

The Guide to Good Practice on Family Law

October 2022

FOREWORD

The Guide to Good Practice on Family Law ("Guide") was compiled by a Working Group of experienced Family Practitioners from the Hong Kong Bar Association, the Law Society of Hong Kong and the Hong Kong Family Law Association.

It sets out good practice, outlining the constructive and conciliatory approach to be adopted in this field. Its objective is to remind Practitioners *inter alia*

- (a) to encourage families to put the best interests of children first;
- (b) to seek less confrontational resolutions wherever appropriate; and
- (c) to minimise and/or manage conflict, including by using appropriate language in court, in correspondence and otherwise that will not inflame and increase acrimony.

Before the Guide was finalised, the authors sought comment and feedback from the Family Proceedings Court Users' Committee ("FPCUC"), which is chaired by The Hon. Mr. Justice Johnson Lam PJ. The FPCUC comprises Judges and Judicial Officers, representatives from the Social Welfare Department, the Legal Aid Department and the Official Solicitor's Office, a barrister nominated by the Bar Council, a solicitor nominated by the Law Society of Hong Kong and a member of the Hong Kong Family Law Association.

It is hoped that Practitioners taking on Family Law work will refer to the Guide, not only to improve and maintain standards but also to avoid adverse consequences and comments should practice fall foul of such guidance.

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This Guide to Good Practice on Family Law is for general guidance only. This Guide does not constitute legal advice. For matters of professional conduct, please refer to the Hong Kong Solicitors' Guide to Professional Conduct issued by the Law Society of Hong Kong and the Code of Conduct issued by the Hong Kong Bar Association.

1. General

1.1 Best Attitude

- 1.1.1** Practitioners should bear in mind that managing expectations and building positive relationships with the client are of utmost importance to the resolution of family disputes. Managing expectations and striving to build positive relationships are not an attitude – it should be part of their practice.
- 1.1.2** Practitioners in family practice should conduct themselves in a manner that is constructive, respectful and seeks to minimise conflict – and should encourage their clients to do likewise.
- 1.1.3** Practitioners should show courtesy and be professional in all dealings, particularly to other parties and practitioners.
- 1.1.4** Practitioners should always remain professional at all times, and not over-identify with the client or be unduly influenced by the emotions of the moment.

1.2 Best Practice

- 1.2.1** Practitioners should adopt a constructive and conciliatory approach to the resolution of family disputes.
- 1.2.2** Practitioners should minimise any risks to separating families by:
- (a) alerting separating couples to treat emotional / psychological and physical welfare as a primary concern;
 - (b) cautioning clients to avoid conflicts in front of children; and
 - (c) narrowing the issues in dispute and ensuring that costs are not unreasonably or unnecessarily incurred.
- 1.2.3** Practitioners should:
- (a) focus on the identification of issues and their resolution;
 - (b) communicate clearly, and free of legal jargon;
 - (c) avoid protracted, unnecessary, hostile and inflammatory exchanges; and

(d) be mindful of the effect of correspondence upon the parties and other family members.

1.2.4 Practitioners should encourage the attitude that a family dispute is not a contest in which there is one winner and one loser, but rather a search for fair and appropriate solutions.

2. Communicating with your Client

2.1 General Notes

2.1.1 Practitioners should ensure that:

- (a) their relationship with client is such that their objectivity is preserved, and their own personal emotions do not cloud their judgment;
 - (b) their role is to give legal advice to enable the client to reach an informed decision when giving instructions;
 - (c) the decision is properly taken by the client, and the client fully understands its consequences, both as to its effect on any children involved and financially;
 - (d) the client is fully aware of the impact of costs on any chosen course of action, especially any legal expenses that will be incurred ultimately and come out of the family assets. Practitioners are under a duty to give an estimate of costs in Form H so that the parties would know the amount they have to pay for the litigation process¹;
 - (e) the client is aware of the existence and range of all other services which may be of assistance in bringing about a resolution and helping members of the family through the process of family breakdown;
 - (f) the client is aware of the value and availability of services such as counselling for the resolution of emotional and psychological problems and mediation as an alternative to the contested Court process;
 - (g) a family dispute needs not necessarily be acrimonious and a collaborative approach can be adopted for the resolution of all issues incidental to a relationship breakdown;
- and

