

FAMILY CONFERENCE 2019

3 July 2019

SUPPORTING, HEALING AND RECONSTRUCTING

JUSTICE DEBBIE ONG

Vice-President of the Law Society, Mr Adrian Tan, Judges, colleagues, distinguished guests and delegates, and all who are here this morning,

1 I am honoured to be invited to address you here at the start of this Second Family Law Conference. I thank the Law Society and the organisers who continue to believe that this is important, that coming together this way is what will keep our justice system strong.

2 This year's expansion on the Conference theme, "Supporting, Healing and Reconstructing" is much in line with the active work going on right now in the Family Justice Courts ("FJC") and the community.

3 The Chief Justice has said that "Family justice is a unique field in the administration of justice" (*per* Chief Justice Sundaresh Menon, Opening of the Family Justice courts, 1 October 2014).

4 Section 46 of the Women's Charter tells us that the law exhorts reconciliation, reasonableness, mutual cooperation, and harmonious conflict resolution. Professor Leong Wai Kum has said: "The law cajoles spouses to try to reach the ideal but refrains from trying to punish each failure. The courts may astutely use every appropriate opportunity to affirm the legal exhortation."

5 In civil law generally, if there is a breach, there is a sanction; breaches are "punished". Family law, which goes deep into one's very intimate relationships and hence involves the complexities of life, cannot be practised in the same way.

6 You can tell from this that family practice is quite special. Indeed, this is a specialized practice, at least in these ways:

7 First, Children are deeply impacted – unlike civil suits where every party has a voice, children are not parties and their voices are not heard unless the system, the courts, the lawyers, and the processes bring up their voices. A weak approach in the family justice system is going to harm children.

8 As Adrian has shared just now, family practice is emotionally charged, and when one is experiencing such a difficult time in life, making rational, reasonable decisions can be very difficult. Divorce has been observed to be the second most stressful event in one's life, after the death of a spouse. It is understandable that divorcing spouses are not their best selves in making the most rational decisions during this distressing phase in their lives.

9 There is a high number of litigants in person in family proceedings – as a family lawyer, you may more often than in civil cases, be the only lawyer assisting the court because the other party is unrepresented.

10 We have required a Less/Non Adversarial, Judge-led approach in family proceedings, even though our legal system is an adversarial one. A less adversarial system is still not the entirely civil inquisitorial system. So it is not the most comfortable ground to stand on when the primary system is an adversarial one. We must continue to work towards a system that is best for us in Singapore.

11 We aim to *minimise* acrimony, bitterness, humiliation, and *facilitate* cooperation and agreements. If adjudication is necessary, we want to ensure that families do not remain in litigation for longer than necessary. It is going to be a balancing exercise – balancing expeditious proceedings against proceedings that feel “too fast” in matters so important.

12 What is the nature of Family Practice today? Here is a very broad snapshot: First, and we have already been noting this in recent years, family cases are increasingly international in nature. Our work involves the Conflict of laws - multiple jurisdictions, issues of *forum non conveniens*, choice of law and so forth. Family proceedings are increasingly of international

character involving issues related to international child abduction, international relocation, international surrogacy, property and assets situated across jurisdictions, financial relief after foreign divorces, as well as issues on the validity of foreign marriages.

**Landscape:
International character**

Filing Year	2011	2012	2013	2014	2015	2016	2017	2018
Divorces between Singapore Citizens	67%	65%	62%	60%	58%	59%	59%	59%
Divorces involving at least one party who is non-Singapore Citizens (i.e. Permanent Residents or Non-Residents)	33%	35%	38%	40%	42%	41%	41%	41%

Table 4: % of Divorces by Nationality
Base: All Divorce Cases

13 You can see from these figures that the number of divorces in marriages between two Singapore citizens is declining, while the number of marriages undergoing divorce involving at least one spouse who is *not* a Singapore citizen is increasing.

14 Not only is the character of divorce more international now, life appears to be more complex. Cases involve complex factual contexts, multiple issues and applications. They also involve more complex disputes with psychological/mental health issues and effects.

