

INTRODUCTION

The Family Lawyers Association (“FLA”) provided written submissions in April 2016 for the Family Law Review as well as participated along with representatives from other law associations in a meeting with Justice Bonkalo. The FLA’s position then, as it is now, is that given the complexities of our family law system, the representation of family law litigants by paralegals would not enhance or promote access to justice.

The FLA position on the Family Law Review is that the Recommendations concerning paralegals goes far beyond what has been found to be acceptable in terms of scope of practice, minimal educational requirements and level of direct supervision in any jurisdiction that has undertaken the task of regulating paralegals. This is a particular concern in the area of family law where the clients are at their most vulnerable, dealing with issues of significant and social importance. Currently, participants in the family justice system including lawyers, mediators and judges have undertaken various projects and initiatives, such as triage systems or non-court based dispute resolution, that go much further in helping to promote access to justice for family law litigants and their families than the creation of a lesser qualified class of legal representation.

FAMILY LAWYERS ASSOCIATION

The FLA was established 23 years ago as a result of the then legal aid crisis and the rising premiums of the then lawyer insurance fund run by the Law Society of Upper Canada (LPIC). Since its inception the FLA’s focus has expanded beyond legal aid and LPIC to the issues facing its primary client base, low and moderate income individuals in the Ontario Court of Justice. The FLA has made submissions in writing to the Cory Commission, on changes to the Family Law Rules, various court procedures, the proposed implementation of court fees, changes to the Child and Family Services (both on the Five year Review of the Child and Family Services Act and on Bill 89), Motherisk Review as well as continuing to work to promote improvements to legal aid. The FLA has participated in meetings and discussions sponsored by the Ministry on a variety of issues including self-representation and the proposed triage system.

In addition the FLA board has representatives on the various bar and bench organizations in Toronto (311 Jarvis, 47 Sheppard and 393 University), the LSUC sponsored Association for Sustainable Legal Aid and the Treasurer’s Liaison Committee. The FLA members including its board are lawyers with extensive experience in family and child protection law. Several FLA members are former counsel for child protection agencies or belong to specialized panels such as the Personal Rights Panel of the Office of the Children’s Lawyer. From this breadth of experience, the FLA is able to provide particular and specialized insight on court and law reform.

RECOMMENDATIONS SUPPORTED BY THE FAMILY LAWYERS ASSOCIATION

i. RECOMMENDATION 1 – UNBUNDLED SERVICES

The Family Lawyers Association supports the use of unbundled services by lawyers as a means to promote access to justice in our Family Courts.

ii. RECOMMENDATION 2 – SUPPORT AND SAFEGUARDS TO BE PUT IN PLACE BY LSUC AND LAWPRO

The Family Lawyers Association supports this recommendation that the appropriate safeguards to be put into place to support the expansion of Unbundled Services by the lawyers be put into place by LSUC and LawPro. In developing such supports, LSUC and LawPro must be mindful of the Ontario Court of Appeal judgement in *Meehan v. Good*, 2017 ONCA103, wherein the Court gave clear statements as to the issue of duty of care owed by the lawyer providing Unbundled Services to a client. The FLA would support a further expansion of such practice as long as the Law Society and Law Pro can address the liability issues as enunciated by the Court of Appeal in *Meehan and Good*. This decision was released after Justice Bonkalo's Report was released and Her Honour did not have the opportunity to consider the issues raised in the decision.

iii. RECOMMENDATION 3 – LEGAL COACHING

The Family Lawyers Association supports the recommendation that lawyers be supported and the appropriate safeguards be put into place by LSUC and LawPro to encourage the practice of Legal Coaching as with Unbundled Services.

iv. RECOMMENDATION 13 – USE OF TRAINED PARALEGALS IN THE DELIVERY OF FAMILY JUSTICE SERVICES, INCLUDING FLIC AND AT THE FAMILY COURT COUNTER

