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Alternative Dispute Resolution in Hong Kong Family Court to deal with Children Issues

Dennis Chi Kuen Ho
Solicitor, Hong Kong

Chairman of Family Law Committee, The Law Society of Hong Kong

The Law in Hong Kong on Children

When the Family Court is to deal with children on separation of the parents, the court has to decide on the following three matters: -

- (1) custody
- (2) care and control
- (3) access

Jurisdiction of the court to make custody order

Section 19(1) of the Matrimonial Proceedings and Property Ordinance Chapter 192 gives the court jurisdiction to grant order of custody, which provides,

“(1) **The court may make such order as it thinks fit for the custody** and education of any child of the family who is under the age of 18 -

(a) in any **proceedings for divorce, nullity of marriage or judicial separation**, before, by or after the final decree; ...”

Secion 10(1) of the Guardianship of Minors Ordinance Chapter 13 provides,

“The court may, **on the application of either of the parents** of a minor (who may apply without next friend) **or the Director of Social Welfare**, make such order regarding-

(a) the custody of the minor; and

(b) the right of access to the minor of either of his or her parents, as the court thinks fit having regard to the best interests of the minor and to the conduct and wishes of the parents.”

Other statutory provisions to deal with custody

There are other provisions in various different ordinances also provide jurisdiction to the Family Court to make custody order in different situations when there is a need to deal with the care of the children.

Guiding Principle in Dealing with Children

Section 3 of the Guardianship of Minors Ordinance Chapter 13 provides the fundamental principle for the Hong Kong Courts in dealing with children which provides,

“the court shall regard **the best interests of the minor as the first and paramount consideration**”.

The Attempt to Reform from “Custody” to “Parental Responsibility”

- (1) Following the change in England and Wales, Scotland, Australia and New Zealand, the **Law Reform Commission** has come up with a **report on “Custody and Access” in 2005** recommending the need to drop the old concept of “Custody” and **to adopt “Parental Responsibility”**.
- (2) In November 2015, the Hong Kong Government came up with a Consultation Paper proposing legislation in a **draft “Children Proceedings (Parental Responsibility) Bill** to implement the recommendations of the Law Reform Commission Report.
- (3) **No legislation** has yet been introduced.

Custody Orders

Custody orders may be in form of:

- (1) **sole** custody
- (2) **joint** custody
- (3) split custody where there is more than one child (i.e. splitting the siblings)

Children Dispute Resolution (“CDR”)

The Hong Kong Judiciary Working Party on Children and Ancillary Relief Procedures in Family Proceedings introduced a pilot scheme on dispute resolution to resolve children issues in 2012.

This is the “**Children Dispute Resolution (“CDR”)**”

Practice Direction 15.13

The Pilot Scheme on Children’s Dispute Resolution (“the Pilot Scheme”) was carried out in the Family Court from 3 October 2012 to 31 March 2016.

After evaluation and consultation, it is decided to **adopt the procedure in the Pilot Scheme**, with some modifications to **Form J**, as standard practice. Practice Direction 15.13 sets out the standard practice in the Family Court.

The new PD 15.13 took effect from 1 April 2016

CDR forms part of the procedure in all Family Courts but NOT any case in the High Court

It is a mandatory process (para.5 of the PD) unless otherwise directed by the court,

- (1) on the court's own motion; or
- (2) on the application by any one party or both.

The objective of the CDR

To assist parents on separation or divorce to **obtain a lasting agreements** concerning children quickly and in a less adversarial atmosphere.

Focus

Best interests of children as well as the duties and responsibility of their parents.

Two stages of CDR : -

- (1) **Children's Appointments** i.e., call-over hearings
- (2) The **Children's Dispute Resolution Hearings**

Children's Appointment ("CA") – Notice of hearing by Form I

Upon commencement of any proceedings **where there is an issue on children**, the court may either

- (1) **direct that a Children's Appointment ("CA"), be heard** at the same time as the First Appointment under PD 15.11; or
- (2) in the case of an **urgent application** allocate an earlier date in the first instance.

The Procedure for CA

14 days before the CA hearing,

- (1) each party shall file and exchange **Form J** (i.e., the Children's Form)
- (2) a **concise statement of issues** relating to the children – sets out the parties' proposal on future custody, care and control and access arrangement

No later than 4 pm the day before CA hearing, file and exchange an estimate of costs (**Form H**)

Children's Form (Form J) – there are 6 parts: -

(1) **the parent has to provide for all facts** concerning the child/children such as, present arrangement, school, health and a concise information on parties' financial situation

Part 1 – You and Your Children

Part 2 – Current Living Arrangements

Part 3 – Schooling

Part 4 – Health

Part 5 – Finances

- (2) **the parent has to propose future parenting arrangements** which include future access for the other parent and any other specific arrangements.

