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# THE CASE FOR MANDATORY MEDIATION TO EFFECTIVELY ADDRESS CHILD CUSTODY ISSUES IN HONG KONG

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ABSTRACT

The use of mediation, as a viable and effective alternative dispute resolution process to litigation, is now firmly established, especially in dealing with family law issues. In many common law jurisdictions, courts have adopted the use of mandatory mediation to specifically address child custody disputes or issues involving children. However, to date, Hong Kong has not opted to impose mandatory mediation to resolve such issues. The purpose of this article is to review the current state of mediation in Hong Kong with respect to child custody issues, conduct a multi-jurisdictional analysis of whether mandatory mediation is used in other common law and civil law jurisdictions to resolve children's issues, evaluate the benefits and disadvantages of mandatory mediation, and to propose a way forward for Hong Kong in better dealing with children's issues in family law disputes.

## INTRODUCTION

When there is a breakdown of the family, leading to separation or divorce, several matters need to be resolved. Two of the most important considerations are ancillary relief for either party to the divorce and issues relating to children. However, divorcing couples often give too much weight to the division of assets at the expense of the welfare of children.[1] In family disputes, child custody issues should be of primary concern and dealt with in a more sensitive way. In recent years, a new development has emerged in Hong Kong's approach to handling family disputes, including issues relating to children, a development

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which may not be considered a trend in other common law jurisdictions, such as the UK, where such recommendations were adopted nearly a decade ago. In 2003, the Law Reform Commission of Hong Kong's report on the family dispute resolution process indicated a need to introduce mediation at the early stages of the dispute. This was followed by the 2009 Civil Justice Reforms legislation, Practice Direction 15.12 (Matrimonial and Family Proceedings), and Practice Direction 31 (Mediation-General), all of which now formally require that parties and their lawyers make a concerted effort to engage in mediation to resolve their disputes. Practice Direction 31, in particular, makes mediation the primary dispute resolution process for nearly all civil disputes, with few exceptions.

Today, there is an increasing trend in the use of mediation to resolve family issues, especially in Hong Kong (Alexander, 2002). Judges and scholars have recognized that the process of litigation does not actually guarantee natural justice and due process, and may instead cause unwarranted complications (Houzhi, 2009: 33). It has been argued that, compared with litigation, mediation is more efficient in terms of both costs and time (Parkinson, 2011). Acrimonious behavior may be destructive to family relationships, especially where children are involved, and the adversarial system is no longer considered the most appropriate means for resolving familial disputes (Holtring, 2007: 3). The adverse effect of the adversarial process on family disputes can be minimized by actively promoting the use of mediation at an earlier stage (The Law Reform Commission of Hong Kong, 2003: 16). Studies have shown that the use of mediation to resolve or overcome disputes that arise between separating couples results in substantial benefits (Yuk-Chung Chan et al, 2007: 7). Other countries also share the same view in recognizing the advantages of mediation. These jurisdictions have taken a further step by incorporating mandatory mediation as an indispensable component of their legal system, especially in the field of family law.

Section 'Review of Child Custody Issues in Hong Kong Family Law' of this article begins by discussing the status of child custody issues in Hong Kong's family law system, Section 'Review of Mediation' explores the general use of mediation in Hong Kong. Section 'Family Mediation in Hong Kong' analyses the development of family mediation in Hong Kong. Section 'Hong Kong's Attitude towards the Use of Mediation in Resolving Children's Issues' outlines Hong Kong's attitude towards the use of mediation to resolve children's issues. Section 'The Practice of Mandatory Mediation in Other Jurisdictions' provides a comparative analysis of how select common law and civil law jurisdictions have adopted mandatory mediation. Lastly, this article will examine whether mediation should be mandatory in Hong Kong by comparing it with the approach taken by other jurisdictions, specifically.

## REVIEW OF CHILD CUSTODY ISSUES IN HONG KONG FAMILY LAW

Custody arrangements for children are an essential issue for those who have children and are in the process of divorce. Custody of a child refers to the rights and responsibilities of a parent for their child (Hewitt, 2011). Under section 2 of the Matrimonial Proceedings and Property Ordinance, the term 'custody' also includes access to the child. The first step is to file a petition or make a joint application for divorce (Matrimonial Clause Ordinance 1997. section 11). After that, if agreements are reached on the custody of a child, the judge may approve and make a court order in order to make the agreement legally binding (Community Legal Information Centre, 2011). Where parties reach an agreement on custody, the process to convert the agreement into a legally binding order is relatively easy. However, in most instances, parties will fight for the custody of their child. When agreement on the custody issue cannot be reached by the parties, the case will be adjourned, and the court will then provide direction on the sequence of steps that occurs before the case is ready for a hearing (The Law Reform Commission of Hong Kong, 2003: 16). Usually, the court will ask for report by a social welfare officer or a child psychologist to assist in making a final decision (The Law Reform Commission of Hong Kong, 2003: 16).

In Hong Kong, the law in relation to child issues in a family dispute is covered by the Guardianship of Minors Ordinance (GMO) (Cap 13), the Matrimonial Proceedings and Property Ordinance (MPPO) (Cap 192), and the Matrimonial Causes Ordinance (MCO) (Cap 179) (Hewitt, 2011: 254). Section 19 of the MPPO gives the court broad discretionary powers to make custody and education orders for children less than 18 years of age involved in separation or divorce proceedings. The court can make custody, care and control, and access orders pursuant to section 10 of the GMO. Furthermore, section 10 of the MCO places limits who may be eligible to apply for custody of a child (Hewitt, 2011: 259). Those who are eligible to apply are confined to parents of the child or Director of Social Welfare (Guardianship of Minors Ordinance 1997. section 10(1)). Other relatives may not apply for custody orders of the child, but may only do so if the Director of Social Welfare is applying on their behalf (Hewitt, 2011: 259). In addition, an access order may only be granted to the parent of the child (Guardianship of Minors Ordinance 1997. section 10(1)). For child custody matters, either a joint or sole custody order may be granted (Hewitt, 2011: 264). In the majority of cases, a joint custody order is appropriate as it holds the contemporary concept of continuing parental responsibilities despite a divorce between the parents (Hewitt, 2011: 264). In a recent Court of Appeals case,[2] Hartmann J

said that '. . . orders of joint custody are in no way exceptional . . . because it is accepted that, in principle, such orders are in the interest of the children'. He went on further to state that 'in all but the most exceptional circumstances, such children desire that they should continue to be protected and guided by both parents'. In exceptional cases, the judge may also have the power to direct the child to the care of the Director of Social Welfare, as provided under section 48 A of the MCO.