¹ See The Court of Appeal in its Judgment of *WW v LLN formerly known as LSM* (CACV 524/2019, 25 March 2020, [2020] HKCA 178) sets out, among others, the Court's views on the proper approach in preparing and using Form H, in particular paragraph 41 of the judgment, which is extracted below:

"41. As pointed out above, the parties and their legal representatives owe a duty to the court to prepare a Form H properly. It is wrong and unprofessional for a solicitor to insert unrealistic figures (be they too high or too low) in a Form H in order to achieve some forensic or bargaining advantage for a client. It is equally unacceptable for a Form H to be prepared negligently, without verifying if there is any reasonable basis for believing that the figures are accurate. As mentioned, such conduct is tantamount to misleading the court which is always regarded as a serious matter. When such a case occurs, the court may consider referring the matter to the Law Society for disciplinary proceedings."

- (h) where appropriate, Practitioners should assist the client to obtain support and professional help through referral to medical practitioners, counsellors, social workers and psychologists.

2.2 First Meeting

2.2.1 Practitioners should in all cases discuss with the client at the first meeting:

- (a) the method of communication with the client to ensure confidentiality is maintained;
- (b) the possibility of counselling being appropriate to help the client with differing emotions following a relationship breakdown;
- (c) the timescale and potential costs involved and how their case will be funded (in particular, solicitors must consider whether clients are or remain eligible for public funding);
- (d) whether any emergency steps are needed and the options available (including safeguarding the client, children or any assets);
- (e) how best to proceed with next steps, having regard to the proportionality of such steps and the emotional and financial costs of such steps;
- (f) court mandated procedures in resolving disputes on children and financial issues;
- (g) adopting a forward thinking approach towards resolving disputes and not dwelling on emotional issues that led to the relationship breakdown;
- (h) the appropriate form of dispute resolution (see Chapter 10 below); and
- (i) the fact that children should not be brought to the meeting/court hearings unless directed by the court.

2.3 Client's Information

2.3.1 Practitioners should advise the client to disclose all information relevant to the matter.

2.3.2 Practitioners should ask probing questions to extract the relevant information since the client may not understand what is relevant.

2.3.3 If the client is reluctant to disclose information, Practitioners should emphasise the impact of non-disclosure and the consequences of and adverse inferences to be drawn from non-disclosure, such as costs orders and the inability to give appropriate advice as a result.

2.3.4 Practitioners should be aware of the adverse consequences of self-help measures in obtaining confidential information belonging to other party² .

2.4 Examination of Documents

2.4.1 Practitioners should:

- (a) ensure that the client understands the contents and meaning of documents/agreements before he/she signs. This is particularly important when the client swears or affirms an affidavit/affirmation and/or signs a Statement of Truth which constitutes sworn evidence for which veracity is crucial; and
- (b) remind the client that any errors in these documents and/or any other information provided may undermine the client's credibility as a witness, which could have adverse effects on the outcome of the client's case or cause the agreement/the court order to be set aside.

2.5 Emotional Conditions

2.5.1 In extreme or crisis situations, Practitioners should be cautious when taking instructions from the client under emotional distress.

3. Communicating with other Parties

3.1 General Notes

3.1.1 Practitioners should avoid actions that have the sole or predominant purpose or effect of hindering, delaying or bullying other parties, and should encourage the client to adopt a conciliatory approach.

3.1.2 Practitioners should avoid the use of inflammatory or derogatory and/or emotive language that would result in provoking the other parties' emotions. Practitioners should not engage in/respond to communications using such language.

3.1.3 Practitioners should in all communications and representation/submissions briefly address the issues and avoid protracted and unnecessary arguments or assertions.

