



June 15, 2017

DELIVERED BY EMAIL – commentsFLSR@lsuc.on.ca

Attention: Treasurer Paul Schabas

The Law Society of Upper Canada
130 Queen Street West
Toronto, ON M5H 2N6

Dear Mr. Schabas,

Re: Submissions re: Family Legal Services Review dated December 31, 2016 (the “Bonkalo Report”)

We are an organization of over 900 lawyers practicing in the County of Middlesex. The purpose of this letter is to set out the position of our members in response to the Family Legal Services Review dated December 31, 2016, completed by the Honourable Madam Justice Annemarie Bonkalo and submitted to the Attorney General of Ontario and the Law Society of Upper Canada (the “Bonkalo Report”).

Together with the Middlesex Family Law Association, we circulated a copy of the Bonkalo Report among our membership, and invited all members interested in the report to provide feedback. We held a meeting with local family law lawyers where the opinions and concerns were discussed in further detail. In general, our members (whether family law lawyers or practicing in another area) are strongly opposed to the recommendation that paralegals should be permitted to practice family law. In this submission, we wish to summarize the various concerns expressed by our members, to make suggestions for ways of lessening those concerns, and to suggest alternative ways in which access to justice might be improved.

Concerns Brought Forward

Some of our members have had experience working with paralegals, and/or of working on files on which the client had previously hired a paralegal. This includes family law lawyers working during the period in which paralegals were permitted to prepare uncontested divorces, and lawyers working in other practice areas where paralegals currently have a scope of practice.

While this is not a systematic survey and the concerns outlined herein would not apply to all paralegals, some of our members have experienced the following:

1. Paralegals charging similar or higher rates than lawyers for proceedings including uncontested divorces, while leaving the client with more responsibility (i.e. serving and filing);

- a. This would undermine the assumption by the general public that hiring a paralegal is less expensive than hiring a lawyer, and may lead clients who do not “comparison shop” to pay a similar or higher rate for a less qualified practitioner.
2. Paralegals making significant errors within pleadings, including uncontested divorce pleadings, which required correction by the lawyer later assuming carriage of the file;
3. Paralegals providing incorrect or incomplete legal advice to clients; and
4. Paralegals drafting pleadings incorrectly, and paralegals making incorrect procedural and legal decisions (i.e. which court/legislation, which claims to make).

Overall, our members have serious concerns that members of the public who hire a paralegal to assist them with a family law matter will be inadequately served.

Family law is a complex area of law. Lawyers must be familiar with multiple statutes and regulations in order to competently represent clients, including but not limited to the *Divorce Act*, *Family Law Act*, *Children’s Law Reform Act*, *Succession Law Reform Act*, *Child and Family Services Act*, and the *Family Responsibility and Support Arrears Enforcement Act*. Family law practitioners must also be familiar with the common law and principles of equity in order to properly advise and represent a client.

Family law also intersects with many other areas of law on a regular and consistent basis. In order to provide clients with competent representation, a family law lawyer must have at least a basic knowledge of these other areas of law, including estate law, trusts, tax law, contracts, bankruptcy, corporate law, and criminal law. A competent family law lawyer must also have a sufficient knowledge of civil procedure and the rules of evidence in order to properly serve his or her clients who are involved in litigation.

Simply put, we do not believe that the education provided to paralegals in a one- or two-year college diploma program is sufficient to enable them to practice family law effectively. Adding a “practical, experiential component in family law” to the paralegal licensing process, as recommended in the Bonkalo Report, will in no way be equivalent to an undergraduate degree, successful completion of law school, ten months of articling, and completion of the Law Society’s licensing examination. If we allow paralegals to practice family law, we will effectively be creating a “two-tier” system of legal representation for clients, which in our view is not providing access to justice.

We feel that family law is significantly different from other areas of law in which paralegals can successfully represent clients, such as small claims, landlord/tenant matters, and summary offences. In these areas of law, the issues are more narrowly defined, as are the potential consequences for the client. In family law, this is simply not the case. There is no limitation on liability in family law, as there is in small claims court files. Even in child support files that appear “simple”, liability, including retroactive liability, can be significant.

In family law, the best interests of children should always be paramount. It cannot be overstated that the work performed by family law lawyers has a direct and lasting impact on children. Our members are extremely concerned with any recommendation that would allow a non-lawyer to provide services or advice to clients in the area of custody and access. The consequences of ineffective representation in a custody and access matter are potentially life-changing, and a client cannot be adequately compensated through a claim through the paralegal’s insurer. We unequivocally agree with the Honourable Justice Peter Cory’s comment reproduced in the Bonkalo Report that “it is the custody and access cases that determine, not only the best interests of children, but to some extent the future of our country.”