In keeping also with the Recommendation 20 (MAG develops a training program that emphasizes the difference between legal information and legal advice) and Recommendation 21 (wherein LSUC ensures the rules relating to the unauthorized practice of law clearly

distinguishes between legal advice and legal information provided by Court staff to unrepresented litigants), the Family Lawyers Association supports the recommendation that specialized paralegals could assist at the FLIC Centres to provide unrepresented litigants with legal information and other resource available at FLIC counters. Such information would include but not limited to the availability of mediation services to resolve their Family Law issues and thus, divert litigants from Court system. These litigants could be directed, where appropriate, to social services such as Families in Transition, counselling services etc.. We are all aware of the funding pressures in our Family Justice System. A properly trained paralegal could be utilized and directed by Court staff to assist the self-represented litigant to understand the legal terminology on the court forms, indicating where documentation is incomplete and explain what documentation needs to be provided. MAG to provide the funding and training for such staff to provide legal information. MAG to provide consistency of such service in each Court House in Ontario.

v. RECOMMENDATION 17 – MAG TO CONTINUE TO FUND STUDENT PROGRAMS SUCH AS PRO BONO STUDENTS, CANADA’S FAMILY LAW PROJECT AND STUDENT LEGAL AID SERVICES SOCIETIES

The Family Lawyers Association supports this recommendation.

vi. RECOMMENDATION 18 – AMENDMENTS TO RULE 4 TO PROVIDE CONSISTENT APPLICATION IN EACH COURT

The Family Lawyers Association supports this recommendation.

vii. RECOMMENDATION 19 – CONNECTION OF ARTICLING STUDENTS AND UNMET LEGAL NEEDS

The Family Lawyers Association can support this recommendation as it would be beneficial for the training of future lawyers and assist expansion of access to justice in Ontario.

viii. RECOMMENDATION 20 – TRAINING OF COURT STAFF BY MAG

The Family Lawyers Association supports this recommendation as Court staff should only provide litigants with legal information and not legal advice, which can be provided by lawyers only.

ix. RECOMMENDATION 21 – RULES CONCERNING UNAUTHORIZED PRACTICE

The Family Law Association supports this provision as legal advice (provided by lawyers only) needs to be clearly distinguished from legal information.

RECOMMENDATIONS NOT SUPPORTED BY THE FAMILY LAWYERS ASSOCIATION

The Family Lawyers Association does not support **Recommendations 4, 5, 6, 10, 11 and 12**. These recommendations, if accepted, would allow paralegals to work independently, both outside and inside court, on a wide variety of legal issues.

With respect to **Recommendation 5**, the areas in which it is recommended paralegals be permitted to provide legal services are far too complex and of such importance to the litigants to be entrusted to a lesser trained class of legal representation. There is a misconception that permeates in the public consciousness that these issues are straightforward and lacking in complexity. This is not in fact the case, particularly at the onset of litigation, where the emotions stemming from the dissolution of the family are at their height and parties need the experience and direction of a family law lawyer. Family matters are complex in the sense that they are not-static. The facts giving rise to a particular remedy can change over time, such that, for instance, a “simple” custody matter where a status quo appears to have been established, and one parent leaves the jurisdiction, turning the matter into a potential Hague Convention case. A family law lawyer is better trained and able to navigate the ever-changing family dynamic.

With respect to **Recommendation 6**, Justice Bonkalo has been clear that the paralegals should not be permitted to represent parties at trial. All the tasks that she lists in this Section, such as interviewing clients to determine the issues to be claimed in their pleadings (Justice Bonkalo refers to pleadings as forms), determining necessary documentary disclosures to advance the client’s case and meet their obligations under the Family Law Rules, drafting pleadings etc. will determine, in large part, a litigant’s success at trial. Allowing paralegals to independently perform these tasks without the supervision of a lawyer may place the client at risk, given the paralegals’ lack of training, ability to recognise the inter-connection between the multiple statutes, which intersect in the area of Family Law. The issue of education is addressed elsewhere in these submissions and the inadequacy of the current education system for paralegals would have to be replaced with a system, which mirrors the training received in law schools and the licensing process of the Law Society for lawyers.

