

A Gentle Divorce in Hong Kong: Fact or Fallacy?

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In Hong Kong, as with other jurisdictions, most divorces are far from "gentle" for the parties. Possibly only in the minority of cases when both parties have moved on and are emotionally at the same stage of acceptance, or when there has been a substantial passage of time, or when the interests of the children are truly prioritized by both parents and they still remain respectful and open to preserving the welfare of their children, can a "gentle" divorce be contemplated or achieved. Yet we believe a gentle divorce is not a myth, and we intend to explore in this paper how best to help our clients achieve this.

In Hong Kong, our function and our training as family lawyers does not specifically include learning the skills of dealing with the emotional impact of divorce and is mostly focused upon helping one of the parties with the formalisation of this catastrophe, i.e., to do the following:

- Achieve the dissolution of a marriage and move on to the "divorced" status
- Assist in making formal and workable arrangements for the care of the children
- Divide the assets fairly and provide for or, where appropriate, obtain a reasonable level of maintenance for one party and the children

How do Hong Kong family lawyers achieve all of the above in

a "gentle" manner when emotions are bound to impact upon all of these functions? In some cases, is a "gentle" approach counterproductive – will it encourage the other party to take liberties and to gain a position which is unfair?

A. Creating options for our clients within the process

As family lawyers in Hong Kong, the first opportunity we have to promote a "gentle divorce" is at the initial consultation when we are given the perfect opportunity to help shape the approach the divorce process will take. Our clients should be made aware that there are other options outside of litigation to resolve any conflict.

There are usually three aspects of a divorce where we need to help our clients in the aftermath of the breakdown of a marriage:

1. The divorce itself – Hong Kong still retains a fault-based system.

The details of each party's behaviour which led to the breakdown of the marriage and all of the emotional fallout frequently form the basis of the actual divorce itself because we retain a fault-based system.

The gentle way to utilize a fault-based system is to use it as a means to start proceedings quickly if it is necessary to seek the Court's assistance to resolve any urgent matters, but to plead the particulars of behaviour in a mild and non-offensive manner.

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2. Children issues

In Hong Kong, we are still using the antiquated concepts of custody, care and control and access.

Custody involves parental responsibilities, which a married couple share during the marriage. On divorce, custody may be granted solely to one parent or continue to be exercised jointly by both parents. A custody order enables one or both parents to continue to make the major decisions in a child's life, such as religious upbringing, education, what extracurricular activities to take, relocation to another jurisdiction and whether to allow medical treatment.

The parent with care and control will have the child's home base with him/her. Usually, the parent known as the primary carer will be granted the care and control of the children. Care and control can be granted solely to one parent or jointly to both parents. Joint care and control, with the children spending a significant amount of time in both parents' homes, is still a novel concept in Hong Kong.

The parent without care and control would normally have access to the children. This can be clearly defined or left flexible, depending on what best suits the children and the parents.

In Hong Kong, any arrangements for the children are guided by what is in a child's best interest and the wishes of the parents are secondary to that.

3. Finances

In Hong Kong, the Court can make a wide range of orders including spousal maintenance, children's maintenance, lump sum payments, transfer or sale of property orders, property adjustment orders or variation of settlement orders.

Maintenance to a spouse can be granted until the spouse remarries or until the death of either party, whichever happens earlier. Alternatively, it may end upon cohabitation with another, the children reaching a certain age or after a defined period of time. Where appropriate, no maintenance may be ordered.

A child's maintenance usually applies until the child turns 18 or ceases full time education, whichever happens later.

It is also possible to order a clean break settlement, which means there will be no spousal maintenance.

We do not have a set formula for the distribution of assets and much will turn on the facts of each case. Our courts are obliged to consider a number of factors set out in Section 7 of our *Matrimonial Proceedings and Property Ordinance*.

The leading authority in Hong Kong is the case known as *LKW v DD*, handed down from our Court of Final Appeal in November 2010.