In summary, our members do not believe that the expansion of paralegal services into family law would achieve the goal of providing better access to justice, and we believe that the focus should instead be on providing the public with better access to advice and representation from a qualified family law lawyer.

Alternatives for Access to Justice

Rather than creating a “lower tier” of family law practitioners, we believe that the public would be better served by working towards providing the public with greater access to advice and representation from qualified lawyers, and a greater focus on alternative dispute resolution over litigation. Some initiatives that we feel could be explored are:

1. Expanding access to Legal Aid duty counsel services, including extended duty counsel services;
2. Creating enhanced public legal education for those choosing to be self-represented;
3. Providing more support for lawyers interested in providing unbundled legal services and/or “coaching” for parties to family law cases, with a focus on the liability concerns associated with that practice;
4. Expanding access to mediation services, including more funding for mediation services;
5. Better integration of dispute resolution into the current system of litigation, for example mandatory mediation and/or expansion of the Dispute Resolution Officer program;
6. An expansion of the legal services that can be provided by law students and articling students under the supervision of a lawyer; and
7. Expanding the Unified Family Court throughout Ontario.

Our members are much less concerned about law students and articling students providing legal services to clients in the area of family law, not only due to the level of education that they have achieved, but also, and more significantly, due to the active supervision under which they act. We find it concerning that the Law Society is being encouraged to allow paralegals to provide services that articling students currently cannot, despite their higher level of education and supervision. We encourage the Law Society to consider expanding the scope of practice of law students and articling students, prior to expanding the scope of paralegals.

If a decision is made to expand the scope of paralegal practice into family law, despite our significant concerns with same, we would encourage the Law Society to address the above concerns as much as possible by improving the scope of paralegal education and limiting the scope of paralegals’ practice. Although our strong preference is for paralegals not to practice family law in any manner whatsoever, we would present the following suggestions if that avenue is pursued:

1. Requiring additional academic/legal education;
 - a. We would suggest a minimum three years of post-secondary education, with an emphasis on legal theory and on identifying legal issues that may complicate a file, particularly those that would make it inappropriate for paralegals to proceed.
2. Requiring a practical/experiential component prior to licensing;
3. Requiring supervision or oversight by a lawyer;
4. Limiting the scope of paralegal practice such that it cannot include any custody or access issues;
5. Limiting the scope of paralegal practice such that no complex files are handled by paralegals;
6. Limiting the scope of paralegal practice to providing “legal information” and assistance with those tasks deemed suitable by the Law Society, not providing “legal advice”, and making that distinction clear to the public;
7. Limiting the scope of paralegal practice such that it does not include the drafting of separation agreements except under the supervision of a lawyer; and
8. Requiring paralegals practicing in family law to carry enhanced liability insurance.

Regarding point #7 above, the Bonkalo Report recommends that paralegals be permitted to prepare written separation agreements in conformity with a mediated agreement. We find this concerning because some individuals offering mediation services are not accredited, and many people attend mediation without a lawyer. A client who participates in mediation has not necessarily received legal advice and may not fully understand what he or she is agreeing to, and the ramifications of that decision. In contrast to litigation, this purely private dispute resolution occurs without the supervision or input of a judge. In our view, if paralegals are permitted to represent clients in mediation and/or draft separation agreements in conformity with mediated agreements, it is crucial that the paralegal receive oversight by a qualified lawyer.

One potential issue with limiting the scope of paralegal practice, as recommended above as well as in the Bonkalo Report, is that this limitation should be made transparent to the public. A client may find it frustrating if he or she hires a paralegal, and is later told that he or she must hire a lawyer for issues such as spousal support or property. This may even result in the client spending more for legal services than they would have had they retained a lawyer initially, and would undermine the goal of better access to justice.

Thank you for allowing us the opportunity to express our concerns and suggestions, which we hope that you will take into serious consideration.

The feedback and consultation with our members was undertaken in consultation with the Middlesex Family Law Association, as members from both organizations have expressed similar concerns with respect to the expansion of paralegal services into the area of family law. The Middlesex Family Law Association has already submitted a similar submission.

Yours very truly,

Middlesex Law Association

Per:
Donald Crawford, President

cc: Nadine Russell (Middlesex Family Law Association)
Michael Lerner (LSUC Bencher)