

**SUBMISSIONS OF THE
FAMILY LAWYERS ASSOCIATION
ON PARALEGAL PRACTICE EXPANSION INTO FAMILY LAW**

Introduction

The Family Lawyers Association agrees that individuals involved in our family justice system should have easy access to justice, together with proper legal representation when dealing with the important issues affecting themselves and their families. There is not one quick fix to the problems facing our family law litigants.

The issue: Unrepresented and Self-Represented Litigants

The issue of access to justice is not new and was addressed in the report “Framework for Regulating Paralegal Practice in Ontario” in 2000. Since then, family law has become more complex. The report examined the possibility of the expansion of paralegals' scope of practice in the area of family law and concluded that it was not in favour of same. In the paper, family law was classified as a high risk area of law and not appropriate for paralegals to practice in. The complexities of the law and intersection of family law with other areas such as contract, income tax, estates, real estate, business law, etc. require a high level of representation to navigate the litigation in a fair and appropriate manner.

Rachel Birnbaum and Nicholas Bala's paper, “Experiences of Ontario Family Litigants With Self-Representation”, provides a snapshot of those representing themselves in family court during the period October 2011 to March 2012. Many of their observations and preliminary comments in this paper hold true today. As stated in the paper, it is important to distinguish between the unrepresented litigants (those acting on their own who at one point may have been represented or not, but cannot afford legal representation or do not qualify for legal aid) and the self-represented litigants who chose to represent themselves.

Statistical distinction between the two groups is needed in order to provide the best suited remedy, especially given that, as per Birnbaum and Bala's paper, 54% of self-represented litigants did not report affordability or not qualifying for legal aid as reason for not retaining a lawyer. According to the same paper, 56% of self-represented litigants, in contrast to 5% of

represented litigants, reported that lawyers always or sometimes make things worse. If the self-represented litigants, those who choose to be self-represented, believe that lawyers are part of the problem, paralegals providing the same legal services will also be perceived as being part of the problem. Given these issues, it is important to remember that the true self-represented litigant will not retain a lawyer or any other service providers to assist them with their family law issues.

The group of litigants that should be focused on is the Unrepresented Litigant. The fact that at some point in the process these litigants were unrepresented does not mean that they were unrepresented throughout the entire-proceeding. The statistics on unrepresented litigants require further inquiry in order to determine at what stages of the litigation process litigants are finding themselves unrepresented. Allowing paralegals to practice in limited areas of family law will not necessarily address the access to justice issue if litigants are requiring representation at stages outside a paralegals' scope of practise.

Since the 1990`s fewer and fewer individuals qualified for legal aid because eligibility cut-offs were low, being unchanged until 2014. While legal aid eligibility has just increased again by six percent, there remains a large group of people earning above the eligibility threshold who cannot afford to privately retain counsel given their limited means.

Is Representation in Family Law Cases by Paralegals a Solution?

Affordability

Starting-out rates for paralegals are between \$50 to \$75 an hour, and go up from there as stated by Ms. Simms, President of the Canadian Paralegal Society, in the Globe and Mail article "I want to be a Paralegal. What will my salary be?" dated September 9, 2015. Some paralegals in private practice earned six-figure salaries, depending on their specialization and rate of referrals. 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, as stated in Julie Macfalane's paper "The National Self-Represented Litigants Project", 40% of these litigants earn less than \$30,000.00 a year.

Competency and Protecting the Public

Family Law has the fourth largest number of LawPRO claims, resulting in \$3.8 million per year in costs as per LawPRO's 2016 Malpractice Fact Sheet. In the last five years, 1 in 5 LawPRO claims involved a domestic contract. The number of claims continues to rise as family law becomes increasingly complex. If paralegals are permitted to practice in limited areas of family law they will be obligated to make costly changes to their insurance coverage, which will result in an increase in expenses for them that will then be passed on to the client.

The Paralegal Society of Ontario's paper, "Submissions by the Paralegal Society of Ontario and the Licensed Paralegals Association of Ontario for the Review of the Paralegal Profession", states that the admission to paralegal college programs needs to be more stringent and that applicants need to be screened for their suitability to the profession. More than 80 percent of paralegal students who responded to the Paralegal Society of Ontario's student survey agreed that a higher admission requirement for paralegal students would be beneficial for them to meet the appropriate standards of competence.

The Paralegal Society of Ontario expressed concerns that lowering the passing grades to 50 percent, which took effect in 2013, for paralegal students would affect their future practical abilities and competence. Concern was also expressed over how some important subjects are too condensed to meet the pre-licensing educational requirements. Finally, there is a disproportionate ratio of compulsory legal courses versus non-legal courses. Given the issues with the current education requirements for paralegals, any expansion of their scope of practice into family law would entail an overhaul of the current system resulting in additional expenses for them that will also be passed on to the client.

