



Family Justice Reform Project

The Advocates' Society

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In family law, statistics abound.

- In Canada, approximately 41% of marriages end in divorce, resulting in approximately 70,000 divorces each year.¹
- Family law cases account for one-third of all civil court cases, and yet only 1% of family law cases ever reach the trial stage.²
- In most cases, it takes two or more years to reach the trial stage.³
- Between 50% to 80% of family law litigants are unrepresented.⁴
- In 2012, the average hourly rate for a fifth year lawyer in Ontario was \$264 per hour. For a 20-year call, the hourly rate was \$384 per hour. The cost of a 3 day trial could be \$60,000 – or more.⁵
- In the last 10 years, at least 10 reports have been commissioned across the country to deal with the reform of the family justice system alone.⁶ Yet, the landscape of the family justice system remains remarkably unchanged.

¹ Mary Bess Kelly, “Divorce cases in civil court, 2010/2011” (28 March 2012) at 7, online: Statistics Canada <<http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11634-eng.pdf>>.

² *Ibid* at 5.

³ *Ibid* at 14-15.

⁴ Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity*, Final Report (February 2013) at p.7, online: <http://www.lco-cdo.org/family-law-reform-final-report.pdf>. See also: Final Report of the Family Justice Working Group of the Action Committee for Access to Justice in Civil and Family Matters, “Meaningful Change for Family Justice: Beyond Wise Words” (April 2013) at p. 18, online: Action Committee for Access to Justice in Civil and Family Matters <<http://www.cfcj-fcjc.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf>> [Final Report of the Family Justice Working Group].

⁵ Charlotte Santry, “The Going Rate: the 2013 Canadian Lawyer Legal Fees Survey” (June 2013), online: the Canadian Lawyer <<http://www.canadianlawyermag.com/images/stories/pdfs/Surveys/2013/cljune13legalfees.pdf>>; Tracey Tyler, “A Three-Day Trial Likely to Cost You \$60,000” (3 March 2007), online: The Toronto Star: <<http://www.thestar.com>>. A successful litigant is unlikely to recuperate his or her full costs, even if a substantial costs award is made by the court: see some of the recent case law, such as *Seed v. Desai*, 2014 ONSC 4639, where the successful mother submitted a bill of costs following a custody trial in the amount of \$162,559.00 and was awarded costs of \$130,000; *KSW v. SW*, 2012 ONSC 5060, where costs of \$265,000 were awarded to the husband following a four day trial on property and support issues, although his bill of costs totalled \$792,447.47. It is not unheard of for parties in Toronto to incur fees of \$1,000,000 per side in complex and lengthy trials.

⁶ This list includes: (1) Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity*, Final Report (February 2013) at p.7, online: <http://www.lco-cdo.org/family-law-reform-final-report.pdf>; (2) Office of the Children’s Lawyer, Final Report from the Office of the Children’s Lawyer Child Protection Committee (August 2013); (3) Law Commission of Ontario, *Towards a More Efficient and Responsive Family Justice System: Interim Report* (February 2012); (4) Law Commission of Ontario, *Voices from a Broken Family Justice System: Sharing Consultations Results* (September 2010); (5) Report of the Ontario Civil Legal Needs Project, *Listening to Ontarians* (May 2010); (6) Lesley Jacobs and Brenda Jacobs, *Multidisciplinary Paths to Family Justice*:

The family justice system is indeed the “poor cousin” of the criminal system.⁷ Years of budget cuts to LegalAid mean that few separating families qualify for funding, increasing the numbers of self-represented litigants and straining court resources. Those that do retain legal counsel routinely spend tens of thousands of dollars before they ever set foot in front of a judge empowered to make a decision in their case.

The need for reform in the family justice system is being embraced at (some of) the highest levels. Former Chief Justice Winkler has said that “family law cries out for reform”⁸ and has made several public speeches calling for “a more dramatic and pragmatic revision of the manner in which family law services is delivered across Ontario.”⁹ Earlier this year, the Action Committee on Access to Civil and Family Justice, chaired by Supreme Court of Canada Justice Thomas Cromwell, released a report making extensive recommendations to the family justice system.

