



April 29, 2016

Family Legal Services Review
Ministry of the Attorney General
720 Bay Street, 7th Floor
Toronto, ON
M7A 2S9

Via Email: FamilyLegalServicesReview@ontario.ca

RE: Submission to Justice Bonkalo's Family Legal Services Review

The Toronto Lawyers' Association ("TLA") is pleased to respond to the joint request of the Ministry of Attorney General ("Ministry") and the Law Society of Upper Canada for submissions in respect of the proposal to expand legal service provider options for the delivery of family legal services. We applaud the Ministry's objective of searching for and implementing more innovative, accessible and affordable ways to deliver quality justice services to Ontarians.

CURRENT PATH OF CHANGE IN FAMILY LAW

The delivery and practice of family law is rapidly changing. Limited scope retainers, increased access to a range of alternate dispute processes (such as the Dispute Resolution Officer program, mediation and collaborative law initiatives), enhanced legal aid coverage, and the long awaited Unified Family Courts are all recent initiatives that are improving, and will continue to improve the process and results for Ontario citizens facing family law disputes.

The TLA strongly recommends that the Ministry should focus its efforts on improving efficiencies in the court system, including reducing the complexity of the court process to make it less onerous and confusing, faster and less onerous to navigate (as detailed below in answer to question 12), and therefore more accessible to those engaging the family law process - whether represented by legal counsel or self-represented. With the introduction of the universal Unified Family Court system, this is the ideal time for the Ministry to reconsider, reformulate, revitalize and update its court processes, which have become mired in unnecessary and burdensome administrative complexity.

For the multiple reasons outlined below, the TLA also strongly urges the Ministry that it should not expand the scope of practice in family law for licenced paralegals working independently. The TLA is concerned that the proposal to expand family law legal services to unsupervised paralegals or others is based upon an unsubstantiated assumption that Ontarians are choosing to be self-represented in family court because they cannot afford a lawyer, and that they would choose to be represented by paralegals if paralegals were able to provide family law services, and

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that those services would be less costly. We are also concerned that this proposal is based upon the erroneous assumption that family law lawyers do not already take all reasonable steps to reduce costs to their clients through alternative billing arrangements, proactive use of available technology, and engaging law students, clerks and/or paralegals under adequate and appropriate supervision.

We caution that family law is highly complicated, even in what may superficially appear to be a straightforward case. It regularly involves highly vulnerable litigants, including children. Hence, the focus must always remain on the provision of competent and qualified legal services, and not on the price tag attached to it.

OVERVIEW OF FAMILY LAW

In the experience of family law lawyers, there are few “simple” family law cases. Indeed, the leading reference text, the *Ontario Family Law Practice*, identifies that there are, at minimum:

- 34 Provincial or Federal Acts or Regulations;
- 4 sets of child support guidelines;
- 2 sets of spousal support advisory guidelines formulae;
- 2 sets of procedural rules.

This list is not exhaustive. The case law for each aspect of Family Law is also complex and constantly evolving. Every competent family law practitioner must have a working knowledge of all these factors, as well as the judgment, experience and ability to identify potential issues not raised by the client, such as the tax consequences of the choices the client is making, and the rights of others impacted by the life decisions that the client chooses.

Family Law is the part of our justice system which protects the most vulnerable in our society - the needs of children in at risk situations in child protection law; adults and child victims or potential victims of domestic violence; children, whose emotional well-being is often the casualty in bitter divorce cases; domestic partners who are victims of emotional and financial bullying and control from a spouse in a position of strength and power. While the TLA recognizes that this Family Legal Service Review is not considering child protection matters under the *Child and Family Services Act*, the reality is that being vigilant towards the protection of vulnerable clients and their children is an integral part of the role of the Family Law lawyer which cannot be compartmentalized. It arises in the case of an “uncontested, simple” divorce as it does in a contested case. Indeed, the uncontested divorce can in fact be the cases that require the greatest scrutiny to ensure that it is not the product of an abuse of power and position.

