THE LAW REFORM COMMISSION OF HONG KONG

SUB-COMMITTEE

ON

GUARDIANSHIP AND CUSTODY

CONSULTATION PAPER

This Consultation Paper has been prepared by the Sub-committee on Guardianship and Custody of the Law Reform Commission. It does not represent the final views of either the Sub-committee or the Law Reform Commission, and is circulated for comment and criticism only.

The Sub-committee would welcome submissions on the proposals contained in this Consultation Paper. You are invited to make your views known to the Sub-committee, in writing, by 1 March 1999.

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It may be helpful for the Commission and the Sub-committee, either in discussion with others or in any subsequent report, to be able to refer to and attribute comments submitted in response to this Consultation Paper. Any request to treat all or part of a response in confidence will, of course, be respected, but if no such request is made, the Commission will assume that the response is not intended to be confidential.

Miss Paula Scully, Senior Government Counsel, was principally responsible for the writing of the Consultation Paper.

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Introduction

Terms of reference

1. On 21 April 1995, under powers granted by the Governor-in-Council on the 15 January 1980, the Attorney General and the Chief Justice referred the topic of guardianship and custody to the Law Reform Commission in the following terms:

> *"to consider the law relating to guardianship and custody of children, and to recommend such changes as may be thought appropriate".*

2. This Consultation Paper is one of a number of references in the area of family law dealt with by the Commission. The Commission has already produced reports on illegitimacy[1] and the grounds for divorce and time limits for divorce.[2] Both those reports have been implemented in legislation by the Parent and Child Ordinance (Cap 429) and the Matrimonial Causes (Amendment) Ordinance (Cap 179) (Ord. No. 29 of 1995) respectively.

Scope of the reference

3. Hong Kong' s law on guardianship and custody is to be found in a number of ordinances. Principal among these is the Guardianship of Minors Ordinance (Cap 13). Private law aspects of guardianship and custody are also dealt with in the Matrimonial Causes Ordinance (Cap 179), the Matrimonial Proceedings and Property Ordinance (Cap 192) and the Separation and Maintenance Orders Ordinance (Cap 16).

4. One of the catalysts for review of the law relating to guardianship and custody was the enactment in 1989 of the Children Act in England, which incorporated major reforms. In particular, there was concern about the restriction in section 10 of the Guardianship of Minors Ordinance (Cap 13), which limited an application for custody or access to parents or the Director of Social Welfare. Thus, grandparents or other relatives actually looking after a child were unable to make application under this Ordinance and instead had to apply for wardship in the Court of First Instance of the High Court.

5. Guardianship can be defined as all the rights that a parent has towards his or her child. When a parent dies, another person may be appointed guardian by a will, known as a testamentary guardian. There is much confusion as to the meaning and scope of the term "custody". It can be confined to the physical custody and day to day care and control of a child after a divorce, or in broader terms to mean something akin to guardianship, whereby the parent without care and control retains a right to be involved, to different degrees, in the upbringing of a child. Access to see his child has traditionally been seen as

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1 Topic 28, December 1991.

2 Topic 29, November 1992.

the main right given to a non-custodial parent. In rare situations this can result in the child spending so much residential time with both parents that it amounts to shared physical custody, an option increasingly popular in the United States.

Private law and public law

6. This reference is confined to the private law aspects of guardianship and custody. Public law will only be dealt with insofar as there is an overlap with the powers of the Director of Social Welfare to intervene in private law disputes. Child care law in the sense of public law is excluded. There are practical reasons for this limitation, as a review of the public law aspects would considerably delay the completion of this reference.

7. There are also policy and conceptual reasons for this choice. The powers of intervention by the state in the lives of a family differ markedly from when a child is the subject of child abuse and needs protection, to when a child is involved in a private law dispute between two parents. It can also confuse the issues, as only a minority of the children who are the subject of a private law dispute will also be the subject of care applications by the Director of Social Welfare under the Protection of Children and Juveniles Ordinance (Cap 213).

The sub-committee

8. In May 1996 the Law Reform Commission appointed a sub-committee chaired by the Hon Mrs Miriam Lau to consider the terms of reference and to make proposals to the Law Reform Commission for reform. In August 1998 the sub-committee completed their deliberations and now make their proposals on reform available to the public for consultation.

Membership and method of work

9. On 8 June 1996 the sub-committee commenced their consideration of a background paper prepared by the secretariat to assist them in their work. The sub-committee held a total of 34 meetings.

10. The membership of the sub-committee is

Hon Mrs Miriam Lau, JP Chairperson	Partner Alfred Lau & Co., Solicitors
H H Judge de Souza Deputy Chairman	Judge Family Court

Miss Rosa Choi	Assistant Principal Legal Aid Counsel Legal Aid Department
Ms Bebe Chu	Partner Stevenson, Wong & Co., Solicitors
Ms Robyn Hooworth	Mediator
Mr Anthony Hung	Partner Lau, Kwong & Hung, Solicitors
Ms Jacqueline Leong, SC	Barrister
Dr Athena Liu	Lecturer Faculty of Law University of Hong Kong
Mr Thomas Mulvey, JP	Director Hong Kong Family Welfare Society
Mrs Cecilia Tong	Regional Officer Social Welfare Department
Ms June Wee	Barrister
Miss Wong Lai-cheung	Counsellor Hong Kong Catholic Marriage Advisory Council

Miss Paula Scully, Senior Government Counsel, acted as Secretary to the sub-committee.

Format of the Consultation Paper

11. This Consultation Paper examines the present state of the law of guardianship and custody in Hong Kong, and puts forward various options for reform. It is impossible to deal with substantive provisions of the law in isolation from the context in which those provisions are used in a dispute between parents, or between a parent and a third party, in relation to guardianship, custody or access. This paper will deal with the substantive provisions but also the methods of dispute resolution that are used, or capable of being used, for resolving such disputes.

12. Part I of the Paper deals with the substantive law in practice in Hong Kong and overseas. Chapter 1 deals with the legal and social background to the law, including the impact of the United Nations Convention on the Rights of the Child. Chapter 2 focuses on the substantive provisions of the various ordinances dealing with guardianship and custody

and problems with them. It includes the Family Court' s way of handling these disputes, and the current situation on mediation in Hong Kong.

13. Chapters 3, 4, and 5 of the Consultation Paper deal with comparative developments from the perspective of the substantive provisions of the law. Chapter 3 focuses on the English provisions of the Children Act 1989. Chapter 4 deals with Scotland. Chapter 5 looks at substantive provisions and developments in Australia and New Zealand. Chapter 6 identifies options for reform in Hong Kong of the substantive provisions of guardianship and custody.

14. Part II of the Consultation Paper deals with non-adversarial dispute resolution for guardianship and custody disputes. Chapter 7 focuses on comparative non-adversarial dispute resolution processes, particularly mediation which is now becoming the preferred method of dispute resolution for disputes involving children. Chapter 8 looks at recent English developments in how divorce and ancillary matters such as custody are dealt with. Chapter 9 deals with family dispute resolution in Australia and New Zealand. Chapter 10 focuses on the dispute resolution process in Canada and the United States. Chapter 11 deals with the legal systems of Mainland China, Japan and Singapore. Chapter 12 sets out options for reforms in the dispute resolution methods of resolving guardianship and custody disputes.

15. Part III, in chapter 13, deals with the Hague Convention on the Civil Aspects of Child Abduction, and the domestic civil and criminal law on child abduction. Chapter 14 summarises the options for reform in child abduction law. Chapter 15 summarises the conclusions and recommendations for reform of the law in Hong Kong. Annex 1 sets out relevant sections from the English Children Act 1989, the Children (Scotland) Act 1995 and the Australian Family Law Reform Act 1995 that the sub-committee used as a basis for some options for draft legislation for Hong Kong. Annex 2 is a Flow Chart dealing with proposed court processes including case management and support services for the handling of disputes concerning children at the Family Court.

16. This Consultation Paper contains the preliminary recommendations of the sub-committee. The purpose of circulating the Consultation Paper is to invite members of the public, agencies and organisations from the non-governmental sector and the relevant government bureaux and departments and other interested parties to express their views on the recommendations. The sub-committee will take these views into account in finalising their recommendations, which will then be presented in a final report to the Law Reform Commission.

Part I - Substantive Law and Practice

Chapter 1

Background to the Present Law

Introduction

1.1 Part I of the Consultation Paper deals with the substantive law on guardianship and custody in Hong Kong and overseas. This chapter attempts to put the law on guardianship and custody in its social context. As so few guardianship disputes come before the courts, the focus will be on custody and access disputes arising from a divorce. A divorce must be seen both as a legal process and a psychological process that impacts on the child as well as the parents. This chapter will also look at the responsibility of the state to intervene and provide a choice of ways of handling disputes which are least detrimental to children and adults. It is also necessary to look at the broader framework of children's rights and parental rights, within the context of international obligations under the United Nations Convention on the Rights of the Child or local obligations to comply with the Bill of Rights Ordinance (Cap 383).

Role of the State

1.2 Traditionally, the judicial system has acted as the guardian of public and private interests when marriage breaks down. The welfare of children has been defined as the cross-roads at which those interests intersect.[3] Clulow and Vincent query whether the best interests of children are promoted by arrangements agreed by the parents, or by arrangements suggested by others, such as divorce court welfare officers.

1.3 This raises an issue of crucial importance about the boundaries between public and private responsibilities, and the effect of their interplay upon each other. When there is a dispute between parents about the custody of a child, the court has to look beyond the adjudication of parental rights in order to protect the child as a member of the community.[4] However "no matter how well intentioned, wholesale intervention into the life of families is not likely to serve the interests of children".[5] An adequate legal framework for custody disputes must be permeated by an acceptance of the core values of the welfare of the child as a member of the family unit and the community.

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3 Clulow and Vincent, *In the Child's Best Interests; Divorce Court Welfare and the Search for a Settlement* (1987), at 206.

4 Saskatchewan Law Reform Commission, *Tentative Proposals for Custody Law Reform Part I, Substantive Law*, Preface at iii, (August 1979).

5 *Ibid* at iv.

1.4 Goldstein, Freud and Solnit[6] argued that parents should be presumed to have the capacity and responsibility to decide what is in the best interests of the children and the family. Parents should have the first opportunity to meet the needs of their children and maintain family ties without state intervention. Folberg[7] argued that the state doctrine of *parens patriae* provides for a responsibility for the welfare of the children only when parents cannot agree or cannot adequately provide for them.

1.5 "*Divorce has been constructed as a prominent social issue, a symptom of conflicts which have activated, and been activated by a shifting personal, social, and economic landscape.... Justifications for State involvement in the private sphere of family life are usually expressed in terms of the need to protect children from harmful influence and experience.... It is proper for the State to ensure that the interests of children exposed to its [divorce] effects are adequately safeguarded. However, when the State intervenes in family life it effectively undermines the authority of parents and encourages an abdication of their responsibilities.... It is analogous with the iatrogenic effects induced by some forms of medical treatment.... The public argument for overriding parental responsibility is justified in terms of the interests of the community as defined by the knowledge and beliefs of the day".*[8]

1.6 It can be seen that there is much controversy about the degree to which the state should intervene in the lives of children and the family. There is a constant tension between the extent of the substantive powers the state should have to intervene in the family and how it exercises its discretion in implementing those powers.

Bill of Rights Ordinance (Cap 383)

1.7 The Bill of Rights Ordinance (Cap 383) lays down some parameters for the exercise of the powers of the state which intrude into the lives of family members. Article 14 of the Bill of Rights Ordinance (Cap 383)[9] provides that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence [and] ... everyone has the right to the protection of the law against such interference or attacks." Article 19 (equivalent to article 23 of the International Covenant on Civil and Political Rights (ICCPR)) acknowledges that the family is the natural and fundamental group unit of society and thus entitled to protection by society and the state. It also states that in the case of dissolution, provision shall be made for the necessary protection of children. It recognises that spouses have equal rights and responsibilities as to marriage and dissolution.

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6 *Before the Best Interests of the Child,* (1979).

7 "Divorce Mediation: Promises and Problems", paper prepared for Midwinter Meeting of ABA Section on Family Law, (Jan. 1983), contained in Goldberg, Sander and Rogers, *Dispute Resolution,* (2nd ed, 1992), at 311.

8 Clulow and Vincent, *supra* at 17-18.

9 Article 17 of the ICCPR.

1.8 Article 20 (article 24 of the ICCPR) ensures that "every child shall have the right to such measures of protection as are required by his status as a minor, on the part of its family, society and the State". These provisions must be taken into account when we proceed to analyse the various ordinances, so as to ensure that any proposals for reform are compatible with the letter and the spirit of the Bill of Rights Ordinance (Cap 383).

United Nations Convention on the Rights of the Child

1.9 The UN General Assembly adopted the Declaration of the Rights of the Child in 1959. In 1989 the Convention on the Rights of the Child was adopted by the UN. The People's Republic of China ratified the convention that year, and the United Kingdom in 1991. It was extended to Hong Kong in late 1994. Approximately 166 countries have ratified the convention. Article 1 of the Convention defines a child as a "human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier".

1.10 Article 41 provides that nothing in the Convention is to affect provisions in a State's laws which are more conducive to the realisation of the rights of the child than the provisions of the Convention. Article 9 gives a right not to be separated from parents except in certain limited circumstances, for example "where the parents are living separately and a decision must be made as to the child's place of residence." Article 9(3) provides that "State parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests".[10]

1.11 The Convention refers to one of the provisions of the Declaration of the Rights of the Child which provides that the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection. Article 3(1) of the Convention provides "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". Article 18(1) obliges State Parties to use their best efforts to ensure recognition of the role of parents in protecting the interests of children and that *both* parents have common responsibilities for the upbringing and development of the child. This also applies to legal guardians.[11]

1.12 Article 12 recognises that a child does have views which should be given weight in accordance with his age and maturity. Article 12(2) provides:

> *"for this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an*

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[10] Note that it respects the child's right to contact with *both* parents.

[11] Article 18.

appropriate body, in a manner consistent with the procedural rules of national law".

1.13 The Administration of the Hong Kong Special Administrative Region are under a moral obligation, as far as practicable, to ensure that the substantive legislative provisions, and the way disputes on guardianship and custody are resolved, comply with the United Nations Convention on the Rights of the Child. However, unless any of its provisions are incorporated into domestic legislation, it is not possible to apply to court to force a government to comply with its international obligations.