This authority obliges our Court to achieve fairness in the division of assets and prohibits any discrimination on the grounds of gender or domestic roles played by each party. At the outset, the Court is to identify the family assets and provide for the needs of the parties and the children first. Only where there is any surplus of family assets will the Court look to share them equally between the parties, unless there are any special circumstances which justify departure from equality. Factors which might justify an unequal split of the surplus of the assets would include a short marriage, significant assets from external sources which were not accrued through the joint endeavours of the parties during the marriage (for example, by way of inheritance or gifts), or the existence of premarital assets. Our Court of Final Appeal further warned that equality in treatment does not necessarily mean equality in division of assets, as dealing with the needs of the parties is an overriding factor.

B. Alternate family dispute resolution

Alternative ways resolving family disputes have steadily increased in popularity in Hong Kong over many years. The "gentler" practice is to suggest that your client considers a number of options to resolve any issues in dispute relating to the breakdown of the marriage, the children and finances before instituting proceedings, and thereby try to reach an agreement which can be attached to a Divorce Petition. Alternatively, they can run concurrently with proceedings, or in some cases require a moratorium in the proceedings so as to enable the parties to focus on the negotiations. This is fortunately becoming a more common occurrence in Hong Kong.

1. Mediation – available in Hong Kong since or around 2000

The Family Court was a pioneer in Hong Kong in embracing the concept of mediation over 12 years ago. The 3 Year Pilot Scheme on Family Mediation, introduced in May 2000 by way of a Practice Direction, substantially pre-dated the introduction of civil justice reforms in Hong Kong which mandated mediation prior to the pursuit of all civil claims; mediation for these claims was only introduced some ten years later in January 2010. Amongst the Pilot Scheme provisions to encourage mediation was:

- The setting up of a Mediation Coordinator's office in the Family Courts, both in the District and High Court levels, with the provision of information sessions and the arrangements made through that Office for the involvement of a mediator;
- The introduction by way of Practice Direction of a Family Mediation Certificate which was to be signed by each party and their lawyers (if any) which identified to the court whether or not parties would engage in mediation;
- The preparation of a Mediation Booklet, explaining the mediation process to the parties;

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- A substantial increase in trained mediators from the fields of solicitors, barristers, psychologists and counsellors;
- The expansion of legal aid to cover the costs of mediation;
- Much later, in 2008/09, just prior to the introduction of mediation in civil litigation in general, there was a further increase in the number of lawyer mediators trained in mediation generally, not just in family mediation.

2. Financial Dispute Resolution – available in Hong Kong since 2003

Procedures within the court process for Financial Dispute Resolution (FDR) have been operating successfully by way of Practice Direction since November 2003. This was accomplished without any legislative changes.

The gentler approach was to mandate a process which must be followed before any party to divorce proceedings can pursue a full blown financial application in court with all of the costs and distress which a full trial entails. Amongst other things, the FDR process requires:

- The completion of standard financial disclosure by both parties (Form E);
- A Family Court judge assigned to the case who will assist the parties to reach an agreement. Important in this process is the ability of the FDR judge to address his or her questions and views directly to the parties if required and to give an indication of what might be an expected solution if the parties were to proceed to full trial. This is often a more informal, relaxed atmosphere than the conventional trial process.
- The discretion of the FDR judge to order prior to the FDR any further disclosure by way of questionnaires and answers. The questions to be answered are to be vetted by the Court, and our Practice Direction specifically requires the questions to be focused on the issues at hand; the old-fashioned “fishing exercise” of asking generic, open-ended questions without basis is no longer allowed.
- The requirement of the parties to identify a chronology of significant/relevant events, a list of the issues in dispute and to disclose to the FDR judge all of the without prejudice correspondence;
- The ability of the FDR judge to adjourn the matter for mediation or for further negotiations, or to adjourn to another FDR if an agreement has not yet been reached but appears possible with more time

- If no agreement can be reached, then the transfer to a different judge entirely who will not be privy to the without prejudice correspondence.