In particular, Justice Cromwell has called on the family law bar to engage in more assertive and sustained advocacy on family law reform and resource allocation.

Perhaps the single greatest challenge in making recommendations for family justice reform is that, notwithstanding what the *Family Law Rules* say, each jurisdiction within the province runs its family courts in a different way. What must be fixed in Brampton is not the same as in Windsor, or Ottawa, or St. Catharines. Nonetheless, we have not been deterred. Although it may be impossible to capture the needs of lawyers and family litigants in each jurisdiction, we have attempted to highlight the major issues with cross-boundary application currently plaguing the family justice system.

This paper was borne out of conference calls and informal meetings among a group of family law lawyers in the Greater Toronto Area, Windsor, Durham region and Ottawa. All members of the Committee want to engage in a more sustained advocacy effort to reform the family justice system. We want to fuel the fires that have been lit by Justice

Professional Challenges and Promising Practices, (Paper commissioned by the Law Commission of Ontario; (7) Dr. Barbara Landau, Tom Dart, Heather Swartz, Joyce Young, Submission to Attorney General Chris Bentley: Creating a Family Law Process that Works: Final Report and Recommendations from the Home Court Advantage Summit (2009); (8) Report of the Access to Family Justice Task Force, Government of New Brunswick (23 January 2009); (9) Alfred A. Mamo, Peter G. Jaffe & Debbie G. Chiodo, Recapturing and Renewing the Vision of the Family Court (2007); (10) A New Justice System for Families and Children: Report of the BC Family Law Reform Working Group (2005); (11) A Summary of Selected Reports on Family Justice Topics from BC, Alberta, & Federal/Provincial Sources since 1992 (BC Ministry of Attorney General, 2003). Most of these reports were reviewed in a preliminary report for the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters by Erin Shaw, “Family Justice Reform: A Review of Reports and Initiatives” (15 April 2012), online: <<http://www.cfcj-fcj.org/sites/default/files/docs/2012/Family%20Justice%20Reform%20Review%20-%20April%2015%20Final.pdf>>.

⁷Final Report of the Family Justice Working Group, *supra* note 4 at 13.

⁸ Chief Justice Warren K Winkler, “Opening of the Courts of Ontario” (September 2011), Remarks, online: Court of Appeal for Ontario <<http://www.ontariocourts.ca/coa/en/archives/ocs/2011.htm>>.

⁹ Chief Justice Warren K Winkler, “County Carleton Law Association Annual Institute of Family Law 2011” (April 2011), Remarks, online: Court of Appeal for Ontario <<http://www.ontariocourts.on.ca/coa/en/ps/speeches/2011-Annual-Institute-Family-Law-CCLA.htm>>.

Cromwell and Chief Justice Winkler. We want to see changes in the family justice system, not just read about them.

There was a general consensus among Committee members that the *Family Law Rules*, intended to simplify and streamline the steps in the family litigation process, have been a failure. The forms are too unruly for most litigants and, as a result of resource constraints, timelines, procedures and filing deadlines vary across jurisdictions throughout the province, no matter what the *Rules* may require. In many jurisdictions, the *Rules* simply cannot be, and are not being, applied. In some jurisdictions with Family Courts, requests by parties for case management cannot be accommodated due to a lack of resources, even though the *Rules* explicitly require the appointment of a case management judge in Family Courts.

Our committee was unable to reach a consensus position on whether the chapter on the *Family Law Rules* should be closed forever, and an entirely new playbook drafted. Most members agreed that, in an ideal world, the *Rules* should be scrapped. However, many members, including those otherwise vehemently opposed to the current *Rules*, could not endorse this proposal as a practical or realistic contribution to the ongoing discussion on family justice reform. All of the members recognize the current crisis in the family justice system and the need to take immediate action within the framework of the province's resource constraints.

And so we asked each other: If you could make 5 changes to the family justice system right now, what would they be?

#1: Unified Family Court

The need for Unified Family Courts (UFCs) in all regions across the province could not be clearer. The existence of two jurisdictions – sometimes overlapping, sometimes parallel – in most parts of Ontario is confusing for litigants, often duplicative, and frequently results in unnecessary costs. Separating families need a one-stop shop for gathering information and accessing the resources of one court to resolve their legal disputes. Early intervention, focussed on an effective triage system and true case management, are only really possible in a single-court system.

