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1 *Children's Issues Forum: The Resolution of Disputes Relating to Children in Hong Kong* (Katherine Lynch & Michael Wong, Editors, 2011).

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The *2nd Children's Issues* Forum would not have been as successful without the diversity and range of distinguished Forum speakers and moderators – eminent judges, academics, legal practitioners, dispute resolution professionals, government officials and representatives from NGOs - who came from both Hong Kong and from afar in the UK, Canada, New Zealand, USA and Israel. The breadth and range of the Forum speakers and the diversity in the participants attending the Forum helped contribute to the inherent multi-disciplinary nature of the *2nd Children's Issues Forum.* Finally, we wish to thank the children of Hong Kong – those children who participated in and attended the *1st* and *2nd Children's Issues Forums* – and also the 1.1 Million children in Hong Kong whose protection and welfare are the ultimate inspiration for the Children's Issues Forums in Hong Kong.

Chapter 1

Introduction

Professor Anne Scully-Hill

Background

The 1st Children's Issues Forum was held in Hong Kong in 2009. It was the brainchild of two local family law solicitors and an academic who were concerned that issues relating to legal disputes concerning children were not being discussed adequately, with the consequence that challenges for practitioners, outdated laws and the role of professionals from other disciplines in hoping to resolve children disputes were not being sufficiently aired amongst the professions and judiciary. Thus, the Forum came into being with the aim of consciousness raising about the legal issues relating to children in Hong Kong, the need for reform and to establish a place to share professional experience and exchange examples of good practice.

Following the success of the first Forum, a second Forum was held in August 2012. The aim of that Forum was to build on the platform created by the first Forum and to share experience of working on child related legal disputes with practitioners and judiciary from across Hong Kong and from around the world. Furthermore, the second Forum extended the scope of its remit to consider public law, as well as private law, issues relating to children and to promote further multi-disciplinary exchange amongst the diverse range of professionals involved today when legal disputes about children arise: lawyers, psychologists, counsellors, social workers as well as hearing from members of the judiciary, academics,

ombudsmen and government representatives. Contributors came from a diverse range of jurisdictions: from common law countries such as England & Wales, Australia, New Zealand, Canada, Singapore, India and America and from civil or mixed jurisdictions such as Japan, Pakistan, Bangladesh and the People's Republic of China. The Forum spanned two days and was divided into nine panel sessions covering a diverse range of topics relating to children and the law. On the first day panellists focused on private law, looking at the paradigm shift from the concepts of custody, care and control to shared parenting; the development of children's dispute resolution procedures; and ways in which to give children a voice in the dispute resolution process, including child inclusive mediation and peer based mediation. On the second day the focus of discussion shifted to public law issues and in particular on safeguarding the mental and physical well-being of children, preventing sex trafficking and the exploitation of child labour, and providing effective child protection services. Lastly, the work done by specialized child advocates and the need for state appointed independent Children's Commissioners were also discussed. This volume, and its sister volume on *International Perspectives on Disputes about Children and Child Protection: Collected Essays on Preventing Abuse, Parental Responsibilities and Empowering Children* (Vol.2), are an edited selection from the papers given over those two days.

Collected Essays on Parental Responsibility and Child Dispute Resolution

The essays in this volume focus on the private law legal issues discussed on the first day of the Forum and in particular on the substantive law relating to the child-parent relationship in terms of custody and access and on the procedural frameworks adopted around the world to resolve disputes arising between parents in relation to their children. The essays are arranged in three sections. The first section includes essays on the legal concepts employed in various jurisdictions governing the parent-child relationship post-relationship breakdown. These range from guardianship and custody