Part 6 – Future Parenting Arrangements

“6.1. If your children are to live with you, what regular arrangements do you propose for them to spend time and communicate with the other parent, including public holidays, school holidays, overnights and overseas trips?”

- Weekdays during school terms
- Weekends during school terms
- School holidays
- Others e.g. Public Holidays, special occasions

“6.2 If your children live with the other parent, what arrangement do you propose for them to spend time and communicate with you, including public holidays, school holidays, overnights and overseas trips?”

- Weekdays during school terms
- Weekends during school terms
- School holidays
- Others e.g. Public Holidays, special occasions

- “6.3 If your children are to live with a carer, other than a parent, please state who the carer will be. **What arrangement do you propose for** your children to spend time and communicate with **you** including public holidays, school holidays, overnights and overseas trips?”
- “6.4 How will you help your children **spend time and communicate with the other parent** and/or other family members?”
- “6.5 How do you propose that your children **maintain their relationships with their friends** if they are going to move from the place where they now mostly live?”
- “6.6 Only complete this section if you propose any changes to the school arrangements. **Please provide details** of any proposed changes to the schooling as set out in part 3.”

“6.7 If there are any other arrangements, which you wish to include in this form, **please set them out** below.”

Other Circumstances

“7. Give details of any other circumstances, which may be **relevant to the arrangements for your children** including, but not limited to, mental/physical disability, mental/physical health and mental/physical abuse or violence. Please also set out any other relevant matters e.g. issues with a new partner or moving home etc.”

At the CA hearing, the judge will give orders/directions for,

- (1) **Social Investigation Report** (“SIR”) or an International SIR (with or without recommendations)
- (2) Other **expert’s report** (e.g., psychologist’s reports)
- (3) Filing of **affirmations/affidavits of the parties.**
- (4) filing of **affirmations/affidavits of other third parties**
- (5) appoint **Official Solicitors or Guardian ad litem to represent the child**

- (6) orders on interim custody and access
- (7) adjourn for mediation, collaborative practice, negotiation or sine die
- (8) if CDR not appropriate, direct for trial
- (9) if appropriate, direct Social Welfare Officer or any other person at the hearing of CDR
- (10) direct parties to attend counseling, a parenting education programme and/or other form of third party intervention
- (11) judicial interview with the child

CDR Hearing

- (1) Notice of Hearing – Form K
- (2) At the CDR hearing, **the judge act as a conciliator**. The judge will talk to the parties directly and not only through the lawyers.

Special Features of CDR

- (1) The CDR Judge will **speak directly to parents at the CDR hearing.**
- (2) May **request** a Social Investigation Report not to make a **recommendation on custody or access.**
- (3) **If CDR fails to reach a settlement, the same judge dealing with CDR will hear the trial** on children issues.
- (4) Anything said or admission made at the CDR shall be **admissible as evidence in subsequent trial.**
- (5) **CDR to go before** Financial Dispute Resolution, another alternative dispute resolution in dealing with financial matters.

CDR – A Process with a Different Mindset

The parties to the CDR should adopt a **different mindset** in the whole process

- (1) It is believed that when the parents are going through the Form J, the **mindset is direct to the best interest of the children.**
- (2) This process involves the judge participating as a **conciliator to assist the parents come to an agreement for future arrangements** of the child/children. (see para. 13 of PD 15.13)
- (3) **Parties** attending the CDR hearing **shall use their best endeavours to reach an agreement** on all relevant matters pertaining to the children. (para. 16 of PD 15.13)

No affidavit in opposition in CDR process

In cases where there is an application on the issues of children e.g., for interim custody or care order, a parent would file an affidavit with allegations against the other parent. Under para. 7 of the PD 15.13, the other parent is not allowed to file an affidavit in opposition during the CDR process unless with permission of the court.

This is because **CDR is meant to be a reconciliatory process** engaging both parents to come to an agreement for the future arrangement of the child. There should not be cross allegations against each other.

Arguments against each other is not to be encouraged, therefore, the information provided in **Form J should be factual and not argumentative.**

Any attempt to include **arguments in reply** to the supporting affidavit **in the Form J may be rejected by the judge.**

Is CDR working?

- (1) majority of children **issues are able to be resolved** in the CDR.
- (2) however, the process to go to CDR Hearing may be long. Parents and children may suffer due to the **delay through the long court process.**

What if CDR does not work?

The CDR Judge will proceed to **set down the case for trial**. He or she will give a direction for a Pre-Trial Review Hearing date and mostly follow with fixing the dates for trial.

Thank You!