From: Jerry McHale
To: Consultation 2018
Subject: Feedback on alternate legal service providers
Date: October-30-18 9:45:17 AM
Attachments: 20181029142358780.pdf

To the Alternate Legal Service Provider Working Group,

I attach a letter containing my comments and feedback on the 'Family Law Legal Service Providers Consultation Paper' of September 2018.

Regards,

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UVicACE

To: The Law Society of BC, Alternate Legal Service Provider Working Group
From: Prof. M. Jerry McHale, QC, Director, UVic Faculty of Law, Access to Justice Centre for Excellence
Re: Family Law Legal Service Providers: Consultation Paper
Date: October 29, 2018

I commend the Law Society and the Alternate Legal Service Provider Working Group for tackling the complicated and innovative question of alternate legal service provision. This could ultimately prove to be a very productive initiative and I urge you to persist in a thorough exploration of the idea.

Background: My comments on the proposal contained in the consultation paper are informed by the following observations:

- As shown by research, the BC family justice system is inaccessible to the majority of people who need it. The high cost of legal services and the complexity of both procedural and substantive law have created a situation where a large cohort of people with family law problems cannot afford adequate representation;

- The hardship and the individual and social costs resulting from this lack of representation - and the corresponding lack of access to justice - are at levels that are unacceptable and unsustainable;

- In addition to the principled arguments for it, there are pragmatic reasons why the profession must make meaningful changes to the system, soon. Lack of access is having a negative impact on public and political confidence in the justice system. Senior justice leaders remind us that we enjoy a monopoly over legal services on the condition that such services are actually provided. As former LG David Johnston said, "What happens if we fail to meet our obligations under the social contract? Society will change the social contract..."[1]

- Effective access reform is imperative. More than 25 years of reform efforts have produced little or no real improvement in access to justice. This means that the justice system needs to be much bolder and more innovative going forward than it has been in the past. Speakers at the recent pro bono conference in Vancouver -

[1] "We enjoy a monopoly to practise law. In return, we are duty bound to serve our clients competently, to improve justice and to continuously create the good. That's the deal. What happens if we fail to meet our obligations under the social contract? Society will change the social contract, and redefine professionalism for us. Regulation and change will be forced upon us - quite possibly in forms which diminish or remove our self-regulatory privilege." Presentation to national CBA conference in 2011.

including Chief Justice Richard Wagner, the Honourable Tom Cromwell, and former AGs Geoff Plant and Wally Oppal – were explicit that we are not making sufficient progress on this problem, that the problem is well out of hand, and that 'we have to get our house in order, now'. (Oppal)

- The justice system tends, not without reason, to be conservative and risk averse. The current situation however calls for leadership that recognizes that the scale of change needed demands a high degree of innovation and will involve taking risks and developing a higher tolerance for mistakes. Concern about this should be balanced by the fact that an unreformed status quo is an even greater risk.

Summary of comments: In my view, the proposal to create a new category of regulated family law service providers (FLSPs) is necessary and credible, and should be pursued by the Law Society. That said, I have two fundamental concerns about the model described in the consultation paper. First, I don't think a proper assessment of the proposed model is possible without considerably more information and more policy work on a few important questions. These include the vision informing the model, the need for a business plan and the nature of the anticipated training regime. Second, I suspect that even with the benefit of that additional policy work, this may not prove to be the best model. It leaves intact all of the procedural and systemic inefficiencies that have made the family justice system so complicated and unaffordable in the first place, and it posits pretty much a copy of the inefficient legal services delivery model already in place, save that the services would be provided by different professionals, having similar skills but – in theory – charging lower fees. This does not correspond with the vision asserted for decades in the family law access reports, nor is it apparent that the proposed model would actually make the system more affordable or accessible for the public.

As such, with the available information and in its current form, I can't support the model described in the consultation paper. Nonetheless, I believe a viable form of alternative family service provision is needed and can be realized.

The Vision: The vision informing the current draft of the proposal appears to be substantially that of the traditional, court-based litigation model. Without taking away from the public service that it would be to make the courts more affordable, I note that access to family justice reports have, for more than 20 years, consistently and emphatically stressed the importance, as a priority, of steering family law matters away from litigation and shifting them out of the courts.[2] This policy perspective was adopted and made explicit in the BC Family Law Act (2011), which provides that "resolution out-of-court is preferred". The Law Society's FLSP proposal is cast almost entirely in the image of traditional adversarial litigation and the traditional lawyer-client relationship. I would like to see the

[2] See for example, BC Justice Review Task Force, "A New Justice System for Families and Children" (May 2005) online https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-reform-initiatives/final_05_05.pdf and the national Action Committee on Access to Justice in Civil and Family Matters, "Report of the Family Justice Working Group" (April 2013) online http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf

FLSP idea considered through an out-of-court, non-adversarial, dispute resolution lens and tested against the recommendations of the family law access reports.

