Toronto Lawyers ASSOCIATION TLA

June 20, 2019

The Honourable Douglas Downey, MPP
Attorney General
McMurtry-Scott Building
11th Floor, 720 Bay St,
Toronto, ON M7A 2S9

Via Email: attorneygeneral@ontario.ca

Dear Minister Downey,

Re: Proposals for Family Law Reform

I am writing to you on behalf of the Toronto Lawyers Association.

We recently had the opportunity to meet with senior members of your staff, and discussed with them several issues of concern to our constituents. Ranked high among those concerns is meaningful access to the courts for Ontarians involved in family law disputes. As you are no doubt aware, family law is one of the areas where the public is most likely to become involved in the judicial system. Accordingly, making the system understandable, accessible, requiring a minimum of engagement with the judiciary and in the courthouse is a priority issue for the Toronto Lawyers Association.

Compatibility between federal and provincial family legislation

The federal government has introduced Bill C-78, which is an act to amend the *Divorce Act* and related federal statutes to modernize that legislation with respect to parenting rights and responsibilities, and the enforcement of support orders.

The *Divorce Act* applies to parents who are married and choose to divorce. Unmarried parents, and parents who are married but do not wish to divorce, or are prevented from divorcing for some reason are governed by provincial family legislation. Bill C-78 is currently before the Senate and expected to pass. The amendments to the federal statutes have been well received by family law stakeholders. Some of these amendments are in line with amendments already made to Ontario's Children's Law Reform Act. Other amendments go beyond what current Ontario legislation encompasses.

It is the opinion of the TLA that Ontario families would benefit if amendments parallel to Bill C-78 are introduced to provincial family law legislation, as these are substantively needed reforms. Furthermore, having equal rights and entitlements for both married and unmarried parents will reduce confusion for members of the public and also reduce complexity in the delivery of family law.

The key provisions of Bill C-78 are:

a. Replacing the use of the terms "custody" and "access" with "parenting orders", "parenting time", "decision-making" and "contact;"

b. Providing specific criteria for the best interests of the child test;

c. Imposing duties on parents, spouses, and their counsel to use non-court processes such as negotiation, mediation, or collaborative law;

d. Providing expressly for courts to consider family violence;

e. Providing statutory guidance for child relocation cases;

f. Implementing the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children;

g. Implementing the Convention on the International Recovery of Child Support and other Forms of Family Maintenance; and,

h. Amending federal support enforcement legislation.

The TLA recommends that the Provincial government amend Ontario's family legislation to track the federal legislation in this field.

Matrimonial Home Exception to Equalization of Net Family Property

The *Family Law Act* provides special treatment for the matrimonial home(s) of married spouses under the province's equalization of net family property scheme. This legislation governs the property rights of spouses whether a marriage ends by separation or death.

Overall, the equalization regime in Part I of the *Family Law Act* deems all marriages to be economic partnerships and provides for the sharing of wealth generated during the marriage arising from the partnership. Wealth that derives from outside the partnership is excluded, such as inherited or gifted assets or the proceeds of damages from a personal injury claim. The value of assets brought into a marriage is deducted. In the case of both exclusions and deductions, these assets are not shared at the end of the marriage, as they were not the product of the marriage.

However, the *Family Law Act* makes an exception for a matrimonial home. Its value is always included in the equalization, even if the home was owned by one of the parties at the date of marriage or received as a gift or inheritance during the marriage. This creates unfair results.

> **Example 1:** A couple, Sarita and Joe, marry. Sarita owns a house worth $500,000 and Enrique owns a business worth $500,000. Sarita and Enrique live together in her house to the date of separation. Sarita's house falls within the definition of a

matrimonial home. When calculating equalization, Enrique gets a deduction worth $500,000 for his business. Sarita gets no deduction for the house. In effect, she has to pay Enrique $250,000 reflecting one half the value of her home brought into the marriage as part of the equalization calculation.