regimes to those based on 'parental responsibility'. In a number of jurisdictions there has been a shift from post-divorce child law based on custody to that based on parental responsibility. In the chapters by The Hon. Mr. Justices Moylan and Boshier, giving the experience of England & Wales and New Zealand respectively, the history of this shift and the reasons for it are outlined, as well as presenting a considered analysis of the circumstance necessary to ensure that the shift to parental responsibility is a success. The Hon. Mr. Justice Moylan examines the history of the courts' application of the welfare principle and their attitude to claims of the exercise of 'parental rights' over a child, observing the culmination of the courts' rejection of talk of 'parental rights' with the introduction in the Children Act 1989 of the concept of 'parental responsibility' and the confirmation of the paramountcy of the welfare principle. Coming to the 21st century, Judge Moylan addresses the Family Justice Review and the consequent legislative reform process which has, since the time of writing, led to the enactment of the Children and Families Act 2014 and the substitution of a 'child arrangements order' for the old orders of residence and contact; the award of these old orders having become imbued with sense of 'winner' and 'loser', just as had happened prior to the Children Act 1989 with the award of sole custody and access. He reiterates the importance of maintaining the paramountcy of the welfare of the child and that any future legislation must not suggest otherwise nor suggest that a parent has any 'right' to equal time with their child but rather only a parental responsibility to promote the welfare of their child. Similarly in Judge Boshier's chapter, we see a legislative shift in the New Zealand legislation from the language of custody, redolent of winners and losers, to the language of shared parenting, parenting orders and parental responsibility under the Care of Children Act 2004. Judge Boshier notes, in a spirit which will be echoed by Judge Marcus in Part II of this book, that change of terminology alone is not enough. Innovations within the 2004 Act, first to ensure that children's views on how they will be cared for after their parents' divorce are heard and taken into account, and second to provide effective enforcement measures to ensure parental responsibility is exercised in compliance

with the parenting orders, have been an integral part of the success of the 2004 Act. In the final chapter in Part I, Judge He examines the Chinese law on child custody, setting out the factors which the court will take into account on making custody decisions and the statutory mutuality of obligations on parents, which despite the use of the word 'custody' echoes the language of parental responsibility as outlined in the chapters on English and New Zealand law, particularly in that the parents' obligations to the child are mutual and do not cease on divorce. She also observes that the primary principle is to protect the legal rights and interests of the child when deciding on the issue of child custody. Other factors to be taken into account vary depending upon the age of the child and may be culturally specific: for example, for children aged between two and ten years old, the parent who does not have any other child may be given priority, which one may speculate as being relevant to either Chinese cultural interests in having an heir or to the realities of the one-child policy. This is however, only one of several factors to be taken into account. Where children are older, their views will be sought and taken into account by the court. Addressing the further steps that could be taken to improve child custody law, Judge He sees the first necessary measure as the explicit adoption of the principle of the best interests of the child accompanied by greater opportunities to hear and consider the views of the child without an age limit and the expansion of the welfare based factors to be considered by the court.

In the second section of this book, the essays focus on the procedural framework within which disputes relating to the parenting and care of children post-relationship breakdown may be resolved. Prof. Linda Silberman notes the relatively early development in America of alternative dispute resolution (ADR) procedures for disputes about children and custody. She presents a comprehensive and indeed tantalising description of the full range of ADR procedures now available there depending on the needs of the parties and their children and the degree of conflict between parents. She locates these procedures within the context of the overall ADR goals of facilitation and education rather than the adversarial, 'fight to win' framework of traditional trial-based dispute resolution. She

describes the preference for ADR processes over trial as 'consistent with change in the overall philosophy about post-divorce parenting.'

This is echoed in the chapters by the Rt. Hon. Mr. Justice Thorpe and Judge Philip Marcus who make the point that, in disputes about post-divorce parenting arrangements, the law, in the traditional sense of trial-based justice focussed on legal principle, is often, respectively, either inapt or unnecessary in the vast majority of cases. They both point to a shift towards encouraging parents, through settlement oriented procedures, to make their own decisions about what arrangements would be set for their children. In their own jurisdictions of England & Wales and Israel respectively, the main alternative to trial is mediation and both judges note the valuable, indeed necessary, contribution to be made to a successful ADR process by the availability of a range of professional expertise, particularly psychological and counselling expertise, rather than expert input being limited to legal expertise. Judge Philip Marcus also argues strongly that a change in the terminology of the law is insufficient to achieve a change of mindset amongst parents, whilst the Rt. Hon Mr. Justice Thorpe notes the need for both judicial and government will for the successful implementation of ADR processes. Judge Marcus illustrates his argument with case studies from his court in which the ADR process has been both successful and unsuccessful and offers suggestions as to why these different outcomes.

