

UNBUNDLING AND FAMILY LAW:

A cautionary tale

The Law Society of Upper Canada recently released its protocols on “unbundling” legal services.¹ *Webb v. Birkett*² is a cautionary tale about the dangers of unbundling in the context of collaborative family law.

Marguerite Webb retained Lucille Birkett, an experienced collaborative family law (CFL) lawyer, to represent her in her divorce proceeding. The plaintiff indicated she wished to use the collaborative process in negotiating resolutions to the various outstanding property and support issues.

After a series of meetings between the plaintiff, her husband, their solicitors, and various accountants and financial advisers, the parties reached a divorce settlement. However, this settlement was reached before all disclosure, appraisals and exchange of tax information were completed.

Three years later, the plaintiff sued her counsel.

The trial judge dismissed the plaintiff’s action. He relied on an expert in CFL, who described CFL as a process in which the role of the lawyers is to develop the process, and the role of the parties is to take ownership of the process, gather their own information, and actively and fully participate in assessing the quality of that information.

The expert testified that a competent matrimonial lawyer would have ensured that the plaintiff understood that disclosure of information to her satisfaction was available, and that in order to prepare a

complete matrimonial property statement of the parties’ assets and liabilities, further information was required. The lawyer must confirm that the client was willing to resolve this matter without such disclosure, and that she was aware of the risks of settlement without completing that process. Since the lawyer had done this, she met the standard of care.

The Court of Appeal found that counsel failed to meet the required standard of care, most notably in failing to demand production of the financial statements of the husband’s businesses.

The Court of Appeal held that CFL practitioners must meet the same standard of care required of other family law practitioners – including taking appropriate steps to get the financial information needed to properly advise the client. A lawyer must obtain sufficient reliable information to be able to ascertain what the client would likely receive, or be required to pay, for spousal support, child support and matrimonial property division, should the matter be resolved at trial, and so advise the client. A lawyer should tell a client who wishes to settle without having received full information from the other side that they may be accepting less, or paying more, than what the law requires.



The lawyer should provide estimates of the value of what might be lost, or paid above what was necessary, to the extent possible, on the basis of the information then available. A prudent solicitor would put this advice in writing.

Fortunately for the lawyer, the Court of Appeal agreed with the trial judge that the plaintiff had failed to establish damages. She failed to prove that had she had the missing information, she would have obtained a better settlement or would have proceeded to trial and obtained more than the settlement provided to her.

The lesson:

Do not “unbundle” tasks to clients without strict oversight and detailed explanations and warnings, confirmed in writing. Indeed, carefully consider the extent to which unbundling is appropriate at all. ■

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- 1 See Professional Regulation, Report to Convocation, September 22, 2011, available on the Law Society’s website
- 2 2011 ABCA 13 (CanLII), dismissing appeal from 2009 ABQB 239 (CanLII)