Parental rights

1.14 The focus in legislation and the common law has been on parental rights rather than on parental responsibilities. In Cretney's[12] view, parents have the following rights:

1. the right to physical possession of a child,
2. the right to control his education,
3. the right to discipline the child,
4. the right to choose the child's religion,
5. the right at common law to the services of the child,
6. the right to represent the child in legal proceedings,
7. the right to consent to medical treatment,
8. the right to consent to marriage, and
9. the right to consent to an application for a passport.

1.15 Additional rights include administering the child's property, agreeing to adoption, arranging for a child to leave or emigrate from the jurisdiction, choosing a surname, and appointing a testamentary guardian for the child.[13] However, a paradigm shift in thinking has occurred and continues to occur from this focus on rights to a focus on parental responsibilities.[14] This is reflected in the English Children Act 1989, the Children (Scotland) Act 1995, the Australian Family Law Reform Act 1995 and the United Nations Convention on the Rights of the Child.

Children's rights

1.16 Allied with this paradigm shift has been a focus on children's rights independent of the rights or responsibilities of parents. Henaghan suggested that in analysing

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12 Cretney, *Principles of Family Law* (1979, 3rd ed).

13 Law Commission Working Paper, *Family Law; Review of Child Care Law; Guardianship*, (No. 91: 1985), paragraph 2.25.

14 A paradigm shift is defined by Barker in *The Business of Discovering the Future* (1992) as a dramatic and collective shift in perception which leads to a new set of rules being created and used.

children's rights there are three concepts that must be balanced: "the child's autonomy to express views and make decisions; the family's responsibility to nurture and bring up children; and the state's responsibility to provide services which protect and enhance the lives of children".[15] A number of questions arise from these principles for which there are no easy answers:

- How old should a child be before he makes decisions or has his wishes taken into account?
- What weight should be given to the wishes or decisions of children?
- What is the basis for imposing responsibility on members of a family?
- Where does family responsibility end and state responsibility begin?[16]

1.17 A further issue which Hong Kong law has not addressed is whether its concentration on the two parent nuclear family reflects the cultural reality of the importance in children's lives of grandparents and other relatives, in particular where the child is physically residing with this extended family.

Divorce as a complex process

1.18 Lawyers tend to see divorce as a legal process whereby a couple dissolve their marriage contract and then become free to remarry.[17] Therapists see divorce as more of a psychological process. A more recent perspective is to see divorce from an ecological perspective. This views divorce :

> *"as a process composed of the interaction of a variety of elements, including statutes and psychological states, but also patterns of interpersonal relating ... child development and the risks to its normal progression, demographic factors (such as ethnicity and income), relations among peers, and community resources (such as the involvement of professionals and agencies)".*[18]

Stages of divorce

1.19 Researchers categorise the process of divorce in different terms. Bohannan[19] suggested there are six categories: emotional, legal, economic, co-parental,

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15 "The 1989 United Nations Convention on the rights of the child", in "Rights and Responsibilities", Papers from Symposium on Rights and Responsibilities of the Family, Wellington, New Zealand, (October 1994). At 32.

16 *Idem.*

17 Paragraphs 1.14-1.36 and 1.43 were taken from an unpublished dissertation by Paula Scully, *Obstacles to Referral, Planning and Implementation of Family Mediation as a Dispute Resolution Process in Hong Kong; Reflections based on Foreign Systems,* April 1996.

18 Irving and Benjamin, *Family Mediation - Contemporary Issues* (1995), 9.

19 *Divorce and after* (1971).

community and psychic. Wiseman[20] referred to five psychological stages - denial, loss, anger, reorientation and acceptance. It is important to put the resolution of custody cases in this broader context. If parents are going through these various psychological stages, and at different times, then what impact has this on the parenting of children during separation and divorce? Are parents really in a fit state to decide to make final decisions about custody of children if they are locked in denial, loss or anger? Is a parent who insists on litigation over the children prompted by anger rather than reason?

1.20 Where counselling is available, it may enable a parent to recognise that emotion is clouding his judgment. A counsellor may, for instance, suggest that a client work through his anger before making a decision committing himself to a contested hearing. Unfortunately, the court has no power to refer parties to counselling. The function of the social welfare officer is to investigate the family and assess the parenting of the children, which is separate from that of counselling the parties to "uncouple" the spousal relationship.

1.21 The ecological perspective entails a recognition that divorce is a process that unfolds over time, and that the parties may be at different stages in the process. The particular stage of the legal process is not necessarily reflected in the concurrent psychological stage of the spouses, and more importantly, the children. Indeed, each parent may be at different stages in the psychological process with, for example, one parent denying there is a problem and refusing to accept the need for a divorce, and the other parent hostile. It is submitted that the best way to look at divorce is through a holistic model which embraces both the legal and psychological processes and the ecological perspective mentioned above.

Impact of divorce on children

1.22 The research literature has found that the majority of spouses involved in difficult divorces temporarily become less adequate and can abandon their parental role.[21]

> *"There is general agreement that marital hostility is a disturbing force that can affect children's emotional well-being and alter parent-child relationships. Many would argue that where serious discord exists, separation or divorce is not in the best interests of all family members. Marital dissolution is not without its own consequences.*[22] *Children often react to divorce with feelings of anger, terror or guilt. They grieve for the lost parent and fear further losses and catastrophies.*[23] *Helping children cope with dramatic changes in the family is an important task for the custodial parent. To this responsibility is added*

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20 "Crisis theory and the process of divorce", Social Casework, 56(4), (1975), 205-212.

21 Isaacs *et al*, "Social networks, divorce and adjustment; A tale of three generations". Journal of Divorce, vol. 9, (1986), 1-16.

22 Honing, "Stress and coping in children (part 1)" Young Children, 41(4), (1986), 50-63.

23 Wallerstein, "Children of divorce; Stress and developmental tasks". In Garmezy & Rutter (eds) *Stress, coping and development of children* (1983).

personal adjustment, shifts in family roles and household routines, and an overload in terms of economic burden."[24]

1.23 There are social and financial consequences to divorce. An additional pressure for a parent who may not be coping in the short term with a divorce is the pressure of handling children on whom the psychological effect is even greater. The majority of children show clear indications of distress and disruption.[25] They are more likely to experience external problems such as aggression or disobedience. They also experience internal feelings of fear, blame, lower self esteem, depression and insecurity.[26]

1.24 Conflict arising out of divorce can affect children's functioning at school.[27] They may be more likely to use psychiatric and other mental health services,[28] though this may not be applicable to Hong Kong where there is still possibly greater resistance to going outside the family for therapeutic support in a time of crisis. Researchers conclude that the consequences for children of divorce are more likely to be influenced by their gender, age, parent-child relationship and social class, than by the fact that the parents have divorced *per se*.[29] Pre-adolescent boys show more distress than girls[30] while adolescent girls are more affected than boys.

1.25 Younger children are more vulnerable to negative consequences than older children. This may be because younger children are more likely than older children to blame their own behaviour for their parent's divorce.[31]

1.26 Benjamin and Irving suggested[32] from their analysis of the research literature that a child's adjustment to divorce is dependent on a number of interacting processes:

(a) the reciprocal adjustment of the custodial parent and the child living with her or him;
(b) the quality of the relationship between the custodial parent and the child;
(c) gender congruence between the custodial parent and the child; and
(d) the degree of involvement of the non-custodial parent.

1.27 Their disturbing conclusion is that "under the intense stress of the divorcing process, a substantial proportion of previously adequate parents become increasingly

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24 Garbarino *et al, Children and Families in the Social Environment,* (1992, 2nd ed.) at 155-6.

25 Hetherington, "Coping with family transitions; Winners, losers and survivors", Child Development, 60, 1-14, (1989) in Irving and Benjamin, *supra* at 58.

26 Wallerstein, *supra*.

27 Bisnaire, Fireston & Rynard, "Factors associated with academic achievement in children following parental separation", American Journal of Orthopsychiatry (1990), 60, 67-76.

28 Dawson, "Family structure and children's health and well-being; Data from the 1988 National Health Interview Survey of Child Health," Journal of Marriage and the Family, (1991), 53, 573-584.

29 Irving and Benjamin, *Family Mediation - Contemporary Issues* (1995), at 61.

30 Plunkett, Schaefer, Kalter, Okla & Schrier, "Perceptions of quality of life following divorce; a study of children's prognostic thinking," Psychiatry, 49, (1986) 1-12.

31 Grynch and Fincham, "Marital conflict and children's adjustment; A cognitive-contextual framework", Psychological Bulletin, (1990), 108, 267-290.

32 *Supra* at 63.

insensitive to the children' s needs[33] or completely abandon their parenting responsibilities[34] with devastating consequences for child adjustment".[35]

1.28 The older research literature supported the belief that the more bitter and prolonged the conflict was between the parents, the more damage there was done to child adjustment.[36] Kelly suggested that conflict does not produce a consistent outcome in children. Difficulties with adjustment are more likely where children feel caught in the middle of the conflict as distinct from those who are not so involved.[37] Hodges found that high parental conflict can undermine or disrupt the relationship between the non-custodial parent and the children.[38] Conversely, a friendly parental relationship positively influences child adjustment and self esteem.[39] The research also emphasises the importance of children having other attachment figures in their lives such as grandparents who may take the place of an absent parent. This helps children to adjust.[40]

Effect of access on child' s adjustment to divorce

1.29 Isaac *et al*[41] compared the adjustment over a period of three years of children of non-clinical and clinical families. They found that the way in which the first 12 months was handled was critical, as it affected the rate of child adjustment when measured at the end of the third year after divorce. As regards access, they found that having consistent, scheduled visits was more salient than frequency of access. Other data revealed that "scheduled visiting by non-custodial fathers was the single best predictor of child social competence by the end of year 3".[42] However, most children, like adults, after two or three years will adjust successfully. For a minority of children the short term consequences of the divorce can leave them vulnerable to long term harm.[43]

1.30 In apparently conflicting findings, some research showed that in North America about half of all children who are in the custody of their mothers seldom or never see their father,[44] while more recent research showed that 65% of fathers visited their

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33 Appel, *America' s changing families; A guide for educators* (1985).

34 Isaacs *et al,* (1986) *supra*.

35 Irving and Benjamin, *supra* at 64.

36 Booth *et al*, "The impact of parental divorce on courtship", Journal of Marriage and the Family, (1984), 65(4), 85-94. Irving and Benjamin, *supra* at 67.

37 "Current research on children' s postdivorce adjustment; No simple answers", Family & Conciliation Courts Review, (1993), 31(1), 29-49, Irving and Benjamin, *supra* at 68.

38 "Problems of visitation post divorce" in Witlin & Hinds (eds) *The child custody handbook,* quoted by Irving and Benjamin.

39 Ambert, "Relationship between ex-spouses; Individual and dyadic perspectives", Journal of Social & Personal Relations, 5, (1988), 327-346

40 Guidubaldi and others, "The impact of parental divorce on children; Report of the nationwide NASP study," School Psychology Review, 12, (1983), 300-323.

41 (1986) *Supra*.

42 Irving and Benjamin, *supra* at 69-70.

43 *Ibid* at 72.

44 Furstenberg & Spanier, *Recycling the family; Remarriage after divorce* (1984).

children at least every other week.[45] It appears that access frequency is inversely related to child age and the time that has elapsed since separation.[46]

1.31 In the past, access was seen as a consolation prize for not being granted custody. Some authors have challenged the assumption that access is in the best interests of children if there is a high level of hostility between the parents. Goldstein *et al*[47] questioned the wisdom of granting access except on a very limited basis. The decision would be left to the custodian who would end access if it appeared to threaten the custodian's relationship with the child.

1.32 However, more recent research has stressed the importance of access for children. Most of this research "suggests that child adjustment is directly related to visitation frequency; more frequent contact is associated with improved child adjustment".[48] Some studies say that the correlation between access by a father and the child's adjustment is more marked when the visits have the mother's support and approval.[49] However, some studies report no relationship between the child's adjustment and the father's visiting.[50] It is accepted that the quality of the access will be influenced by the quality of their pre-divorce relationship. So, if that relationship was good, the child will suffer more distress at the loss of the father than otherwise. The divorce process may also produce an increased interest in parenting by fathers who were not so involved before.[51]

Long term harm caused by divorce

1.33 Between 26-40% boys and 15-25% of girls of divorced parents were found by Wallerstein and Blakeslee to have developed a history of delinquent behaviour.[52] Also, children of divorced parents were less internally well-adjusted than those who did not have that experience. Their intellectual and academic functioning could be less.[53] Benjamin and Irving agreed with other researchers that "a substantial minority of children suffer long term harm as a direct consequence of their parents' divorce".[54]

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45 Healy, Malley and Stewart, "Children and their fathers after divorce", American Journal of Orthopsychiatry, (1990), 60, 531-545.

46 Arditti, "Differences between fathers with joint custody and noncustodial fathers", American Journal of Orthopsychiatry, (1992), 62, 186-195.

47 Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child* (1973).

48 Hetherington, "Divorce; A child's perspective", American Psychologist, 34, 851-8 (1979), referred to in Irving and Benjamin, *supra* at 66.

49 Guidubaldi & Perry, "Divorce and mental health sequelae for children; A two year follow-up of a nationwide sample", Journal of the American Academy of Child Psychiatry, 24, 531-537. (1985).

50 Kline *et al,* "Children's adjustment in joint and sole physical custody families", Developmental Psychology (1989), 25, 430-438.

51 Hetherington, Cox and Cox, "Effects of divorce on parents and children". In Lamb *Nontraditional families; Parenting and child development*, (1982) Irving and Benjamin, *supra* at 67.

52 Wallerstein and Blakeslee (1989), *supra*.

53 In Wallerstein and Blakeslee's study, 50% of the boys went to college compared to 85% of their friends. See Irving and Benjamin, *supra* at 81.

54 *Ibid* at 83.

1.34 Wallerstein and Blakeslee found that younger children are more acutely affected by the divorce at the time. They did better in terms of long term adjustment than the older children, who were more likely to have taken a position on one parent's side.[55] They noted that anger and hostility towards the former spouse by the custodial parent could result in the custodial spouse seeking to damage the relationship between the non-custodial spouse, normally the father, and the children, particular boys.[56] Once that relationship deteriorated then it was more likely that child support for college education would be refused. They also found that children had some difficulty adjusting to a custodial parent marrying again. This could result in conflict with the step-father, who was seen as a threat to the relationship between the children and the biological father.

