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The Association of Family and Conciliation Courts, Ontario Chapter (AFCC-O)

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Family Legal Services Review
Ministry of the Attorney General
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Attn: The Honourable Madam Justice Annemarie E. Bonkalo

Re: AFCC-O Submission to Family Legal Services Review

Dear Justice Bonkalo,

Thank you for the opportunity to provide submissions to the Honourable Madeleine Meilleur, Attorney General of Ontario (the "Attorney General") and the Law Society of Upper Canada (the "Law Society") on the review of the provision of family legal services by persons in addition to lawyers. We recognize the vital importance of improving access to family justice, and appreciate the willingness of the government and the Law Society to address these issues, as is reflected in undertaking this review.

The goal of this submission is to provide an overview of various considerations (both positive and negative) that you may wish to take into account during the consultation process and to

[1] The Board Members listed above endorse the contents of this letter, which has taken into consideration the views of AFCC Ontario members.

highlight factors that the Association of Family and Conciliation Courts, Ontario Chapter ("AFCC-O") considers to be of fundamental importance when making recommendations. As the AFCC-O considers paralegals, law clerks and articling students to be three discrete groups with different sets of qualifications and characteristics, the AFCC-O has broadly outlined below certain factors relevant to the potential expansion of legal services provided by these three discrete groups of "para-professionals."

There are considerable challenges in addressing these issues. On the one hand, there is a crisis in Ontario as there is a lack of access to affordable legal assistance and representation. On the other hand, family law matters are of profound importance. Poor quality of assistance can result in the endangerment of vulnerable parents and their children, and a significantly more precarious economic situation for the whole family. Often issues that appear relatively straightforward and discrete are actually complex and interrelated to other issues – without an assessment and appropriate supervision by an experienced lawyer, there are real dangers with involving para-professionals in providing assistance to individuals. For ease of reference we include the table of contents below.

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The AFCC-O

The Association of Family and Conciliation Courts ("**AFCC**") is an interdisciplinary and international association of lawyers, mental health professionals, social workers, psychologists, mediators, court administrators, family law judges and other professionals working in the family justice system throughout the United States, and in various jurisdictions around the world. AFCC-O is a charitable organization with approximately 475 Chapter members in Ontario who are dedicated to the resolution of family conflict. AFCC members share a strong commitment to education, innovation, research and collaboration in order to benefit communities, empower families, and promote a healthy future for children, as well as a concern about access to family justice. AFCC members have developed dispute resolution processes such as child custody mediation, parenting coordination and divorce education, and they have collaborated with other organizations to develop essential standards of practice and guidelines to raise the bar in the field of family law.

AFCC-O Working Group and Survey

The AFCC-O provides opportunities for its members to share their interdisciplinary views on family justice matters at a local level and within a Canadian context. In preparing this submission, AFCC-O circulated a survey to its membership and created an interdisciplinary working group who reviewed the survey results and prepared a report for the consideration of the Board of Directors, who make this submission on behalf of the AFCC-O. This survey asked members about:

- The perceived impact of allowing non-lawyers to represent parties in the family justice system;
- The type of tasks which they believed might potentially be carried out by para-professionals;
- The importance of various factors to be considered in determining whether a party to a family law proceeding should be permitted to be represented by a non-lawyer (e.g. the non-lawyer's training and education, the party's financial circumstances, issues in the

family law proceeding, direct supervision by a family law lawyer, oversight by the Law Society of Upper Canada, and liability insurance for non-lawyers);

- Whether safeguards such as direct supervision by a lawyer would alter their views on the type of tasks which could be effectively carried out by a non-lawyer; and
- Whether Rule 4 of the *Family Law Rules* (which requires the court to give advance permission for a party to a family law proceeding to be represented by a non-lawyer) should remain in place even if non-lawyers were permitted to represent family law litigants in any capacity.

The survey was completed by 84 members, generating over 200 pages of responses. Input was received from judges, lawyers, professors, social workers, psychologists, mediators, arbitrators, parenting coordinators, a grief counsellor, a court information referral coordinator, a psychotherapist and a custody/access assessor. Approximately 39% of those currently practising employed a law clerk, 16% a law student, 1% a paralegal, and 58% of the respondents employed none of the above.

As the AFCC-O membership is a multidisciplinary group of professionals dedicated to improving the lives of children and families in the context of separation and divorce proceedings, the comments of our diverse membership were central to the formulation of this submission and are canvassed in further detail below.

