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Family

System reform will not work without buy-in from family law lawyers | AJ Jakubowska

By **AJ Jakubowska**

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(December 16, 2022, 11:26 AM EST) -- Earlier this month we were treated to a two-part invitation to a dialogue, by one of the pioneers of family dispute resolution (FDR) in Ontario — Tom Dart ("The high cost of family law legal services and need for change;" "The high cost of family law legal services and need for change — part two"). His points are set out in his usual calm and organized style, and he makes a number of vital and thought-provoking observations.

This debate is not new and Tom has poked a bear we wake up from time to time — the state of our family law system, and the challenges faced by the courts, by Ontarians needing family law services and by those who provide them. We have all heard the adage: one definition of madness is doing the same thing over and over again and expecting a different result. From my perspective, we have a choice: we can let the bear go back to its den and leave the situation as is, or we can actually wake it up, because we have truly decided change is essential and cannot wait. We are at a crisis point. Words are not enough, articles are not enough.

Those who are already working in the trenches to improve the system will bristle at my comments and perhaps say, "What does she know, we are doing the best we can." I know you are and I commend you for your work. This piece is not directed at you. I am hoping to reach my colleagues, fellow lawyers who practise in this field every day (yes, this time I am writing as a lawyer and not a mediator).

I have written similar pieces before and I will again. Without our active participation in the process of reforming our system to make it more accessible and affordable, no change will ever come, no matter how many hours those already working in the trenches devote to efforts at change. Plainly put, if family law lawyers do not buy into FDR as an alternative to costly and lengthy litigation, we will persist in the faltering status quo.

In his piece, Dart lays out the steps in a "typical" family law case, if it proceeds to court. It's a methodical, thoughtful list, with estimates of costs along the way. I encourage all junior lawyers to read it. I believe that by including his list, Dart meant to show that FDR is a more affordable, less adversarial alternative (paraphrasing).

When I read the list, I had another thought I will share with you — it explains, in part, why the cost of legal services is high. Properly pursuing a family law case from start to finish takes a lot of work and, therefore, expense. Many of the steps listed by Dart are foundational, and cannot be bypassed if we are to serve as our clients' champions. A number of the early steps are necessary whether the matter proceeds to court or to FDR.

For example, we cannot avoid the costly but vital exercise of gathering the facts through client interviews and reading volumes of related material. Bluntly, those who criticize lawyers for charging high fees need to realistically consider the work it takes to get a family law file to what I call "the fork in the road" — that point in a classic family law case where we ask, "Where do we go from here?" because negotiations between the lawyers have not been successful. I want to spend more time on those crossroads.

My complaint is not about the cost of those early but necessary steps — my concern is about the financial impact of choices made at this important juncture in the case.

You have now spent hours working with your client on a fulsome financial statement accompanied by thorough disclosure. You have identified the legal issues and researched the law. Do you turn left and start a court case or do you turn right, try mediation and even consider arbitration?

That is the fork in the road where, I will say directly, many of my colleagues continue to falter.

I am disheartened by how often, in the context of a classic family law case without issues around power imbalance, I receive letters saying, "This case is not suitable for mediation." No explanation.

I am also disheartened by those of my colleagues who for reasons I have speculated on before treat commencing a proceeding as the default, in pretty much every case. I am not speaking of cases that do require the court's involvement, and early on. My complaint is about involving the court in the thousands of Ontario garden-variety family law disputes populating court dockets each day.

Reforming our system requires a fundamental change in the mindset of many family law lawyers. The complexity of the legal issues is no excuse for not choosing FDR. As I have written before, we are lucky to have available to us many senior, very experienced family law lawyers/mediators who can tackle even cases involving tricky legal propositions. We have options for co-mediations, where law and mental health professionals work together to assist a family facing not only legal but also clinical issues.

And let's face it: as Dart rightly identified, emotion is an ever-present element in family law, and many disputes are driven by anger and the perceived need for vengeance rather than actual legal issues. Two people with a legally straightforward case spiralling out of control because they want to score points against each other do not belong in court. They should be in FDR, including arbitration, if necessary. Often, it takes work on the part of their lawyers to get them there, but we owe that effort — to them and to the family law system.

This is part one of a two-part series. In part two, I offer suggestions for steps we, family law lawyers, must take (yes, I said must) to steer more of our cases to FDR and away from the courts.

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