

**Report of the Working Group to
Consider a Pilot Scheme for the
Introduction of Mediation into
Family Law Litigation in Hong Kong**

April 1999

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I. Introduction

1.1 Mediation was one of the subjects discussed in 1995 by the Working Group to Review Practices and Procedures Relating to Matrimonial Proceedings chaired by the HH Judge Hartmann (as he then was). Members of that Working Group supported the concept of promoting mediation services as an option in contested matrimonial proceedings. However, mediation was only then beginning to develop in Hong Kong. In the absence of a pool of qualified mediators, it was then considered premature to institute a court annexed mediation scheme. The Working Group recommended that the option be examined again when a reasonable pool of professionally qualified mediators was available in Hong Kong.

1.2 In October 1997, the Chief Justice appointed the Working Group to Consider a Pilot Scheme for the Introduction of Mediation into Family Law Litigation in Hong Kong with the following terms of reference -

"To draw up proposals for a practical, cost-effective pilot scheme for the introduction of mediation into family law litigation in Hong Kong."

1.3 The members of the Working Group are:

Chairman

The Honourable Mr. Justice Hartmann	Judge of Court of First Instance of the High Court
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Members

Mrs. Anita Chan	Family Mediation Committee of the Hong Kong International Arbitration Centre
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H H Judge Bruno Chan Ms Mary Chan Suk Han	District Judge The Law Society of Hong Kong
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Ms Rosa Choi Mrs. Robyn Hooworth	Legal Aid Department Family Mediation Committee of the Hong Kong International Arbitration Centre
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Ms Jacqueline Leong, SC	The Hong Kong Bar Association
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Ms Amy Liu Miss Paula Scully Mrs. Nancy Tse (from October 97 to September 98) Mrs. Cecilia Tong (from September no November 98)	Family Law Association Law Reform Commission Social Welfare Department
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Secretary

Mr. David Leung	Judiciary Office	Administrator's
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In attendance

Ms Estella Fung	Judiciary Office	Administrator's
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II. Scope of Study

2.1 The Working Group first met on 16 October 1997 and since then has met on 13 occasions. The Working Group has studied family

mediation services in other common law jurisdictions including Australia, Canada, Ireland, the United Kingdom and the United States. Publications on family law mediation were considered.

2.2 The Chairman of the Working Group visited the Family Court of Western Australia in January 1998 to obtain a first hand understanding of the provision of family mediation services there. He also had meetings with Professor John Wade and Professor Payne during their visits to Hong Kong in February 1998 to discuss their experiences of family mediation in Australia and Canada respectively.

2.3 The Working Group concluded from studies of overseas experience that family mediation has been shown to have the following benefits:

- (a) Mediation is a non-adversarial approach to resolving disputes arising from marital breakdown, thereby minimizing the attendant trauma and acrimony which may, among other things, adversely impact on the welfare of the children of the marriage;
- (b) If an amicable settlement (or part settlement) can be reached, there will be a marked saving in litigation costs and court time;
- (c) When a settlement (or part settlement) has been reached by means of mediation, the parties are more likely to comply with the agreement, being one in which they have actively participated.

— The benefits of family mediation as demonstrated by experience in other jurisdictions are summarised in **Appendix A**.

2.4 The Working Group acknowledged the view of professional mediators that mediation may not be effective or even desirable in all cases. A broad guide setting out the circumstances in which professional mediators consider that mediation might not be suitable is at **Appendix B**.

2.5 The Working Group recommended that a pilot scheme should be run to test the effectiveness of mediation in resolving matrimonial disputes in Hong Kong.

2.6 The Working Group re-visited the question of whether there is a sufficient pool of accredited mediators with various agencies to provide family mediation services. The Hong Kong Catholic Marriage Advisory Council, the Family Mediation Committee and the Social Welfare Department conducted a survey to ascertain the number of accredited mediators. The survey showed that, as at end November 1998, there were 20 accredited mediators and about 46 trainees of family mediation. The survey results are set out in **Appendix C**. The Working Group considered that the number will be sufficient for the purpose of a pilot scheme.

2.7 The Working Group noted that at this time the profession of family mediation in Hong Kong remained an emerging profession. Members were of the view that the qualifications for family mediators at **Appendix D** be adopted for the purpose of the pilot scheme. To the knowledge of the Working Group, professional family mediators in Hong

Kong have so far been accredited by the Hong Kong International Arbitration Centre. However, that should not preclude the possibility of adopting additional internationally recognized accreditation procedures when they are available in future.

III. Nature of the Pilot Scheme

3.1 The Working Group noted the similarities and differences between mediation, counselling and litigation which are summarised in **Appendix E** and endorsed the definition of mediation for the purpose of the pilot scheme as follows:

Family mediation is a problem-solving process designed to help separating/divorcing couples reach their own mutually acceptable agreements regarding the on-going arrangements for their children and/or the resolution of financial matters.

It is a process in which a trained, impartial third person, the mediator, can assist both parties to communicate and negotiate issues in dispute in a confidential setting.

