

Family Mediation

Theory and Practice With Chinese Families

Howard H. Irving



香港大學出版社

HONG KONG UNIVERSITY PRESS

Hong Kong University Press
14/F Hing Wai Centre
7 Tin Wan Praya Road
Aberdeen
Hong Kong

© Hong Kong University Press 2002

ISBN 962 209 595 X

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British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

Secure On-line Ordering
<http://www.hkupress.org>

Printed and bound by Kings Time Printing Press Ltd., Hong Kong, China.

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Introduction

For decades, divorcing couples in Hong Kong and elsewhere were necessarily subject to the vicissitudes of the adversary system, modeled after Great Britain. While some of the parties may have lamented its limitations, their comments carried little or no weight, for there was no alternative. This remained so so long as the system was functional, that is, so long as the number of cases flowing through the courts remained low. When the number of such cases began to rise, and rise sharply over a relatively short time, the system began to breakdown. Court dockets became full, backlogs began to appear, and delays became inevitable.

Such difficulties were new to Hong Kong but were long familiar in Western nations. There, various solutions have been tried, chief among them the introduction of some form of court-supported family mediation. In most jurisdictions, such diversion to mediation has been on a voluntary basis; jurisdictions, such as California, that have tried making mediation mandatory have usually reported decidedly mixed results. As will be apparent in a later chapter, such efforts at diversion have been successful in three senses, namely that (a) the majority of these cases have ended in full or partial settlement, (b) the vast majority of these clients have reported satisfaction with the experience, and (c) available evidence shows that the rights and entitlements of both women and men have been recognized and respected.

Given their urgent need, and in light of this evidence, Hong Kong

has recently introduced a family mediation service. The history of that effort is ably recounted in a later chapter. Here, it will suffice to say that most, if not all, of the mediators providing that service have been trained in the **therapeutic family mediation (TFM)** practice model, developed by Howard Irving and Michael Benjamin, and which is the primary focus of the text.

Defining Basic Terms

In the interests of clarity, it will be useful to define a handful of basic terms at the outset. These are terms that are used throughout the literature, but typically without formal definition. For the beginning practitioner this is unfortunate, and may inadvertently lead to misunderstanding.

Mediation

Mediation is that voluntary process whereby an impartial third party, the mediator, helps parties identify and clarify the issues in dispute between them, and facilitates communication between the parties in an effort to promote settlement of some or all of these issues. In the process, family mediation does not deal with fault, assign blame, give legal advice, or make decisions for the parties. Family mediation is successful when the parties are able to negotiate an agreement that meets the best interests of the entire family system. It is also successful when it recognizes that in some cases family mediation may not be recommended.

In this context, third parties are seen as impartial when they act fairly and without bias towards both parties. That said, three approaches to mediation may be distinguished. One approach is generic in character and advance a set of practice techniques that apply to all groups in conflict, including couples in divorce. The second approach concentrates on family mediation, but treats the family like any other group in conflict, that is, by focussing on substantive issues while giving limited attention to affective or relational dynamics. The third approach treats family conflict as different from conflict in other groups by applying techniques designed specifically with the family in mind, and that therefore engage family affective and relational dynamics as integral to mediating disputes among its members. The TFM practice model is one of a handful of models comprising this third approach.

Conflict

Conflict is a universal feature of human groups. Conflict is rooted in differences. Differences in feelings and relationships. Differences in values and principles. Differences in information and misinformation. Differences in interests and present or future goals. Differences in power, authority, competitive urges, and psychological states. In coming together in groups, participants carry their differences into their relationships, and in so doing ensure the inevitability of conflict. Conflict, then, refers to a difference of opinion or disagreement between two or more family members concerning one or more issues of importance to them.

In contrast, **conflict resolution** refers to a new agreement or understanding concerning one or more issues in conflict that is acceptable to and satisfying for the parties in question.

Divorce

This is a legal term denoting the formal dissolution of the marriage between a man and a woman. It does not apply to the dissolution of the heterosexual or homosexual relationship between two parties who have lived together.

Litigation

This is the impartial application of a set of abstract rules and procedures, with the parties themselves typically represented by lawyers who are ethically committed to zealously present their client's position in the most favorable light possible. The issues are said to have been **adjudicated** or settled when a ruling is handed down by a judge.