Family Law is a complex area of law with the intersection of many areas such as taxation, estates, trusts, real estate law, contracts etc.. Law school provides its students with

training in these areas of law. Paralegal colleges do not. Permitting paralegals to practice in the area of Family Law is putting the public at risk.

With respect to **Recommendation 10**, paralegal licensing is already under the ambit of the Law Society of Upper Canada. In terms of insurance, the Family Lawyers Association agrees that paralegals undertaking responsibilities on behalf of clients must be insured. The Family Lawyers Association, however, takes the position that it should be a separate insurance fund, so as to not compromise the affordability of insurance premiums to lawyers.

With respect to **Recommendation 11**, the Family Lawyers Association is of the view that this is not the ambit of the Law Society of Upper Canada, to the extent that its resources should be utilized. Lawyers and other service providers have managed to independently form associations and networks to provide a wide range of services to the family law client. While it is not within the scope of these submissions to comment, the resources of the Law Society of Upper Canada should continue to be utilized to make improvements to the licensing process, particularly in the area of Articles for lawyers. Further, while it has been commented that Family Law lawyers have no specialized training, most family lawyers already exercise a form of self-screening, in accordance with their professional obligations to not take on a matter for which they are not qualified, by referring complex matters to more senior counsel.

ACCESS TO JUSTICE ISSUES

The Family Lawyers Association agrees that all individuals involved in our family justice system should have easy access together with competent legal representation when dealing with the important issues affecting themselves and their families. However, we do not believe that the majority of the recommendations made in Justice Bonkalo's report, Family Legal Service Review, will in fact result in an increase to access to justice for the majority of the self-represented and unrepresented litigants.

The recommendations pertaining to paralegal practice expansion into family law, specifically 4, 5, 10, 11 and 12, are not based on sound and current data about legal service delivery in Ontario. An evidence based approach should always be adopted over anecdotes and assumptions. In Alberta, Ipsos Reid, was retained by the Law Society of Alberta to conduct a general consumer survey on legal service delivery usage and attitudes and a second survey of the legal profession before making recommendations on increasing access to justice for Albertans. In Ontario, there is not sufficient information to make recommendations for change to the current state of the delivery of legal services in family law.

Firstly, it is very important to distinguish between the unrepresented litigants, those who cannot afford legal representation or do not qualify for legal aid and the self-represented litigants

who choose to represent themselves because they wish to. This distinction is ignored in the report. Statistical distinction between the two groups is needed in order to provide the best suited remedy, especially given that, 54% of litigants (without the representation of counsel) did not report affordability or not qualifying for legal aid as a reason for not retaining a lawyer. Allowing for the presumably less costly option of paralegal representation in court will not remedy a problem not founded on an inability to afford counsel. The report does not recognize there being any other reason for the lack of counsel other than the inability to afford counsel. The issue of self-represented litigants choosing to represent themselves is a lot more complex and not easily solved by simply providing a reduction in a representative's hourly rates. The issue needs to be further examined in order to be fully addressed. Unfortunately, by failing to explore the other reasons for the self-represented litigants' lack of representation, the report ignores the concerns of 54% of those appearing before the courts without representation. The issue of litigants choosing to represent themselves is not exclusive to Ontario, in fact in Alberta, 71% of those not represented by counsel preferred to self-represent and would not have chosen to be represented by a lawyer as reported in The Law Society of Alberta's Alternate Delivery Of Legal Services Final Report.