Definitions

Paralegals

The AFCC-O Board is using the following definition for "paralegals":

1. Paralegals are persons who are licensed and regulated by the LSUC.
2. Persons are eligible to apply to the LSUC to become licensed as paralegals if they have graduated from a paralegal program accredited by the LSUC. They must also pass the paralegal licensing examination and be determined to be of good character.
3. Currently, a person with a paralegal license can represent someone:
    a. in Small Claims Court,

b. in the Ontario Court of Justice under the Provincial Offences Act, and
c. on summary conviction offences where the maximum penalty does not exceed 6 months' imprisonment and/or a $5,000 fine.

4. A person with a paralegal license can do the following in the course of representing a client in any of the proceedings mentioned above:
    a. give legal advice concerning legal interests, rights and responsibilities with respect to a proceeding or the subject matter of the proceeding,
    b. draft or assist with drafting documents for use in a proceeding, and
    c. negotiate on behalf of a person who is a party to a proceeding.
5. Currently, paralegals are not permitted to appear in Family Court.

Notably, in contrast to law clerks and law students, paralegals do not require the supervision of a lawyer when carrying out the duties above.

Law Clerks

When reference is made to "law clerks", the AFCC-O Board is adopting the definition used by the Institute of Law Clerks in Ontario, which is as follows:

> "Law Clerk" means a person, qualified through education, training, or work experience, who is employed or retained by a Lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the ultimate direction and guidance of a Lawyer, or duties of an administrative or managerial nature, and/or of specifically-delegated substantive legal work which requires a sufficient knowledge of legal concepts that in the absence of a law clerk the Lawyer would perform.

Law Students

Law students are broadly defined as students who are enrolled in an accredited law school (common law program) at a university in Canada. The Law Society of Upper Canada distinguishes between lawyer licensing process candidates who have graduated from their program and are serving approved Articles of Clerkship or are engaged in their Legal Practice Placement Work term (collectively referred to in this paper as "students-at-law" or "articling students") and other law students who have not yet completed their law school program, such as summer students after their first or second year of law school.

The Law Society of Upper Canada By-Laws provide that "an articling student shall act in good faith in fulfilling and discharging all the commitments and obligations arising from the articling experience." Articling students must identify themselves as such when appearing in the Family Court branch of the Superior Court of Justice and the Ontario Court of Justice and are still subject to Rule 4 of the *Family Law Rules*, that anyone acting for a litigant must be a lawyer unless the Court gives permission in advance.

Subject to Rule 4, the Law Society provides that students-at-law (both articling students and those in the Law Practice Program) may appear before Ontario courts and tribunals on the following family law matters, provided the Candidate is employed under the direct supervision of a licensed lawyer:

1. Consent motions and matters before Ontario Court of Justice and the Superior Court of Justice, and before the Masters and Registrars of the Superior Court of Justice and the Registrars of the Court of Appeal for Ontario, including references and assessments of costs.
2. Matters brought without notice to the opposing party before the Ontario Court of Justice and the Superior Court of Justice, and before the Masters and Registrars of the Superior Court of Justice, *provided no substantial rights will be affected* (*emphasis added)*.
3. Simple contested interlocutory motions before the Ontario Court of Justice and the Superior Court of Justice and before the Masters and Registrars of the Superior Court of Justice, unless the result of such interlocutory motion could be to finally dispose of a party's substantive rights by determining the subject matter in dispute.
4. Examinations for discovery, examinations in aid of execution, examinations of witnesses on pending motions and cross-examinations on affidavits in support of interlocutory motions.
5. Assignment court matters in both the Superior Court of Justice and the Ontario Court of Justice.
6. Status hearings in the Superior Court of Justice.
7. Applications in the Ontario Court of Justice. Candidates may not appear on contested Crown Wardship Applications.

Subject to Rule 4, the rights of appearance of law students other than articling students who are employed by a law firm (e.g., for the summer) are governed by the Law Society By-laws. These students may appear as agents in courts and tribunals with potentially the same opportunity for appearance as an articling student provided there is direct supervision by the supervising lawyer.[2]

Further, Ontario law students in a Student Legal Aid Society or Legal Aid Clinic may appear as agents in courts and tribunals, with rights of appearance similar to those of an articling student, provided they are supervised by a lawyer and covered by the lawyer's insurance.

In practice, there is very significant variation in the application of Rule 4 and the extent to which judges allow articling students, employed law students and law students from clinics to appear in their courts. Some of the variation is by level of court, with more willingness to allow students to appear in the Ontario Court of Justice than in a Superior or Family Court, but there is also substantial variation in the approach to law students from judge to judge, as well as from one court site to another, even within the same level of court.

Results of the AFCC-O Survey regarding the Expansion of Services by Para-Professionals

The AFCC-O conducted a survey of its members, which asked numerous questions about the perceived impact of permitting an expansion of the role of paralegals, clerks, and students in family law proceedings. There were 84 responses to the survey, ranging from judges, lawyers, mediators, social workers, and parenting coordinators. The majority of the respondents (over 80%) had practiced in the family law profession for over 10 years.

