



Toronto Lawyers Association (“TLA”) Response to Justice Bonkalo’s Family Law Review

April 27, 2017

Recommendation 1:

Lawyers should continue to offer unbundled services and should take steps to ensure the public is made aware of their availability. Lawyers should consider innovative opportunities to offer unbundled services, including affiliations with other lawyers and online platforms.

The TLA supports this recommendation. Unbundled services, offered in increasingly innovative ways, are a positive and appropriate way to provide necessary legal advice and assistance at a more reasonable cost to the consumer than an overall retainer.

Recommendation 2:

The Law Society of Upper Canada should continue to support the expanded use of unbundled services and should offer continuing legal education opportunities and tools to address the liability concerns that lawyers have raised as an impediment to offering these services.

The TLA supports this recommendation. The Law Society should continue and increase its awareness and education programs so that both lawyers and consumers are aware of choices available to them. Lawyers are wary of their liability in regard to unbundled services, especially as a result of the recent decision in *Meehan v. Good 2017 ONCA 103*. The TLA suggests the Ontario government urgently address regulation to confirm the contractual relationship between counsel and client in unbundled services, such that lawyers are protected from liability for issues outside the services in the contract. This would encourage lawyers to take on unbundled work.

Recommendation 3:

The legal profession should support the development of legal coaching and offer continuing legal education opportunities to ensure lawyers are equipped to offer these services. Lawyers should be encouraged to take these training programs, and to offer and advertise coaching services. The Law Society of Upper Canada and LawPRO should consider providing incentives for lawyers to make legal coaching an integral part of their practice.

TLA supports this recommendation. Legal coaching falls into the category of unbundled services.

Recommendation 4:

The Law Society of Upper Canada should create a specialized licence for paralegals to provide specified legal services in family law.

TLA continues to oppose this recommendation for reasons set out in detail in its original submission to Justice Bonkolalo's review. To quote from Justice Bonkalo's report' *"It is important that family legal services providers be regulated because clients can be seriously damaged by deficient services and because they are generally unable to determine service quality themselves"*. (b. Paralegals paragraph 7)

The TLA continues to remain exceedingly concerned about the public's protection in the complex and sensitive area of family law, if represented by a partially trained non-lawyer.

The TLA strongly recommends paralegal involvement in family law matters involving children be limited to service under the supervision of a lawyer, and be further limited, in court appearances, to procedural matters such as a consent adjournment. Representation in substantive issues in court requires the education and skill of a fully trained lawyer. Only with that full skill set can a client be assured his or her counsel is competent to advocate for his or her interests in a forum of evidentiary rules, procedural rules, ethical responsibilities, and duty as an officer of the Court. A lawyer is trained to examine the scope of a client's issues beyond basic child custody and support, and issues beyond family law

issues which can affect the welfare of a child. Representation by a partially trained non lawyer may encourage a client to settle on “simple” terms re: child custody, access, and or child support arrangements and not pursue, due to lack of advice:

- the merits of a section 30 Assessment or the involvement of the Office of the Children’s Lawyer;
- a thorough analysis of the Cliff Effect in shared custody cases;
- a thorough analysis of each spouse’s income, so the after tax cost of section 7 expenses (after appropriately determining such expenses) can be proportionately allocated, *especially* where a child has special needs;
- claims in tort for damages in relation to domestic violence (directly or indirectly affecting children);
- claims in trust (a child’s welfare is directly affected by a parent’s financial circumstances, including assets to which a parent may be entitled via trust law);
- claims in regard to a parent’s business relationships (a child’s welfare is directly affected by a parent’s financial circumstances, including income and/or property entitlement which might include oppression remedy claims);
- spousal support, which directly affects the lifestyle of a child (for instance, a party may abandon a claim for spousal support, if such claim appears modest, in order to employ a paralegal, assuming his her net disposable income will include all of the child support. The party may then find that his or her obligation to pay a joint debt incurred solely for the benefit of the other party requires most of the child support;
- claims related to pre existing foreign orders;

The list could go on.....

The failure to pursue remedies in regard to other issues such as these, especially where a limitation period may apply, can have a direct bearing on the welfare of children.

Recommendation 5:

Paralegals licenced in family law should be permitted to provide legal services in the following areas: custody; access; simple child support cases; restraining orders; enforcement; and simple and joint divorces without property.

They should not be permitted to provide services in cases involving:

The Convention on the Civil Aspects of International Child Abductions (i.e. the Hague Convention); child protection (which is outside the scope of this review); property; spousal support; complex child support in which discretionary determinations are necessary to arrive at an income (e.g. self-employment, undue hardship); and relocation;

The TLA states unequivocally that children, as the most vulnerable of Ontario's citizens, deserve the highest and best representation available when their interests are at stake, as in any family law legal matter. Partially trained non lawyers, without a full education and understanding of the complex areas of law related to children in custody/access/support/restraining orders and enforcement, as well as the numerous potential issues outside these issues, should never be subjected to having their interests advocated and protected by partially trained non lawyers. We owe Ontario's children more than that.

The question will evidently be asked: Is it better to have representation by a paralegal, or no representation at all? The answer is "better no representation at all" - because where a party is not represented and the interests of children are involved, the judge will inevitably take a more activist and sometimes necessarily interventionist role in order to satisfy himself or herself that any settlement is in the best interests of the children. There is also duty counsel, often well experienced in the area, available to assist, though likely unavailable if paralegal representation as "counsel" were to be permitted.

The concept that a partially trained non lawyer is of assistance to a litigant in a case involving children prior to, but not at trial, is difficult to accept. Decisions regarding custody and access are made at an interim stage on the best information available to the court at that time. The resulting situation becomes a status quo and that is much more difficult to change at a trial. A litigant could be hugely prejudiced by a compromise position advocated by a partially trained non

lawyer at an interim stage, only to find it has set a status quo that is not changed at trial.

