



Meaningful Change for Family Justice - Beyond Wise Words Report

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Submitted to: Action Committee on Access to
Justice in Civil and Family Matters

Submitted by: Ontario Bar Association, Family
Law Section



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The Ontario Bar Association, Family Law Section (the "Section") wishes to congratulate the Action Committee on Access to Justice in Civil and Family Matters (the "Committee") on the excellent work on the Beyond Wise Words Report (the "Report") dated December 19, 2012. The Section supports the work the Committee is doing. The Section recognizes the effort and thought that went into both the process and recommendations, and support the Committee's work in ensuring more timely and affordable outcomes for spouses, parents and children involved in the justice system.

The OBA

As the largest voluntary legal organization in the province, the OBA represents approximately 18,000 lawyers, judges, law professors and students in Ontario. OBA members are on the frontlines of our justice system in no fewer than 38 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA has assisted government and other policy makers with countless policy initiatives - both in the interest of the legal profession and in the interest of the public.

This submission was formulated by the OBA Family Law Section which is comprised of nearly 600 members.

Recommendations and Comments

The Section's comments are provided below on some of the recommendations made by the Committee.

Recommendation 4:

That Law Societies recognize the unique knowledge and skills needed to practice family law by accepting training in these areas as meeting ongoing obligations for continuing professional development; and, that continuing legal education organizations should develop courses to support the full range of skills needed by family law lawyers.

Many of the lawyers who practice family law in Ontario have solo or small firm practices. In fact, there is only one family law firm in Ontario with more than 15 lawyers. We expect this is the case across Canada.

While we support the need to recognize the unique knowledge and skills needed to practice family law, and an expansion of continuing legal education to support the full range of skills necessary to maintain our practices, the training must be affordable to our many solo and small firm lawyers. There must be opportunities for low cost or subsidized learning, scholarships and bursaries.



Ontario is paving the way in many ways in developing continuing legal education programs across the country, and the OBA strives to provide many different options for training at a reasonable cost. The OBA also works co-operatively with the Law Society of Upper Canada to provide joint programming to family lawyers in Ontario from time-to-time. This is a model that could be used in other provinces.

We also support any initiative that would extend web-based learning to family lawyers outside of the larger cities. The Committee's support of new technology for learning is critical in this regard.

Recommendation 6:

That the family law Bar in each jurisdiction review and consider adopting guidelines similar to those promulgated by the BC Branch of the Canadian Bar Association for lawyers practicing family law.

The Section wholeheartedly supports the guidelines promulgated by the BC Branch of the Canadian Bar Association for lawyers practising family law. We see these best practice guidelines as promoting the public's confidence in family lawyers and ensuring that civility is both implicitly and explicitly promoted amongst the bar.

Recommendation 7:

That ministries of justice, Bar associations, law schools, mediators, collaborative practitioners, PLEI providers and – to the extent appropriate - the judiciary, contribute to and advocate for enhanced public education and understanding about the nature of collaborative values and the availability of CDR procedures in the family justice system.

The Section recognizes the valuable role that lawyers can and do play in promoting the public's understanding about the nature of the collaborative values and the availability of CDR procedures in the family justice system.

CDR procedures are an integral and growing part of the family justice system and lawyers play a significant role both inside and outside of the courtroom. In that regard, CDR is a tool in the family justice toolbox and it is often lawyers participating in CDR processes with their clients, supporting them and advocating for them through the process. Where CDR is not appropriate¹ or has not resulted in an out-of-court settlement, it is lawyers who can assist in moving a client's case through an often confusing judicial system, using many of the best practices endorsed by the BC Branch of the CBA.

¹ We recognize that the Committee has adopted a "CDR"-first model. We wish to draw the Committee's attention to the challenges with CDR in some families, especially where there has been domestic violence or there is a significant power imbalance. We urge the Committee to consider whether CDR-first is appropriate for all families.



The public must have confidence in lawyers, and lawyers must be seen as a helpful part of the family justice system. The Section is committed to working with the Committee to ensure that this message is clear to the public.

