



OUR SPEAKERS

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Key Takeaways from ‘Protecting Your Children in Case of Divorce’ Webinar

In the event of relationship breakdown between married couples, children are at their most vulnerable and are most in need of help and protection. LexisNexis expresses gratitude to family law specialists Alfred Ip (Partner of Hugill & Ip) and Azan Marwah (Barrister-at-law of Gilt Chambers) for conducting a webinar on 28 July 2020 in which they shared their insights on how children can be legally protected during their parents’ divorce. Alfred and Azan shed light on a variety of issues from custody rights, dispute resolution, removal and relocation, maintenance, and domestic violence. Below are a few key takeaways.

1. Key considerations in distributing custody over children

A common issue between parents during relationship breakdown is custody over their children, namely the right to make major decisions about a child’s life. The default position at law for married couples is joint custody, with each parent having equal rights and authority that are exercisable by either without the other. This would likely cause no concern in an amicable stage of the relationship, but problems arise during divorce and courts may have to intervene to assign rights to parents during litigation. **With regards to major life decisions, Hong Kong courts are strongly in favour of maintaining joint custody** as it generally in the best interests of a child to have both parents involved in such decisions, even if they may not be willing to communicate with each other. However, **the court may assign different rights to each parent with regards to the exercise of care and control over their child’s daily life, as well as their amount of access to their child.**

In determining the distribution of rights such as custody and care and control, Hong Kong courts strictly adhere to the welfare principle whereby **“the court shall regard the best**

interests of the minor as the first and paramount consideration". A parent's custody rights therefore exist for the benefit of the child, not of the parent, and is proportional to the former's needs. **The welfare checklist as adopted from the UK Children Act 1989 serves as guidance in this assessment.** The court then relies on various sources of information for further consideration. This includes the Children's Form (Form J) under Practice Direction 15.13, where both parents can provide full disclosure of all relevant information relating to the child as well as detailed plans the parent has for the child from current living arrangements, schooling, to future parenting plans. **Social welfare officers also submit reports to assist the court, acting as a third party who communicates relevant information to the court after conducting interviews with parents about the child's day to day life.**

2. Priority of alternative dispute resolution over litigation

While Hong Kong courts endeavour to reach an outcome with children's best interests in mind at trial, the consensus among judges and legal practitioners is that litigation is a long and confrontational process that is emotionally taxing on all those involved, especially on children. **Parents are therefore encouraged to pursue avenues of alternative dispute resolution including mediation and Children's Dispute Resolution (CDR) hearings.**

Mediation allows for direct communication between parents with a view to come to a mutual agreement in the child's best interests of their own accord, with the help of a third-party mediator. While parties are still advised to have solicitors assist in mediation, this is very different from communication through correspondence drafted by solicitors. Since they are drafted in a formal manner for legal purposes, the other party would inevitably view them as aggressive messages coming from their former spouse, thus exacerbating the conflict between the parties. By removing this barrier and facilitating direct dialogue between the child's parents, mediation is the recommended method of dealing with disputes involving children.

In CDR hearings, a judge will preside over the proceedings to provide an indicative ruling before reviewing any evidence and without deciding on the legal issues in the hearing. **CDR hearings are conducted with an aim to facilitate the child's parents in coming to an agreement and compromise by providing them with informed knowledge of the possible outcome of their trial.** Once an agreement is reached through either mediation or a CDR hearing, the agreement would be final and there will be no recourse for appeal.

3. Act expeditiously in cases of removal and relocation

A parent may seek to relocate to a third country with their child after relationship breakdown with their former spouse. In such cases, they may apply for a relocation order and the court will assess the best interests of the child. Without such an order, **the wrongful removal of a child from Hong Kong from a former spouse who has the rights of custody constitutes child abduction, and there are mechanisms that parents may rely on both before and after abduction has occurred.**

In the former scenario, a parent may apply to the court for a non-removal order if there is an immediate risk of removal, which can be obtained immediately in most cases. **The key here is to act expeditiously to prevent removal of the child occurs and to provide as much information as possible about the child.** This information can be used by personnel such as immigration officers who can prevent the child from departure.

On the other hand, if abduction has already occurred, the Hague Convention on the Civil Aspects of International Child Abduction (the “Convention”) allows a person with custody to seek the return of their child from a third country that is also a contracting state to the Convention. **The parent may make an application to the Department of Justice who will then apply for a mandatory return order with the local court of the third country, which will usually be issued within six weeks.** This does not entirely bar a parent from relocating to a third country with their child, but simply facilitates the child’s return to their home country so that appropriate measures can be taken to assess whether relocation should be allowed. Where a child is abducted to a country that has not contracted to the Convention, the HKCFI still has wardship jurisdiction over a child who is a Hong Kong subject regardless of their location at the relevant time. A parent may therefore seek relief by directly applying to the HKCFI for the court to exercise their wardship jurisdiction over the child.

Other resources on this topic:

-  **Halsbury’s Laws of Hong Kong – Family**
-  **The Annotated Ordinances of Hong Kong – Guardianship of Minors Ordinance (Cap 13)**
-  **Lexis Advance Hong Kong® Practical Guidance – Private Client**
-  **Hotten and Ho on Family and Divorce Law in Hong Kong**
-  **Butterworths Hong Kong Family Law Handbook – Third Edition**
-  **Hong Kong Family Court Practice – Third Edition**

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