System efficiency: Looking at the proposal again from the perspective of 2 or 3 decades of access reports, I am concerned about the possibility that FLSPs could add more moving parts to a machine that is already far too complicated. The extravagant complexity of the family system has driven the cost of legal help beyond the reach of most British Columbians. The public would be far better served by a less complex system than by cheaper hourly rates. Rather than reducing the hourly rate, the first priority should be to reduce the number of hours it takes to get through the system. For 25 years access reports have repeatedly recommended that we streamline and expedite family procedure and that we significantly increase reliance on out-of-court options like mediation and collaborative law. The system however has failed to do this. It has not yet come anywhere near exploiting the potential efficiencies or the full cost-saving capacity of either strategy. If the system is now ready to turn to stronger medicine, then getting serious about streamlined procedure and expanded mediation is simpler, safer and more predictable than trying to create a new profession of more affordable legal service providers. To be clear, this is a matter of ordering priorities, and prioritizing expedited procedure and increased ADR does not preclude the creation of FLSPs.

Business model: In terms of the need for further information, it would be very helpful to have a better sense of the business model supporting the FLSP concept. There are two basic questions here. First, on the demand side, how low would hourly rates have to go to make the system affordable for the public, and will this model reduce costs to that level? Would this model reduce overall costs by a quarter, a third, half? I have spoken to family lawyers who believe the system would remain out of reach for most people even if hourly rates were cut in half. I have no idea if that is accurate, but it would be useful to have a detailed analysis of the anticipated cost reduction and its impact on affordability.

Second, on the supply side, will there be a sufficiently profitable niche in the market to attract alternate service providers and if so, where is it? Has there been any research to confirm the assumption that the new service will be sufficiently profitable to attract practitioners? It is clear that there is a large inventory of family legal needs that are not currently being met by the bar. Does this mean that the bar cannot lower their fees enough to profitably meet the current demand? Or is the bar simply turning to other, more lucrative work? Or, is the bar surviving by representing family litigants at full tariff rates at the front end of the litigation process, until their money runs out (as Professor Julie Macfarlane's research suggests is the case for 53% of SRLs)? If lawyers cannot afford to service a large part of the market, how it will be different for FLSPs? And it may well be different. I am told that Limited Licence Legal Technicians in Washington are making a living, and of course Notaries have survived in the BC market for long time. But before committing to an initiative of this size there should be a detailed examination of its economic viability for both the users and the suppliers of legal services.

Training and education: It is not clear how much time and cost will be involved in meeting the education requirements. The scope of proposed training is commendably

broad (and in this respect, reassuring) but it is also quite ambitious. Would the subject areas identified in part V of the consultation paper be covered in say, one year? It is a narrower scope of training of course, but it almost looks as if the training set out in the consultation paper contemplates FLSPs with more knowledge and skills than law students have after 3 years of school. It would be helpful in assessing the proposal to have a more detailed understanding of how long the training is expected to take and what it would look like. Who will train FLSPs and who would cover the cost of designing, implementing and operating the training program? Will universities be subsidized to provide this training?

On a related point, I'm not sure whether the consultation paper actually makes this assumption or not, but I would advise against assuming that a shorter training period for FLSPs would necessarily translate into materially lower costs for litigants.

What standard of care? This again goes to fleshing out the model in a little more detail. Does the Law Society expect that new service providers will be held to the same standard of care as lawyers? If not, will it actually be possible to implement and sustain a lower standard? Aside from problems with the optics of implementing a lower standard, would the courts ultimately support it? Would a FLSP in a law firm be held to a different standard that a lawyer in that firm or than that of a FLSP operating out of their home? If they were required to meet the same standard of care as lawyers, FLSPs (with less training) might be looking at a greater investment of time in each file to reach the lawyer's level of diligence. Would liability concerns put upward cost pressures on a new class of service provider?

Notaries Public: If there is a reference to it in the consultation paper I missed it, but I am wondering if the option of having expanded family law services provided by Notaries has been considered? Is it an option to gradually expand the scope of authorized family work that Notaries could undertake, and if not, why not? They are a known quantity with a good track record, they already have a training and administrative infrastructure in place, and they have been seeking a broader jurisdiction for some time.