The need for both a multi-disciplinary approach and strong government will to successfully implement the ADR ethos in relation to disputes about children is reiterated by Prof. Parkinson in his chapter on the Australian experience in which he outlines the ways in which disputes about children have been addressed in the Family Court since 1975, noting the clear intention to characterise the court as a 'helping court' with a 'strong emphasis' on ADR processes, an approach which is also now adopted in relation to children disputes in the Federal Circuit Court. Further more, since the reforms of 2006, parties are obliged to try, unless exempted, some form of ADR before they can file an application for a parenting order. Prof. Parkinson, like Judge Marcus, notes that where legal intervention is unnecessary because parents can agree between themselves then

that agreement will be respected in the form of a consent order from the Family Court. However, where intervention to achieve dispute resolution is necessary it is no longer 'court-centric' but since the mid-2000s is instead 'community-centric', delivered via government sponsored Family Relationship Centres and embracing a range of services and disciplines, including legal advice, counselling and mediation. This approach allows for more 'interim' arrangements given that, as Prof. Parkinson notes, there is 'no such thing as final arrangements with children. There are too many things which can and do change'. These services run in tandem with other innovations such as the recently introduced child-inclusive mediation and in Prof. Parkinson's view offer a range of solutions which have resulted in fewer disputes being brought to the court.

Reviewing the Canadian experience, Prof. McHale also notes the woefully unsuitable nature of the civil litigation model for the effective resolution of family disputes, not least because children, who are at the centre of the dispute, are themselves generally unrepresented. Like Judge Marcus, Prof. McHale observes that whilst changes to the substantive law on post-divorce parenting arrangements are necessary, they are not sufficient of themselves to implement a change of attitude; additionally, a procedural transition from adversarial to consensual dispute resolution is necessary. He acknowledges that there has been a shift from the resolution of disputes about children by means of adversarial trial and an outcome imposed on the family by the court, to greater emphasis on ADR processes to achieve resolution and settlement between the parents. However, Prof. McHale argues that, thus far in the Canadian experience that shift has been insufficiently extensive and lacking in the wholehearted commitment necessary in order to achieve effective change: reforms in the past have been 'add-ons' to the existing adversarial process, and thus disputes about children were framed first in a adversarial terms and then 'translated' into ADR. A better approach, recently adopted in the province of British Columbia and resonant of Prof. Parkinson's observation of the shift in Australia from court-centric to community-centric processes, is to frame the dispute so that the Court is not the presumptive starting point. Prof.

McHale notes that traditional adversarial approaches to dispute resolution are unsuitable for family disputes for a host of reasons and that whilst there are already a range of ADR processes available to disputing parents in Canada, these will continue to be less than fully effective until the necessary multi-disciplinary resources are in place and a change to legal culture is achieved so that disputes about children are not seen first and foremost as a legal dispute.

Turning again to New Zealand, Prof. Henaghan and Ruth Ballantyne consider how the adoption of ADR processes to resolve disputes about children take the child's views into account. As Judge Boshier noted in his chapter in the first section of this book, New Zealand has moved from a system of 'child custody' to one based on 'parental responsibility' and the 'best interests' of the child. In addition to this substantive change to the law, New Zealand has also built ADR processes into the child dispute procedures in the form of family dispute resolution service (FDR) which the parties must undertake before they can apply to the Family Court and which is designed to encourage settlement prior to moving, if settlement is not achieved, to a traditional trial. Henaghan and Ballantyne turn their focus to what it means under this system to act in a child's best interests. To answer this question, they analyse New Zealand's child dispute procedure through the lens of Childhood Studies theory: that each child is unique and cannot be 'standardised' and therefore it is imperative that each child's views in each dispute should be canvassed and taken into account in order to make good decisions about what is in the best interests of that child. But to what degree is this possible within the procedural framework currently in place? They observe that although the FDR procedure introduces an ADR approach into resolving disputes about children, since the reforms of the Family Dispute Resolution Act 2013 the child's voice is not required to be heard within the New Zealand version of FDR and neither is there provision for separate representation of the child during FDR. However, Henaghan and Ballantyne argue that there are techniques, either previously available and limited by the recent legislative amendments or which could be introduced, which would effectively ascertain the child's views and thus, from the perspective

of Childhood Studies, result in outcomes decidedly in the best of interests of the specific child. These techniques include judicial interviews with the child, appointment of a lawyer to represent the child separately, and the commissioning of reports by various non-legal professionals.

