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Response to the Consultation on Expanding Legal Services: Options for Ontario Families

Family Services Legal Review

Ministry of the Attorney General

Submitted April 28, 2016

To the Attention of:

The Honourable Justice Annemarie E. Bonkalo
Family Legal Services Review
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EXECUTIVE SUMMARY

Please accept this submission on behalf of the Federation of Ontario Law Associations, (the “Federation”).

For the past 30 + years, we have been known as The County & District Law Presidents' Association (CDLPA), but in November of 2015, our members voted to change our name to the "Federation of Ontario Law Associations" to better reflect who we, in fact, represent. Our Federation is made up of the members of the 46 local law associations spread across Ontario. In total, we represent approximately 12,000 lawyers who are, by-in-large, practicing in private practice in firms of all sizes across Ontario. Many of our members practice in small communities or service neighbourhoods in larger centres where they are pillars of their community. Our members are on the front-lines of the justice system and see its triumphs and shortcomings every day.

The Federation is an advocate, on behalf of practising lawyers, for a better justice system that recognizes the crucial role competent and professional lawyers play in our system of justice. Many of our members practice family law either exclusively or as part of a broader general practice, but regardless of area of practice, this topic and the potential to expand the scope of practice for non-lawyers is of great interest – and concern – to nearly all our members.

Our Position in Brief

While we applaud the efforts by the Attorney General and the Law Society to examine the challenges of “access to justice” in the family law system, we believe that providing access to competent counsel and justice is a very complicated issue. A lack of access is rooted in many causes with many different possible solutions.

As we will lay out in the course of this submission, the Federation of Ontario Law Associations and its members do not believe that the Ontario government can adequately or appropriately address and improve access to justice in family law by simply expanding the scope of practice for non-lawyers. In fact, we have serious reservations and doubts that expanding scope will, in fact, improve the situation except perhaps in superficial ways. Other potential reforms hold out more hope for greater impact and should be examined first.

Summary

In this submission, we will seek to do three things:

First, we will challenge some of the underlying assumptions that are defining the problem and driving the development of a policy that seems to inevitably conclude with a call for an expanded scope of practice for non-lawyers.



Second, we will seek to make the case that the training, disposition and skills of lawyers make them the best positioned professionals to remain at the centre of family law disputes and litigation.

Third, we will offer our perspective on a number of promising family law reforms and initiatives that could and should be undertaken in an effort to make our family law system more affordable and effective for the public we all serve.

We will conclude this report with some recommendations on steps the Attorney General and Law Society should consider undertaking to improve the plight of all litigants in the family law system.

We look forward to being invited and included in the focused and detailed discussions that you will be holding with key stakeholders and we anticipate that you will seriously consider our input and responses to help inform your recommendations to the Attorney General and to the Law Society of Upper Canada.



CHALLENGING THE UNDERLYING ASSUMPTIONS

Underlying this consultation are four assumptions which, to varying degrees, we believe need to be challenged and questioned. We acknowledge that each of these assumptions have some degree of truth to them, but we believe further careful empirical study is needed to better quantify the challenges and to fully appreciate the scope of the problem.

The four underlying assumptions are:

- that the growth of self-represented litigants in the court system is a result of high legal costs associated with high lawyer fees;
- that the self-represented litigant problem is suddenly growing to crisis levels;
- that paralegals would be less expensive; and,
- that there are many “simple” cases in the family courts that could be better dealt with by non-lawyers.

We acknowledge that on the surface, there may be some logic in all of these assumptions, but in our research that has scanned across North America we can find no empirical evidence that this is the case. Even if there is some grain of truth in these assumptions, we object to the degree and scale of how these assumptions are being represented and used to justify policy decisions that will have a profound impact on the family law system, on family law practitioners and on the litigants themselves.

Assumption #1: “Self-represented litigants are self-represented because they cannot afford a lawyer”

It is observably true that there are many self-represented litigants who are “too rich” to qualify for Legal Aid certificates and “too poor” to afford the standard lawyer rates to work through an entire case.

Our challenge to this assumption is three-fold. First, there are many lawyers in Ontario who offer flexibility in their payment arrangements (such as offering payment terms that might extend over years). Also, early results from flexible arrangements such as limited scope retainers and other mechanisms are promising and deserve to be fully explored. (We will touch on this more later in our submission.)

Second, it is our experience in the courts every day that there are many self-represented litigants who could afford legal representation but choose not to seek that counsel or are ignoring that counsel. Our members see this anecdotally every day and in conversations with judges – both OJ and SCJ – they tell us stories where this is the circumstance behind their status. What is striking to us is that there has been no effort to quantify this problem to get an accurate handle on how big it is.

Third, the cost of family law are the result of many factors including the complexity of relationships, blended families, the higher net-worth of some of the litigants (and therefore higher costs associated with unpacking and dividing assets) and the Family Law Rules that require more appearances. Family law is also unique in that it allows re-litigation in cases of material changes of



circumstances. Conceivably, a young couple with young children may be facing off in court for nearly 20 + years.

Assumption #2: “The self-represented litigant problem is growing to crisis levels”

We have no doubt that there are too many self-represented litigants in our courts. We believe every litigant has the right to counsel and that our system would function more efficiently and effectively if there was counsel available to everyone. Our concern is that action is being undertaken today without having an accurate and complete picture.

The report from the Honourable Justice Peter Cory delivered to the Attorney General in May 2000 on the subject of regulating paralegal practice in Ontario noted (in Chapter IX) that 50 – 85% of parties appearing before judges of the Provincial Court were unrepresented. If true, the level of unrepresented litigants has not changed in the past 15 years. But it is also true that there has been no study of the root causes of this phenomenon questioning why or what solutions might exist to the problem. We also note that the available research, such as the work done by Professor Julie McFarlane at the University of Windsor School of Law, does not – to our knowledge - ever question whether a litigant might have been represented at some point in the litigation process. Anecdotally, our members report that in many cases a “self-rep” is of that status after having a lawyer for at least one or two other parts of the process. In many cases, the “self-rep” is of that status after having received advice from counsel that they did not like or expect. In other words, in many cases the lawyer has advised one course of action, such as a settlement or mediation, but the emotion that almost inevitably accompanies a family case has gotten in the way of a rational decision. We believe this to be the circumstance in at least some cases, but we believe more work and study needs to be done to quantify how many cases this might represent. Expanding scope of practice for non-lawyers would do nothing to help in this circumstance, except to potentially extend the litigation process and increase court costs.