² [*Imerman v Tchenguiz and Others*](#) [2010] EWCA CIV 908 establishes the relevant principles on self-help disclosure;

3.2 Dealing with Unrepresented Litigants

3.2.1 Practitioners should:

- (a) when communicating with unrepresented parties, recommend that they seek independent legal advice³; and
- (b) take particular care to be courteous, restrained and patient, and maintain professional and co-operative interactions with the other party to set the right tone at the outset.

4. Communicating with other Practitioners

4.1 General Notes

4.1.1 In all dealings with other Practitioners, Practitioners should:

- (a) show courtesy and endeavour to create and maintain a good working relationship;
- (b) focus on issues that are relevant to the dispute and not to instigate a quarrel or arouse acrimony;
- (c) communicate in a non-confrontational and constructive manner designed to preserve dignity and encourage agreements; and
- (d) not denigrate the other Practitioners involved in the case to the client.

4.1.2 Please also refer to Chapter 11 - Relations with Other Solicitors of the Hong Kong Solicitors' Guide to Professional Conduct.

4.1.3 Practitioners are reminded not to disclose any documents in the proceedings to any third party (such as, banks) which are subjected to the parties' implied undertaking and Rule 121(2) of the Matrimonial Causes Rules, Cap. (179A).

5. Communications involving Children

5.1 Protection of Children

5.1.1 Practitioners should ensure that clients are asked to refrain from:

- (a) arguing in the presence of, or within earshot of the children;
- (b) discussing the family/parental conflicts with anyone, especially their lawyers, within earshot of children;
- (c) showing children any court or other documents pertaining to the proceedings;

³ Please also refer to [Chapter 9](#) - Conflict of Interest between Clients of the Hong Kong Solicitors' Guide to Professional Conduct.

- (d) discussing court events with children;
- (e) drawing the children into disputes for example, by asking the children to referee, take sides or be a messenger between the parties; and
- (f) being discourteous to the other partner, his/her extended family members or new partners, and making derogatory remarks about them in the presence of, or within earshot of, the children.

However, in certain appropriate situations, children should be told about the court's order in relation to them such as, their access time with a parent, or subject to their maturity, they should be given an opportunity to express their wishes which include meeting with the Judge and/or separate legal representation.

6. Children

6.1 Best Interests of Children

6.1.1 Practitioners must, in advising, negotiating and conducting proceedings, encourage both clients and other family members (where communication with the same is appropriate) to regard the best interests of the children as the paramount consideration. This should be in the forefront of Practitioners' mind at all times. In any case where the separating couple have dependent children, Practitioners should exercise particular care, even where there is no apparent dispute between the parents.

6.1.2 Practitioners should advise the client that the court will be approaching the matter from the viewpoint of what is in the best interests of the children and that this can override the wishes and interests of either of the parents or the wishes of the children.

6.1.3 Practitioners should emphasise the need for both parents to accept responsibility for their children, and that it is the children's right to have both parents involved in his/her upbringing and to have a positive relationship with them⁴.

⁴ The United Nations Convention on the Rights of the Child 1989 ("UNCRC") was extended to Hong Kong in 1994. Article 18(1) of the UNCRC states that "*States Parties...use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents..have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.*"

6.1.4 Practitioners should remind parents that they are in a position of trust in relation to their children, and that there will be a detrimental impact on the children's well-being and their clients' case if they fail to put the children's interests before their own.

6.2 Continuing Nature of Family Relationship

6.2.1 Practitioners should bear in mind and emphasise to the clients, throughout their case, the best interests of the children as the paramount consideration would be served wherever possible, by maintaining the relationship of both parents with the child, and recognising the benefits of a positive cooperative relationship between the parties as parents with common responsibilities for the upbringing and development of the child.

6.2.2 Practitioners should warn the client about the damaging effects of involving their children in disputes between their parents or encouraging them to take sides, and accordingly advise them against the same. Where appropriate, a neutral expert may be considered to assist the parties in their dispute.

6.3 Cooperation between Parents

6.3.1 Practitioners should aim to promote co-operation between parents in decisions concerning the children and should advise the client on the options available for appropriate dispute resolution processes outside of Court.