Negotiation

In TFM-based family mediation, negotiation may be defined in terms of the following core elements:

- a dynamic verbal and behavioral interaction process
- involving both partners and possibly others
- who are in conflict over parenting, financial, and relational issues
- affecting them, their child(ren) and possibly others, and

- who seek to achieve agreement over these issues
- in order to:
- realize their self-interest(s)
- meet their individual needs
- protect the best interests of their child(ren)
- preserve their relationship as parents, and
- otherwise get on with their separate lives.

While somewhat cumbersome, this definition captures the sense of negotiation in TFM-based mediation. Mediation is a complex process driven by multiple motives the outcome(s) of which will likely affect the lives and relationships of the people making up the two family systems brought together by the marriage of the partners.

Separation

Separation has two slightly different meanings. The first variation simply notes the fact that married or common-law partners have elected to live apart for some period of time. The second variation, used throughout this volume, refers to the breakdown of the relationship between married or common-law partners, with the understanding on the part of one or both of them that there is no possibility of reconciliation. Accordingly, the parties no longer act towards each other as married partners would be expected to do, whether they live together or apart. That is, they are no longer sexually intimate, and neither party cares for the other by making their meals, doing their laundry, and so on.

Hong Kong: The Little Dragon

This volume concerns family mediation with Chinese families throughout Asia and beyond. However, a detailed examination of the nations comprising this region is beyond the purview of this volume. Instead, Hong Kong has been used as an illustrative example. Accordingly, it is important to understand the context in which divorce and family mediation have become issues in Hong Kong. In a single generation, Hong Kong has gone from being just another Asian trading city to one of the four "Little Dragons" — along with Singapore, South Korea and Taiwan (Leung, 1991). In becoming the economic powerhouse that it is

now, Hong Kong has taken advantage of various changes in the world economy, while undergoing a "reconfiguration of traditional and modernistic values" (Chan & Lee, 1995: 83). As will shortly be apparent, one aspect of that reconfiguration has been the very recent adoption of family mediation in the effort to resolve disputes arising from divorce.

Among the various changes that have occurred recently in the world economy, perhaps the most striking and the most consequential for Hong Kong and throughout urban areas in China has been the computer revolution and its convergence with allied technology. Not only have computers become increasingly fast and powerful, more importantly their use has become pervasive, especially in business and government. Computer networks now span the globe, making communication, for example between New York and Hong Kong, nearly instantaneous and relatively affordable. This has been helped by changes in related technologies, including fiber optics, laser technology, communication satellites, facsimile machines, digital telephone technology, and so on. From the perspective of trade, the immediate result has been globalization, making Hong Kong a major trading and manufacturing centre, with markets around the world.

This expansion of the labour market in Hong Kong has had several salient consequences, both positive and negative. For one thing, globalization has generated a rapid rise in Hong Kong's standard of living, but with a corresponding increase in the cost of living. For example, residential rents have risen rapidly, while the apartment vacancy rate has dropped sharply. Similarly, economic growth is responsible for a surge in demand for cheap labour, coupled with a corresponding decline in the rate of unemployment. Conversely, the related rise in the cost of living has made it difficult, if not impossible, for the average family to manage economically on a single wage. As a result, women in large numbers have, of necessity, entered the labour market, often working long hours at relatively meager wages. This feminization of the work force has resulted in an increase in the number of men who are forced to commute to work in mainland China and who, in consequence, have much reduced contact with their families who remain in Hong Kong.

For the children, paternal absence only compounds the effect on them of an extremely competitive education system. Globalization offers prosperity, but at the cost of intense competition. To be competitive, many Hong Kong firms, such as those involved in finance, banking and insurance, depend on a highly educated work force. In practice, this has meant a steady rise in the level of education required to compete for even entry-level positions. In response to these corporate needs, Hong Kong's

education system is among the most demanding in the world, and one which virtually ensures that many will fail and be consigned to Hong Kong's working class. Thus, children are not only under enormous pressure to do well, but often with limited contact with their parents, both of whom are away at work.

