

8th Family Law & Children’s Rights Conference: World Congress 2021
“Through the Eyes of A Child”

Monday, 12 July 2021

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Supreme Court of Singapore

Madam Halimah Yacob, President of the Republic of Singapore, Patron of the
8th World Congress on Family Law and Children’s Rights,
The Honourable Diana Bryant AO, QC, Chair of the Board of the World
Congress,
Mr Yap Teong Liang, Chair of the Family Law and Family Rights Section of
LAWASIA,
Members of the Board of the World Congress,
Distinguished guests,
Ladies and gentlemen,

I. Introduction

1. I am honoured to deliver the Keynote Address for this year’s Family Law & Children’s Rights Conference. It has become almost commonplace to begin an address in these times by making some observations about the effect of the pandemic on our lives. That is a reflection of the fact that this has been a time of great difficulty, suffering, and loss for many around the world. Indeed, with particular reference to the theme of this World Congress, we are

* I am deeply grateful to my law clerk, Wu Yu Jie, and my colleagues, Assistant Registrars Kenneth Wang and Reuben Ong, for all their assistance in the research for and preparation of this address.

reminded that for many families, this extended period of uncertainty, financial difficulty, and social isolation will have exposed or deepened the rifts and divisions in their familial relationships. In a very real sense therefore, as professionals and persons involved in the field of family justice, the challenge of striving to ensure that we have the best possible systems in place, with appropriate laws, procedures, and people, has become ever more urgent as we endeavour to ameliorate the strain that the pandemic has exerted on so many families. That is just what we have gathered today to consider. And so I want to begin by extending my heartfelt thanks to the Chairpersons and to everyone in the Organising Committee for making this event a reality.

2. More than a century ago, in *The Prophet*, the famous Lebanese-American poet Kahlil Gibran wrote these words about parenthood.¹

Your children are not your children.
They are the sons and daughters of Life's longing for itself.
They come through you but not from you,
And though they are with you yet they belong not to you.

3. The poem was published at a time of great change in family justice. In the late 1800s, the welfare principle was making its first appearance in English legislation and judicial texts.² It posited that the welfare of the child is of paramount importance in all matters concerning the child. Its emergence

¹ Kahlil Gibran, *The Prophet* (Knopf, 1923).

² See the Guardianship of Infants Act (1886) and *In re A and B (Infants)* [1897] 1 Ch 786.

reflected a larger shift in societal views and consequently also in the attitude of the law towards the family. The law had historically harboured reservations about the extent to which it could properly intervene in family relationships. With the turn of the 19th century, however, there was a wave of economic and social transformations, including the women's rights movement, which brought about seismic changes in societal views on families. A new consensus eventually emerged that the law could, and in some cases should, intervene in family relations in order to ensure the welfare of the vulnerable ones, especially women and children.³

4. Looking at the arc of the history of family law, we might say that in accepting the welfare principle, the law was just beginning to come to terms with the sentiment expressed in Gibran's poem – that children are neither the property nor merely an extension of their parents, but rather are persons deserving of the law's respect and protection in their own right. More than a century later, we have come a long way, and the welfare principle is today thought of as the golden thread that runs throughout the family law framework

³ A more detailed discussion of these developments can be found in Sundaresh Menon, "From Family Law to Family Justice", Keynote Address at the Law Society Family Conference 2020 (14 September 2020) at paras 7 to 11, <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/chief-justice-sundaresh-menon%27s-keynote-address_family-conference-2020.pdf?> (accessed 30 April 2021).

of many jurisdictions.⁴ But, for all the transformation that we have witnessed thus far, the work is not done. I suggest that we now stand at the cusp of a new wave of changes that will be no less significant or transformative – one in which the family justice system will come to terms with the inherent differences between family disputes and other types of disputes, and abandon the long-held precept, at least in the common law tradition, that it must be structured, like other civil cases, according to an adversarial system of justice presided over by a distant and detached arbiter. By this, I am referring to the fundamental shift towards a model of therapeutic family justice. I suggest that this would emerge as an inescapable imperative if we were to try to see family justice through the eyes of a child, because if we are serious about the welfare of the child being the paramount consideration in this context, then family disputes cannot be about legal battles and children cannot *ever* be allowed to become the pawns of war or litigation outcomes to be won or lost.