Assumption #3: “Paralegals are less expensive than lawyers”

On the surface, this assumption might seem irrefutable. In fact, the Federation commissioned research on this very question and the conclusions from a survey of available sources across North America show that “surface pricing” of paralegals are indeed less expensive than lawyers. Our research conducted by respected research firm Corbin Partners also sought out any sources or quantitative work that compares the total cost of paralegals versus lawyers to the legal system. No such research could be found.¹

Our belief, which needs to be tested further to confirm our hypothesis, is that the cost-differential between a paralegal and a lawyer would be reduced if an accurate “system-wide” view of costs could be done. We believe that the extra training provided to lawyers do, in many cases, enable lawyers to conduct interactions with their clients or the legal system more quickly, thus reducing

¹ Reference is to Corbin Partners’ “Market Reconnaissance Study” examining fees of private practice paralegals and lawyers. Study was commissioned by the Federation of Ontario Law Associations. Text of the study can be provided upon request.



the overall cost. (Take for example, a lawyer who charges \$300/hour and would interview a client and prepare a motion in one hour, while a paralegal might charge \$150/hour, but take 1.5 hours to do the same work. The surface pricing - \$300 vs. \$150 – shows a large spread between the two fees; the actual cost difference is much less.)

A further and more detailed examination of total system cost would need to look at the relative efficiency of lawyers and paralegals in the courts, for example. Anecdotally and based on conversations with judges, we believe that many interactions in court are dealt with more efficiently and quickly when both sides are represented by lawyer counsel. If one side was represented by a paralegal, instead being self-represented, presumably it would be somewhat better for the system and for the litigant, but the degree to how much better is questionable.

The Canadian Research Institute for Law and the Family conducted a 2012 survey with Alberta family law lawyers about experiences with self-represented litigants. In this study, participants were asked about alternative approaches to legal representation, including the delegation of legal services to paralegals. The findings of the study include the following:

“Most lawyers expressed concerns about the quality of Paralegal’s work, the possibility that their services could increase litigants’ expenses or require remedial work to repair (31.6%), and that paralegals lack the necessary training, skills and expertise to provide legal services (21.1%) ...”

“Among respondents commenting on the suitability of paralegals to provide legal services, judges believed that paralegals should be restricted from giving legal advice and providing advocacy services. A fifth of lawyers expressed concerns about the adequacy of paralegals’ training, skills and expertise to provide legal services, and almost a third expressed concerns that paralegals provide poor quality service which may delay the conclusion of a dispute or require additional expense to correct.”

Our own survey of members came to similar conclusions. There is a high degree of skepticism by members of the bar that the quality of work done by paralegals will be such that it will not require remediation and additional cost to other litigants or to the justice system. We acknowledge that this skepticism is not without its own bias, but it is nevertheless a consideration that we feel the Attorney General and the Law Society should be looking at very closely.

On a related note with respect to the quality of advice and cost to the system, it is notable that currently in a circumstance where one side in a dispute is represented by a lawyer and the other is self-represented, the judiciary are left in the difficult position of attempting to guide the self-represented litigant without actively assisting them and breaching the rules of court. While the judiciary would be spared this difficulty if a paralegal was present for the self-represented, the court would be absolutely bound to accept the submissions of the paralegal. In this circumstance, it is presumed that both sides are represented by competent counsel, but in many cases there would be an imbalance of competence and experience if one side had a lawyer and another a paralegal, which could lead to other problems and costs to the justice system.



Assumption #4: The assumption that there are “simple” divorces and family law matters. It is widely reported that there are many cases of “simple” divorces and family law matters that could be dispensed with quickly and efficiently without the need for a lawyer. That the “paperwork” can be done by a knowledgeable professional who plugs numbers into a formula and follows the proper procedure. We strongly disagree.

In the experience of our members, there are rarely circumstances where a divorce is “simple” and can be dispensed with through a formula or simply following the procedure. Putting aside the high-degree of emotion that inevitably comes with a family law matter, there are many dozens of statutes and law that must be dealt with, and there could be even more depending on the complexity of the case and whether the matter touches business ownership issues, matters of taxation or even criminal law. Moreover, the diversity of issues and laws that have to be dealt with is high. Everything from real estate to child protection and custody, immigration law, mental health issues and dozens of other factors contribute to making family law incredibly complex.

It is the experience of most family law practitioners that it is very rarely evident in the first meeting that a divorce or other matter is, in fact, “simple”. On the face of it, a divorcing couple with a joint ownership of a primary residence and no children could seem to be a “simple” matter, but often after the initial consultation, other matters such as ownership of a business, immigration status or other factors emerge. In other cases, power relationships and potential abuse are not well understood or identified as risk factors until well after the initial consultation. Would a less well-trained professional pick up on all of those factors and understand the rights and responsibilities for each party in the initial consultation? What if that professional gets that initial assessment wrong? Who picks up the pieces then?

Further, the idea of expanding scope of practice so that non-lawyers could do the less complex matters ignores the economic reality of a professional services practice (regardless of whether it is a law practice or any other). The less complex matters in a law office are very often assigned to support staff to conduct the labour under the supervision of the lawyer such that the client gets the benefit of a proper job under proper advice for the least cost. We fear that “cream skimming” the so-called simpler cases could, in fact, drive more lawyers out of the family law practice (and maybe out of law altogether) by making it economically unviable to practice. How will that help “access to justice”?

Summary/Conclusion

There may be at least some validity to elements of the assumptions that are forming the basis for the current push to expand scope of practice for paralegals and other non-lawyers in an effort to expand “access to justice”, but the evidence is simply not clear and what little exists is not compelling.