In the 1980s and 1990s, the handover of Hong Kong to mainland China in 1997 had caused much uncertainty. The combination of highly competitive labour and education systems, coupled with political uncertainty and a high cost of living, helps explain the rise in the number of "astronaut" families in which one or both parents remain in Hong Kong, while their children take up their education elsewhere, in Europe, the United States, or Canada (Lam, 1994; Man, 1994). Not surprisingly, research has shown that this family form is extremely stressful, and can involve adolescents and young adults who no longer feel at home in Hong Kong (Chiu & Rosenthal, 1992; Irving et al., 2000).

Furthermore, these various social, political and economic changes lead to a tremendous increase in the conflict between the demands of work and the demands on family life (Lam-Chan, 1999). On the one hand, that conflict has made for increasing freedom of choice. Indeed, compared to the past, men and especially women have a much wider array of choices than were available to them in the past. One choice is to have fewer children, a choice more and more couples have taken in Hong Kong in recent years. This reduces pressure by limiting the demands on family life, thus freeing up more time and energy to devote to work. Another choice involves a shift in values, from the traditional extended family to the modern conjugal family system (Chan & Lee, 1995). For example, traditional marriages, involving a primary wife and a number of concubines, have all but died out (Liu, 1999). Similarly, while traditional notions of honour or "face" remain important, the salience of other traditional ideas, such as filial piety, have lost ground to modern notions of love and marital commitment (Benjamin, 1996; Chan & Wong, 1997; Gao, 1996).

On the other hand, that conflict has seen an increasing number of families who have succumbed to the tremendous pressure resulting from the competing demands of work and family life. Under such pressure, family relationships can become increasingly distant, conflictual and unsatisfying. One consequence has been the gradual but steady rise in the incidence of domestic violence (Tang, 1994). Another consequence concerns the rise in the number of divorces. In 1987, there were only 5,000 divorces in Hong Kong. By 1997, that number had doubled, to more than 10,000. By 2000, the number of divorced had increased by

nearly 50%, to just under 14,000. That is, between 1987 and 2000, the number of divorces in Hong Kong had tripled. It is important to note that these figures are for “official” divorces only; they necessarily omit the many couples (number unknown) “who chose to dissolve their marital relationships through private arrangement” (Lam-Chan, 1999: 2).

In global terms, these figures pale by comparison to other industrialized nations. In the United States, for example, more than 1,000,000 couples divorce every year. In Great Britain the number is closer to 170,000, and in Canada, it is about 70,000. That means that about 50% of marriages in the US will eventually end in divorce, while in Great Britain and Canada the proportion is more like 35% (Irving & Benjamin, 1995).

Even so, by Hong Kong standards, given a population of 6.6 million, 14,000 divorces is a high number and signals the beginning of a trend, already seen in the US, Britain and Canada, towards a rising divorce rate. Indeed, under such conditions, what is remarkable is not that a rising number of families have broken down, but rather that the number of divorcing couples is not many *times higher*. As Hong Kong’s economy continues to flourish, and should the economic pressure on families hold steady, the current divorce rate can only continue to rise.

Litigation: The Traditional Response

In complex societies like Hong Kong’s, institutions do not stand alone; they are linked and interconnected. As the institution of the family began to falter, it could not but effect other, related institutions, such as the judiciary. Due to the pressure exerted on the courts by the rising number of divorce, the legislature responded by passing into law the Marriage Reform Ordinance, which served to modernize statutes related to marriage and divorce (Liu, 1999; see this volume, Chapter 2). This, in turn, led to a further increase in the divorce rate that overwhelmed the courts. Court dockets became clogged, and there was mounting urgency to increase the number of courts, judges, and lawyers. The response was to deal with a traditional problem — divorce — with a traditional approach — litigation and the adversary system.

While such a response would seem natural and logical, it is quite problematic. Given that Hong Kong and other Chinese communities have only begun to trod the same path as other technologically advanced nations, it had the luxury of hindsight. Regarding the use of litigation in

divorce matters, experience in other industrialized countries supports two conclusions: that "the human ramifications of divorce are too complex to be dealt with by a single profession such as law, social work, or psychiatry" (Irving, 1980: 25), and that the adversary system in general and litigation in particular are poorly suited to the issues raised by divorce (Irving & Benjamin, 1995).