1.35 Rutter's[57] findings suggested that it was not the disruption of the bond with a parent that was of greatest significance but the distortion of family relationships. The fear of separation in the intact home was replaced by an experience of actual separation from one or other parent which could result in long term insecurity in relationships.[58] A review of the effects of separation and divorce on child development by Richards and Dyson[59] estimated that between 20-50% of children of divorced parents showed degrees of upset which required outside help at some time.[60]

1.36 Garber commented on the failure of many non-custodial parents to sustain their involvement as parents in the face of their children's anger and disappointment.[61] Clulow and Vincent posited that there are three main factors mitigating the effect of divorce on children: a continuing relationship with both parents, the quality of parenting from the residential parent, and the quality of what is created to take the place of the past marriage.

1.37 There is some evidence that men find it more difficult than women to come to terms with divorce.[62] Ambrose found that many were still angry, even years after the divorce, even if they had custody of the children.

Conclusions from research

1.38 These conclusions from the research need to be addressed by those professionally involved in the divorce process - that is, lawyers, judges, mediators or

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55 *Idem.*

56 *Ibid* at 86.

57 Rutter, "Parent Child Separation: Psychological Effects on Children", Journal of Child Psychology and Psychiatry 12 at 233-60 (1971); and *Helping Troubled Children,* (1975).

58 Richards, "Children and the Divorce Courts", One-Parent Families, 7; 2-5; (1984) "Separation, Divorce and Remarriage: the experiences of children". In Guy (ed) *Relating to Marriage*, National Marriage Guidance Council.

59 Richards and Dyson, *Separation, Divorce and the Development of Children: A Review,* Child Care and Development Group, University of Cambridge, (1982).

60 *Ibid* at 19.

61 Garber, "Parenting Responses in Divorce and Bereavement of a Spouse". In Cohen, Cohler and Weissman (eds) *Parenthood: A Psychodynamic Perspective* (1984).

62 The authors query the methodology which elicited responses by advertising for respondents as it might attract those with an axe to grind. Ambrose, Harper and Pemberton, *Surviving Divorce: Men beyond Marriage* (1983).

counsellors. It is clear that boys and girls have different needs and their adjustment is also age related. So, Wallerstein and Blakeslee suggest that males have a critical need for paternal involvement, once when aged 6 to 9 and again in late adolescence. "In contrast, females need such involvement in early adolescence and in addition have a greater need than males for family structure".[63] Older children' s concerns also need to be addressed. An important point is that it is not the divorce *per se* that causes the problem for children but the post-divorce conflict.[64]

1.39 Benjamin and Irving suggest that it is useful to regard families as moving through a function/dysfunction continuum in the divorce process. This perspective is useful as family lawyers can be frustrated by the fact that their clients in a divorce case do not behave rationally at times.[65]

Joint custody

1.40 In England, Scotland and Australia there has been a shift towards parental responsibilities being shared after divorce and the avoidance of orders which appear to award custody to one parent and only access to the other parent. This shift has occurred to a certain extent in some parts of the United States, though the language of custody, albeit joint custody, is still being used.

1.41 There has been considerable academic debate as to whether joint custody orders are more in the interests of children than orders of sole custody with access to the non-custodial parent. The term "joint custody" has been interpreted to mean either joint physical custody (where the children stay half the time with each parent) or that the decisions on the upbringing of the child will be made jointly by both parents.

1.42 Joint physical custody is more likely to be successful where both parents have a reasonable relationship and do not have dysfunctional patterns of behaviour. If both parents are positively motivated then it can work. Joint custody should not be forced on parents, as it is only practicable where, for instance, there is adequate housing for the children at both parental homes and reasonable proximity between those homes.

1.43 The issue should be how to encourage both parents to be involved with their children, both before and after divorce. Any change of the law needs to ensure sufficient flexibility to enable the law to reflect changing demographic trends in families. Those changes include smaller families, more mobility, more common law relationships, and an increase in shared parenting.

1.44 Ironically, as more families divorce, the single parent, usually the mother, who has been allocated custody because of more physical time with the children, has to rely more on relatives or child care workers as more women return to work. Thus, the old

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63 *Ibid* at 84.

64 *Ibid* at 440.

65 *Supra* at 442.

preference for women to have custody as they were likely to stay at home, has changed to a situation in Hong Kong where both parents are likely to be working long hours. The child is looked after by a domestic helper who is not necessarily specially trained in child care, or a grandparent or other relative. This reduces the argument in favour of maternal custody, though the law and the decisions of the courts are not necessarily reflecting those demographic changes. We will next look at the current law and practice in Hong Kong in chapter 2.

Chapter 2

Current Law and Practice in Hong Kong

2.1 Part A of this chapter examines the various legislative provisions which govern guardianship, custody and access to children, setting out their effect and perceived shortcomings. Other matters such as child abduction, emigration and the interaction of private and public law on children are briefly discussed in Part B, and the method of dispute resolution of such cases in the Family Court is addressed in Part C.

Part A - Current legislation

a) Guardianship of Minors Ordinance (Cap 13)

Welfare principle

2.2 Section 3(1) sets out the principles that govern the conduct of proceedings. These are that:

> *(a) "in any proceedings before any court ... the court:*
> *(i) shall regard the welfare of the minor as the first and paramount consideration and in having such regard shall give due consideration to -*
> *(A) the wishes of the minor if, having regard to the age and understanding of the minor and to the circumstances of the case, it is practicable to do so; and*
> *(B) any material information including any report of the Director of Social Welfare available to the court at the hearing ...."*

2.3 "Minor" is defined in section 3 of the Interpretation and General Clauses Ordinance (Cap 1) as a person who has not yet attained 18 years. The court is also to take cognisance of the equality of the rights and authority of the father and the mother, except if the child is born out of wedlock.[66] These rights and authority shall be "exercisable by either without the other". The concept of joint guardianship is not referred to in the legislation.

2.4 The High Court in *Re Y & Anor*[67] relied on *Halsbury's Laws of England*[68] to hold that the court would take the wishes of an infant into consideration if the infant was

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66 Section 3(1)(b). Then the father would have to apply for a court order under section 3(1)(d) for some or all of the rights and authority that a father of a legitimate child would have.

67 [1946-1972] HKC 378.

68 (3rd ed) vol 21.

of an age to exercise a choice. That appeared to be 14 for a boy and 16 for a girl. However, the court accepted that the modern practice was that each case depended upon its own particular circumstances.

2.5 The welfare of the child is not defined. In practice, the court would look at the physical, social, intellectual, moral and religious welfare of the child.[69] Lord MacDermott, in *J v C,*[70] approached the term "first and paramount consideration" thus:

> *"reading these words in their ordinary significance ... it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare ... that is the first consideration because it is of first importance and the paramount consideration because it rules on or determines the course to be followed."*

Judicial discretion

2.6 The court has a wide discretion in determining the welfare of the child and can be assisted in exercising that discretion by the report from the Director of Social Welfare and the wishes of the child. Each case depends on its own facts and judicial precedent plays a minor role in decision making. While judges do not have to receive training in child psychology or the psychological process of divorce, they will receive assistance in these matters from the reports of the Director of Social Welfare or a child psychologist or other expert used by the parties.

Factors in welfare

2.7 The court will consider a range of factors in determining what is best for the child. These include: the age of the child; the parents' capacity to care for the child; the need to maintain siblings together if possible; the desirability of maintaining continuity of care for children, particularly younger children; the conduct of the parents towards each other and the children; the relationship between any person who is emotionally involved with one parent and the child; and the wishes and rights of the child.

2.8 Section 3(1) of the Guardianship of Minors Ordinance delineates the parameters of the proceedings that are governed by these principles. These are for "custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of the income of any such property."

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69 Section 2 of the Irish Guardianship of Infants Act 1964 includes these constituents in its definition of welfare.

70 [1970] AC 710, 711.

2.9 This subsection does not refer to disputes between guardians, the appointment or replacement of guardians, or access disputes. On a purposive interpretation it could be argued that the welfare principles should also govern these types of disputes as ultimately they relate to the "upbringing" of the minor. Section 19 of the Interpretation and General Clauses Ordinance (Cap 1) provides for a purposive interpretation:

> *"An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit."*

Definition of terms

Guardian

2.10 The term "guardian" is not defined, nor is "custody" or "care and control" or "access". "Guardianship" normally connotes the bundle of rights and duties and authority of a parent towards a child. This includes the right to make decisions and to be consulted on decisions about the upbringing of a child, that is, on all aspects of his welfare. Usually a guardian has the right to have custody, which means the right to physical care and control of a child. When parents divorce or separate, the non-custodial parent may not have the child physically living with him except for access periods, but he will remain under a duty to provide maintenance for the support of the child.[71]

Custody

2.11 Section 2 of the Matrimonial Proceedings and Property Ordinance (Cap 192) provides the only statutory definition of custody, and includes access to the child. The term "custody" has been used to describe physical custody, that is, where the child resides on a daily basis. In some jurisdictions legal custody refers only to physical custody, as both parents retain rights as guardians. These rights include the right to be consulted on all matters affecting the upbringing of a child, including health, education and religious welfare. In practice, it is accepted that the parent with physical custody must take the major responsibility for decisions on these matters. However, he is expected to consult the other parent on major decisions affecting the child.

2.12 However, in Hong Kong it seems that in practice there is confusion as to the meaning of the term "custody" and the parameters of custody and guardianship. Must the custodial parent inform the non-custodial parent if the former wants to go away with the child for a weekend within the jurisdiction, or need the custodial parent only consult the non-

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[71] Walsh J of the Irish Supreme Court in *B v B* [1975] IR 54, 61 states: "a parent so deprived of custody can continue to exercise the rights of a guardian, and ... must be consulted on all matters affecting the welfare of the child which ... comprises the religious, moral, intellectual, physical and social welfare of the child".

custodial parent on major decisions, such as a major operation or changing schools, or emigration?

2.13 Custody in Hong Kong seems to be treated as equivalent to guardianship and so orders of sole custody are made with the intention that the person having physical care and control also retains all rights to make decisions on the upbringing of the child without consulting the non-custodial parent. That parent retains rights of access and the duty to support but must apply to court if he wants to be consulted on the welfare of the child.

2.14 The court may also make a care and control order which vests the physical day to day care in one parent, with a joint custody order. We understand that sometimes the court and one of the parties have refused to countenance a joint custody order as it is seen as implying joint physical custody, or that such an order implies a duty on the parent having care and control to consult the other parent on all matters concerning the child. Perhaps there is a concern about the non-custodial parent exercising a veto on day to day decisions. However the impact of a sole custody order has practical effects. For example, a school will not send school reports to the non-custodial parent. There are also potential problems if the non-custodial parent has to bring the child for urgent medical attention during a period of access.

Access

2.15 Access is the right to have reasonable contact with the child, either by visiting the child or by being allowed to take out the child or having the child to stay. Access could also include reasonable contact by telephone, particularly where the parent is in another country.[72]

Legal effect of custody orders

Split orders

2.16 A split order vests care and control in one parent and gives custody, in the sense of wider decision-making power, to the other parent. The non-custodial parent has a right to access, a duty to pay support and a right to object to major changes such as adoption or emigration, or a change in the child's name.

2.17 In *Dipper v Dipper,*[73] an order giving sole custody to the father but care and control to the mother to ensure that the father was informed before the children might be removed from their school, was criticised on appeal by Cumming-Bruce LJ: "the parent is always entitled, whatever his custodial status, to know and be consulted about the future education of the children and any other major matters."[74] The Court of Appeal changed the order to a joint custody order with the mother having care and control.

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72 Scottish Law Commission, *Report on Family Law,* (Scot Law Com No 135: 1992) at 2.17.

73 [1981] Fam. Law 31.

74 *Ibid* at 48.

2.18 Despite this judgement, "it was widely thought that the effect of a custody order was to transfer to the custodial parent exclusively most of the major decision making powers over the child".[75] This judgement was criticised for causing confusion as it appeared to be in conflict with the statutory provisions "applying to legal custody orders under which it was impossible to have an order for joint legal custody but under which the court could specifically reserve to the non-custodial parent certain decision making powers."[76]

2.19 In an interesting judgement on split orders, *Lo Chun Wing Yee Lilian v Lo Pong Hing Daniel,*[77] a consent order for joint custody previously granted was changed to an order of sole legal custody. The post-divorce relationship between the parents had deteriorated and the mother sought an order of sole custody as she had care and control of the child in Hong Kong. The father had remarried and was living in Canada. Liu J stated that:

> *"courts were generally reluctant to grant or endorse split orders unless the advantages demonstrably outweighed the inherent disadvantages. Total lack of co-operation between the father and the mother, perpetual absence of the father from the jurisdiction and the undesirability of having more than one voice in the running of the daily affairs of the child fortified the need for removal of the split order. By vesting sole legal custody in the mother, it would not prevent the father from making a real contribution to the upbringing of the child."*[78]

2.20 Liu J also said that sole custody would facilitate the management of affairs for the welfare and benefit of the child and enable decisions to be promptly made. The court also ordered the mother, if she brought the child outside Hong Kong on vacation, to give an undertaking to return the child to Hong Kong at the end of every vacation and to give a quarterly report to the father under the heading of education, health and activities of the child.[79]

Impact of split order on maintenance

2.21 Pegg defined split orders as referring "to the situation where the courts divide up the bundle of rights and powers which normally constitute custody, giving one parent actual physical care and control, while leaving with the other the legal rights associated with custody".[80] He further stated:

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75 Bainham, *Children, The Modern Law*, (1993), 67.

76 Bainham at 123, referring to section 8(4) of the Domestic Proceedings and Magistrates' Courts Act 1978, and section 11A of the Guardianship of Minors Act 1971.

77 [1985] 2 HKC 647.

78 This is from the headnote.

79 *Ibid* at 651.

80 *Family Law in Hong Kong,* (3rd ed, 1994), 264.

"both under the Separation and Maintenance Orders Ordinance and the Guardianship of Minors Ordinance,[81] it is to be seen that if a split order is made giving custody to one parent and care and control to the other, it would nullify the provision that only the spouse with custody could obtain an order for maintenance."