II. Therapeutic justice and the Singapore experience

5. Therapeutic justice is not a new concept. As some of you will know, it was developed in the 1980s and 1990s by two mental health and disability law

⁴ See, for example (although to different extents), the Children's Act 1989 (c 41) (UK) s 1, the Family Law Act 1975 (Australia) ss 43 and 60CA, the Children of Care Act 2004 (New Zealand) s 4, and Charter of Fundamental Rights of the European Union (2012/C 326/02) Art 24(2). Internationally, see United Nations Convention on the Rights of the Child (20 November 1989), 1577 UNTS 3 (entered into force 2 September 1990) Art 3.

professors, David Wexler and the late Bruce Winick.⁵ Perhaps because of their areas of specialisation, they were particularly attuned to the potential of the legal system to touch and transform the lives of the individuals whose lot it is to interact with it. The idea is to identify and use the therapeutic potential of the law to maximise beneficial outcomes for its users. Contrary to traditional perspectives of the law which emphasise its dispassionate and detached nature, therapeutic justice engages with the deeper human elements that underlie a dispute – that is, the social, psychological, and emotional aspects of the dispute. While it first gained traction in criminal and community courts, its influence can today be observed in many other areas including in the family justice system.⁶

6. In Singapore, therapeutic elements are not new to our family justice system. Mechanisms that give effect to therapeutic objectives, such as mediation and counselling, have been gradually incorporated into our laws and processes since the 1990s when dedicated family courts were first established.⁷ Last year, however, marked a milestone in our family justice history, when we formally announced a concerted shift towards a vision of

⁵ David B Wexler, “The Development of Therapeutic Jurisprudence: From Theory to Practice” (1999) 68 Rev Jur UPR 691 at 693–695.

⁶ For an early and influential example, see Barbara A Babb, “An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective” (1997) 72 Indiana Law Journal 775 at 798–801.

⁷ Kevin Ng, Yarni Loi, Sophia Ang and Sylvia Tan, “Family Justice Courts – Innovations, Initiatives and Programmes” (2018) 30 SAclJ 617 at paras 7–13.

therapeutic family justice.⁸ In presenting this, I described our view of therapeutic family justice as a means of resolving familial disputes that is defined by three themes: first, it must be **holistic**, in that we must endeavour to take account of and address both the visible legal issues and the underlying non-legal causes; second, it must be **restorative**, in that the law must endeavour to aid the parties to repair their relationships at least to a minimally functioning state; and third, it must be **forward-looking**, in that the law must encourage the parties to focus on their shared futures, rather than leave them preoccupied with their painful past.⁹ There are no real winners in a family dispute, and it would only make things worse if we compelled aggrieved and agitated individuals to undertake a painful journey through a legal process that ensnares them in a vicious cycle of ill will and inflammatory remarks. As the Singapore Court of Appeal observed in a recent judgment, this shift towards therapeutic justice is not simply an aspirational ideal, but rather a necessary and defining object so that we can help preserve healthier and more constructive familial relationships even in situations of disharmony and

⁸ See Debbie Ong, Presiding Judge of the Family Justice Courts, “Today is a New Day”, speech at Family Justice Courts Workplan 2020 (21 May 2020) <https://www.familyjusticecourts.gov.sg/docs/default-source/news-and-events/2020_pj_address_workplan.pdf> (accessed 30 April 2021).

⁹ Sundaresh Menon, Chief Justice, “From Family Law to Family Justice”, keynote address at the Law Society Family Conference (14 September 2020) at para 33, <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/chief-justice-sundaresh-menon%27s-keynote-address_family-conference-2020.pdf?> (accessed 30 April 2020).

breakdown.¹⁰

III. Actualising therapeutic justice values in a legal system

7. As with all foundational policy ideas, our vision of therapeutic justice will need to be brought to life through a sustained, practical, and thoughtful review and reform of all aspects of the family justice system. I suggest that we can think of the changes needed to actualise these therapeutic justice values in three main aspects: our laws, our procedures, and our people.