Recommendations 8, 14 and 15

Recommendation 8:

That the family justice system offer an array of dispute resolution options to help families resolve their disputes, including information, mediation, collaborative law, parenting coordination, and adjudication.

and

Recommendation 14:

That legal aid be defined, for the purpose of both funding and service delivery, as consisting of a broad range of services and service providers, including:

- *full legal representation, partial representation, duty counsel, advice counsel, summary advice, brief services and limited scope retainers;*
- *legal information and self help services, including guided self help; and*
- *programs or services linking or coordinating legal help with non-legal services.*

and

Recommendation 15:

That funding for family law legal aid funding be increased.

The Section supports options for families to resolve their disputes. While all of the options this recommendation refers to are valuable, it is integral that the legal aid system be properly funded so that spouses or parents can have the valuable advice of a family lawyer through information gathering, mediation, collaborative law and in the courtroom as necessary.

There is not enough funding for family lawyers through Ontario's Legal Aid Plan. We draw the Committee's attention to not only the rate that lawyers are paid under this province's tariff, but, sometimes more importantly, the number of hours that are allocated to clients under a legal aid certificate. The restriction on hours prevents many clients from participating in CDR processes with the advice of a family lawyer. The restriction on hours prevents clients from getting the best service available to them, simply because the tariff may only fund 2 hours of work for a Case Conference (the first attempt at a negotiated resolution in front of a judge under our *Family Law Rules*), when the optimal time needed may be closer to 5-10 hours between drafting, preparation and attendance.



Canadian families need lawyers who are able to support them through the family justice system and the CDR options this Committee so eloquently supports. This requires a commitment to ensure the existing model of legal aid services are funded properly.

Recommendations 9 and 27

Recommendation 9:

That before filing a contested application in a family matter (but after filing initial pleadings), parties be required to participate in a single non-judicial CDR session. Rules should designate the types of processes that are included and ensure they are delivered by qualified professionals. Exemptions should be available where the parties have already participated in CDR, for cases involving family violence, or where it is otherwise urgent for one or both parties to appear before the court. Free or subsidized services CDR services should be available to those who cannot afford them.

and

Recommendation 27:

That Canadian family law statutes encourage consensual dispute resolution processes and agreements as the norm in family law, and that the language of substantive law be revised to reflect that orientation.

The Section supports voluntary non-judicial CDR, and particularly lawyer-supported participation in CDR, but not mandatory CDR. Mandatory CDR may not be appropriate in many cases. Having clients forced to disclose family violence may also be inappropriate.

We draw the Committee's attention to the successful "mediate393" program in all levels of Court in Ontario. With this program, all Ontarians going through a separation or involved in the family justice system receive up to two (2) hours of no-cost mediation at the Courthouse. The parents or spouses may also take advantage of highly subsidized off-site mediation for a further two (2) to eight (8) hours.

The Section supports the expansion of free and low cost mediation to all Canadian families involved with the family justice system in order that parents and spouses may make a choice as to how they seek to resolve their family disputes.

Recommendations 10 and 13

Recommendation 10:

That the provision of early, front-end services in the family justice system be expanded. This means:

- *making front-end services highly visible, easy to access and user-friendly, as has been done through initiatives such as the Family Law Information Centers in Alberta and Ontario, Justice Access Centres in British Columbia, and les Centres de justice de proximité in Quebec;*



- *coordinating and integrating the delivery of all services for separating family whether provided by lawyers, governments or non-government organizations; and*
- *allocating new resources and/or reallocating existing justice system resources in support of expanded front-end services.*

and

Recommendation 13:

That triage services, including assessment, information and referral, be made available to people with family law problems.

The Section supports the provision of early, front-end services in the family justice system. There needs to be funding for the proposed expansion. Funding cannot come at the expense of further cuts to legal aid plans across the country. Family lawyers are an important part of the public's education about these front end services.

In Ontario, our Family Law Information Centres, Mandatory Information Programs, and free/subsidized mediation resources in Courts across the province promote the early resolution of disputes for families and we urge the Committee's support for the expansion of these programs across the country.