3.2 The Working Group noted that there are different models of mediation. Each model has its own unique characteristics and suits different needs of parties seeking mediation. While the Working Group considered that it should not dictate the approach to be adopted by mediators, it recommended that mediators should take note of the following when they provide mediation services funded under the pilot scheme:

- (a) The mediator should maintain an impartial attitude to facilitate the voluntary participation of divorcing couples. Persuasion, coercion and evaluative judgement should be avoided.
- (b) Divorcing couples should be encouraged to maintain life-long parenthood with emphasis on the welfare of children.
- (c) Divorcing couples should be empowered during the mediation process to take responsibility for their decisions and exercise self-determination so that maximum compliance with the agreement can be achieved.

3.3 The Working Group recommended that mediation under the pilot scheme be provided on a voluntary basis.

3.4 While noting that attendance at information sessions to explain the process of mediation is mandatory in some jurisdictions, the Working Group considered that it would not be appropriate to make such attendance compulsory under the pilot scheme which would, in any event, require legislation to make it compulsory. Only parties who have agreed to try mediation would be invited to attend an information session provided by the Mediation Co-ordinator.

3.5 The Working Group recommended that parties should be given the choice of mediators from a list of accredited mediators kept at the Mediation Co-ordinator's office. The list should as far as possible contain mediators from the Social Welfare Department, non-

governmental organisations and mediators in private practice.

3.6 If mediation was to be successful, the Working Group was of the opinion that it must be viewed by the public as a process endorsed by the Family Court and, as a result, possessing high status. For this reason the Working Group considered it imperative that the office of the Mediation Co-ordinator should be physically sited within the Family Court building so that it would be recognised as being integral to the Hong Kong system of family dispute resolution.

3.7 However, while judges would, in appropriate circumstances, encourage parties to attempt mediation, they should at all times be seen to maintain their neutrality as they will have to adjudicate cases if litigants have attempted mediation but without success. There should, therefore, be a clear separation of functions between judges and the mediation service offered through the Mediation Co-ordinator. Judges should not be seen to be working hand in hand with the Co-ordinator or individual mediators nor should it be thought that judges may be biased either for or against one party because of the outcome of mediation.

IV. Implementation of the Pilot Scheme

Preparation

4.1 International experience shows that early referral of a couple in dispute to mediation enhances the likelihood of successful mediation. It is therefore of importance that the pilot scheme be widely publicised before it commences and that all likely sources of referral are educated as

to what the service offers. Litigants will only use the service and lawyers will only refer their clients to the service if they clearly understand the process. Proper understanding of the mediation service should also eliminate the likelihood of inappropriate referrals. In the light of the experience in other jurisdictions, the Working Group recommended that there should preferably be a lead-in period of 6 months before the commencement of the pilot scheme to enable the Mediation Co-ordinator to prepare information leaflets on mediation and organize activities to promote the awareness and understanding of the service among family judges, the legal profession, court registry staff, the government departments concerned, social welfare agencies and members of the public.

Staffing and funding

4.2 To implement the pilot scheme, the Working Group recommended that a post of full-time Mediation Co-ordinator with the support of a full-time secretary and a clerk be created. The Co-ordinator will provide information sessions in which matrimonial procedures and mediation services will be explained to litigants. He or she will conduct an initial assessment of suitability of cases for mediation having regard to the nature of the disputes. Suitable cases will be referred in accordance with a list of accredited mediators. In addition, the Co-ordinator is expected to discharge the following duties:

- (a) liaising with mediators, the legal profession and government departments to keep them informed of community education programmes being organised to promote public awareness of mediation;

- (b) arranging sessions on the latest developments of family/mediation law and changes in the administration of the scheme;
- (c) preparing publicity material and running publicity programmes for mediation services;
- (d) liaising with and assisting researchers on the evaluation of the Pilot Scheme;
- (e) administering the allocation of funds for the provision of mediation services.

4.3 The Working Group recommended that funds should be provided under the pilot scheme to 'purchase' mediation services from non-government organisations and mediators in private practice. Mediator posts should also be created in the Social Welfare Department.

4.4 The Working Group considered whether legal aid should be extended to fund mediation sessions under the pilot scheme. The Director of Administration relayed to the Working Group the legal advice that the Legal Aid Ordinance would not cover mediation except in negotiations in Motor Insurers' Bureau cases. If the pilot scheme was successful and the Government decided to provide legal aid to mediation cases, the Legal Aid Ordinance would need to be amended.

Premises

4.5 As already stated in paragraph 3.6, the Working Group recommended that the Mediation Co-ordinator's Office should be accommodated in the Family Court to give a clear indication to legal practitioners and litigants that the court fully supported mediation. The

following accommodation should be provided:

- an office for the Mediation Co-ordinator which could also serve as the interview room with clients;
- another office on the same floor shared by a secretary and a clerk supporting the Mediation Co-ordinator;
- one waiting room on the same floor for litigants;
- one audio-visual room which could accommodate up to 20 clients on the same floor for running information sessions.
- one properly staffed children's room close to the Co-ordinator's office.

4.6 While information sessions provided by the Co-ordinator would be conducted in the premises of the Family Court, mediation would take place outside the court premises in the government department concerned, non-government agencies or private mediators' offices.