Family Law is complicated, and often complex law:

Child Welfare and Custody/Access Cases

A court hearing a child welfare matter, and obligated to make a decision involving whether to remove a child from the care of its parent or guardian temporarily or permanently, requires counsel who are informed and up to date in regard to case law in this field and to have the

judgment capacity, earned after many years of formal education and practical experience, to best present such cases and to reach out to involve other professionals (assessors, mental health professionals etc.) after due consideration in regard to costs, time delay, potential risks and rewards re: end goal for client etc. While child welfare is not included in the current review, many of the families involved in child welfare matters are also struggling with domestic and financial issues. Only lawyer licensees can competently advise clients on the totality of the legal issues with which the families may be presented.

Similar factors and considerations apply to custody cases between parties who have disparate views as to the best interests of their children. Competent counsel who can provide informed and objective advice is absolutely necessary in these cases.

Child and Spousal Support Cases

In determining child and spousal support cases, the Court increasingly must rely on counsel's knowledge and experience in regard to income determination. The conceptual basis of the Child Support Guidelines and Spousal Support Advisory Guidelines is that determination of support obligation and entitlement is based on income. While, historically, many of our citizens were formally employed by one employer and had clarity as to income in a T4 slip and tax return, the world has changed. Ontario citizens are increasingly working in part-time, temporary, or self-employed positions, or a combination thereof. At the higher end of income scale, total remuneration/compensation requires a complicated analysis of bonus entitlement, stock options, restricted stock units, partnership capital, allocation of retained earnings for working capital, pension valuations, etc. Determination of income is not simple.

Simply having access to licensed programs such as Divorcemate is not a panacea. The software is merely the foundational tool for calculations; but it will perform no better than the inputs into the program. The user must understand the required information that must be assembled for input into the software to produce the proper result. The user must be able to competently explain to his or her clients the full extent of their disclosure obligations, and assist them in identifying all income sources and net family assets. The user must be able to identify lacunae and inconsistencies in the information provided by the client and in the information produced by the opposing party. There is an extensive, complex and developing jurisprudence on the determination of income for support purposes which is distinct from the principles applied for tax purposes. This is not work for technicians. It requires the comprehensive education and experience lawyer licensees have acquired.

The TLA cites, for example the very recent case of [*Nikolaev v Fakhredinov*](#), 2015 ONSC 6267 (CanLII), which highlights exactly the abuses that can be suffered in situations of unequal bargaining power, complex property issues, and a failure of the paralegal to identify any of the problems inherent in the "consent" separation agreement he drafted.

Property Issues

Similarly, and as highlighted in the above-referenced case, in regard to property division at the end of marriage, equalization of net family property is a calculation that requires in-depth understanding of:

- trust law's application to joint and individually owned assets;
- restitutionary principles such as unjust enrichment and resulting trusts;
- property, title to which was held at date of marriage by one spouse with contributions from both spouses, and subsequently sold during the marriage;
- tracing of inherited property through the marriage, especially if co-mingled with other property acquired by one or more spouses during the marriage;
- the application of unconscionability to the equalization of net family property determination;
- valuation of diverse assets, including closely held corporations, trust interests, real estate, pensions, contingent assets and liabilities, such as taxes and costs of sale;
- identification, valuation and other issues related to property held off-shore; and
- how the equalization of net family property can impact on support issues.

We now have the added complexity in non- married partnerships of trust claims as well as understanding and applying the law related to joint family ventures.

Geographic and Legislative Jurisdiction

In addition to all of the legal issues identified above, there is the added complexity of the global village in which we live. Litigants move around, come and go from domestic partners, transfer assets, and participate in marriage, or marriage-like ceremonies. The issues often span multiple jurisdictions. Determination of the proper forum or the applicable law governing the relationships often involves significant analysis. These situations are not confined to high income litigants, but affect a broad spectrum of society. In fact, immigrant families will often have interjurisdictional issues arise in their Family Law disputes, and they may be more vulnerable than other Ontarians who are more familiar with our legislative regimes. Here, the importance of properly qualified and competent advice cannot be over-emphasized.

Issues of legislative jurisdiction, such as the current distinction between Ontario Court of Justice and Superior Court of Justice authority over specific family law issues, and residency requirement for commencement of a divorce in Ontario, and whether Ontario is the correct jurisdiction for custody, access, support or property claims must be addressed before one even completes the myriad of necessary forms to bring a matter before the court.

