

LawAsia Conference on 'Children & the Law' – 27 & 28 May 2005

Keynote Address by the Honourable Justice Lai Siu Chiu

Opening Address

Honourable fellow members of the Judiciary, President Law-Asia Mr GL Sanghi, President and members of the Law Society, distinguished guests, ladies and gentlemen, it is my pleasure and privilege to deliver this keynote address to you this morning.

Introduction

1 In the many family law cases that have proceeded through the courts, several have proven memorable. These inevitably involve children. I wish to share the facts of one such case. The Family Court had ordered that a father could have access to his four year old son at the court premises. During the access period, in the presence of a court counsellor, the little boy was observed to interact with his father in a warm, loving and positive manner. Yet, within minutes of his mother coming into sight, he would make a 180 degrees turn by pushing his father away, making rude remarks and even using his fists to hit the father. On every single occasion after access, the mother would file police reports against the father, on some occasions the reports were directed at the counsellor who had supervised access and on one occasion, she even brought garlic along and wanted to sprinkle the bits of garlic around the access venue before she was stopped by court officers. One wonders if the garlic was the mother's symbolic attempt to ward off the "evil" of access.

2 Such a scenario, ladies and gentlemen, and variations of these bitter battles are fought out in our courts every day. In 2004, of the 5317 divorce petitions filed in the Family Court, at least 2778 petitions involved parties with young children. Children, frequently more than the parties to a divorce, are the unseen and unheard victims of a breakdown in the marital relationship.

3 This is where your conference's twin focus on Children and the Art of Family Lawyering merge. The picture is clear. While the legal process formally terminates the marriage relationship, the orders made have a significant impact on the children's lives.

4 In this vein, the conference program boasts an impressive and, may I add, an ambitious range of topics. It deals not just with immediate challenges concerning family law practitioners and children's rights advocates. For example, the discussion on Juvenile Justice to follow soon after this morning's tea-break involves a rich and diverse panel of speakers from the judiciary, government and non-governmental organisation. It is 'ambitious' also because the conference does not hesitate to spur lively debate on rarely-debated issues that will doubtless challenge legal thinking in the near future such as this evening's talk on posthumous sperm donation. In my view, the conference agenda is very much in touch with the latest policy changes to foster family friendly workplaces – we see an increasing level of participation from non-custodial parents in facilitating access periods with their children. It is also most heartening to note that 'children with special needs' have been included in a special segment featuring the challenges faced in representing them.

Rights of the Child in Family Law Proceedings

5 The Convention of the Rights of Children and our legislation, the Women's Charter, require the court to take into consideration the views and wishes of a child who is sufficiently mature to express an independent opinion. Yet quite often, one parent purports to convey the child's views on the other parent, inevitably bearing negative inferences against the latter. There are also complaints from non-custodial parents of the adverse influence the custodial parent exerts on a child insofar as the child's opinion and relationship with the former is concerned. So the question remains whether it is fair to ask a child for his views, in trying to arrive at a conclusion in the child's best interests. If so, for which issues and under what circumstances?

Custody & Access Issues

6 The court is constantly challenged to balance these various considerations in custody and access applications. I am grateful for having sight of a draft of 'The Art of Family Lawyering' launched just now by the President of the Law Society. The book's contents make the fundamental point that these challenges do not just belong to the judicial process, but form an integral part of family lawyering. Clients embroiled in family disputes are heavily influenced by their counsel, and by extension, that counsel's practices. Such clients are emotionally charged. They look to their counsel for guidance as to how to proceed.

7 The book's contributing authors are to be commended for recognising the enormous influence wielded by counsel. Essentially, it captures the message that family lawyering is an art which requires different strokes. Weapons of civil procedure and advocacy cannot be completely and immediately imported to family litigation. To this end, it is hoped that this conference and the resulting papers and collaborations will build a dynamic core group of family law practitioners and help establish good practices and partnerships between the courts, policy-makers and practitioners with the aim of advancing the legal process to the benefit of the child. It is not an easy task. The practical realities include the fact that specialising in family work is itself not always sufficient for smaller law firms or for a sole proprietor to concentrate his entire commercial energies. It follows that many habits of civil litigators are carried over to family law procedure, even where they are clearly against the spirit of the family court adjudication process. The courts recognise this feature and a recent decision has dealt with requests for further arguments in interim access proceedings and distinguished their purpose from that in civil proceedings. This distinction is also recognised with the recent amendments to the Matrimonial Proceedings Rules,

The Matrimonial Proceedings (Amendment) Rules 2005

8 The latest amendments to Singapore's Matrimonial Proceedings (Amendments) Rules, which took effect on 30 April 2005, deal with the use of an expert's report in custody and access proceedings. While civil procedure language

deal with this as an expert's report, the new Rule 26A rightfully places weight on the process by describing it as an Examination of Children. Where disputing parties see it as their entitlement to rely on an expert, the new rule reminds all involved that to pursue such a course of action in family proceedings would be to subject a child to professional examination. This should not be lightly applied and the new rule, formulated after considerable discussion with the Law Society's Family Law Practice Group and concerned parties, requires the court's leave to be obtained before subjecting a child to such an examination. The new rule should go some way toward signalling the different treatment that expert's opinions are given in family proceedings, not just in respect of access and custody. Essentially, it signals the need for a disciplined approach in upholding the spirit of the matrimonial proceedings rules.