Length of mediation sessions

4.7 Taking into consideration overseas experience and the provision of family mediation services by local agencies on a modest scale, the Working Group noted that an average of 15 hours would be required for handling a case, although more time might be required for handling exceptionally complex cases. The Working Group considered that it

would be important to strike a balance between the need to ensure that the scheme operates in a cost-effective manner and the importance of providing a quality mediation service.

Target intake of cases

4.8 The Working Group recommended that a certain number of mediation sessions should be provided free of charge under the pilot scheme to encourage litigants to try the service. The target number of cases should at least be sufficient to form a pool for a meaningful evaluation of the pilot scheme.

Duration of the Pilot Scheme

4.9 The Working Group recommended that the pilot scheme should last for three years to allow for sufficient time to make the public and other parties concerned aware of the scheme so that meaningful evaluation could be conducted.

Monitoring

4.10 The Working Group recommended that a steering committee be appointed by the Chief Justice to oversee the implementation and smooth running of the pilot scheme.

V. Operation of the Pilot Scheme

5.1 Under the pilot scheme, litigants may seek mediation before litigation begins or at any stage during the process of litigation. Even though either one or both spouses indicate at the outset that they do not wish to have mediation, they may make application to the Mediation Coordinator after the litigation has commenced. Such applications will not however lead to an automatic stay of the proceedings.

5.2 The Mediation Coordinator may receive requests for mediation directly from either one or both spouses and referrals from the Family Court Registry, lawyers, social welfare agencies or government departments (e.g. Social Welfare Department and Legal Aid Department). Where both spouses indicate a wish to have mediation, the Coordinator will give a date for an information session during which the mediation service will be explained to the parties and a list of accredited mediators provided. The Coordinator will then refer cases considered suitable for mediation to the mediator on the list chosen by the clients and the mediator will be required to inform the Coordinator of the outcome of the mediation.

5.3 Experience in other jurisdictions indicated that lawyers were the major agents making referrals. The Working Group recommended that lawyers should be obliged under the pilot scheme to do two things. First, to advise their clients of mediation and how it may assist in the proceedings; and second, to give to their clients the information leaflet on mediation prepared by the Coordinator. As proof of this, lawyers should be required to file with the court a form bearing the title: "Certificate as to Mediation" (Contents of the Certificates are at **Annex I**

-III to Appendix F). To give effect to the above requirements, the Working Group recommended that under the pilot scheme the Certificates be introduced by way of a Practice Direction issued by the Chief Justice. Amendments to the Matrimonial Causes Rules to provide for statutory forms should be considered if the pilot scheme proves to be successful.

5.4 As regards petitioners acting in person, the staff of the Family Court registry would advise them of the availability of the mediation service and provide the information leaflet and the Certificate. Other social welfare agencies and government departments concerned would also be given the information leaflet for distribution to their clients.

5.5 The preliminary thinking of the process of referral to mediation is at **Appendix F**. It is recommended that the proposed process be fine-tuned before implementation by the Mediation Co-ordinator working in consultation with the Family Court Registry. In addition, detailed manuals should be prepared to assist the Family Court Registry staff.

VI. Evaluation of the Pilot Scheme

6.1 The Working Group recommended that an evaluation of the pilot scheme should be done by an independent research team.

6.2 The Working Group recommended that there should be an interim assessment of the pilot scheme at the end of the second year, followed by a full evaluation at the end of the Scheme. The evaluation of the pilot scheme should cover the following broad areas:

- (a) profiles of clients;
- (b) characteristics of the mediation process;
- (c) impact on the court's caseload;
- (d) outcome and effectiveness of mediation;
- (e) satisfaction of mediation clients;
- (f) views of referring agents on mediation.

— More details of the proposed scope of the research are set out in **Appendix G**.

VII. Family Mediation Rules and Code of Practice

Code of practice and Family mediation rules

7.1 The Working Group envisaged that a Code of Practice would be required to regulate the standards and conduct of family mediators. A set of rules clearly setting out the relationship between the mediator and the parties and between the parties themselves would also be required to ensure the smooth conduct of mediation sessions. The Working Group noted that the Hong Kong International Arbitration Centre (HKIAC) had already approved a set of Guidelines for Professional Practice of Family Mediators and was in the course of finalizing a set of family mediation rules.

Privilege and confidentiality in family mediation

7.2 While in due course, if the pilot scheme proves to be successful and mediation is incorporated into legislation, it will be preferable to

ensure confidentiality by means of an appropriate statutory provision (which has been done in other jurisdictions), the Working Group is of the opinion that at this time, for the purpose of the pilot scheme, the common law provides adequate means to ensure the confidentiality of mediation -

- (a) When parties accept mediation, they will be required by the mediator to sign an agreement to mediate which will state that all negotiations are to be privileged and conducted on a without prejudice basis. (see, for example, section B VI of the HKIAC's Guidelines for Professional Practice of Family Mediators).
- (b) In addition, there exists authority to the effect that mediation or conciliation negotiations are privileged as being negotiations made in a bona fide attempt to settle a dispute and/or are privileged on the basis of the public interest in ensuring the stability of marriage (see, for example, *Wilkinson v Wilkinson* [1994] 1 HKC 430 and *In re D (minors)* [1993] 1 WLR 721 at 728).