8. First, we must strive to ensure that our laws align with this vision. Virtually all human decisions and conduct occur in the shadow of the law even before any formal legal process is engaged. Each society must wrestle with its own conceptions about marriage and families, making compromises and forging consensus on a range of legal issues from the grounds of divorce to the obligations that spouses owe to each other and their children both during and after a marriage. The answers to these questions will affect the ability of the law to achieve its therapeutic goals, and the manner in which it may best do so. We can see this by imagining a fault-based legal framework in which every party seeking a divorce was required to prove adultery or some type of offensive behaviour on the part of the other spouse. This would inevitably shape and influence the parties' mindsets and the kinds of allegations that

¹⁰ *VDZ v VEA* [2020] 2 SLR 858 at [77].

they would need to investigate, raise, and prove in order to obtain a divorce.

9. Judicial decisions and frameworks too can have a significant impact on the therapeutic influence of the law. In the context of the division of matrimonial assets, for example, Singapore courts have long adopted what we refer to as a broad-brush approach when assessing and weighing the spouses' respective financial and non-financial contributions to the pool of matrimonial assets.¹¹ Because of this, our courts will not mechanically scrutinise every deed or transaction, or require proof of every contribution or payment towards improving or maintaining the assets.¹² This arises out of the idea that marriage is not a commercial relationship and that many things in a marriage are rightly done out of love and concern, without records being scrupulously kept in anticipation of future litigation.¹³ This approach is not unique to Singapore,¹⁴ and it reflects a view as to questions of proof in family dispute resolution that is designed to reduce rather than exacerbate tensions between the parties.¹⁵

¹¹ See for an early reference to the “broad brush” approach in Singapore: *Ng Hwee Keng v Chia Soon Hin William* [1995] 1 SLR(R) 819 at [28].

¹² See *NK v NL* [2007] 3 SLR(R) 743 at [28].

¹³ *ANJ v ANK* [2015] 4 SLR 1043 at [25].

¹⁴ Other courts have also recognized the need to take such an approach in the family law context: see *Parra v Parra* [2003] 1 FLR 942 at [22] (decision of the English Court of Appeal) and *LKW v DD* (2010) 13 HKCFAR 537 at [62]–[63] (decision of the Hong Kong Court of Final Appeal).

¹⁵ *USB v USA and another appeal* [2020] 2 SLR 588 at [43] and [45].

10. The second area of focus, which I would suggest is the most essential, is an honest and holistic review and reform of our dispute resolution procedures. This is pivotal because procedure is the gateway through which justice is accessed. Indeed, a key insight offered by the theory of therapeutic justice is the significant influence that a considered use of procedural tools can have on the parties, their attitudes and mindsets, and their ability to feel truly at peace at the end of the legal process.¹⁶

11. A procedural system designed with therapeutic aims in mind will likely have some distinctive features. First, there will be a greater use of non-adversarial methods to complement the existing adjudicative tools because spouses are not adversaries, but rather, should see themselves as having to find a mutually acceptable solution to a shared problem. Indeed, the fundamental pursuit of family justice, especially where children are involved, should not be a single-minded inquiry into who is in the right and ought therefore to win, which is what typically characterises adversarial systems. Rather, the key goal is the amelioration of tensions and the preservation of functional relationships so that the parties can continue to work towards their own welfare and especially that of their children. Second, the system will need to integrate multidisciplinary expertise, including non-legal expertise, to more

¹⁶ See Bruce J Winick, "Therapeutic Justice and Problem Solving Courts" (2003) 30 Fordham Urban LJ 1055 at 1088.

competently deal with the range and complexity of human emotions and relational issues that underlie family disputes. This will require the involvement of experts like counsellors and psychologists both before and when the court processes are engaged. This is so that spouses and their children are given the support they need, and judges have the information and tools needed to make constructive decisions. Third, there will be greater and more considered integration of technology. While technology will not replace the magic of personal contact and trust that is inherent in the practice of family law, a well-designed tech-enabled framework can help reduce unnecessary friction and anxiety for users navigating the legal system, and facilitate access to family justice which is especially important given the increasing number of litigants-in-person in family courts. This could be done, for example, by enabling certain applications to be filed and hearings to be conducted either online or from touchpoints in the community, rather than requiring physical court attendance in each and every instance, and by providing more digitised and automated services for common administrative requests and functions.¹⁷

