THROUGH THE TJ LENS: A BALANCED APPLICATION OF THE LAW

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1. I am honoured to address you at this third Family Law Conference 2020. I congratulate the Law Society for organising this virtual conference packed with current topics on family justice.

2. At last year's Family Conference, I had urged in my Keynote Address: *"Love the law - Family law is not fluffy! ... It is rich in doctrinal issues, what some call "black letter law."*[i] Family law has much legal jurisprudence.

3. In our excitement in thinking about the problem-solving system and focusing on the harmonious route to resolution, I think it apt for me to take a reflective pause here, to remind us that our system is built on the foundations of strong family law.

4. Family law and its underlying philosophies are critically important whether parties are trying to sort out their lives after breakdown or are coming to court for a decision.

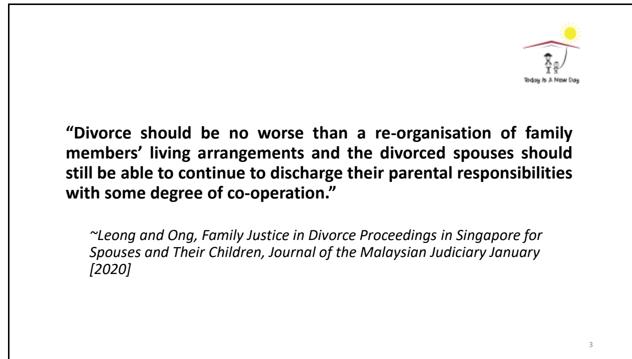
5. The adoption of Therapeutic Justice or "TJ" does not replace or override substantive law.

6. The law shapes our behavior. Criminal law punishes what society views as unacceptable behavior. In family law, the statutes and court judgments lay down legal principles which set out society's expectations on how family members ought to discharge their responsibilities to other family members.

7. I would like to focus on fundamentals – family law and its application in this current justice system. I will pick out a few selected areas which will illustrate how the law should be applied through the lens of therapeutic justice.

Divorce

8. I begin by taking a brief look at what divorce law can achieve for families.



9. I have taken this slide from my Workplan Address delivered earlier this year. There, I had quoted from an article that "Divorce should be no worse than a re-organisation of family members' living arrangements and the divorced spouses should still be able to continue to discharge their parental responsibilities with some degree of co-operation."

10. This does not change the substantive law on divorce or the ancillary matters. But it does remind us about how the substantive law ought to be applied to reach that ultimate outcome that we desire for divorced families.

Problem-Solving TJ System

11. I had explained in the Workplan address that divorce proceedings need not be "litigation" proceedings just because a "writ" of divorce has to be filed in court – there is just no administrative way to obtain a divorce. Divorce need not be associated with litigation. Instead, the divorce regime is aimed at allowing parties to terminate what has broken down and to facilitate the recasting of their future.

12. I had also shared that we will adopt TJ (that's Therapeutic Justice), and that we must build the TJ "hardware" structure and the TJ "software" resources that will ensure therapeutic effects in family proceedings.

13. Against this background, we have been talking about the "amicable resolution" of disputes, instead of allowing parties to treat each other as adversaries.

14. As we explore what TJ means in practical terms, I will look at 2 broad issues. First, what do we mean by "amicable resolution" in our problem-solving TJ system? Second, how do we *apply* the law in this TJ system?

Amicable Resolution

15. What is an "amicable resolution"?

16. Here are some meanings given to the word "amicable". The online Cambridge dictionary offers these two meanings: "relating to behaviour between people that is pleasant and friendly, often despite a difficult situation", or "relating to an agreement or decision that is achieved without people arguing or being unpleasant". Other online dictionaries state that it "implies a state of peace and a desire on the part of parties not to quarrel"; "showing goodwill; friendly; peaceable".

