Proposals to Improve the Family Justice System In Ontario. July 31. 2019

The Family Dispute Resolution Institute of Ontario (FDRIO) serves to establish high quality family dispute resolution processes, and to educate the public about them. The organization does not advocate for any process over another, and has therefore great credibility in an exercise such as this. FDRIO serves no special interest; rather it seeks to ensure that all families in Ontario benefit from the most appropriate, effective, accessible and affordable dispute resolution option for that family.

Background

Over the past 20 years there have been numerous reports and ideas about how to improve the family justice system in Ontario. Family law is an area of shared jurisdiction between the federal and provincial government, and that shared jurisdiction has made meaningful progress difficult. But all provinces share this challenge, and yet Ontario lags behind other Canadian jurisdictions on a number of fronts. At least 50% of Ontarians who proceed to family court do so without lawyers, and in some court locations upwards of 80% of litigants are unrepresented.

In testament to the high level of interest in family law reform, one can review several major reports and commentary about these issues from the last 10 years:

Family Legal Services Review Report

Meaningful Change for Family Justice: Beyond Wise Words

Access to Civil and Family Justice: a Roadmap for Change

Increasing Access to Family Justice through Comprehensive Entry Points and Inclusivity

Family Law and Access to Justice: A time for Change

Superior Court Family Law Strategic Plan

The family justice system is where the majority of adults intersect with the court system. Few are arrested or are victims of crime, even fewer use small claims court. But many adults separate and about 30 thousand couples divorce every year in Ontario. This does not include cohabiting couples which is close to another 30 thousand couples. And when these families go through the court system without representation, they often do not have positive experiences, with some likening it to doing surgery on oneself.

Even with representation, court resolution is costly, divisive and potentially damaging to long term relationships between parents and children.

The Attorney General is seeking ways to:

- Direct family matters out of a combative court process where possible
- Reduce costs to parties and taxpayers and
- Streamline processes to shorten time to resolution

What changes can government make to improve the family justice system? Options include legislative, procedural and policy approaches.

Important safeguards

The goals of this review are laudable. Change is inevitable and necessary. It also must take into account what we know from decades of research and experience about the context of family breakdown; otherwise change could come at the expense of the most vulnerable.

We advise caution, for instance, with the characterization of the court system as "combative". It is not court that is combative; it is the very nature of human beings experiencing separation and divorce that is combative. It is the legal culture that pervades family law that is combative. Courts are not combative; the due process requirements of the courts along with the many supports for the vulnerable are critical to our Canadian legal value system. The courts build safeguards into their processes to ensure that justice is done—that bullies and perpetrators of domestic violence and those seeking revenge at all costs cannot achieve unfair outcomes that put the future and safety of children at risk.

We emphasize this because the starting point for all family justice reform should be this: what is the safest process that is likely to lead to a fair result for each family? Where the power imbalances or safety risks are great, the dispute resolution process may need to have the coercive power of the courts in order to protect the vulnerable.

But for a great many others, resolution in other ways is more likely to meet the objectives of the Attorney General.

Underlying principles

FDRIO's work is guided by its Standards of Practice. The first eight standards should inform all family justice reform:

1. Respect party self-determination
2. Establish and maintain competence
3. Do no harm
4. Respect the rights of children

5. Maintain confidentiality and inform parties of exceptions
6. Ensure freedom from conflicts of interest
7. Establish and maintain quality of the process
8. Remain impartial and neutral

Alongside our Standards of Practice are our Screening Guidelines, which are designed to identify cases where there is a power imbalance, so that steps can be taken to plan a safe dispute resolution process. FDRIO has established the most comprehensive set of guidelines to date for those working with separating families as dispute resolution service providers. Understanding the nature of family violence, coercive control, and other forms of power imbalance and having expertise in identifying, assessing and managing it is crucial to successful family dispute resolution.

This is the most important of all the standards guiding our work: *Do No Harm*.

Recommended Legislative Changes

1. Reform property laws under the Family Law Act to include cohabiting couples. **Why?** Most cohabiting couples think they have property equalization rights and are shocked to find they do not. More couple are commencing their relationships as a cohabitation.

2. Create a beneficial ownership property regime rather than a debtor/creditor regime. **Why?** A beneficial ownership regime (like BC) offers some protection if one of the spouses declares bankruptcy.