As one of our Committee noted, when confronted with the argument that hiring a licensed paralegal rather than a lawyer on an hourly basis would be significantly less expensive than hiring a lawyer, he said: *“No basis is given for this statement ... (it is made) as a result of Socratic reasoning*



which prima facia would seem logical but has shown time and again not to be the case in other areas where paralegals compete with lawyers such as Small Claims Court and various tribunals.” In fact, our research across North America has concluded that there is a lack of evidence – one way or another – to prove either hypothesis.

The report of the research commissioned by the Federation concluded:

Based on an investigation of existing market intelligence, using a wide variety of sources within Canada, the US and the UK, it leads to the following inferences:

- *At the surface, there is a general impression given that the legal fees charged to clients by paralegals are lower than fees paid for similar services provided by lawyer.*
- *When delving deeper into an assessment of total case fees for comparable legal matters, we learn that there are doubts and uncertainties expressed in the legal marketplace on whether there is a significant cost difference at all.*
- *However, while anecdotal evidence exists to question comparative pricing, there is a lack of empirical evidence to gauge this issue. Fees for the services of a lawyer continue to be tracked in the Canadian market (nationally and by province). Similar tracking has not been found for the regulated paralegal market.*

Even in the jurisdictions that have moved to expand scope of practice for paralegals and non-lawyers, such as in Washington State, we can find no empirical or published evidence that the move has resulted in the promised improvements in access to justice or even that there are currently studies being done to test this question.

On the question of cost and value of various lawyer and non-lawyer service models; on the question of scope of the problem of self-represented litigants; and on the questions of impact that such a move to expand scope of practice will have, too many questions remain unanswered and too many doubts exist to confidently draw the conclusions that lead to a policy of expanded scope of practice.



THE CASE FOR LAWYERS ... AND THE RISKS ASSOCIATED WITH EXPANDING SCOPE OF PRACTICE FOR PARALEGALS

Family law, especially as practiced in Canada, is an extremely complex area of law requiring the combination of proficient technical skills and an adept personal touch. Family lawyers need to be knowledgeable on dozens of statutes and the precedents coming out of the family law courts are constantly evolving the jurisprudence of family law.

It has long been our feeling that only well-trained lawyers can adequately serve family law clients. Only lawyers have the depth of knowledge of the relevant family law statutes, and many other aspects of the law, such as real estate, corporate/commercial law, immigration law, mental health law, criminal law and many others. In some ways, the best family law lawyers are not really specialists, but deeply knowledgeable generalists who apply their expertise to emotionally charged family breakups.

At a system level, the Law Commission of Ontario notes that:

“There are several challenges in describing and assessing Ontario’s formal family justice system. There are many actors involved and there is a fragmentation of services ... The organization of the courts and the multiple forms of non-judicial dispute resolution are another factor. In Ontario the diversity of community organizations linked to the system is another reason for local differences and sometimes a fragmentation of services. ...

Family law in Ontario is an area of specialists.”²

We believe that lawyers are best suited and trained to navigate these complex family law waters. A lawyer’s education, temperament, breadth of knowledge, regulatory oversight and insurance requirements make them uniquely qualified to work in the complex, multi-faceted field of family law.

The admission requirements for lawyers getting into law school examine intellect, temperament and reward the social and rhetorical skills that good advocates need to be successful. Law school, when at its best, is less an exercise in technical skills development than it is a forum for the development of skills in “how to think” and solve complex problems. The licensing and regulatory regime for lawyers encourages professionalism and the development of systems to efficiently manage complex files. The continuing professional development requirements for lawyers are rigorous and ensure that lawyers stay up-to-date on all aspects of the law that they need to know. For the circumstances where lawyers lack specific knowledge, they are trained in specialized research skills and have access to a network of law libraries across Ontario that allows them to remain current. The insurance regime for lawyers is comprehensive and risks are well known and tested.

In each of the above areas, paralegals and other non-lawyer professionals do not have the depth of experience or skill as lawyers. The insurance regime for family law practitioners will need to be

² <http://www.lco-cdo.org/en/family-law-reform-interim-report-sectionIII>



reconsidered and, if the risks do not balance, could cause the entire insurance regime to be thrown out of balance, raising the costs for everyone and this cost is inevitably passed along to clients.

In our view, even if there was a specialized education and skills development regime set up to raise the skill-level of paralegals to allow them to practice family law, we do not fathom how it could become rigorous enough to overcome these challenges. Our view of the possibility of paralegals in family law has not changed substantially from the views expressed by Justice Cory in his report on the topic in 2000.

In that report, the Honourable Peter Cory delivered to the Attorney General of Ontario a possible framework for regulating paralegal practice in Ontario. Chapter IX of that report deals with “area of permissible practice – Family Law...” Cory states: *“It must be remembered that Family Law is fraught with complexities and replete with legal pitfalls.”* After referring to members of the bar who had made submissions to the effect that there was no such thing as a simple divorce and that paralegals should not be permitted to proceed even with an uncontested divorce The Honourable Mr. Cory stated:

“I see no reason why licensed paralegals should not be authorized to undertake uncontested divorce proceedings in any of three circumstances: first where the parties have no children and no significant assets or the assets are jointly held; and if there is no need for, or no issue outstanding, as to spousal support; second where the proceedings are commenced within one year of the execution of a Separation Agreement which resolves all collateral concerns; third, where there was a Court Order resolving all of the ancillary issues granted within one year of the commencement of the divorce action. In any of these circumstances, licensed paralegals should be entitled to undertake uncontested divorce proceedings.”

While Mr. Cory might be correct, we simply do not believe that there are very many of these types of cases to be found in the system. So, should these recommendations be followed, not much of substance would change to address the challenge of self-represented litigants. A typical self-represented litigant is not dealing with an uncontested divorce.

On the issue of “is there other work in this field, for example drafting Separation Agreements, that can be undertaken by paralegals?” Cory said that he would be opposed to any licensed paralegal drafting a Separation Agreement. *“This requires a sound knowledge of the law, property and contract law as well as family law. Quite simply, it is too complex an area for licensed paralegals...”* As Cory notes, the complexity of the law, beyond the most straightforward of cases, are best handled by licensed lawyers who have the specialized training.