The modern family law case involves a series of case and settlement conferences prior to trial,¹⁰ the purpose of which is to assist litigants in settling their issues at the earliest

¹⁰ In May 1997, litigants and counsel in Toronto were informed that a case conference must precede a motion except in the case of emergency. The purposes of a case conference were identified as the following: try to resolve interim issues by agreement; organize the case including the setting of timetables, where advisable; and deal with any other procedural issues the parties may raise: Regional Senior Justice Lang, "Notice to the Profession" (6 May 1997), Note, cited in *Menzinger v Menzinger*, [1998] OJ No 3567, 40 OR (3d) 205 at para 43 (Ct J (Gen Div)) and *Percival v Percival*, [2000] OJ No 1764, 7 RFL (5th) 400 at para 9 (Sup Ct). The *Family Law Rules* came into effect in the fall of 1999. Rules 14(4) and (4.2) provides that no notice of motion or supporting evidence may be served and no motion may be heard before a conference dealing with the substantive issues in the case has been completed, except in the case of urgency or hardship or that a case conference is not required for some other reason in the

points in the litigation. To be effective, this process requires judges with substantive knowledge of family law – child and spousal support, income determination, property and trust issues, parenting and child-protection, just to scratch the surface - and superior skills in dispute resolution. Users of the system deserve to be heard by judges who have, or who have acquired, substantive experience in family law.

This problem is particularly evident in smaller rural regions across the province, where many judges preside over family law cases without having any experience in family law. In these regions, there are often no judges on rotation with experience in family law or knowledge of the *Family Law Rules*. The experiment of treating family litigation as nothing more than a subset of civil litigation has failed, to the detriment of families. Family law is unique, and the consequences of getting it wrong go far beyond the courtroom. There should be at least one specialist family law judge in rotation at all Ontario courts, particularly in more rural regions, where there are no UFCs nearby.

Existing UFCs would also benefit from changes to their service delivery models. For example, all UFCs should have the type of mediation services that are available through mediate393 at the courthouse in downtown Toronto. Although most UFCs have mental health professionals on site to assist in mediating some disputes, mediate393 offers lawyer/ mediators who can be very effective in settling cases or narrowing issues. Having trained mediators – both mental health and legal professionals – available at every courthouse would assist in settling many disputes that do not need to, and should not, proceed to litigation.

Meaningful reform of the family justice system will not be possible without a commitment to implement properly staffed UFCs across the province. For example, the UFC in Newmarket is notoriously understaffed, with some of the longest wait times in the area. At the UFC in London, child protection trials are given priority over other matters on the trial list, sometimes forcing those matters off the list and onto another trial sitting months away. All family courts would benefit from more active management of trials and more effective use of trial management conferences, with a view to controlling the growing numbers of lengthy high-conflict trials. Without a commitment to staffing, UFCs will not be effective in streamlining cases through the family law justice system.

#2 Early intervention

Two of the most pressing issues in the family justice system are: (1) the significant delay between the start of a court action and the first case conference; and (2) the court's ad hoc approach to which "urgent" motions may be heard in advance of a case conference. These two issues raise serious concerns about procedural fairness within the family

interest of justice. Rule 17 deals specifically with conferences, including the purposes of case, settlement and trial management conferences, and the orders that can be made at conferences.

justice system and represent one of the single greatest barriers to access to justice for family law litigants.

Under the old family justice model, the first step in any litigation was to bring an immediate motion to have interim issues decided at an early stage. In many cases, the adversarial nature of motions and the exchange of inflammatory affidavit material in the early stages of litigation ratcheted up the parties' conflict and were considered counter-productive. The *Family Law Rules* ushered in a new model, allowing motions to be heard in advance of a case conference only in the event of urgency. The purpose of the first case conference was to organize the parties, address immediate support and access issues, and provide parameters to parties for resolving their conflicts.