The respondents overwhelmingly raised serious concerns about non-lawyers providing legal services. Different issues were raised with respect to paralegals as opposed to clerks and law students, primarily as a result of the assumption that law students and clerks are supervised by a lawyer.

[2] By-law 4, Subsection 34.2, Law Society of Upper Canada By-Laws

The most significant concern raised in the survey centred on quality control. The domestic side of family law is not limited to financial issues, and although those are extremely important, respondents flagged parenting as a very difficult area with potentially very serious consequences to the parties and their children. Custody and access arrangements can be difficult to change once they have been established, and it is therefore imperative that parties are properly informed of their rights and the steps that they have available to them. This applies whether the parties are at court or at mediation. If the parties receive inaccurate or insufficient advice from a non-lawyer, this may result in significant prejudice to the client. Although the respondents had varying opinions about the tasks that a non-lawyer should be permitted to do, there was almost universal agreement that any non-lawyer who works in the field of family law must be supervised by a family lawyer in order to maintain quality control.

Child protection files were raised peripherally by one or two respondents, and given the stakes involved where a parent can be at risk of losing custody of their children to the state, very serious concerns were also raised about parents receiving any kind of advice or representation from a non-lawyer.

Many of the respondents raised the issue of mediation, given that a substantial number of family law files are negotiated without a court attendance. Questions were raised about the authority of a non-lawyer to negotiate and/or draft an agreement, as the lawyer for the other party will need guidelines about whether to negotiate directly with the party or with the non-lawyer.

The increased complexity of family law, and the consequences of having to "fix" mistakes that arise from inadequate legal representation were raised by numerous respondents. A party who retains a paralegal because he or she is less expensive than a lawyer may ultimately incur greater expenses in the long run if errors are made in the drafting or submission of materials. The perception generally is that it is more cost-efficient to spend more money on effective and comprehensive legal advice up front than it is to spend money after the fact to correct serious errors in the pleadings, financial statements, and other relevant documents.

In terms of the impact on their personal practice, almost all of the respondents stated that this would have some impact on their practices but several respondents distinguished between small firms and sole practitioners, and lawyers at larger firms. The perception is that allowing a non-lawyer to represent parties will have a much greater impact on the small firms and sole practitioners, as there is likely to be more financial competition for limited clients. If non-lawyers can offer the same service as lawyers at a reduced cost, this may result in smaller firms and sole practitioners cutting their rates in order to compete. Given that the large firms often deal with high income earners who also have significant complex property issues, it is less likely that these firms would be as affected by the less-expensive competition from non-lawyers.

Positive aspects related to the potential expansion of service providers include the opportunity for self-represented litigants to obtain legal or practical advice, and to receive information about procedural matters. Dealing with self-represented litigants can be challenging for lawyers, and courts often rely on lawyers to ensure that documents have been filed properly, and the files complete. Self-represented litigants who have access to legal or practical advice may be better able to prepare documents such as trial records and books of authorities.

When asked about the services that paralegals could perform, adequate oversight was noted as the primary consideration. In Ontario, paralegals are licenced separately by the Law Society, and can operate independently, without being supervised by a lawyer. In order to qualify as a paralegal in Ontario, candidates have to complete a course of study, pass their licensing exams, spend 120 hours in a placement and be of good character. If paralegals are to be permitted to participate in family law files, there will have to be a clear provision about who is to provide education and training, and how ongoing professional development will be structured.

Many survey respondents noted that clerks and students already interview clients and draft documents such as affidavits and financial statements. As they are always supervised by the lawyer who is ultimately responsible for the file, these tasks were not seen as unusual or expanding the scope of their existing services. With respect to court appearances, if the matter is non-contentious and will not have an impact on a substantive issue, the respondents generally did

not have a concern about non-lawyers attending. The respondents noted that there needs to be clarity about the type of appearances where non-lawyers would be permitted and in what circumstances, especially as there are quite significant differences between the Ontario Court of Justice and the Superior Court of Justice. One commenter noted that sometimes there are unanticipated issues that arise at court, which may create challenges for non-lawyers and their clients, particularly when they believe that the only issue before the Court is an uncontested adjournment.

The overarching question is whether this proposal to expand services will help unrepresented family law litigants in a cost-effective manner while still ensuring that the quality of the service is not eroded in any way. Practicing lawyers are open to changes, but they have significant concerns about whether these changes will be implemented in a way that does not erode the quality of legal services that are available to litigants in Ontario. The AFCC-O Board members listed on the first page of this letter have taken into account the comments and views of its membership in providing further submissions on the expansion of legal services by para-professionals below.

