

Hearing the child's voice in Family proceedings in Hong Kong

1. In May 2010, a special judicial working committee headed by Mr Justice Hartmann, a member of our Court of Appeal and a non permanent member of our Court of Final Appeal, was formed to consider and make recommendations concerning the advancement of children's interests in family proceedings generally. There are two very experienced Family Court Judges also on the Committee as well as Family Court practitioners and representatives of the Legal Aid Department and Social Welfare Department as well as the Judiciary.

2. The objectives of the Working Group are:
 - (i) to consider how to create more effective and more timely managed Dispute Resolution proceedings;

 - (ii) to consider how, in appropriate cases, the views of children who are subject of the proceedings may better be obtained;

 - (iii) to obtain the possible benefits of involving those children in a process of mediation;

 - (iv) to consider how, in appropriate cases, child experts may better assist in the resolution of disputes; and

 - (v) to consider the benefits of specialised judicial training. The Committee is also considering whether there should be specialised training for children advocates as well.

3. Current statistics, going up to 2009 in any event, show that although only a small number of contested children matters go to Trial that somewhere between

27% and 36% of Court days in any one year are spent on those child related issues. This has been a topic of concern in Hong Kong for some time. In 2005, the Law Reform Commission of Hong Kong published a report on custody and access. This report published the recommendations of a Committee that had been set up in 1996. Although very important amendments were proposed in the Law Reform Report, none have yet been implemented. This is very unfortunate, particularly as a report from the Australian Family Law Council published in 1992 was quoted at the beginning of the Report in the following terms:

“All too often, [we] are confronted with reports of marriage or de facto relationship breakdowns that involve bitter and sometimes tragic disputes over the children. ... The children can become pawns in a power struggle between their parents or can be used as vehicles for one or both parents to express unresolved and ongoing dissatisfaction with the breakdown of the domestic relationship.”

“Some separating couples ... find themselves unable to distinguish between their personal bitterness about the breakdown of the relationship and the necessity of focusing on the future and well being and contentment of their children.”

4. It is difficult to believe that any of us practising Family Law have not echoed those same sentiments articulated by the Australian Family Law Council in 1992, and one of the most unfortunate realities is that parents who are angry and bitter about the other, and fearful of the changing circumstances that divorce or separation brings, simply cannot be relied upon to suddenly act with sensitivity and courtesy on matters concerning their children. To expect otherwise is, perhaps, purely aspirational and so more often than not the Court has to step in order to ensure the best interests of a child can be advanced and that their needs

can be disentangled from the complex dysfunction of the breakdown of his or her parent's marriage.

5. In Hong Kong, we still rely on the concepts of "custody" and "care and control".
6. Section 19 of the Matrimonial Proceedings and Property Ordinance directs that in any proceedings for divorce, nullity of marriage or judicial separation, our Courts may make such Orders as they think fit for "the custody and education of any child".
7. The discretion given by Section 19 is a wide one and also has to be read with our Section 3 of the Guardianship of Minors Ordinance which states that in any proceedings before any Court, the Courts:
 - (i) shall regard the welfare of the Minor as the first and paramount consideration and in having such regard shall give due consideration to
 - (a) the wishes of the Minor if, having regard to the age and other standing of the Minor and to the circumstances of the case, it is practical to do so; and
 - (b) any material information including any report of the Director of the Social Welfare available to the Court at the hearing.
8. As Hong Kong Law has developed and now presently stands, when a marriage breaks down and a Court must ensure the best interests of any child of the union, it will variably do so by bringing into place the concept of "custody" whether it be sole or joint custody, and also "care and control". Neither concept, however, is defined in our statute books.

9. To all practical purposes, there is no significant difference between sole or joint custody, it is an old fashioned English historical concept, but in the small number of custody cases brought before the Court, this single issue of principle is more often not the argument that takes up days and days of Court time.

10. The Court of Appeal in the case *PD v KWW (Joint Custody, Care and Control)* [2010] HKFLR 184 attempted to clarify the issue following an Appeal by a Mother against an Order made in the Family Court for joint custody of the child of the family, a girl, aged 9. The Mother was a Malaysian national and the Father was from Belgium. They had married in 2000 and separated in 2007. The Petition for Divorce had been issued by the Father in June 2008. Following the separation, the Father had moved into an apartment close to his daughter, but once he started cohabiting with another woman, this caused distress to the child as she had hoped for her parents to reconcile. The Mother wasn't too happy about it either. The Mother sought sole care and control because she did not want to be disturbed by the Father's continuing involvement and wanted to be "left in peace" to be able to raise the child as she thought best. The Mother wanted to determine matters such as the education, religious upbringing and choice of activities free from disturbance from the Father. The Father had sought joint custody and feared that an Order for sole custody would forfeit his right and responsibilities as a father being left with the residual rights spent time with his daughter and the responsibility of making a financial contribution to the costs of her upbringing. At first instance, the Judge, the very experienced Judge Sharon Melloy in the Family Court, made an Order for joint custody despite the recommendations of the Social Welfare Officer that sole custody was the best Order in the circumstances.