Scope of practice and implementation strategy: Another way to approach an FLSP initiative might be to rethink the scope of the FLSP role by basing it explicitly on identified service gaps and then staging implementation to fill these gaps incrementally over time. The steps in this process might look like this:

a) the Law Society would make a formal commitment in principle to implementing FLSPs as an access to justice initiative;
b) a services gap analysis would be conducted to identify the places in the family system where unrepresented litigants would benefit most from services that are not being provided at an adequate or affordable level by lawyers. Such service gaps might, for a start, include early, front-end information and orientation, triage and referral services, forms completion, procedural orientation and basic navigation through the system.
c) FLSPs could be given a practice jurisdiction that initially limits them to these or similar functions on the basis that their jurisdiction could be expanded over time to cover additional gaps.

Consultation paper scope questions: More information could convince me of the viability of the consultation model. However, as I don't support the current draft I hesitate to comment on the specific questions about scope in the consultation paper. So my approach here is to say that *if* the proposed model were going ahead regardless, then:

- I would be against limiting any aspect of the scope of practice set out at schedule A.1 to the paper respecting included areas of practice:
    - Within the context of the model described, FLSPs should be permitted to draft orders and to draft and finalize settlement agreements, and a lawyer should not be required to vet the final agreement. The cost, delay and inefficiency – as well as the risk of the agreement collapsing or being renegotiated – mitigates in favour of leaving it with the service provider. The public protections here include training, oversight and regulating for competence, tort law and market forces.
    - FLSPs should be permitted to give and take undertakings and be regulated in this respect to the same standard as lawyers. It is essential that they have all of the tools needed for efficient negotiation and settlement. Undertakings are not conceptually difficult; their proper use is a matter of education and ethics, which can be regulated.
    - For the reasons above, FLSPs should be free to operate a trust account and enforce orders.
- With respect to scope of practice matters (excluded areas of practice) as set out at A.2 of the consultation paper:
    - I would agree, for the reasons set out in the consultation paper, that the Working Group is right not to exclude matters relating to allegations of domestic violence, sexual abuse and substance abuse.
    - I would agree with excluding all matters involving third parties outside the spousal relationship.
    - Re asset division, I disagree with excluding pension division. Family issues must be dealt with as a package and excluding pensions from the process will have the effect of eliminating too many cases from the FLSP scope of practice. FLSPs would be required to avoid taking on any issue, including pension division, until they know they could manage the issue competently. There could be ongoing "CLE" training available to support FLSPs in acquiring the necessary competence.
    - I agree with FLSPs being permitted to appear in court to assist a self-representing client.

Two remaining points:

- I assume the Mediate BC Society will comment in more detail on this issue, but there is no need for the Law Society to get into the business of regulating non-lawyer mediators – as seems to be anticipated by the model. Mediate BC has been doing a very good good job of that since 1998.
- I like the fact that the paper largely avoids the words "alternate" or "limited" (as is used in Washington State) and the terms "para-legal" and "non-lawyer" in referring to the new designation. The public will read much into the name and it would be a

mistake to signal an inferior status in the designation or title itself. It must be clear that these professionals will be competent, even though they will have less education and less authority than lawyers.

Thank you for the work that has gone into this initiative and for the leadership shown in taking it forward. Whether or not the proposed model is exactly the right one, this degree of willingness to innovate is very much what is needed. I trust that the Law Society will continue to refine this proposal and ultimately push through to some form of alternate service provision to fill the vast legal services gaps now confronted by separating families.

Yours truly,

M. Jerry McHale, QC
Director
University of Victoria, Faculty of Law

From: David Ibbetson
To: Consultation 2018
Cc: Pinder K. Cheema, QC; Dean P.J. Lawton, QC; Nancy Merrill, QC
Subject: Family law legal service providers- Consultation Paper – suggested alternative process.
Date: October-30-18 3:45:49 PM

To whom it may concern

I realize governing the law society and 10,000 [?] lawyers is difficult. I appreciate the efforts of everyone involved.

The Benchers application to seek legislative amendments to the Legal Profession Act and the September 2018 consultation paper attracted a proposed resolution for the AGM [aborted].

The resolution proposed that the Benchers withdraw their application and that they be directed to **"refrain from any further action to have nonlawyers practice law."**

I expect that resolution would have passed. I was considering making an application to amend the resolution to delete the reference to refraining to take any further action. I have a feeling it would not have passed and that lawyers wanted to completely put to bed so to speak the idea of nonlawyers practicing law in any degree. [I did not have or make the time to follow up with other lawyers-– other than chat with a couple before the meeting]

I personally believe there could be a role for nonlawyer family law legal service providers.

If the above motion passes at a rescheduled AGM, depending on the extent the benchers are required to follow membership directives, there may be no opportunity to pursue the matter of alternative legal services providers, in family law, or any area.

I can personally see why the resolution to have the application withdrawn, and that there be no further action re nonlawyer family law service providers, was brought forward.