Cory also heard from two Judges of the Provincial Court indicating that between 50% and 85% of parties appearing before them in Family issues were unrepresented. Cory commented that there could be a place for licensed paralegals to assist the public in the Court but, of course this work could only be undertaken by those licensed paralegals who had received special training and demonstrated competence in Family Law through an examination. Cory suggested that licensed paralegals should provide a role comparable to that of Duty Counsel if properly trained and that Legal Aid could provide some funding.



In connection with the suggestion that paralegals should give advice in connection with custody and access, division of family property and support and maintenance Cory stated:

I worry about a paralegal giving advice of this sort. It is the custody and access cases that determine, not only the best interest of the children involved, but also to some extent the future of our country. The best interest of the child will always be paramount. A consideration of children's best interests must include custody and access entitlements...questions of child custody, access and support are of fundamental importance. Yet they raise legal issues of great complexity, very often involving the use and division of property both real and personal. The more complex the situation the more likely a mistake will be made in giving advice. Only a lawyer should give advice in this area.

So Justice Cory's review opens the door for paralegals in family law, but the restrictions that he feels are prudent – and to which we concur for all the reasons noted – are so restrictive that one is left to wonder whether they would have any impact on the self-represented litigant problem at all. Would sufficient system resources be freed up if uncontested divorces could be done by paralegals or other non-lawyer professionals? We have our doubts.



BETTER OPTIONS TO CONSIDER

In this next section, we offer some comments on what, we feel, are better and more impactful options the Review should consider on the question of how best to make our family courts more accessible to more people. There is a cost consideration to some of these ideas, but many are low-cost, practical ideas that could be done with existing resources or modest (and necessary and long overdue) investments.

We appreciate that the field of family law is complex and reforming the family law system will require many inter-related reforms and changes. That is why this menu of choices is being offered.

Unified Family Courts

As you know, in Ontario family law matters are heard in the Ontario Court of Justice, the Superior Court of Justice, or the Family Court branch of the Superior Court of Justice, depending on the issue in dispute and where you are located in the province. There are presently seventeen unified Family Courts of the Superior Court of Justice located across Ontario in Barrie, Bracebridge, Brockville, Cobourg, Cornwall, Hamilton, Kingston, L'Orignal, Lindsay, London, Napanee, Newmarket, Oshawa/Whitby, Ottawa, Perth, Peterborough, and St. Catharines.

Where the unified Family Court branch exists, the court hears all family law matters, including divorce, division of property, child and spousal support, custody and access, adoption, and child protection applications. In all other sites across the province, family law matters are divided between the Ontario Court of Justice and the Superior Court of Justice, and this inefficiency – especially in the largest population centres of Toronto, Peel, Halton, etc. – is contributing to the challenge. Inefficiency and inconsistency across the province in the way the courts handle family cases contribute to the cost that has to be borne by all clients.

We feel that investing in the expansion of the Unified Family Court across Ontario will result in substantial efficiency gains and make the entire system more accessible for everyone. We recognize that there are considerable federal/provincial negotiations that need to take place to make this happen, but we strongly encourage Ontario to take leadership and push to make this a priority.

Making Case Management More Accessible and More Effective

The Case Management system under the Family Law Rules was developed because many family law lawyers, judges and social scientists believe that an effective and accessible family justice system requires pre-trial and post-trial case management by a single judge, an approach to family justice reflected in the slogan: *“One judge for one family.”* Judges should have the necessary knowledge, skills, and training needed to resolve family disputes and to help effect changes in parental behaviours and attitudes, as well as the willingness to collaborate effectively with non-legal professionals.



“One judge for one family” is what true Case Management is supposed to be, i.e. “a single judge who deals with conferences and motions and both procedural and substantive issues” and that judge has “the necessary knowledge, skills and training needed to resolve family disputes and help effect changes in parental behaviors and attitudes.” Under a “one judge for one family” model, our experience is that the family justice system is much more effective and accessible.

The nature of family law disputes requires that the litigants receive consistent messages, directions and orders from judges that have the education, training and experience in dealing with family cases to ensure that the cases are being effectively dealt with in an efficient manner. This is especially important to self-represented family law litigants who do not have lawyers to help manage their behaviors or understand their rights and obligations which can help to minimize the conflict. If one judge is familiar with the litigants and the facts of their case, this can ease the frustration of the parties and lower the level of conflict. It can also ensure that there will be less inconsistency in the approaches and more effective enforcement of orders.

Presently, Case Management is only available in cases in the Family Court of the Superior Court of Justice which jurisdiction is limited to those municipalities listed in Family Law Rule 1 (3). In some of those communities, the Case Management system is well established and runs smoothly. However this is not the case in some communities where the judicial and court resources are strained and there may not be enough judges to provide true Case Management.

Introducing a paralegal or other non-lawyer professional into the process has the potential to confuse and mitigate any of the benefits that come about from unified case management because one could foresee a circumstance where a party will be represented by multiple professionals, depending on the scope of practice being considered.

On a related note, the Family Law Rules currently force parties to attend a First Appearance, Case Conference and Settlement Conference and then even a Trial Management Conference where the judge has no power to make a decision, unless reached on consent, or for purely procedural matters. This process can become very expensive and creates opportunities for delay and costs. Families in conflict and separation need options that assist them in finding quicker resolutions and a simpler process to get some results.

More Effective use of Mediation

Many costs and delays start because the parties commenced a court action when it was not necessary. Many family law matters could (and should) have remained out of court in the first place. In our experience, if one or both of the parties had retained a lawyer, they may have been redirected to alternative dispute resolution services like mediation, collaborative or cooperative processes to negotiate a resolution out-side court. Despite the many common sense solutions available outside of court, many self-represented and unrepresented parties are simply unaware of or are suspicious and ill-informed about alternative dispute resolution and so they forgo any attempts to settle their issues amicably choosing instead to go straight into court.



Most Comprehensive Family Law Mediators operate under three strong principles. These principles are: “Voluntariness; Fairness & Autonomy; and Do No Harm.” These principles help family law mediators to use their skills (active listening, reframing, emotional intelligence, trust building exercises and an understanding of the role of anger) to build a safe process that recognizes and addresses power imbalances and helps parties to find an alternative resolution to their conflict.