The focus of the third and last section of the book is the current situation in Hong Kong and the need for reform. Hong Kong is considered separately from the other jurisdictions represented here for the simple reason that the Children's Issues Forum was originally conceived as a means of invigorating and stimulating discussion in Hong Kong amongst a wide range of stakeholders as to the adequacy of our current laws on children. By inviting speakers from jurisdictions, whether common law or not, Asian or not, the aim was to identify shared concerns, to canvass the range of possible solutions to existing problems and to share experiences of what works and what does not work in terms of promoting and protecting the best interests of the child. The two chapters in this section represent these goals. In her chapter Prof. Lynch, writing after the Second Forum, offers an overview of the status quo in Hong Kong and suggests, in light of the papers and discussions at the Forum, and from a starting point of a consideration of the current proposals for reform of child custody laws, suitable measures to address the existing lacunae and challenges in Hong Kong's child law. She notes that despite the enactment of a number of legislative amendments arising from the recommendations made in Hong Kong's Law Reform Commission's four volume report on the need for reform of child law in Hong Kong, the key recommendation, that of a shift form a custody regime to one of parental responsibility for children, remains unimplemented although there is a ongoing and lengthy consultative and drafting process in train. Despite the challenges of bringing this last plank of the reform proposals into being, Prof. Lynch notes that the Hong Kong Judiciary have undertaken their own process of procedural reform in the area of family law and have actively promoted ADR, in particular, Family Mediation and more recently Private Financial Adjudication, by means of Practice Directions, as well as introducing a further Practice

Direction on Children's Dispute Resolution, specifically aimed at promoting settlement between the parties and giving an opportunity to bring the child's views into consideration. The Judiciary have also published further guidance on how to conduct Judicial Interviews with children. Whilst examining further innovations including the Judiciary's publication of unified Family Procedure Rules and the legal profession's engagement with collaborative practice, Prof. Lynch also surveys the range of additional measures needed in order to achieve the best possible child law for Hong Kong: in particular, she points to the need for greater focus on a multidisciplinary approach to both the reform and practice of child law; the need for a unified and specialist Family Court to build on the work of the Family Court at District Court level; and at a most fundamental level, the need for greater research and data to inform future reform and review processes. The need for more accurate data to underpin reform proposals and to challenge assumptions was expressed by Judge Boshier in his chapter on New Zealand's shift from custody to parental responsibility and is also the focus of Her Honour Judge Sharon Melloy's chapter on the current proposals in Hong Kong to reform child custody laws from a traditional custody regime to one based on parental responsibility. Whilst Hong Kong has already enshrined the best interests of the child as the first and paramount consideration in custody proceedings, the orders which the court can make are in the form of sole or joint custody orders with care and control orders and access orders as a supplement. Her Hon. Judge Melloy makes the point that the Hong Kong Government's Consultation Paper on the Law Reform Commission's proposals makes one basic assumption: that the courts today make more joint custody orders than sole custody orders. This assumption could be invoked to rebut the reform agenda: there is no need to legislate to increase the involvement of both parents in the lives of their children post-divorce as this is being achieved already. However, as Her Hon. Judge Melloy makes clear from data collected in her own court, this assumption is not accurate: there are still more sole custody orders being made than joint orders. As seen in this collection of essays alone, jurisdictions around the world have come to the conclusion

that the involvement of both parents in their children's lives post-divorce is, where safety allows, essential to the well-being of those children and that an effective means of achieving that is by means of acknowledging an inherent parental responsibility in both parents, whatever the living arrangements for their children. However, because of a lack of accurate data, the legislative reform proposals in Hong Kong to achieve this same result were unnecessarily left open to challenge even though the introduction of a 'parental responsibility' framework is a means of dismantling the 'win-lose' mindset associated with the current custody regime, creating an alternative parent-child dynamic based on an ongoing and unceasing relationship while also introducing a standard of parental obligation to promote the best interests of their child. Accurate and probing research to produce accurate data is key to effective and informed policy-making and legislative implementation. Those engaged in the campaign for reform of Hong Kong's child custody laws can only hope that these failings are remedied promptly to give Hong Kong's children the very best child law possible.

Conclusion

The essays contained in this volume examine the substantive and procedural law relating to parenting arrangements post-relationship breakdown across a range of jurisdictions: all but one are common law systems, though even within the common law systems represented here there are variations in terms of institutional arrangements and constitutional structures, let alone distinctions in their respective substantive and procedural laws. However, what is also clear is that these jurisdictions share a number of common themes: first, the shift to a child-focussed body of child custody law in which the child, generally, though not always, by means of a change of terminology from the 'proprietary' language of custody to the dynamic language of parental responsibility towards the child, becomes a party to that relationship rather than a possession. The semantic change is often reinforced by the creation of new orders, most successfully perhaps the 'parenting' or 'child arrangements' orders of New Zealand,