6.3.2 Practitioners should advise the client to consider the potentially adverse impact of contested family proceedings on their children.

6.4 Separate Issues of Children from other Considerations

6.4.1 Every effort should be made to avoid linking the issues of arrangements for the children on the one hand and finance on the other. One should never be used as leverage for the other. Wherever possible and practicable they should be referred to separately.

6.4.2 Practitioners should not be complicit in the making of applications for parenting orders which are solely or predominantly motivated by considerations other than the children's welfare. Likewise, Practitioners should attempt to dissuade parents from opposing an application for such reasons.

6.4.3 Practitioners should encourage the client to address the needs/interests of the children and the parents separately.

6.5 Separate Representation for Children

6.5.1 Practitioners must remember that the interests of the children may not coincide with those of either parent, and in certain cases, it may be appropriate for the child to be separately represented. Please refer to PDSL6: Guidance On Separate Representation For Children In Matrimonial And Family Proceedings dated 23 July 2012.

6.5.2 If requested by their client to have contact or interview their client's children, Practitioners should explain to their client that it is generally considered not appropriate for legal representatives to see their client's children. In any event, Practitioners should avoid meeting or discussing the case, with or without their client, in the presence of their client's children.

6.6 Judge Meeting the Child

6.6.1 Practitioners should advise the client that judges will not always agree to meet children and should let client know of PDSL5: Guidance on Meeting the Child dated 28 March 2012.

7. Financial Arrangements

7.1 General Notes

7.1.1 Practitioners should assist parties to resolve their differences speedily, fairly, and as costs effectively as possible.

7.1.2 Parties are encouraged to consider dispute resolution processes as set out in Chapter 10.

7.2 Disclosure of Information

7.2.1 Parties must provide full, frank, and clear disclosure of all material facts, information, and documents to enable proper discussion and negotiation to settle any ancillary relief claim. Practitioners should advise and remind the client of the same.

7.2.2 Practitioners are reminded of the ongoing duty of full, frank and clear disclosure, even after the evidence has closed; and the duty of the Practitioner to advise client that proper

discovery must be made and that the Practitioner must cease to act if the client refuses to accept such advice: *Vernon v Bosley (No.2)* [1999] QB 18⁵

- 7.2.3** Parties are encouraged to complete and exchange their respective Form Es: Financial Statement (see Practice Direction 15.11 and PDSL10.4) prior to having settlement discussions in order to have an informed decision and to enable Practitioners to properly advise clients.
- 7.2.4** Practitioners shall advise the client of the potential consequences of failure to make full and frank disclosure of their financial position, which could result in, including but not limited to adverse costs consequences and the award or consent summons being set aside for material non-disclosure. Where fraud is established the burden of proof of materiality shifts to the defaulting party.⁶
- 7.2.5** Please refer to PDSL10.3: Guidance on Setting Aside a Consent Order on Ancillary Relief dated 18 January 2019.
- 7.2.6** Please refer to PDSL10.2: Guidance Note on Judgment Summons Procedure dated 18 January 2019.

8. Agreements

8.1 General Notes

- 8.1.1** Practitioners should inform separating couples that they can only act for one party and that the other party may obtain independent legal advice.
- 8.1.2** Practitioners should ensure that the client is focused on the children's best interests in making any agreement about parenting matters and the provisions of s.18, MPPO Cap 192

⁵ *Per* Stuart-Smith L.J. Where there is a danger that the court will be misled, it is the duty of counsel to advise his client that disclosure should be made. If the client refuses, then it is not as a rule for counsel to make the disclosure himself, but he can no longer continue to act (post, p. **39A-B**). [1999] Q.B. 18 Page 20

Per Thorpe L.J. If his client demurs in the communication of necessary material, counsel has a duty to disclose the relevant material to his opponent and, unless there is agreement between the parties otherwise, to the judge (post, p. **64B-C**).