VIII. Summary of Recommendations

8.1 The Working Group made the following recommendations:

- (a) a pilot scheme should be run to test the effectiveness of mediation in resolving matrimonial disputes in Hong Kong;
- (b) information and mediation sessions be provided on a voluntary basis under the pilot scheme;

- (c) litigants should be given the choice of mediators from a list of qualified mediators containing mediators from the Social Welfare Department, non-governmental organisations and those in private practice;
- (d) a lead-in period of 6 months before the commencement of the pilot scheme should preferably be allowed to enable the Mediation Coordinator to prepare information leaflets on mediation and organize activities to promote the awareness and understanding of the service among family judges, the legal profession, court registry staff, the government departments concerned, social welfare agencies and members of the public;
- (e) a post of full-time Mediation Co-ordinator with the support of a full-time secretary and a clerk be created;
- (f) funding should be provided to the Social Welfare Department, non-government agencies and mediators in private practice for the provision of mediation services;
- (g) the Mediation Co-ordinator's Office should be accommodated in the Family Court to give a clear indication to legal practitioners and litigants of the court's full support for mediation;
- (h) a balance should be struck between the need to ensure that the scheme operates in a cost-effective manner and the importance of providing a quality mediation service;
- (i) a certain number of mediation sessions should be provided free of charge under the pilot scheme to encourage litigants to try the service. The target number of cases should be sufficient to form a pool for a meaningful evaluation of the pilot scheme;
- (j) the Chief Justice consider appointing a steering committee to oversee the implementation of the pilot scheme;

- (k) lawyers should be obliged under the pilot scheme to advise their clients of the availability of mediation services and to give information leaflets on mediation prepared by the Coordinator to their clients. As proof of this, lawyers should be required to file with the court a form titled "Certificate as to Mediation";
- (l) "Certificates as to Mediation" should be introduced by way of a Practice Direction issued by the Chief Justice;
- (m) the pilot scheme should last for 3 years with an interim evaluation of the scheme at the end of the second year, followed by a full evaluation at the end of the scheme;
- (n) an evaluation of the pilot scheme should be conducted by an independent research team.

MERITS OF FAMILY MEDIATION

<u>Countries</u>	<u>Names of Studies/Mediation Programmes</u>	<u>Findings</u>
<u>General</u>	<p>Johnston et al "Impasses to the resolution of custody and visitation disputes" American Journal of Orthopsychiatry, vol 55, 112-129. (1985).</p> <p>"An evaluation of process and outcome in a private family mediation service", Mediation Quarterly, vol 10(1), 35-55. (1992).</p> <p>"An approach to resolution of litigation disputes postdivorce: Short-term counseling" Doctoral Dissertation, San Diego. (1973).</p> <p>"Does mediation work? A survey of long-term satisfaction and durability rates for privately mediated agreements", Mediation Quarterly, vol 11(2), 157-170. (1993).</p> <p>"A preliminary portrait of client reactions to three court mediation programs", Conciliation Courts Review, vol 23(1), 1-14. (1985).</p> <p>Irving & Benjamin, Family Mediation: Theory and Practice of Dispute Resolution, at 65 (1987).</p>	<p>The relitigation rates among mediation clients have been lower than among their litigation counterparts. Johnston had 18% relitigation rates with another 18% returning to mediation rather than court. Irving and Benjamin reported rates of 10%, Margolin 12%, Mierding; 7%, and Pearson and Thoeenes 4%. Low relitigation rates have implications for diversion from the court and for saving the costs of court and legal aid.</p> <p>Despite some methodological concerns, Benjamin and Irving concluded that: "irrespective of variation among studies, the majority of couples entering mediation will reach agreement, will express satisfaction at the process and outcomes, will comply with the terms of their agreement, and will not turn to the family court should they encounter later problems."</p>

Australia

Sophy Bordow and Janne Gibson, Evaluation of the Family Court Mediation Service - Research Report: No.12, March 1994.

The Family Court mediation service offers a highly successful option for the resolution of family disputes with 82% of couples who enter into mediation emerging with an agreement on all or at least one substantial issue.

Mediated agreements tend to endure, at least on one-year follow-up, with clients adhering to the terms of their agreements and demonstrating a clear preference for informal resolution (as opposed to litigation) of any problems associated with their agreement.

The durability and high compliance of mediated agreements significantly lessens the need to use the court to vary or enforce agreements and carries a real potential for reducing the number of contested cases.

Most lawyers saw the impact of mediation on their practice in positive terms, but the strongest testimonials were reserved for the impact of mediation on their clients and the nature of the resulting agreements. The benefits of mediation mentioned included: more satisfying and binding agreements, empowerment and acquisition of negotiation skills, less costly and more personal alternative and the intrinsic fairness of the mediation process.

Europe

United Kingdom Gerard, "Conciliation: present and future" in Freeman, The State, Law and Family, (1984) 281,283-4.