3. Amend the Children's Law Reform Act to remove the terms custody and access and replace with the terms decision making and parenting time. Align the best interests of the child test with the new federal Divorce Act changes. **Why?** Decision making and parenting time are more understandable than custody and access, and there is value in consistency between federal and provincial law in this area, so that children in married or cohabiting families are treated the same when their parents separate. The terms decision making and parenting time are used in ADR processes and when parents make a parenting plan.

4. Amend the Family Law Act support provisions to explicitly make reference to the federal Spousal Support Advisory Guidelines. **Why?** Judges and lawyers routinely use the SSAG, even when the parties are not married, and the Family Law Act applies. This change would recognize reality.

5. Amend the Ontario Child Support Guidelines (a regulation under the Family Law Act) to have a step-down reduction in child support based on time shared in parenting, rather than the cliff of the 40% rule. **Why?** The 40% rule encourages parents to strategically negotiate overnights to maximize (in the case of a recipient) or minimize (in the case of a payor) the financial impact of parenting time. In Quebec, a scaled change in child support based on parenting time

encourages parents to decide on the best time schedule for their children without the motivation to negotiate based on financial impact.

6. Amend the Family Law Act to clarify the means of enforcing an arbitration award. **Why?** This minor change would assist private arbitrators who help families use arbitration to settle family matters, and as these are some of the most difficult cases, clarity in the law is essential. There is currently a delay in enforcing support orders under an arbitration award. Arbitration awards should be treated similarly to domestic contracts.

7. Amend the Family Law Act to clarify the standards for screening for domestic violence. Ontario should, like British Columbia, require all professionals working with separating families – mediators, arbitrators, parenting coordinators, assessors, child protection workers, family therapists, family lawyers, coaches, collaborative professionals, etc- to:

    (i) take at least 14 hours of training in identifying, assessing and managing family violence and other forms of power imbalance, **and**

    (ii) **personally screen** their clients for such imbalances, as BC has done. In particular the requirement that arbitrators use a third party screener should be eliminated and replaced with the requirement that family arbitrators, like all other FDR professionals, conduct appropriate screening. Arbitrators should also be required to take a 40 hour course on arbitration and process training in addition to the current training required for family arbitrators.

    Why? Effective diversion from court requires an assessment about suitability and safety, not only for parties and their children, but for professionals and their staff as well. This is particularly important for processes that involve adjudication such as arbitration and parenting coordination.

    There have been too many failed cases-- some with tragic results for families and children in particular - that evidence the ongoing failure of family law professionals of all kinds to correctly assess the needs of the parties, the suitability of the process being chosen and the appropriate safety planning and other process adjustments necessary. These requirements—that all family law and dispute resolution professionals have specialized training in family violence and power imbalances, **and** that all be required to conduct their own screening processes for same -- will significantly enhance all three objectives of this consultation. They would also eliminate the confusion and in many cases unacceptable practices for such screening that have evolved in the ten plus years since Regulation 134/07 under the Arbitration Act was introduced.

8. Amend the Family Law Act to extend coverage of restraining orders to dating or intimate partners who have not cohabited or alternately adopt a specific act for

civil protection orders as exists in most other provinces. **Why?** Victims of violence and stalking who are not spouses, or have not cohabited with the abuser cannot apply for a restraining order under Ontario law. So a person who is dating, or who lives in a university residence, for example, cannot apply for a civil restraining order. Since young women aged 15-24 are the most likely victims of intimate partner violence, the current provisions do not protect the most vulnerable. Many other provinces have created civil protection order acts which also permit emergency applications to court.

9. Introduce legislation for parenting coordinators. Ontario should, like other jurisdictions across North America, empower judges to order parties to work with a parenting coordinator, and provide some guidance on the parenting coordination process that address issues of procedural fairness, confidentiality and safety. **Why?** The courts are bogged down with "frequent flyers": those couples who are unable to resolve the smallest details of their parenting arrangements due to very high degrees of interpersonal conflict. Many other jurisdictions have empowered courts to divert such couples away from the courts and into private or public parenting coordination processes, representing a significant saving of court resources.
   FDRIO has developed Canada's only professional certification for parenting coordinators. We are working closely with other leading organizations and would be pleased to discuss this further.