For example, the adversary system, designed more for commercial rather than family disputes, assumes no on-going relationship between the parties, divergent and separate interests among them, and that zero-sum solutions (in which there is a clear winner and a clear loser) are appropriate. In the words of Herbert Gliberman, a family law lawyer, these are cases in which there is "no compromise, no conciliations, no good feelings to balance the bad. This will be an all-out confrontation, a real tooth and nail fight. I'll love it" (cited in Irving, 1980: 39).

While some lawyer may indeed love the fight, this is seldom, if ever, true of the partners caught up in the process, for each and every one of the adversarial assumptions listed above makes little sense in the context of family disputes. In such disputes, the parties not only have a lengthy history together, but can anticipate a similar history in the future as they share responsibility for their children. Not only do they have at least these interests in common, but the larger family system has interests which may supersede those of any individual family member. And zero-sum solutions are no solutions at all, locking the parties into years of turmoil and on-going dispute which not only hurts their children, but represents an important and chronic drain on court resources.

In short, adversarial solutions seldom work and, more often than not, do more harm than good. In the words of a distinguished jurist from the US, chief justice Warren Burger, "for some disputes, trials will be the only means, but for many claims . . . our system is too costly, too painful, too destructive, too inefficient for a truly civilized people" (cited in Allen & Mohr, 1998). This is especially true of the children. Children need continuous involvement with both parents and their related extended kin. They need parents who can work together to provide them with care and support. Children get both if, and only if, the parties walk away from divorce relatively intact and satisfied, and not consumed by bitterness, resentment, guilt or rage. All of these destructive feelings are typically exacerbated by adversarial proceedings, which seem designed to separate the parties and facilitate conflict between them.

None of this is to suggest that we would or should dispense with the judiciary. Some divorcing spouses demand their day in court and deserve to get it. For the most part, the intentions of judges and lawyers

are positive in their desire to help and support spouses going through a difficult time. But the system makes victims of them all, their benign intentions notwithstanding. There must be a more rational alternative, better suited to family disputes.

Family Mediation in Hong Kong

Happily, there is a more rational alternative. It is called family mediation. Mediation is that process by means of which an impartial third party, typically a trained professional, facilitates negotiation between the parties in an effort to help them resolve their differences. The roots of the mediated approach to interpersonal conflict are ancient, in the moot courts of Africa, the "peacemaker" system of the Navajo Indians of the United States, the *Ha'oponopono* or "setting to right" ceremony of the Hawaiian peoples of the South Pacific, the Jewish arbitration court, and especially in the Asian wisdom of Master K'ung, better known in the West as Confucius (Wilson, 1982) whose overriding concern was for family harmony.

Such auspicious origins do not mean that in recent times family mediation has been readily accepted as an effective approach to dispute resolution. On the contrary, in Canada, for example, the judiciary was openly suspicious. Judges were concerned that an informal approach such as mediation did not offer parties the same protections available through litigation, while lawyers were concerned with the potential loss of revenue and the fact that women in particular would be disadvantaged.

However, as the results of family mediation efforts began to be known (Irving & Benjamin, 1995), these fears proved unfounded. In turn, as mediation's credibility was established, its popularity rose rapidly. Some form of family mediation is now available in virtually all technologically advanced nations worldwide, and rapidly becoming the method of choice in many (Scully, 1997). That popularity is founded on the benefits that accrue from mediation for the parties, the state, and the judiciary.

The parties are especially enamored of mediation's process benefits. By and large, clients like the control mediation offers to determine their own fate. They like the opportunity it provides simply to be heard, to say their piece. They like the chance to express their feelings without interruption. They like the forum in which to explore and clarify issues, and to gain insights into their situation they might not have had before. They like to learn about their rights and the courts and the laws, even if

only to know that they may choose to give them up. They like the feeling of support mediation offers, including the support sufficient to drop out of mediation as inappropriate to their circumstances. And they very much like the opportunity to put the process behind them, and to get on with their lives with at least some assurance that this process will not keep happening.

