

9TH LAWASIA FAMILY LAW CONFERENCE – PENANG, MALAYSIA

A GENTLE DIVORCE IN HONG KONG? FACT OR FALLACY?

The Emotional Context in which we all operate whether in Hong Kong or elsewhere in the world

In Hong Kong, as with other jurisdictions, most divorces are far from “gentle” for the parties - how can such an event be gentle in terms of emotions - the breakdown of a close and loving relationship which each party had anticipated would last for their lifetime, the loss of a partner with whom the most intimate moments have been shared, the prospect of your children not living with you for significant periods of time - those aspects of divorce are surely never gentle, and can be overwhelming. 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 parties and the parties 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 predominantly focused upon helping one of the parties with the formalisation of this catastrophe in legal terms, ie to:

- 1. Achieve the dissolution of a marriage, move on to the “divorced” status** – this function is not really a major legal drama where the basis for divorce is separation for a period of one or two years rather than fault related.

2. **Assist in making formal and workable arrangements for the care of the children** - this can be the source of some of the most heart-rending decisions the parties or a court has to make, and consequently how family lawyers approach this process can have a major impact on the behaviour of their clients and the outcome for the children.

3. **Divide the assets fairly and provide for or where appropriate, obtain a reasonable level of maintenance for one party and the children** – whilst not as emotionally charged, this area is also one in which the approach of the family lawyer can have a major impact on behaviour of divorcing couples and also the costs of the process.

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 counter productive – 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. At the very first meeting, when our clients arrive with little idea of what the next steps should be, or at the very least undecided, they look to us for options and guidance, and 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 3 aspects of a divorce where we need to help our clients with in the aftermath of the breakdown of a marriage. If the parties have not been separated for the required period of one or two years, this is the first chance for us to utilise a “gentle” approach. Should we be advising our clients not to embark

upon a litany of horrific behaviour in order to commence their divorce proceedings? Should we be advising our clients to focus on the future rather than focus on the wrongs of the past? We believe that the answers to both questions are “Yes”.

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

In Hong Kong, our first difficulty is that the details of each party’s behaviour which led to the breakdown of the marriage and all of the emotional fall out frequently form the basis of the actual divorce itself, because in Hong Kong we retain a fault based system. However, there are surprisingly some advantages of retaining the fault based system

- (i) Timing - we are able to issue proceedings immediately and do not have to wait for a statutory period of separation
- (ii) Immediate proceedings can assist the client in knowing that their concerns are heard and can be acted upon promptly. If urgent, Court assistance is available.
- (iii) We do not need the other party’s consent

The disadvantages are obvious:

- (i) Immediate proceedings may raise the level of acrimony – it is an opportunity to vent anger, to tell one side of the story, get this story on the record and in such a manner which seeks to prejudice the financial settlement and the arrangements for the children.
- (ii) Proceedings immediately start off in a negative and adversarial manner and are likely to continue in that vein.

The gentle way to utilize a fault based system is to use it as a means to start proceedings quickly, if that is necessary, in order to seek the Court’s

assistance to resolve any urgent matters, but to plead the particulars of behaviour in a very mild and non-offensive manner.

Amongst many family law practitioners, this has become a regular feature of Hong Kong divorce petitions based upon “fault”. Our divorce courts frequently see and encourage petitions which plead, amongst other things that:

- * the other party has not shown the Petitioner the usual love and affection he or she would expect from a spouse:
- the other party has led an independent and separate life socially.
- The other party has demonstrated a different outlook or attitude to life which is incompatible with that of the Petitioner.

If separation has occurred but for a period of less than a year, that can also be cited by the Petitioner.

This is the first way in which a Hong Kong family lawyer can start to make the divorce itself gentle and not the focus of any contested hearing.

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 up-bringing, education, what extra-curricular activities to take, relocation to another jurisdiction and whether to allow medical intervention.

The parties or the Court will also need to decide on care and control and access. The parent with care and control will have the child's homebase 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 is still a novel concept in Hong Kong, with the children spending a significant amount of time in both parent's homes, but it has become more common in the past few years.

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 would be guided by what is in a child's best interest, and the wishes of the parents are secondary to that.

A Practical question – for a couple who, having already separated, cannot agree on the best access regime for their children – what is the best first step?

- * A lawyer's letter which sets out in detail all the grievances of one's client and demanding immediate changes, with the threat of going to court?

- * A lawyer's letter setting out the difficulties and a genuine concern to work together to find a solution?

- * An immediate application to court for an Order on interim or long term children arrangements?

- * An appointment with an independent and professional third party, such as a counsellor, therapist, psychologist, mediator, or parental co-ordinator to find out the sort of arrangements appropriate for children of their age and to help the children and their parents deal with the breakdown of the marriage.

Of course, each of those options may be appropriate depending upon the detail of the circumstances provided to us, but it is clear that family lawyers must set out the options for our clients, and we need to change our mindset from the start - we need to be creative and use all of the tools at our disposal - not just the formal legal letter, or the immediate application to court.