2.22 Pegg also suggested that the parent with the formal order of custody would not be able to obtain an order of access. However, since financial orders under sections 4 and 5 of the Matrimonial Proceedings and Property Ordinance (Cap 192) can be made without reference to custody, then joint custody orders and split custody orders should be made under this ordinance.[82]

Applications for custody and access

2.23 Section 10(1) of the Guardianship of Minors Ordinance provides that an application for custody or access may be made by the parent of a minor or the Director of Social Welfare but access can only be granted to a parent.

2.24 In our view section 10(1) seems unduly restrictive in disallowing persons such as a relative, grandparent or foster parent from applying for a custody or access order. As the law stands they would have to persuade the Director of Social Welfare to take the proceedings and represent them in court and have the Director's consent that he would not oppose an order of custody in their favour. We understand from the Social Welfare Department that no court proceedings were initiated under section 10 by the department between 1994 and March 1997.

2.25 If an order of custody or access is made it is enforceable only if the parents are not residing together.[83] If they continue to reside together for three months after the order was made, then the order ceases to have effect.[84] An order of custody or access can be discharged, varied, revived after suspension or suspended by a subsequent order. This type of application is confined to a parent, or guardian, or on the application of any other person having the custody of the minor "before or after the death of either parent".[85]

2.26 It would be simpler to allow relevant persons to apply in the District Court to be granted custody or access. Section 10 could be amended to provide that anyone may apply to the court, or that a restricted group of persons who fulfil certain criteria may apply. Other persons not fulfilling the criteria would have to obtain the leave of the court. Alternatively, the section could be replaced by a provision along the lines of sections 8 and 10 of the English Children Act 1989.[86]

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81 Section 10 (2)(a).
82 *Ibid* at 265.
83 Section 10(3)(a).
84 Section 10(3)(b).
85 Section 10(4).
86 See chapter 3.

Maintenance

2.27 Section 10 of the Guardianship of Minors Ordinance also deals with maintenance and transfer of property for the benefit of the minor. Section 10(2) only allows a maintenance order to be made when a prior custody order is granted. It would be preferable if this were not a pre-condition.

2.28 If section 10 is to be retained then it should expressly state that the court has power to give custody to the Director of Social Welfare,[87] if that is the intention. Section 10 is unclear in that, even though the Director can apply, there is no provision expressly stating that an order of custody can be made in his favour. Section 3 of the Interpretation and General Clauses Ordinance (Cap 1) defines "person" to include any public body and any body of persons, corporate or uncorporate".

2.29 However section 15(2) of Guardianship of Minor Ordinance provides that:

> *"In relation to an order under section 13(1)(b)[88] or to an order under section 13(2) requiring payment to be made to the Director of Social Welfare, sections 10(3), (4)[89], 19 [90]and 20[91] shall apply as if the order under section 13(1)(b) were an order under section 10 giving custody of the minor to a person other than one of the parents (and the Director of Social Welfare were lawfully given that custody by the order), and any order for payment to the Director were an order under section 10(2) requiring payment to be made to him as a person so given that custody."*

2.30 The explanatory memorandum to the Guardianship of Minors (Amendment) Ordinance 1986 (Ord. No. 65 of 1986) merely stated that the amendment provided "that an order for custody and maintenance in respect of a minor may be made by the High Court and the District Court on the application of the Director of Social Welfare". Section 15(2) supports the interpretation that the Director can be awarded custody, except that the term preferred seems to be "care order" under section 13(1)(b).

Guardianship

Appointment of guardians

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87 The insertion of "Director of Social Welfare" only occurred when section 10 was amended by section 3 of the Guardianship of Minors (Amendment) Ordinance 1986.

88 An order committing the care to the Director.

89 The effect of section 10(3)is that an order in favour of a non parent remains in existence, while an order in favour of a parent ceases to exist if the parents live together for more than three months. Section 10(4) grants powers to discharge or vary an order of custody, access or maintenance.

90 This provides for a person liable to pay maintenance informing a named person of a change in address.

91 This deals with attachment of pension or income to satisfy a maintenance order.

2.31 Part III of the Guardianship of Minors Ordinance (Cap 13) deals with the appointment, removal, and power of guardians. Section 5 provides that the surviving parent shall be the child's guardian, either alone or with the guardian appointed by the deceased parent. Where no guardian has been so appointed, or the person appointed as guardian refuses to act or has died, then the court may appoint a guardian to act with the surviving parent.[92]

2.32 Section 6 allows a parent to appoint a guardian by deed or will. Section 2 of the Age of Majority (Related Provisions) Ordinance (Cap 410) provides that a reference in a deed or will, made after the Ordinance took effect, to a minor or infant shall be construed as a person under 18 years. Unless the surviving parent objects to the guardian so acting, the surviving parent and the testamentary guardian act together as joint guardians.[93] In those circumstances an order for payment of remuneration "for his services as guardian" can be made under section 6(6).

Removal of surviving parent as guardian

2.33 If the parent objects to the appointment of the testamentary guardian, or if the guardian considers that the surviving parent is unfit to have custody, the guardian can apply to the court under section 6(3). The court can make an order that the guardian act as sole guardian, or jointly with the surviving parent.[94] This seems to imply that the surviving parent's guardianship rights can be removed and, given the significant consequences of such an order, it would seem desirable that the legislation should spell this out explicitly. Yet section 8, which provides for removing or replacing a guardian, only gives this power to the court where it is a guardian appointed or acting by virtue of the ordinance or a testamentary guardian. The welfare principle applies.

2.34 Section 11 deals with the situation where a person has been appointed sole guardian to the exclusion of the surviving parent under section 6(3)(b)(ii). The court can order custody, presumably to the guardian, and access by the parent to the minor. The welfare principle applies in making such orders. The court can also order the parent to make periodical or lump sum payments for the child, or to transfer property. The section seems to imply that any other rights as a guardian to be consulted on any major matters affecting the upbringing of the child are removed, and the surviving parent only retains access rights. It seems unfair that in a divorce the non-custodial parent retains his rights as a guardian and can apply to court to enforce them, if denied by the custodial parent, and yet under the guardianship provisions, a sole guardian who is not one of the parents can exclude the guardianship rights of the surviving parent, except for access.

2.35 The English Law Commission, in a working paper, argued that the High Court had a limited right to removal of a natural parental guardian.[95] This was because, historically, in serious cases of misconduct, unfitness or inability the court could appoint another person to act in the place of the father and could restrain the father from interfering,

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92 Section 5(a) and (b).

93 Section 6(2) of Cap 13.

94 Section 6(3)(b)(i).

95 *Family Law, Review of Child Law, Guardianship*, paragraph 2.19 (No 91: 1985).

though his rights were never completely abrogated. However, the Commission noted that there were no recent cases on these grounds.[96]

Surviving parent's objections

2.36 Section 6(3)(a) also provides that, if the surviving parent objects, the court can refuse to make any order "in which case the surviving parent shall remain sole guardian". Thus, the deceased parent's wishes are thwarted. It is unclear whether the welfare principle applies to such a determination, as section 3(1) is limited to custody or upbringing and property matters. Section 8, which refers to removal of guardians, does apply the welfare principle. If a guardian is removed because of the surviving parent's objections, then the guardian has no right to seek access, nor can he be ordered to pay any maintenance, as section 11 is restricted to situations where the guardian is acting to the exclusion of the surviving parent.

Unfit parent

2.37 On the death of the custodial parent, the surviving parent shall not be entitled as of right to custody or the guardianship of that child if the court has under section 19(3) of the Matrimonial Proceedings and Property Ordinance (Cap 192) made an order that the surviving parent was unfit to have custody. This order may be included in the decree of divorce or judicial separation.

Unmarried father

2.38 Where the minor has no parent or guardian, or a person having parental rights with respect to him, the court can appoint a third party as guardian under section 7. "Parent" is defined in section 2 as father or mother but section 21 provides that for the purpose of sections 5, 6, 7, and 11 the natural father is not to be treated as father[97] unless he is entitled to custody by already having an order under section 10 in force or an order under section 3(1)(d). The natural father would have to issue proceedings first under section 3(1)(d) to seek an order for some or all of the rights and authority "that the law would allow him as father if the minor were legitimate."

Unmarried father as surviving parent

2.39 The question then arises whether the natural father, with an order of parental rights under section 3(1)(d) in his favour before the death of the mother becomes the "surviving parent" for the purposes of the Ordinance. One argument in favour of his being deemed to be the surviving parent is that section 21 provides, *inter alia*,

> *"any appointment of a guardian made by the natural father of an illegitimate child under section 6(1) shall be of no effect unless the*

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96 Paragraph 2.7.

97 It should really say "parent" as those sections only refer to parent.

appointer is entitled to the custody of the minor as under paragraph (a)[order of custody by an order under section 10(1)], or to enjoy any rights or authority with respect to the minor as under paragraph (b)[order under section 3(1)(d)], immediately before his death".

2.40 If he is the "surviving parent", then under section 5 he becomes the guardian either alone or, if the mother has not appointed a testamentary guardian, jointly with a guardian appointed by the court. If there is a dispute between the two guardians, then the court can give such directions as it thinks proper under section 9.

2.41 If the natural father is deemed to be the surviving parent and he objects to the guardian appointed by deed or will by the deceased parent, then the court can order either the father or the testamentary guardian to act as sole guardian.[98] The court could also make orders under section 11.

2.42 For the purposes of clarification, it would assist if a provision were inserted that once the natural father is granted parental rights, then the court can deem him to be the surviving parent and thus a guardian under the Ordinance. This would be discretionary, as section 3(1)(d) provides for the granting of limited rights. Presumably a court would have discretion to order that a natural father could have access rights under section 10, or the right to be consulted on some limited matters, such as emigration, but not to be treated as a guardian or "surviving parent". Where the court has ordered another person to act as sole guardian under section 6(3)(b)(ii), then the court can, under section 11, order access in favour of the father and maintenance or property orders against the natural father.

If unmarried father is not the surviving parent

2.43 If the unmarried father is not to be regarded as the "surviving parent", then he may wish to apply to be appointed guardian on the death of the mother. If he applies under section 7 to be appointed as guardian, he may be rejected, as he cannot be considered as "a parent" or "a person having parental rights". He may be able to apply under section 8 for an order to remove a guardian already appointed for the child, either by the court or by a deed or will, and instead to appoint him as guardian. Section 5 would not apply as there is no "surviving parent" with whom the guardian appointed under that section could act. Alternatively, the natural father could apply to have the child made a ward of court.

2.44 Even if he were not appointed guardian, he could, once he had an order under section 3(1)(d) in his favour, apply for custody or access under section 10. A person having a custody order in his favour under section 10 could apply for a maintenance order against either parent for the support of the child.

Grandparents caring for child born outside marriage

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98 Section 6(3)(a) or (b).

2.45 Section 7 allows any person to apply to be appointed as guardian of a child who has no parent, guardian or other person with parental rights. This would, for instance, permit the grandparents caring for a child born outside marriage to apply to be appointed as guardians in appropriate circumstances. Though the legislation does not specifically so provide, the court can appoint joint guardians.[99]

2.46 If, by virtue of a prior parental rights order under section 3(1)(d), the natural father is held to be a surviving parent for the purposes of the Ordinance, then the court could appoint the maternal grandparents under section 5 to act jointly with the father where they are actually looking after the child. The grandparents could later apply to the court under section 8 for removal of the natural father as guardian if the welfare of the child so demanded, as section 8 allows the court to remove a guardian "appointed or acting by virtue of this Ordinance".

2.47 Unmarried mothers should be encouraged to make a will appointing the person already assisting in looking after the child, usually a relative or grandparents, to be a guardian to avoid the complicated legal position that may arise after her death.

Dispute between joint guardians

2.48 Where there is a dispute between joint guardians, section 9 allows the court to "make such order regarding the matters in difference as it may think proper". Joint guardians are either the surviving parent acting with the testamentary guardian or a court appointed guardian under section 5 or 7, or guardians appointed by both parents.[100] Section 9 does not indicate whether orders of custody or access or maintenance can be made against a guardian who is not a parent. However, the English Law Commission suggested that the court, in dealing with a dispute between joint guardians under the English legislative equivalent to section 9,[101] can make any order as is proper, and this could include access.[102]

2.49 Section 12 deals with powers to order custody and maintenance where joint guardians disagree and where one of the guardians is a surviving parent. The court can order access by the surviving parent, and maintenance orders against the surviving parent. Arnold J in *Re N (Minors) (Parental Rights)*[103] said that an application under the equivalent English legislation, the Guardianship of Minors Act 1971, was of little help when both parents are dead as the court cannot settle the custody of the child where members of the family disagree about where the child should live.

Consent to marry

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99 Section 7(2) of the Interpretation and General Clauses Ordinance (Cap 1) provides that words in the singular include the plural.

100 Section 6(4).

101 Section 7 of the Guardianship of Minors Act 1971.

102 Paragraph 2.28 of *Family Law, Review of Child Law, Guardianship*, (No 91: 1985).

103 [1974] Fam Law 40, 44 referred to at paragraph 2.18 of the Law Commission.

2.50 Section 14 of the Marriage Ordinance (Cap 181) (as amended by sections 28-36 of the Law Reform (Miscellaneous Provisions and Minor Amendments Ordinance) (Ord. No. 80 of 1997) provides that the written consent to the marriage of a child under 21 is required from the parent who has custody, or both parents if they have joint custody. In the case of an illegitimate child, the consent of the mother, or if she is dead, the guardian, is required when the child is under 21. This removed a doubt as to whether the consent of the father of an illegitimate child was required. A guardian is now defined by section 18A(3) as including "any person to whose custody the party is committed by order of the court, other than a parent".[104] If a person whose consent is required refuses to give his consent or cannot be traced, then a District Court Judge may give his consent under section 18A.