12. The third area of focus concerns the people who will have key roles to play in this new vision of family justice. This includes family lawyers and

¹⁷ See Sundaresh Menon, “The Problem-Solving Practitioner and the Complexity of Family Justice”, Address at the Family Justice Practice Forum (14 July 2017) at paras 38–41, <[https://www.supremecourt.gov.sg/Data/Editor/Documents/Family%20Justice%20Practice%20Forum%20-%20Family%20Justice%202020%20-%20The%20Problem-Solving%20Practitioner%20and%20the%20Complexity%20of%20Family%20Justice%20\(final\).pdf](https://www.supremecourt.gov.sg/Data/Editor/Documents/Family%20Justice%20Practice%20Forum%20-%20Family%20Justice%202020%20-%20The%20Problem-Solving%20Practitioner%20and%20the%20Complexity%20of%20Family%20Justice%20(final).pdf)> (accessed 21 May 2021).

judges, who will need to be equipped with skills and knowledge beyond the law such as interpersonal skills, basic familiarity with relevant social science concepts, and exposure to non-adjudicative conflict resolution methods.¹⁸ It will also require the training of allied experts from non-legal disciplines, including counsellors, mediators, and child psychologists, so that they are sufficiently aware of the features of the legal system within which they operate, and the legal tools that are available to achieve therapeutic outcomes. In the longer term, we will also need to review the education and training of our future family justice professionals. This will be a long-term process that starts from the early stages of legal education through to the Bar and professional exams, into continuing professional development. One example of how this is already being done is the law programme at the Singapore University of Social Sciences (SUSS). Founded with the mandate of training lawyers for family and other community law practices, SUSS requires its students to take electives in allied subjects such as psychology and social work.¹⁹ Such a holistic reform of our family law training and education systems will help facilitate a more fruitful and sustained collaboration between the different domains of expertise that are needed to work towards a shared goal.

¹⁸ See Debbie Ong, Presiding Judge of the Family Justice Courts, “Today is a New Day”, speech at Family Justice Courts Workplan 2020 (21 May 2020) at para 103 <https://www.familyjusticcourts.gov.sg/docs/default-source/news-and-events/2020_pj_address_workplan.pdf> (accessed 30 April 2021).

¹⁹ “Law Programmes” <<https://www.suss.edu.sg/law-programmes>> (accessed 3 May 2021).

IV. A triaged and calibrated system of family justice

13. Beyond this, and speaking from the perspective of a jurisdiction which is in the midst of grappling with and implementing therapeutic justice, it seems to me that we cannot make effective progress towards a model of therapeutic justice just by introducing a new set of tools. We will need also to be particularly careful in how we choose to use them. As a “lens of care”,²⁰ therapeutic justice calls for flexibility in how we approach each case. There can be no uniform prescription, because an identical set of procedures might be therapeutic in one case but not necessarily in another. It is crucial, therefore, that we develop the ability to triage cases and to calibrate the use of different tools to achieve therapeutic outcomes suitable to the context of each case.

14. I can illustrate this by referring to how we approach judicial interviews of children. Used wisely, these serve to give a voice to the child, and research has shown that its use can benefit both the child and the family as a whole.²¹ At the same time, there are situations, some obvious and some less so, in

²⁰ Debbie Ong, Presiding Judge of the Family Justice Courts, “Today is a New Day”, speech at Family Justice Courts Workplan 2020 (21 May 2020) at para 43 < https://www.familyjusticecourts.gov.sg/docs/default-source/news-and-events/2020_pj_address_workplan.pdf > (accessed 30 April 2020).