Unfortunately, the scheme envisioned in the *Family Law Rules* does not work. Worse, it leaves families – especially children – in limbo for months on end waiting for the first available case conference date, and has spawned a patch work of ad hoc jurisprudence about the meaning of the term “urgent motion”.

The issue is that wait times for Case Conferences are painfully long. In Durham Region, it takes four to six months after starting a court case for separating spouses to meet with a case conference judge. In Newmarket, some conference dates are currently being booked 5 months in advance. In Ottawa, where there is a UFC, conference dates are being set approximately 2 months in advance or less.

A lot can and does go wrong while newly separated spouses are waiting for their first case conference. Children can go weeks without seeing a parent. Parents and spouses in financial need try to make ends meet until they can obtain a support order. Parties continue to live together in the matrimonial home – a pressure cooker environment that frequently results in one party requesting police intervention. Under the *Family Law Rules* and the case law that has developed under rule 14, none of these issues meet the threshold for an urgent motion. The current system creates and nurtures conflict; it does not diffuse it.

Separating families need early intervention, and the benefits could not be clearer.¹¹ We support suggestions of a two-staged approach, consisting of triage at the entry point of litigation and true case management throughout the life cycle of a case.¹²

At the triage stage, all parties would meet with a triage professional – a judge, a master, or another quasi-judicial professional such as a Dispute Resolution Officer, who could

¹¹ For example: see, Law Commission of Ontario, *Voices from a Broken Family Justice System: Sharing Consultations Results* (September 2010); *Focus on Family Law, 16.1 The Consultation Process* (March 1995), online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/firstreport/familylaw.asp>>

¹² See, for example, Mark D Lerner, “Towards A More Efficient and Responsive Family Law System: Interim Report Submission to Law Commission of Ontario on Interim Family Law Report” (30 April 2012), online: The Advocates Society <<http://www.advocates.ca/assets/files/pdf/submissions/TAS-Submission-LCOonInterimFamilyLawReport.pdf>>.

act as a first responder in family court – within weeks of the case being started, to canvass support, custody, access and issues dealing with the matrimonial home, and high-needs and high conflict cases. This triage professional would be able to refer parties to the appropriate professionals at an early stage, ensure that real emergencies are brought to the attention of a judge as soon as possible, and divert cases to less adversarial processes, such as mediation, where appropriate. Cases that are not referred to mediation or settled at an early stage would be truly case managed on a one-judge-one-family approach, either by the triage professional, if he or she is a judge, or by a judge assigned to manage the case.

The expansion of the Dispute Resolution Officer mandate, discussed below, is one step toward creating a triage system. However, the ability to obtain interim orders, particularly on issues related to child support, access, and the physical separation of the parties, is fundamental to an effective triage system. In practice, both the triage system and true case management need to be implemented in the context of a UFC in order to move the parties and their lawyers forward with the case and achieve results.

#3 Better and more use of Dispute Resolution Officers (DROs)

As family lawyers, we are in the business of fielding difficult questions. Unfortunately, the most difficult one we often face is: “how long until I see a judge?”

Worse is to explain that, when the time comes to meet with the judge, very little is likely to be accomplished.

Anecdotal evidence from judges and court staff in some jurisdictions suggests that conferences are scheduled and heard, even where there are numerous outstanding disclosure issues and the parties are unprepared to discuss settlement. Lengthy and unproductive conferences eat up time and money, and force litigants into motions court. In many jurisdictions, including those with a UFC, motion dates must also be booked weeks or months in advance.

Appointing more judges to hear family cases is one solution to the problem. However, making better use of judicial resources would go a long way to reducing the backlog currently experienced by litigants in many jurisdictions. One practical way to free up judicial time is to expand the Dispute Resolution Officer program across the province.

On January 1, 2013, the DRO mandate was formally expanded. In courthouses where there is a DRO program, DROs will now hear all first case conferences dealing with Motions to Change. In several jurisdictions, the courts have decided to have all first case conferences heard by a DRO, no matter the issue.