The Toronto Lawyer's Association is confident of the value to litigants of a full legal education, the significant licencing requirements for lawyers and the professional regulation of those who have completed this process. It is the work of professionals who are well informed, well-educated and tasked with operating with integrity and principle that ensure that litigants in the Family Law system receive reasonable access to justice without putting the public at risk and increasing their overall costs.

The TLA cites as another example of the risks arising from unsupervised paralegals practicing in the Family Law arena the LSUC discipline case of [*Law Society of Upper Canada v. Teodoro Corales Atienza*](#), 2013 ONLSHP 73 (CanLII). The Panel found that the paralegal was misleading, confusing and deceptive. The client did not understand that he had not retained a

lawyer. The paralegal put the customer at serious risk, and left that person with no recourse but to pay a lawyer to fix his errors and shoddy work.

ROLE OF PARALEGALS/CLERKS/ STUDENTS AND ASSISTANTS

Paralegals, law clerks, law students and legal assistants can, and do have an important role in assisting family law litigants. However, their role must be in support of a lawyer, in order to ensure that the client is fully and properly advised of his or her rights and obligations, and provides instructions with a full understanding of the potential risks and rewards of any step in the process. Just as the well trained draft persons in an architect's office perform an invaluable role in the design and construction of a building, it is the architect, the professional whose education, licencing, regulation, and professional integrity creates the authority for decisions and who bears responsibility for the project and safety for occupants of the building. Similarly, paralegals, law clerks and law students working under the direct supervision of a lawyer licensee can play an invaluable role in improving the efficiency and reducing the costs of many family law cases. Examples might be found in the preliminary drafting of a financial statement with the client, including working with the client to compile the documentary evidence of assets and liabilities at relevant dates, tracing of gifts or inheritances etc. However, it is the lawyer's role to review such compilation to identify gaps, point out issues in reviewing the documentation that could be of benefit or risk to the client, and ensure the client is fully aware of his or her obligation to make fulsome and complete disclosure.

Similarly, court appearances on behalf of a client should only be attended by a lawyer licensee, or articulated student under his or her authority, as attendance for even seemingly simple adjournments can go awry and result in orders that substantially affect a client's position in the litigation.

The training and education that paralegals receive is simply not sufficient to ensure that clients receive adequate representation in court or in the office absent supervision from a lawyer. The review of paralegal licensing conducted by the LSUC after 5 years draws sharply into the focus the inadequacy of the limited training received by paralegals, particularly for complex legal issues. It also highlights the fact that the public is not sufficiently aware of the distinction in services provided by lawyers versus paralegals. This leaves the public at risk.

Given the impossibility of monitoring the distinction between an unsupervised paralegal and one acting under supervision, the only way to ensure that the public is properly protected is to maintain the blanket prohibition on court attendances by paralegals.

SELF REPRESENTED LITIGANTS

More than half of litigants in our family courts act in person. Some of them prefer to do so, some are unable to afford counsel to represent them fully. There is a hypothesis that lower fees may encourage retainer of paralegals. This was not borne out by the review undertaken in the 2000 Cory Report.

The TLA is not aware of any empirical evidence that paralegals would or do charge significantly lower fees than a law firm charges for, for example, the paperwork to process a divorce after a Separation Agreement is signed, where the negotiation of the Agreement included representation and advice from a lawyer for each party, or for the work performed by a clerk or paralegal or student acting under the supervision of a lawyer.

There are many recently called lawyers looking for work, whose education and training ensure competence to provide Family Law services, and who do not charge excessive fees. Many will accept a legal aid certificate. If level of fees were the only issue for family law litigants, this cohort of young lawyers should be able to provide legal services at fee levels in the same range as paralegals. And yet, the trend has not been to engage these lawyers, but rather for individuals to choose self-representation. This suggests that price is not the only determining factor.

The TLA agrees that the trend to self-representation in Family Law matters is troubling and that it should be addressed. However, the root cause of the trend should be determined empirically and then methods of resolving those issues should be addressed. Assuming that cost is the driving factor, and that permitting paralegals to perform a narrow silo of work within the Family Law regime will not adequately address the current issues in the delivery of family law services. Indeed, it would likely lead to greater problems and confusion, increased costs, denial of true access to justice and abuses to vulnerable litigants.

