

Family

Making the most of mediation, economically

By **Omar Ha-Redeye and Dan McAran**



Omar Ha-Redeye

(May 21, 2021, 1:49 PM EDT) -- Family law disputes can often be qualitatively different than other legal disputes because the emotional components can easily override practical and economic decisions. Some regulators globally are therefore introducing greater financial incentives for parties in the hopes that common-sense resolutions are more easily achieved in family disputes.

In March 2021, the U.K. government introduced a new "Family Mediation Voucher Scheme" to address the issue of the backlog in family law court cases through financial incentives for settlement through mediation. Although the field of microeconomics is typically used to analyze logical behaviour of firms and individuals, these types of regulatory approaches have the potential to better address the psychological barriers of parties that compel them to continue to utilize scarce court resources.



Dan McAran

The new voucher scheme was motivated by the acute access to justice challenges on the British justice system, and offers a £500 voucher to parties willing to engage in mediation for a family law matter. It is even available to those who qualify for legal aid.

However, only the following types of cases are eligible for the voucher scheme: (1) a dispute/application regarding a child, (2) a dispute/application regarding family financial matters involving a child.

Archana Medhekar, a Law Society of Ontario-certified family law specialist who supports the use of incentives for mediation, believes that any type of incentive for accelerating family conflicts are crucial, especially in the aftermath of the pandemic:

The "new normal" is shaping up every day, which will never look the same as pre-pandemic position. Any "non-court-based" dispute resolution processes — including family mediation — would provide options for a timely and cost-effective intervention for the separating families.

However, Medhekar notes family mediation is already subsidized by Ontario, and that affordability is not the primary challenge. She points out that the court-connected family mediation programs funded by the Ministry of Attorney General already offers free two-hour, on-site family mediation services, with a full roster of trained mediators that have diverse backgrounds and experiences:

We would need more than just the financial incentives to encourage people to use [the] family mediation process. Public education and building public confidence about the benefits of family mediation would be the key. We can build the public confidence by requiring screening of cases for suitability for mediation (similar to arbitration) and making domestic violence training mandatory for lawyers practising in Ontario.

Joseph P. Hamon, also a family law specialist, sees economic incentives as facilitating needed change: "Financial incentives can help build a culture where respectful negotiated resolution is the norm and not the exception," he says. Hamon further comments that the public and private litigation costs far outweigh financial incentives to mediation.

The use of financial incentives is also promoted in the European Union. In a report entitled *Quantifying the cost of not using mediation — a data analysis* by the European Parliament's Committee on Legal Affairs, the following is emphasized:

On a micro-level, Member State governments can save time and money by making mediation happen. Indeed, even low — at times, extremely low — rates of mediation success free significant litigation costs for governments, businesses, and citizens. This study has aimed to show just how low the mediation success rates can be and still see results.

Other jurisdictions are looking at other incentives other than a payment. Italy implemented Article 20 of Decree 28 to grant a tax incentive for mediating.

The EU report notes that the program would be economically beneficial even at low rates of success:

The break-even point for costs is 24% ... Additionally, it is important to note that the average cost to litigate in the European Union is €10,449 while the average cost to mediate is €2,497. When mediation is successful European citizens can save over €7,500 ...

The economic system in Canada makes extensive use of economic incentives such that the Finance department regularly uses to the *Income Tax Act* to achieve desired policy economic outcomes.

Ontario also offers a wide range of tax credits, including: the Ontario Child Care Tax Credit; Ontario Focused Flow-Through Share Tax Credit; Ontario Seniors' Public Transit Tax Credit; Political Contribution Tax Credit; Seniors' Home Safety Tax Credit; Northern Ontario Energy Credit; Ontario Energy and Property Tax Credit; and the Ontario Sales Tax Credit.

Why not a family law mediation tax credit in Ontario? Family law is an area that has enormous financial impacts, not just on the justice system, but to the parties involved. Promoting more effective and efficient resolutions of such disputes will have significant societal benefits well beyond parties to a dispute or the justice system, including improved mental and physical health, better childhood outcomes, and even less volatility in housing and business.

Change has been rapidly accelerated in the legal profession during the pandemic. Many suspect that radical change in the legal profession, particularly in relation to the courts, will continue. Perhaps it is time that the legal profession and the clients of the legal system be better incentivized to achieve desired outcomes through measures common to economics, particularly the tax system, creating the new academic discipline of legal microeconomics.

Omar Ha-Redeye is a lawyer and legal academic, who has considerable background in promoting access to justice across many areas of law. He is the executive director of the Durham Community Legal Clinic. Dan McAran has a DBA from Henley Business School, University of Reading (U.K.) and has a CPA, CGA designation. He has over 23 years' experience in various roles with technology providers to the Canadian market with a focus on legal technology.

Photo credit / TheaDesign ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Yvette Trancoso-Barrett at Yvette.Trancoso-barrett@lexisnexis.ca or call 905-415-5811.