If limited permissible areas of practice were allowed, how would the Law Society be able to monitor and ensure that paralegals do not provide services outside their scope of practice? The public is not sophisticated enough to be able to distinguish between those areas of practice allowed and those areas of practice which are unauthorized. How would this be policed effectively to ensure that the public is protected from unauthorized practice? Over 40% percent of the lawyers who completed the Family Lawyers Association survey experienced having a paralegal representing the opposing party and 20% had assumed a file from a paralegal, despite paralegal's current exclusion from practicing in the area of family law unless they are authorized

to represent a person by a judge on a particular case. According to the same survey, 83% of these encounters with paralegals working in the area of family law occurred after the Law Society began regulating them.

In 2014, the Law Society had more than 47,000 lawyers and almost 7000 paralegals. Lawyers and paralegals made up a total of 54,000 licensed members with lawyers accounting for 87% and paralegal 13% respectively. As per the Law Society's 2013 Annual Report, the Law Society Tribunal opened a total of 33 or 18% of the files against paralegals and 146 or 82% against lawyers. The trend continued in 2014, with a total of 28 or 19% of the files being opened against paralegals and 120 or 81% against the lawyers, despite the fact that in 2014 paralegals only made up 13% of all licensed service providers. Moreover, The Paralegal Society of Ontario in their paper (referred to above) raised concerns that too many of the complaints to the Law Society about paralegals were not being investigated.

Does the expansion of paralegal practice into the area of family law create a two tiered system in Ontario? If you have sufficient resources you can retain a family law lawyer properly trained and who possesses the necessary skills to navigate a complex legal system. If you do not have sufficient financial resources, then you can retain a paralegal who does not possess the necessary training and skills to navigate this complex system.

How would such a system protect the public and advance access to justice? How would the public be educated to understand the different skill sets and expertise available between retaining a family lawyer or paralegal to assist in the resolution of their family law problems? These are questions that must be asked and answered before the scope of practice of licensed paralegals is expanded into the area of family law.

Are There Better Options?

The expansion of eligibility for those with limited means to retain a lawyer through Legal Aid would be a far more effective means of increasing access to justice and proper legal representation. The Family Lawyers Association supports a meaningful enhancement of the eligibility levels. A staggering number of self-represented litigants earn \$30,000 or less a year. An increase to legal aid funding and a move to increase the eligibility cut-off for a non-

contributory certificate to \$30,000.00 would address almost half of the current self-represented litigants.

The Family Lawyers Association has lobbied for a major expansion of the Contributory Certificate program for several years. Those individuals who are able to make monthly payments towards legal fees, would be able to retain counsel and over time would pay legal aid back the cost of the litigation together with the applicable administration fee. This expansion would greatly decrease the number of unrepresented litigants in our courts.

Other Barriers - Family Law Fees

Recently it was announced that the Attorney-General is proposing an increase in the fees charged in the Superior Court of Justice and the Superior Court of Justice (Family Branch).

In addition, the Attorney General of Ontario has decided that fees shall be introduced on July 1, 2016 into the Ontario Court of Justice courts dealing with family law cases in this province. The Ontario Court of Justice deals with this province's most disadvantaged and marginalized citizens. The imposition of such fees will result in the creation of a new barrier to access to the justice in that the fees will increase the overall cost of a family law case. The Family Lawyers Association submits these fees will prevent many individuals from bringing the important issues of custody, access, child and spousal support and restraining orders before the court for determination. A waiver of fees, depending on the threshold level for eligibility, is not be an adequate solution.

Conclusion

Given the complexities of our family law system, the current and future barriers family law litigants face, the representation of family law litigants by paralegals will not enhance an individual's ability to access our justice system.

SCHEDULE “A”

Summary of Survey Results

The Family Lawyers Association surveyed its members over the period commencing February 10, 2016 and ending March 30, 2016. The membership was asked various questions about current practice, performance and what further role, if any, paralegals, law clerks and law students should have in our family courts.

The respondents are experienced family law lawyers. There were 69 respondents, the majority of which devote more than 75 per cent of their time to family law. Well over half of the respondents had been practising family law 10 or more years.

The majority of respondents employ or have employed law clerks. Only about 20% employ or have employed a paralegal. Less than 30 per cent have ever employed a law or articling student.

Of those respondents who employ or who have employed a paralegal or law clerk, those respondents reported that they had paralegals and law clerks do essentially the same tasks – drafting, interviewing clients and reviewing and assembling disclosure.

Respondents were asked to rate the work of law clerks and paralegals. Law clerks were rated highly with a rating of “Good” or “Excellent” in most areas - drafting, communications, and compliance with rules. Paralegals rated much lower although many categories for paralegals were marked not applicable.

Respondents were presented with a variety of tasks and asked if that work should be undertaken by a paralegal without supervision. Over 44 per cent stated that paralegals should NOT do any family law work without supervision.

Around 42 per cent of respondents felt that it would be acceptable for paralegals to do some work without the supervision of a lawyer, like interviewing clients or appearing in the first

appearance court before a court registrar. The majority of respondents, however, did not feel that it was appropriate for paralegals to take on any work representing clients in court.