Powers of the Director of Social Welfare

Care and supervision orders

2.51 If there are exceptional circumstances making it impracticable or undesirable to entrust the minor to the parents or any other individual, then the court may commit him to the care of the Director of Social Welfare.[105] In 1994/95 one case was referred for a care order, and none in 1995/96. There were two cases in the period April 1996 to the end of March 1997. The court can also order supervision in exceptional circumstances for minors under 18 years.[106] There were 12 supervision orders in 1994/95 and 4 in 1995/96. There were ten orders in the period April 1996 to the end of March 1997. The scope of a supervision order is not defined.[107] The court can order the parent to pay maintenance to the Director.[108] The supervision order ceases when the child is 18 years.[109] It may be varied, discharged, suspended or revived on the application of either parent or, a guardian, or by any person having custody by an order under section 10, or on the application of the Director when he has a supervision order in his favour.[110]

2.52 The court must hear the representations of the Director, including representations on maintenance of the child, before ordering a child to be committed to the Director's care.[111] Section 17 provides that the court can also order the Director to make a report to the court where the court is considering an application under section 10 (custody

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104 This is wide enough to include the Director of Social Welfare. The definition was included in section 31 of the Law Reform (Miscellaneous Provisions and Minor Amendments Ordinance (Ord. No 80 of 1997).

105 Section 13(1)(b).

106 Section 13(1)(a).

107 However, section 34B of the Protection of Children and Juveniles Ordinance (Cap 213) states that the duty of a supervisor is to advise, assist, and befriend the supervised person. Section 34A puts the supervised person under a duty to comply with requirements of residence, medical or surgical attention or treatment. The wishes of the parent or guardian, but not the child, can be taken into consideration.

108 Section 13(2).

109 Section 14(1).

110 Section 14(2).

111 Section 15(1).

or access) or section 14(2).[112] Strangely, the court does not have a similar power when ordering the child to be committed to the supervision of the Director. It might be assumed that it would be only after such enquiry that the Director would seek a supervision order, or that the court would only consider making such an order after receipt of such a report.

2.53 There is no time limit specified for the expiration of a care order. However, since the ordinance uses the term "minor" and this is defined in section 3 of the Interpretation and General Clauses Ordinance (Cap 1) as a person who has not yet attained 18 years, the care order expires at 18 years. The time limit of 16 on a supervision order has been removed by section 4 of the Marriage and Children (Miscellaneous Amendments) Ordinance (Ord. No. 69 of 1997).

2.54 No provision is made under section 13(1)(b) or associated sections for parents to apply for access to a child who has been the subject of a care order. It could be argued that section 10 is broad enough for parents to apply for access. It should be noted that section 10(1) includes reference to an "application of either of the parents of a minor (who may apply without next friend)". This would imply that the minor could apply himself for access to a parent, whether the minor was in the custody of a parent, guardian, or third party or the Director of Social Welfare.

Guardian of the estate

2.55 Section 18 confirms the principle that a guardian is not only guardian of the child's person, but also of his estate. The Court of First Instance retains its power to appoint a guardian of the estate either generally or for a specific purpose.[113]

2.56 The powers of a guardian and parent may not be co-extensive. For example, a surviving parent can object to a testamentary guardian. A testamentary guardian cannot appoint a guardian for the child. Liability to maintain can only be ordered against a parent under section 10 or section 11. The child who is the subject of a guardianship order can then be regarded as a child of the family for the purposes of an order for maintenance when the guardian's marriage breaks up, but not otherwise.[114] The English Law Commission concluded that there was uncertainty as to a parent's position in relation to the property of the child, and it may be that a guardian has more powers than a parent. The English Law Commission[115] and the Scottish Law Commission[116] dealt extensively with the rights and duties of a guardian of the estate. This matter is dealt with in more detail in Chapters 3 and 4 respectively.

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112 Application to vary or discharge a supervision order.

113 Section 18(2).

114 Paragraph 2.29 of the Law Commission's Working Paper *Family Law, Review of Child Law; Guardianship*. (1985: No 91).

115 *Ibid.*

116 *Report on Family Law*, Scot Law Com, (1992: No 135).

Proceedings concerning a minor

2.57 A guardian of the person or testamentary guardian can be appointed as next friend to take or defend proceedings on behalf of the minor.[117] Order 80 of the Rules of the High Court deals with the appointment of a next friend or guardian *ad litem* to represent the interests of the child. The Order refers to a "person under disability", which is defined in Order 80 rule 1 to be "a person who is a minor or a patient". The court must approve the settlement of any proceedings in which there is a claim of money. The court gives directions under rule 12 to control the monies recovered for the minor. Usually the money is invested by the court until the minor reaches majority. Payment out of any of the monies may be applied for by the next friend and the court will give directions on this matter under rule 12(3).

2.58 There is no definition of "next friend" but "the court generally expects a next friend to be a substantial person; and, as in the case of a guardian *ad litem*, it is desirable that he be a relation, connection, or friend of the family and not a mere volunteer".[118] The Official Solicitor can also be appointed[119] especially if no other person is willing to act.[120]

2.59 The guardian *ad litem* or next friend can be removed if he is acting adversely to the interests of the infant, or if he conducts the infant's affairs improperly.[121] The White Book also warns of the potential conflict of interest after the settlement has been lodged in court where parents or guardians think it is a windfall for the whole family. However, the Court can make an order to appoint the Official Solicitor if there is such a conflict.[122]

Difference between wardship and guardianship

2.60 A court has no power to remove rights as a guardian while a parent is alive, even though the impact of a custody order between two parents is sometimes perceived effectively to remove such rights. This jurisdiction is different from the wardship jurisdiction. If a guardian is appointed that does not make the child a ward of court.[123] In wardship proceedings, the court becomes the guardian and has responsibility for all matters affecting the upbringing of the child.

Wardship

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117 *Harris v Lightfoot* (1862) 10 WR 31, referred to in the *White Book,* at 80/3/1 (1991 ed).

118 *Ibid* at 80/3/1 referring to *Nalder v Hawkins* (1833) 2 M & K 243.

119 *Re W* [1907] 2 Ch 557, 568 CA.

120 *Supreme Court Practice* at 80/6/4/. See *infra* for powers of the Hong Kong Official Solicitor.

121 *Ibid* at 80/3/2/.

122 *Ibid* at 80/12/9/.

123 Section 9(1) of Law Reform (Miscellaneous Provisions) Act 1949.

2.61 Section 26 of the High Court Ordinance and Order 90 of the Rules of the High Court governs the wardship jurisdiction. An order of wardship vests custody:

> *"in the sense of the whole bundle of parental rights, in the court which usually delegates actual care and control to an individual. Major decisions affecting the ward, e.g. consent to marriage, adoption proceedings, surgery and education must be taken by the court. Interference with and disobedience to the court order is a contempt of court".*[124]

2.62 Order 90 Rule 3 provides that where an application to make a child a ward of court is pending, any application made under the Guardianship of Minors Ordinance (Cap 13) may be made in the pending wardship proceedings. Wardship would also be relevant where a non-parent who has had the physical custody of the child is opposing a request by a parent or parents to return the child. Foster parents can also apply to make the child a ward of court. Unless the Official Solicitor takes proceedings or the applicant can obtain the consent of the Director of Social Welfare for him to take proceedings, wardship is the only remedy.

2.63 The costs will most likely be the greatest deterrent, as the Director of Social Welfare may not want to incur the legal expenses of the proceedings. Another practical difficulty is that if a maternal grandparent is looking after a child and wants to retain custody, as, for instance, where the mother is marrying again, then the grandparent has to persuade the natural mother to issue proceedings under section 10 of the Guardianship of Minors Ordinance (Cap 13) to ask the court to grant custody to the grandparent.

2.64 It is curious that this is the only remedy in the absence of wardship or the Director of Social Welfare's consent. The natural mother may be reluctant to take proceedings as a maintenance order could be made against her for the support of the child. From another perspective a mother may not want to surrender legal control of the child as she may fear that the child will feel abandoned and resent her in later years.

2.65 The District Court has no jurisdiction in wardship. An infant will remain a ward until majority, at the age of 18.

2.66 The question arises as to what power a court has when considering the arrangements for a child in a divorce if it feels that neither parent can make proper arrangements for the child. It can refuse to make the decree absolute under section 18 of the Matrimonial Proceedings and Property Ordinance (Cap 192) or appoint the Official Solicitor to represent the interests of the child, or direct that proceedings be taken to make the child a ward of court.[125] If the District Court had wardship powers then it could make orders to protect the child during the course of the matrimonial proceedings, apart from using its powers under various ordinances to involve the Director of Social Welfare.

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[124] Pegg, *Family Law in Hong Kong*, (3rd ed, 1994) at 271.

[125] Section 19(1) of the Matrimonial Proceedings and Property Ordinance (Cap 192).

Duties of the Official Solicitor

2.67 The Official Solicitor can act where so appointed by the court,[126] or at his discretion where he is satisfied that the interests of justice so require and where there is no other person fit and willing to act.[127] The Director of Legal Aid is the Official Solicitor.[128] The duties of the Official Solicitor include acting as guardian *ad litem* or next friend to a person under disability of age or mental capacity, or where a person is committed to prison for contempt and who is unable or unwilling to apply to the court to purge his contempt.[129] The Official Solicitor can also be requested by the Juvenile Court to act for a party involved in proceedings under the Protection of Children and Juveniles Ordinance (Cap 213).[130] The office was established in 1991 when the ordinance came into existence. The Official Solicitor is also the Official Trustee and Judicial Trustee.[131] He also took over the functions of the Crown Solicitor under rules 105(4) and 108(1) of the Matrimonial Causes Rules (Cap 179).[132]

2.68 Where the Official Solicitor is appointed in wardship proceedings, he appears as advocate for the ward and represents the interests of the ward to the court. He is also the guardian of the ward. He does not represent the parents.[133]

b) Matrimonial Causes Ordinance (Cap 179)

2.69 This ordinance deals with jurisdiction in divorce, nullity, and judicial separation, and in proceedings for ancillary relief for maintenance from a deceased parent's estate. No specific power is given to the court under the Matrimonial Causes Ordinance (Cap 179) concerning custody or access except in relation to the Director of Social Welfare's powers.

Supervision order

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126 Section 4(1)(a) of the Official Solicitor Ordinance (Cap 416).

127 Section 4(1)(b).

128 Section 7.

129 Schedule 1, Part 1. The Official Solicitor's office, up to June 1995, received 285 requests for representation, mostly in matters involving receivership, unclaimed estates, adoption and guardianship.

130 Schedule 1, Part 3.

131 These functions under the Trustee Ordinance (Cap 29) were taken over from the Registrar General.

132 Schedule 3.

133 Goff J in *Re R(PM)* [1968] 1 WLR 385, 387.

2.70 Section 48 provides that where the court has jurisdiction to make a custody order,[134] and there appears to be exceptional circumstances making it desirable that the child should be under the supervision of an independent person, "the court may, as respects any period during which the child is, in exercise of that jurisdiction, committed to the custody of any person, order that the child be under the supervision of the Director of Social Welfare."[135] There were 139 supervision orders made in 1994/95 and 152 in 1995/96. The numbers have increased to 244 orders for the period April 1996 to the end of March 1997.

2.71 Section 48 is similar to section 13 of the Guardianship of Minors Ordinance (Cap 13). The court' s jurisdiction to vary any such order is exercisable at the instance of the court itself.[136] The court is given power to vary or discharge any provision made in pursuance of this section.[137] Section 48 has been amended by section 19 of the Marriage and Children (Miscellaneous Amendments) Ordinance (Ord. No. 69 of 1997) to provide for an age limit of 18 years for a supervision order. There is no definition of supervision.[138] The question arises whether the granting of a supervision order under this ordinance allows the Director of Social Welfare to invoke his powers under section 34A of the Protection of Children and Juveniles Ordinance (Cap 213).[139]

Care order

2.72 Section 48A provides a power to commit the child to the care of the Director of Social Welfare. However, the exceptional circumstances must make it impracticable or undesirable for the child to be entrusted to either of the parties to the marriage or to any other individual. One order was made in 1994/95 and three orders were made in 1995/96. There were six orders for the period April 1996 to the end of March 1997. Before making the order, the court must hear representations from the Director of Social Welfare, including any representations as to financial provisions.[140] This again is similar to the powers of the Director under section 13 of the Guardianship of Minors Ordinance (Cap 13). Section 48A(4) (as amended by section 20 of the Marriage and Children (Miscellaneous Amendments) Ordinance (Ord. No. 69 of 1997)) provides for the care order to remain in force until the age of 18. A power to vary or discharge is also provided for.[141] Section 48A(3) provides that the child "shall continue in the care of the Director of Social Welfare notwithstanding any claim by a parent of the child or another person".

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134 That is, under this ordinance or the Matrimonial Proceedings and Property Ordinance (Cap 192). Custody is not defined nor is there a reference to access.

135 Amended by No. 39 of 1972, section 33.

136 Subsection (2).

137 Section 48(3).

138 Section 34B of the Protection of Children and Juveniles Ordinance (Cap 213), if applicable, states that the duty of a supervisor is to advise, assist, and befriend the supervised person.

139 This includes requiring the supervised person to comply with requirements as to residence, medical or surgical attention or treatment, giving due consideration to the wishes of the parent or guardian. Nothing is said about the wishes of the child who is being supervised.

140 Section 48A(2).

141 Section 48A(5).

2.73 Even though section 48A refers to a child being entrusted "to any other individual" the section does not give power to award custody to a third party. Presumably, it was thought that section 10 of the Guardianship of Minors Ordinance (Cap 13) was sufficient, as it allows the court to make an order in favour of any person. However, we have seen that section 10 denies the third party a right to apply, and he must rely on the parents or the Director to take the application.

2.74 The parent or guardian is under an obligation to inform the Director if there is a change of address. Yet there is no provision for access by the parent to the child. The assumption behind the legislation may have been that there was no need to specify such a power as the parent could seek access from the Director who would reach voluntary agreement with the parents on this issue. Alternatively, it may have been thought that the parent could apply for access under section 10 of the Guardianship of Minors Ordinance (Cap 13).

2.75 Despite the fact that the Director of Social Welfare may grant access, there is still a need to clarify the legislation by allowing parents or guardians or a relevant third party[142] to take proceedings for access to children in the care of the Director. This is particularly so where the only ground for removing the child from parental custody is that it is impracticable or undesirable, which is a lesser standard than the present grounds for taking a child into care under the Protection of Children and Juveniles Ordinance (Cap 213).[143] Section 34(2) of Cap 213 sets out specific and serious grounds, including assault or sexual abuse.