Many of these potential issues may also arise in what appears to be, to a partially trained non lawyer, a simple divorce. There are few “simple” divorces. The breadth of issues that can be affected by a divorce is extensive, and a partially trained non lawyer may assist in the completion of a divorce application, but is likely not qualified to advise of all of the potential consequences of a divorce, from loss of extended health care benefits and pension entitlements to limitation periods for property claims.

The best regime for Ontarians is for only licensed lawyers to act in all family law matters.

The TLA certainly supports Justice Bonkalo’s recommendation that partially trained non lawyers should not be permitted to provide services in any case involving international child abduction, child protection, property, spousal support, complex child support and relocation.

Recommendation no. 6:

Within the areas of practice as set out in Recommendation 5, above, paralegals licenced in family law should be permitted to do the following;

Conduct client interviews to understand the client’s objectives and to obtain facts relevant to achieving that objective; Perform some forms-related tasks.

The TLA does not support this recommendation. Partially trained non lawyers are not in a position to assess the client’s position on a holistic basis. Even the additional training suggested in the Bonkalo report would not equip a non lawyer to advise the client, not just on his or her objectives as stated, but to assess other related potential claims and the merits of including or abandoning same. Family law forms are pleadings and affidavits. Partially trained non lawyers will not have the skills and knowledge necessary to prepare these documents competently.

Recommendation no. 7:

Paralegals wishing to specialize in family law should first be required to complete the current requirements for a paralegal licence.

The TLA does not support the expanded scope of practice in family law for paralegals.

Recommendation no. 8:

At minimum, the following topics should be included in any education and training of paralegals in family law: gender-based violence, family dynamics, client counselling, forms completion, ethics and professionalism, substantive and procedural family law and indicators that a client requires referral to a lawyer.

The TLA does not support the expanded scope of practice in family law for paralegals.

Recommendation no. 9:

A practical, experimental component in family law should be built into the licencing process for paralegals specializing in that area.

The TLA does not support the expanded scope of practice in family law for paralegals.

Recommendation no. 10:

Licensed paralegals with a specialization in family law should be subject to regulation and oversight by the Law Society of Upper Canada, and be required to be insured for their services.

The TLA does not support the expanded scope of practice in family law for paralegals.

Recommendation no. 11:

The Law Society of Upper Canada should take steps to facilitate collaboration between lawyers and paralegals with family law licences to form formal and informal affiliations, referral networks and interdisciplinary teams.

The TLA supports collaboration between lawyers and nonlawyers working under the supervision of a lawyer, in delivering services in family law. Currently Colleges provide such training in the law clerk programs.

Recommendation no. 12:

Legal Aid Ontario should apply its interdisciplinary model to family law, using paralegals licenced in family law wherever possible.

The TLA does not support the expanded scope of practice in family law for paralegals. Low income Ontarians, as all Ontarians, should be entitled to legal services in family being delivered by fully trained lawyers, with adequate compensation provided by legal aid.

Recommendation no. 13:

The Ministry of the Attorney General should consider whether opportunities exist to utilize paralegals licenced in family law in the delivery of family justice services, including at the Family Law Information Centre and at the family court counter.

The TLA supports better training for Court staff at Family Law Information Centres and at filing counters. Appropriate training is available under current College law clerk programs.

Recommendation no. 14:

The Family Rules Committee should consider how the family court forms could be amended to require service providers who are compensated for preparing, or assisting in the preparation of forms, to indicate that they have provided such assistance.

The TLA supports this recommendation.

Recommendation no. 15:

The Law Society of Upper Canada should review the impact paralegals specialized in family law have had on access to justice five years after the first family paralegal licences have been issued. This review should include an analysis of whether paralegals provide an affordable alternative to traditional models, whether the introduction of paralegals in family law has had any impact on self-representation and whether adjustments should be made to their scope of practice.

The TLA does not support the expanded scope of practice in family law for paralegals.

Recommendation no. 16:

In order to facilitate a five year review, there should be a robust evaluation system in place as soon as paralegals are permitted to be specializing in family law. The evaluation should measure client and paralegal satisfaction, as well as obtain views from the wider family justice community on the impact of paralegal practice in family law.

The TLA does not support the expanded scope of practice in family law for paralegals.

Recommendation no. 17:

The Ministry of the Attorney General and LAO should ensure continued funding to enable student programs like Pro Bono Students Canada's Family Law Project and the student legal aid services societies to continue to operate and possibly even expand.

The TLA supports this recommendation.

Recommendation no. 18:

The Family Rules Committee should consider amendments to Rule 4 to ensure its consistent application across courts, particularly with respect to court appearances by students and to clarify when lawyer supervision is required. Where supervision is required, judicial permission should not be necessary.

The TLA supports this recommendation.

Recommendation no. 19:

The Law Society of Upper Canada should take the opportunity during its review of its licencing process for lawyers to consider whether there is a way to connect the experimental learning of law students with unmet legal needs in family law.

The TLA does not support this recommendation. Family Law is an area where many clients are in a vulnerable state in complex situations. It is not an appropriate place for students to gain experience in the practice of law before they move on to careers in other sectors.

Recommendation no. 20:

The Ministry of the Attorney General should develop a training program for court staff that emphasizes the difference between legal information and legal advice and encourages staff to provide as much assistance as possible within the limits of their role.

The TLA agrees and supports this recommendation.

Recommendation no. 21:

The Law Society of Upper Canada should ensure that rules relating to the unauthorized practice of law clearly distinguish between legal advice and the legal information provided by court staff to unrepresented litigants.

The TLA supports this recommendation.