

Family

Both 'opportunity' and loss for lawyers in revamp of Manitoba family law, says legal mind

By Terry Davidson

(June 13, 2018, 11:24 AM EDT) -- A report calling for the use of mandatory couples mediation in fixing Manitoba's combative family law system could mean "opportunity" for some lawyers but less work for those doing "high conflict" cases, says a legal mind behind the paper.

The much-anticipated report, titled "Modernizing Our Family Law System: A Report from Manitoba's Family Law Reform Committee," was released June 8 and aims to increase accessibility to Manitoba's family law system by offering a "non-adversarial approach."

The report, completed by the committee at the request of the provincial government, recommends mandatory mediation for couples who apply to resolve matters under Manitoba's *Family Maintenance Act*.

The goal is to divert separating couples from the slow, costly and expensive court system to an administrative officer who would triage cases to appropriate forms of mediated resolution.

It also aims to help the many people in Manitoba who, unable to afford a lawyer, end up representing themselves in court.

Couples could opt out of the mandatory mediation, but only in "exceptional" or "urgent" circumstances, stated the report, which recommended a three-year pilot project.

But the report also poses the question: What would be the role of family lawyers in this new system, given couples would be sent directly into mediation? The paper stated that family lawyers could still be hired to help people understand their rights, advocate for them, handle documents and participate in collaborative resolution.

But some, it says, "will need to develop new skills."



Allan Fineblit, Thompson Dorfman Sweatman LLP

Committee chair Allan Fineblit, of Thompson Dorfman Sweatman LLP, said this would apply to the roughly 15 per cent of those in Manitoba's family law bar who do "high conflict work."

"There is a percentage of the bar that have a practice which is high conflict family law, and for them I suspect they will have less high conflict work and they may look at other things," said Fineblit.

"How much impact [there will be] is pretty hard to say. But I don't think you can sugarcoat it. It is certainly going to have an impact on some types of family law practice, and that is an unfortunate thing, but the goal isn't to make money for lawyers, the goal is to improve family law."

These lawyers, he said, may have to consider engaging in other forms of practice, such as collaborative family law.

But Fineblit also said the revamp could mean "opportunity" for some lawyers who could end up being hired by people in mediation who need some form of legal help but who can't afford a lawyer to act for them from beginning to end.

"There is a huge percentage of people who can't go to lawyers, or for whom lawyers act at a significantly reduced fee because they simply can't afford to pay their fee, or who go to lawyers and then stiff them for their fees," said Fineblit. "This creates an opportunity to service all of those unmet needs."



Jurgen Feldschmid, chair of the Manitoba Bar Association's family law section

Jurgen Feldschmid, chair of the Manitoba Bar Association's family law section, agreed on this point.

"This system has a potential in doing something useful in terms of legitimizing the unbundling of services," said Feldschmid, explaining clients could pick which services they need from a lawyer and thus retain some control over cost. "Rather than pay \$10,000, maybe I only need \$3,000 or \$4,000 worth of services from this lawyer and then I can do certain other things myself or through the assistance of other resources."

However, there could be issues around professional liability and duty to the court faced by lawyers working on the sidelines for clients in mediation.

"There is an anxiety ... that if I don't have a full view of everything that is going on in this case, yet am still professionally liable for something that is alleged to have gone sideways, how do I ... manage that risk?" asked Feldschmid, a partner with Duboff Edwards Haight & Schachter LC. "And duty is also to the court. When you're unbundling services, you're sort of one foot in and one foot out of this person's case, and I think it sort of runs afoul of your position as an officer of the court."

Feldschmid disagreed mandatory mediation would negatively impact high conflict family lawyers, saying such lawyers would be needed to deal with these complex, lengthy and expensive cases.

"The high conflict cases are going to happen probably no matter what," he said. "Those cases are

borne of either both parties, but often just one party either having a mental health issue or being just a very angry or nasty person, or something of that nature, and there is virtually nothing you could create [to resolve these].”

Some are so complex, said Feldschmid, a full-on trial with lawyer involvement is necessary for a resolution.