2.76 There is no reason why the grounds for committing a child to the custody of the Director under section 48A of the Matrimonial Causes Ordinance in private law disputes between parents should not be the same grounds specified in section 34(2) of the Protection of Children and Juveniles Ordinance (Cap 213). No specific provision is made for ascertaining the wishes of the child or taking these into account.

c) Matrimonial Causes Rules

Application by third parties

2.77 There is nothing in Part VII of the Matrimonial Causes Ordinance (Cap 179) which provides a right to apply to the court for custody. That right is provided in the Guardianship of Minors Ordinance (Cap 13) and the Matrimonial Proceedings and Property Ordinance (Cap 192). The latter ordinance is silent on the right of any third party to apply for custody. The court can make an order that a parent is unfit to have custody but the ordinance does not say that the consequences of that order can be an order in favour of a third party who is a fit person.[144] Only the Guardianship of Minors Ordinance (Cap 13)

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142 Like a grandparent or other relative.

143 See *infra*.

144 Section 19(3).

allows the Director of Social Welfare to apply for custody of a child. It seems that an interested third party cannot apply to be appointed guardian *ad litem* unless he falls within the criteria under rule 92(3) of the Matrimonial Causes Rules.

2.78 Rule 92 provides that an application for custody or education or supervision under section 48 shall be made to a judge. A registrar may deal with applications for an order in terms agreed between the parties concerning custody or access where "the only question for determination is the extent to which access is to be given."[145] A registrar has a choice to make the order or refer the application to a judge.

2.79 Rule 92(3) sets out the persons who may apply by summons: the guardian of any child of the family and any other person who has the custody or control of the child pursuant to an order or, where a child is under supervision, by an order under section 48. This is stated to be without prejudice to the right of any other person entitled to apply for an order as respects the child.

2.80 Rule 92(4) provides that if there is a dispute concerning care and control of, or access to, a child the judge may refuse to admit any affidavit unless the author is available to give oral evidence. It is interesting that the language is confined to care and control or access and does not refer to custody. There is an unusual provision in rule 92(5) that if there are allegations of adultery "or of an improper association with a named person" then notice of that allegation is to be filed and served by the person making the allegation. This allows the person against whom the allegation is made to intervene in the proceedings. It is difficult to see what relevance such allegations have to the custody, care, and supervision of children unless it is alleged that such improper conduct is taking place in the presence of the children. There is a general power given to the court to give directions as to the filing and service of pleadings and as to the further conduct of such proceedings.[146]

Director of Social Welfare's powers

2.81 Rule 93 allows the Director of Social Welfare to apply for variation, discharge or direction by letter to the court where it is urgent "or where the application is unlikely to be opposed". In either circumstance the Director need only notify any interested party if it is practicable. There is a similar provision in rule 61D of the District Court Civil Procedure (General) Rules (Cap 336) for cases under the Guardianship of Minors Ordinance (Cap 13). It is submitted that in accordance with the principles of natural justice, the relevant interested parties should be notified of a hearing, even if the Director retains an initial power to apply *ex parte* in an emergency.

Social Welfare Officer's report

2.82 Under rule 95, a judge or registrar may refer a case for investigation and a report on any matter arising in matrimonial proceedings which concerns the welfare of a

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145 Yet section 48 makes no reference to access.

146 Rule 92(7).

child. Prior to a hearing, any person who comes within the category of approved applicants can request the Registrar to call for a report from the Director of Social Welfare. The Registrar may refer the matter to the Director if he is satisfied that the other parties consent and that sufficient information is available to enable the officer to proceed with the investigation. The rule allows the Director to inspect the court file. When the report is completed and filed in court the parties must be notified and may inspect and apply for a copy on payment of a fee. A similar provision exists for any proceedings in the court concerning the welfare of the child under rule 61F of the District Court Civil Procedure (General) Rules (Cap 336).

Proceedings in other courts

2.83 Under rule 96 of the Matrimonial Causes Rules, an applicant for custody must at the time when the application is made file a statement of the nature of any other proceedings concerning the same child in the Court of First Instance, District court or magistrate's court. Therefore he has an obligation to inform the court of previous proceedings concerning the child. However, no provision is made for consolidation of proceedings.

Separate representation

Rule 108

2.84 The court has a broad discretion to order that a child ought to be separately represented. It can appoint the Official Solicitor if he consents or, "on the application of any other proper person, appoint that person, to be guardian *ad litem* with authority to take part in the proceedings on the child's behalf".[147] The Official Solicitor's duty is similar to his duties in wardship.[148]

2.85 A Practice Direction issued by the Chief Justice on separate representation provides as follows:

> "*Where it is felt by a Court to be desirable or necessary that an infant shall be separately represented in any proceedings, the Director of Legal Aid, in the exercise of his powers as Official Solicitor, shall, unless the Court otherwise directs, be appointed as guardian ad litem where no other person is available for appointment.*"[149]

2.86 In an unusual case, *Yeung Chung Ping v Yeung Wan Yuet Kuen*,[150] the husband disputed the paternity of the child of the marriage. He applied for an order that blood tests should be carried out on the parties and the child. On appeal, the Court of

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147 Rule 108(b).

148 *Official Solicitor's Report - from August 1993 to July 1994*, at paragraph 22.

149 Reported in Hong Kong Law Digest, October 1993, at J89.

150 [1987] 1 HKC 206.

Appeal ordered the blood test. "There was no reason within the scope of the protective jurisdiction of the court over infants which would justify any departure from the general practice of ordering blood tests in circumstances where the paternity of a child was in issue".[151]

2.87 It was apparent from affidavits that this was a long standing issue.[152] The court refused to appoint the Crown Solicitor as guardian *ad litem* since there were no grounds on which he could reasonably argue that the blood test should not be carried out. However, the court said that under rule 108 the Crown Solicitor should be asked if he was prepared to act for the child in whatever proceedings might continue after the result of the blood tests.[153] The child was ordered to be joined as a respondent to the divorce proceedings.

2.88 There is an unusual provision in Rule 108(2) that a certificate by a solicitor must be filed certifying that the proposed applicant "has no interest in the proceedings adverse to that of the child and that he is a proper person to be such guardian". There is an argument that a relative who is applying for custody could not be seen to be sufficiently neutral or independent to represent the best interests of the child as a guardian *ad litem*. In other jurisdictions a guardian *ad litem* is a professional officer appointed to protect the child. It is submitted that it would be more appropriate if a person conferred with this role was a professional with experience in children's issues. Then a separate right could be given to allow a relative, foster parent or other close friend to apply to be a party to the proceedings, rather than assuming that this person's interests coincided with the role of separately representing the child.

Rule 72

2.89 Rule 72 also allows for separate representation where an application is made to vary a settlement order. This compels the court to appoint separate representation "unless it is satisfied that the proposed variation does not adversely affect the right or interest of any children". No definition of settlement order is made. The only reference to settlement order is to a settlement of property order under section 6(1)(b) of the Matrimonial Proceedings and Property Ordinance (Cap 192).

2.90 The scope for separate representation is broader under this rule as the child can be represented by a solicitor, or a solicitor and counsel. The court may appoint the Official Solicitor, or other fit person to be guardian *ad litem*. A similar certificate to the certificate in Rule 108(2) has to be filed for the proposed fit person. The certificate must be filed by the solicitor acting for the child. The term "proper person" and "fit person" are

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151 At page 206.

152 In reliance on *S (an infant by her guardian ad litem, the Official Solicitor to the Supreme Court)* [1972] AC 24, 45. Lord Reid said the order would only be refused if it was against the child's interests.

153 Reference was made to a Practice Direction at [1975] 1 WLR 81 which indicated that it was not necessary to order the Official Solicitor to act as guardian *ad litem*, unless the minor is ten years or more, or there are special circumstances making such appointment immediately desirable.

mentioned in the rule, without definition, or explanation of the difference between them. It may be that what was intended was that a person alleged that he was a proper person for the purposes of the application and if the court was satisfied of his capability then he became a fit person.

2.91 Rule 72(2) is important as it gives a similar power to the court to appoint a separate representative "on any other application for ancillary relief". "Ancillary relief" is defined in rule 2 in terms of a range of financial orders, including maintenance orders, orders for settlement or transfer of property and orders for variation of settlement.

2.92 The irony is that the children cannot be separately represented by a solicitor or counsel in a custody or guardianship dispute, as it seems rule 72 is confined to property matters, and rule 108 does not deal with the right to be represented by a solicitor or counsel. Only the Official Solicitor if he consents, or the "proper person", can separately represent the child.

2.93 However, in *Chow Hui Shui-yee v Chow Sung-ming,*[154] the Crown Solicitor, who formerly had the powers now held by the Official Solicitor, refused to act as guardian *ad litem* on the basis that no interests of the respondent were prejudiced. However, the court requested the Crown Solicitor to act for the respondent and appointed him guardian pursuant to rule 105(5). The court had a residual jurisdiction to request the Crown Solicitor (as an officer of the court) to intervene or act on behalf of a party to prevent either a denial or miscarriage of justice, and the Crown Solicitor was in duty bound to obey the court's request. The respondent in this case was incapable of protecting his own interests due to ill health.

2.94 It seems strange that the Official Solicitor has no discretion to refuse to be appointed under rule 72 in respect of financial matters, but has that discretion in relation to matters affecting the welfare of the child. The court has no power to appoint legal representation for children except in ancillary relief matters.

d) Matrimonial Proceedings and Property Ordinance (Cap 192)

Arrangements for the children

2.95 Only sections 18 and 19 of Part II of the Matrimonial Proceedings and Property Ordinance (Cap 192) are relevant to guardianship and custody. Section 18(1) restricts the court's right to make a decree of divorce or nullity absolute unless satisfied, *inter alia*:

> *"(b) that ... (i) arrangements for the welfare of every child so named have been made and are satisfactory or are*

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[154] District court , DJ No 1178 of 1984, Deputy Judge van der Eb; April 29, 1985, reported in 16 HKLJ (1986) No 2, at 280.

the best that can be devised in the circumstances: or

(ii) it is impracticable for the ... parties appearing before the court to make any such arrangements; or

(c) that there are circumstances making it desirable that the decree should be made absolute or should be made ... without delay notwithstanding that there are or may be children of the family to whom this section applies and that the court is unable to make a declaration in accordance with paragraph (b)".

2.96 In relation to the circumstances outlined in (c), subsection (2) provides that the court must first obtain an undertaking from either or both of the parties to bring the question of the arrangements of the children before the court within a specified time. The consequences of making an absolute decree without making an order expressing satisfaction with the arrangements of the children is that the decree is void.[155]

Age

2.97 Section 18(5) defines the children of the family to whom the section applies as minor children who are below the age of 16 years, or receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not they are also in gainful employment.

2.98 Section 19(1), as amended by section 28 of the Marriage and Children (Miscellaneous Amendments) Ordinance, (Ord. No. 69 of 1997), gives power to the court to make orders as to custody and education for children under the age of 18 years, in proceedings for divorce, nullity, and judicial separation.

Child of the family

2.99 The court's powers extend to any "child of the family". Section 18(5) provides that the court may direct that the section shall apply to any child of the family if the court is of the opinion that there are special circumstances which make such a direction desirable in the interests of the child. "Child of the family" is defined in section 2 as a child of both parties to a marriage, or a child who "has been treated by both those parties as a child of their family". Section 19(2) of the Matrimonial Proceedings and Property Ordinance (Cap 192) provides that the rights over a child of any person other than a party to the marriage cannot be affected by an order for custody or education, unless that person was a party to the proceedings.[156]

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155 Section 18 (3). However, the validity of the decree cannot be challenged on the grounds that the conditions of subsection (1) and (2) were not satisfied.

156 Section 19(2). This would cover the natural father of a child born out of wedlock. Presumably he would be joined as a party to the proceedings in order to process the ancillary proceedings concerning the custody, access, education or training of the child.

Court discretion

2.100 The scope of the discretion given to the court is to make "such order as it thinks fit" for the custody and education of any child of the family.[157] Even where proceedings for divorce, nullity, or judicial separation are dismissed, then or at a reasonable time thereafter, the court retains power to make custody or education orders.[158] The court also has power to direct that appropriate proceedings be taken to make a child a ward of court.[159] The inherent flexibility of orders concerning children for their best interests is preserved by section 19(5), which allows orders to be made from time to time, and the power of discharge, suspension or variation contained in subsection (6).

Separating siblings

2.101 The court's discretion extends to making a split order. In *W v W,*[160] custody of a daughter of nine years, who had been brought up by the maternal grandmother, was given to the mother, and the father was granted custody of his son of five years. The father's brother's wife had the day to day management of the son, as the father had lived with his brother and the brother's wife since the separation. The court reluctantly allowed the status quo to remain, provided each parent had access to the other child and the court encouraged the children to come together at weekends. "Even where the court was faced with a *de facto* split, it would always examine all the relevant circumstances very closely before turning such a situation into a *de jure* one by its order".

2.102 However, the court went on to hold that:

> *"within the context of section 18(1)(b)(i) of the Matrimonial Proceedings and Property Ordinance (Cap 192), the court was not satisfied that the arrangements for the welfare of the children were satisfactory but the court was satisfied that such arrangements were the best that can be devised in the circumstances and this was a sufficient declaration for the purposes of the section".*

2.103 The original order was for custody of the children to be given to the wife with care and control of the son to the husband. Bokhary J said "since split orders, whereby custody is given to one person while care and control is given to another, are not ordinarily made, ... it can be seen that the extraordinary nature of the present situation has already been judicially recognized".[161]

Unfit parent

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157 Section 19(1).
158 Section 19(1)(b).
159 *Idem.*
160 [1981] HKC 466.
161 At 469, referring to *S v S (otherwise D)* (1968) 112 Sol Jo 294.

2.104 It is interesting that the court is given power under section 19(3) to make an order that either party is unfit to have custody. This order may be included in the decree of divorce or judicial separation. It is surprising that it could not also be made in an application to dismiss an application for custody, or in an order refusing custody. The significance of such an order is that on the death of the custodial parent, the other parent is not entitled as of right to custody or the guardianship of that child.[162] However, section 19(1) does give power to the court, where it could make a custody order, to direct instead that proceedings be taken to make the child a ward of court. The statistics of the Social Welfare Department for the period April 1996 to the end of March 1997 show that two supervision orders under section 19 were made.

2.105 Under section 20, the court can exercise some of the powers under section 19 where it has already ordered maintenance and one of the spouses has wilfully neglected to maintain a child.[163] The rest of the Ordinance deals with maintenance and property for spouses and children.