The general principle as laid down in section 3(1)(a)(i) of the GMO is that 'the court shall regard the welfare of the minor as the first and paramount consideration' (GMO 1997. section 3(1)(a)(i)). In assessing what is in the best welfare of the minor, the court may consider factors such as the wishes of the child and information provided by the social welfare report (Hewitt, 2011: 275). In *YLS v TL*,[3] HHJ Melloy stated that, 'there is no statutory checklist in Hong Kong . . . to help both judges and practitioners, when determining issues relating to children'. However, the common practice is to expand the list of factors to consider by following a checklist provided by the Law Reform Commission Report (Hewitt, 2011: 275-76). The recommended checklist suggests that the court consider the views of the child, the child's physical and emotional needs, preserving the child's status quo, capability of the parents, and the nature of relationship between the child with his parents (Hewitt, 2011: 276). Thus, the court generally does not adopt a bright line rule in matters of child custody but takes a case-by-case approach depending on the circumstances and facts of each case.

In recent years, with the rise in family law cases, Hong Kong has recognized the need and benefits of using mediation in family law issues, including those involving children. The next section provides a brief review of mediation and family mediation in Hong Kong.

## REVIEW OF MEDIATION

Mediation is a process by which disputing parties seek the assistance of a neutral third party, the mediator, to facilitate in resolving their conflicts (Roberts, 2008: 7). The aim of mediation is to 'reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship' (Fuller, 1971: 325). As compared with the adversarial style of litigation, mediation focuses on resolving disputes in mutually accepted conditions on the basis of what the parties think is fair and just, while considering what their interests are, instead of their rights (Law Reform Commission of Hong Kong, 2003: 6). In mediation, the emphasis is on encouraging honest and open communication between the disputed parties (Deis, 1985: 149–150). This allows the parties to position their

focus on the causes of dispute, and strengthen positive relationships rather than engaging in the blame game (Deis, 1985: 149–150).

Unlike the experience in a court setting, mediation only involves the parties concerned, with the aid of the neutral mediator. This means the atmosphere is likely to be less intimidating, which in turn may help enhance communications between the parties (Community Legal Information Centre, 2011). Since mediation does not involve a court process, fees are relatively lower and the length of time it takes to resolve issues may be quicker, depending on the complexity of the issues (Community Legal Information Centre, 2011). The mediator has no authority to make binding decisions on the parties, but only takes on a facilitative role in helping the parties reach their own decisions (Greensmith, 2011: 327). Putting mediation in the family context, family mediation is a process where couples appoint an impartial third party to help them reach family related issues by negotiation (Greensmith, 2011: 239). Once the dispute is settled, an agreement will be drafted for both parties to sign, and it will be converted into a legally binding document or consent order (Hewitt, 2011: 524).

However, family mediation may not be the best option for cases that involve domestic violence or child abuse (Hewitt, 2011: 515). This is because mediation requires co-operation and equal bargaining powers between the parties (Hewitt 2011: 515). If one party seems to be in control or has an apparent advantage, then mediation should not be used.

## FAMILY MEDIATION IN HONG KONG

In Hong Kong, a continuing rise in divorce rates causing increased caseloads in the courts appears to have created a change of attitude towards adopting mediation as a means of solving family disputes (Yuk-Chung Chan et al, 2007: 5). Divorce rates have significantly risen because of socio-economic changes and the relaxed requirements of divorce outlined in the Matrimonial Causes Ordinance since 1997. The divorce rate climbed from 0.13 to 2.41 per 1000 from 1972 to 2003 (Sullivan, 2005: 109). This has resulted in an overwhelming number of cases received by the courts and the Legal Aid Department (Sullivan, 2005: 109). Figures from the Legal Aid Department show that roughly one-third of the civil legal aid budget was spent on matrimonial cases in 2002–2003 and 2003–2004. The rise in divorce cases is undeniably costly both financially and emotionally if divorcing parties decide to litigate. (Yuk-Chung Chan et al, 2007: 5). Therefore, there was a compelling need for an alternative way to solve family disputes, which resulted in the introduction of family mediation (Yuk-Chung Chan et al, 2007: 5).

Historically, in Hong Kong, family mediation was set up by non-government organizations as early as the 1980s. However, at that time, there was little recognition of its use and benefits (Yuk-Chung Chan et al, 2007: 5). In its 1997 Policy Address, the Health and Welfare Bureau declared that a mediation service would be established in the Child Custody Services Unit in order to assist couples to resolve child custody and access problems (The Law Reform Commission of Hong Kong, 1998: para 2.179). In the same year, a Working Group was appointed by the Chief Justice to consider the commencement of a pilot scheme for mediation into family law litigation (Hong Kong Polytechnic University, 2002: 3). In the report completed in 1999, the Working Group suggested a three-year pilot scheme designed to test the effectiveness of mediation for resolving family disputes (Hong Kong Polytechnic University, 2002: 3). In 2000, the Family Mediation Pilot Scheme was officially launched and the Mediation Co-ordinator's Office was set up in the Family Court Building in order to promote the Family Mediation Pilot Scheme (Hong Kong Polytechnic University, 2002: 4).