10. Amend the Family Law Rules to mandate family mediation intake. Ontario should require all couples who have initiated court proceedings to attend individual intake meetings for family mediation, conducted by certified or accredited mediation specialists with expertise in identifying, assessing and managing power imbalances including family violence, except in cases of emergency. **Why?** The government has wisely funded - mediation services in all family courts across the province. These services are - provided by well trained and highly experienced family mediators with extensive experience working with victims of family violence, cultural and language barriers, mental illness, substance abuse problems and other forms of power imbalance. This expertise is under-used in some areas throughout the province.

    A requirement that all parties attend a confidential mediation intake session will significantly contribute to achieving all three goals of this consultation. Such intake meetings are supportive of both parties and the family and enable vulnerable clients to connect with community resources in a safe and confidential way without being compelled to negotiate with an abusive spouse. They will no doubt result in a dramatic increase in the use of voluntary mediation following them, given the highly positive client feedback received by mediation service providers province-wide.

    (We note that mandatory family mediation is not advised, not only because mediation is most effective when it is a voluntary process, but more importantly,

because of the risk of harm arising from its reversal of onus on victims of violence (who are required to disclose the violence to avoid mandatory mediation, but often without the safety planning and other safe termination supports required to keep parties and professionals safe).

We recognize that there would be a cost associated with this requirement, which we believe would be more than outweighed by the cost savings to the family law system. We recommend this service be provided by way of private service provider contract.

Lobby the federal government to make the following changes:

11. Amend the Income Tax Act to require parents who have child support obligations to file income tax returns, and to permit provincial child support services to receive copies of these returns for support enforcement purposes, if a court orders. **Why?** It is difficult to establish an income for payors who are self-employed or do not file their taxes. Tax refunds are also a source of payment for arrears of support. Allowing enforcement agencies to see tax filings would permit them to locate payors, see if they are co-habiting and allow them to more accurately recalculate support owning.

12. Amend the federal Child Support Guidelines to align with any changes to the Ontario child support guidelines (or to have all Ontario payors follow the Ontario child support guidelines). **Why?** If the Ontario guidelines are amended to change the 40% rule, change to the federal guideline should also occur to ensure that children in married and cohabiting families are treated equivalently by the law.

Recommended Procedural Changes

13. The Mandatory Information Program (MIP) should take place *before* any court application. All couples considering using the courts would then have a general base of knowledge about the court process, how to find a lawyer, mediation and other ADR options, the impact of family violence on all family members and how process choice can impact children caught in middle. This program should use technology better to be more easily accessible to parents and those living in remote areas.

14. Triage by qualified professionals should be first point of contact for each case as it is about to enter the family court. Depending on funds available, this service would ideally be provided by the Information & Referral Coordinators now providing similar services under contract, but other professionals could also do so in a cost effective manner including supernumary judges. The goal would be

to ensure all cases are directed to the most appropriate process choice for each family .

15. Consider providing legal court-based services by way of service provider contracts. For example, family mediation services struggle to find affordable legal advice for their clients, which restricts the effectiveness of the mediation service in achieving the objectives of this consultation. This situation has become worse as a result of Legal Aid Ontario's (LAO) response to the reduction in its funding. The private service provider model could be expanded to contracts for the provision of legal support services in the courts, for mediation and also for anyone in need of legal advice, with much higher income cut-offs than those required by LAO. Enhancing access to free or affordable legal advice is a critical component of achieving the three goals of this consultation, particularly for those clients being diverted out of court.

16. Continue mediation funding. The Ministry provides free mediation for clients in the court process and subsidized mediation for to those that have never started an application. This service effectively reduces the case load in the courts, though, as noted below, it needs to be better promoted by the Ministry of the Attorney General to achieve its maximum potential.

17. Continue funding other essential services that are consistent with the goals of the Attorney General: Other essential services that should (continue to) be provided in the courts by private service providers are, family court support workers (and these services should be extended to victims of all genders) and interpreters. Fund additional training for interpreters. Such services should support clients in court, clients in mediation and clients attending arbitration and parenting coordination.

18. Find ways to make better use of the existing court infrastructure. Our court houses have the ability to act much more as community hubs of excellence and dispute resolution. Private service providers providing legal, mediation, triage, counselling and other supportive services that will enhance the ability to achieve the three goals of this consultation could be provided in specific parts of the court buildings.

