

## Why mediation should be used to resolve child custody disputes in Hong Kong

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When parties decide to separate and divorce, this can be devastating for their children. Parents are all too often embroiled in their own dispute to realise the effect that their actions are having on the children. It has been proven that high conflict cases have a particularly damaging effect on children. Mediation is designed to reduce conflict by helping the involved parties to reach an agreement instead of litigating in Court. Therefore, increasingly, parties are urged to engage in mediation for the sake of the children by their lawyers and the courts alike. There are also parental coordinators available to further assist in the process.

With that end in mind, since 2012 there has been a court-led process of mediation called the Children's Dispute Resolution hearing which is compulsory if there is a dispute involving children. The aim is to: "support mothers and fathers, so that they are able to effectively parent their children post separation or divorce...that lasting agreements concerning children are obtained quickly and in a less adversarial atmosphere."

In addition, parties are often urged to resolve child disputes using private mediation. Mediation is suited to these disputes because the parents can make detailed arrangements for their child post separation. They are encouraged to prepare a parenting plan which focuses the mind on their child's daily routine and what is best for them, rather than the "win or lose" mindset a court case can generate. It puts the child firmly back into the centre of the parties' minds.

The difficulty with a contested custody case is that it tends to polarise the parties into separate camps and this will often result in a destructive campaign against the other party whereby they seek to undermine the other parent, in order to bolster their case in court. As matters polarise, children suffer, as they are often caught in a loyalty conflict and torn between both parents.

At present, the law relating to children is divisive. The courts can order joint or sole custody, which is the ability to make important decisions on behalf of the child and implies a physical custody of the child. On that basis the parents are more likely to fight each other for sole custody. In fact, there is little practical difference between sole and joint custody as both parties ultimately can have a say in the important decisions in their child's life. There is an increased emphasis, which is supported by mediation, on the duties and responsibilities of parents rather than their rights and authority. Courts will normally order joint custody in the hope that parents will resist arguing when it comes to their children. However, sometimes this is too aspirational and in high conflict cases the court will order sole custody.

Logistically, the most important matter for children is where they will live and their daily routine. This is called care and control. The court will examine certain factors such as the views of the children, if they are of sufficient age and understanding, social welfare report and in some cases, psychologist reports, and other factors their the child's physical, emotional and educational needs, the effect of a change in circumstances may have on the child, the relationship with their parents and how capable each parent is in looking after the child. If the parents are able to cooperate, the court may use its initiative to leave the matter open for the parents to make arrangements, which normally takes the form of a care and control order in favour of one parent and a reasonable access order in respect of the other. There may also be an order for defined access and increasingly more often, an order for joint care and control.

Mediated agreements are beneficial to children by reducing conflict and producing an agreement specifically tailored to each child's needs, including detailed parenting plans, which a court cannot order. It avoids acrimony between the parents as they will feel that they have both been heard and have come to an agreement voluntarily on their own terms. More importantly, the children will have been given the priority that they need.

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