In 2002, an interim report on the Family Mediation Pilot Scheme was released outlining the findings, results, and perceptions of success related to the Family Mediation Pilot Scheme. The results revealed that there was a widespread consensus that family mediation caused less harm as compared with litigation (61.6% in the first poll, and 68.6% in the second poll) (Hong Kong Polytechnic University, 2002: 7). Although a small percentage of people (only 47.8% in the first survey, and 53.6% in the second survey) showed confidence in the sustainability of the agreements reached during mediation (Hong Kong Polytechnic University, 2002: 4), these results may only be due to the early introduction and the lack of detailed knowledge about mediation. A majority of the people surveyed (80%) also expressed a preference for family mediation over litigation for settling family disputes. In addition, consistent with the preference for family mediation over litigation, 85.6% of participants in the first survey, and 97.8% in the second survey believed that family mediation should be further promoted (Hong Kong Polytechnic University, 2002: 8). Statistics from a final review of the 3-year family mediation pilot scheme revealed that, among the 86.5% of cases which were mediated, 79.2% of those cases concluded in agreements (Gu, 2010: 58). Users involved in the pilot scheme indicated a general degree of satisfaction in using family mediation to resolve family disputes. The apparent success of the pilot scheme resulted in the judiciary formally adopting the use of family mediation through Practice Direction 15.10, which specifically requires practitioners in Hong Kong to pursue family mediation first prior to filing a case in court (Hewitt, 2011: 513).

## HONG KONG'S ATTITUDE TOWARDS THE USE OF MEDIATION IN RESOLVING CHILDREN'S ISSUES

There has been a long history of complaints about the time consuming and costly features of the current system for handling civil litigation. As a result, there has been a stronger drive to introduce Alternative Dispute Resolution (ADR) (Gu, 2010: 3). Launching the civil justice reform in 2000, the Chief Justice appointed a Working Party to review and recommend changes to the Rules of High Court to improve the civil justice system so Hong Kong can keep up the pace with other countries (Gu, 2010: 44). The Civil Justice Reform came into effect in April 2009, with a significant objective of the 'courts' encouragement and facilitation of ADR, in particular mediation, to resolve disputes with a view to 'filtering' litigation cases and procuring early settlements' (Gu, 2010: 58). In the reform, it was pointed out that mediation is a commonly used form of alternative dispute resolution (Hewitt, 2011: 513). The element that prompted the Working Party to explore court-annexed ADR for the civil justice system is the recognition it has received in other jurisdictions, in particular mediation (Gu, 2010: 45). Furthermore, the success of the family mediation pilot scheme also drove the Working Party to explore more options (Gu, 2010: 45). In the amendments made to the Rules of the High Court, the court now has a duty to manage cases by 'encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and should facilitate the use of such procedure' (Rules of High Court 2009. Order 1A r4(2)(e)).

While the amendments of the Rules of High Court do not directly apply to the mandatory family mediation, it is of great significance to evaluate and witness the changing attitudes and the public perception of mediation. The judiciary's increasing encouragement to adopt ADR illustrates the rising value of mediation. With greater awareness of mediation, the road is easily paved for implementing mandatory mediation processes.

Over time, the Hong Kong courts have also advocated for the use of mediation, especially to solve family disputes where children and children's issues such as custody and education are involved. For example, the case of *P v P*[4] concerned an application by the wife for the custody of her children. The wife sought a court order to remove her children from Hong Kong. In the judgment, the District Court expressly stated that, although mediation is an option provided for the parties, it may not be enforced by the court, and the parties can adopt mediation only if they wish to do so. Judge Chan also emphasized the advantage that mediation would have brought for the parties if it was used at an earlier stage of these custody issues rather than seeking litigation. (He concluded by stating that mandatory mediation would better serve couples

in the future who are contemplating divorce proceedings (para 164)). The outcome of this dispute might have been different had the parties used mediation instead of litigation because a mediator would have been able to help the parties come to a more harmonious settlement and avoid the possibility of anger and the loss of relationships that an adversarial process like litigation can produce.

The matter to be settled in *FHY v GJS*[5] was whether joint custody of the two children should be granted. The presiding judge opined that in relation to family law cases involving children, the parents have a duty to turn to mediation as their primary means of resolving conflict, and that '. . . litigation should be of last resort, since this will no doubt increase acrimony and hostility between the parties' (para 83). It was the husband's case that mediation was attempted, but was refused by the wife. The court accepted that the wife did not refuse mediation, but only showed a lack of enthusiasm. The husband had suggested they participate in the Family Court's Pilot Scheme for mediation, but there was no follow up after the wife's solicitor had informed them of the termination of the free pilot scheme. With respect to that, the court showed annoyance by pointing out that some social workers or organizations charge a low fee for mediation, and even private mediator's fees are low compared to litigation. The court went on and stated that 'it is a pity that both sides have not followed up on the mediation proposal . . . and that neither side has attempted to explore the possibility of mediation' (para 83). After all, recommendations put out by social welfare reports are not decisive in family disputes, and in many instances, the courts have not followed such suggestions when making custody orders. This case illustrates the court's clear preference for mediation in stating that the wife has to bear some responsibility for the cost of the trial by not trying to avoid litigation through the use of mediation.

In *MJP v JWP*[6] the mother wished to permanently remove her three children from Hong Kong and relocate them to UK while the father sought joint custody and care and control. The parties attempted mediation, but it was not successful. They then jointly filed a psychologist's report, to assist the court at the hearing. In the report, a recommendation was given, suggesting that the parties should continue attempting mediation to resolve the issues as soon as possible, so as to lessen the negative emotional experience for both the children and the parents. It was also noted that children can sense the emotional distress, and it would be in the best interest of the children if both parents could reach an agreement in a calm state so they can be effective caregivers in the future.