REVIEW QUESTIONS

Here, TLA provides answers to the specific questions set out in the Review. However, the TLA objects to the form of the questions, and the premise of the Review itself which appears to presuppose there should be an expansion of the scope of practice for independent, licenced paralegals. In the opinion of the TLA, the focus of the Family Law Review should be on ways to improve the system and the inefficiencies in the administration of the Family Law Courts to provide better service to litigants.

Answers to Review Questions

- 1. What legal services are sought and provided in each type of family law case (e.g. divorce, custody and access), from beginning to end?**

Conflicts check; assessing client's position and capacity to instruct counsel; identifying issues; advising clients re: rights and obligations; assessing risks re personal safety; domestic violence, power imbalances etc.; reviewing and gathering evidence, exploration of non-litigation options for resolution; exploration of need for involving other professionals and/or experts; developing negotiation strategy; advising and/or attending at mediation sessions; drafting documents to reflect agreements; initiating litigation through drafting documents and arranging for issue and service and filing with court; advising re: offer to settle at early stage, and throughout the proceeding; attendance at case conferences and motions; preparing and updating financial statements and other necessary documents; reviewing opposition documents; cross-examinations on affidavits;

reviewing litigation strategy throughout; interviewing witnesses in preparation for trial; ongoing research of legal issues at each stage; attending at trial; review with client of final results of litigation; processing orders; consideration of appeal; reporting to client.

Throughout the retainer the lawyer must have current understanding of family law legislation, regulations; rules, case law, the law of evidence, and reasonable awareness of tax, property corporate and estate law, as referenced above.

2. What family legal services are currently provided by a person other than a lawyer (e.g. paralegals, law students, law clerks), whether independently or under the supervision of a lawyer?

Under supervision by a lawyer – document collection and organization; preliminary drafting of financial statements; client communication and management; review of opposing party’s documents and production demands, reporting to supervising lawyer.

Unsupervised by a lawyer – Currently, judges are sometimes faced with financial statements and other court documents in regard to contested issues prepared by a non-lawyer, often incomplete and with inaccurate information. Clients often seek advice from a lawyer after having signed such court documents, or a domestic contract prepared by a non-lawyer. Advice from a lawyer is sought because the document is incomplete, has conflicting or unenforceable sections and the client is confused about what such document means and its consequences. Non-lawyers also provide “guidance” to clients (especially those with language, financial or cultural barriers to meeting with a lawyer licensee) in regard to completion of documents. What such non-lawyers are often actually providing is not “guidance.” It is legal advice. Often clients have the impression such advisors are lawyers. This is not only illegal, it puts the public at serious risk of harm.

3. What family legal services are covered by legal aid? What family legal services are provided by duty counsel?

Minimal – limited hours are provide, and these are focussed on court attendance, rather than the more important aspects involving collecting and preparing the necessary information for an informed and reasonable resolution outside court.

Duty counsel provide minimal summary advice and mostly speak to adjournment requests. They are not intended to, and cannot provide substantive legal advice.

4. Which legal service offerings (e.g. conducting legal research, preparing correspondence, appearing in court, etc.) could improve the family justice system if they were more widely available?

All of the described services would benefit litigants if they were more widely available, but only if delivered by, or under the direct supervision of a lawyer who has the skills,

knowledge and experience required. Many litigants do not have sufficient sophistication to assess and appreciate different levels of professional legal assistance.

Similarly, on-line programs are of little utility if the user does not have the information or knowledge necessary to make meaningful use of these programs. Unlike, for example, software that is available for completing a tax return, family law documentation is not amenable to “fill in the blank” forms. To complete the documentation requires a complete and fulsome understanding of the law and the requirements and obligations underlying the process.

5. If an appropriate framework is put in place, should persons other than lawyers, such as paralegals, be permitted to provide legal services in certain family law matters?

No - except under supervision by a lawyer. The only appropriate framework is to have competent and qualified licensees providing family law legal services. This area of law is not amenable to creating “silos” of work that can be completed by persons without a fulsome understanding of all of its complexities. What may seem simple on its surface is often not, as referenced in the case examples set out above.