Considerations (Positive and Negative) in Respect of Different Types of Para-Professionals: Law Students, Law Clerks and Paralegals

Law Students

According to the Consultation Report of the Law Society of Upper Canada's Articling Task Force, there was a shortage of articling placements for candidates. By June 2011, 174 or 10% of 1,748 candidates in the 2010 licensing process had still not secured an articling placement.[3] The percentage of respondents who were employed following their call to the bar in June 2011 was 68.6%.[4] The Law Society subsequently introduced the Law Practice Program (LPP), an experiential training component, to address the shortage of articling positions and create an

[3] Law Society of Upper Canada, Articling Task Force Consultation Report, December 9, 2011: Table 3.
[4] Law Society of Upper Canada, Articling Task Force Consultation Report, December 9, 2011: Table 4.

alternative means through which law school graduates could fulfill their lawyer licensing requirements. Unfortunately, there has been a proliferation of unpaid articling positions and estimates place the percentage of unpaid LPP placements at 32% with an additional 27% with "wages to be determined". Further, there is a particularly small number of articling jobs in the family field, in part reflecting the fact that most lawyers who engage in family practice are in small firms or sole practice and unable to afford hiring a student. The lack of family articling positions means that many of those entering the profession and starting to practice in this complex area, lack basic skills, attitudes and knowledge.

With an average student debt load of $70,000 according to the Law Students' Society of Ontario, and a shortage of paid articling positions (either traditional or through the LPP),[5] there is a significant gap between the number of students actively looking for paid legal experience and the number of family law litigants looking for legal assistance. There may be untapped opportunities for law students to help address the access to justice crisis without expanding the scope of services to paralegals and law clerks. Expanding the scope of supervised family law experiences available to students would better prepare them for the practice of family law.

A major barrier to law student appearances in family proceedings at present is the variation in the application of Rule 4, and the related complication that there is a broader opportunity for appearance by students in the Ontario Court of Justice than in the (Unified) Family Court or the Superior Court. While there are good reasons for limiting law students to certain types of cases, and excluding appearances for such matters as contested child protection or custody or access proceedings, it is unclear what the justification may be for allowing a properly supervised law student to appear on a contested child support matter in the Ontario Court of Justice but not in a Family Court or Superior Court. The present regime may effectively deny access to lower cost services provided by law students (or free services for Legal Aid qualified litigants) in communities with a Unified Family Court.

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[5] "Ontario Law Practice Program leaves some students in financial limbo", *The Toronto Star*, January 1, 2012, retrieved from http://www.thestar.com/news/gta/2015/01/02/law_practice_program_leaves_some_students_in_financial_limbo.html

In communities with student legal aid clinics that provide family law services, (including Ottawa, Kingston, Toronto, London and Windsor), greater clarity and consistency about the range of cases in which students can appear when representing legal aid eligible clients would be helpful. There may be increased opportunities for students to assist lower income legal aid eligible clients, and family lawyers may be more interested in hiring articling and Law Practice Program students if they are able to undertake more varied roles in the delivery of family law services.

Appearances in contested court hearings should be limited to those matters that are relatively defined, and do not have an immediate impact on the safety of victims of family violence. Further, there may be a broader role for supervised law students in the interviewing of clients, preparation and filing of court documents, and attendance at conferences than at contested hearings. Matters where a law student could appear in court on a contested matter may include support, obtaining a divorce and procedural motions. However, law students should not be permitted to appear on contested hearings regarding child protection, custody or access, given the complexity of these issues and the long-term ramifications of these decisions. Further, law students should not appear at contested hearings regarding exclusive possession, restraining orders or equalization of property for the same reasons.

As at present, there is scope in all family and child welfare proceedings for law students and law clerks to participate in interviewing of clients and witnesses, and preparation of documents, always under the supervision of a lawyer and with the lawyer having responsibility for the student's work. We believe that this level of supervision is appropriate and should continue.

While it is a good practice for supervising lawyers to attend at court, it may not be necessary in all instances. Supervising counsel should be satisfied with the skills and knowledge of every student who provides legal information, drafts court documents or represents a client in court. Law students should be permitted to provide legal representation in a limited range of contested matters in a manner commensurate with their experience (albeit subject to the *Rules of Professional Conduct* and within their own self-assessment of competency). Students may be

involved in out-of-court roles such as drafting separation agreements and supporting parties in mediation. Supervising lawyers hold ultimate responsibility for all matters, even when they are not present, and should ensure that appropriate liability insurance is in place. By holding lawyers accountable for their students, it is anticipated that they will continue to closely supervise the next generation of family law practitioners, which is good for students, clients, courts and counsel.