Welfare of the child

2.106 Section 48C of the Matrimonial Causes Ordinance (Cap 179) provides:

> *"for the avoidance of doubt, section 3 of the Guardianship of Minors Ordinance (Cap 13) (which provides that the welfare of the child shall be the first and paramount consideration) shall apply in relation to any order for the custody care or supervision of a child which may be made under this Ordinance or the Matrimonial Proceedings and Property Ordinance (Cap 192)."*[164]

2.107 Section 18(6) of the Matrimonial Proceedings and Property Ordinance defines "welfare" for the purposes of that section as including custody, education and financial provision.[165] Section 2 of the Ordinance defines "custody" to include access, and "education" to include training.

Criticisms of Matrimonial Proceedings and Property Ordinance (Cap 192)

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162 Section 19(5).

163 This order would have been made under section 8.

164 This was added by the Matrimonial Causes (Amendment) Ordinance (Ord. No. 10 of 1983), section 2.

165 The whole section is taken from section 17 of the Matrimonial Proceedings and Property Act 1970 c 45 .

2.108 O' Donovan[166] recommended that the law should be amended to include a similar section to section 25 of the United Kingdom Matrimonial Causes Act 1973. This provision, inserted by the Matrimonial and Family Proceedings Act 1984, puts the court under a duty to give first consideration to the welfare of a minor when making a decision on financial matters.

2.109 There is no specific provision in the Matrimonial Proceedings and Property Ordinance for the wishes of the child to be taken into account. However, as noted earlier, section 48C of the Matrimonial Causes Ordinance (Cap 179) does refer to section 3 of the Guardianship of Minors Ordinance (Cap 13). Section 3(1)(a)(i)(A) of Cap 13 makes specific reference to the wishes of the child.

e) Separation and Maintenance Orders Ordinance (Cap 16)

2.110 The Separation and Maintenance Orders Ordinance deals with separation from a spouse. Most of the ordinance stems from the United Kingdom Summary Jurisdiction (Married Women) Act 1895.[167] This was enacted to give power to a magistrate to protect a married woman whose husband had been convicted of assaulting her or was a habitual drunkard. The District Court has the power, *inter alia*, to make an order that the legal custody of children of the marriage be committed to the husband or wife under section 5(1)(b). The application is grounded on allegations of misbehaviour set out in section 3, which include assault, desertion, being a habitual drunkard or a drug addict, compelling the other party to submit to prostitution, or being guilty of persistent cruelty to the children.

Adultery

2.111 Section 6(1) of Cap 16 prohibits the making of an order for "legal custody" if it is proved that the applicant has committed an act of adultery. Section 6(1) contains a proviso if the spouse of the applicant has condoned or connived at, or by his or her wilful neglect or misconduct conduced to the adultery. The ordinance does not define "legal custody", nor does it explain what difference there is, if any, between legal custody and custody. There is no reference to access in the ordinance, so it is not known whether the non-custodial parent would be denied access if he or she were guilty of adultery.

2.112 It is submitted that an order of custody should not be refused merely on the grounds of the applicant' s adultery. Such a prohibition is not based on the best interests of the child, but on irrelevant questions of morality.

Variation or discharge

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166 "Recent Developments in the Law Relating to Children", Law Lectures for Practitioners (1987), at 172.

167 1895 c 39 section 6, UK; 1925 c 51 section 1(4) UK.

2.113 Section 7(1) gives power to the court to vary, discharge, suspend or revive after being so suspended, any order made under the ordinance, but only on fresh evidence. Section 7(3) provides that a prior order shall be discharged if a husband or wife commits an act of adultery. If there is an application to discharge the order on the grounds of a subsequent act of adultery by either party, the court has the discretion, even if it discharges the original order, to make a new order continuing the custody order in favour of that original party, with consequential orders for maintaining the children.[168] Section 7(5) states that "in making an order under subsection (4)(b) the court shall have regard primarily to the best interests of the children".[169]

Criticisms of the Separation and Maintenance Orders Ordinance (Cap 16)

2.114 This whole Ordinance reflects a fault based regime between the spouses, which deals inadequately with the children. The focus of the Separation and Maintenance Orders Ordinance is on granting a separation order and an ancillary order of maintenance for the wife and children. An order of custody is a prerequisite to an order of maintenance for the children. The sub-committee understands from practitioners that this ordinance is rarely used. However, it can be used by those women who are a party to a customary marriage or a union of concubinage, who cannot apply for a divorce or decree of judicial separation under the Matrimonial Causes Ordinance (Cap 179).[170] The amendments made by the Marriage and Children (Miscellaneous Amendments) Ordinance (Ord. No. 69 of 1997) have redressed many of the defects of this ordinance. It remains to be seen how the courts will resolve the apparent conflict between the mandatory requirement of section 6, prohibiting an order when there is adultery, and the best interests of the child.

2.115 Section 5(1)(b) of the Separation and Maintenance Orders Ordinance (Cap 16) limits its custody jurisdiction to "children of the marriage".[171] There is no definition of this term so it is not clear whether it includes children born outside wedlock, but who are accepted as children of the marriage.[172] The duration of a custody order is now specified as being 18 years.[173] Section 12 deals with continuation of payments for the maintenance of children beyond 18 years if they are in training or education or there are special circumstances which justify the making of the order.[174] This would include a child who is suffering from a mental or physical disability.

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168 Section 7(4)(b), as inserted by section 12 of the Marriage and Children (Miscellaneous Amendments) Ordinance (Ord. No. 69 of 1997).

169 As inserted by section 12 of the Marriage and Children (Miscellaneous Amendments) Ordinance (Ord. No. 69 of 1997).

170 The definition in section 2 includes these categories of relationships.

171 *Supra* at 173.

172 There is a definition of "child" and "child of the family" in section 2 of the Matrimonial Proceedings and Property Ordinance (Cap 192).

173 As inserted by section 11 of the Marriage and Children (Miscellaneous Amendments) Ordinance (Ord. No. 69 of 1997).

174 As inserted by section 17 of the Marriage and Children (Miscellaneous Amendments) Ordinance (Ord. No. 69 of 1997).

2.116 Pegg argued that, in view of section 3(1)(a) of the Guardianship of Minors Ordinance,[175] section 6 cannot mean that an adulterous spouse would be prevented from obtaining custody. It is submitted that this is precisely what the ordinance is intended to achieve. It is a fault based ordinance. What is peculiar is that the bar of adultery only applies to the applicant and does not include the respondent.

2.117 The court is left in a difficult dilemma in weighing up the respective faults of the parents, though it is hoped that the inclusion of the "best interests" criteria in the legislation will shift the focus more in the direction of the children and away from the fault allegations. There is no reference to a third party being able to apply or be granted custody. Nor is there a power given to the court to commit the children to the custody of the Social Welfare Department.

f) Domestic Violence Ordinance (Cap 189)

2.118 Orders of non-molestation against a person can be made to protect a child from further molestation.[176] Such an order can exclude the other person from the matrimonial home.[177] The definition of child has now been changed to a person under 18 years by section 25 of the Law Reform (Miscellaneous Provisions and Minor Amendments) Ordinance (Ord. No. 80 of 1997). The Ordinance applies to cohabiting couples, and any child living with the applicant. The needs of the children can be taken into account in deciding whether or not the injunction of non-molestation or exclusion from the home is justified.[178]

2.119 There is a saving as to the existing jurisdiction of the Court of First Instance and the District Court in section 9. There is no provision as to the effect of an injunction under the Ordinance on existing orders of custody, guardianship or access. It would be useful if there were a provision for suspending or varying access orders where a person has been made subject to a non-molestation order (or excluded from the home) for molestation of a child, until there was an application by the person excluded for an order to resume access. Otherwise, the custodial parent of a child who has, for example, been molested by the other parent, will have to apply for an order to suspend or vary the access order, in addition to the application for the injunction.

g) Adoption Ordinance (Cap 290)

2.120 Section 13 of the Adoption Ordinance provides that all rights, duties, obligations and liabilities of parents or guardians of an infant in relation to, *inter alia,* future

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175 This provides, *inter alia*, that in any proceedings before any court, the welfare of the minor shall be the first and paramount consideration.

176 Section 3(1)(b).

177 Section 3(1)(c).

178 Section 3(2).

custody, including all rights to appoint a guardian to consent or give notice of dissent to marriage, shall be extinguished, and instead vest in the adopter.

2.121 In *Re Phillips,*[179] it was held by the High Court that a natural father, who had a court order of access in his favour after his divorce from the mother, was not unreasonably withholding his consent to adoption. The fact that the mother had remarried was "by no means out of the ordinary and [the children] could live in harmony and affection without the need for adoption". The mother had argued that, unless an adoption order was made, the children would not be entitled to British citizenship or passports and so would not have a right of abode in Britain.

2.122 The court said that welfare of the child was only one of three conditions for an adoption. The first was that the consent of the parent must be given unless the consent could be dispensed with by the court. The natural father had been regularly seeing the children once a month and he argued that to make the adoption order would unreasonably deprive him of his right to access granted by the court. Changing the children's surname was not a legitimate ground for adoption, or generally in the interests of the children.[180]

h) Protection of Children and Juveniles Ordinance (Cap 213)

2.123 An overlap of orders may occur where a child who is subject to a custody or access order as a result of a divorce, then becomes in need of care and protection and is removed from the custodial parent's home, or from the parent who is exercising access. The latter situation might arise where there is an allegation that the parent has been accused of sexually or physically abusing the child. Alternatively, allegations of abuse against one parent may lead to the other parent seeking a divorce after care or supervision orders are made. Then the question of access to the child by either parent, or by the abusing parent, may arise in the Family Court. It is therefore necessary to consider the provisions of the Protection of Children and Juveniles Ordinance (Cap 213) that may overlap in relation to the rights of a parent in respect of a child who is in care.

2.124 Section 34 of the Protection of Children and Juveniles Ordinance (Cap 213) gives power to the juvenile court to appoint the Director of Social Welfare as legal guardian of a child or juvenile where they are in need of care or protection. The right to apply for such an order is restricted to the juvenile court itself, the Director, "or any person authorized by the Director of Social Welfare in writing in that behalf either generally or specially", or any police officer.[181] However, even if a parent or third party cannot apply, the court can order that the child is committed to the care of a relative or any other person who is willing to undertake the care of the child.[182]

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179 [1987]1 HKC 503.

180 At 507, in reliance on *Re D minors* [1973] 3 All ER 1007.

181 Section 34(1).

182 Section 34(1)(b).

2.125 Section 34(2) states that a child or juvenile needing care or protection means a child or juvenile:

> *"(a) who has been or is being assaulted, ill-treated, neglected or sexually abused; or*
> *(b) whose health, development or welfare has been or is being neglected or avoidably impaired; or*
> *(c) whose health, development or welfare appears likely to be neglected or avoidably impaired; or*
> *(d) who is beyond control, to the extent that harm may be caused to him or to others,*
> *and who requires care or protection."*

2.126 There is nothing in the ordinance to indicate whether the parent can apply for access to a child who has been removed to a place of refuge under section 34E or indeed when a care order is being made. Section 34(5) provides that where the Director of Social Welfare has been vested with the legal guardianship of a child or juvenile, he may, subject to any order to the contrary by a juvenile court:

> *"(a) make any order (including if he thinks fit an order for removal to and detention in a place of refuge) regarding the custody and control of the child or juvenile which he thinks desirable in the interests of that child or juvenile."*

2.127 Presumably, this allows the Director to refuse an application by parents for access to the child. The reference to "order" is curious as it purports to give a quasi-judicial discretion to the Director. It is not known whether the Director has ever exercised this power. There has been criticism as to whether a parent has a right of access to a child taken into the care of the Director of Social Welfare under section 45A. This section provides for child assessment and for the removal of the child for assessment.[183]

2.128 However, section 36 provides that nothing in sections 34, 35 or 45A ousts the jurisdiction of the Court of First Instance to make any order to appoint a guardian, or make orders for custody or access. This section was amended in 1993,[184] but it does not mention the powers of the District Court concerning these issues. Perhaps the section was intended to deal with the wardship powers which can only be exercised by the Court of First Instance.

2.129 Section 39 gives the Chief Executive in Council power to make regulations concerning, *inter alia,* "visits to children and juveniles". But nothing is said about access orders. No regulations have been made under section 39.

Child assessment

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[183] Liu *infra*.

[184] Amended by the Protection of Women and Juvenile (Amendment) Ordinance (Ord. No.25 of 1993), section 11.

2.130 Section 45A of the Protection of Children and Juveniles Ordinance provides for a child assessment procedure, where the Director has reasonable cause to suspect that a child or juvenile is, or is likely to be, in need of care or protection. The evaluation of the child's state of health or development, or of the way he has been treated, is to be done by an approved social worker, clinical psychologist or medical practitioner. It is interesting that the term "psychiatrist" was not included. An assumption could be made that it would be the doctor who would deal with the health issues and the other two professionals who would deal with the development issues. A child or juvenile can be removed for the purposes of assessment for 12-36 hours.[185] No similar provision exists in matrimonial legislation, though if there were allegations of child abuse in a custody dispute between parents the court could invite the Director to investigate whether there were grounds for him to use his powers under this section.

Criticisms of Protection of Children and Juveniles Ordinance (Cap 213)

2.131 Section 34 has been criticised for restricting applications by interested persons, such as family members or neighbours. They cannot apply unless authorised by the Director. This would take time, and defeats what is presumably a principal purpose of the section, which is to protect children in emergency situations.

Wishes of the child

2.132 There is no provision for the wishes of the child to be taken into account in the making of any orders. The parent or guardian's wishes can be taken into account in the requirements laid down in supervision orders under section 34A. We have already seen that the matrimonial ordinances give powers to the court to order supervision orders, but no reference is made in those ordinances to similar provisions to section 34A or 34B.

Age

2.133 The interpretation section of the Ordinance defines "child" as having the same meaning as in the Juvenile Offenders Ordinance (Cap 226), which in turn defines a child as a person under the age of 14 years. Section 2 of the Protection of Children and Juveniles Ordinance defines "juvenile" as a person of 14 years of age or upwards and under the age of 18 years. Section 34(6A) refers to an order under section 34(1)(b), (c) or (d) which is in force at the commencement of the 1978 amendments. These respectively are: an order to commit a child to the care of any person or institution; an order for his parent or guardian to enter into recognizance to exercise proper care and guardianship; and an order placing the child under supervision. These orders cease for a male child at the age of 16 years, and at 18 for a female unless she has married under that age. Liu draws attention to the fact that this is in breach of article 20 of the Bill of Rights Ordinance.[186]

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185 Section 45A(5)-(7).

