

Dear Presidents:

I am pleased to offer my second report as the Family Law Chair for FOLA. I would like to start by congratulating our past Chair, Sonja Jain, on her recent appointment to the Ontario Superior Court of Justice, Family Branch, presiding in Barrie, Ontario. Congratulations Justice Jain!

Non-Lawyer Licensees

Perhaps the issue of most interest, and concern, to the practising family la December 1, 2017 Convocation determined to create a specialized license for non-lawyers to provide services in the area of family law. While there is still a great deal of resistance to the idea of non-lawyer licensees, it is important to understand that the decision has already been made by the LSO; the best we can do at this point is, quite frankly, damage control, by trying to persuade the LSO to limit the scope of practice to those areas that are the least risky, and ensure adequate education and training.

The issues for determination by the LSO are:

1. Scope of practice, which the LSO indicated was the most difficult issue; and
2. Credentialing for competency.

How did we get here?

On May 31, 2000 Justice Cory delivered a Report to the Law Society regarding the licensing of paralegals, focussing on protecting the public and access to justice. Among the recommendations for scope of practice was uncontested divorces in certain circumstances. The Law Society did not accept that recommendation at the time. Further, they did not consider licensing of paralegals as an access to justice issue, for three reasons:

1. a lack of evidence on why there certain persons are being denied access to justice;
2. it was not clear that paralegals actually facilitate access to justice; only a minority used a paralegal instead of a lawyer as a result of cost;
3. *“No amount of education and training short of that undertaken by individuals who later qualify to become lawyers can permit a paralegal to bring to a client’s problem the knowledge, skills and abilities of a lawyer. A paralegal, practising in certain areas (e.g., family law, wills and estates) stands to mire the administration of justice leaving his or her clients without any access to justice at all or with a level*

of access to justice far short of that obtained by a lawyer for his or her clients. It is not serving the public well to answer their call for access to justice, their need and wishes for the services of a lawyer, by saying that the public can have access to the services of a licensed paralegal.”

Regarding the recommendation that paralegals be permitted to prepare Uncontested Divorces, the Law Society Response was:

“Lawyers, paralegals, stakeholders and tribunal representatives all agree that there is potential for abuse in the area of family law. In fact, the Society’s research showed that stakeholders classify family law issues as falling within the “high risk” category. Important rights are at stake in family law matters, such as property issues, financial support and child-related matters. The area of family law, which includes, among other things, marriage or cohabitation agreements, separation agreements and divorces, is a highly complex area.

Family law also involves tax planning, which if done improperly may have disastrous consequences for spouses and children.

A professional providing services in the area of family law would need to be familiar with at least 35 statutes”

A little over 15 years later, Justice Bonkalo was appointed to lead a review to:

1. Identify the legal services at different stages in a family law matter which, if provided by persons in addition to lawyers, could improve the family justice system by better enabling people to resolve their family law disputes.
2. Identify persons other than lawyers (e.g. paralegals, law clerks and/or law students) who may be capable of providing those family legal services with appropriate safeguards put in place (e.g. education, training).
3. Recommend procedures, mechanisms and/or safeguards (such as education, training, insurance, regulation and/or oversight) to ensure the quality of family legal services provided by alternative legal service providers.

The scope of the family law services review does not include child protection matters under the *Child and Family Services Act*.

FOLA made submissions to Justice Bonkalo on April 28, 2016, opposing the expansion of scope of practice, ironically largely mirroring the very same objections the Law Society had raised following the recommendations of Justice Cory.

Despite the overwhelming objection of family law practitioners, on December 31, 2016 the Family Legal Service Review Report was released. The Report made 21 recommendations, including:

1. Lawyers should continue to offer unbundled services and should take steps to ensure the public is made aware of their availability. Lawyers should consider innovative opportunities to offer unbundled legal services, including affiliations with other lawyers and online platforms.
2. The Law Society of Upper Canada and LawPRO should continue to support the expanded use of unbundled services and should offer continuing legal education opportunities and tools to address the liability concerns that lawyers have raised as an impediment to offering these services.
3. The legal profession should support the development of legal coaching and offer continuing legal education opportunities to ensure lawyers are equipped to offer these services. Lawyers should be encouraged to take these training programs, and to offer and advertise coaching services. The Law Society of Upper Canada and LawPRO should consider providing incentives for lawyers to make legal coaching an integral part of their practice.
4. The Law Society of Upper Canada should create a specialized licence for paralegals to provide specified legal services in family law.
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7. Paralegals wishing to specialize in family law should first be required to complete the current requirements for a paralegal licence.
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12. Legal Aid Ontario should apply its interdisciplinary model to family law, using paralegals licensed in family law wherever possible.

Following the Report, FOLA again made submissions to the Law Society on May 23, 2017, challenging many of the assumption underlying the recommendations.

On December 1, 2017 the Law Society determined to develop a licence for licensed paralegals and others with appropriate training to offer some family law legal services,

following resource-related discussions with government. The Law Society committed to:

2. Recognising the urgency of the need, this licence will support training in process navigation, form completion, investigating forms such as financial, motions to change, and uncontested divorces, and possibly other areas outside the courtroom context.
3. At the same time, (the Law Society will) assess what additional family legal services by providers other than lawyers, and including advocacy, are in the public interest, and consider how to develop a further expanded licence, following resource-related discussions with government.
4. Engage in a robust evaluation of the success of the family law legal services licence for providers other than lawyers, and make any adjustments that are in the public interest.
4. As part of its priorities, consider experiential training for lawyer candidates in the licensing process, including how they may provide supports for the delivery of family law legal services under appropriate supervision.
5. Review its rules relating to the unauthorized practice of law and ensure that the rules are as clear as possible concerning the difference between legal information that might be provided by court staff to unrepresented litigants, and legal advice.
6. Continue to support the expanded use of unbundled services and legal coaching, including offering continuing legal education opportunities and tools to address liability concerns.