11. Mr Justice Hartmann, who himself was an experienced Family Court Judge before moving through the High Court and Court of Appeal ranks, explained that the decisions to be made by a custodial parent are those of real consequence in safeguarding and promoting the child's health development and general

welfare. They included decisions as to whether or not the children should undergo a medical operation, what religion the child should adhere to, what school the child should attend, what extra curricular activities of the child should pursue, be it learning a musical instrument or being coached in a sport. A parent vested with custody, the Judge said, has the responsibility as the child's legal representative.

12. By contrast, the Judge stated, the decisions to be made by a parent who "at any time" has care and control of the child are of a more mundane, day to day nature, decisions of only passing consequence in themselves but accumulatively of importance in moulding the character of the child. They include a host of decisions that arise out of the fact that the parent has physical control of the child and the responsibility of attending to the child's immediate care. They include decisions as to what the child will wear that day, what the child may watch on television, when the child will settle down for homework and when the child will go to bed. They also include the authority to impose appropriate discipline.
13. Unfortunately in Hong Kong, and probably almost certainly in other jurisdictions also, parents choose to misunderstand the nature and extent of the two concepts of custody and care and control. This is demonstrated by the misconception that if sole custody is given to one parent, that parent thereby "wins" the rights to determine all matters big and small in the upbringing of that child while the parent who has not been given custody "loses" the rights of having say in the child's upbringing.
14. The Courts in Hong Kong rely upon the old English case of *Dipper* in reassuring the parents who is not granted custody that their rights over their child are not lost.

In that case, the Judge, Ormrod L J, said as follows:

“It used to be considered that the parent having custody had the right to control the children’s education, and in the past, their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing, or any other major matter in their lives, that disagreement has to be decided by the Court. In day to day matters, the parent with custody is naturally in control. To suggest that the parent with custody dominates the situation so far as education or any other serious matter is concerned is quite wrong.”

In the same case, another Judge, Cumming-Bruce LJ said,

“... it being fallacy which continues to raise its ugly head that, on making a custody Order, the custodial parent has a right to take all the decisions about the education of the children in spite of the disagreements of the other parent. That is quite wrong. The parent is always entitled, whatever his custodial status, to know and be consulted about the future education of the children and any other major matters. If he disagrees with the course proposed by the custodial parent, he has the right to come to Court in order that the difference may be determined by the Court.”

15. The effect of this is that a non custodial parent has the right to be consulted in respect of all matters of consequences that relate to a child’s upbringing. How this translates into practical application is more difficult to see, especially in those cases where there is conflict between the parents. One might wonder what benefit there is in the right to be consulted, if that right does not confer a power of veto. The inevitable consequence is that if a parent is given sole custody given the authority to make the final decision even if made after due

consultation (whatever that might mean for parents in conflict), the Court may still be called upon to determine any matter.

16. The Court of Appeal suggested that the giving of sole custody to one parent did no more than recognize that in the circumstances of the breakdown of a marriage, the best interest of a child was secured by giving to that parent the authority, if necessary, to make a final decision concerning matters of consequence in the upbringing of the child, but only after the other parent's views had been given full and rational consideration. The Court of Appeal stated that an Order for sole custody did no more than add a qualification to the otherwise joint endeavour of both parents in raising their child, that qualification being that the final decision will rest with one parent. The Court of Appeal felt that for this reason there was a thin line between sole custody and joint custody, and that's probably true, but the line becomes broader if the situation is manipulated by a parent.

17. In an attempt to try and fudge this very old and encumbersome concept of custody and care and control, the Court of Appeal stated,

“It needs to be emphasised that, whether a Court awards care and control to one parent but rights of access to the other ... the Court is effectively awarding a form of shared care and control. This is because when a parent exercises its rights of access, especially staying access, that parent is in care and control of the child for the time that the child is in the parent's physical custody. Rights of access, it is to be remembered, are given – in the interests of the child – to ensure continued bonding between parent and child.”