Cost-benefit analysis is becoming increasingly popular as a rationale for the introduction of government supported mediation. The research done in the first three months of the pilot conciliation scheme in the Principal Divorce Registry in London found that out of 282 cases of custody/access, only 45 welfare officer's reports were ordered, the balance being disposed of by consent. Before this scheme, such reports would have been ordered in about two thirds of cases. If an officer's report cost £700-800 each, then the saving was £10,000 in such a short time.

Ireland Irish Family Mediation Service

The service has mediated 3,600 couples, about 360 a year. 63% reach agreement on all issues.

Between 1 September 1986 and 31 December 1992 there were 5,531 requests for initial appointments. Of these, 3,535 received advice and information. The remaining 2006 were given appointments..... Of these 1,437 couples attended mediation. 774 reached a mediated agreement on all issues and in 102 couples were reconciled.

North America
United States

Pearson and Thoennes in Folberg and Milne *op cit* at 437, referring to their survey, "Mediation of contested child custody disputes" Colorado Lawyer, vol 11(2), 337-355 (1982).

"A Decade of Family Mediation Research: Some Answers and Questions", Second International Mediation Conference, (January 1996), Conference Papers, at 149.

Emery, *infra*, (1994) and Kelly "Mediated and adversarial divorce: Respondent's perceptions of their processes and outcome", Mediation Quarterly vol 24, 71-88. (1989).

Benjamin and Irving, Family Mediation: Theory and Practice of Dispute Resolution.

"A Preliminary Portrait of Client Reactions to Three Court Mediation Programs", Conciliation Courts Review, vol 23(1), at 1 (1985).

"An evaluation of court mediation: A comparison in divorce cases with children", Journal of Family Issues, vol 2, No 1, 39-60, March 1981.

While mediation may not always be more effective than court adjudication, in preventing recidivism, it certainly does not produce a rash of relitigation activity.

Kelly summarized her review of the research on agreement rates as being between 50-85%.

When mediation samples are compared with litigation samples, mediation clients are significantly more satisfied than adversarial groups.

Court based mediation cost only 25% of contested cases processed through the court, resulting in a net saving in 1978 of US\$175,000 and more than 600 court days.

Pearson and Thoennes (1985) estimated that the public saved between US\$5,610 and US\$27,510 per 100 cases sent to mediation. Pearson and Thoennes found that the average cost of mediation among those who reached agreement was US\$1,630 compared to US\$2,360 for those who went through litigation, a difference of \$730 per case.

Kressel estimated that, projected on a national basis in the United States, this would be a saving of US\$79.5 million - \$159m.

In 1978 the Los Angeles Conciliation Court handled

"Mediation is the Winner", Family Advocate vol 3(4), 32-35, (1981) referred to in Irving and Benjamin, "Family Mediation, Theory and Practice of Dispute Resolution", at 238. (1987).

March 1981, *op cit* at 55, quoted in Blades Family Mediation (1985) at 99.

"Evaluation and study report on conciliation courts, in Frontenac Family Referral Service", *Couples in Crisis II*, Ontario (1984).

747 cases, with an estimated net saving of US\$175,004.

The director of Hennepin County in 1982 said that mediation cost US\$238 while a custody evaluation cost \$1,530. The use of mediation in that year, rather than automatically assigning contested cases for evaluation, saved his county \$139,000. Bahr found that private mediation cost an average of US\$565 less per case than litigation.

All available evidence indicates that a court mediation service would save substantial amounts of money and improves the quality of dispute resolution at the time of divorce. Although the data has limitations, their strength is that mediation has been successful under a variety of conditions in several different states and countries. Whether mediation is very brief (2 hours) or rather lengthy (12 hours), it is economically efficient, resolves some disputes that would otherwise go to trial, and appears to improve post-divorce adjustment and compliance with settlement. Therefore, it is recommended that a court mediation scheme be established in all states.

Gardner found that excluding legal fees (average C\$100-200 per hour), mediation at the Frontenac Family Referral Service cost an average of C\$27 per hour compared to C\$273 per hour in court. Time saved was an average of 12 minutes of court time as compared to 33 minutes for non mediated cases.

Kelly, "Is mediation less expensive? Comparison of Mediated and Adversarial Divorce Costs", (1990) & Mediation Quarterly 15.

Fees for mediation ranged from US\$40-120 per hour depending on the family's income. The average cost for attorneys in the adversarial group was US\$6,850 for men and US\$5,376 for women, making a total of US\$12,226 per couple, a figure 134% higher than mediation costs. One of the reasons for the higher costs in litigation was that opposing experts were used while in mediation parties tended to agree to use one accountant or pension evaluator.

Canada

Court-based Divorce Mediation in Four Canadian Cities, An Overview of Research Results (1988).

The satisfaction rates were 80-90%. A full or partial settlement was reached in 64% of the mediation cases. Court records showed 49% of mediated cases reached complete settlement and another 15% reached partial settlement.

Women achieved higher child support payment through mediation than litigation. There were considerable time savings and clients had positive experiences in using mediation. Contested case took 23 weeks less when mediation was used. Clients felt that delay prolonged the pain involved in marriage breakdown and mediation was more rational and humane.