While the consultation paper stated that schedule A is proposed for the purpose of focusing discussion, it clearly in my opinion, starts with a very broad

educational and training program. It then proposes excluding very few matters, from the gambit of these new family law providers. I can't take credit for the term but Schedule A looks like the Law Society is trying to educate, train and license “mini lawyers” so to speak.

I would urge the benchers to voluntarily, withdraw the current application to amend the Legal Profession Act. I believe if such application is maintained the resolution proposed will pass when the AGM reconvenes and there may be little or no opportunity to revisit this issue.

I believe the benchers should put forward to the profession the Ontario example noted in schedule B, section 1. I realize that is only at this point approved "in principle," but in my view, it provides a sensible framework for nonlawyer family law legal service providers. [One exception may be the area of restraining orders, which I believe would need to be examined more closely]

I don't mean to be critical but the thought comes to mind "why reinvent the wheel"?

I have practiced family law for over 45 years, one stint of approximately 22 years, and another of approximately 23 years.

I'm currently wrapping up my family law practice, focusing on practicing part-time in the area of estate litigation, adult guardianship, elder law etc. and getting into the field of coaching lawyers. I've taken coaching training etc. and should have this new venture launched in about a month.

From my experience in family law, I've often thought that cases as described in the Ontario example, could be handled by experienced paralegals. An exception as noted, might be restraining orders.

In particular, over the years in my practice, I thought that perhaps an individual who was maybe more of a counselor then a lawyer, could better represent parties regarding custody and access [parenting] matters. I tried to use counselors where I could.

This is a fairly brief analysis of this issue. I expect there are matters I don't understand, that I might have missed etc.

Regards,

Dave
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From:	Kathryn Ginther
To:	Consultation 2018
Subject:	Penticton Family Law Study Group Response
Date:	October-31-18 5:39:19 PM
Attachments:	Response Re Non-Lawyers Practice.pdf

Please find attached a brief response from the Penticton Family Law Study Group with respect to the proposals to amend our current legislation to permit non-lawyers to practice law in the family law venue. If the committee wishes further response or more in-depth discussion of these important issues please contact the writer at the above email address.

Thank you,

Kathryn Ginther for the Penticton Family Law Study Group

November 1, 2018
Penticton Family Law Study Group (PFSLG)

Response to Law Society Proposal
Non Lawyer Practice in Family Law

Proposals

It is recognized that currently non-lawyers are practicing law in the family law venue. It is also recognized that access to the court system is extremely limited for family law matters and that all participants in the court system should have competent and reliable assistance that is affordable and accessible.

Concerns

The concerns identified by the PFLSG with respect to the current proposals are:

1. Education,
2. Standardization
3. Oversight
4. Liability Insurance and Trust Fund Insurance
5. Cost
6. Public Perception of Competency of Practitioners

Arbitration/Mediation

Non-lawyers are involved in this developing area. Currently there are no restrictions or qualifications required to participate in this area. Various programs are in place to provide varying certifications but to date the PFLSG is not aware of any requirements for continuing education, liability insurance, or oversight. Cost is variable and in our view these services are not likely to be delivered in a competent manner at any lower cost than what is offered by qualified lawyers; however, the skills offered by many of the non-lawyers in this area are valuable and the

PFLSG supports an inclusion of non-lawyers in this area provided that the concerns raised above are met.

Court Processes

The PFLSG does not support an expansion non-lawyer practice in this area except under the supervision of a qualified lawyer or in a clerical capacity supervised and employed by:

a). The Legal Services Society

b). The Court Registry, or

c). The Family Justice Office

It is the view of the PFLSG that the provision of services in any other capacity would not be cost effective to users after the practitioner pays the costs necessitated by education, including continuing education, insurance, and overhead.

Trust Funds and Property Negotiations

The PFLSG is extremely concerned about the protection of the public in this area and is opposed to this extension. In this highly complex and dynamic area of the law maintaining competency is difficult even for qualified lawyers. The regulation of the administration of trust funds and, indeed, any funds that are paid through a non-lawyer again raises the issue of the appropriate insurance, oversight and the seriousness of undertakings. Again it is not anticipated that non-lawyers would be able to operate in this area.

Public Perception of Competency

The practice of family law, particularly in the courtroom is complex and dynamic. The emotional vulnerability of the participants and some times the mental health conditions of the participants makes them particularly susceptible to emotional/psychological reliance on third parties including their legal representatives. Often the parties do not have the skills or the emotional balance to make informed choices both respect to the negotiations inherent in the litigation venue and in respect to the competency of their advisors. The PFLSG believes that it would not be in the public interest for people who are not qualified lawyers to advise litigants or act on their behalf.