15 Naturally it would take many months to resolve complex cases – a lot of time, a lot of work, a lot of stress! Here are just two examples of such cases:

16 In *UDF v UDG* (10 May 2018), a total of 275 affidavits were submitted, which amounted to 38,946 pages; there were 57 summonses, 17 registrar’s appeals, 3 sessions of mediation, 16 sessions of cases conferences for Ancillary Matters (“AM”) and 3.5 days of AM hearings at the High Court (Family Division) (“HCFD”).

17 In *UTJ v UTK* (7 March 2019), a total of 113 affidavits were submitted, which amounted to 10,012 pages; there were 21 summonses and 2 registrar’s appeals, 8 sessions of

mediation, 9 days of contested divorce hearing; 33 sessions of case conferences for AMs; 3 days of AM hearings at HCFD.

18 But there are encouraging statistics that bear testimony to the great work of all, certainly family lawyers, involved in the family justice system:

Landscape: More agreements, more on simplified track				
Table 5: % of Divorces on Simplified and Non-Simplified Track				
Filing Year	2015	2016	2017	2018
Total	100%	100%	100%	100%
Simplified Track	24%	37%	49%	55%
Non-simplified Track	76%	63%	51%	45%

19 Divorces filed on the simplified track have been increasing in the past few years – from 24% in 2015 to 37% in 2016, to 49% in 2017, and reaching 55% last year in 2018. As the simplified track is a recent process, it might well be that there were more cases in 2015 or 2016 that were settled before filing but as the track was then just introduced, they were not all filed on that track.

20 If family lawyers, whether as instructed solicitors or as mediators, are able to assist parties to settle disputes by agreement in a durable way, I would say, that is successful family lawyering.

21 Figures on the non-simplified track are also encouraging:

**Landscape:
More agreements, with mediation**

Settlement Rates of Divorce Mediation, 2015 – 2018

Year of Mediation	2015	2016	2017	2018
Full Settlement Rate (%)	69%	65%	70%	70%
No. concluded	1,469	1,556	1,257	1,280
No. fully settled	1,007	1,016	884	891
Full and Partial Settlement Rate (%)	80%	77%	85%	86%
No. concluded	1,469	1,556	1,257	1,280
No. fully and partially settled	1,171	1,199	1,069	1,098

*Based on FDR conferences and mediations conducted for Divorce cases only.

22 70% of cases filed on the non-simplified track in the past two years reach full settlement. About 85% reach partial settlement.

23 These encouraging outcomes are testament not only to the efforts of counsellors and court mediators, but the invaluable efforts of family lawyers. Family lawyers make a huge, huge difference to these families (if I had a glass, I would raise it to you now).

24 This Conference has adopted the theme “Supporting, Healing and Reconstructing” - it is a wonderful and apt theme.

25 When the Family Justice Courts was established, the Chief Justice exhorted us to assist families towards the path that will bring healing, like doctors diagnosing the problem and choosing the right treatment for healing. He said at the Opening of FJC in 2014:

“...the task can be likened to that of a doctor with a focus on diagnosing the problem, having the appropriate bedside manner to engender trust and convey empathy, and the wisdom to choose the right course of treatment so as to bring a measure of healing.”

26 Our aspiration as a society is to support every family towards a way forward. This means recasting the family’s future, for the past may contain pain and perceived failures. We as legal professionals can give them hope for a positive future.

27 Why should litigation in court be the last resort? What are the effects of being in litigation on one's mental health? Reading hurtful affidavits, writing affidavits, being judged:

“Does a person get any sleep at all, on the night before her acts are to be judged?”
[Helen Garner, Joe Cinque's Consolation 2007]

28 Litigation lawyers know how awful it is to be cross-examined, to be asked questions that cast doubt on your character and credibility.

29 Better it is that parties make their own agreements for their own lives in matters that are so personal - how to care for the children, how to communicate, where to live. Family disputes are different from civil suits – the subject matter goes into the very intimate everyday lives of the parties and children. It is not just a matter of winning a one-off monetary sum. The judge does not know the children for whom orders on their care are to be made – what is each child's personality? Do the children sleep early or late; are they versatile or in great need of clockwork routine; are they dawdlers or efficient kids? Do they miss the other parent? Is Tuesday a good day, or is Wednesday better? The parents know their children best. Judges, counsellors and mediators do not live with (and love) them the way parents do. Parents are the ones to live out the life of a dad or mom, they set aside their Tuesday, they should make the arrangements they consider best. Lawyers must assist the parents to see beyond their own needs or anger.