In *CLFM v DWR*,[7] joint custody was granted to both parents, with care and control to the mother, and generous access to the father. However, as the mother wanted to remove the children from Hong Kong, the father issued a summons to vary the custody order, seeking care and

control, and generous access to the mother. The mother then proposed to arrange a trial period for the children to be under the care of their father, and at the end of the trial, let the children decide. But this was declined by the father. Just before the hearing, the father requested the use of mediation to resolve the removal issue rather than going to court, but it was rejected by the mother as she wanted to settle the matter as soon as possible. The court concluded that joint custody remains unchanged, and noted that had the proposal been accepted earlier, the parties would have been able to reach a decision by now. Dispute among parents is likely to cause anxiety and misery to their children, and it is in the best interest of the children to have the issue resolved as soon as possible. If this case had been first handled by mandatory mediation, it would effectively address the concerns of both parents – the mother wanting to solve the issue as soon as possible, and also fulfilling the father's desire to mediation – and in addition, taking into account the children's own views. Going through the court process is no doubt acrimonious and harmful to children; therefore it should be avoided with great effort.

In the traditional approach of litigation, parties seek advice from their lawyers and have them negotiate on their behalf, in front of a judge (Roberts, 2008: 3). For divorcing couples, this means that they have passed the negotiation power onto their lawyers, and have final decisions made by the judge, a third party (Roberts, 2008: 3). The choice of mediation then became available, and was extensively proposed to resolve child custody issues for the reason of its capability to flexibly accommodate the distinct needs of each family (Vincent, 1995: 275). The sole purpose of family mediation is to assist the couple entangled in child custody disputes to resolve their conflicts, and come together with a parenting plan that is in the best interest of the child. The process and outcome of mediation have been established as being advantageous to children (Roberts, 1997: 139). Mediation for issues relating to children might receive a higher success rate because children are the common interest of parties, which in turn induces a collaborative effort by the parents (Roberts, 1997: 139). The agreement reached during the mediation process is not likely to be litigated again, and has a high compliance rate since both parties have contributed towards the mutually mediated agreement (Zeps, 2007: 245). Logically speaking, if one party was not satisfied with the terms of the agreement, then a consensus would not have been reached in the first place (Zeps, 2007: 245).

Hong Kong courts and Hong Kong society advocate believe in the use of mediation to resolve children's issues in family law disputes. Considering the recognized advantages of mediation, it would be advantageous to maximize the benefits to the fullest by instituting a framework of mandatory mediation. With high rates of success through the

Family Mediation Pilot Scheme in Hong Kong, it would not be harmful to conduct a preliminary trial of mandatory mediation before resorting to filing a formal claim in the courts. While Hong Kong does not yet have a mandatory mediation scheme, the use of mandatory mediation to resolve child issues is relatively common in other civil and common law jurisdiction. The next section presents a comparative analysis of these jurisdictions and how they have adopted mandatory mediation.

## THE PRACTICE OF MANDATORY MEDIATION IN OTHER JURISDICTIONS

Traditional mediation is entirely voluntary (Hewitt, 2011: 514). Mandatory mediation would mean that parties are required to attend a preliminary mandatory mediation information session, or attempt a mediation to resolve the child-related disputes before resorting to the courts.

The objective of mandatory mediation is to reduce the need for long and costly litigation. From the perspective of the judiciary, referring cases to mediation at an early stage may reduce the court's caseload. In addition, separating couples will not have to endure prolonged stress, increased lawyer expenses, or the breakdown of relationships with their children even though there is a breakdown of their relationship. The greatest benefit of adopting mandatory mediation to resolve children's issues is that children themselves will not experience unnecessary harm, and witness tension between their parents.

This section will show a comparative analysis of how other common law and civil law jurisdictions have successfully implemented mandatory mediation in resolving child custody issues.

### 1. CANADA – ONTARIO

In 1999, the province of Ontario, Canada started a pilot scheme of mandatory mediation for civil disputes which lasted for 2 years (Canadian Forum on Civil Justice, 2009). The program was then implemented permanently, subsequent to the release of the evaluation report in 2001 (Canadian Forum on Civil Justice, 2009). Under Rule 24.1 of the Rules of Civil Procedure, certain civil cases are referred to mandatory mediation with the goal of saving money and time. However, family law cases were excluded (Office of the Attorney General, Ontario, 2010). Despite the exclusion of family cases, findings published in the evaluation report showed a considerable reduction in time and costs, and a high overall user satisfaction in the mediation process. Furthermore, approximately 40% of the disputes were completely settled at an early stage of the litigation process (Canadian Forum on Civil Justice, 2009).

Although family law cases are excluded from the mandatory mediation program, the Chief Justice in Ontario, Warren Winkler, expressed his view that compulsory mediation for divorce and custody disputes in family law ought to be put into practice (Tyler, 2010). Winkler proposed to have a free court-based mediation, rather than having the parties pay for a private mediator and provide evidence showing that mediation was attempted (Van Rhijn, 2010). Providing mediation at an early stage would make cost savings, since the majority of family law cases could be solved more quickly, compared to costly and lengthy court trials (Schmitz, 2010). Winkler referred to the introduction of the mandatory mediation program as part of the civil justice reform and noted that the queue time to trial was trimmed down by two-thirds (Van Rhijn, 2010). As such, he expressed confidence that the same positive effects would result if mandatory mediation is used for family disputes (Van Rhijn, 2010). Likewise, family lawyers share the view that the requirement for people to go through mediation as an alternative dispute resolution before resorting to the courts is an excellent idea because most cases can be settled at an early stage (Tyler, 2010).