We are aware that family mediation services are now available at every family court location (albeit with variable hours), but we are particularly bullish on the model being employed in The County of Simcoe. In Barrie, “The Mediation Centre” is a group of social workers and lawyers who greatly assist in many cases in either narrowing the issues or resolving some cases in their entirety (many times before the parties have ever entered a courtroom). This service is geared to income, so the parties pay very modest fees. They also have “on-site” services wherein parties receive up to one (1) hour of mediation services free of charge. The Federation recommends the replication and support of this model and ones like it across the province. The cost to expand such a service would be minimal and we anticipate could be found from savings associated with fewer court appearances.

Family Law Information Centres

Much of the social science done in the field recommends providing greater access to information to litigants early in the process. With more information, litigants can make better decisions and know where to find the right support. The Family Law Information Centres have proven to be a helpful resource in filling this need.

We recommend continued support for FLICs and an expansion of their hours of operation to include evenings and weekends, where practical. Right now some FLICs have very limited service hours that do not even cover court sitting hours. Expanding hours, particularly at non-unified family court SCJ locations will have a profound impact. A further improvement could be made with the addition of an Advice Lawyer located at every FLIC and adding more hours for that service where it exists now.

Steps should also be made to improve access to information on where the FLICs are located. Presently, when searching for FLICs on the Ministry of the Attorney General web-site, for example, the search directs you to a page of all courthouses, regardless of whether there is a FLIC on-site. This is confusing to a trained practitioner knowledgeable in Ontario’s court system. It is practically opaque to an untrained person.

We also believe that a small investment in making more of the information available at FLICs available on-line and through a toll-free information line would be a wise and worthwhile investment.

We commend the Ministry for providing the brochure *“What you should know about Family Law in Ontario”* in nine languages, but we would strongly recommend that many more languages be added. According to the Statistics Canada Linguistic survey of 2011, there were more than 200 languages commonly spoken in Canada. Consideration should be given to making the brochure



more accessible by changing from a text-dense 42 page document to something interactive that utilizes graphics, pictures and (in an on-line version) video to make it more user-friendly. Consideration might also be given to tailoring the brochure to different populations such as mothers with young children, fathers, couples without children, etc. so that the information is presented in a more tailored fashion, rather than in such a general brochure, and steers the individual in the right directions for other resources, including help from a lawyer.

Another suggestion is to have each of the FLIC offices equipped with computers, software and printers to assist in Family Form completion. Some FLICs have access to such equipment, but most do not. This would be a very simple and relatively straightforward initiative that could help many people.

By making information more accessible earlier in the process, we anticipate that many family law cases can be dealt with earlier, before the confrontational litigation process starts and feelings are hardened even more.

Improvements to the Mandatory Information Program

Presently every litigant (applicant and respondent, moving party or responding party) must attend a 1.5 hour presentation where a lawyer reads a set script about the family court and the alternative dispute resolution options that are available. No one is allowed to ask any questions in this “Mandatory Information Program” (MIP). They must have a certificate of attendance signed. The lawyer conducting the session is volunteering their time for this. Many of the lawyers who provided input to this submission do not feel the MIP is achieving what it set out to do. Most litigants need this type of information prior to the court action being commenced, not after. If hours at the FLIC were expanded and Advice Lawyer and Mediation services were also expanded and offered equally around the province, we feel that would go a lot further to educate parties on options that are available to them and discourage unnecessary litigation.

Collaborative Practice, Cooperative Practice, Early Neutral Consultations, Limited Scope Retainers, Unbundled Legal Services, Day-of-court Counsel and other innovations:

Many of the lawyers that are attracted to the practice of family law do so out of a genuine wish to help families. By offering Collaborative Practice, Cooperative Practice, Early Neutral Consultations, Limited Scope Retainers and unbundled legal services, lawyers can provide some relief to the self-represented and unrepresented litigant and divert their clients from the family court. These services offer lawyers an opportunity to become problem solvers and peacemakers and show the public and the judiciary how lawyers care about their clients, about family law and access to justice.

Collaborative Practice is a process focused on settlement such that the lawyers enter into a participation agreement signed by all parties and counsel that they will not bring the matter to litigation. They often form a “team” including the lawyers, a family therapeutic professional and a financial professional. The primary objective is to assist the parties in achieving a reasonable and thorough settlement that is in both the clients and the children’s best interests.



Cooperative Practice is a process where the lawyers create and provide a constructive and efficient negotiation process for the parties. The parties and lawyers do not enter into a contract where they agree they will not go to court; however they work collegially and cooperatively together to help minimize or lower the conflict and manage their client’s expectations. They also practice with a good sense of proportionality to the legal and financial resources available to them and their clients.

Early Neutral Consultations provide legal information and neutral consultations to separating couples. They are family law facilitators that provide legal information and contacts to parties so they can choose the direction of their separation or divorce. They try to assist the parties in putting their families and children first by working as a family unit in making decisions. They provide a safe environment for separating couples and their families and assist the families in saving family resources.

Limited Scope Retainers and Unbundled Legal Services are “the provision of legal services by a lawyer for part, but not all, of a client’s legal matter by agreement between the lawyer and the client.” These services generally include: consultation and legal advice; document preparation; and limited representation in Court. Consultation includes a lawyer providing advice and direction in “typically a short meeting or phone call” about the legal and/or procedural issues in the matter. The lawyer could also provide the litigant with an evaluation of their case. Document preparation “typically involves getting a lawyer’s assistance as to the form and content of a contract, court pleading or other legal document.” It could also include, “reviewing or preparing correspondence or documents, factual investigations, legal research.” Limited representation in court could take place “in court, an administrative hearing, at a mediation, etc.: Typically where a lawyer provides assistance with a single appearance in court or at a hearing, or for work and appearances for a particular stage of a matter.” Representation may even include, “examinations for discovery, planning negotiations, planning for a court appearance, providing support during a trial or assisting with an appeal.”