Concept of custody and joint parenting responsibilities

9 I have thus far spoken of the need to respect the rights of children and to safeguard their interests in the context of their involvement in custody and access battles in court. I would now like to touch on a more fundamental issue which has been generating some debate in recent times, namely, the concept of custody and in particular, whether our focus should still be on making custody orders.

10 The Convention of the Rights of Children, to which Singapore is a signatory, enjoins state parties to use their best efforts to ensure the recognition of the principle that both parents have common responsibilities for the upbringing and development of their child. The Women's Charter of Singapore also provides that parents shall cooperate with one another in caring and providing for their child. In the event of a divorce, however, the Charter provides that the court may make custody orders and the first and paramount consideration when making such orders is the child's welfare. There can be no doubt that the welfare of a child is best secured by him freely enjoying the love, care and support of both parents. The needs of a child do not change simply because his parents no longer live together. In any custody proceedings before the court, it is thus crucial that the courts recognise and promote joint parenting so that both parents can

continue to have a direct involvement in the child's life. Does an order granting custody of a child to one parent, and thereby implicitly excluding the other, then accord with the ideal of joint parenting?

11 The Singapore courts have generally been making sole custody orders, granting custody of a child to one parent when parents divorce or separate. This is because cases have held that a joint custody order is not appropriate unless parties can cooperate with each other in making joint decisions for their child. Unfortunately, parties tend to exhibit great acrimony and bitterness towards each other when presenting their case leading to the conclusion that joint custody is just not feasible in many cases. It is thus almost inevitable that sole custody orders are made.

12 This has attracted much discussion with many academics advocating that joint custody orders (orders giving custody to both parents), or no custody order should be the norm to reflect the principle that joint parenting responsibilities do not cease with the separation of parents. I am glad to observe that a trend has emerged and the courts are no longer inclined to assume that sole custody orders should be made just because parents display animosity towards each other in the midst of litigation. Several recent decisions have shown a greater willingness by the court towards granting joint custody orders unless there are exceptional circumstances, such as a parent being clearly unfit to exercise parental responsibility. I should add that this direction has been supported by the Court of Appeal in dismissing the appeal in the case of CX v CY just three days ago.

13 Therefore I note with interest that one of the topics in this conference will deal with the concept of custody and will no doubt delve into this area in greater depth. Over and above the type of custody order to make, I would venture to add that it may be timely for a comprehensive review of this area of law to be undertaken in Singapore. For example, I understand that the concept of custody has been abolished in England. In its place, greater emphasis is placed on shared parental responsibilities and the courts only step in to make orders on residence,

contact and other specific issues. Similarly, in Australia, 'parenting orders' are made encompassing residence and contact orders. Hong Kong has also just released a Law Reform Commission Report, which recommends that a new "joint parental responsibility model" be adopted. I would suggest that we study the experience of other jurisdictions in this area in detail and consider if the welfare of children can be promoted with a reform of this area of family law.

Post litigation support

14 At the end of the day, whether the law provides for the making of custody orders or parenting orders, the fact remains that conflicts between the parents do not always end with an order of court. Whilst in the majority of cases, parents can put aside their differences and deal with each other reasonably well for the sake of their child in the aftermath of a divorce, in some cases, the battle continues long after the end of a case. An effective legal system that seeks to promote the welfare of children must ensure that there is proper follow through in appropriate cases. For instance, in cases where access cannot be carried out due to the high level of conflict between parents, it will be necessary for a service to be provided to facilitate access.

15 In the Family Court of Singapore, under the Project Contact programme, a neutral venue with trained counsellors available is provided for access where necessary to give a child an opportunity to have contact with a parent free from the interference of the other parent. However, although this programme has been found to be beneficial, there are several issues – first, the service is provided by volunteer family service centres and is thus dependent on their continued participation; secondly, due to the limited operational hours of these centres, the demand for such service is not fully met at present; and finally, the centres now levy a charge to help defray the cost of running this service but some parties can ill afford to pay this. It is hoped that more resources will be pumped into this area to beef up and expand the support services afforded to children post separation.

Conclusion

16 To conclude, there are very seldom easy or obvious answers when it comes to doing what's best for a child under trying circumstances, as all divorces and separation are. We can only try our best, by ensuring that the orders made sufficiently recognise the joint parenting roles of parents; by ensuring that the legal processes take utmost care when eliciting a child's views and avoid adding to the trauma experienced by a child in being 'forced' to take positions time and again; and by ensuring that the necessary support is given to a child both during and post court proceedings. More importantly, all practitioners will have to appreciate and adopt family lawyering practices that are sensitive to a child's needs. I believe that this conference will go a long way towards achieving this. I wish you a fruitful and productive discussion. Thank you.