## 2. NORWAY

In Norway, mediation is mandatory and is limited to child issues (Parkinson, 2011: 350). Mandatory mediation has the aim of achieving settlements about child custody and visitation rights (Lodrup, 1992: 415). Accordingly, mediation focuses on children issues and places the best interest of children as top priority, rather than the marriage itself or ancillary issues (Lodrup, 1992: 415). Section 26 of the Marriage Act 1991, which came into force in 1993, stipulates that parents who have children under the age of 16 years old must attend mediation sessions before their case for separation or divorce can be brought before the court (Casals, 2005: 7). In the case of a divorce, the couples would not be granted a divorce certificate unless mediation was attempted. Likewise, separating couples would not have the full rights as single parents if mediation was not attempted (Cusworth and Bradshaw, 2007: 9). Several core values are encapsulated in family mediation:

(1) Families continue, despite separation and divorce;

(2) Children need to maintain their relationships with both parents, in the majority of cases;

(3) Decisions agreed by parents themselves are more likely to work in practice;

(4) Mutually acceptable solutions can be reached more quickly through mediation and can be tailored to the needs of individual families;

(5) The individual claims and interests of each parent need to be understood and addressed in the context of the continuing needs and well being of the family as whole. (Parkinson, 2011: 350)

With the highlighted values in family mediation, it is not difficult to understand why Norway has imposed compulsory mediation for family law cases relating to children issues.

Mediation is conducted at no cost, and is typically limited to four sessions, each lasting one hour (Parkinson, 2011: 350). During the mediation session, mutual agreements regarding child custody and contact are drawn up (Cusworth and Bradshaw, 2007: 9). The mediator has a duty to notify the couple that any views of children over 12 years old must be listened to, according to the Norwegian Children Act. Although children are not directly involved in the mediation process, they may be required to attend the mediation in particular circumstances. The first mediation session is usually to elucidate issues and exchange information, which helps set the stage for resolving children and financial issues during the second and third session. The last session is for drawing up written agreements, and issuing to the couples a certificate proving their attendance at mediation sessions. The signed agreement reached at the end of mediation is binding on both parties.

## 3. AUSTRALIA

For years, Australians have been anxious about contact and residency issues relating to children upon the breakdown of the marriage. These issues were brought to attention, and changes to the family law system followed an inquiry by the House of Representatives Standing Committee on Family and Constitutional Affairs (2003), which proposed changes to the legislation (Australian Institute of Family Studies, 2009: 1). The report from the committee made suggestions aimed at making the family law system better for the children (Australian Institute of Family Studies, 2009: 1). The Report of the Parliamentary Inquiry into Child Custody Arrangements in the Event of Family Separation recommended that amendments to the Family Law Act 1975 should be made 'to require separating parents to undertake mediation or other forms of dispute resolution before they are able to make an application to a court/tribunal for a parenting order . . . '

(Holtring, 2007: 4). As a result, and after consultation, in 2006 the Australian Government made alterations to the family law system, in particular for divorcing couples with children to settle their disputes by mandatory mediation (Holtring, 2007: 4–5). One of the aims of the reform is to move 'away from litigation and towards co-operative parenting' (Australian Institute of Family Studies, 2009: 1). The 2006 reform was driven by the recognition that, despite the fact that the emphasis is always on the best interest of children, family disputes over children in post-separation are shaped by relationships problems rather than legal problems (Australian Institute of Family Studies, 2009: 1).

Similar to the position in Norway, Australia made legislative amendments in 2006, making mediation a pre-litigation requirement (Rhoades, 2010: 183). One of the objectives of the changes is to 'help separated parents agree on what is best for their children (rather than litigation), through the provision of useful information and advice, and effective dispute resolution services' (Australian Institute of Family Studies, 2009: 2). Effective from 1 July 2007, parents have to provide a certificate issued by an accredited family dispute resolution practitioner, proving their effort to resolve their disputes in relation to child custody issues through a family dispute resolution process before they can apply for to the court for parenting orders to be made. This is stipulated by section 60I of the Family Law Act 1975. The court may refer the parties back to mediation, and may make the party who refuses responsible for court fees incurred in total.[8] The exception to the requirement of issuing such a certificate is where the case involves family violence.[9] Once an agreement is made during the mediation process, parenting plans can be made following section 63 C, or the parties may apply for consent order.[10]

Application of family dispute resolution was used to meet the objective of the 2006 reform, mandating separating couples to solve their family issues before seeking help from the courts. Roughly two-fifths of separating couples who used family dispute resolution did not subsequently proceed to the courts to have the matters solved by the judge (Australian Institute of Family Studies, 2009). According to a report from Sydney's Sunday Telegraph, only around 5% of family disputes wind up in litigation when mediation became compulsory (Tyler, 2010). The overall evaluation of the reform reveals the increased use of mediation, and a reduction in filing family cases relating to children to the courts (Australian Institute of Family Studies, 2009). From the success of compulsory family mediation, in 2011, the Civil Procedures Act has also made changes that require parties to attempt to resolve issues prior to litigation.[11]

## 4. USA – CALIFORNIA

In the USA, it is not unusual to expect high rates of divorce. Consequently, family courts have to deal with increasing case loads (Hendricks, 1993: 491). There is a growing trend to use alternative dispute resolution, namely, mediation, in trying to solve family law issues (Zeps, 2007: 241). This can be attributed to the introduction of no-fault divorce in the 1970s, where supporters of alternative dispute resolution proposed that mediation guarantees benefits in family law cases, especially for child custody disputes (Zeps, 2007: 241). The public policy is to ensure that minor children keep in ongoing contact with their parents after divorce, and also to promote parental responsibilities for the upbringing of their child (California Law Review Commission, 1993: 302).

As early as 1939, California has had a Conciliation Court Law, which was to protect the rights of children and to promote public welfare by safeguarding family life (Zeps, 2007: 241). In 1977, few California courts had already established mediation programs for child custody and visitation issues as local court policy, and the San Francisco Superior Court mandated mediation for custody disputes (Kuhn, 1984: 739). Before mediation was required by the courts, there were between 5 and 15 custody cases per day (Kuhn, 1984: 739). However, in 1980, after mandatory mediation was adopted, only five custody cases were heard per day in the court (Kuhn, 1984: 739).