On February 3, 2015, The Action Group on Access to Justice hosted a unique program to “explore limited scope retainer and access to justice.” Additionally, on October 26th, 2015, the Law Society aired a webcast presentation on the topic of Limited Scope Retainers for Family Law Lawyers. These programs had speakers “with extensive experience using limited scope retainers” and who promoted the “development of new ideas about how they may be implemented in a variety of practice settings.” With the increase in the numbers of self-represented and unrepresented litigants in family court, encouraging limited scope retainers and unbundled legal services is a simple way that lawyers can be part of the solution and could greatly assist the courts, the litigants and the community. Promotion and expansion of this idea could help the courts and the province without it costing any public monies.

The Law Society has amended the Rules of Professional Conduct to allow for Limited Scope Retainers and provide some guidance to lawyers of their additional obligations regarding this type of work. LawPRO has also contributed immensely to developing practice resources for “Best Practices” which can be found on their website.



In Simcoe County a panel of lawyers that call themselves the “PLUS Panel” (Private Legal Unbundled Service Panel) has formed. They are developing a Financial Eligibility Test (not unlike the Legal Aid test) for the litigants referred to them. If the litigants are financially eligible, the lawyers will provide specific limited retainer legal services at reduced rates or on a block fee system. Initial proposals that have circulated are to have a financial eligibility test and practice guidelines that consider providing these services to clients with a total family income over \$48,000 but under \$65,000 per annum. The PLUS Panel also want to help people save their savings instead of spending it all on legal fees, so they are setting the asset limit at approximately \$5,000. All of this is still being discussed and is under development in the early stages, however, if it works, it could even expand to create a “private duty counsel” panel that could make lawyers available for one-day appearances at Settlement Conferences, Trial Management Conferences and Exit Pre-Trials. This panel initiative has the support of the local judiciary and mediation centre.

Another innovation that we strongly endorse for further study is the idea presented by Stacy MacCormac, a practitioner in Cobourg, Ontario, who has proposed an *“Onsite – On Demand - Day of Court - Limited Scope Retainer Private Counsel”* model that holds promise for helping many family law litigants, at a low cost. Her model maintains the role of lawyers at the centre of the family law transaction. A full description of Ms. MacCormac’s proposal is provided as Appendix A to this document.

All of these innovations in the provision of legal services need to be encouraged and promoted by the Law Society and Attorney General. If there are regulatory or practice-guideline barriers to the greater adoption of these practices, they need to be looked at and ameliorated. If there are professional liability insurance considerations that are barriers to adoption of these practices, those should be dealt with as more practitioners utilize these models and the insurers become more familiar with the risks. If there are education barriers, the Law Society and every advocate for reform should be hosting even more continuing professional development. If not enough lawyers know about these options, greater promotion should be done of the benefits of these practice innovations.

In our view, an expansion of the scope of practice for paralegals and other non-lawyer professionals may make the economics for these alternative retainer arrangements, and especially limited scope retainers, even more untenable and unattractive to lawyers. If a paralegal can offer “to be by your side every step of the way” (though with less expertise and experience) for the same price as a limited scope retainer provided by a lawyer, the client may well believe they are better served by a paralegal, when in fact the evidence suggests they might not be. Quantity of service does not equate to quality of counsel. If the competition for limited scope retainers grows in this way, we predict a perverse economic impact and fewer lawyers will offer the service and many others will leave the profession. Since limited scope retainers and these alternatives are relatively new to the market, we strongly recommend that they be given time to gain traction before threatening their existence with new competition.



Strong and Continued Support for Duty Counsel and Legal Aid Certificate Programs across the Province

No discussion of access to justice can be offered without a word about Legal Aid and a reiteration of the important role of both certificates for the private bar and of duty-counsel to the service of lower-income Ontarians. The Federation applauds the Attorney General and Ontario government for the recent infusion of new money, including the money that has helped to raise eligibility and expand certificate eligible services. This money is welcomed and it is making a difference. But it also remains inadequate. The demand for legal services by lower and middle-income Ontarians remains high and continues to grow in the family law space.

We encourage the Attorney General to continue to make the case to her Cabinet colleagues that further investments in legal aid continue to pay strong dividends. We will continue to stand shoulder-to-shoulder with the Attorney General, the judiciary, the Law Society and many others in making that case.

We also reiterate our long-held position, borne out by the facts and experience, that the private-bar certificate and per diem duty counsel system remains the most efficient way to deliver legal services to the legal aid eligible population.

CONCLUSIONS

After careful consideration of all the questions, review of the research that we have commissioned, a survey of our own members across Ontario and many hours of debate and deliberation, we have come to a few conclusions and offer a few final observations which we hope will be considered as you prepare your report to the Minister and to the Law Society.

First, we recommend that much more study and challenge of the assumptions that are underpinning this proposed shift in policy needs to be undertaken. No jurisdiction – that we can find – that has expanded scope of practice for non-lawyers has done the longitudinal study or analysis to determine whether costs have come down or if more litigants are, in fact, being served. And even if more litigants are getting some counsel, questions of quality and the additional cost of repair or mitigation have never been examined. These are questions too important to be left to supposition, especially considering the stakes at hand.

Second, we believe that there are many innovations in the provision of family law, such as those laid out in this paper, that deserve to be given a greater chance to grow and succeed. These innovations need to be promoted, encouraged, funded and made universally available across Ontario. Many of these innovations, such as limited scope retainers, have been phenomena for less than two years and are just starting to gain traction. Adding competition from non-lawyer professionals at this time might make the economic case for many of these innovations unsustainable.

Third, there are reforms and investments that should be undertaken in the administration of our own courts that can help the situation dramatically. Making a unified family court available across



Ontario would be a great place to start. An examination of the rules in family court, with a view to removing cost and streamlining process, will also bear fruit.

Fourth, the behaviour and actions of the Ministry of the Attorney General and the courts administrators must stop sending contradictory messages when it comes to access to justice in family law. For example, we recently became aware of a proposed fee hike³ on certain SCJ cases and, for the first time, on OCJ family matters. Comments on this particular proposal to raise fees on family court are due May 1st, with implementation proposed for July 1, 2016. On the one hand, this Family Law Review is lamenting that lawyer fees are too costly for many litigants, and on the other hand the Ministry is raising fees and costs directly borne by those same litigants. This contradictory message is very disappointing to many family law practitioners and to our clients.