Of course, DROs do not replace judges. The integrity of the justice system requires that DROs be appointed by the Regional Senior Justice and the Senior Family Justice, and

prevents them from being given the authority to make orders. Nonetheless, DROs can be effectively used as part of the early intervention strategy, to gate-keep at the start of a case (as triage professionals), and to ensure that matters are judge-ready before they move on to the next stages of litigation. Additionally, many DROs are able to assist one or both parties by making recommendations to the judge for an order.

We need to appoint more DROs to the courthouses that are already running this program,¹³ and we need to expand the program to more jurisdictions across Ontario. However, as part of that exercise, the issue of compensation for DROs must also be addressed. At the moment, only DROs in Toronto receive a token honorarium for their services; all other senior family law counsel who assist the court as DROs do so on a volunteer basis. We do not ask anyone else who works in the justice system, including criminal defence lawyers, to work for free. Given that the family justice system is increasingly reliant on the services provided by DROs, appropriate funding is necessary in order to ensure the continued success and growth of the DRO system.

#4 Practical Accountability

The *Family Law Rules* were designed to create a framework for settling disputes, by focussing litigants on judicial conferencing, delaying non-urgent motions, and punishing unnecessarily litigious behaviour. Rule 2 of the *Family Law Rules* specifically provides that parties and their lawyers are required to help the court to deal with cases justly, including saving expense and time.

The *Family Law Rules* were intended to make the system more accessible and more accountable. However, a lack of accountability for all participants – parties, lawyers, and judges – has permeated the family justice system and means that most litigants do not see the practical effects of Rule 2.

- **Rule 17 – Case/Settlement conference briefs:** Lawyers and parties need to show up to conferences at court prepared and ready to engage in settlement discussions. This includes filing comprehensive briefs on time, with Net Family Property Statements, support calculations, and offers to settle attached.
- **Rule 14 – Motion materials:** The rules for filing materials on motions need to be amended. Currently, a responding party's materials are due 2 days before the motion is heard. Since no other documents may be filed after 2 p.m. two days before the motion, the party bringing the motion must decide whether to forfeit his or her right of reply or whether to seek an adjournment of the motion, including all of the cost and time delay that goes along with postponing a motion date, in order to be able to prepare a reply. Second, the current patchwork of

¹³ The courthouses already running the program include: Newmarket, Durham, Barrie, Brampton, Milton, Toronto, Hamilton.

rules applying to the use of factums on motions must be standardized and the timelines for service and filing addressed in the *Rules*. As it stands, many parties (and particularly self-represented litigants) are unsure of whether and when factums are required on motions. In most cases, factums are served and filed at the deadline 2 days before the motion date, meaning that a responding party is required to produce his or her factum without having read the moving party's legal case. The *Rules* should be amended to require factums on motions, and requiring that they be served according to the same timelines as other motion materials.

- **Rule 24 - Costs:** Rule 24 of the *Family Law Rules* provides that a successful party is entitled to his or her costs, promptly after each step in the case. This rule is almost never enforced at the conference stage, even when a party insists on setting a conference unnecessarily or attends unprepared. The *Rules* allow cost consequences to be used as a disincentive to pursuing lengthy and unproductive conferences, and they should be enforced as such at each stage of the process. Further, many motion and conference judges reserve costs to the trial judge, notwithstanding the case law that has developed that such an approach is not consistent with the *Rules*. As a result, most trial judges award costs only for the work done at trial and many successful parties never recuperate their costs from each stage as this rule intended. Some lawyers believe that judges do this because they think that if they order costs too early in the process it will polarize the parties and reduce the chances of settlement. However, if costs are warranted, they should be ordered as required by the *Family Law Rules* and the court's jurisprudence.

#5 Funding for custody and access assessments, parenting coordinators, and coaches

In a growing number of custody and access cases, the parties' own evidence is insufficient to make a proper determination about a child's best interests. The stakes are high and the evidence is self-serving and imperfect. As a result, judges, lawyers and family law litigants are increasingly relying on mental health professionals to work with separating families and to make recommendations about what custody and access arrangements would be in the child's best interests. Custody and access assessments, Voice of the Child reports, and/or the involvement of the Children's Lawyer are becoming routine in any case where custody and access is being seriously disputed.