Where are we now?

The Law Society began its consultation process by meeting with various interest groups on February 5, 2018 to discuss the action plan moving forward for competency based credentialing, including FOLA, the Ontario Bar Association, The Advocates Society, Toronto Law Association, the Family Law Association, and various representatives from the LSO, including the Treasurer.

The LSO confirmed that the scope of practice had yet to be determined, but that they are seeking a licensing process that is safe, effective, and of high quality. They expect the process to take 24-48 months, but indicated that this could be longer depending on

whether further steps were required to ensure the new licensing process was of high quality.

The LSO conducted teleconferences with bar representatives in March, 2018 to discuss views, primarily on scope of practice. Workshops are scheduled to take place on November 13 and 14th, 2018, which we will be participating in. I expect I will have a great deal more to report on this issue at the May, 2019 Plenary.

Unbundled Family Law Services Project

A dominating theme in the recommendations of Justice Bonkalo was the provision and promotion of unbundled services by lawyers. The Ontario Family Law Limited Scope Services Project is a private-bar driven collaborative effort in response to that recommendation. The project is intended to fill the gap for middle income families who do not qualify for Legal Aid, but realistically cannot afford a lawyer to conduct all of their case.

The Advisory Committee is made up of members from the Ontario Bar Association Family Law Section; the Federation of Ontario Law Associations; the Association of Family and Conciliation Courts - Ontario Chapter; The Advocates' Society; the Family Lawyers Association, the Superior Court of Justice and Ontario Court of Justice; experts in non-traditional legal services delivery; and researchers. The Chair of the Project's Steering Committee is Tami Moscoe, Senior Family Counsel at the Superior Court of Justice, and the Senior Program Director is Helena Birt, private family law practitioner. The Project team also works with Legal Aid Ontario, the Law Society, LawPro, and Community Legal Education Ontario (CLEO).

Notably, the Law Society does not have representation on the Committee and is not part of this initiative.

The Family law limited scope services, also known as "unbundled" legal services, provide an option between full representation and no representation at all. The Ontario Family Law Limited Scope Services Project's aim is to improve access to family justice for middle and lower income Ontarians by:

1. increasing the use of limited scope retainers (such as court document drafting or in-court representation on a single appearance);
2. legal coaching (lawyer assists client by offering advice, guidance and support); and

3. summary legal counsel (scheduled lawyers provide day-of-court assistance for a fee to unrepresented litigants not eligible for Legal Aid) in family law cases.

The Project will facilitate access to and use of these services through the creation of a website hosting a province-wide roster of trained lawyers willing and able to provide such services. Prospective clients will be able to search the website by location, type of service and service provider.

The Project's research and evaluation component will study the perceptions of judges, lawyers and other justice system professionals, as well as clients, the advantages and value of this type of service, as well as its limitations and how service delivery can be improved.

The Project has received a \$250,000 grant from the Law Foundation of Ontario, which will be spread over the three years of the Project. Following our last Plenary, the Project hired a Senior Manager.

The Pilot Project is being launched in Barrie. Training was held June, 2018, and the Summary Legal Counsel Services (day of court counsel) is set to launch in November. The Website is schedule to launch January, 2019.

In order to qualify to be on the Roster for Summary Legal Counsel, you must:

1. Be a Lawyer in good standing with the Law Society of Ontario.
2. Have three years or more of family law experience.
3. Have at least 30% of your practice devoted to providing family law services.
4. Have participated in a training session for the provision of SLC services.

The next area targeted to implement the Program is Toronto. Training takes place December 5th at the OBA. Webinar registration and access is also an option. The Program is actively looking for other jurisdictions to roll out the Program. A draft letter for distribution to your membership is attached, which can be modified as required. I encourage you to consider this an option for your association.

BILL C-78 (Divorce Act)

On May 22, 2018 the federal government introduced Bill C-78, amending among other statutes, the *Divorce Act*. The Bill had its second reading October 4, 2018, and is scheduled for its third reading on November 5th. Highlights of the amendments include:

- Changes the language of custody and access to “decision making responsibility”, “parenting time”, and “contact orders” for third parties;
- Provides definitions “best interests”, including and defining “family violence”;
- Requirement that parties protect children from conflict arising from the proceeding and direction to use family dispute resolution processes where appropriate;
- Counsel has obligation to inform and encourage parties to use dispute resolution processes where appropriate;
- Creates test and onus for mobility cases. Parties must give notice in writing of the change 60 days in advance;
 - If Shared custody – moving party has onus to prove move is in child’s best interests;
 - If Primary care – presumption in favour of that parent

Unified Family Court Update

In February, 2018, the Federal Budget was released, confirming the federal government’s support of the expansion of the Unified Family Court. The Unified Family Court was previously present at 17 locations. 9 additional located were targeted for phase one of expansion, being Belleville, Picton, Pembroke, Kitchener, Welland, Simcoe, Cayuga, and St. Thomas. Further, the government made a commitment to creating 14 new Family Judicial Positions. The goal is for phase one to be completed by May, 2019.

As good as this news is, it is unclear how the government intends to follow through with phase two, which is provincial roll out. Unlike phase one which was relatively low cost, making use of current infrastructure, phase two will require the creation of facilities to physically house the Unified Family Court and thus far no plan for that has been announced. With the target date for provincial roll out being 2025, it is unclear how that will happen.

Valerie L. Brown
Family Law Chair