3. Finances

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

Maintenance to a spouse can be until the spouse re-marries or until the death of either party, whichever the earlier. However, depending on the background of the case, maintenance can also end upon cohabitation with another, the children reaching a certain age or for a defined period of time. Where appropriate, no maintenance may be ordered.

A child's maintenance is usually until the child turns 18, or ceases full time education, whichever the 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 on each case. Our Courts are obliged to consider a number of factors in Section 7 of our Matrimonial Proceedings and Property Ordinance, namely:-

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (c) the standard of living enjoyed by the family before the breakdown of the marriage;
- (d) the age of each parties to the marriage and the duration of the marriage;
- (e) any physical or mental disability of either of the parties to the marriage;
- (f) the contributions made by each of the parties to the welfare of the family including any contribution made by looking after the home or caring for the family; and

- (g) the value to either of the parties of any benefit lost as a result of the dissolution of the marriage, for example, a Pension.

Our leading authority in Hong Kong is from our Court of Final Appeal, handed down in November 2010. It is the case known as *LKW v. DD*. 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 justifying such a departure of equality of division of those surplus assets. The reasons for a departure from an equal share must be explained by the Court. 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 endeavors of the parties during the marriage, for example by way of inheritance or gifts, existence of pre-marital assets, or where there are a few or no assets included during the marriage. However, our Court of Final Appeal further warned that equality in treatment does not necessary mean equality in division of assets as dealing with the needs of the parties is an overriding factor.

It is within this context that Hong Kong family lawyers assist their clients in working out an appropriate financial settlement.

B) ALTERNATE FAMILY DISPUTE RESOLUTION

Alternative ways of resolving family disputes have steadily increased in popularity in Hong Kong over many years now – 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 in 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 predated 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 10 years later in January 2010. A copy of the current Family Mediation Practice Direction is **attached**.

Amongst the provisions to encourage mediation was:

- * the setting up of a Mediation Co-ordinator'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 the parties would engage in mediation;
- * The preparation of a Mediation Booklet, explaining the mediation process to the parties;

- * A substantial increase in trained mediators from the fields of solicitors, barristers, psychologists, counselors;
- * 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. A copy of the up to date Practice Direction is **attached**.

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 in 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 on hand, and the old fashion “fishing exercise” of asking generic, open ended questions without basis are 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 – about to be introduced in Hong Kong in or around September 2012

Prompted by the success of the FDR process, it is widely accepted in Hong Kong that, disputes regarding children would 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 children issues.

It has taken from 2003 to 2012 to explore the mechanism of a bespoke Children Dispute Resolution process (CDR) for Hong Kong and to persuade the powers that be to introduce it into our Courts. It is not yet introduced, but it is expected to come into effect in September 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 dispute and severely impact any possibility of future co-operation in the care of the children.

The issue in Hong Kong in respect of CDR, was whether such process should be conducted on an open or a without prejudice basis. The final decision is that the CDR, 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 was 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 of 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 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, focus should be on settlement and not protracted litigation.

4. Collaborative Practice

In comparison with other western jurisdictions, such as the USA, Canada, England and Wales, Australia, and many others in continental Europe, Hong Kong has been slow to adopt collaborative practice. In common 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 multi disciplinary training session for a collaborative approach to family law, training solicitors, barristers, psychologists, mediators, counselors 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 multi disciplinary colleagues trained. We now have 40 trained professionals in our group. More information about the group can be found at www.hkcpg.blogspot.com.

There are, to the best of our knowledge, several collaborative disputes in 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 RELATES 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 towards their children. Our Law Reform Commission published a report on Child Custody and Access as long ago as 7th 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 many 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 yet.

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 including 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 Law Reform Commission's recommendations following its report on Child Custody and Access in 2005 have yet to be acted upon.

Hong Kong can further be 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 co-operate with each other in safeguarding the interests of the union and in caring and providing for the children.”

Hong Kong has no such legislative provisions. Because of this section, there is a positive duty for Singapore parents to be responsible and co-operate with each other in caring and providing for their children. 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 MULTI DISCIPLINARY 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 the professional expertise of accountants, other financial experts and valuers to assist with analyzing and comprehending complex financial arrangements, and reporting to court in respect of the finances of a couple; now we are turning to health care 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 care 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 counselors 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 well being of our clients and their children through the process. They have become an invaluable tool 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 their neutral input in the resolution process.

Our views are that divorce should not be the sole province of lawyers – we need to consider the necessity and benefit of a multi-disciplinary approach. Now, in Hong Kong we also have other developing areas, such as play therapists and

even parenting co-ordinators are slowly becoming available to help in an 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:

- Our multi disciplinary professionals often wear several hats – there is a limited pool and many are trained in more than one discipline, eg. some are mediators/lawyers/counselors 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 soon to be 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.

Dated 5th July 2012

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