

Lawyers fight ‘archaic’ ban on no-win no-fee arrangements in family court

GTA lawyers say stay-home mothers are put at a huge disadvantage by Ontario’s ban on contingency fees, where lawyers collect only if they win.



Stephen Durbin, of Stephen Durbin & Associates, wrote a letter to the government on behalf of 11 GTA lawyers calling for the prohibition on contingency fee agreements in family law matters to be abolished in Ontario. The province is the only jurisdiction in Canada that outlaws the payment method.

By: Olivia Carville Staff Reporter

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Ontario is the only jurisdiction in Canada that outlaws no-win no-fee legal arrangements in family law cases, and according to lawyers, the “archaic prohibition” harms women the most.

The province “desperately needs to catch up with the rest of the country” and legalize contingency fee agreements in family law matters, a group of 11 GTA lawyers recently wrote in a letter to the provincial government.

The “severely misguided” regulation forces a huge number of people, mostly stay-at-home mothers, to self-represent themselves in family court cases. It’s creating a two-tier family justice system, the letter said.

Stephen Durbin, of Stephen Durbin & Associates, who wrote the letter on behalf of the group, told the Star the prohibition against contingency fees stacks the legal odds in favour of men, who are typically in control of the family finances.

It also adds pressure to an already overburdened justice system, Durbin said. He added that the growing number of self-represented cases is contributing to delays in the courts.

“This province has no excuse for not allowing contingency fees, when the rest of the country does. Ontario is way behind the times,” he said.

Under provincial legislation, contingency fees — by which lawyers agree to take on a case knowing they will only be paid if they win — are banned in criminal cases and family law matters. The contingency method is allowed in personal injury litigation and class-action cases.

The government prohibits contingency fees in family law matters because it fears they may give lawyers an “inappropriate share of often scarce family resources,” Brendan Crawley, spokesperson for the Ministry of the Attorney General, told the Star.

Though other jurisdictions allow the use of contingency fees in family law matters, British Columbia, Saskatchewan, New Brunswick and Yukon all require court approval first, Crawley said.

If a lawyer is promised a percentage of any monetary award in a family law matter, it could significantly reduce the financial resources available to care for children, he said.

“Also, contingency fees could impede the reconciliation of estranged spouses by fuelling litigation between them,” he said.

However, Durbin claims the concerns raised by the ministry are “unfounded.”

“The Ministry of the Attorney General has an opinion, and I think it’s wrong,” he said.

On Friday, Durbin posted the letter calling for legislative change to Premier Kathleen Wynne, Attorney General Madeleine Meilleur and the Law Society of Upper Canada, which also prohibits the use of contingency fees in family law matters.

The letter claims the prohibition is creating a major barrier for equitable representation of women in family law matters.

Women going through divorce or custody battles are often out-manuevered and out-spent by their estranged spouses, who may have more funds to hire a lawyer, Durbin said.

“This is an anachronistic rule that unfairly marginalizes people,” he said.

“A lot of these litigants are stay-at-home moms trying to get out of a bad marriage. Many of these people end up representing themselves in court and frequently become victims of an overburdened family law system.”

The Star has previously covered stories about lengthy wait times in the provincial courts, [with lawyers and judges voicing alarm](#) about vacancies in Ontario’s Superior Court and Federal Court of Appeal delaying cases. In December, Ottawa [announced 22 new judicial appointments](#), of which only three were women.

The restriction on contingency fees created an additional power imbalance in family courts between men and women, Durbin said.

Many single mothers have approached his firm for legal guidance, but have been forced to walk away because they were not in a position to pay for a lawyer as their estranged spouses controlled their finances, he said.

“Often the way it works in family law cases is that one person is in a position of power and control and the other person has no funds and no arsenal to litigate.”

A self-represented individual would be in a “tremendously disadvantaged position” when fighting experienced counsel, as court documentation can be a minefield to laypeople, Durbin said.

Toronto family lawyer Andrew Feldstein, who was not involved in the letter, agreed the lack of contingency fees was “a barrier to accessing justice.”

Recent figures show more than 50 per cent of family law litigants are self-represented, Feldstein said.

“Some people struggle to afford a lawyer, so this is a way to pay. Even if someone is asset-rich, they may have challenges in affording a lawyer from a cash-flow perspective.”

However, Feldstein acknowledged that legalizing the payment method for family law matters was more complicated than personal injury cases, because the money the lawyer is fighting for is a family’s savings.

Durbin said he first became aware of the provincial shortfall in contingency fee payments after an associate from British Columbia joined his firm and expressed shock over the fact that the payment method was banned in Ontario.

The firm started to investigate the use of contingency fees in other provinces and found every single jurisdiction allows them – except Ontario.

“How bizarre and unjust is that?” he said.

The last line of Durbin’s letter reads: “We call upon the Province of Ontario and the Law Society of Upper Canada to reverse the prohibition of contingency fee agreements in the family law context.”

<http://www.thestar.com/news/canada/2015/05/31/lawyers-fight-archaic-ban-on-no-win-no-fee-arrangements-in-family-court.html>