Example 2: A couple, Miguel and Enrique, marry. During the marriage, Miguel's parents give him $25,000 which he invests in a GIC. Enrique's parents also give him $25,000 which he uses as part of a deposit on a condominium in which Miguel and Enrique are living in when they separate. When calculating equalization, Miguel gets to exclude the $25,000 GIC but Enrique has to include the full value of the condo even though $25,000 was gifted to him by his parents. In effect, Enrique will have to pay $12,500 to Miguel reflecting one half of the gift from his parents as part of the equalization calculation.

These results not only seem unfair, they are unfair. They are also not well understood, and many Ontarians are caught by surprise by this treatment of matrimonial homes. For those who do understand the implications of the law, this provision is a major incentive for the couple to enter into marriage contracts to provide for a more fair arrangement. Marriage contracts can be difficult to negotiate and they are expensive. For those caught by surprise, the inequality can lead to a more contentious negotiation of the equalization of net family property, and in some cases may motivate applications to the court for an unequal division of net family property. The TLA recommends that the special treatment of the matrimonial home for equalization purposes be revoked. It serves no valid policy purpose and leads to unfair outcomes.

Proposed Access to Justice Initiatives

(a) Parenting Co-ordination:

Parenting co-ordination is a form of arbitration for high conflict parenting disputes. Parties retain parenting co-ordinators to assist them in implementing their parenting plans in their children's best interests. Parenting co-ordinators can assist parents in a cost-effective manner to work out disputes about educational choices, extra-curricular activities, and scheduling adjustments for holidays, special events or otherwise. Parenting co-ordinators can adopt informal processes to decide issues that are more flexible and more accessible to parents without lawyers.

In Ontario, parents may consent to an order appointing a parenting co-ordinator; but the court does not have the jurisdiction to appoint a parenting co-ordinator over the objection of one of the parties. For some high conflict family disputes, the only option is for the parents to repeatedly return to court to litigate everyday parenting decisions. This is financially and emotionally destructive for the families, and a burden to the court system.

In British Columbia, the *Family Law Act* empowers the courts to appoint a parenting co-ordinator in an appropriate case. It has enacted comprehensive, and well-thought out processes for the appointment of and scope of authority for parenting co-ordinators - see *Family Law Act* [SBC 2011] c.25, Part 2, Division 3.

The TLA recommends that Ontario amend the *Children's Law Reform Act* to empower courts to appoint parenting co-ordinators in appropriate cases. This will enhance the court's ability to meet the children's best interests promptly and efficiently, and will reduce demands on courts, as well as the legal costs to parents dealing with day to day parenting disputes. Removing these disputes from the courts, and into a process guided by specially trained personnel is beneficial to all Ontarians, increasing access to justice and reducing costs.

(b) Contingency Fees for Family Law Matters

Currently contingency fees are impermissible for family law matters. They are barred by the Law Society of Ontario's *Rules of Professional Conduct* and by the *Solicitors Act,* s. 28.1(3)(b).

In 2004, the *Solicitors Act* was amended to permit lawyers to charge contingency fees in certain cases, which has been broadly viewed as an enhancement to access to justice. A contingency arrangement may be the only way that a litigant with a good claim can afford to enforce his or her legal rights.

Given the crisis of access to justice in family law, the TLA submits that it is time to revisit the prohibition of contingency arrangements in family law. There are cases in which a spouse with a good equalization claim or right to a substantial retroactive support payment may be prevented from retaining a lawyer, or forced to accept a settlement for less than her or his true entitlement because she or he cannot afford to pay legal fees, and may have no way of financing the litigation. With a contingency arrangement, the claiming spouse would have wider access to qualified lawyers and would be able to effectively pursue his or her claim to a fair conclusion.

The TLA recommends that the restriction on contingency fees in family law matters be removed for spousal support and equalization matters. This change would require co-ordination with the Law Society of Ontario.

Thank you for considering these suggested reforms. Our Family Law Committee would be pleased to discuss these recommendations with your team at your convenience, if they would find additional consultation beneficial.

Yours very truly,

Margaret L. Waddell
President
Toronto Lawyers Association

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