Broad Guide on Disputes Not Appropriate for Family Mediation

As the process of mediation requires a high degree of participation by the parties themselves to be able to identify and articulate their own interests and to be able to negotiate on a relatively equal basis, there are a number of circumstances when the use of mediation must be questioned. This highlights the crucial need for a thorough assessment for suitability by the mediator during the individual intake sessions.

When might mediation not be suitable?

1. One or more of the parties is in a severely disturbed emotional or psychological state, such that they cannot represent themselves or focus on the needs of their children.
2. The parties have ulterior motive for using mediation, for example, to cause delay, to gather further information, because the status quo is to their advantage, to punish the other party, to achieve some illegal or immoral purpose on a confidential basis, to prolong the relationship or to continue a pattern of 'negative intimacy'.
3. Where there is a remedy which only a court could provide, such as an injunction or a protection order, or where something has to be achieved with great urgency.
4. When there is an imbalance of power due to guilt or intimidation to the extent that they cannot represent themselves in negotiations, that is, they cannot articulate or stand up for their own legitimate concerns.
5. Mental illness.
6. Certain issues of child abuse.
7. Where the use of mediation could involve the risk of personal danger for one or more parties, or there has been a history of a 'fixed pattern' of domestic violence.
 - (i) Where an agency or mediator considers offering mediation for a case which involves abuse or violence, it should proceed only where it has satisfied itself of:-

(a) the abused party's capacity to participate effectively in mediation, as evidenced for example by:

- there being no current abuse and no evidence of substantial impact of past abuse.
- the client's having received appropriate counselling and legal or other assistance in relation to the abuse.
- sufficient time having elapsed so that the abuse is not a major current concern for the abused person.
- the abused person's being well informed about legal rights and responsibilities in relation to the matters in dispute and about any possible implications of the abuse for the process or outcomes of mediation.

(b) The abuser's capacity to abide by the terms of the agreement to mediate, to negotiate fairly, and to cooperate in ensuring a safe environment for mediation.

(ii) Mediation where violence has been disclosed or is suspected should include:

- An understanding of how abusive ex-partners may attempt to use the mediation process to continue abuse or intimidation and the possible impact of domestic abuse on clients' capacity to mediate and achieve a fair outcome.

Adapting the mediation model where necessary. For example; having routine, compulsory private session, using shuttle mediation, using a gender-balanced co-mediation team, allowing third parties or support persons to attend the sessions and scheduling shorter mediation sessions.

- Strict safety measures during the mediation. For example, separate waiting rooms, plan how the safety of the abused party will be assured during mediation breaks, and the abused party leaving the mediation earlier than the abuser.
- Phone follow-up between sessions should check safety and commitment to mediation.

**Survey on the Number of Accredited Family Mediators
(As at end November 1998)**

	<i>Social Welfare Department</i>	<i>Catholic Marriage Mediation Service</i>	<i>Family Mediation Committee</i>	<i>Total</i>
1. Number of accredited mediators (see Note)	2	12	6	20
2. Number of accredited mediators who can do mediation on a full-time basis.	2	5	3	10
3. Number of accredited mediators who can do mediation on a part-time basis	-	7	6	13
4. Number of accredited mediators who are proficient in:				
<input type="checkbox"/> Cantonese	2	12	3	17
<input type="checkbox"/> English	2	12	6	20
<input type="checkbox"/> Putonghua	-	3	-	3
5. Number of trainees of family mediation	9	12	25	46

Note Family mediators accredited by the HKIAC are required to complete both 5 day basic family mediation training course (40 hours) plus 3 day advanced training courses and complete at least 2 supervised cases (or equivalent).

Qualifications for Family Mediators

1. A degree from a recognised university or institution in social work, psychology or law or a post graduate qualification in counselling/psychiatry or law;

and
2. three years working experience in the fields of family law or family welfare/counselling;

and
3. Satisfactorily completed the training and supervised practical requirements as required by the Hong Kong International Arbitration Centre or other internationally recognised accreditation procedures;

or
4. Satisfactory and relevant experience in either Mediation or the fields of family law or family welfare/counselling and who also satisfies clause 3 above.

or
5. Demonstrated the ability to function at an academic level although not holding a professional degree, and has had a substantial amount of applicable personal or professional experience to demonstrate an attitude for mediation and who also satisfies clause 3 above.

**Similarities and Differences among
Mediation, Counseling and Litigation**

	Mediation (Mediator)	Counseling (Counselor)	Litigation (Lawyer)
Time-Orientation	- focus on present & future	- focus on impact of the past experiences on present & future	- present & future
Goal	- focus on decision making that achieves the optimum satisfaction for both parties in a voluntary spirit	- for personal growth - to resolve issues from the past	- to strive for client's maximum benefit
Focus	- interest-based	- client-centered	- position-based
Role of Practitioner	- impartial facilitator	- therapist	- advisor & advocator
Key Principles	- children's welfare are paramount - life-long parenthood & co-parenting	- to promote the well-being of self	- client's benefit is paramount
Assessment	- assess the underlying concern of all parties to formulate strategies to facilitate amicable decision making	- requires a more extensive assessment to promote insight and change in behavior	- based on client's allegation & evidence
Dispute Resolution	- clarify needs and concerns, reframing - brainstorm options & possible resolutions - promote co-operation & mutually-satisfied agreement - non-adversarial	- counseling, reframing - promote insights & empathy - non-adversarial	- litigation/settlement - adversarial legal process
Handling Emotion	- provide opportunity to express emotion and frustration, in a safe and non-threatening way, which may block the negotiation	- allow ventilation - go over the past & work out unresolved emotional issues	- put aside emotions in order to attain settlement
Strategy	- win/win situation	- hold therapeutic value	- win/lose strategy
Personal Empowerment	- Yes	- Yes	- No
Strengths	- economical & time saving - more durable agreement - reduce hurt and hostility - facilitate on-going cooperation	- personal growth & healing - restore functioning - raise self-awareness	- effective with highly conflictual couples & cases with power imbalance, violence or threatening behavior