Responding to the advantages child custody disputes through mediation, section 4607 of the California Civil Code, coming into operation on 1 January 1981 provided specifically for the mediation of child custody disputes upon divorce (Gaschen, 1995: 469). This occurred one year after California's joint custody statute, which was designed to promote effective methods for coming up with joint custody resolutions (Kuhn, 1984: 735). Where child custody and visitation issues cannot be resolved through mediation, section 4607(e) stipulates that the mediator has the authority to suggest the disputing parties have recourse to the court. Two years later, in 1982, a new provision, section 4351.5 of the California Civil Code, was included for the mediation of visitation disputes (Zeps, 2007: 241). In 1994, the California Civil Code was repealed, and replaced by the California Family Code, sections 3155–3177, and later by sections 3160–3192 of the Family Code. The repealed sections of the Civil Code are now the California Family Code, sections 3170 and section 3175 (California Department of Consumer Affairs, 2011). Under section 3170, child custody and visitation disputes are required to go through mediation before being taken to court. Mediation is limited to contested child custody cases or visitation issues because of the concerns about unequal bargaining power between women and men. To address this concern, child custody issues are separated from financial settlement disputes, reducing the chances

of one party settling for financial reasons (Gaschen, 1995: 471). Section 3161 sets out the purposes of mediation. They are to minimize acrimony between the couples, form a close and continuing connection between the child and his parents, and to agree to visitation rights of the parties. When the law in relation to child custody was first enacted, it was criticized for neglecting to consider what was in the best interest of the child (Gaschen, 1995: 470). Subsequently, the legislature addressed this problem. Currently, emphasis is placed on what is in the best interest of a child, and section 3180 provides that during mediation, the duty of a mediator is to assess the needs and interest of the child, and may in certain circumstances, interview the child (California Law Revision Commission, 1993: 341). With the help of a mediator, parents will be able to understand their children's needs and work cooperatively in the best interest of their children. Under section 3160, each superior court provides mediators (California Law Revision Commission, 1993: 334), but parties are free to employ private mediation services (Kuhn, 1984: 742). However, it is only when the parties fail to reach an agreement in mediation that they can bring the action to court by showing a genuine effort in attempting mediation (Kuhn, 1984: 742).

## 5. ENGLAND AND WALES

The UK government and judiciary increasingly encourage and support the use of mediation to resolve family and child-related issues. In the recent case of *Al-Khatib v Masry,*[12] involving child abduction and ancillary relief, the Court of Appeal played a central role in actively encouraging the parties to mediation since the matter had been in dispute for over 4 years already. In the process, the court assisted in making arrangements for mediation, involving the parties, their children, and their legal representatives. The dispute was subsequently settled through mediation, and consent order was presented to the Court (Greensmith, 2011: 255). This case significantly illustrates the situation where even obstinate disputes may be resolved successfully through mediation, and this will likely be the motivation for more family cases involving children to be settled in this manner.

The President of the Family Division issued a Practice Direction under which, since April 2011, divorcing and separating couples are now referred to compulsory mediation assessment to see if the dispute is capable of being resolved before they can issue proceedings before a court. The party who initiated the case will first have to seek a professional mediator, and then a session explaining the process of mediation will be arranged for both parties to attend (Ministry of Justice, 2011a). Disputed parties are obligated to attend such a Mediation Information and Assessment meeting (MIAM), but are not however, forced to commit to the process of mediation. Mediation can only proceed if

both parties agree to it. But where the mediator or one party thinks that mediation is not suitable, they can resort to the courts (See O'Callaghan, 2011). If the parties do end up in court proceedings, the court will inquire, at the first hearing, whether mediation was considered (UK Ministry of Justice, 2011). The court will also take into consideration any failure to act in accordance with the pre-application protocol and may refer the parties to a meeting with a mediator before the proceedings continue further (UK Ministry of Justice, 2011). This is only a mediation assessment meeting, and the process of mediation remains voluntary (Blacklaws, 2011).

The UK government has also made proposals to restrict legal aid for separating couples to the costs of mediation and legal advice in connected with it. Legal aid would not be available for legal advice alone even if this led to agreement (Ministry of Justice, 2011b). Similar to other jurisdictions who has implemented mandatory mediation, the new rule will not be applicable to domestic violence cases. Once the parties have gone through mediation and the process is complete, the court would still need to formalize the divorce by making a decree nisi or decree absolute.

As a pre-condition for obtaining public funding for family court proceedings, parties are required to attend a meeting with the mediator (UK Ministry of Justice, 2011: 2). Hence, the new Practice Direction is merely an extension of the existing procedure for legally aided cases (Percy Hughes and Roberts Solicitors, 2011). In response to the new rule and its aim to reduce the legal aid bill, Justice Minister Jonathan Djanogly said that 'mediation already helps thousands of legally aided people across England and Wales every year, but I am concerned those funding their own court actions could be missing out on the benefits it can bring' (Ministry of Justice, 2011a). The Ministry of Justice claims that separating couples frequently resort to the court for solving disputes that they are capable of solving themselves (Ministry of Justice, 2011a). Not surprisingly, parents can make more suitable decisions for the wellbeing of their children, and mediation is the correct medium for this to be accomplished. A survey revealed that 65 per cent of respondents supported this change, 16 per cent of the people do not feel the positive impact, and 18 per cent were unsure (Backsi, 2011). Quite a substantial amount of people support this change, and one can foresee this increasing when the public becomes more aware of mediation.

## CRITICISMS OF MANDATORY MEDIATION

Despite the claimed benefits of mandatory mediation as discussed above, there have been ongoing concerns about the use of mediation in family disputes involving children or in mandatory mediation.