19. Mandate a parenting course: Require all separating couples with minor children to complete a skills-based parenting after separation program on line. Create a distinct in-person facilitated program for families who have domestic violence or substance abuse issues, for judicial referral or referral at the triage stage.

20. Limited mandate for paralegals: Permit paralegals to assist Ontarians with uncontested divorces where there is no property and no minor children.

21. More training for judges: Offer more training on a variety of subjects and support to judges who hear family law cases, particularly given the stresses of working

with so many unrepresented parties, and to the extent possible have one judge manage each family case. Permit the judge to control the scheduling of the case, refer to mediation, accept evidence whether it is filed properly or not and generally control the judicial process.

22. Change Form 13.1 the Financial Statement with assistance from a banking app expert to allow litigants to draw real data from their banking program and investments to populate the statement.

23. Simplify all family law forms to use plain language, intuitive process and to clarify what information must be included. Use forms experts and plain language experts rather than lawyers and judges. Complete this change now before completing CLEO's family law guided pathways project, so that the work does not have to be redone.

24. Complete a plain language review of the Family Law Rules, to recognize that most users are not lawyers. Alternately provide a plain language version of the rules for unrepresented litigants.

25. Permit and encourage information sharing between the courts and other government or government-funded entities like the CAS's, the Family Responsibility Office and the police. This change would require amendmants to privacy legislation.

Recommended Broader Policy Changes

26. Fund community counselling agencies to provide counselling to couples and separating families on a more urgent basis, without long wait lists. Link referrals from triage professionals, the qualified mediators and parenting program leaders above for subsidized counselling. Fund parenting after separation groups focused on step parenting, blending families, reunification and other family justice issues.

27. Advertise the services that are available. The Ministry of the Attorney General's website, social media and advertising generally has not adequately informed the public about the good services already available such as free and subsidized mediation, family court support workers, fee waiver, information programs etc. Furthermore, many in the legal profession remain unaware of such services. More could be done to promote these services.

28. Not all cases which proceed in our Family Courts require the same Rules. Some cases involve issues which can be resolved in a more expeditious manner. We may want to consider "simplified rules" for those cases, as was done in the civil court system. If so, the authority to stream cases to the simplified rules could be given to the triage professional. FDRIO would be willing to work on simplified rules.

29. Legal Aid – Justification for Expansion not Reduction:

a. The Ministry is encouraged to review the cost of providing legal services through the court system. What is the hourly cost of providing services in this manner? In every step it takes to reform the system, the Ministry needs to do a "cost benefit" analysis.

b. It is anticipated that the hourly rate of running a court room, (Judge's salaries, court room staff both front and back office, court room space, etc.) far exceeds the cost of providing legal services to the public at legal aid hourly rates. If a trained lawyer can save two to three hours per day of court room time by processing cases in an efficient, expeditious, lawyer like manner, the cost savings to the court could be enormous and more people could be represented. At least the public has a right to know the cost of providing court based resolution services.

c. In its review of the system, the Ministry is urged to try to determine which person is best to perform the service the public needs to resolve family law issues. Questions follow.

    i. Conferencing is a good thing – it encourages people to settle. But should that service at its cost be provided by Judges? Would the clients and the system not be better economically served if this service was, in appropriate situations, provided by professional mediators who already have the training, the skill and the time? Should Judges, at their expense, not be reserved for what they do best, that is, judging cases? If we took conferencing out of their current obligations, there would be less wait for trial time and a more efficient use of courtrooms.

    We suggest that judges be empowered to direct parties to attend 'private case conferencing' in appropriate cases.

    ii. The majority of self-represented clients believe they cannot afford a lawyer. For those who truly can't, then legal aid needs to be expanded to provide funding. This will ultimately save the system money. For those who can, more information should be provided to the public about such things as 'unbundled services' and the Summary Legal Advice program available in person in the courts and at various clinics, and by phone.

    iii. Legal aid is especially justified for those who are able to come to a settlement through mediation but cannot afford to retain a lawyer to help them draft their separation agreement which is necessary to

make their settlement binding. Many of these people have not initiated a court action. But, without the ability to put a separation agreement in place, they now must commence a proceeding in order to obtain that binding resolution of their issues. A Judge must then be involved at, no doubt, far more expense to the public.

For more information contact:

Tom Dart, Barriston Law
tdart@barristonlaw.com