18. This is now how the thorny question of custody be it sole or joint and care and control is being tackled head on in Hong Kong. Orders are now often being

made whereby there are Orders for joint custody with care and control to one parent and then care and control to the other parent during the period of time the parent is having access to their child.

19. Hong Kong is doing its best to bring its legislation up to date and parallel to modern philosophy. Those involved in this area of law and certainly the Judges who are regularly hearing the small number of contested cases that are taking up so much of Court time, and create so many difficulties for a family, believes that it is the long term best interests of a child that despite the breakdown of the marital union, both parents are able to continue to play an equal role in making important decisions that will determine the child's upbringing. But that's easy for us to say as we are not embroiled in the conflict.

20. In its investigations of overseas jurisdiction, the Hong Kong working party has looked at what has been done in the United States, where shared custody is common with often a child moving from one parent to the other on a weekly basis. This is not a formula that is ever likely to find favour in Hong Kong. The Committee has also looked at England and Wales where its Children Act has sought to emphasise the continuing parental responsibility of both parents even if an Order has been made that the child will reside with only one of them. The recent legislation in Australia was also looked at where it is clear that the Australian Courts are doing their utmost to ensure continued active involvement of both parents of the upbringing of a child to the extent it seems as though there has been a fundamental shift with a Father, usually, expecting, in Australia, equal time with their child. I understand that particular shift is itself being examined in Australia, as I understand there is concern that the emphasis now in what rights the parent has in so far as equal time to a child is concerned as opposed to the rights and best interests of the child but you here will know more about that than I do.

21. Fundamentally the Hong Kong Court has determined that Orders for joint custody should not be exceptional because such Orders will be in the best interest of the children. Sensibly the Court of Appeal determined that if as a result of the breakdown of a marriage, relations between the parents are estranged, that should itself not be a reason to refuse to make a joint Order for custody, and nor is the fact that the parent to be given care and control does not agree to such an Order for joint custody. The Court said that such Orders should look to the future as they will govern a limited area of exchange between the parents, albeit one of the greatest importance.
22. The Court of Appeal has determined that the issue for the Judge at first instance is whether, with the Court proceedings concluded, it is reasonably anticipated that the parents will be able to agree on the questions of importance that will determine the upbringing of their child, both recognising that, as difficult as it may be for them, this process of co-operation is in the best interests of the child. The Court determined,

“In determining this issue, the Judge is entitled to proceed on the presumption that competent loving parents possessed of sufficient objectivity are able to make rational decisions in the interests of their child and will be able to co-operate with each other concerning matters of importance in the upbringing of their child.”

One can only hope.

23. The Court of Appeal in *PD v KWW* refused to overturn the Order for joint custody made at first instance even though the Court found there may be situations where the ability of the parents to reach any rational accord in respect of matters concerning their child was so deeply undermined that to compel attempts at co-operation would not protect the interests of the child, but only leave the child more vulnerable. At first instance, Judge Melloy had said that

the parties might need ongoing mediation to reach accord on matters concerning their child, which the Court saw as a good thing, even though the parents did not, and that the Mother's fundamental approach that she wanted to be "left in peace" to raise her child as she saw best was the best reason for not allowing her to have sole custody.

24. A further emerging new feature in contested cases involving children is separate representation for children. That is usually done through the Official Solicitor, or on occasions independent Solicitors can be appointed to act for the children, and they are then paid for jointly by the parents. In the case of *SEB v ZX* [2007] HKFLA 165, Judge Melloy again dealt with a highly contested application for custody and care and control that involved a Chinese Mainland Mother and an American Father and their sons of 11 and 13. In this case the children were separately represented and decisions had to be made by the Judge as to whether or not she would see the boys. In this case, there were a Social Welfare Reports, psychologist reports and clearly very conflicted children who loved both parents and took to protecting the feelings of their parents at the expense of their own. At the request of the boys, the Judge did see them on the basis that the boys were of an age where their views must be given serious consideration and weight. In this case, the Judge saw the boys in her Chambers, in the presence of the Solicitor and Counsel for the boys. The Judge taped the conversation with the boys and later a transcript was given to both parents. The boys used this conversation as an opportunity to tell the Judge what arrangements they thought would work best. The Judge, in her judgment, explained that she had explained to the boys that whilst their views would be taken into account by her, she would not promise them that her decision would necessarily mirror their views, as there were so many different factors to be taken into account.
25. In a jurisdiction where Judges meeting children is not common, and often not welcomed by the Judges, the Judge found this to be an extremely helpful experience. The reality is, for good or bad, children these days are a good deal

more confident and articulate about their own personal needs and requirements, and in my experience, they want to be given the opportunity to have their say. The Judge said of her interview with the boys,

“I have to say that I was impressed by both of them. They are personable and mature young people. They have given the present situation considerable thought and it is fair to say their views have changed from time to time as the matters has progressed. Their solutions are sensible ones, grounded on their notions of what they think is fair and what they think would work.”