For the 46% of unrepresented litigants who have stated that their lack of representation is a direct result of not being able to afford a lawyer or qualifying for legal aid, there is no empirical evidence that paralegals would be an affordable alternative given that 40% of these litigants earn less than \$30,000.00 a year. In Alberta, as per The Law Society of Alberta's Alternate Delivery Of Legal Services Final Report, polling data indicated that the average mean cost differential on the final bill to the client from a lawyer and a non-lawyer providing legal services was not substantially different (approximately \$350). Justice Bonkalo's report recognizes that for many unrepresented litigants, hiring a paralegal as an alternative to a lawyer will not be an affordable option but that paralegals will at least provide a greater choice of legal service providers for those in the middle class. Unfortunately, given that over 50% of unrepresented litigants earn well below a middle class income these recommendations will not be a realistic option for more than half of the unrepresented litigants. When we factor in that the report has already ignored the concerns of over half of litigants without representation, these recommendations at best would assist less than 20% of those it set out to help.

The litigants earning above legal aid's financial eligibility cut off and a middle class income, the most vulnerable, will be left without a viable solution to their access to justice issue. If the majority of the report's recommendations are implemented it will ultimately result in a three tier justice system in which those litigants who can afford lawyers will continue to do so, those litigants who qualify for LAO will continue to be represented by lawyers, and those who cannot afford paralegals or lawyers will continue to go on without any representation. In Alberta, as per The Law Society of Alberta's Alternate Delivery of Legal Services Final Report, consumers indicated they would rather have services of a lawyer for those matters that are

perceived to be more complex and high risk to them. Allowing paralegals to practice in the area of family law is essentially a classist solution that benefits a small minority of middle class litigants while continuing to ignore the working poor litigants. Poverty in families is often a contributory factor to the difficulties with resolving family disputes outside of Court. Resources that are easily available to families with means are rarely a possibility for the working poor. If these litigants are unable to afford the resources aimed at assisting them with resolving their disputes how can they be expected to afford the hourly services of a paralegal.

Alberta has a higher rate of self-represented and unrepresented litigants than Ontario and the Law Society of Alberta does not regulate paralegals as is done by the Law Society of Upper Canada. Despite this lack of regulation and essentially an open market for paralegals and other non-lawyers, there is no evidence that the offering of their services has reduced the access to justice issue for low income Albertans.

“There is evidence however, that low-income Albertans (those making \$50,000.00 annually) experience the legal system differently than those making over \$50,000.00; and they are more likely to have more than one legal difficulty. There are high needs areas such as family law where the cost of legal services (by both lawyers and non-lawyers) is a barrier for low income Albertans. The expansion of the scope of practise by independent non-lawyers agents for a fee will not solve the access to legal services problem because the fields where independent non-lawyers agents offer their services are where they are able to make a living. Generally, independent non-lawyers agents are not offering legal service in the high needs areas of law where there is a lack of access to affordable competent legal services. Data collected indicates that low-income Albertans are unable to pay for many legal services whether delivered by lawyers or non-lawyers in areas generally classified as poverty law and family law.” (The Law Society of Alberta: Alternate Delivery of Legal Services Final Report, 2012.)

Without adequate funding for LAO the most vulnerable, unrepresented litigant earning between \$22, 000.00- \$30,000.00, are left to venture on their own. LAO typically spends an average of \$3,000.00 per family law case and it is highly unlikely that paralegals will be able to provide unrepresented litigants with the same services for less. This is why Contribution Certificates would be a realistic option for those earning \$22, 000.00- \$30,000.00 to obtain counsel and without necessarily having to drastically increase funding to LAO.

It is the Family Lawyers Association’s position that the recommendations in this report will do nothing to further the issue of access to justice for the overwhelming majority of self-represented and unrepresented litigants and at the same time place in jeopardy the rights of the few unrepresented litigants who could afford to retain paralegal services.

