

Family lawyers leery of legal aid work despite new programs

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For Law Times

Even as Legal Aid Ontario tries to respond to the issue of self-representation with several family law projects in the works, many family lawyers are still wrestling with whether they can afford to take on legal aid work.

Tom Kelsey, LAO's director general for the Toronto north district, is enjoying himself these days as the organization makes one announcement after another about legal aid increases and projects.

"It's fantastic. After years of finding ways to conserve funding, we are now building out in the family law area," he says.

The organization has benefited from \$30 million in additional provincial funding that's allowing it to address areas such as the flood of self-represented litigants in the family law system.

Many of the announcements have involved increased funding to family law service centres across the province, including student legal services at most universities and duty counsel programs. Kelsey notes the most recent announcement on Oct. 20 related to increased billable hours for child protection files. Prior to that, LAO announced the introduction of non-litigation



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certificates to cover independent legal advice to support mediation as well as the preparation and formalization of separation agreements. Both certificates apply the duty counsel financial eligibility test.

For the most part, family lawyers are welcoming the changes. Gary Joseph of MacDonald & Partners LLP says anything that encourages and assists people to obtain legal advice is a positive development. "Obviously, the government is hearing concerns from practising lawyers and, I'm willing to bet, from the judiciary and court administration staff that self-represented litigants cost the system significantly more than lawyer-represented

litigants. It is undeniable that self-represented cases take longer to work through the system and take more court time. There are direct costs to the legal system and indirect costs to those litigants who are represented. I honestly feel that the involvement of self-represented people is the worst thing that's happened to the legal system in my 37 years of practice."

He adds: "Obtaining a certificate for mediation is terrific. There will be faster settlements in some cases and people can narrow the issues in others and at least get some advice in the process."

Andrew Feldstein of the Feldstein Family Law Group in Markham, Ont., also applauds

the introduction of non-litigation certificates. "It's a wonderful idea," he says. "When you are against a firm that is working on a legal aid certificate, they only have certificates to go to court. They cannot be resolution-oriented right off the get-go. Just commencing litigation increases conflict in the family. Non-litigation certificates will reduce fees for legal aid and reduce family conflict without the need for court."

Kathryn Smithen, a family lawyer in Toronto who provides resources to self-represented parties, admits to having mixed feelings about the changes so far. "I sometimes wonder how helpful it is if they are not offering it to the average family. The very poor and the very rich are the only ones who can use the system. Middle-class average families are still out of the loop."

LAO is also working to address complaints from lawyers about its administrative and billing processes. During consultations with several law associations last year, it identified a list of practices that are irritants to lawyers. So far, it has addressed 28 of the complaints raised and is working on another 36 of them. "We are always trying to improve delivery of services to clients, who are our primary focus, and our dealings with the private bar as well," says Kelsey.

Smithen says she often sees clients who have gone to several lawyers without finding anyone who wants to take a legal aid certificate. "My experience is that legal aid expects practitioners to carry the burden of doing work without being sure they'll be paid. These new changes have to go hand in hand with creating a system where practitioners want to offer legal aid. Legal aid must make a partnership with practitioners."

Feldstein says that apart from addressing mechanics, LAO could do more to make legal aid acceptable to the family law bar. "If the objective was to get more lawyers to take up legal aid work, they will have to increase the hourly rate. The money is just not there. On legal aid rates, it would be hard for us to afford to function."

There have been increases in the hourly rate over the last four years under the 2010 memorandum of understanding signed by the Ministry of the Attorney General, the Criminal Lawyers' Association, and LAO. One more increase is due on April 1, 2015. Kelsey hopes all of these changes will encourage another cohort of lawyers to take on legal aid work.

"This is a very exciting time for family law from a legal aid perspective in Ontario, particularly now that we are moving into a more consensual way of dealing with disputes." **LT**