²¹ See, for example, Jan Ewing, Rosemary Hunter, Anne Barlow and Janet Smithson, “Children’s voices: centre-stage or sidelined in out-of-court dispute resolution in England and Wales” (2015) 27 *Child and Family Law Quarterly* 43 at 47.

which the use of such interviews may be less appropriate.²² The judge, assisted by other specialists, will need to consider what is best for the particular child, and if an interview is not suitable, consider the possible alternatives to achieve therapeutic outcomes while striving at the same time to give a voice to the child. Triage is also invaluable for identifying complex and high-needs cases which require earlier and more intensive intervention. Our Family Justice Courts recently adopted a pilot programme to identify such cases early on, and to have them dealt with by a multi-disciplinary team of judges, mediators, counsellors, and other professionals. The first cases have been identified and are currently undergoing the pilot programme, and we are hopeful that the early intervention will prevent them from escalating as they otherwise might have done.

15. The ability to calibrate and triage will be an essential feature of therapeutic justice. This is so because we deal with a broad spectrum of cases and these can call for different responses. Take the example of cases involving family violence. While a typical tool of therapeutic justice, such as mediation, may not be appropriate, other solutions might nonetheless bear fruit in an equally therapeutic way. My colleague, Justice Debbie Ong, the Presiding Judge of our Family Justice Courts, has related an encouraging story of a perpetrator of family violence who experienced healing and

²² See *AZB v AZC* [2016] SGHCF 1 at [14]–[15].

restoration in the course of court-ordered counselling.²³ While he had initially been unwilling to undergo counselling and in that context to discuss his personal issues with strangers, he found, over time, that he benefited from that process. In his words, it became possible with time to “la[y] down our pride, drop[] the blame game so that we can actually protect the people who love us ...”. It is therefore of fundamental importance that we pay careful attention to ensuring that we can triage cases and apply tools appropriate to the particular case at hand. Effective triaging will require the input of our practitioners and judges, whose experience, judgment, and wisdom will be invaluable. At the same time, we must complement this with empirical data collected by our family courts and with rigorous analysis from other domains of knowledge, especially in the social sciences.²⁴ A combination of these human and empirical factors will strengthen our ability to triage matters, for example, by helping us better identify indicators commonly associated with cases that are either more or less amenable to child interviews, or the trends and factors typically associated with cases that will require more intensive intervention. In addition, our capacity to calibrate and triage can be improved

²³ Debbie Ong, Presiding Judge of the Family Justice Courts, Opening Address at the Family Justice Practice Forum 2019 (2 October 2019) at para 30 <[https://www-familyjusticecourts-gov-sg-admin.cwp.sg/docs/default-source/resources/forum/openingaddress_justicedebbieong.pdf](https://www.familyjusticecourts-gov-sg-admin.cwp.sg/docs/default-source/resources/forum/openingaddress_justicedebbieong.pdf)> (accessed 22 May 2021).

²⁴ See for example Barbara A Babb, “An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective” (1997) 72 *Indiana Law Journal* 775 at 788.

with continued reflection on the best way to achieve the desired therapeutic outcomes in our family justice system. To that end, our Family Justice Courts established an Advisory and Research Council in 2020 for the precise purpose of bringing together the leading thinkers and researchers in the field of therapeutic justice from around the world. We have done all this in the belief that therapeutic family justice, buttressed by a strong system for the calibration and triage of appropriate procedures, will best serve the families who are looking for a way past their present conflict to a brighter future.

V. Conclusion

16. I would like to close by returning to the theme of this year's World Congress, which invites us to look at family justice through the eyes of a child. I think this gives us the most compelling reason to embrace this shift towards therapeutic justice. What would a child wish for in a system of family justice? What would she need? Surely, more than a fair set of laws, efficient court administration, or an impartial and intelligent judge. Surely, more than anything else, that child needs a system that can sensitively manage and ameliorate a distressing personal and familial situation so that she can see and believe that there is a path forward beyond the present.

17. The growing acceptance of therapeutic justice reflects a maturing in the family law, as it comes to terms with its fundamental societal purpose. Therapeutic justice has the potential to revolutionise the family justice system

by placing the human being at the front and centre of the legal process. It marks an era in which Gibran's poem might be seen to evoke an attitude towards children and families which is not purely aspirational but is ever coming within our grasp. The conversations we will have today are critical to charting the future of family justice and to making our system one that is worthy of our children.

18. I look forward to the insights and views that will no doubt be shared over the coming days, and I wish all of you a productive and engaging conference. Thank you all very much.