Should the Ministry and the Law Society choose to ignore our reservations and take the advice of those who feel that expanding scope of practice will be a solution to the problems at hand, we strongly urge that actions be taken in a slow and measured manner. There is simply too much at risk and the economics of family law are already precarious enough that any action taken to dramatically shift the practice will drive many practitioners out of this field. Losing this expertise and years of experience will be difficult to replace. In short, replacing quality with quantity will simply not yield the results we all desire.

We all genuinely desire to see a better and more efficient family law system in Ontario that serves the needs of every family law litigant that enters the system. It is in this spirit of genuine desire to make the system better that we have offered this submission and look forward to continued dialogue with you, with the Attorney General, with the Law Society and any other stakeholder that is charged with making our family courts operate better. We wish you well in your deliberations and look forward to discussing our submission with you in greater detail, should you wish to meet.

Submitted on behalf of the Federation of Ontario Law Associations

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³ <http://www.ontariocanada.com/registry/view.do?postingId=21402&language=en>



Appendix A

Onsite – On Demand - Day of Court - Limited Scope Retainer Private Counsel

Written by: Stacy M. MacCormac, LL.B., Cobourg, Ontario

Self-representing family litigants require professional legal help the most when they are standing in a courtroom in front of a Judge or adjudicator. The latest statistics show that somewhere in the range of 60% of litigants in Ontario family courts are unrepresented, in some regions this is even higher. This means that Judges, adjudicators, lawyers and court staff are dealing with unrepresented parties more often than not. More family units are breaking down than ever in our history and a lot more of the people in these breakdowns end up as family litigants in court. This is an emergency government cost and access to justice situation from every angle.

This is a Middle Class Crisis

In all of this, the lack of qualified legal representation for the middle class litigant is especially troubling. A strong middle class produces highly-skilled workers, develops human capital through a well-educated population and contributes tax dollars that allow for critical government services.

As the stabilizing component of society, if 60% of middle class family law litigants are appearing on their own in court, they are at risk, which means the balance they represent in our society is at risk. Among other things, the risk comes in the form of distressed and broken down family relationships between parents and children, leading to possible long term mental health issues for both, as well as the immediate financial viability risk of paying too much or not enough for the support of dependant children and spouses.

Access to effective legal advocacy for these middle class self-reps needs to happen now!

Of course, this is not news. The 1995 Cost of Civil Courts Report has said this exact thing 21 years ago,

“it is important to ensure access to justice applies fairly to all members of society. There is a particular concern that the middle class, who do not qualify for Legal Aid, cannot afford the costs of litigation and therefore encounter a barrier to access to justice. As well, wealthier members of society can wear down middle-class members since the latter cannot afford to fund lengthier lawsuits”.

Since this 1995 Report little to nothing has been accomplished by government to help the middle class.

The Ontario provincial government spends in excess of \$300 million on court services administration and this may not even count compensation for Judges. Without having a specific number, which you can look for but not necessarily find, trust me searching was performed, it can be argued that self-presented parties cost our justice system hundreds of thousands or more, maybe even millions of tax dollars on account of delay, volume of cases in court and lack of legal knowledge.



Access to Justice for Middle Class

It is time for courts, government and the regulatory bodies to own up to this epidemic. The Ministry of the Attorney General has recently announced that it will take on a review of the family law justice system in Ontario to deal with the access to justice problem.

Traditionally, we view access to justice as a socio-economic/poverty law issue. However, this cannot be the case in this instance. This is because litigants who attend court who have low to no-income have duty counsel family lawyers available to represent them. While it is not a perfect system, they have some access to legal representation when they are in court in front of a Judge. Who does not have that same access to justice or legal representation at a court appearance is the middle class litigant.

To approach this self-rep crisis, this current family law justice review has set out to determine if non-lawyers are the solution to the problem.

Quite simply, this will not truly increase access to justice for the middle class.

Trying to solve middle class in court legal representation issues by suggesting that paralegals, law clerks or law students represent them in court in family law disputes is akin to allowing nurses, nursing students and medical students to perform surgery instead of a doctor. No disrespect is meant to any nurses or students; these are all incredibly valuable resources, but they are not the correct resource for the job. Standing in front of a Judge in a courtroom to argue a client’s case is the defining role of a litigation lawyer. Each step in a case in front of a Judge leads to the next step. Each step must be carefully and expertly taken. The courtroom is the litigation lawyer’s operating theatre.

In the possible scenario as suggested by this MAG study, a middle class litigant in court earning \$60,000.00 a year with a career, good credit rating, two kids, a home, a mortgage, etc., potentially gets the services of a law student, law clerk or paralegal. At the same time, a low or no-income litigant can be represented by a qualified family lawyer through duty counsel at court. This simply makes no sense.

Connecting Lawyers with Litigants at Court

The focus here needs to be on connecting the qualified family lawyers with the middle class family law litigants when they are actually in a courtroom. Limited scope retainers and unbundled services agreements are instrumental here. With a limited scope retainer, experienced family law lawyers can now more effectively help a litigant with some parts of a case when they are in court in front of a Judge, without having the client to pay to retain a lawyer for the entire case.

It is understandable that a middle class litigant who earns \$40,000 - \$80,000 per year may not have \$10,000 or \$20,000 or more for a traditional retainer arrangement, but they more than likely would pay a private lawyer’s hourly rate to have legal representation in court for a court appearance for a couple or several hours; thus, getting the legal representation help when they need it the most.



As family practitioners we are experts in the ins and outs of family court procedure, along with the substantive issues. We can often provide substantial assistance to a self-rep in a very short amount of time. This can help things move forward to the next step in the litigation or sometimes, if the case is relatively straightforward, we can actually help to resolve the case either partially or completely.

Family law is deceptively complex. There are few if any simple cases. There are often long term consequences to hastily-made, uninformed short-term agreements. The Law Society Complaint and Discipline Committee and LawPRO claims administrators can surely attest to this. The issues can involve children, incomes, real estate, businesses, pensions and estates. There are also often issues related to mental illness, domestic violence, child abuse, drug and alcohol addiction, and impending bankruptcy among a whole host of other pressing human background issues. It calls out for lawyer involvement.