States are especially enamored of mediation's outcome benefits. On the basis of extensive and on-going research in North America, the UK, and Australia (Irving & Benjamin, 1995, in press [2002]), we now know that, compared to litigation, parties in mediation:

- are more likely to reach voluntary agreement (60% to 80%)
- require fewer service hours to do so
- expend fewer resources in the process (mediation costs fewer dollars per case, saves money in terms of court diversion, and is more likely to yield satisfied clients)
- are more likely to adhere to the terms and conditions of settlement
- are less likely to return to court

Finally, the judiciary is enamored of different process and outcome benefits, including:

- helping to avoid unnecessary litigation
- better preparing the parties to understand the issues
- allowing clients to use legal services more appropriately
- reducing the clients' emotional pain.

In court systems that are chronically clogged, and rapidly becoming more so, these are attractive features indeed. Furthermore, just as there is no evidence that mediation places women or men at heightened risk, so there is no evidence that instituting mediation eliminates the need for courts, judges or lawyers. Unfortunately, mediation is no panacea. Using Canadian data, 20% to 40% of divorcing couples do not use mediation, either because they prefer litigation and/or because they are unable (at that time) to engage in productive negotiation. Consequently, demand for judges and lawyers is unlikely to diminish for the foreseeable future. However, for the majority of clients who are amenable to mediation (see Chapter 3), it promises a process for ending marital relationships that is caring and sensitive, as well as quick and efficient. It is the civilized way to respond to couples in dispute.

Given the civility and the pragmatic benefits of applying family mediation, Hong Kong initiated their own three-year pilot study to explore the benefits of family mediation for divorcing couples (Working

Group, 1999; this volume, Chapter 2). Operating out of the Hong Kong International Arbitration Centre, in 1998 Hong Kong had 20 accredited family mediators and 46 trainees. And efforts are being made to expand the cadre of trained family mediators (Irving, 1997).

Two conclusions can be drawn about mediation practice in Hong Kong. First, based on experience with Chinese families in North America (Wong, 1995) and Hong Kong (Chan & Wong, 1997), mediation efforts cannot be generic, but must be acutely sensitive to the particular needs of mostly Cantonese-speaking Chinese families (Holt & Steinhard, 1990; this volume, see Chapter 4). The salience of practitioners who are culturally competent is a lesson well known in other clinical areas of practice, such as social work (Devore & Scheslinger, 1996) and psychotherapy (Chao, 1990), but has only recently been appreciated in mediation (Barsky et al., 1996). The second conclusion concerns the extremely good fit between the TFM model (Irving & Benjamin, 1995) and the needs of Chinese families in Hong Kong and elsewhere.

Turning first to the model itself, there are, in fact, very few practice models that regard family conflict as different from conflict in other groups, that apply techniques designed specifically with the family in mind, and that therefore engage family affective and relational dynamics as part of mediating disputes among family members (Emery, 1994; Haynes, 1994; Sasposnek, 1994). TFM is one such model, and it is grounded on the view that there are at least three reasons for thinking that a therapeutic approach is likely to be more effective than its generic counterparts. The first reason concerns the character and complexity of relations among members in family as opposed to other social systems. This argument holds that family systems are unique as regards the meaning, intimacy and intensity of family relations, and that divorce marks the reorganization rather than the disintegration of such systems (Ahrons & Rodgers, 1987; Pam & Pearson, 1998). In that sense, conflict within family systems is unlike conflict between neighbors, landlords and tenants, or buyers and sellers. In effect, spouses do not get divorced *from* each other; rather, they get divorced *to* each other, mediation affording them a unique opportunity to consciously decide how they will relate to each other as parents in the future. It follows that if family system conflicts stand apart from conflict in other systems, then the mediation techniques used to address such conflict should similarly stand apart, that is, be crafted with such systems in mind (see Chapter 5).

That gets us to the second reason to believe in TFM's effectiveness, namely, the range of families amenable to mediation. As their name suggests, generic models are designed with generic client populations in

mind. Accordingly, these models are unsuited for clients with special needs who are rendered unable to negotiate productively. Unfortunately, that applies to many couples in divorce (Coy & Hedeon, 1998), thus limiting the range of couples likely to benefit from mediation. In contrast, therapeutic models, including TFM, assess for the bases on which productive negotiation cannot occur, and intervenes to change interaction, thus increasing the likelihood that mediation can proceed to settlement. The obvious consequence is that TFM is useful in mediating disputes in a much wider range of divorcing couples than would be the case among its generic counterparts.