3. Children’s Dispute Resolution – came into effect on 3 October 2012

Prompted by the success of the FDR process, it is widely accepted in Hong Kong that disputes regarding children need to be resolved prior to the resolution of long-term financial issues. It was thought that the same process of assistance by a judge in the negotiation and discussions was required to more appropriately, and in a gentler and less destructive manner, resolve issues regarding children.

It has taken from 2003 to 2012 to explore the mechanism of a bespoke Children Dispute Resolution (CDR) process for Hong Kong and to persuade the powers that be to introduce it into our Courts. It finally came into effect on 3 October 2012 by the same means – a Practice Direction involving no legislative change. It employs the same methodology: a standard form (known as the Children’s Form) which each of the parties has to complete, but with much fuller information about the existing and future arrangements for the children. It is a conscious move away from the narrative affidavit in which parties feel free to lay blame, criticize, vent their anger and recite the litany of bad behaviour of the other parent and which tends to increase the hostility and severely impact any possibility of future cooperation in the care of the children.

The issue in Hong Kong in respect of CDR was whether such a process should be conducted on an open or a without prejudice basis. The final decision is that the CDR process, unlike the FDR process, will be conducted on an open basis because it relates to the welfare of children and to hide behind the “without prejudice” tag is inappropriate when the best interests of children are at the heart of the dispute. The Court should be provided with all relevant information and proposals relating to the children in question when it is requested to consider matters affecting their welfare.

Both the FDR and CDR processes have been initiated by our Family Court judges in consultation with the Family Court Users Committee and interested stakeholders including, amongst others, the Bar Association, the Law Society and the Hong Kong Family Law Association in an effort to make the process of resolving family disputes less adversarial, giving judges better control and case management. The idea is that, within the court system, the focus should be on settlement and not protracted litigation.

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4. Collaborative Practice

In comparison with other western jurisdictions such as the US, Canada, England and Wales, Australia and many others in continental Europe, Hong Kong has been slow to adopt collaborative practice. As with all of the above changes in the approach of the Family Court, this process has been introduced in Hong Kong not by the legislature, but by pressure from family lawyers to find a better and kinder way to resolve family disputes.

In February 2010, the Hong Kong Family Law Association set up the first multidisciplinary training session for a collaborative approach to family law, training solicitors, barristers, psychologists, mediators, counsellors and accountants together.

The Hong Kong Collaborative Practice Group was subsequently formed, and a further training session, which took place in October 2011, saw more of our multidisciplinary colleagues trained. We now have 40 trained professionals in our group. More information about the group can be found at www.hkcpq.blogspot.com.

There are, to the best of our knowledge, several collaborative disputes in the process of resolution, but as yet no news of any successes.

5. Arbitration

To the best of our knowledge, there are no developments within the family law field in Hong Kong with regard to arbitration of family disputes as yet, although we are watching with interest as England and Wales proceeds down this path.

C. There is no help from our legislature with a gentler approach to the law as it applies to children

Quite simply, there has been no progress at all in Hong Kong in respect of modernizing the law regarding the obligations of parents and other significant adults toward their children. Our Law Reform Commission (LRC) published a report on Child Custody and Access as long ago as 7 March 2005. None of its 73 recommendations, including the replacement of the concepts of custody, care and control with the concept of joint parental responsibility, have been implemented, despite immense pressure from the Bar Association, the Law Society of Hong Kong, the Hong Kong Family Law Association and many other interested stakeholders over the years.

The up to date position is a Public Consultation Document entitled "Child Custody and Access: Whether to implement the Joint Parental Responsibility Model by Legislative Means," published by the Labour and Welfare Bureau in December 2011,

some five and a half years after the LRC report and its multiple recommendations.

The process of the public consultation ended in April 2012. As far as we are aware, there has been no feedback from the Bureau as of the time of publication of this article.

The thrust of the consultation document appears to be that of doing nothing, the justification being that despite the immense pressure from the legal sector, including our top family judges and those in our Court of Appeal calling for the change, there is opposition to any legislative changes by social workers and by women's groups.