First, for cases that reach the family court, the judge must consider the best interest of the child in granting custody or access orders. However, when it comes to mediation of such matters, it is no surprise that disputing couples tend to put their own interests over the interests of their children. Ryrstedt (2012) argues on the basis of research in Sweden that often in mediation a child's best interest is deemed to be satisfied upon the parents reaching a mutual agreement regarding custody. In those circumstances, then, mediation aims simply at reaching an agreement rather than a decision that is in the best interest of the child.

Second, mandatory mediation strikes a controversial tone because of its potentially contradictory nature (Spencer and Brogan, 2006: 87). Recall that mediation is a voluntary process which requires the consent of disputing parties. Thus, mandatory mediation would seem to violate the voluntary aspect of mediation. Critics argue that mediation is unlikely to be effective if it is forcefully imposed on unwilling participants (Van Rhijn, 2010). In addition, mediation only yields fruitful outcomes in low-conflict cases where parties are willingly to mediate (Fehlberg et al, 2008). If mediation is forced upon the parties, it is unlikely that mutual agreements can be reached, which leads to the parties ending up in litigation and unnecessarily prolonging the divorce process (Van Rhijn, 2010). Moreover, mediation may not be successful all the time. In circumstances where it fails, parties would have to incur extra time and money than expected, had they chosen to take the litigation route from the outset. The cost-effective objective of mediation would not succeed due to the failure of mediation referrals, thus in reality, adding an extra step in the legal process (Dingwall, 2010: 109). Consequently, it elevates the stress level in the divorcing parties and may prevent future cooperation in order to reach a mutual agreement.

A third concern about mandatory mediation is related to legal representation. Many have recognized the benefits of mediation as being an alternative form of resolving family conflicts and a less formal way of resolving children issues in divorce proceedings. However, unlike litigation, parties who attend mediation on their own, without legal representatives, are unlikely to be aware of their rights (Beck and Sales, 2000: 994). This may negatively influence the parties' mediated agreement. Further, the mediator cannot fully assess the situation through the usual litigation procedures like discovery of evidence (Beck and Sales, 2000: 994). Without adequate information, it may be difficult for the mediator or the parties themselves to reach the best possible solution.

A fourth criticism of mandatory mediation relates to the disregard of the traditional role of negotiated settlements in resolving family disputes. In Hong Kong, while Practice Direction 31 strongly advocates for the use of alternative dispute resolution to resolve disputes (Hong

Kong Legal Information Institute, 2012) with mediation being the primary ADR process (Hong Kong Legal Information Institute, 2012), it does not recognize settlement negotiation between parties, generally conducted with the aid of lawyers, as a valid ADR process (Hong Kong Legal Information Institute, 2012) even though lawyers would appear to fall within the definition of ADR in Practice Direction 31 since lawyers are third parties who try to assist the disputing parties. Eekelaar (2011) points to the extremely high degree of success lawyers have in achieving settlement between parties without having recourse to court proceedings, and criticizes the perception that lawyers are exclusively concerned with litigation. This is consistent with the settlement culture that dominates resolution of family disputes in other jurisdictions, such as Australia, where the 'constructive family lawyer' (Howieson, 2011: 11) is preferred over the purely adversarial lawyer. Hunt (2011: 384) argues that removing lawyers from playing an active role in family law disputes, as may be happening in the UK, will only create unrealistic expectations by parties due to lack of legal knowledge, and 'clog up the courts, expose more litigants to an experience which is indisputably the most stressful part of going to court, and increase delay . . . '

A fifth concern relates to the role and power of the mediator. Similar to a judge in the litigation process, a mediator is expected to be an impartial third party who facilitates the mediation process. As previously mentioned, not all cases are suitable for mediation. However, Beck and Sales (2000) have raised doubts as to whether private mediators are, in reality, unbiased as to their decisions whether mediation would be the appropriate means for resolving certain family disputes. A survey revealed that mediators were willing to mediate if they were paid. Additionally, mediators may be affected by the unsubstantiated belief that any family dispute should be settled immediately because mediation is promoted as a quicker means of resolving disputes to ease the workload of the courts (Beck and Sales, 2000: 1009). Influenced by this belief, mediators may not accurately assess the appropriateness of using mediation for each case, which poses a great danger for separating couples, especially those who have experienced family violence. During mediation, the mediator is presented with both sides of the story, and it is only human nature to draw a conclusion or unconsciously be biased when one is evaluating the facts (Gerami, 2009: 436). This causes a chain reaction that, in turn, influences the mediator's suggestions and proposals to the parties. Mediators are not legally trained, and thus, cannot fully inform separating couples of their legal rights. Where lawyers will always fight for the parties' needs and wants, mediators, who are supposed to be impartial, may be tainted with bias, thus possibly skewing the trust the parties have in the mediator.

In an effort to address the concerns about mandatory mediation, Salem (2009) discussed and proposed implementing the triage

system, to replace the tiered model of mediation, arguing that it offers greater efficiency and effectiveness. Mandatory mediation is a tiered service model, which is a sequence of steps where the separating couples first goes through educational programs about divorce or separating, and are subsequently referred to mediation. Only when no agreements can be made do the parties go to triage. The triage system, which is being introduced in Pinal County, Arizona, Connecticut, and British Columbia, allows separating couples to attend a preliminary interview to determine the type of service that will be best suited to meet their needs. A triage system enhances the efficient use of resources and lightens the burdens on each family. Rather than directing all family cases to mediation, the triage system offers a more personalized solution to match each family's unique circumstances. Accordingly, resources can be better allocated and it may be less time consuming for families, especially those who predictably may not benefit from the mediation process.

Mandatory mediation has been challenged as depriving parties of their rights to litigate (Dean, 2010), contrary to Article 6 of the European Convention on Human Rights, which states that, 'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'. It should be regarded as a complement to justice, and not a substitute (Beck and Sales, 2000: 1009). Skeptics might perceive mandatory mediation as not allowing parties the right to a fair hearing within a reasonable time if there was delay in the process (Dingwall, 2010: 112). As Lord Neuberger, Master of the Rolls, cautioned, 'if we expand mediation beyond its proper limits as a complement to justice, we run the risk of depriving persons of their right to equal and impartial treatment under the law'.