The final reason concerns the durability of settlements. By suppressing conflictual behaviour and ignoring affectively charged responses, generic models can be effective in helping divorcing couples reach agreement. However, in doing so, they not only increase the dropout rate, but also place the durability of such agreements at risk. Clients drop out of mediation and mediated agreements break down because spouses feel that they have not been truly heard, or that underlying sources of conflict have not been addressed, or that dysfunctional ways of handling conflict have been left untouched, or some combination of all three. By addressing these processes directly, TFM maximizes the likelihood that clients who reach agreement have truly settled their conflict (if not necessarily their differences) and, having learned new and better strategies for managing conflict, will be better prepared to address these differences informally when they inevitably arise in the future.

As to the character of Hong Kong families, our direct experience indicates that they respond best to practitioners who are active and prepared to become involved in family dynamics beyond the issues presented for resolution. This is a good characterization of mediators who are trained in TFM. The goodness of fit appears to reflect widespread family values, rooted in Confucianism (Chan & Wong, 1997). On the one hand, Chinese families value peace and harmony, and the resolution of conflict. On the other hand, they also value the healing impact of strong central leadership in the person of the provider, whether in medicine or mediation. Certainly these values, among others, are central to TFM, and are integral to our training efforts in Hong Kong and to other geographic areas where Chinese families live in some numbers.

Plan of the Book

With these thoughts in mind, this volume will be organized around three practice themes.

The first theme concerns the TFM practice model. In this part we will examine the history of mediation in Hong Kong (Chapter 2), explore the principles which underpin the TFM model and describe its various phases in overview (Chapter 3), demonstrate how TFM can be adapted to the culturally specific needs of Chinese families (Chapter 4), enumerate the various clinical techniques available to practitioners (Chapter 5), explore various issues concerned with parenting in divorce (Chapter 6), and describe the model in action through the case history of Mr. Chan and Madam So (Chapter 7).

The second of these themes concerns a number of special topics in family mediation. Here, we will explore the use of TFM in helping couples create parenting plans (Chapter 8), demonstrate its helpfulness in working through some of the special problems of remarried families in divorce (Chapter 9), and discuss the application of TFM techniques to the different patterns of conflict which characterize the ways divorcing families negotiate financial matters (Chapter 10).

The third and final theme concerns the future of TFM-based family mediation with Chinese families (Chapter 11).

Summary

Processes of economic development in Hong Kong have put tremendous pressure on families. A partial result is that the divorce rate has risen sharply over the past 15 years, and continues to rise. Reliance on the adversary system has proven inadequate, both in terms of processing the increased number of cases, and in terms of the approach used to do so. That is, the adversarial approach heightens conflict and may be inimical to the best interests of the children.

Family mediation may be a preferred approach among couples able to negotiate productively. It is now the method of choice in industrialized nations worldwide, and has recently been introduced into Hong Kong. Most available mediation models are generic in character, and rely on methods that emphasize facts and issues. Only a handful of models recognize families as special kinds of systems, and rely on methods that recognize the importance of feelings and relationships. Therapeutic family

mediation (TFM) is one such model, and is the primary focus of this book. There are a number of reasons for thinking that the TFM practice model is both effective and efficient, and would be an especially good fit with the needs of Chinese families throughout Asia.

Study Questions

1. What is family mediation?
2. On what grounds do mediators claim to be impartial?
3. How is mediation different from litigation?
4. How would you explain the recent rise in the divorce rate in Hong Kong?
5. In the next decade, is the divorce rate in Hong Kong likely to go up or down, and why?
6. On what grounds would one prefer mediation as opposed to litigation in dealing with families undergoing divorce?
7. Describe the therapeutic family model (TFM)?
8. How is TFM different from other models of family mediation?
9. On what grounds does TFM claim to be effective and efficient?
10. What skills would be required to become a TFM-based family mediation practitioner?

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