

Time to regulate family law mediators?

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With mediation touted as the dispute resolution method of choice for family law, some lawyers feel the mediation industry is burgeoning with little formal control over the quality or credentials of those who are offering their services. While a consensus is forming that the time to regulate the industry has come, the method of regulation is the subject of much debate.

Gary Joseph of MacDonald & Partners LLP in Toronto wonders whether unregulated family law mediators are serving the public well.

"We as lawyers are surrounded now by an army of family law professionals advising, drawing agreements, and mediating. Some are qualified in the broad sense to bring people together to find a solution but they are doing much more than that. Half of the ones we hear about are providing legal advice."

Andrew Feldstein of the Feldstein Family Law Group Professional Corp. in Markham, Ont., finds the situation frightening. "Clients tell me they've found a mediator who will do everything — negotiate everything and draft

the agreement. The allure is that it's very inexpensive and cost-effective. For that day, it does feel good because they've come to a resolution, but one day in the future they find it's very unfair. One will spend a small fortune trying to undo it and most likely will succeed."

Feldstein remembers one case where the husband was paying half the guideline amount for no legal reason. "The mediator had said, 'That sounds like a lot of money.' There is a lot of pressure on people in mediation. After the conclusion, they need to truly get independent legal advice and not just from two lawyers who are mediation friendly and build their practice signing off on agreements."

Ottawa lawyer and mediator Ernest Tannis has looked at the bigger picture of the evolution of disciplines that intervene with



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the affairs of society and the individuals in it. "Every profession needs regulation — self-regulation or peer regulation — or the government steps in with legislation. Not every discipline reaches that level, but family mediation is now at a level of acceptance where it needs to be regulated."

There are several organizations that offer certification, but it's completely voluntary. "The organizations don't have much of a whip," says Joseph.

All mediators who provide services in Ontario's family courts must have accreditation or certification by the Ontario Association for Family Mediation, Family Mediation Canada or the ADR Institute of Canada Inc. or have equivalent qualifications such as a law or master-level degree, relevant work experience, and specialized training,

But for mediation occurring outside of the courts, there are no similar requirements.

Many other jurisdictions have models for regulated mediation professions. In the Florida model, people must already be established members of a self-regulated profession in order to practise and then get the training and experience required. Sarah Boulby, a partner at Basman Smith LLP, favours this approach. "Many mediators are members of professions that are already regulated by colleges, including psychologists, social workers, and lawyers. The question is why it's an area that people can do without any substantive knowledge. There is no supervision and nowhere to go if a member of the public has a complaint."

Boulby notes that even in the crossover between lawyers and health professionals, there may be gaps in the knowledge base. "Lawyers may not have much knowledge of parenting issues and social workers and psychologists may not have an understanding of spousal support

or property obligations. That's already a concern, and then there is the possibility of people with no substantive knowledge at all hanging out a shingle. I worry about that practice because I don't think the general public understands what skills and knowledge mediators need and the responsibilities they have."

Joseph believes regulation is the role of the Law Society of Upper Canada. "Family law involves law. They are complex matters and sometimes the cases that seem the simplest turn out to be the most complex." He gives the example of the calculation of spousal support. "People are given the spousal support advisory guidelines and create a number, but there are multiple notes to [them]. It is a lawyer's duty to know the notes. I would guarantee the vast majority of mediators don't even know there are notes."

Tannis ardently opposes the idea of the law society spreading its wings in this way. He believes the regulator should reflect the multidisciplinary nature of the industry and favours self-regulation.

"It would be a huge mistake if the law society or any other existing self-regulating body takes control of that. What we'll lose is common sense and the intelligence of the other disciplines."

Tannis encourages the various alternative dispute resolution groups in Ontario to take on the challenge of regulation before someone else does. "I remember warning the franchise industry in the 1980s that if they didn't get their act together to self-regulate, the government would step in. Now legislation controls them." **LT**