Allowing parties engaged in civil litigations to settle out of court, in and of itself, does not deprive their rights to litigation. Those who oppose mandatory mediation appear to apply the idea of mandatory mediation in a strict and rigid sense. As previously stated, mandatory mediation may simply indicate a mandatory attendance at a mediation information session, or a first trial attempt of mediation. This is not to say that parties are compelled to employ mediation to resolve their family disputes. Rather than ordering mediation by courts, providing educational services about mediation and informing parties about their options would seem more favourable (Zeps, 2007: 242).

## THE WAY FORWARD IN HONG KONG

In his 2007 Policy Address, the Chief Executive of Hong Kong stated that 'on many occasions, interpersonal conflicts need not go to court' (Tsang, 2007). As the Hong Kong family mediation pilot scheme

demonstrated, nearly 75 per cent of those who utilized family mediation under the pilot scheme were satisfied with the mediation process (Gu, 2010: 59). From the proven success in the family mediation pilot scheme, a natural and future trend should be to more fully utilize mediation for resolving family disputes, especially where children are concerned and would be affected by separation and divorce proceedings. With the initiatives of the judiciary and continued encouragement by the courts to use mediation as a means of resolving child custody issues in family disputes, further steps should be taken to make mediation information sessions a mandatory step that parties undergo before filing a formal claim in court.

Given the relatively recent endorsements for the use of mediation in Hong Kong, the way to gain support for mandatory mediation in Hong Kong is by raising public awareness, and increasing the current use of mediation. This will allow the public to obtain first hand experience of the benefits of mediation, making it more acceptable in the future for the implementation of a mandatory mediation process. The key to success is education. The public may not be well aware of their options when it comes to matters of divorce, and it takes time for them to fully comprehend the benefits of mediation and accept it as a better alternative to litigation. In addition to educating the general public, legal practitioners will also need to broaden their knowledge of mediation and welcome this process. Initially, lawyers may feel uncertain about compulsorily implementing mediation for family cases as they are trained to focus on the litigation process and advocacy skills (Gu, 2010: 63). Their views and attitude towards mediation need to be changed so as to view the mediation process as complementing, not competing against, the litigation process. At present, courses in ADR are not compulsory in law schools (Gu, 2010: 63). With the increasing use of mediation, it is important that the new generation of lawyers obtain first hand knowledge and education in ADR (Department of Justice, 2010, para. 5.101).

Hence, to effectively incorporate mandatory mediation in family law, a much needed change in law school curriculum is required to train the new generation of lawyers (Department of Justice, 2010, para. 5.101). Mediation courses should be made compulsory and future lawyers should be required to be certified mediators as well. Success can be envisioned once the judiciary implements such a scheme, and legal professionals accept and actively promote its use, which in turn, enhances public confidence in the use of family mediation.

## CONCLUSION

Traditionally, the courts of Hong Kong have generally taken an adversarial approach when it comes to resolving family disputes. However, in

recent years, mediation, as a dispute resolution process, has gained in popularity as a better alternative and a less threatening alternative for children who are caught in the middle of their parents' separation or divorce. Child custody disputes arising from divorce can be a gruesome experience for the couple, and it is especially agonizing for the child. Couples who have previously worked together for the well being of the family, suddenly turn into enemies and wrangle over who gets custody of the child and who is the more suitable care giver. Caught up in the dispute, couples often neglect the fragility of the feelings of their children, who are innocently dragged into the conflict.

When dealing with family cases including child custody, the Hong Kong courts bear in mind section 3(1)(a)(i) of the GMO, which states that the welfare of the child is paramount. As such, the use of mediation can better accommodate the needs of children because parents can jointly make decisions for the benefit of their child, without relying on the decision of a judge. Also, the agreement by the parties tends to have a higher compliance rate since the parties jointly agreed to the terms they negotiated (Hewitt, 2011: 516). Entering into mediation ensures that all parties are winners at the end of the day, unlike in formal litigation where it creates a win-lose situation. Separating parents will be able to solve issues in a more harmonious atmosphere, by keeping a logical and clear mindset that their dispute should not affect their children's future. Children can easily adjust to changes in the family structure and keep in continuing contact with both parents since both parents are not in constant argument and seen as rivals. It would also benefit the courts by lowering their case loads. Mediation not only promotes a win-win situation for the parties, but it also has a positive impact on the society as a whole. Family mediation was effectively introduced in Hong Kong, but the majority of the public has yet to realize all its potential benefits. The next step is to increase public awareness and acceptance, thus moving towards the ultimate step of making mediation a mandatory process. If all goes well, mandatory family mediation in the future may no longer be seen as a 'mandatory' process. Rather, it will become an entirely 'voluntary' process by which parties will immediately turn to upon divorce, seeing it as the better alternative to litigation.

Evaluating the advantages of mediation, some jurisdictions have already taken the first step in implementing the use of mandatory mediation for child custody cases. While there are concerns and criticisms about mandatory mediation as discussed in prior sections, Hong Kong, as a vibrant, progressive, and international community, would benefit from adopting mandatory mediation as discussed in this article. Through the development of family mediation, and the success of the Family Mediation Pilot Scheme, citizens in Hong Kong may be ready to accept this change. However, this is not to say that mandatory

mediation is a 'cure' to the existing court system (The Law Reform Commission of Hong Kong, March 2003: 12). In fact, the mediation scheme in Hong Kong would benefit from an annual review in order to avoid the issues faced by other jurisdictions as well as to evolve with the needs of the community (Section 'Criticisms of Mandatory Mediation'). Rather, mediation is merely a complement to the court system, which should be used more effectively than before.

## NOTES

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