Law Clerks and Paralegals

As stated previously, law clerks and paralegals do not currently practice family law, and many of the respondents to the AFCC-O survey raised concerns about making such a change. If the Attorney General chooses to remove some of the restrictions, it should be done in a measured and limited way. Any amendment to Rule 4(1)(c) of the *Family Law Rules* should not broaden the right of representation of parties as a general rule to allow paralegals or paid legal agents to appear in matrimonial proceedings. Rather, permission should still be required in advance of the non-lawyer's representation, which would continue to be an exercise of discretion in special circumstances. On a case-by-case basis the judge reviewing the request should be satisfied that representation by a law clerk or paralegal would be useful to the litigants and the court.

It may be helpful for judicial discretion to be codified in any amendment to Rule 4(1)(c) of the *Family Law Rules*, to delineate the factors to be met, in consideration of the following:

1. The nature of the issues involved, including whether they are procedural or substantive;
2. The importance and complexity of those issues;
3. Whether there are urgent circumstances;
4. The stage of the case;[6]
5. Whether the request for representation is for a single step or the entire litigation;
6. Whether the litigant making the request appears to be vulnerable to the opposing party;
7. Whether the opposing party is represented;

[6] Considerations for a representation order are different at trial than they are during the case management process. At trial, the importance of an individual's ability to present and challenge evidence becomes elevated. See *Scarlett v. Farrell,* [2014] O.J. No. 1913 (O.C.J.), at para. 22.

8. Whether the non-lawyer is being supervised by a lawyer;
9. Whether the litigant making the request for representation is able to demonstrate that he/she needs assistance in advancing his/her case, such that it is in the interests of justice and access to justice that someone be appointed;[7]
10. Whether the concerns raised by appointing a non-lawyer representative can be adequately addressed by enforceable conditions associated with the appointment, to hold the representative accountable to professional standards of procedural, evidentiary and substantive law, and to set the expectation that the representative's role is to help the court to deal with the case justly;[8] and
11. Whether the litigant understands the nature and the implications of being represented by a non-lawyer representative, such that the request for permission is informed. The litigant must understand that the court expects and requires one standard from all parties, irrespective of the fact that a non-lawyer is unlikely to have a lawyer's knowledge or ability.

Any amended Rule 4(1)(c) should continue to be interpreted narrowly, with permission to be granted only in compelling cases. It may be desirable to grant permission to act on a step by step or temporary basis, so that there is an opportunity to assess the non-lawyer's discharge of his/her conditions of his/her appointment, thereby ensuring accountability and controlling risk. Decision-making with respect to the non-lawyer's representation will become increasingly informed as the case unfolds. Moreover, as indicated above, different considerations may apply, depending upon the stage of the case or the step at hand. First appearances, consent or unopposed matters, procedural, or uncomplicated matters are entirely different from those that are substantive. On the other hand, a litigant in the middle of a trial who is struggling may require assistance, and such assistance may be in the interests of the administration of justice and access to justice.[9] The overriding objective must be the integrity of the justice system, to which a litigant's desire for the representation of his/her choice must yield.

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[7] *Children's Aid Society of Algoma v. J.M.,* [2015] O.J. No. 5042 (O.C.J.), at para. 16.
[8] *Pires v Dedvukay,* [2010] O.J. No. 294 (O.C.J.), at paras. 28 to 30.
[9] *Children's Aid Society of Niagara Region v. D.P., [2002] O.J. No. 4993 (Ont. Fam. Ct.) and Children's Aid Society of Algoma v. J.M.* at para. 8.

Depending upon the circumstances, the procedure for requesting permission for representation by a non-lawyer might be made by way of Form 14B motion, on notice. A supporting affidavit would be required, addressing the factors set out above, as applicable, as well as evidence of the non-lawyer's competence, experience and the active and ongoing supervision to which he/she will be subject, to be validated by an undertaking from any lawyer providing the supervision. The lawyer's undertaking will serve to satisfy the court that the following is in place:

1. a code of ethics;
2. solicitor/client privilege;
3. liability insurance, to protect the client from negligence; and
4. access by the non-lawyer to the necessary training, education and experience to properly represent the client.[10]

A set of criteria regarding the granting of non-lawyer representation on a Form 14B motion, and any restrictions accompanying such order, would need to be established. If, during the term of the non-lawyer's representation, it becomes apparent that the non-lawyer is not meeting the conditions of his appointment, the court must have the power to revoke the appointment. The interventionist level should be high to maintain standards for legal representation. Furthermore, thought should be given to what process might be used to govern and test the use of non-lawyer representation in out-of-court processes, such as mediation, arbitration or traditional negotiation of a separation agreement. If mediators, arbitrators and lawyers are confronted with a request for non-lawyer representation by a party, serious consideration should be given to whether such representation is likely to improve or impair the administration of justice, having regard to the considerations for a representation order above. A "best practices" protocol should be developed, which may include a formal request to a neutral or third party decision-maker where interested parties are unable to agree upon the matter of non-lawyer representation on consent.