17. Is it possible to remain "amicable" within these descriptions, even when parties cannot agree on a solution? Does "amicable resolution" in reality only mean mediation and settlement? Is "amicable resolution" achievable even if there is no agreement and court *adjudication* is required?

18. Before we proceed further, let me introduce you to "The Pit".

The Pit

19. Let us imagine this scenario: A husband and a wife have instructed their lawyers to act in obtaining a divorce. Their lawyers assist them in robust negotiations towards settlement. The negotiations are unsuccessful in yielding any settlement. The parties then go before a private mediator. The mediation is also unsuccessful. Having tried what they thought was "amicable resolution", they carry on with the court proceedings. They indicate that they wish to move on to a hearing judge to adjudicate the case. Still, they go before a judge-mediator for yet another shot at settlement. No settlement is reached. Finally, they head for adjudication.

20. Now, just as the parties are about proceed to adjudication, just when they are so close to reaching the Hearing Judge to conclude their matter, a trap-door opens up, and the parties fall into "The Pit". And in there, down in the Pit, before them, is … another mediator.

21. There is no dark pit in FJC. The Hearing Judge is reachable. Mediation is intended to be enabling and empowering, a means towards reaching a fair settlement. It is not the opposite – a barrier to resolution instead.

22. The desire for "amicable resolution" should not cause parties to feel "forced to agree" or feel that they can never move forward if they do not reach some agreement.

23. There will be cases which will require court adjudication. After hearing about the Pit though, we should not also swing the other way, and head to court

adjudication as a first resort. Each case is different and we must not lose sight of that.

24. Currently less than 10% of our annual number of divorces require some adjudication. We hope that as few cases as possible need it, but if any parties do resort to court for adjudication, the court will be there for them.

Triage

25. As every case is different, the path to be taken by each case will vary. We must therefore discern which cases are suitable for counselling, for mediation, when these cases should be provided with these services, and when a case should proceed for adjudication.

26. The process of “triaging” will be helpful. To “triage” means to sort out and assign degrees of urgency to the various needs. By ascertaining the real needs and issues clearly at the early stages, cases can be assigned to different tracks so that the appropriate resources can be provided at the appropriate time. By triaging early in the day, a case need not become more complex, and this may also reduce the parties’ conflict over time.

27. To the question I posed earlier, “Is ‘amicable resolution’ achievable even if there is no agreement and court adjudication is required?” Yes! It is possible in a problem-solving court adopting TJ.

28. “Amicable resolution” does not mean only resolution by mediation and settlement. Any resolution, even if concluded by court adjudication, should be “achieved without people being unpleasant” (that was one of the definitions of “amicable”).

29. An amicable problem-solving system is the system from start to end. I had said in my Workplan Address that lawyers must work collaboratively as a team where children’s interests are involved – this is the case whether the matter is in the upstream stage, in the mediation stage or the adjudication stage. Triaging aims to move the case along the most suitable path, utilising the most appropriate resources.

Balanced Application of Law

30. The next issue to explore is: How do we apply the law in this TJ system? The word that comes to my mind in answer is “balance” – our approach must be a steadfastly “balanced one”.

31. I pick out a few areas to highlight the importance of strong family law and the balanced application of the law to the various cases. I will share my thoughts on how this relates to the adoption of TJ.

32. Our Divorce law addresses 3 “Ancillary Matters” arising upon Divorce - they are in fact three areas of consequences of family breakdown that need to be addressed in order to stabilise post-divorce life.

33. The law on the Division of Assets enables parties to split up fairly what they have acquired during marriage, obtain a clean break and use their share of assets to support their new future.

34. The Division of Assets is not compensation for alleged sufferings during the marriage. The process of dividing up assets should not incentivise the spouses to be acrimonious and unpleasant towards each other.

35. The law on Maintenance is important to dependent family members who are worried about the lack of financial provision after divorce. The underlying philosophy is that able family members should provide for the needs of dependent family members – this is a fundamental legal obligation imposed by the law – this is what society expects.