What might it take to support, heal and reconstruct?

Upstream activity

30 First, the parties' own frame of mind and will to address challenges at the earliest point are really important.

31 I have heard from friends who had visited a conciliation/mediation centre outside Singapore, where participants begin their journey with spending time at a centre for a 'retreat' - with time to think through what one wants out of this life, in this fallen world full of

challenges. They self check. They take stock. This is to help parties see what is most important in life, and look ahead towards achieving those aspirations, including healing and a fresh start.

32 I think one of the hardest places to be is to feel “lost”, unclear and uncertain about the future. If this is how a party who is faced with a broken marriage finds herself or himself in, what can we do? We can help them understand both the legal remedies and the legal expectations in the law and the journey ahead. Support from lawyers, friends, counsellors, mediators, therapeutic services, community interventions early in the journey can make a difference. Understanding the road map and having clear access to counselling and mediation can point the way. We have an established Singapore Mediation Centre (“SMC”) where there is quality mediation; our experienced FJC judges and counsellors also give training to build up the pool of Family Mediators in SMC.

33 What else deserves attention in an approach that heals and reconstructs?

Family Law

34 The law and its application should support the aspiration.

35 I pick a few areas which impact Children, and will make just a point or two on only a few of these: Divorce, Children, Financials aspects of Division of assets and maintenance, Disputes in Maintenance and Violence.

36 First, here are some statistics that hopefully encourages us even as we try to get a feel of where we are:

Stats: Divorce and Ancillary Matters Adjudication

- Number of contested divorce hearings: average of 48 per year (2014 to 2017)

- Percentages of divorce cases contested on either the ground/fact for

	2014	2015	2016	2017
% of concluded Divorce applications that went through Contested Divorce and/or Ancillary Matters hearing as at end May 2019	9%	8%	9%	7%

37 The average number of Contested Divorces per year was 48 (in the years 2014 to 2017). This is about 1% of all concluded divorces. In 2017, less than 7% of divorce hearings were contested on either the ground/fact for divorce or on ancillary matters.

Fighting over the Divorce itself

38 The policy relevant to how we view marriages and divorce is that parties should not enter and/or leave a marriage capriciously. The law and process thus attempt to balance these interests: first, where a marriage has irretrievably broken down, the law and process should not make it harder for the couple to dissolve what is broken. Second, where a marriage is salvageable, the law should not be too quick to terminate the marriage, and reconciliation support ought to be provided if parties continue to remain married.

39 Where divorces are contested, not all contests are brought to stop a grant of divorce in order to keep the marriage. Many contested divorces are fought out at trial because a party challenges the other spouse's allegations of his/her misconduct, and proceeds to seek a divorce based on his/her own allegations against the other spouse instead. In such cases, both parties are seeking a divorce – the only point that really matters then is that the marriage has broken down irretrievably and a divorce ought to be granted if the relevant facts are proven. Is it helpful in such cases to have parties go through a contested mud-slinging divorce trial?

40 The law on divorce reflects society's values, and the matter is infused with policy. We the legal profession must apply the law in the best way we can which supports healing.

Fighting over children

41 In Ong and Lim, "CUSTODY AND ACCESS: Caring or Controlling?" Developments in Singapore Law Between 2001 and 2005 (Singapore Academy of Law, 2006), it was observed:

Custody and access are the constructs used by the court to make arrangements ... In this regard, custody and access are instruments which allow the parents to continue caring for the child after the breakdown of their relationship. From another perspective, custody and access are rights to be acquired, negotiated with, and even fought over in the elaborate aftermath of separation and divorce. They are a means employed to gain dominion over the child. Basely used, they can be instruments to control the activities of the other parent. A misguided sense of entitlement, unresolved anger, or a genuine and intolerable difference of opinion are all it takes to turn an instrument of care into an instrument of control.

42 In *TAU v TAT* [2018] SGHCF 11 at [10] I had remarked: "*By focusing on the child's welfare*, the courts remain vigilant that custody, care and control, and access are not used by a parent as "instruments of control" over the child and the other parent."