Thought must also be given to liability insurance and re-examining the test for whether the para-professional fell below a certain duty of care: Is the para-professional expected to know what a

[10] This list of concerns related to representation by non-lawyers appears in *Stone v. Stone (2000), 5 R.F.L. (5th) 151* (Ont. S.C.J.).

lawyer should have known? Amendments would need to be made to the *Family Law Rules* and other relevant legislation and by-laws to address processes for the addition, inclusion and removal of para-professionals from family law proceedings.

While some U.S. jurisdictions are considering expanded legal services in family law to non-lawyers, it is noteworthy that these new classes of para-professionals differ from law clerks and paralegals in meaningful ways. Washington State is leading the field, and it has created a class of non-lawyer known as a Limited Licence Legal Technician (LLLT). LLLTs are similar to paralegals in Ontario, but with some significant differences. It is notable that LLLTs are not permitted to appear in court or negotiate on behalf of clients, and they can only prepare documents that have been approved by the LLLT Board. There is a much more rigorous licencing process, which includes 3,000 hours of paralegal work experience that must be conducted under the supervision of a lawyer. LLLTs are not supervised by a lawyer once they are fully certified. This training clearly goes significantly beyond that which paralegals currently undergo in Ontario.

Improving Legal Services to Self-Represented Litigants

In a national Canadian study on the needs of self-represented litigants ("SRLs"), 64% of family law litigants in Ontario were self-represented at the time of filing, higher in some jurisdictions.[11] The majority of self-represented litigants were not opposed to receiving legal counsel and, in fact, 86% of study participants had attempted to access legal services in some form.[12] The most consistent reason for litigants to self-represent related primarily to economics: their inability to afford to retain or continue to retain counsel. Other complaints included counsel "not doing anything," counsel not being interested in settling their case, difficulty finding counsel to take their case, counsel not listening or explaining, and in a few cases, perceptions that counsel was

[11] Ontario Ministry of Attorney General, as cited by Dr. Julie Mcfarlane, The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants – Final Report, May 2013 at page 33.

[12] Dr. Julie Mcfarlane, The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants – Final Report, May 2013 at page 82.

not competent. Only 1 in 10 study participants expressed confidence in handling their own cases without legal assistance from the outset.[13]

Almost all SRLs began their journey with confidence and then became disillusioned and overwhelmed over time. The psychological impacts of self-representation in the current state of the family law system are significant and concerning. Many SRLs described high levels of stress, lost nights of sleep, depression, and feeling traumatized by the experience.[14] They described the social isolation and inevitable experience of becoming fixated on their case given the amount of time and energy involved. The psychological impact extended to family and friends trying to support the SRL, and would be expected to negatively affect parenting and ultimately children who often bear the brunt of their parents' stress and may end up in a losing battle competing for their parents' time and attention. An area in which SRLs wanted the most help was with their court appearance. Most SRLs wanted someone to come to court with them and speak for them because they were very intimidated and emotional speaking on their own.[15] Ultimately, some described having lost faith in the justice system entirely.

In Ontario, a number of efforts to assist SRLs have been undertaken but with varying degrees of success. Family Law Information Centres (FLICs) have been established in Ontario to assist individuals in getting free help related to family law matters. However, while SRLs have described counter staff at FLICs as being helpful, frustration arose due to limitations of time and scope; counter staff expressed confusion about what constituted legal advice versus legal information and so erred on the side of withholding information.

While it is possible for SRLs to obtain summary legal advice at the FLIC or through the Law Society Referral Service, such summary legal advice generally entails a one-time 30-minute

[13] Dr. Julie Mcfarlane, The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants – Final Report, May 2013 at pages 39-48.
[14] Dr. Julie Mcfarlane, The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants – Final Report, May 2013 at pages 108-109.
[15] Dr. Julie Mcfarlane, The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants – Final Report, May 2013 at pages 11-12.

meeting with a lawyer. To maximize use of summary legal advice, the individual needs to be adequately prepared in advance, must be able to absorb large amounts of information in a short period of time, manage their emotions well, and be focused on resolution. People experiencing high levels of stress, poor sleep, or depression like the typical SRL, might find any one of these pre-requisites challenging. Moreover, individuals with mental health issues and poor cognitive abilities might have difficulties benefitting from the summary legal advice model for similar reasons.