36. The concepts of “Custody, Care & Control and Access” are instruments that the law provides to regulate the parent-and-child relationships after divorce – they are powerful legal constructs that enable parents to continue caring for their children after breakdown. Parties should use these for that purpose, and not as tools for revenge.

37. This conference has put together sessions discussing the law in these areas. As we learn from these discussions, I encourage us to think about how the law can be further strengthened or reformed in the light of our vision for family justice today. I will only briefly touch on a few areas.

Division of Assets

38. The Division of Assets can be a challenging area where battles, if fought aggressively, can leave the spouses' relationship in an even more bitter state.

39. Recently, the Court of Appeal in *UYQ v UYP* [2020] SGCA 3 (at [4]) reiterated that the "courts should discourage parties from applying the structured approach in a rigid and calculative manner". Being calculative and petty in affidavits tends to spawn fiery reactions.

40. Having said that, I hasten to add that neither should we swing to the other extreme, where evidence is inadequate, or piecemeal and disorganised – the Court of Appeal said in the same judgment that "this does not mean parties should swing to the other extreme by being remiss in submitting the relevant records."

41. The Court of Appeal remarked that parties should not swing to the other extreme. We see here the importance of "balance", avoiding swinging to extremes that are unhelpful. Applying the law requires a balanced approach, not just in this area, but in all of family law. This may seem obvious, and yet, when parties are highly emotional, "balance" is not always within reach.

42. This brings me the next area I wish to discuss where balance and good sense are imperative. This is in the area of disputes involving children.

Voice of the Child

43. In 2014, the Report of the Committee for Family Justice[ii] recommended that a dedicated department provides "a voice to the child". The Family Court's Counselling and Psychological Services, CAPS for short, can represent the voice of the child. The Report also recommended the "Appointment of Child Representatives in court proceedings involving children" to act as the child's advocate.

44. In 2019, the Report of the R.E.R.F, "RERF" Committee[iii] recommended that the judicial interview of children is part of the Judge-led approach – this is because judicial interviews can be a valuable method of hearing the child's wishes, in addition to other methods.

45. All these recommended methods of ensuring the voice of the child is heard have been implemented and used in FJC. Indeed some of the lawyers attending this conference have been appointed as Child Representatives and they have

assisted the court tremendously in those cases. Judges have also interviewed children where they think appropriate.

46. I had mentioned a little earlier about the reminder given by the Court of Appeal not to swing to extremes. The Court of Appeal's caution must apply to this area involving children as well.

47. While we must ensure that the voice of the child is heard, we should be mindful not to swing to the other end where a child becomes overly involved in the court proceedings or made to choose one parent over the other.

48. Let me share a story from a real case.

49. In this counsellor's report, Bobby rated his relationship with his sister Stella as 8 out of 10. He feels closest to her amongst all the family members. He was tearful when asked about his relationship with Stella. He explained that he feels bad that she "has to be in this" and worried about the impact of their parents' conflict on her.

50. This boy at 13 years of age was carrying the burden of worrying for his younger sister.

51. Stella also feels closest to her brother, or at least, they used to be close. She said her brother had started to isolate himself in the bedroom and stopped communicating with her when he was in Primary 5 – and that was 4 years before the divorce proceedings!

52. Stella was tearful when she recounted her parents' conflict. She feels her family is "not normal". She recalled a time when her family was "normal" when there was no shouting and no physical violence. Bobby shared his desire for his parents to stop quarrelling. He does not want his parents to badmouth each other, he no longer wants to be involved in his parents' conflicts, and also does not wish for his parents to continue with the fights. He does not want to choose between their parents.

53. This report stated that "He does not want to choose between either parent".

54. In seeking the voice of the child, an important factor to bear in mind is whether the child is being burdened with decisions that should in fact be made by her parents.

55. A child should not have to look back and bear any guilt that comes from thinking she might have been responsible for some choices that she now regrets making.