26. By the time the Judge had seen the boys, there had been three Social Welfare Reports with two different Social Welfare Officers being involved in the case as well as the psychologist. Although it is easy to make the argument that the children having been involved with so many professionals by that stage, as well as with warring parents and their own lawyers, that one more professional in the form of a Judge would be just too much to bear for the children, it was clear that these children, as I believe most children these days, wanted to be part of the process in determining their future. What the boys said to the Judge was that they wanted “clarity and certainty”. The boys themselves felt that “flexibility” led to friction and that, in their words, “friction is the danger zone”. The message conveyed by the children to the Court was that the children did not want to be placed in the middle and did not want to be the messengers in their parents disputes. In the final analysis, the Judge stated,

“Although I do not intend to follow what the boys have proposed in its entirety, I have tried to ensure that my Orders satisfy their needs for clarity and certainty.”

27. How then best to ensure that the child's voice is heard? Before a divorce can be concluded in Hong Kong, the Court has to give what is known as a "Section 18 Declaration" that the arrangements for the children are satisfactory or the best that can be devised in the circumstances. If a Consent Order is filed setting out agreed arrangements for the children, then the Court would normally rubber stamp such an agreement and there are a few incidents where a Judge will go on to challenge the proposals put forward by the parents themselves. That is appropriate in many circumstances as intelligent caring parents will want to make the best arrangements for their children that they believe to be appropriate. However, in this increasingly information available age, there are now circumstances where the children themselves, and often the children in the 11 to 14 age bracket, are not necessarily willing to comply with arrangements that have been made for them, and they are creating difficulties, and want to be heard on who they live with and where they are to spend their time. This empowerment is sometimes leading to an accusation of parental alienation on the part of the parent whose own access arrangements are being disrupted by the children voting with their feet. How best to deal with that?
28. The Hong Kong working group is considering whether it would be best to expand its existing system of Financial Dispute Resolution into a system known as Child Dispute Resolution. The former, Financial Dispute Resolution, is a mixture of mediation and Court hearing with a Judge giving an informed opinion to both parties and their Solicitors as to what Orders he or she would be likely to make if the matter came before her or him in Trial. At that stage, financial disclosure has been made and both parties have advanced their case. If FDR fails then the case goes to a traditional Trial before a different Judge.
29. What is now being considered in Hong Kong is whether this same concept should be advanced towards Children Dispute Resolution, so that after Social Welfare Reports have been filed, and probably Affidavits also, a Judge gets to see the parties, and also the children, who may be represented by either a Social

Welfare Officer, or their own legal representative, in order to give firm direction as to what is likely to happen if the matter actually advances to Trial. Prior to the CDR, there would be directions hearings, at which the parents and possibly the children would be required to attend. Case management of such a process would be essential. Such an idea is still very much at the discussion stage, and not universally accepted, and principally by our Social Welfare Officers, who want to see the children directly involved as little as possible, they say that they are the best voice for the children which they can properly convey to the Court.

30. In Hong Kong, we do not have a children's Ombudsman, or anything remotely similar, and what we learn from Social Welfare Officers is that children, particularly those from traditional Chinese families, still regard the whole concept of divorce, and separation from one or other of their parents, as a matter of great personal shame. This means that another area that the Committee may well be pursuing is to see whether there needs to be more basic civic education as far as Family Law and the rights that the children might themselves have. This might need to be done in order to promote the atmosphere that it is rather sad, but ordinary, for Divorce proceedings to take place, even in a conservative society like Hong Kong, and that children should have the opportunity to articulate their thoughts and feelings. With a divorce rate of now in the region of 1 in 5 or 1 in 6, it is important that our children should have the freedom to engage in a process that so completely involves them, even though they are not going to be expected to make any final decisions, that job, perhaps, still best left to the professionals.
31. Clearly, this is a hot topic everywhere, and I note that the first session tomorrow is whether children in Court is a basic human right or an abuse of a child. Depending upon the role the child plays, and the sensitivity of the Judge and the Court system, I hope it is the former, but I will be interested to learn the Australian point of view. Certainly what you are doing in Australia has an

enormous impact on our own jurisdictional development, and we are drawing on your experiences – so we need you to get it right!

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