The Labour and Welfare Bureau draws support for their inaction by the retention in Singapore of the concepts of custody and access and the decision there not to implement the joint parental responsibility model. However, Hong Kong can differentiate itself from the position in Singapore, where the Singaporean Court advocated the promotion of parental responsibility through the use of joint custody or no custody orders. By contrast, the Hong Kong courts have been vocal in commenting on the long overdue implementation of the LRC report in a number of recent judgments. These judgments all commented on the unfortunate situation in Hong Kong, in that the LRC's recommendations following its report on Child Custody and Access in 2005 have yet to be acted upon.

Hong Kong can be further differentiated from Singapore as the latter has legislation enshrined in their Women's Charter, particularly under Part VI, Section 46(1) in that:

"Upon the solemnization of marriage, the husband and the wife will be mutually bound to cooperate with each other in safeguarding the interests of the union and in caring and providing for the children."

Because of this section, there is a positive duty for Singaporean parents to be responsible and cooperate with each other in caring and providing for their children. Hong Kong, however, has no such legislative provisions. Further, the Hong Kong legislation does not allow the Court to make a "no custody order" at present, which is one of the options in the Singaporean model.

D. Creating options for our clients outside the legal process – a multidisciplinary approach

We believe that we should not deal with family disputes simply as legal disputes. Family lawyers in Hong Kong are increasingly embracing a much wider approach which draws upon the expertise of other appropriate disciplines to resolve family disputes. Of course, for many years we have turned to

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the professional expertise of accountants, other financial experts and valuers to assist with analysing and comprehending complex financial arrangements and reporting to court in respect of the finances of a couple; now we are turning to healthcare experts, not just for reports, but for their help from the outset.

The first thing we should be considering as family lawyers is whether our clients need the immediate assistance of mental health professionals who are equipped to deal with emotions and to provide advice on what is an appropriate approach to helping their children through a most difficult time.

It is increasingly the case that we now call upon the assistance of psychologists, psychiatrists, social workers and counsellors, not simply for the purpose of producing an expert report to the court in due course, but more importantly to become involved from the outset to counsel, advise and manage the mental and emotional wellbeing of our clients and their children through the process. They have become invaluable in helping the lawyers and parties in understanding the non-legal aspects of the consequences of a divorce, and often if appointed jointly, the mental health professional provides tremendous assistance through his/her neutral input in the resolution process.

Our view is that divorce should not be the sole province of lawyers; we need to consider the necessity and benefit of a multidisciplinary approach. In Hong Kong we also have other developing areas, such as play therapists and even parenting coordinators, who are slowly becoming available to help in a gentler, more constructive manner.

Unfortunately, in Hong Kong, the most relevant point for family law practitioners is that appropriate and speedy help from other disciplines is not easy to find because:

- Our multidisciplinary professionals often wear several hats as there is a limited pool and many are trained in more than one discipline (i.e., some are mediators/lawyers/counsellors and it is easy for them to fall into conflict in the roles they take;

- There is in Hong Kong a shortage of mental health care professionals, especially those willing to do work which may ultimately involve them in reporting to the court.

E. Summary

1. Our laws in Hong Kong in relation to the process of divorce and in relation to our approach to parental responsibilities are proving very difficult to progress and change.
2. Nevertheless, great steps have been taken by our Family Court judges and those professionals who work within the Family Court system to make the process of divorce a much gentler and less destructive process.
3. Through these efforts, the means of achieving a gentle divorce are already there within the system: the long established process of mediation, the successful implementation of the FDR process, collaborative practice and the recently introduced CDR.
4. There is still a great deal to be done in changing the mindset of those lawyers who deal with this area of the law as pure litigation.
5. There is still a great deal to be done in changing the mindset of some of our clients who expect to embark upon litigation with all guns blazing and without regard to the consequences.
6. We all need to be aware that any one or a combination of the existing or newly developing processes are available for us to use, but above all else, as family lawyers, there is an onus upon us to inform our clients about the number of different possibilities in resolving a conflict. Having a lawyer does not automatically mean litigation. We need to understand that the resolution of a legal problem is best tackled by creating options for our clients within and outside the court process.