⁶ See: *Sharland v Sharland* [2016] AC 871; *Gohil v Gohil (No.2)* [2016] AC 849

which prohibit the making of a Decree Absolute unless the Court has considered the effect on children of the family.

- 8.1.3** Practitioners should give a clear warning to the client of the consequences of the making of financial orders on divorce.
- 8.1.4** Practitioners should advise the client on the status of a separation or post-nuptial agreement and advise the client of the requirement that such agreement has to be made an Order to enable enforcement; otherwise, it cannot be enforced as a court order.
- 8.1.5** Practitioners should seek to support the client's wish to enter into agreements unless the agreements have been tainted by family violence, or the agreements have been reached as a result of duress or incomplete disclosure, or the agreements are unworkable and cannot be made workable.
- 8.1.6** Practitioners should question the client as to the circumstances in which the agreement was reached to determine whether there has been violence or duress or other vitiating circumstances.
- 8.1.7** Practitioners should ascertain whether the client has a full understanding of the family's financial circumstances to determine whether the client has sufficient information to enter the agreement.
- 8.1.8** Practitioners should advise the client as to the most appropriate way to record the agreement and, as appropriate, draft and present to the court any necessary consent summons or prepare any necessary separation agreement.
- 8.1.9** Practitioners should ensure that the client fully understands the terms and effect of the agreement and the alternative options available if the agreement is inappropriate or inadequate.
- 8.1.10** Practitioners should advise the client on the implications of the agreement reached and whether it is in the client's best interests, both in the short term and the long term.

8.1.11 Prior to signing any settlement agreement (or Consent Summons) between the parties, each party should have been advised of their right to seek independent legal advice as to the terms of the settlement agreement (or Consent Summons)⁷.

8.1.12 Practitioners should explain to the client the nature, enforceability, and consequences of any undertakings or terms of the Orders or Agreements.

9. Family Violence

9.1 General Notes

9.1.1 Practitioners should be aware of:

- (a) any incidents of domestic abuse, the need to screen for it and to make a risk assessment;
and
- (b) civil and criminal remedies.

9.2 Role of Practitioners

9.2.1 The role of Practitioners is:

- (a) to recognise that family violence can come in many forms and is a serious problem;
- (b) to be sensitive to different needs and experiences of clients from different backgrounds and cultures;
- (c) to provide the client with an opportunity to talk about violence issues if they wish;
- (d) not to be judgmental;
- (e) to have information about other sources of help and support available and keep such information up to date;
- (f) to consider whether the client should obtain an injunction for non-molestation and its related orders; and
- (g) to consider whether it should draw the attention of the court under PDSL 10.1 for the Guidance on Child Arrangements: Domestic Violence.

⁷ On the drafting of consent summonses in cases where one of the parties is not represented. The following practice should be adopted:-

- (a) Solicitors should obtain a written acknowledgement (in the appropriate language) from the non-represented spouse confirming that he or she has been informed on the right to seek independent legal advice.
- (b) If the consent summons is in English, confirmation by the solicitor that the document has been properly explained and, where necessary, interpreted to that spouse.
- (c) Draft consent orders failing to meet judicial scrutiny will be rejected with the consequential costs orders.

9.3 Duty of Practitioners

9.3.1 Safety of the client and any children needs to be a foremost consideration. As soon as family violence is revealed as an issue, Practitioners should consider the safety of clients and any children and in appropriate cases consider early referral to a specialist service. The following should be considered:

- (a) Practitioners should explain their duty of confidentiality to the client, including the limits of that confidentiality, and the duty of confidentiality does not extend to information about the commission of a crime, including child abduction, or about harm or the threat of harm to a child;
- (b) when the clients are in hiding from their partner/spouse, Practitioners should discuss with them the possible risk that their whereabouts may be disclosed once proceedings are issued and possible actions needed to be considered including application for non-disclosure of whereabouts or addresses; and
- (c) Practitioners should consider carefully whether an injunction is appropriate in such circumstances.