We see the need for more front-end judicial involvement in triaging as critical. We have, in many courts in Ontario, a "first appearance clerk". The parties must appear before the first appearance clerk to ensure that documents are filed correctly and to canvass settlement opportunities before all judicial conferences in the Ontario Court of Justice (the provincial court). This is an existing resource. A first appearance clerk, with the support of advice or duty counsel, could be given more opportunity to identify potentially high conflict cases and to stream them appropriately.

We also see opportunities for pre-court appearance appointments with a court clerk to assist self-represented parties and to deal with procedural or consent adjournments as a relatively inexpensive option in the existing family justice system.

Initial disclosure Orders could also issue from a court clerk at the same time an Application is issued, ensuring the production of basic financial disclosure, such as Income Tax Returns, prior to any appearance before a Judge or Dispute Resolution Officer.

The expansion of reliance on motions in writing for procedural or uncomplicated issues is encouraged as a triage measure in many cases.

We additionally draw the Committee's attention to the piloted Integrated Domestic Violence Court in Toronto, at 311 Jarvis. This pilot project allows the family and criminal systems to co-ordinate services and judicial intervention for families where there is an existing family case and one or both



of the spouses or parents face criminal charges. Many of the families we see also face criminal issues, particularly where there are allegations of domestic violence. The Committee's recognition of the intersection of family justice and criminal law is critical to addressing the issue of effective triaging.

A Judge at the first Case Conference could also be encouraged to institute case management (which is permitted in our *Rules* but is a more familiar concept to Unified Family Court branches or the Ontario Court of Justice sites) for families to ensure resources are allocated appropriately.

Recommendation 11:

The FJWG supports recommendations made by other NAC Working Groups with respect to making early information available to citizens, and supports the following as particularly useful for families:

- *information that is accessible, in plain language, neutral and accurate;*
- *information that responds to the needs of self-represented litigants; and*
- *information that is available in a variety of forms including in-person (through law information centres and phone lines), online, and printed guides.*

The Section is enthusiastic in its support of a recommendation that will provide Canadians with more accessible information about CDR options and the family justice system. We ask for the Committee's support for lawyers as integral part of this recommendation.

Lawyers in various parts of this country, with the support of local bar associations or provincial law societies, have collaborated to prepare plain language and accessible information to separating spouses and parents. Lawyers can play an important role in assisting with the triaging of family conflicts, so that clients are given appropriate information about their options and are supported in making the best decisions for them.

If this recommendation is implemented, it must not simply add to the non-centralized and often confusing numerous resources that are presently available. While making information more readily available, the message must be consistent and should support a centralized hub of information as envisioned in the recommendations. The message must also be cohesive and consistent.

The Section recognizes that when people access information in a courthouse, it is often-times too late. By making the information available in other locations, we could encourage earlier resolution.

Recommendation 12:

Except in cases of urgency and consent orders, that information sessions be mandatory for self represented litigant and all parents with dependent children. The session should take place as early as possible and before parties can appear in court. At a minimum, the following information should be provided:



- *how to parent after separation and the effects of conflict on children;*
- *basic legal information;*
- *information about mediation and other procedural options; and*
- *information about available non-legal family services.*

The Section supports mandatory information sessions at all levels of courts in this country.

Ontario's mandatory information sessions have been a popular and well received resource for families in this province. Lawyers and mental health professionals teach these sessions on a voluntary basis throughout the province. Ontario's program would be an excellent model to replicate in every province. The Section draws the Committee's attention to the voluntary involvement of lawyers in this program, which we believe promotes public education and instils a sense of confidence in lawyers.

We would note that mandatory information sessions are effective, whether parties are represented or not, and therefore we would not limit the recommendation to unrepresented parties.

Recommendation 16:

That professional Codes of Conduct and court rules in all jurisdictions be reviewed to allow and support the use of limited scope retainers.

The Section supports any effort to increase access to justice for spouses and parents.

