Submissions of the Criminal Lawyers' Association

Consultations on Expanding Legal Services: Options for Ontario Families.

To the attention of:
The Honourable Justice Annemarie E. Bonkalo,
Family Legal Services Review
Ministry of the Attorney General
720 Bay Street, 7th Floor
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THE CRIMINAL LAWYERS' ASSOCIATION

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Preface

The Criminal Lawyers Association (CLA) is a non-profit organization founded on November 1, 1971. The CLA is one of Canada's largest legal specialty organizations, comprising approximately 1350 criminal defence lawyers. The CLA mandate included educating and supporting its members as well as all criminal justice system participants. The CLA is committed to raising awareness of the challenges faced by vulnerable persons within the justice system.

The CLA is regularly invited to consult with the House of Commons and Senate committees to share its views on proposed legislation pertaining to the criminal, constitutional or other areas which impact on the individuals' relationship to the government. The CLA frequently meets with representatives of the Ministry of the Attorney General on Ontario and expresses its views on provincial legislation, court management, Legal Aid Ontario and the general administration of the criminal justice system in Ontario.

Moreover, the CLA has routinely made submissions with respect to policy decisions both provincially and federally. The CLA has also intervened as an interested party in significant litigation that concerns important criminal law matters and the concerns of its members, both at the Ontario courts and the Supreme Court of Canada.

Introduction

The CLA appreciates the opportunity to participate in the discussion concerning the expanding legal services of non-lawyers in family court. In brief, our organization is very concerned about the expansion of non-lawyers in the family law sphere. Our concerns stem from the lack of competence and education surrounding paralegals in this area of law and our strong belief that those who choose not to retain counsel for these matters do so by choice rather than necessity. Many of the issues raised in this consultation are familiar to the criminal bar.

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(1) UNREPRESENTED PARTICIPANTS:

In the Ontario Court of Justice there are more unrepresented accused in criminal courts than unrepresented litigants in family court. It is not surprising that there is some overlap in these groups of participants. Although there have been recent improvements in the Ontario Legal Aid Plan, those with modest incomes still do not qualify and are often forced to represent themselves in court. The notably increases in the financial eligibility criteria are still at-or-below poverty lines in the Province. It is our position that the correct response to this issue is to improve participants' access to competent legal counsel by improving the Legal Aid Ontario certificate system rather than lowering the bar by opening up the family court system to less competent options.

UNREPRESENTED FAMILY LITIGANTS:

One of the central issues identified by this Consultation is the perceived problem of unrepresented litigants. The implicit assumption is that all litigants want to hire lawyers, but the perceived costs of hiring a lawyer are too high. In the family court context, perhaps more than in the criminal courts, many litigants choose to represent themselves even though they have the ability to retain counsel. Dr. Julie McFarlane's research discloses that most unrepresented participants in the family court system had previously retained counsel. There are a variety of reasons for this. Further research is required to determine why counsel is discharged before assumptions can be made attributing this decision to cost alone.

The Consultation must recognize that family court participants are often making emotional rather than rational decisions about the direction of their case and cannot always be persuaded by "cost/benefit" analyses. Alternatively, the litigation may be protracted by a relentless opponent. Many unrepresented participants choose to represent themselves, believing they can present their own case. It is a myth that "lawyers' fees," are the *cause* of the phenomenon of unrepresented family court litigants.

Unrepresented family court litigants of modest means are already assisted by Duty Counsel on the day of court, if they financially qualify. Many more are eligible for legal advice from lawyers at the Family Law Information Centres or through the Legal Aid Certificate Plan.

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(2) <u>Expansion of legal services provided by non-lawyers</u>

The competency level of non-lawyers providing legal advice remains a significant concern. Paralegals in particular, can obtain their licence to practice after only one year of study and with minimal practical training. There remains a significant disparity in the quality of education they receive. At present, none of the institutions with paralegal programs provide any training in family law. (Paralegal Standing Committee, Report to Convocation, February 24, 2013.)

By contrast, Law Clerks in the Province of Ontario have more stringent educational requirements which includes studies in family law procedures. The significant difference between paralegals and law clerks is the recognition that the work of the law clerk *is supervised by a lawyer.*

It would be a disservice to the public to permit "alternative legal service providers" to expand their services without a thorough review of the education and skills required to service this segment of the legal community properly. It would not be advisable to move toward the unsupervised provision of these services without more study and consultation.

In many First Appearance courts, law students, agents and paralegal appear to "set dates" for matters, often under the supervision of counsel. This is an appropriate practice. The criminal courts however, have strongly resisted efforts by paralegals to appear in their courts to represent accused persons at trial on more serious matters. The courts recognize that criminal and Charter issues are beyond the competency of most non-lawyers and the consequences are too significant to the clients and the public.

Similarly, in the family law courts, the issues and the law are equally complex and the consequences to the parties are personal, profound and can have long lasting and collateral consequences. Alternative legal service providers are not trained in areas of divorce, custody and access and support, estates or property law. The suggestion that there are "simple family law matters," is over simplistic and denies the realities of modern day practice.

Completing "simple" Minutes of Settlement are equivalent to drafting and completing separation agreements. These agreements will affect the most personal aspects of the parties' lives. Paralegals do not receive the years of legal training and on-going education which lawyers receive to practice in this area. There is a real danger that poorly written documents and or agreements will cause the participants more harm in the long run.