10. Appropriate Dispute Resolution

10.1 General Notes

10.1.1 Practitioners should advise clients of the various channels of dispute resolution processes generally available. Such options include but are not limited to:

- (a) direct discussions between the parties;
- (b) collaborative practice;
- (c) mediation (to include child-inclusive mediation, if appropriate);
- (d) negotiation with the assistance of the parties' solicitors;
- (e) parenting co-ordination;
- (f) private family adjudication; and
- (g) litigation – but as a last resort, wherever possible.

10.1.2 Practitioners should inform the client that some of these avenues may be pursued in tandem and are not always mutually exclusive. Such options can be considered even after legal proceedings have started.

10.2 Assistance during Appropriate Dispute Resolution

- 10.2.1** Practitioners should ensure that the chosen dispute resolution process is supported by independent legal advice ⁸.
- 10.2.2** Practitioners should advise clients that seeking independent legal advice between negotiations may be helpful in assessing the appropriateness of the proposals, save that in the case of a Private Financial Adjudication, legal advice and representation is a prerequisite to an agreement.
- 10.2.3** Practitioners should assist clients to provide full and frank financial disclosure and assess any disclosure which takes place in the negotiations.
- 10.2.4** Practitioners should have regard to the best interests of any children when advising on settlement proposals.
- 10.2.5** Practitioners should provide a realistic assessment when assisting clients in coming up with a settlement proposal to ensure that it will not be unworkable.
- 10.2.6** Practitioners should consider whether other experts would assist in the dispute resolution process, for example a child expert, a financial advisor, tax planner, etc. In such an event, the expert should ideally be appointed on a joint basis where appropriate. Please refer to PD 15.12: Matrimonial Proceedings and Family Proceedings dated 11 February 2022 on Expert Evidence under item K.
- 10.2.7** Practitioners should ensure the client understands the pros and cons of each process in assisting them in deciding on the process best suited to them.

11. Court Proceedings

11.1 General Notes

⁸ In Private Financial Adjudication, the initial appointment must be after legal advice: see para 14 of PDSL9 - *Prior to any Private Financial Adjudication taking place, the parties (including third parties, if any) shall sign an unequivocal agreement in the presence of witnesses ("PFA Agreement") and such agreement shall contain the following terms: (1) All parties are legally represented and each of them has obtained adequate and independent legal advice on the nature, implications, procedures and the issue of confidentiality concerning the PFA.*

11.1.1 The taking of any actions or proceedings which is likely to cause or increase animosity between the parties must be balanced against the likely benefit to the client and the family. Wherever possible, the parties should consider, if appropriate, the settlement or the narrowing of issues prior to the issuance of proceedings.

11.1.2 Practitioners should conduct family law proceedings, including the preparation, advocacy and implementation, in the most cost-effective manner and in such a way as not to increase hostility unnecessarily and as to allow reasonable opportunity for settlement⁹.

11.1.3 Practitioners should:

- (a) ensure the client fully understands the implications and obligations arising from Court orders;
- (b) write to clients confirming the outcome of proceedings; and
- (c) remind the client of restrictions on the dissemination of information about the existence of proceedings, and information contained in documents produced for the purposes of proceedings.

11.1.4 If appropriate, Practitioners should remind the parties to participate in a family dispute resolution such as negotiation, collaborated practice, mediation, parenting coordination and/or private financial adjudication.

12. Jurisdictional Issues

12.1 Awareness

12.1.1 Practitioners should consider whether there are issues or potential issues relevant to jurisdiction. Practitioners should also have regard to issues relevant to forum-shopping.

12.2 Unilateral Removal of Children

12.2.1 Practitioners should advise the client that The Hague Convention on the Civil Aspects of International Child Abduction was incorporated into Hong Kong law through the enactment of the Child Abduction and Custody Ordinance (Cap.512).

12.2.2 Any removal of children out of Hong Kong would require consent of the other parent or an order of the Court.

⁹ See paragraphs 30 and 31 of the Judgment, [LLC v LMWA and Another](#) CAMP 143/2018, 27 February 2019, [2019] HKCA 347