

Argument to permit family law contingency fees

BY MICHAEL MCKIERNAN

For Law Times

A Toronto lawyer says the province should scrap its prohibition on family law contingency fees after a judge ruled the “results achieved fee” he charged a client violated the ban.

In *Jackson v. Stephen Durbin and Associates*, Ontario Superior Court Justice Thomas Lofchik ordered the Toronto law firm to refund the \$72,000 premium it charged to a family litigant for the positive result achieved at trial in a hotly disputed custody battle.

The judge found the extra fee, which was accounted for in the retainer agreement between the parties, violated s. 28.1 (3) of Ontario’s Solicitors Act, which prohibits contingency fee agreements in criminal and family law matters.

“The language of the retainer agreement combined with the way the results achieved fee was charged (by way of a separate account), confirms the firm’s intention that the fee was contingent on the successful disposition or completion of the matter in respect of which services were provided,” Lofchik wrote in his Sept. 14 judgment.

“As such, the results achieved fee charged by the respondent to the applicant is a contingency fee defined by the Solicitor Act and is a prohibited charge.”

Stephen Durbin, the firm’s principal, says he’s considering an appeal because he doesn’t think this particular type of premium charge should be considered a contingency fee. However, he says his real beef is with the law as it stands.

“It wouldn’t be an issue if contingency fees were allowed in family law, instead of being prohibited by statute,” Durbin tells *Law Times*.

“Ontario is the only jurisdiction in Canada that doesn’t allow them.”

He says the current ban works to the disadvantage of women coming out of long relationships where their husbands controlled the finances, leaving them, at least initially, with nothing.

“They need a lawyer, but they can’t afford to retain counsel because he’s got all the money,” Durbin says.

“Maybe they can get someone fresh out of law school or try being self-represented, but that’s going to be a disaster because they’ll be facing the toughest counsel money can buy on the other side.

“It’s extremely unfair, but that’s what we see happening,” he adds.

In 2015, Durbin led a previous campaign in favour of the legalization of contingency fees in the area of family law.

Writing to the provincial



Andrew Feldstein says introducing contingency fees to family law matters would impose practical difficulties.

government on behalf of a group of 11 Greater Toronto Area colleagues at the family bar, Durbin described the current ban as “severely misguided” and urged Queen’s Park to “catch up” with the rest of Canada.

“The billable hour method contributes to a two-tier family justice system here, and also exacerbates the feminization of poverty,” Durbin’s letter read.

“Those fortunate enough to hire lawyers, do. Those less fortunate cannot. Despite improvements made to our legislation over the past decades, women continue to be more likely to suffer the adverse economic consequences of marriage breakdown.”

Family lawyer Andrew Feldstein says introducing contingency fees to family law matters would impose practical difficulties because the amount a client recovers is not always in proportion to the risks for the lawyer who takes them on, especially with pricey assets such as homes frequently at stake in family litigation.

“I’m not against the idea in principle, because there are always access-to-justice considerations. I’m just not sure how it would be structured to be fair to the client,” says Feldstein, founder of the Markham, Ont.-based Feldstein Family Law Group.

“You can imagine a situation where your client is not on title and their spouse owns a \$3-million home. If you get them an equalization payment of \$1.5 million, that’s a pretty easy job, and I don’t see why you should be entitled to a large portion of that.”

In the *Jackson* case, Durbin’s client Davis Jackson, a police officer, hired the firm back in 2013 for proceedings involving his estranged spouse, where the primary focus was custody of his six-year-old daughter.

The retainer agreement provided for hourly rates for the firm’s lawyers and support staff, as well as for “an increase in fees in the event of a positive result achieved.”

Following a 36-day trial, Durbin’s client was awarded

sole custody of his daughter, plus \$192,000 in costs and half of the proceeds from the sale of the matrimonial home, which added \$423,000 to his recovery.

The firm then issued a separate statement to Jackson for the results-achieved fee.

Michael Cochrane, a partner at Brauti Thorning Zibarras LLP who acted for Jackson in the fee dispute, says his client was not expecting it.

“He was surprised, to say the least, to be dinged with an extra charge of \$72,000 plus HST,” says Cochrane, adding that Jackson paid out more than \$400,000 in legal fees over the course of the retainer with Durbin and Associates.

Jackson applied to have the account assessed, asking for the premium charge to be refunded on the grounds that it was a prohibited contingency fee under the Solicitors Act.

“The solicitor for the respondent argues that the inclusion of a premium in a family law retainer does not in and of itself render the agreement a contingency fee agreement for the purposes of s. 28.1(3) of the So-

licitors Act. One element, to all contingency fee agreements in Ontario is that they require the client to pay the lawyer’s fee only in the event of success in the litigation,” says the ruling.

Durbin, meanwhile, argued that because the agreement it-

the prospect of having to refund the client.”

Feldstein says that while he does not charge premiums depending on results, he has heard of others offering the service in family law.

“I’ve always felt hiring a law-

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Michael Cochrane

self was not conditional upon success, the inclusion of a bonus did not alter its nature.

Cochrane says Jackson was “extra thrilled” when Lofchik sided with him, “because of how shocked he was when he got the original bill.”

“I hope the message goes out to the family law bar that these kinds of fees, where they are tied to success, are not acceptable,” Cochrane adds.

“If they are telling clients that their retainers entitle them to a bonus, then they may face

yer is expensive enough as it is,” he says.

Despite that, he’s not convinced by the result.

“I’m not sure it’s fair to consider this type of fee as a contingency fee,” he says.

“I think the challenge may have been that the premium in this case seemed rich to the court, especially in light of the fees already collected, which were significant. But now we have a precedent that says family lawyers can’t charge a premium for success.” **LT**

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