Process of Referral to Mediation

1. Before Litigation Begins

1.1 The Mediation Co-ordinator (the Co-ordinator) may receive requests from either one or both spouses before litigation has commenced. If one spouse alone seeks assistance, the Co-ordinator will issue a letter to the other spouse to invite that party to participate. If the other party is willing to attempt mediation, the Co-ordinator will invite both to attend an information session. If both parties seek mediation, the Co-ordinator will arrange for them to attend an information session. In these circumstances, mediation will be conducted without the court being involved.

1.2 If the other party refuses to attend an information session or thereafter to attempt mediation, the co-ordinator will inform the other party of this. Again, the court will not be involved.

2. When Matrimonial Proceedings Are Instituted

2.1 When one spouse consults a solicitor and decides to institute matrimonial proceedings, the solicitor will be required to:

- (a) advise the petitioner of mediation and how it may assist in the proceedings; and
- (b) give the information leaflet on mediation prepared by the Co-ordinator to the petitioner.

2.2 As proof that the solicitor has fulfilled the requirements of 2.1(a) and (b), he or she will be required to file a "Petitioner's Certificate as to Mediation" duly signed by the petitioner and the solicitor when the divorce petition is filed. This will be in addition to Form 2A. A copy of the Certificate is at **Annex I**.

2.3 If the petitioner indicates his/her wish to attempt mediation and if the petitioner is legally represented, the solicitor will file the Certificate with the Co-ordinator. If the petitioner is not legally represented, the Family Court Registry (the Registry) will file the Certificate with the Co-ordinator. The Co-ordinator will write to the other party to seek his/her consent to participate. If the other party consents, the Co-ordinator will arrange for both to attend an information session. If the other party refuses to attend an information session or thereafter to attempt mediation, the Co-ordinator will inform the petitioner or his/her solicitor of this.

2.4 The petitioner or his/her solicitor should serve on the respondent, in addition to the Petition and Form 4, the information leaflet on mediation, the *signed* "Petitioner's Certificate as to Mediation", and a form of the "Respondent's Certificate as to Mediation". A copy of the Certificate is at **Annex II**.

2.5 The respondent will be required to complete, in addition to Form 4, the "Respondent's Certificate as to Mediation". If the respondent indicates that he/she wants to attempt mediation, the Registry will refer the request to the Co-ordinator who will then contact the petitioner to seek consent. If the petitioner consents, arrangement will be made for both to attend an information session. If the petitioner refuses to attend an information session or thereafter to attempt mediation, the Co-ordinator will inform the respondent of this.

2.6 When a petitioner acting in person files a petition at the Registry, the Registry staff will hand to him or her the information leaflet on mediation together with the "Petitioner's Certificate as to Mediation". If the petitioner indicates his/her wish to attempt mediation, the procedure in paragraph 2.3 above will apply.

2.7 If the spouses make a joint application, the Registry will give them the "Applicants' Certificate as to Mediation". A copy of the Certificate is at **Annex III**.

3. After Litigation Has Commenced

3.1 During the course of litigation, either party may file an "Application for Mediation" with the Mediation Co-ordinator. A copy of the form is at **Annex IV**. If one party files the application, the Co-ordinator will send a letter inviting the other party to participate. If the other party consents, both will be invited to attend an information session. If the other party refuses to attend an information session or thereafter to attempt mediation, the Co-ordinator will inform the party requesting mediation of this.

3.2 A party's application for mediation will not lead to an automatic stay in the legal proceedings. For example, parties who agree on divorce but do not agree on ancillary matters may proceed to obtain the decree nisi for their divorce while they are seeking to resolve other matters through mediation. Trial dates may still be set and pleadings completed while mediation takes place.

4. After Mediation Has Been Completed

4.1 The Co-ordinator should submit a report to the court giving the results

of the mediation. Such reports shall be couched in neutral language advising the judge that-

- (a) mediation was sought but neither party attended an information session.
- (b) one (or both) parties attended information sessions and thereafter no referral was made.
- (c) there was a meeting with the Co-ordinator or the mediator who considered that this case was not suitable for mediation.
- (d) mediation did take place but the parties were unable to resolve any issues.
- (e) mediation did take place and the parties were able to resolve certain issues (e.g. divorce, custody and access, maintenance, financial matters generally).