For example, she should not bear the burden of her mother's depression which she thinks was due to her telling the Judge that she preferred to live with her father instead of her mother.

56. We should bear this in mind as well as the need to hear the wishes, the worries and the views of the child. We must examine the facts of each case and think carefully on what is appropriate. Whether a Child Representative should be appointed, whether a Custody Evaluation Report should be directed, whether the Judge should speak to the child, will depend on the precise facts and needs of the case. We need to take a balanced approach.

Using the TJ Lens

57. I have thus far, highlighted 3 examples of using the "TJ lens". TJ is a lens of "care", a lens through which we can look at the extent to which laws, procedures, practices and our roles, produce helpful or harmful effects. It is about being mindful of the consequences affecting the family.

58. First, I have described "The Pit". Mediation is a good TJ "hardware", and a good use of mediation can produce therapeutic effects. But if mediation is not used appropriately, its poor application may produce anti-therapeutic outcomes, where it feels like being in "The Pit".

59. Second, I have referred to the Court of Appeal's reminder to keep a balance between being rigid and calculative on one hand, and presenting sufficient evidence on the other. Either extreme can produce negative effects.

60. Third, I have noted that Child Representatives, CAPS assessments, Judicial Interviews are good TJ "hardware", but if used inappropriately, can ironically lead to harmful effects on children.

61. Using the TJ lens, we see the ways that an unthinking application of law, processes and measures can lead to anti-therapeutic effects.

62. I proceed to another area which I think is very current.

Parental Alienation / Excessive Gatekeeping

63. Related to this issue of hearing the voice of the child is an allegation commonly raised by parents recently – the allegation of parental alienation or excessive gatekeeping. This usually arises when the children reject Parent A and Parent A then alleges parental alienation by Parent B. Parent B then asks the Judge to

interview the children to hear for herself that the children's wish is not to be with Parent A.

64. The notion of "parental alienation" has been fiercely debated in the social science field. One view is that upon finding parental alienation, the solution or "treatment" should be to reverse care and control to the rejected parent. This view has been heavily criticised, and critics warn of the grave risks of emotional harm to the child subjected to such traumatic treatment.

65. Cases involving children who appear to be intensely rejecting one parent are extremely challenging. In a recent decision, I had said:

> *"The law does not 'force' children to love a parent; even in functioning families, children may be closer to one parent than the other, and may even have conflicts with a parent. The law expects a parent not to engage in alienating behaviour, and to support the reunification efforts as far as he or she can. If a parent has been facilitative and still the children, for whatever reasons, continue to reject the other parent, that is another matter. In this case, not only was the Father not facilitative, he had exhibited excessive gatekeeping or alienating conduct.*
>
> *I do not by this view find that the Father's influence was the only cause of the estranged situation between the Children and the Mother, for there are various factors at play in how relationships turn out."*

66. Your teenage child may not want to watch a movie or hang out with you, and this may have nothing to do with your spouse's conduct. He's a busy teenager, and he may be frustrated by *both* his parents' quarrelling.

67. In this decision that I've just referred to, I had not endorsed any theory of "parental alienation" – I did not think it helpful to go into whether the Father had intention to alienate. What was clear to me was, whatever the ultimate intention, I had found conduct by the Father that had contributed to the children's estrangement with their mother, and such negativity had to stop.

68. The important question before me was: *how to help this family move forward whatever may already have happened in the past*. The Mother, whom the children continued to reject, also accepted that it was not in their interests to abruptly remove them out of the Father's care into her care. In this case, directions were made for the parents and children to continue with therapeutic support services, with a view to reconnection between mother-and-children in the future.

69. It may be that children, only after they have reached adulthood, are able to look back on the difficult years and understand that their parents were themselves mired in deep emotions that may have taken over rational decision-making. These children as more mature adults may be willing to re-connect with their estranged parents. It may also be that a positive turn of events could happen sooner. What is important is to press on and do our best.