43 We have encountered how tools used to assist families can instead be abused and used for purposes that hurt and damage. We are aware of the debates in the public domain, including views from groups lobbying for presumption of shared care and control and equal time. This is a huge area we can spend days talking about. For now, I will only highlight one point, and it is that care arrangements depend on the specific circumstances of the case. The legal principle is simple: the welfare of the child is paramount. But the application of the legal principle is extremely challenging. I had explained in *TAU v TAT* [2018] SGHCF 11 at para 14:

apportioning of time needs to take into account the child's developmental needs at that particular stage of life – the cognitive, psychological, emotional, social, academic,

physical and special needs. As mentioned, the needs of a child are dynamic and change over time; for instance, the way a child needs security and stability depends on the age and emotional maturity of the child. A parent who is better at providing the basic physical care needs of an infant may be better placed to have care and control of an infant, but that skill will be less salient when parenting a teenager. The various factors discussed demonstrate how important it is that each case must be determined on its own facts. Further, parenting arrangements must consider the needs of all the children of the parties for many cases do involve more than one child at different stages of development and needs.

44 There are many “moving parts” and many factors to consider such as: the child’s age, the child’s specific needs, the child’s personality, the child’s relationship with other siblings and with his/her parents, where the family members live, where each child’s school is, what strengths each parent has ...

Fighting over assets

45 Divorce law should support marriage and good behaviour – this sounds like an oxymoron – *divorce supporting marriage*? Divorce law including Ancillary Matters such as the Division of Matrimonial assets, should not result in conduct that is destructive to Marriage. It should not, for example, encourage a happily married couple to keep records and receipts or conduct their married lives in a way that will build up their respective “best case” should there be a divorce. We must instead encourage conduct that safeguards the marriage relationship – being bigger, kinder and wiser.

46 So the *ANJ v ANK* structured approach, the law, the Court of Appeal’s instructions and guidance, should be applied in a way that upholds the aspirations of our family justice system.

47 Law and process can shape behaviour. Let me ask us this: What Division law is fair, principled, does not incentivise parties to be calculative or allege the worst of the other spouse, minimises acrimony, resentment and humiliation, and incentivizes parties to recast the future? Sounds like a riddle, like “What has 4 legs but is not a dog?”. No, it is not a riddle, it is an important question I think about a lot. I hope you will too.

48 I have heard a suggestion that winning a case is therapeutic, as the aggrieved spouse gets to vent in the trial which helps the spouse feel better. Our family system does not offer adversarial litigation as a form of therapy - venting, processing your thoughts and dealing with issues should not be done in a trial; there are appropriate forums for therapy for that. The litigation process which spans months and in some cases, years, takes its toll on parties and the children especially - it has negative effects.

49 I have just one more point to make on the Division of assets. I leave other points to Professor Leong's teaching in this afternoon's sessions.

50 The Division exercise in s 112 deals only with matrimonial assets. The Court of Appeal has explained that when a marriage breaks up, the spouses' contributions, financial and non-financial, "are translated into economic assets in the distribution according to s 112(2) of the Act" (see *NK v NL* [2007] 3 SLR(R) 743 at [20]).

51 Apart from such economic assets, there are immeasurable "gains" in a marriage that the court cannot divide – the life they built together and most significantly, their children. The full experience of the responsibilities and joys of parenting, the closeness and love shared between parent and child, even financial support that adult children may subsequently give to the elderly parties later in life, are some of life's treasures this court cannot divide between spouses.

52 One must not lose sight of the family law principles at play in s 112.

53 As lawyers, will you remind your clients about this please?

54 Divorce is very painful, and its effects on one's life, one's psychological and physical wellbeing are affected. We do not disrespect or belittle the pain. We want to help the family recast, have hope, to focus on something positive.

Family law and proceedings

55 Family law and proceedings play a huge part in therapeutic justice. We are working on proceedings which are Judge-led, expeditious, supportive. We are revamping the Family Justice Rules – consolidating, ensuring rules cohere and are navigable, reducing complexity of

forms, leveraging IT. Streamlining court processes and interlocutory processes to achieve greater efficiency are all in our plans.