Online forms, information, and video resources regarding the family justice system have been made available but are considered by many SRLs to be confusing or insufficient. Even those with legal training who have audited the available online resources have found the information to be confusing.[16] Court guides designed to be helpful are often confusing and use complex language, which may be well above the reading and comprehension level of an SRL. It is worth noting that the consequences of making mistakes on forms are significant including adjournments, wasted time, additional stress, and in cases of custody and access, children being left in limbo or ongoing delays resulting in a status quo that favours one parent over the other. To date, it would seem that online efforts are insufficient for replacing face-to-face education and support.

It is interesting to note that in the national self-represented litigants project, some SRLs spoke of not wanting legal advice per se, because they already had a direction and wanted to maintain control over their case. Rather, they were desperate for information such as procedural protocols and orienting themselves with the courtroom experience. This is already offered by non-lawyers (and often mental health professionals) in victim-witness programs and sometimes referred to as "court preparation"; however, services could be expanded to include other family justice participants. Evidence and legal arguments are not discussed, but the witness has an opportunity to learn the etiquette of the courtroom, to better understand the players and their roles, and tour

[16] Cynthia Eagen, Appendix I: Report of the Court Guides Assessment Project, as cited by Dr. Julie Mcfarlane, The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants – Final Report, May 2013 at page 66.

the courthouse. Walking into a familiar setting and possessing the social skills appropriate to the context would be less stressful than walking into an entirely unfamiliar situation. SRLs are also interested in what is involved in self-representation including options that are available (e.g., mediation) and the advantages and disadvantages of each option for the SRL.

Based on the experiences, needs and lack of resources of self-represented litigants, there may be ample opportunity for paralegals, law students, and law clerks to be more involved in assisting SRLs in ways that do not amount to full legal representation but will still improve their experience with family justice. For example, para-professionals could help SRLs maximize their use of the available but limited free summary legal advice service by conducting intakes, narrowing issues and preparing the SRL for their 30-minute summary legal advice session with a lawyer. Providing scripted information programs specific to SRLs and carried out by law students, paralegals, and law clerks might be another opportunity to share necessary information.

Coaching in the form of answering questions about process, preparing for court (e.g., what to wear, what to expect, how to make an argument and address everyone), and emotional support are all areas in which law students, paralegals, and law clerks might be helpful. Improved preparation and role playing scenarios could be provided by non-lawyers but importantly by people such as para-professionals who are more familiar with legal procedure and have had experience in a courtroom. This might help SRLs to be more confident in speaking for themselves. Many SRLs have asked a friend to accompany them to court,[17] but a friend may not have the know-how of a para-professional and may be required by the judge to sit in the gallery of the courtroom, out of the view of the SRL. It can also be difficult and humiliating for the SRL to have friends and family witness unflattering, intensely private, and at times cruel exchanges between parties in the courtroom. Providing support to an SRL involved in family litigation is also a significant time commitment and is unlikely to be manageable for most in the SRL's support system.

[17] Dr. Julie Mcfarlane, The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants – Final Report, May 2013 at pages 118-119.

In parts of Europe, courts have allowed SRLs to be accompanied by "trusted advisors" who may have legal training or be lay individuals. This is often referred to as a McKenzie friend and there remains confusion about the possibility of a McKenzie friend for SRLs in family court in Ontario. The term "McKenzie friend" originated from a divorce case in England, where an unrepresented litigant sought the assistance of an Australian barrister who was not qualified to practice in London.[18] The "friend" intended to prompt his client, take notes and quietly suggest questions in cross-examination from counsel's table but was disallowed from doing so by the trial judge, who ordered the friend not to take any active part in the case and to sit in the public gallery. The appeal court held that the trial judge erred in depriving McKenzie of the right to have a friend in court and ordered a retrial. The court approved the use of an unpaid unqualified friend to a litigant to assist him in presenting his case when acting in person in a defended divorce case. Such a friend would not be able address the court except with the express allowance by the court.

Subsequently, the use of McKenzie friends has been adopted by different jurisdictions to varying degrees and effect. In the United Kingdom, McKenzie friends were traditionally relatives, family friends, law students and charities that assisted SRLs as McKenzie friends in the United Kingdom. However, drastic cuts to legal aid in 2013 led to a rise in McKenzie friends charging services by the hour.[19] Such McKenzie friends range from professionals with experience in the justice system, such as former social workers or police officers, to previous litigants who have experience from their own family law case. The verdict still seems to be out on whether McKenzie friends contribute a net benefit to the UK legal landscape. Proponents argue that McKenzie friends improve access to justice, with some judges admitting that, "something in the way of legal representation is better than nothing."[20] On the other hand, detractors are concerned about the risks posed by unregulated, uninsured McKenzie friends and argue that England and Wales should follow the example of Scotland, which has banned McKenzie friends from

