Focus FAMILY LAW

Unbundle to offer settlement-oriented services

Sharon Silbert

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It is no secret that a significant proportion of individuals who experience family law problems are not getting the help that they need to resolve their disputes fairly and efficiently. Attention given to the issue of access to family justice often focuses on self-represented litigants, whose number and experiences are very concerning. However, we must be careful not to think about access to justice as simply a question of how to provide more litigants with legal representation in the courts.

As former Chief Justice of Ontario Warren Winkler has said, "access to a *justice system* does not necessarily equate with *access to justice.*" To achieve meaningful access to family justice, we must broaden our focus, and work towards establishing a more prominent role for consensual dispute resolution. Fortunately, there is much that family lawyers can do to improve the situation, including offering settlement-oriented unbundled legal services as part of our practices.

Research has revealed that the most significant reason why so many litigants are representing themselves in court is the high cost of legal services. More and more clients are looking for alternative relationships with legal counsel to the traditional retainer/billable-hours model, and there is a significant and largely untapped market of clients willing to pay for unbundled legal services.

Although the promise of unbundled legal services is increasingly well-recognized, most of our attention has been focused on providing services to support individuals representing themselves in court. While this is certainly an important function, it does not represent a complete picture of what we might accomplish through "unbundling."

Many self-represented litigants wish to pursue settlement, but do not have the knowledge, tools, and skills to do so on their own. Unbundled legal services which focus on litigation efforts do little to actually resolve disputes. In many cases, individuals dealing with family law problems who have limited resources would be better off using those resources to hire a lawyer on a limited-scope retainer to provide advice on legal rights and obligations and evaluate settlement options, while they handle negotiations themselves with the assistance of a capable mediator.

The scope of services provided by the lawyer in such an arrangement would be tailored to each particular case, and might include:

- providing substantive legal advice and analysis prior to the actual mediation;
- preparation and/or review of financial disclosure;
- mediation coaching and/or representation;
- assistance with preparing and evaluating settlement proposals;
- helping the client understand his or her best and worst alternatives to a negotiated agreement;
- providing independent legal advice on the terms of an agreement reached in mediation; and
- turning a mediated settlement into a binding separation agreement or consent order.

While these roles are not new to family lawyers, many have not yet considered the potential benefits of offering them as part of a limited-scope retainer to self-represented litigants and other individuals who have limited resources to devote to legal services.

Mediation allows clients to maintain control over outcomes and craft solutions that are designed to meet their unique needs. It also provides an opportunity for parties to learn to work together to problem-solve. These benefits are particularly significant in the realm of family law, where individualized justice is key, and where parties often have an ongoing relationship as parents following the conclusion of legal proceedings.

Of course, mediation will not be appropriate where there are significant concerns related to domestic violence, power imbalances, or addiction or mental health issues that might impact a party's ability to negotiate. However, a skilled mediator will screen for these issues at the outset. In any case, mediation usually leads to resolution quickly and affordably.

Mediation's efficiency, flexibility, informality, and focus on autonomy make it especially well-suited to meet the needs of individuals who cannot afford full representation by a lawyer. The fact that potential clients are unlikely to explicitly ask for legal services aimed at supporting mediation does not mean there is no demand for them. Many self-represented family litigants seeking unbundled legal services do not understand the various processes that are available to assist them in resolving their disputes. It is our responsibility as lawyers to counsel them about options that may be both more affordable and more effective at achieving their goals than simply completing the next step in the court process.

Offering limited-scope retainers to support clients through mediation has the potential to contribute a great deal to access to family justice, by serving a portion of the population who might otherwise go without legal counsel. Further, it would do so in a way that would allow them to obtain the greatest value from their limited resources, while simultaneously helping to reduce the number of family law cases making their way through our over-burdened courts.

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Exploitation: The duplicitous should not profit from their wrongdoing

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as such, not void *ab initio.*

In both appeal decisions released concurrently, the court relied on a "fundamental equitable principle" in denying the predator's claims: "No one shall be permitted to profit by one's own fraud, or take advantage of one's own wrong, or to found any claim upon one's own iniquity, or to acquire property by his own crime." This principle, called the "Slayer's Rule," was first applied in *Riggs v. Palmer*, 115 N.Y. 505,511 [1889], to stop a murderer from recovering under the will of the murdered person. Pursuant to this doctrine, the wrongdoer is deemed to have forfeited the benefit that would flow from the wrongdoing. The rule was similarly applied to deny a murderer the right to succeed in any survivorship interest in a victim's estate.

The court recognized that while the actions of predatory spouses were not as "extreme" as those of a murderer, the required causal link between the wrongdoing and the benefits pursued was even more direct. A murdering beneficiary exists in a position to benefit from his victim's estate when he commits the wrongdoing, which is distinguished as against the predatory marriage which itself constitutes the wrongdoing that puts the spouse in a position to profit. The court held that the spouse should not be permitted to benefit from wrongful conduct any more than should a person who through coercion becomes a beneficiary in a will.

Canadian courts have frequently engaged similar doctrines in the estates/trusts context. It is well founded that no murderer can take under the will or life insurance of his victim (*Lundy v. Lundy* [1895] S.C.J. No. 44). It is established that a beneficiary will not inherit where the beneficiary perpetrated a fraud on the testator to obtain a legacy by virtue of that fraud (*Kennell v. Abbott* 31 E.R. 416), or where a testator was coerced by the beneficiary into a bequest (*Hall v. Hall* [1868] L.R. 1 P.& D. 48).

These "rules" are equitable, legal and founded in public policy by virtue of the legal maxim, *ex turpi causa non oritur actio* (no right of action arises from a base cause). The maxim is a defence to bar a plaintiff's claim where the plaintiff seeks to profit from acts that are "anti-social" (*Hardy v. Motor Insurer's Bureau* [1964] 2 All E.R. 742) or "illegal, wrongful or of culpable immorality" (*Hall v. Hebert* [1993] S.C.J. No. 51) both in contract and tort. Simply put, a court will not assist a wrongdoer to profit from a wrongdoing.

Arguably, such an approach should be viable in Canada to defend or attack against these predatory entitlements. The duplicitous should not be entitled to financial gain arising from "anti-social" or "immoral" predatory/scheming acts. A predatory spouse alters property rights during life and the testamentary plan by securing entitlements in the same manner as if one coerced a testator to add one's name to a will.

These New York cases suggest there is significant merit to the exploration of other defences outside of the common law capacity approach. That would include the doctrine of unconscionability, where one party takes unfair advantage or where an inequality of bargaining power/relationship exists (*Juzumas v. Baron* [2012] O.J. No. 6159), as well as in equity, any or all of which may well tip the balance in favour of denying the iniquitous predator the profits sought.

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