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At the recent 10th Annual 2016 Family Law Summit, Ms. Susan Sack presented a paper entitled, "Setting Aside Domestic Contracts & Risk Proofing your Practice, ". The paper noted LawPro reports that 4 out of 5 family lawyers will face a claim during their career. Ms. Sacks noted:

> For the past decade, especially with the *Levan v Levan* decision, domestic contracts have been fair game for challenge. So much so that in 2015, an Ontario Superior Court judge quoted the opportunistic divorce lawyer Arnie Becker: "I've never seen a pre-nup I couldn't break." This mentality seems to have permeated our profession. **In turn it has made the area of domestic contracts the single riskiest area of family law and the most costly from our professional liability insurer's perspective.**

It is into these dangerous waters that "alternative legal service providers" now want to wade. The consequences to the participants and to the profession as a whole would be significant. The potential increase in liability is very concerning.

Professional responsibility:

If the role of the "alternative service provider" is simply to assist individuals in completing the required forms (often on the day of court), then they are providing administrative rather than legal services. This is not providing the public with true access to competent legal advice or enhancing access to justice. There is much more involved in the conduct of a family court matter than simply "completing the forms." The new financial disclosure rules require more oversight from lawyers.
As Mr. Braham Siegel noted in his article, *"Legal Ethics and Financial Issues: Navigating Choppy Waters with Integrity."* Family Law Quarterly, 30 (2011): 71-92, that financial disclosure requires a high level of professionalism. Citing Justice Aikens in Buttrum v Buttrum 2001 Carswell ON 1308 (Ont. SCJ).; additional reasons at 2002 Carswell Ontario 3009 (Ont. S.C.J.):

> Complete, honest and on-going financial disclosure is required during the course of a family law case. This is the very purpose of r. 13. Lawyers must devote their full attention to the accurate completion of financial statements… **I caution lawyers that they are providing poor service to their clients if they delegate responsibility to the clients to figure out how to complete the forms, with the lawyer's assistant merely typing them. Completion of a client's financial statement must be done under the direction of a lawyer**. (***emphasis added)***

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Mr. Siegel argues it is a lawyer's professional duty to be as thorough and diligent and honest in preparing the client's financial statement as it is the foundation of the court action. It is unhelpful to the clients or the courts to short change the process. The pleadings, affidavits and financial statements are the cornerstone of the court proceeding and are simply too important to be delegated to an "alternative legal services provider" without adequate legal training and without the supervision of competent legal counsel.

SYSTEMIC ISSUES: "Why does this keep happening?"

Justice Pazaratz recently asked that question in the publicized case of Jackson v. Mayerle, 2016 ONSC 1556. Following a 36-day trial, Mr. Jackson was granted custody of the couple's one child. In ordering Ms. Mayerle to pay Mr. Jackson $ 192,000 in costs, he noted, "Their eight-year-old daughter's future has been squandered."

To focus solely on the final legal bill, misses some fundamental issues with the family court system itself. Some of the difficulties originate in the complexity of the family court processes, rules and forms. The numerous appearances and conferences add to inherent delay in the system. Counsel in the case above, as in most others, exchanged Offers to Settle before trial in an effort to resolve or reduce the number of issues. Some form of Case/ trial management system would be a great addition to the process.

Alternatives:

Access to justice for families in transition must involve access to competent legal counsel throughout the process who can provide advice about family, property, estates, criminal law and equity.

Mediation, in appropriate circumstance can assist the parties to settle their issues without resorting to the litigation process. The court mandated mediation session can only benefit the parties if the mediators are adequately trained. If Mediators are addressing legal or property issues, they should be senior family lawyers who understand the law.

Collaborative law is a growing alternative to court. Parties agree to provide each other with full disclosure and to avoid the court process. Lawyers trained in family law and the collaborative process can assist families to resolve their matters in a more efficient and less antagonistic way.

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In recent years, there has been an expansion of "Unbundled" or "limited" retainers by lawyers prepared to provide limited legal services to clients. Clients who cannot retain a lawyer for the entire process, can hire the lawyer to assist in the professional preparation of a financial statement, review of a domestic contract or appear at a case conference.

The Family Law Information Centres which are often staffed by Legal Aid counsel are useful resources for unrepresented participants of modest means. Where appropriate, law clerks, under the supervision of the FLIC lawyer could assist individuals through the maze of forms and steps in the process.

An encouraging example of innovation is the new Ministry of the Attorney General – Child Support Service, which allows parents to vary the amount of child support online. Which, if integrated with the Family Responsibility Office, could enhance enforcement as well as reduce the need to bring a court motion to change child support.

Conclusion:

The phenomenon of unrepresented litigants in the family courts is the result of a number of factors, including the inherent complexity of the court process itself. Introducing "alternative legal service providers" into the family court who do not have the legal training to competently represent the interests of the public will not improve this situation. Given the nature of family law disputes, some participants will make decisions to continue to litigate against the advice of counsel, against their own interest, or even against the best interests of their children. The family court process has become cumbersome and any solution to these issues will require a systemic review of the process.

For participants of modest means, there is assistance available from Legal Aid Ontario: duty counsel, Family Law Information Centres, and Certificates. Legal Aid now provides certificates to assist parties negotiate a separation agreement rather than litigate their matters in court. The private bar assists participants by providing "limited" retainer services. The private bar also participates in some mediation and collaborative process to settle files. We support the improvement of the Certificate system to assist participants retain competent counsel throughout the litigation process.

There may be some benefit to further research into the suggestion of creating sub-classes of specialized non-lawyer licensees. The licensees could acquire additional education and training in a particular area of practice, such as

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administrative tribunals or Provincial Offences Courts. However, only lawyers have the years of education and continuing professional development in all of the areas of law impacted by family and criminal law to practice in these areas. These are “choppy waters” for both participants and practitioners. There is a very real potential for increased risk to the public.

There may be a role for alternative service providers to assist the public with the procedures in family court, <u>but only under the direct supervision of competent legal counsel</u>. We would not support unsupervised non-lawyers appearing in these courts as a substitute to competent counsel. The potential liability to the professions could be overwhelming and the risk to the public would be too great.

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