56 Law and process shape behaviour. Court proceedings are formal and serious; there must be access to justice by fair and clear rules. Some may argue that we should do away with too much formality and make proceedings much simpler or more informal. As I have said, there is ongoing work on the review of the rules and processes. Let me pause to suggest that we consider the extreme version of that suggestion – having proceedings that are simple, fast, informal, casual, (undisciplined?), that just “go with the flow”. We can see that an extreme position will not serve the ends of justice. We need a balance and we aim for the optimal balance.

57 Costs also affect behaviour and reflects the value of legal services. I see now my opportunity to correct an apparent misinterpretation of *JBB v JBA*. I often receive a citation of this case for the submission that “in family matters, parties should bear their own costs”. This case is not authority for that broad statement. In *JBB*, I explained that “costs follow the event” in general litigation because the successful litigant A, who was entitled to \$100,000, had to litigate in order to get B to pay him what he was entitled to. B should have simply paid A without litigation. So A should be paid legal costs, which arose only because B refused to pay. In Divorce cases, only the court can grant a divorce. Parties have to come to court for a divorce. In the Division of assets, parties are both seeking a proportion of the matrimonial assets. They do not even have clarity on what the total pool of assets are, or are unable to agree on the asset pool. There may be no “winner” or “loser” similar to the successful or unsuccessful litigant in a civil suit. So the general rule that costs follow the event may not even be applicable. However, I reiterated in *JBB*’s judgment that costs may be ordered for unreasonable conduct. Further, in appeals, there is a successful and unsuccessful party; thus “costs follow the event” is applicable; costs are often awarded to the successful party in appeals.

Multidisciplinary approach and remedies

58 Therapeutic justice must reside in a multi-disciplinary environment.

59 Such an environment includes upstream counselling and conflict resolution, including the parties' mindset to take charge to heal, with support from therapeutic services, instead of looking to litigation at every turn.

60 We need to know how to support families in pointing them to appropriate services. Services should be coordinated – financial help, shelters, marital therapy, grief counselling and so forth. These should be accessible conveniently, with coherent coordination.

61 I envisage legal and mental health professionals to be coordinating and working together more in this regime, ensuring appropriate specific interventions and therapy for the specific needs of family members.

Essential role of Family lawyers in Supporting, Healing and Reconstructing

62 As emotions run high, lawyers provide counsel, and the voice of calm and reason. The Court of Appeal said in *BOI v BOJ* [2018] SGCA 61:

...counsel are not the mere “mouthpieces” of their clients. ...especially where the client wants each and every point to be taken in order to inflict maximum “damage” on the other party, and where the taking of such points is – in a word – pointless and would not only engender a wastage of the other party's, but also the court's, time and resources. ...lawyers must counsel their clients and apprise them of what is permissible and what is not. ...A lawyer has to tread a fine line when adhering to these occasionally inconsistent duties in practice, but that is the very essence of being a legal professional.

63 At last year's Family Law Conference, Second Minister for Law Ms Indranee Rajah SC, said in her Keynote Address:

“We are an adversarial system. So, the instinct which carries over into family justice is to be adversarial. The time has come for family lawyers to realise and to understand that your role is different...You should know that it is not wrong to depart from the highly adversarial approach because this is a specialised area of law in which a different approach is needed...cut down on the aggression. That is something well-worth doing.”

64 She also understood, that when you try to bring down the heat, your clients may say:

“Are you my lawyer or not? ... Why aren’t you doing what I am telling you to do? ... That puts the lawyer in a difficult position which is why, ultimately, when it comes to the court, the judge is the final arbiter. The judge has the ability, the power, and every right to guide the parties on how the case should be conducted.” (speech at para 41-43)

65 We must all move together in this. You must be able to say: the court will not look at such conduct with favour.

66 We must do all we can to equip ourselves to adopt the Judge-led approach appropriately. How does a family lawyer assist when the other party is not represented? How does one assist in harmonious resolution, avoiding angry disputes? What words? What exchanges and affidavits are inflammatory? Where litigation is necessary, what are relevant and necessary in affidavits? There may be an art required – you may have to seek swift orders in some cases, and at other times, you may have to pause to bring your client to a place where he or she is ready to take on the next step. We need to be equipped with the right skills. Let me suggest some good starting points:

67 Love the law - Family law is not fluffy! *au contraire*! Family law is rich in doctrinal issues, what some call “black letter law”. If you are a law student and you think family law is mostly about discretion only, you should not expect a good grade. If you are a lawyer and you think there is little law in Family law, you might find the family judge asking you many questions. Family law has much legal jurisprudence and inter-disciplinary jurisprudence as well as international law!

