblige the parties to communicate honestly, openly and in a timely way, and ...
- (3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,
 - (a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,
 - (b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court, ...
 - (d) when using publicly funded Court resources, use them effectively. ...

These provisions suggest that an ENE program of some sort would fit within the existing Rules of Court as a “dispute resolution process ... involving an impartial third person” without the need for amendment, and would in fact further the overall purpose and intention of the Rules.

Given the positive findings regarding the use of ENE processes in other jurisdictions, we suggest that a small group of interested family law practitioners, mediators and arbitrators, judges, and representatives from Alberta Justice and court administration, form a working group to develop a pilot ENE program to address family law disputes. Based on the international literature review and best practices learned from the available evaluations of ENE programs, the Institute makes the following recommendations for this working group.

- (1) Limited consultations should be held with the local bar and judiciary to gauge their interest in and support for a pilot ENE program, as well as whether there should be any limitations on the types of family law cases addressed. Enquires should be made to determine where an ENE program could be piloted. It is

essential that the need for administrative support for coordination and scheduling appointments be considered when choosing the location for the pilot program.

- (2) Discussions held during ENE processes should be confidential and the evaluation results should be non-binding unless settlement is reached. Although there are differing opinions as to whether the process should be mandatory or voluntary, it is suggested that participation in the pilot program only should be voluntary and that the court may recommend participation.
- (3) Best practices require that every aspect of the program be documented, and that all information communicated to the parties be as clear as possible. Established ENE programs have written procedures, as well as an agreement form for parties to sign that confirms their commitment to cooperate with the process and their agreement to maintain confidentiality with respect to offers and admissions made in the course of an ENE process. Similar documents will be required for a pilot ENE program in Alberta.
- (4) Similar to ENE programs in Minnesota, we recommend that a pilot ENE program in Alberta be open to self-represented litigants, although we recognize that self-represented litigants may require additional supports, including additional information about the nature of the program, its relationship to the court system and the consequences of settlement.
- (5) We recommend that evaluators screen cases for domestic violence, and determine the suitability of a family law dispute for the ENE pilot program based on the extent to which the domestic violence may affect the safety of a litigant, as well as the litigant's ability to negotiate a fair settlement and their willingness to participate, and whether the litigant is self-represented.
- (6) Evaluators should have at least 10 years' experience practicing family law. They should be respected members of the bar, and should be required to attend a specialized ENE training course developed by the program.
- (7) While ENE programs in Minnesota and Colorado use a team approach of one male and one female evaluator, often a lawyer and a mental health professional, we suggest that a pilot ENE program begin with one evaluator, a lawyer, with the option to bring in a mental health professional as required. We do not see the need to ensure an equal division of genders among team members, particularly given the questionable benefit of such a division would bring to family law disputes involving same-sex couples.
- (8) To maximize the benefits of an ENE program, ENE sessions should be held as early in the process as possible. Best practices range from 45 to 60 days of a Case

Management Conference order in Minnesota. We suggest that the ENE process begin within 45 to 60 days of the filing of a defence or counterclaim to ensure that the process is only provided when a claim is contested.

- (9) At least one week prior to the ENE session, each party should submit to the evaluator and each other a written summary of the nature of their dispute. This allows the evaluator time to review the case prior to the ENE session. We suggest that a prescribed form be developed to limit the opportunity for narrative, and the arguments and invective which often accompany it in family law disputes.
- (10) The litigants and their lawyers, if represented by legal counsel, should be required to attend the ENE session to increase the likelihood of settlement, compliance with any agreements reached and participant satisfaction.
- (11) According to the literature, an average ENE session lasts for three hours, allowing time for the following steps:
 - a) the evaluator will make opening remarks explaining the purpose of the ENE program, the confidential nature of the proceedings, and the procedures that will be followed;
 - b) each party will make a 15- to 30-minute presentation of their case;
 - c) the parties may ask questions of each other to clarify their positions and their evidence;
 - d) the evaluator may ask questions to clarify issues;
 - e) the evaluator will provide feedback on the merits of each party's case, the likely outcome if it goes to trial, and recommendations for the resolution of the dispute;
 - f) the parties may attempt to reach settlement of some or all of the issues in the dispute with the assistance of the evaluator, if desired;
 - g) where a complete settlement is not reached, agreements are made regarding the disclosure of additional documents, the scheduling of discovery, and next steps in the proceeding; and
 - h) a record will be signed by the parties summarizing any agreements reached and identifying the matters remaining in dispute, if any.
- (12) It is critical that any settlements reached should be recorded immediately following the conclusion of the ENE session, and be signed by the litigants and

their lawyers, if represented by legal counsel, to discourage buyer's remorse and the subsequent unravelling of the parties' settlement. The working group will need to consider whether such settlements should be recorded as memoranda of understanding, written agreements or consent orders, and who should be responsible for the preparing the record, particularly when one or more litigants are self-represented.

- (13) It is important that follow-up procedures be incorporated into the program administration as a regular part of the ENE process to ensure that any resulting agreements and/or orders are recorded and that any other steps recommended by the evaluator are taken.
- (14) The working group must explore funding options to pilot an ENE program. Best practices indicate that a cost-recovery model may be necessary for sustainability, with accommodations made for low-income litigants.
- (15) If a pilot ENE program is commenced, it is essential that the program be evaluated to assess:
 - a) the effectiveness and efficiency of the program, particularly with respect to the rate of full and partial settlement of disputes;
 - b) the satisfaction of litigants, lawyers and evaluators with the program;
 - c) whether the program can be improved in any way;
 - d) the long-term viability of the program, and whether the pilot program should be extended to other court centres; and
 - e) the extent of any savings realized by litigants and by the justice system as a result of the program.

The research literature demonstrates that the ENE processes are a promising dispute resolution mechanism for addressing family law matters in an efficient and economic manner. Resolving family law disputes early in on in the life of a case will save the litigants time, money and emotional stress, and better prepare them to deal with future family law problems. The literature also suggests that ENE programs enjoy high settlement rates, saving the justice system time and money and improving efficiencies. Manitoba has already implemented an ENE program, and the process is being explored in British Columbia.

While financial resources are necessarily limited in the current economic climate, the Institute recommends that consideration be given to developing an ENE pilot program that would benefit Alberta families and improve access to family justice. We

note that such a program aligns well with the objectives and guiding principles of the Reforming the Family Justice System Initiative presently exploring means of improving the family justice system in Alberta, and may be ideally suited for adoption and evaluation as a prototype by the Initiative.⁴

⁴ See the website of the Reforming the Family Justice System Initiative at: <http://www.rfjs.ca>.

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