A recent comprehensive self-rep study conducted by Dr. Julie MacFarlane released in May 2013 entitled “The National Self-Represented Litigants Project: Identifying and Meeting the needs of Self-Represented Litigants”, arrives at the conclusion as well. Dr. MacFarlane found in all of her work with self-reps that most family litigants would prefer to be represented by counsel if they could afford it. There is no doubt that people would like to pay for this expertise if they could. They will more likely pay for it if it is on a limited-retainer or short term basis.

The time has come for the court, government and the law societies to allow experienced family law lawyers who practice primarily family law to be onsite at court and available for these litigants. Judges and adjudicators want family litigants to have legal representation.

Not Pro Bono Work

This program is not based on lawyers providing free services. They do not need to be nor should they be free. Family lawyers are experts in this field and have invested serious time and money to obtain their comprehensive legal education and experience in family law procedure.

Lawyers Benefit

Lawyers will benefit from this program as this will allow them to perform their jobs and provide much needed services to the public while receiving appropriate compensation in return.

This program may initially raise fears with the bar that potential paying clients would opt to use the day of court services each time they go to court, over hiring a lawyer for full or partial representation on a traditional retainer basis.

However, there is no need to fear this program. The reason for this is threefold. First, if the day of court private retainer lawyers are not permitted to be retained past that day, as it is with duty counsel, there is no fear that lawyers will be searching for new files through the program.

Second, there will not necessarily be one lawyer per litigant available under the day of court program. There may only be one or two lawyers and there could be as many as 20 litigants. On this basis as well, there could be a waiting list to speak to a day of court private retainer lawyer as litigants wanting representation will have to sign up. Litigants would not be able to rely completely on the system as the sole source of legal representation.



Third, as it is with duty counsel, day of court lawyers will more than likely advise litigants that more legal advice and representation is needed to proceed properly with their cases and if they agree, those litigants may go and hire counsel, if financially reasonable. The nature of legal information in family law is such that once a little bit of information is provided to a litigant, much more information and advice is sought out.

The day of court private limited retainer lawyer program is not likely to take away from the traditional work of traditional private retainer lawyers. In fact, quite the opposite may be true, with 60% of litigants self-representing, arguably this program will facilitate more lawyers doing more work, not less.

SOLUTION

To do all this means that family lawyers need to be available to the litigants on demand and onsite on the day of court. For this to happen, the private bar lawyers need onsite facilities at all the court houses. Just as duty counsel lawyers have rooms to conduct legal aid services for low to no-income litigants, on demand private retainer lawyers need rooms to do the same for everyone else.

Limited Scope Retainer Agreements - These can be prepared by lawyers in advance to address the scope and realities of the limited legal representation engagement to set appropriate client expectations and to protect against malpractice claims and complaints.

Customized and standardized limited scope retainer agreements can be carefully crafted to address the different types of court appearances. This will ensure that once the court appearance and limited retainer have concluded the litigant receiving the representation fully understands the limited scope of the service for which they are paying and the lawyer providing the representation is protected. The effectiveness of the representation is limited to the facts known and the information available at that court attendance. This is not meant to be comprehensive legal representation and it does not have to be. It is there primarily to temporarily assist self-representing litigants through specific parts of the complex and confusing procedure of family law litigation. While it is anticipated that litigants will be grateful for the help, we all know from experience that in family law hind sight is 20/20.

Credit Card Payment - Credit card machines are now mobile with use of an iPhone, so payment for quality and experienced legal representation at court can be billed and completed in real time. Lawyers can charge their own set rate and the litigant has the choice to take advantage of the services or not. This is not a pro-bono situation.

Invoices - Printers and laptops are portable and most documents including an invoice can be produced immediately and emailed in any event.

ID - Identification can be verified on site.

Panel - If the service is set up, local eligible lawyers can possibly join a panel, just as they do with legal aid duty counsel.

Requirements would need to be met to join the panel, as clients using the service would expect counsel to know the ins and outs of family court litigation. Family lawyers on the panel must have



experience arguing contested motions (both short and long) and ultimately and preferably some trial experience.

To address this, it is proposed that only lawyers with a minimum of 4 years of primarily family law practice be eligible to join the panel. This will provide a minimum level of litigation procedure experience to the litigant while at the same time minimize the movement of duty counsel panel lawyers to the day of court private retainer panel, ensuring a continuance of access to legal representation for the low to no income family law litigant.

How do you know if a lawyer is going to be at court and available? A panel management system can be implemented and managed through a simple software application with registered lawyer users.

Is there a guarantee that there will be a private retainer lawyer available there? No, but there will likely be one present as this is a business arrangement, not strictly a social service. Lawyers who commit to this type of program will act professionally to be available and conduct business.

Conflict Checking - There are professional conduct rules in place already through the Federation of Law Societies' Model Code of Professional Conduct which confirm that lawyers providing short-term legal services do not have to perform full conflict checks. This applies to duty counsel and potential onsite pro-bono lawyers.

Since the model proposed in this paper involves for profit legal services, an exception may need to be considered. The retainer will still be a short-term legal service, however, so a full conflict check may not be appropriate. That being said, it is possible that conflict checking could be performed if an onsite lawyer were to have access to a current and historical firm client database while they are at court, either by computer or telephone.

The Record - The lawyer will likely not be going on record as they will not have carriage of the matter. The lawyer can advise the court that they are appearing as agent and this will encourage all parties, including the court, to try to make headway as much as possible that day.

There are many implementation and execution details to be worked out if this concept takes flight, but these details are all very manageable and the alternative is unacceptable.

SUCCESS STORY

This concept is so obvious, yet so elusive. It presents a compelling value proposition for litigants, lawyers, families, government, courts and society. We can help get cases processed successfully through the justice system and get them out of the system faster, creating cost savings which is the value proposition for government. It will also provide valuable and prudent legal representation of the middle class by lawyers which provides them with critical access to justice.

This may not be a cure all for the family law access to justice issue, but it cannot help but be a huge part of the solution to the problem of self-reps in family court. This is a win-win situation. It is going to be a success story. Now let's get going with it!