Custody and access assessments provide the court with independent evidence about a family, including the personalities of the children and the parenting dynamics. In the very best cases, the parties can use the assessment process to gain better insight into their parenting relationship and, often, the assessor's recommendations provide the parties with a framework for settlement.

There remains some dispute about the usefulness of assessments. Some lawyers argue that they are costly and unhelpful because most experienced counsel can predict the results of an assessment ahead of time. Others argue that assessments can be problematic because courts do not usually rule against an assessors recommendations, even where the findings and recommendations are flawed. Some suggest that Voice of the Child reports, which may or may not be undertaken by a mental health professional, may be a more practical and less costly alternative to assessments. As a result, they are becoming more common in Ontario in cases where the age and stage of the child make such reports appropriate.

There is much to be said for involving trained mental health and other therapeutic professionals with the children who are central to, and deeply affected by, their parents' custody and access disputes. However, the financial reality for most families in litigation is grim. Although the courts request the assistance of the Office of the Children's Lawyer in many cases, the OCL is not required to accept the Court's referrals and has the resources to take on only a fraction of the cases where their assistance is requested.¹⁴ For families that require the assistance of a third party assessor, an average custody and access assessment is likely to cost at least \$15,000, and often more. Although potentially less expensive, the cost of retaining a parenting coordinator to help parents work through ongoing parenting issues will fluctuate, depending on the rates of the parenting coordinator, the level of conflict between the parties, and the complexity and duration of the parenting issues that need to be addressed.

Further, the high conflict nature of many custody and access cases has contributed to a crisis within the health professions, with a growing number of disgruntled litigants filing complaints against assessors with their professional regulatory bodies. For example, in 2007, one-third of all complaints made to the College of Psychology of Ontario arose out of custody and access assessments.¹⁵ The cost of dealing with a vexatious complaint to an assessor's regulatory body is significant, and many assessors refuse to undertake custody and access assessments once they have lived the experience.¹⁶ Without appropriate funding to family court clinics, new assessors are not being trained and the pool of qualified assessors is diminishing every year.

Studies consistently show that children who are exposed to parental conflict and divorce are more likely than others to suffer from anxiety, depression, and to have difficulty in school. The family justice system needs increased funding for custody and access assessments and Voice of the Child reports, where appropriate, and the use of

¹⁴ Cases are accepted (or not) by the OCL on the basis of necessity, without regard to the financial need of the parties.

¹⁵ Nicholas Bala et al, "Discussion Paper for Legal Reform: Protecting Custody Assessors from Vexatious Complaints to Regulatory Colleges by Disgruntled Litigants" (November 2009).

¹⁶ *Ibid* at 5.

parenting coordinators. This discussion must form part of a larger federal-provincial strategy to promote treatment for young people suffering from mental illness.¹⁷

Complicating matters is the fact that the mental health system is funded by several different ministries, including the Ministry of Health, the Ministry of Education, the Ministry of the Attorney General and the Ministry of Child and Youth Services. In addition, there is a question as to whether family law lawyers should take on an advocacy role regarding funding of mental health resources for families, or whether our skills and expertise are better used by focusing on legal reforms to the family justice system. However, as custody and access assessments, Voice of the Child reports and parenting coordinators have become an integral part of custody and access decisions in family law, it seems difficult to separate the two.

In short, the OCL is overburdened with requests by the court for assistance, there are too few mental health professionals in private practice that are willing and able to become involved in family litigation, and not enough parties with money to retain their services. This is uniformly true across jurisdictions in the province. What can be done? As a first step, the existing burdens on the OCL need to be assessed and redistributed, so that the social work and legal services provided by the OCL are targeted first to families that do not have the financial capacity to retain the services of a third party to undertake a custody and access assessment or report to the Court on a child's views and preferences. One proposal for achieving this goal is to set an income level, based on combined family income, above which parties are disqualified from accessing the services of the OCL. For those families above this threshold, we continue to advocate for better funding for and more participation from mental health professionals in custody and access assessments and parenting coordination roles.

¹⁷ André Picard, "Exposing Canada's Ugly Mental Health Secret" (13 October 2013), online: The Globe and Mail <<http://www.theglobeandmail.com>>.