68 Good advocacy is required in court – you as a lawyer play a very, very important role. Good advocacy assists the Court and thus helps the parties to reach an outcome expeditiously.

69 Good decorum and etiquette must be practised in court – this has an impact on the parties’ respect for court orders and proceedings. Senior lawyers must nurture the younger lawyers in this aspect.

70 You the family lawyer play a huge role – you can be the hand that pulls the drowning family member to safety. Lawyers’ services are valuable, and when cases resolve without litigation – this is also successful family lawyering, and these services should be paid for reasonably.

71 How do lawyers practise effectively in the new family justice system and within the judge-led approach?

72 FJC has developed a targeted and specialised curriculum for family judges with an emphasis on the specific competencies and skills required to be effective and efficient. In fact, later this month, we will be holding an intensive week of training for all family judges, and I would like to share with you the areas that are relevant to us:

- (a) why some marriages work and some fail, facilitating families in re-framing and crafting a positive narrative of experience for the children and family.
- (b) the “child’s best interests” principle, perspective of social sciences.
- (c) factors impacting a child's development and needs, at different stages of development; social science models
- (d) common child outcomes related to various types of adverse experience
- (e) challenges, skills and techniques in interviewing children, how to prepare for the interview, how to ask the questions, types of questions, how to interpret the information.
- (f) judge-led case management
- (g) self care

73 These areas are relevant to the family lawyer too.

74 So, Family practice today has features that are much about Supporting, Healing and Reconstructing.

75 In the area of Divorce & Children, practice is defined by these features - the child's welfare is paramount, harmonious resolution is the aim, the simplified divorce track should be the natural path, mediation and agreements are core features, litigation is less/non adversarial, it is judge led, and the practice is carried out in a multidisciplinary environment.

76 In the area involving the Mental Capacity Act, we aim for simplified processes for deputyship to support family members trying to care for elderly persons, but also ensure safeguards to protect against potential abuse by deputies of vulnerable adults.

77 Family lawyering is not easy. FJC will conduct focus group discussions with lawyers. There will be about 5 Groups and discussions will take place between July and August (starting this month).

The future Family Justice Courts (physical premises)

78 Finally, let me share some updates on the “physical” aspects of FJC.

79 The “Octagon” (current State Courts building) will house *all* FJC functions including High Court Family Division, Family Registries, Mediation and Counselling Services and etc.

80 We aim for:

- (a) Takeover of Octagon from State Court for works: **2Q 2020**
- (b) Opening of new FJC building: **1Q 2023**

81 We will conduct Focus group discussions with lawyers and stakeholders to receive feedback and queries on FJC's future Octagon building.

Guided by these Design Principles:

- **Modernisation** and **re-contextualisation** to suit FJC needs; *courtrooms/chambers to be solemn and stately, counselling rooms to be warm and less intimidating.*
- **Inclusive** environment for ease of access
- **Ease of wayfinding** within the building
- **High traffic** receiving services at **ground floor** for court users' convenience.
- **Sufficient waiting areas** to cope with **high traffic**



26

The world as it should be

82 In her autobiographical book, “Becoming”, Michelle Obama shares what drove former President Barack Obama to give of himself into his work; she wrote:

“...as Barack had put it ..., you may live in the world as it is, but you can still work to create the world as it should be.”

83 The 2015 Disney movie “Cinderella” ends with these last lines:

“Ella continued to see the world not as it is, but as it could be, if only you believe in courage, and kindness...”

84 How do we keep going, when there are challenges in our work every day? With courage, that is driven by kindness.

85 And I say: “Today is a new day.”

‘Just as a doctor gives hope to a patient with a serious illness, a family judge can give hope of a new future. I often tell parties, after they have alleged the many failures of the other party: “today is a new day”.’ [FJC Workplan Seminar 2018]

86 Thank you very much.

87 May you have an enriching two days at this conference.

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