Limited scope retainers should not be seen as an alternative to continued efforts to provide financial assistance for vulnerable clients and to make the justice system more affordable.

Vulnerable clients must be protected by a requirement that the client is given a clear explanation of the limits on the service that will be provided. In addition, services must not be limited inappropriately such that there is little or no value to the service provided. A lawyer's professionalism is necessary to determine what advice is appropriate concerning the limited service retainers.

The Committee should recognize that there will need to be not only changes to the Rules of Professional Conduct in each province (or at least those provinces who have not already addressed this issue), but also to the rules of practice and to the laws of negligence to address liability issues for family lawyers who accept limited retainers. Additionally, there would have to be education for lawyers in order to ensure they are diligent in their obligations when giving limited scope advice.

Recommendation 17:

That jurisdictions expand reliance upon properly trained and supervised paralegals, law students, articling students, and non-lawyer experts to provide a range of services to families with legal problems.



The Section has serious concerns about any recommendation that would permit paralegals to provide legal services to spouses, parents and children accessing the family justice system.

The Law Society of Upper Canada does not currently permit paralegals to practice family law. It is beyond their scope.

As family lawyers, we believe that it is lawyers who are qualified to represent children and families through separation, parenting disputes, property division and support issues. There is a tremendous complexity in family law. In addition to extensive knowledge of family law legislation and case law, family lawyers must have knowledge of everything from tax law to criminal law, and health law. This well-rounded knowledge base is better supported by the training and education received by lawyers. The Committee has recognized in other recommendations the unique knowledge that family lawyers have and should be supported through ongoing continuing legal education.

Family law clients are often very vulnerable. Clients in child protection matters, for example, face the prospect of losing their children to the state. Other clients may consider releasing rights to property divisions, spousal support or even custody. Without the advice of a trained family lawyer, these decisions can have devastating consequences. Paralegals do not have the training or skill to properly represent vulnerable children, parents or spouses as they navigate the family justice system.

Recommendations 18, 19, 22 and 23

Recommendation 18:

Recognizing that each jurisdiction would have its own version of the unified court model, to meet the needs of families and children in each jurisdiction, that the two levels of government to cooperate in the completion of unified family courts for all of Canada.

and

Recommendation 19:

That a unified family court retain the benefits of provincial family courts, including their distinctive and simplified procedures, and that it have its own simplified rules, forms and dispute resolution processes that are attuned to the distinctive needs and limited means of family law participants.

and

Recommendation 22:

That specialized judges be appointed to hear family cases and that these judges have or be willing to acquire:

- *substantive and procedural expertise in family law;*



- *the ability to bring strong dispute resolution skills to bear on family cases;*
- *training in and sensitivity to the psychological and social dimensions of family law cases (in particular, family violence and the impact of separation and divorce on children); and*
- *awareness of the range of family justice services available to the families appearing before them.*

and

Recommendation 23:

That one judge preside over all applications, conferences and hearings in family cases.

The Section supports the expansion of a United Family Court (“UFC”).

The UFC provides an effective tool for families navigating through the family justice system. A UFC ensures that families can resolve all of the legal issues they face in one location, instead of having to resolve property and divorce issues in a Superior Court, and parenting and support matters in a Provincial Court. UFC also supports specialized family judges, who are properly trained and able to triage effectively. A UFC also houses all resources, such as Family Law Information Centres, Mandatory Information Programs, and free or low cost mediation, in one location. Families would benefit from the centralization of resources and UFCs would make optimal use of judicial time and resources. A UFC can be a responsive and simplified model to help families navigate the justice system, especially in these challenging fiscal times.

In the interim, and pending a joint provincial and federal commitment to a UFC model, the Section supports specialized judges to hear family cases, and training for these judges. Specialized judges are critical to the early and just resolution of many family law disputes, and to the proper triaging of more high conflict disputes. Families are better served by a bench attuned to their needs, and better able to ensure that families are supported by parenting co-ordinators, mental health professionals, and domestic violence supports, as necessary.