70. Speaking of gatekeeping, I note that one early manifestation of alienating behaviour or excessive gatekeeping is in blocking access. The challenging issue has already been highlighted.

71. The RERF Report of 2019 recommended providing for a simpler mode of commencing enforcement proceedings for breaches of child access orders and for the courts to be empowered with a slew of measures which will encourage compliance with child access orders. These reforms are currently being worked on.

72. When these measures become available, we must use them in a balanced way, as we should with all other measures. We must not swing to extremes. We can facilitate access within a multi-disciplinary environment, making use of therapeutic services to enhance these new remedies.

73. Again, these are examples of using the TJ lens in applying the law. We will build good TJ hardware, such as these measures for the enforcement of child access orders. We must also build up our TJ software, such as the capacity of judges, lawyers, and social science professionals to apply the remedies in a TJ-inclined way.

A Milestone Point

74. We are at a crucial point in the development of family justice.

75. We must build our understanding of what adopting TJ means. To support this endeavour, we have established the Advisory Research Council, called A.R.C. or "ARC", for short. ARC comprises a panel of international experts on Therapeutic Jurisprudence – they are Professors David Wexler, Barbara Barb, Tania Sourdin, Vicki Lens, and Robin Deutsch.[iv] The ARC will assist in our efforts to build our TJ narrative, and implement TJ in practical terms in our family justice system.

76. I am very grateful to have such experts with us on this journey. Two of the members on the ARC are participating in this conference – I would like to express my deep appreciation to Professor David Wexler and Dr Vicki Lens for readily agreeing to share their insights in this morning's sessions.

77. Divorced parties can no longer be at that same place they were at before the divorce – the marriage has broken down. Change will come whether or not the parties want them. What changes do the parties wish for?

78. Effective family lawyers can help parties to properly consider what that new place can be for them – will they remain angry and unhappy even one year later? Can they imagine a positive future? Will they have the will to do what it takes to get there? You, the family lawyer, are in that opportune place to help them get there.

79. A family lawyer who is faced with an opposing counsel who takes an aggressive stance will have a more challenging path in helping the family move forward. But where both lawyers are practicing in a TJ-inclined way, these lawyers will find family lawyering at its most effective, and most fulfilling.

80. The training in the forthcoming Family Lawyer's Certification Course is intended to bring lawyers on board on the same bus. The old connotation that associates any "certification" with a "barrier" to practice should be no more. Instead, today's perspective is that training will equip us all to practise in a way which is going to be more meaningful for every family lawyer.

81. I cannot emphasise enough how important the family lawyers' work is to our family justice system. Your connection to the divorcing parties is very substantial. You can help the parties move from point A to point B – which may involve the way they view the difficult situation that they are in, or how they view the other spouse, or how they understand the children's real needs to be – you can do so much! I respect your fortitude and commitment to our common vision.

82. I wish you a most enriching and fruitful experience in this conference, and I look forward to working with you. Thank you very much.

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[i] "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!": Keynote Address, Family Conference 2019, Supporting, Healing And Reconstructing at [67]

[ii] Report of the Committee for Family Justice on the framework of the family justice system (4 July 2014)

[iii] Report of the Committee to Review and Enhance Reforms in the Family Justice System (13 September 2019)

[iv] David Wexler, Professor of Law, University of Puerto Rico and Distinguished Research Professor of Law, Emeritus at the James E Rogers College of Law, Tucson, Arizona;
Barbara Babb, Professor of Law and Founder and Director of the Sayra and Neil Meyerhoff Center for Families, Children and the Courts, University of Baltimore;
Tania Sourdin, Professor, Head of School and Dean of the University of Newcastle Law School, Australia;

Dr Vicki Lens, Professor, Silberman School of Social Work, Hunter College, CUNY; Dr Robin Deutsch, Professor of Clinical Psychology at William James College.