5. Role of Judges in Mediation

5.1 While a Judge may encourage parties to attempt mediation in appropriate cases, the Judge should at all times maintain his or her neutrality as he or she will adjudicate cases after litigants have attempted mediation but without success. A Judge should therefore not be seen to be working hand in hand with the Co-ordinator nor should it be thought that a Judge may be biased either for or against one party because of the outcome of mediation.

Petitioner's Certificate as to Mediation

For Petitioner who is legally represented#

I, _____, the solicitor acting for the petitioner in the above cause, certify that I have advised the petitioner of the availability of mediation and have given the information leaflet on mediation to the petitioner.

I, _____, the petitioner in the above cause, certify that my solicitor has advised me of the availability of mediation and has given me the leaflet on mediation. At this time, I do/do not* wish to seek mediation. I am aware, however, that I may at any time during court proceedings indicate to the court my wish to attempt to resolve any outstanding issues by means of mediation.

For Petitioner acting in person#

I, _____, the petitioner in the above cause, have been given the information leaflet on mediation. At this time, I do/do not* wish to seek mediation. I am aware, however, that I may at any time during court proceedings indicate to the court my wish to attempt to resolve any outstanding issues by means of mediation.

(Signed) (Solicitor)

(Signed) (Petitioner)

Dated this _____ day of _____ 19 ____ .

Notice to Petitioner

Please put down a contact address and a telephone number to enable arrangements to be made to attend an information session and/or seek mediation.

Contact address: _____

Contact telephone numbers: _____

Complete the section relevant to your case only

* Delete as appropriate

Respondent's Certificate as to Mediation

For respondent who is legally represented#

I, _____, the solicitor acting for the respondent in the above cause, certify that I have advised the respondent of the availability of mediation and have given the information leaflet on mediation to the respondent.

I, _____, the respondent in the above cause, certify that I have received the information leaflet on mediation. At this time, I do/do not* wish to seek mediation. I am aware, however, that I may at any time indicate to the court my wish to attempt to resolve any outstanding issues by means of mediation.

For respondent acting in person#

I, _____, the respondent in the above cause, have been given the information leaflet on mediation. At this time, I do/do not* wish to seek mediation. I am aware, however, that I may at any time during court proceedings indicate to the court my wish to attempt to resolve any outstanding issues by means of mediation.

(Signed) (Solicitor)

(Signed) (Respondent)

Dated this _____ day of _____ 19 ____ .

Notice to Respondent

Please put down a contact address and a telephone number to enable arrangements to be made to attend an information session and/or seek mediation.

Contact address: _____

Contact telephone numbers: _____

Complete the section relevant to your case only

* Delete as appropriate

First Applicant

Contact address: _____

Contact telephone numbers: _____

Second Applicant

Contact address: _____

Contact telephone numbers: _____

Complete the section relevant to your case only

* Delete as appropriate

Application for Mediation

To: Mediation Co-ordinator,

I, _____, the petitioner/respondent/applicant* in the above cause, believing that the outstanding issues in this matter may be resolved by mediation, hereby apply to the Mediation Co-ordinator for referral to mediation. The outstanding issues to be covered include:

- The welfare of the children (custody and/or access)
- Financial support for one spouse and/or the children
- Accommodation for one spouse and/or the children
- Financial matters generally
- Others, Please specify _____

I make this application in the knowledge that the filing of this application shall not result in a stay of proceedings.

(Signed) (Petitioner/Respondent/Applicant*)

Dated this _____ day of _____ 19 ____ .

Notice to Petitioner/Respondent/Applicant

Please put down a contact address and a telephone number to enable arrangements to be made to attend an information session and/or seek mediation.

Contact address: _____

Contact telephone numbers: _____

* Delete as appropriate

Scope of the Research on Family Mediation Pilot Scheme

The research of the Pilot Scheme on Family Mediation in Hong Kong may include the following broad parameters -

(a) **Profiles of clients**

The number of couples using the service, age and social-economic status, relationship status (eg. duration of relationship and length of separation, children, level of conflict, etc), issues in disputes (eg. financial assets, children's guardianship, custody and access, spouse maintenance, multiple issues, etc), whether the couples are legally aided, motivation for entering mediation and expectation of outcomes.

(b) **Characteristics of the mediation process**

Sources of referral (e.g. referrals by solicitors, family court registry, Legal Aid Department, Social Welfare Department, non-government organizations, brochures, word of mouths, etc), stage of proceedings during which mediation begins, number and duration of mediation sessions, profile of cases judged not suitable for mediation, including the reasons not proceeding with mediation.

(c) **Impact on court work**

Percentage of contested matrimonial cases diverted from litigation to mediation, comparisons between mediation and litigation in terms of time and costs.

(d) **Outcome and effectiveness of mediation**

Overall agreement rates and breakdown for different types of disputes, factors associated with agreement or non-agreement including gender factors, durability of agreement, and re-litigation rate of agreement cases

(e) **Satisfaction of mediation clients**

Client satisfaction with the mediation process, outcomes, agreements and factors affecting client satisfaction.

(f) **Views of referring agents on mediation**

An opinion survey of lawyers and other agents that have made referrals regarding types of disputes referred to mediation, level of complexity/difficulty of referred cases and the stage of disputes at which the referral is made.