Case management can only work in a UFC. In the Superior Court in Toronto, where there is no UFC, most judges rotate through the family court on a three (3) to six (6) month basis, with a year-long commitment at most. This does not allow a single judge to follow a family from beginning to end.

We note the provision for case management in Ontario’s *Family Law Rules*. Case management is implemented in all provincial courts, with a single judge hearing all interim steps and working with families to achieve resolution before a trial. The Section hopes the Committee will consider recommending a case management system that allows a single specialized judge to hear all non-contested steps until trial, with another specialized judge to hear all contested steps until trial. This allows parents and spouses to make every opportunity to canvass settlement options without worrying that the case management judge will be pre-disposed to a result on a motion or contested



hearing. It also promotes a “team approach”, such that there are always two (2) judges familiar with one family’s needs, thereby ensuring resources are managed appropriately.

Recommendation 25:

That the following measures be considered:

- *each case be assessed and placed on different procedural track that is proportional and appropriate to the needs of the case;*
- *enhance judicial discretion to impose proportional processes on the parties;*
- *all court appearances be meaningful;*
- *parties be required (where possible) to agree on a common expert witness;*
- *both courts and parties be encouraged, where appropriate, to engage in a short, focused hearing under oath and without affidavits or written briefs to allow the court to hear oral evidence and, thus, reduce the cost and time of preparing legal materials;*
- *jurisdictions explore using non-judicial case managers to help the parties move their cases forward and, where appropriate, narrow and resolve many issues in a proceeding;*
- *case managers should have and use the powers, in appropriate circumstances, to limit the number of issues to be tried and the number of witnesses to be examined;*
- *judges should use costs awards more freely and more assertively to contain process and encourage reasonable behavior.*

We support this recommendation generally, but urge the Committee to consider replacing the word “required” in the fourth measure (i.e. parties be required (where possible) to agree on a common expert witness;) to “encouraged”. Parties and their lawyers may very well make a determination that a common expert witness is not appropriate, particularly where, for example, one of the spouses is not providing proper financial disclosure or is limiting the expert’s access to financial documentation. On this same measure, we suggest adding the words “and appropriate” after “possible”. Therefore the measure would read: parties be encouraged (where possible and appropriate) to agree on a common expert witness.

We also urge the Committee to change the reference to case managers to “judges or their delegates” in the second to last recommended measure. Non judicial case managers are not trained to limit the number of issues to be tried or the number of witnesses to be examined, and this becomes a serious issue for appellate review if a non-judge is limiting the scope of a trial or hearing.

Recommendation 29:

That substantive family laws be simpler and offer more guidance by way of rules and presumptions.

While the Section supports the accessibility of family laws, and the promotion of rules, we are concerned with the recommendation that there be more presumptions.



The Committee may wish to consider the considerable research being conducted in Australia, for example, to address the backlash as a result of the implementation of a presumption of joint custody. We reject the notion that there should be any presumption in parenting matters other than the best interests of the children.

Presumption in other areas of family law could be equally problematic and should be approached cautiously.

Recommendation 30:

That existing post-resolution programs be expanded and that justice system policy-makers continue to explore additional ways to provide post-resolution support to families.

The Section supports a holistic approach to the resolution of family law disputes and the provision of post-resolution supports. We are concerned with the sources of funding for this recommendation however, and would urge the Committee to consider highlighting the need to properly fund legal aid programs across the country as a priority to any new family justice initiatives.

We see this recommendation as being tied to the recommendation to expand the UFCs, so that families can access all programming, whether it be before the litigation starts, during the litigation, or after, at one site.

We also support the Committee's attention to a recalculation service, one that we do not have for support in Ontario but which other provinces have. This service would reduce costs to parties and assist with enforcement issues, which are significant to many Canadians engaging with the family justice system.

Conclusion

The OBA's Family Law Section appreciates the opportunity to provide feedback on the Beyond Wise Words Report of the Action Committee on Access to Justice in Civil and Family Matters. We look forward to further discussion and collaboration.