[18] [1970] 3 WLR 472; [1970] 3 All ER 1034, CA.
[19] Clive Coleman, "Is having a 'friend' for your day in court a good thing?" *BBC News*, November 10, 2014, retrieved from http://www.bbc.com/news/uk-29883819
[20] Clive Coleman, "Is having a 'friend' for your day in court a good thing?" *BBC News*, November 10, 2014, retrieved from http://www.bbc.com/news/uk-29883819

charging fees.[21] In Singapore, the Subordinate Courts created a pilot project whereby lay persons, including law students at the National University of Singapore, help low-income litigants who are ineligible for legal aid by assisting with court procedures and taking notes. The assistants are not allowed to address the court or breach court rules, which are subject to monetary penalties and jail time, but can attend hearings, advise in court on non-legal issues and help with administrative tasks.[22]

By applying a more consistent interpretation allowing law students, law clerks and paralegals to accompany SRLs as so-called "McKenzie friends" without necessarily having such para-professionals represent the SRL pursuant to Rule 4 of the *Family Law Rules*, para-professionals could still provide numerous benefits to SRLs by being a source of moral support, assisting with note-taking, providing guidance on procedural matters, and providing legal information. Most judges will not allow McKenzie friends to speak in court but will permit them to sit at the counsel table, assist with paperwork, whisper information to the SRL and provide moral support.[23] Based on the experience of SRLs, such tasks in themselves could be helpful to a SRL who may otherwise be overwhelmed by lack of familiarity with the court process.

Attending court is akin to visiting a foreign country where one does not speak the language but where the stakes are incredibly high, particularly for SRLs in child custody disputes. Individuals perform best and can best represent their interests when they are experiencing optimal levels of stress (the proverbial butterflies in their stomachs) yet SRLs report being over-stressed and often distressed. Under the supervision of a family law lawyer, paralegals, law clerks and law students with special training in family law have the potential to reduce the stress and errors made by SRLs. Whether there is a net benefit to the SRL is an empirical question and would require close study perhaps through a pilot project.

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[21] Nick Hilborne, "Judiciary proposes fee ban and new name for McKenzie friends", *Legal Futures*, February 25, 2016.
[22] Ansley Ng, "Law undergrads in court's pilot scheme", *Singapore News*, January 5, 2007, p. 6.
[23] David Mossop, Q.C., Community Legal Assistance Society, "Bring a Friend to Court: A Guide (McKenzie Friend and B.C. Supreme Court Chambers), September 1, 2004 at page 5.

Conclusion

AFCC-O recognizes the issues associated with growing self-representation in Ontario and we appreciate that the Attorney General is considering a wide variety of strategies (which may include a possible expansion of the practice of family law, changes to Legal Aid Ontario or other options) in order to address the current obstacles that impede access to justice.

In our review of the para-professional issue, numerous concerns were raised by a diverse multi-disciplinary group of AFCC-O members in response to the survey on the expansion of legal services. Recurrent themes included concerns around quality control, the complexity and "high stakes" of family law, cost-effectiveness, adequate safeguards, and allocation of supply and demand. Different considerations applied to articling students and law clerks versus paralegals, due to the former being supervised by a lawyer.

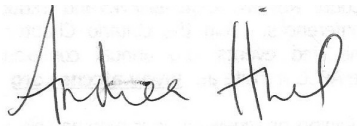
AFCC-O believes a careful and limited expansion of Rule 4(1)(c) of the *Family Law Rules* regarding the right of representation shows potential promise in improving access to legal services by para-professionals, particularly law students and law clerks who will continue to be supervised by a lawyer. However, this potential expanded application of Rule 4 would need to be subject to a thorough consideration of numerous counterbalancing factors and would ideally be accompanied by a supervising lawyer's undertaking. Special consideration would also need to be given to the application of Rule 4(1)(c) to out-of-court alternative dispute resolution processes, where family justice participants also require legal assistance but which process is not necessarily overseen by a member of the judiciary.

More efficient resource allocation may enable para-professionals to assist participants in the family justice process in meaningful ways without fully representing them in lieu of lawyers. So-called "McKenzie friends" have been allowed in certain jurisdictions to provide moral support to SRLs by sitting with them quietly at counsel's table, assisting with note-taking, and providing guidance on procedural matters. Even though these permitted tasks may seem limited in breadth, they could help participants better navigate the family justice system without exposing them to the potentially devastating consequences of improper legal advice without recourse to legal

malpractice insurance and regulatory oversight. The availability of para-professionals such as McKenzie friends could also reduce the overall time and cost of family law related services, so that the litigants' budget for legal fees may be used towards limited retainers from qualified and experienced lawyers.

Given the importance of the financial and custody/access matters involved in family justice, any reforms should be undertaken with due caution and based on cost-benefit analyses to the various stakeholders involved.

Yours truly,



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