6. 7. 8. – not applicable

9. Are there any promising models in other jurisdictions in Canada or abroad that Ontario should consider, with respect to the role of family law legal service providers, other than lawyers?

None. People in need of legal aid should not have the illusion they are receiving legal advice, if they are not receiving from a lawyer.

The TLA notes that the BC pilot project has not resulted in permitting paralegals to provide Family Law legal services without supervision. The TLA recommends that the Ministry consult with the BC ministry to understand the results of its pilot project and the decisions that have been taken based upon those results.

There is little information about models in other areas. Washington State appears to bar appearance in court by a limited licence technician. This program is in its infancy, with no measurable outcomes yet available. The TLA cautions reliance on this unproven model as justification for following suit in Ontario.

The unified family court has been mandated by the current federal government. There is much work to be done in anticipation of this massive change to the delivery of family law services in Ontario. The TLA submits the best interests of Ontario citizens are met by postponing any further consideration of expanded scope of practice to non-lawyers in family law until the unified family court is a reality. In the interim, Ontario should

carefully watch and wait for measurable outcomes in other jurisdictions in regard to expanding scope of practice for non-lawyers. Ontarians who are engaged in the Family Law system should not be guinea pigs to processes which could prove dramatically detrimental, particularly when the established conclusions are that to do so puts the public at serious risk of harm.

Why are so many family law litigants unrepresented? How can this be corrected?

Resolution of family law issues with lawyers is unaffordable for many in the current system. Some litigants prefer to act for themselves. Language and culture also create barriers for some needing legal representation.

The legislative framework is overly complex. The cumbersome forms and multiple appearances and steps before any determination is made are costly and unnecessarily complicated. The reliance on paper court files adds to cost and delays.

Suggested Steps for Improved Efficiency

- (i) Improvements in efficiency in the court system, for example electronic court records and filing, service by email without need to obtain opposing party's or the court's permission, more efficient time scheduling by fixing times for motions and dates for trials, ending attendances for trial scheduling court, increasing the use of telephone and video conferencing rather than in person appearances, removing mandatory case conferences, engaging specialized family court judges, reduction in the number and complexity of forms;
- (ii) Reduction in complexity of the legal framework to make it simpler and better understood. The current legislation is so complex that even non family law lawyers do not understand how income is calculated for determination of support and the numerous factors that must be addressed in order to accurately determine net family property at the end of a marriage.
- (iii) Timely and affordable legal advice from lawyers, through expansion of legal aid, increased availability of duty counsel at court houses, and limited scope retainers which would be encouraged by addressing lawyers' current unlimited liability for malpractice claims that acts as a disincentive to limited scope retainers; as well as increased access to a range of alternate dispute processes, including more mediation services in court houses and communities, will provide the best results for Ontario citizens facing family law issues requiring resolution in court. The anticipated expansion of a Unified Family Court will also greatly improve the experience for those with family law disputes.

CONCLUSION

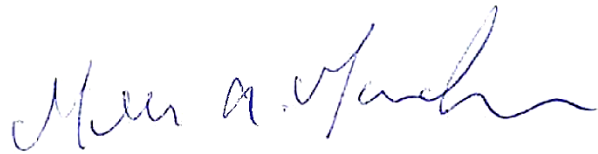
While the TLA supports the initiative of the Ministry of the Attorney General in seeking improvements in the delivery of family law services, the TLA submits the expansion of the scope of practice of non-lawyers, acting independently, is contrary to the best interests of Ontario citizens. There are many ways the system may be improved which keep the protection for litigants of representation (whether full retainer; duty counsel or limited scope retainer) by a lawyer licensee. The TLA submits the focus of the Ministry, the Law Society of Upper Canada, and the profession should be on efficiency in the current litigation process; expansion of early and affordable ADR services, better insurance and other structural terms for lawyers to make limited scope lawyer retainers more efficient for clients and lawyers, and the earliest possible implementation of a unified family court.

The TLA welcomes the opportunity to meet with Justice Bonkalo as she holds her focussed discussions with key stakeholders about the constructive ways in which the family law system can be improved to provide meaningful access to justice for Ontarians.

Yours very truly,



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