Speech for the 32nd Annual General Meeting of the Hong Kong Family Law Association By The Hon Mr Justice Lam, VP 7 November 2018

The Judiciary has announced its plan to relocate the Family Court to a new building to be constructed at a site in Causeway Bay. The plan to have a new Family Court Building provides us the timely opportunity to review our family justice system. As the new building shall serve our community for a long time in the future, we should ask some soul searching questions in our attempt to map out the long term planning for our system. We should bring about developments which would meet the future demands in the administration of family justice in Hong Kong. Such planning cannot be confined to projection on number of court rooms and chambers in the new building based on caseload and number of judges and supporting staff. It should also give consideration to the potential improvement in the quality of family justice to be delivered within such building.

With this in mind, a delegation of Hong Kong judges (comprising of judges in the CA, CFI and the Family Court) visited family courts in Singapore, Melbourne and Sydney in late October to learn from the overseas experience and gain insights on how our own family justice system can be improved to meet modern demands.

It has been a fruitful trip and the discussions with overseas judges reinforced my view that due to the unique nature of matrimonial cases, the family justice system as a whole (especially in children cases) must adopt a holistic approach involving multi-disciplinary assessment and treatment/services to achieve a satisfactory outcome for all the parties. Sometimes, lawyers and judges tend to focus too narrowly on the legal or forensic side of a dispute and overlook the

need to work closely with social workers/counsellors in restoring the balance in the lives of the divorcing couples or their children which has been disrupted by the divorce. As a Singaporean judge commented, in family disputes the legal remedy only provides part of the solution. Despite divorce, parents remain parents, children remain sons and daughters and relationships continue. Hence relationship issues need to be addressed. A good family justice system should cater for such need in addition to providing a legal solution to the issues arising from a divorce.

In so saying, I am not suggesting that Hong Kong should follow the Singaporean model of incorporating counselling services as part of the Family Court System. But I do believe that judges and lawyers should pay more attention to the importance of counselling and relationship issues. We should build into our legal solution some mechanism ensuring that those who need counselling do obtain such help. Actually, with the benefit of counselling services it is more likely that litigants will acquire insights to find their own long term solution. This would be conducive to the effectiveness of mediation or other modes of consensual dispute resolution. Whilst generally it would not be appropriate for a judge to communicate directly and secretly with a counsellor, the social worker who prepared reports in family cases may provide the court with a general picture on the counselling services received by the parties and the children. Lawyers can also obtain such information from their clients which would be useful for assessing if a party is ready to undergo mediation. In Singapore, the counsellor in the Family Court can communicate with the judge-mediator and he may even take part in a co mediation session. This is an approach which requires careful study as I can see the benefit of a synergy between mediator and counsellor.

This conveniently bring me to the topic of judicial settlement conference. As I said, in Singapore there are judge-mediators. In Australia, they have registrars

undertaking the role of conciliation officers at Conciliation Conferences. In Hong Kong, our Family Judges do both CDR and FDR. When I mentioned this to Australian judges, they are amazed because Australia had tried that for a while but eventually decided that it was a luxury they could not afford. Unless a case is settled, the Family Court has to offer at least 2 judges[1] to handle one case. Given the ever increasing caseload and the shortage of judges in our Family Court, I personally think we should review if FDRs and CDRs should continue to be conducted by judges or by judges alone.

There are various options to modify the existing schemes. As you may be aware, we are proposing that there should be masters in the Family Court. One possible option is to hive off FDRs and CDRs to be heard by masters (either on their own or jointly with judges in more complex cases). A prerequisite is that the masters must be experienced in family cases. As the Rules Committee takes the view that the law has to be amended to permit masters to be appointed in the Family Court, it would take some time. In view of the heavy caseload we face (and I wish to take this opportunity to pay tribute to our hardworking family judges as our judge to caseload ratio is much lower than those in other jurisdictions), there is a pressing need to have such legislative change in place.

Another option which may be considered is to provide assistance to judges by some settlement officers (some of them may later become masters). Such settlement officers should be required to have family mediation qualifications. With such assistance, one judge could manage several FDRs or CDRs in one day.

There is also scope for the better synergy of FDRs or CDRs with private family mediations. Sometimes, there are cases where parties could achieve some breakthrough in settlement negotiations after hearing the evaluations at FDRs or

[1] The judge who heard the FDR cannot be the judge who presides in the trial of ancillary relief, though there is no such restriction in respect of CDR, see PD 15.13 para 16.

CDRs but still not quite able to reach settlement for one reason or another at such hearing. It is a pity that the momentum of settlement should be halted by virtue of the limited time allocated for a FDR or CDR. The impetus of negotiations should be maintained and with better co-ordination and co-operation, a skillful private family mediator should be able to make good use of the evaluations in FDR or CDR to continue a meaningful dialogue between the parties with a view to facilitate settlement. I am perhaps thinking aloud, but the following scenario is certainly worth exploring: a private mediator starts the process of mediation before the CDRs and FDRs, and if no settlement reached in that initial mediation, the mediator shall sit in (or may be even participate) in the CDR and FDR; and if there is still no settlement, the mediator shall carry on with more in depth mediation afterwards. The family courts in Singapore and Australia place high regard to family mediation (both in children and non-children cases) and there are actually voices in Hong Kong suggesting compulsory mediation for children cases. Personally, I am more interested in improving the quality and effectiveness of the mediation process and I hope what I said above provide some food for thoughts.

The various options mentioned above can be tested and they are not mutually exclusive. The Family Court could offer a combination of these options, the judge or the parties can adopt the appropriate mode depending on the circumstances in each case.

Apart from FDRs and CDRs, the masters in the Family Court can also handle pre-trial case management or simple procedural matters, freeing up valuable capacity of the judges to hear substantive matters. In Australia, the registrars in the Family Court heard applications for interim relief. The masters in Family Court have to establish the necessary expertise before we can follow that example. However, given that there could be review by a judge and with the

interim nature of such relief, it is a potential approach that we should consider in the long term.

Further, with judges focusing on substantive applications, I hope that the interim period can be shortened. I strongly believe that complex cases aside, in general, proceedings in the Family Court should be completed within a reasonable timeframe and a divorcing couple should not have to spend a large portion of their family wealth on legal fees when they split up. $10,000 spent on legal fees mean $10,000 less for distribution between the parties and the maintenance of the children. Under stress and emotional turmoil of a divorce, a matrimonial litigant who is inexperienced in court business may wish to take steps in the litigation which bring no rational benefit to the effective resolution of the dispute. As I have said in a recent case[2], professionals involved in family litigation have a duty to assess objectively and professionally whether a proposed course is appropriate in the circumstances of the case instead of carrying out the wishes of a client blindly. The improvement in the administration of family justice cannot be delivered by judges or the Judiciary alone. We must have the co-operation and support of the lawyers and other professionals involved in the course of a divorce in order to attain the goal of a holistic restoration of balance in the lives of divorced couple and their children within a reasonable time and at proportionate costs. With the professionalism of those who are present this evening, I know I can count on your support in this regard. Thank you.

[2] JHK v YK [2018] HKCA 542