EDUCATION ISSUES ARISING OUT OF JUSTICE BONKALO'S REPORT

Justice Bonkalo addresses the educational requirements for licensed Family Law paralegals in Recommendations 6, 7, 8, and 9 of her report. Education and competency go hand in hand. The current educational requirements both at the Community and Private colleges in no way meet the prerequisites required to provide competent Family Law paralegal practice in Ontario. The Family Law Association takes issue with Professor Semple's statement found in page 76 of the Report wherein he states, "If we trust a newly licensed lawyer with no family law training to hang out a shingle and offer quality family law services, it is hard to believe that a highly experienced paralegal would be unable to do so." Attached as Schedule "A" to these submissions is a chart outlining the admission requirements for all Ontario law schools, the first year mandatory courses and Family Law and other related courses available to students in second and third year. In addition, this chart also outlines moot/advocacy opportunities at each law school, placements/clinic opportunities in Family Law and where Pro Bono program operates. Attached as Schedule "B" is a similar chart for paralegal courses offered through Community and Private colleges as well as admission requirements. At present, Family Law is not offered and if Justice Bonkalo's recommendations are to be implemented, a rigorous educational program would have to be implemented to provide for competent practice in this complex area the law. Even seasoned paralegals recognize they do not have the education today to work in the Family Court. In a recent article published in the Windsor Star entitled, "Should Paralegals be Allowed to Practice in Family", Marshall Yarmus states:

"The Lawyer groups are correct that paralegals do not have the education today to work in family court. Courses still need to be developed. Stringent licensing tests still need to be prepared. The lawyers who are specialists in the field should be involved in making sure that the course materials set a high standard bar for paralegals who want to practice family law. We want to provide you affordable access to justice, but not for the sake of low quality education."

Highly respected law professor, Nicolas Bala, in a recent article entitled, "Bonkalo Report: Questions about Paralegals for Family Cases", quite rightly states:

"A central benefit that legal education and qualifications provide to clients is some assurance of the ability of their lawyer to see the complex interrelationship of different issues; to appreciate the evidentiary and procedural requirements for achieving legal remedies; and to engage with their clients in an analysis of long-term implications of decisions. Paralegals have generally been expected to deal with more discrete and focused issues; matters related to the future care and well-

being of children and victims of violence are complex, multifaceted and extremely important and certainly beyond what paralegals have been doing.”

Illustrated in Schedules A and B attached to these submissions, is a stark comparison of the type of education received by law students versus those taking paralegal courses in Ontario. The law schools and the licensing process through LSUC provide the training for the young lawyer to have the skills available to them to deal with client issues as described by Professor Bala. The vast majority of custody and access cases before the Ontario Courts today involve families, especially the children, caught in high conflict cases. More often than not in these cases, are allegations of domestic violence against the spouse and at times, the children of the families. The paralegal schools/colleges do not possess the education infrastructure to provide the necessary level of education required to deal with these complex issues to the trial stage. What happens at the beginning of a case, the drafting of Court documents, how the issues are approached, and the theory of the case developed, all of which will have a profound effect as to the outcome at trial. It will be the lawyers who will pick up the pieces at the end of the day, but it may be too late as these matters proceed to trial. It is the Family Lawyers Association submission that how a case is approached and handled at the beginning of a case will determine the outcome at trial. This is not access to justice but rather a band-aid solution for larger problems within our family justice system in Ontario.

CONCLUSION

The Access to Justice term has been used to characterize the expansion of appearance rights by different classes of legal representation, and in particular, paralegals. This is unfortunate in that by focusing on who can appear in court, we have lost the opportunity to engage in a meaningful and constructive dialogue on what is “Access to Justice”. The Family Lawyers Association takes the position that Access to Justice requires an examination of the various roles by all participants in the legal system, including lawyers, mediators, court and court administrators and legal aid. Our focus and our resources should be on changing how we provide services. Some of those initiatives include changing the traditional lawyer’s retainer by allowing unbundling or coaching, encouraging or even requiring ADR, simplifying rules and procedures, updating and modernizing court services and procedures to make better use of technology, providing for better funding for legal aid by increasing financial eligibility and issuing contributory certificates.