Australia and England & Wales to demonstrate the unique nature of each child and its relationship with its parents; that a child cannot be fitted into a 'one size fits all' remedy. The shift to child-focussed law is also manifested in the willingness of the legislatures and the courts of the jurisdictions represented in the essays in this volume to create spaces in which the child's views can be ascertained in an appropriate manner and taken into account. As noted in Henaghan and Ballantyne's chapter, children feel very strongly that they are part of the process of their parents' divorce and that they should be consulted. After all, as Prof. McHale observes, without hearing the child's view, the children who are the very focal point of the dispute remain voiceless. The trend towards hearing the child's view is perhaps one of the strongest commitments a legal system can make in empowering children, protecting them from abuse and in educating others that children are capable of being active participants rather than passive recipients to whom things are done. However, it is apposite to sound a note of caution here: the development of the law is not linear; at times there may be reversals as in the New Zealand experience, where the well-meaning introduction of the Family Dispute Resolution service has actually diminished children's opportunity to be heard. Furthermore, as a number of contributors, including Prof. Parkinson, The Rt. Hon. Lord Justice Thorpe and Prof. McHale have observed, simply having the legal revision to hear the child's views on the statute books is not enough: there must be sufficient government and judicial will to implement the principle.

This brings us to the second commonality: the challenge to the centrality of law in resolving custody disputes. This challenge takes two forms in the essays here: either that law is not necessary, as argued by Judge Marcus and that just because parents are divorcing does not somehow stop then from being able to make decisions about their children and that while they are able to do so then the law need not intervene. This is reflected too in the English Children Act's 'no order' principle which is also part of the Hong Kong Law Reform Commission's proposals for reform. The centrality of the law in custody disputes is however more commonly challenged on the basis that the law is not the most suitable means by which to remedy those

disputes. Prof. McHale mirrors the positions of other contributors when he says that the adversarial trial polarises, magnifies conflict and tends to place the interests of the party over the desire to achieve justice; and because custody disputes are emotionally driven, resolving the legal issues may leave emotional conflict unresolved and thus likely to re-surface. None of this is good for the children who are the subject of the dispute and so most of the jurisdictions represented in this volume have turned to alternative means of dispute resolution (ADR), taking the conflict out of the court room and including input from non-lawyers. A key example of this has been the commitment in Australia to frame the dispute not in a court-centric manner but in a community-centric, or community-services, manner thus achieving what Prof. McHale seeks for Canada: a shift in culture so that the court is not the 'presumptive starting point' with ADR being a diversion but rather a starting point in itself.

While there seems to be broad agreement regarding the value of ADR as the preferred starting point for a child-focussed, less hostile, means of resolving custody disputes, it is apparent from a number of the essays here that ADR covers a wide and diverse range of options for resolution. It is also clear that those jurisdictions where ADR was adopted early have developed the multiplicity of ADR processes incrementally, building on experience and identifying different needs for different approaches. Prof. Silberman, writing of the US experience presents a panoply of approaches, beginning with the introduction of mediation in the 1970s and matched by Australia, having introduced mediation as early as 1975, while Canada has been implementing ADR approaches over the past twenty years. Hong Kong has actively promoted family mediation for about fifteen years now and, as with other jurisdictions, has gone on to explore other forms of ADR where mediation may not be the best fit; in particular, collaborative practice. There is also the question raised by several contributors of voluntary or mandatory participation in ADR and the need for effective enforcement mechanisms once resolution has been agreed. Not only is diversity of ADR processes a common theme, but also diversity of expertise imported into the resolution process. Professors Parkinson, Silberman, McHale and Lynch all

concur that non-legal expertise, whether mediators, psychologists or social workers, can be vital to the effective implementation of alternative forms of resolution of child custody disputes and, more broadly, family disputes generally. However, to sound another note of caution, this brings us back to the questions of government will and of resources, both financial resources and adequately trained personnel. To encourage governments to commit public money to the provision of these services and the training of sufficient personnel, accurate data is essential. Informed policy-making cannot realistically be achieved without it and, as shown by Her Honour Judge Melloy, it is too easy to mistake anecdote for hard fact.

In conclusion, that such distinct commonalities exist across a range of jurisdictions suggests that it is possible to distill a core meaning of 'best practice' in child custody dispute resolution. To identify such best practice has been one of the aims of the Children's Issues Forum and will continue to be so as we look forward to future meetings of the Forum. It is also heartening to note that, as represented in these essays, so many individuals, groups, professions, governments, educators and service providers are engaged in building a better family justice system and in particular, a better justice system for children.