186 "The Protection of Children and Juveniles Ordinance: An Overview", 1995 HKLJ, vol 25, Part 3, 343, 361.

2.134 Section 34(6B) provides that orders made after the commencement of the 1978 Ordinance under the subsections referred to above shall cease when the child or juvenile reaches 18 years or marries before that date.

2.135 There is nothing in section 34 making the parent or guardian a party to the care proceedings, nor is there any provision as to a right of appeal. They have no right to legal aid, as legal aid only relates to proceedings and not to legal advice. The parent could seek legal aid for wardship, though the Court of First Instance may not intervene if another court has already exercised jurisdiction over a child.

Separate representation

2.136 It seems strange that there is provision for separate representation in private law proceedings but there is no provision in the Protection of Children and Juveniles Ordinance (Cap 213), even though the Director of Welfare can intervene in private law proceedings. However, under the Official Solicitor Ordinance (Cap 416) the juvenile court could make a request for the Official Solicitor to "act for any party involved in proceedings under the ... Ordinance ... relating to the care and protection of a child or juvenile."[187]

Access by parent to child

2.137 It would seem that one way that a parent could gain access to a child who has been made the subject of a care order is to apply under section 10 of the Guardianship of Minors Ordinance (Cap 13). It is not known whether the Director of Social Welfare has exercised his right to use section 10 to obtain custody or an access order in favour of the parent.

Variation of order

2.138 It seems that, even though the court has no power to order access under the Protection of Children and Juveniles Ordinance when making the original care order, it can on an application for a variation order. There is scope under section 34C(1) to vary an order under section 34(1)(a), (b) or (c) on the application of a parent or guardian or of any person to whose care a child or juvenile has been committed. It would seem that only section 34C(2)(b) could be relevant to a parent applying for access in the juvenile court in that it allows the court to insert any requirement which could have been included in the original order. However, section 34C(6) provides that if there is an application to discharge or vary an order made under section 34(1)(a) which appointed the Director as guardian, the juvenile court shall have power, whether or not it discharges the original order, to make any order as to the custody or control of or access to the child or juvenile as it considers to be for the benefit of the child or juvenile. It may also discharge or vary any order or requirement made under section 34(5) by the Director. It is not known whether any orders have been so made by the juvenile court.

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[187] Schedule 1, Part 3 of the Official Solicitor Ordinance (Cap 416).

2.139 The Guardianship of Minors Ordinance (Cap 13) gives jurisdiction to the District Court or the Court of First Instance.[188] There is no reference to the juvenile court. Theoretically the same child could be the subject of proceedings in the juvenile court and the District Court with regard to the making of care or supervision orders. There is an inconsistency between the grounds for a care and supervision order specified in the matrimonial ordinances and Cap 13. For the sake of fairness and the rules of natural justice, these inconsistencies should be removed, unless there are strong policy reasons for retaining them.

Part B - Miscellaneous matters

Age of marriage

2.140 The Law Reform Commission report on Legal Effects of Age[189] recommended that the age at which custody and wardship orders should cease to be made and to have effect should be lowered to 18 years.[190] The age at which a child could marry without parental consent should also be lowered from 21 to 18 years. There was some controversy regarding these aspects of the Commission' s recommendations.

2.141 The Administration proposed instead an amendment to section 18A of the Marriage Ordinance (Cap 181) to provide that where a person whose consent is required under section 14 refuses to give his consent, a District Judge may consent to the marriage and the consent so given shall have the same effect as if it had been given by the person who refused consent or, as if the forbidding of the issue of the certificate had been withdrawn.

2.142 Section 14 of the Marriage Ordinance (Cap 181) as amended[191] provides for the consent of the parent or guardian when a party to a marriage is under 21. This provision was recently criticised on the basis that an 18 year old is mature enough to make major decisions, such as whether to enter into marriage. The author argued that it is illogical to allow an 18 year old to vote but not to marry.[192]

Medical treatment

2.143 The only aspect of medical treatment that this Consultation Paper will deal with is where there is a dispute between parents or guardians as regards the appropriate medical treatment for children who are the subject of custody or access orders. The

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188 Section 23.

189 *Young Persons - Effects of Age in Civil Law*, (Topic 11, 1986).

190 Paragraphs 6.3.3. and 16.4.2.

191 This is by sections 28-36 of the Law Reform (Miscellaneous Provisions and Minor Amendments Ordinance (Ord. No 80 of 1997).

192 Ng Man Kin, "Parental Consent", Hong Kong Lawyer, 18 December 1995 at 18.

Consultation Paper is not concerned with disputes between parents and health or social work agencies.

2.144 We have already seen that the Protection of Children and Juveniles Ordinance (Cap 213) gives power to the Director of Social Welfare to take action where a child or juvenile is in need of care and protection. The relevant grounds under this ground are where the child's health, development or welfare has been or is being,[193] or appears likely to be, neglected or avoidably impaired.[194] The court can, *inter alia*, make a supervision order which includes a requirement that the child undergo medical or surgical attention or treatment.[195]

2.145 Only a parent or guardian can consent to the medical treatment of a child. This is seen as a common law right, arising from the relationship between child and parent. There is no specific power or duty set out in legislation dealing with medical treatment. However, section 9 of the Guardianship of Minors Ordinance allows a dispute between two guardians concerning the welfare of a minor to be dealt with by the court. This has become an issue where the parent belongs to a minority religious sect. It is also relevant where the child is mentally or physically handicapped. There may be a dispute between the parents or between the parents and the medical or social work professions.

2.146 Failure to obtain the consent of a parent or guardian before medical treatment theoretically amounts to an assault on the child. There could also be a claim for the tort of trespass. The majority of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority*[196] agreed with the proposition that a parent's power to consent to medical treatment on behalf of a child diminishes gradually as the child's capacity and maturity grows. It is argued that the emphasis on the welfare of the child as a paramount consideration is inconsistent with complete control by a parent.[197] Arising from this view, a parent has no authority to consent to medical treatment unless it is in the best interests of the child.

2.147 The court can use its *parens patriae* jurisdiction to protect children when there is a conflict between the interests of the child and those of a parent or parents. Lord Esher MR in *R v Gyngall*[198] described this jurisdiction as follows:

> *"the court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner of which a wise, affectionate, and careful parent would act for the welfare of the child".*

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193 Section 34(2)(b).

194 Section 34(2)(c).

195 Section 34 (1B)(c)(iii).

196 [1986] 1 AC 112.

197 *Consent to Medical Treatment of Young People*. Discussion Paper, Queensland Law Reform Commission, (May 1995: WP 44), at 34.

198 [1893] 2 QB 232, at 241.

2.148 There are conflicting views as to whether this jurisdiction gives wider powers to the court than to parents. Eekelaar[199] challenged the view that the Crown, as *parens patriae*, can claim a right to intervene in the lives of minor children which it denies to those children's parents. However, the courts have asserted such a jurisdiction in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case).*[200] The majority of the High Court stated "the more contemporary descriptions of the *parens patriae* jurisdiction over infants invariably accept that in theory there is no limitation upon the jurisdiction ...."[201] Even though the jurisdiction over infants mostly consists of supervising the exercise of care and control by parents and by guardians, "the courts can exercise jurisdiction in cases where parents have no power to consent to an operation, as well as cases in which they have the power."[202]

2.149 Section 8 of the English Family Law Reform Act 1969 states that a young person over the age of 16 years can consent to medical treatment as if he or she was an adult. In the *Gillick* case, the House of Lords held that parental rights exist "only so long as they are needed for the protection of the person and property of the child". Lord Scarman took the view that "as a matter of law the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if and when the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed."

2.150 In Hong Kong, the Law Reform Commission's report on *Young Persons - Effects of Age in Civil Law*[203] noted the guidelines adopted by the medical profession which indicated that the consent of a parent or legal guardian should be obtained if a patient was under 21 years. The Commission, having considered correspondence from the Director of Medical and Health Services and the significance of the *Gillick* judgement and a survey, "unanimously recommend[ed] that 18 years should be the age to be inserted in the proposed statutory provision creating a presumption of ability to give a valid consent to medical treatment".[204] We have been informed that in 1994 the medical profession advised the Health and Welfare Branch that they considered the common law rules governing medical consent were working well and that there was no need for legislation.

Contempt of custody orders

2.151 The only remedy for breach of a custody, access or guardianship order would seem to be contempt of court but it is arguable whether the District Court can commit a person to prison for contempt of one of its orders. Section 20 of the District Court

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199 "The Eclipse of Parental Rights", (1986) 102 LQR 4, at 8.

200 (1992) 175 CLR 218 (Australia).

201 Mason CJ, Dawson, Toohey and Gaudron JJ at 258-9.

202 *Idem.*

203 Paragraphs 5.2. Topic No 11, (1986).

204 Paragraph 5.5.4.

Ordinance (Cap 336) provides, *inter alia*, that it may be an offence if a person "wilfully interrupts the proceedings of the Court or commits contempt of the court or otherwise misbehaves in court ...." At first sight, this would seem to imply that the contempt is punishable only if it occurs in court, rather than when an order is breached outside the court.

2.152 Section 48 provides that the District Court shall grant such relief as ought to be granted in such a case by the Court of First Instance. Rule 90 of the Matrimonial Causes Rules (Cap 179) sets out the procedures for committal and injunction and refers to Order 52 rule 4(1) of the Rules of the High Court. Rule 91 provides that where the registrar is satisfied that the order cannot conveniently be enforced in the District Court then the order can be transferred to the Court of First Instance for enforcement. In *Xavier v Xavier*[205] the Court of Appeal rejected the view that the District Court did not have power under rules 87 and 88 of the Matrimonial Causes Rules (Cap 179) to commit to prison for breach of its order. It followed an English decision, *Jennison v Baker,*[206] which was based on a similar provision. Thus, it would seem that the District Court does have power to commit to prison for breaches of guardianship, custody and access orders. Order 52 rule 6 of the Rules of the High Court provides for applications for committal in guardianship, custody or access to be dealt with in private.

Enforcement of court orders overseas

2.153 A difficulty arises in that Hong Kong has provisions for the reciprocal enforcement of civil judgements with only seven non-Commonwealth countries. Mainland China and the United States are not included.

Enforcement of mediation agreements

2.154 Mediation is increasingly being used as an alternative way of resolving custody and access disputes when parties divorce, or when arrangements may need to be varied after the divorce as the children grow older.[207] Mediation is not legally binding unless the terms are incorporated into an agreement, which can be treated as binding provided there was independent legal advice and no pressure exerted by one party on the other. The memorandum of agreement should be clear as to whether it is binding on the parties or not, to avoid any subsequent dispute on this issue.[208] Also, the agreement to mediate may have provided that any agreement reached in mediation would not be binding unless reduced to writing and signed by the parties. In some agreements there may be a provision that the

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205 [1976] HKLR 964.

206 [1972] 1 All ER 997.

207 *Report and Recommendations of The Chief Justice's Committee on The Desirability of Introducing a Court Annexed Mediation Scheme in Hong Kong and related matters*, August 1993. Paragraphs 2.156-166 were substantially taken from an unpublished dissertation by Paula Scully, *Obstacles to Referral, Planning and Implementation of Family Mediation as a Dispute Resolution Process in Hong Kong; Reflections based on Foreign Systems,* April 1996.

208 Brown and Marriott, *ADR Principles and Practice*, (1993), 378.

parties should obtain independent legal advice, and thereafter agree to be bound.[209] In addition the mediation agreement can be incorporated into a court order by consent. It is useful if an agreement contains a clause setting out a procedure for enforcement if one of the parties were to default in complying with the agreement or order.

2.155 However, any arrangements made by the parties for children cannot be treated as legally binding without the court' s approval under section 18 of the Matrimonial Property and Proceedings Ordinance (Cap 192). In reality, the court is unlikely to interfere with an agreement by the parties unless it appears to be against the welfare of the child. In particular, the court would regard any custody or access arrangements, whether contained in a mediation agreement, consent order, or other order, as being capable of variation if the interests of the child required it.

2.156 If there are future disagreements about interpretation of the consent order, the court will resist setting aside an agreement reached freely by the parties. The parties cannot appeal the consent order but must apply to set it aside on the ground of variation of circumstances or duress or fraud. Godfrey J, in the Court of Appeal in *W v W*[210] stated that:

> *"The court will treat a formal agreement, properly and fairly arrived at with the benefit of competent legal advice, as one which should be given effect to unless good and substantial grounds are shown for concluding that injustice would be done by holding the parties to its terms".*

2.157 He referred to the situations where the court would examine the state of mind of the parties when they reached the agreement:

> *"[Undue] pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of reaching agreement, are all relevant to the question of justice between the parties".*[211]

Privilege

2.158 "Privilege" is the right of a party to prevent statements or documents being adduced in evidence. The Law Commission of England and Wales recommended a statutory privilege should be conferred on statements made during conciliation. The term "mediation" is now preferred to conciliation, which is still used in the industrial relations

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209 The English Family Mediators Association agreement is similar to this provision.

210 [1994] 1 HKC 430, 437, CA.

211 Lord Justice Ormrod in *Edgar v Edgar* [1980] 1 WLR 1410 at 1417.

field. Statements made which indicate a risk of harm to a child would be privileged but not confidential.[212]

2.159 The Court of Appeal in England recognised that conciliation, though not forming part of the legal process, was as a matter of practice "becoming an important and valuable tool in the procedures of many Family Courts". Thus, there was great importance in the "preservation of a cloak over all attempts at settlement of disputes over children".[213]

2.160 Conciliation would not work unless the parties approached the process in an open manner, prepared to give and take, and make admissions and gestures to reach an accord. If instead the "parties remain in their entrenched positions no armistice will be reached in no man's land".[214] Conciliation cannot be successful unless the parties can conduct the meeting off the record. They must be "confident that their concessions and admissions cannot be used as weapons against them if conciliation fails and full-blooded litigation follows".[215]

2.161 This privilege is similar to the rule that communications made "without prejudice" protect communication made in a *bona fide* attempt to negotiate a dispute.[216] However, it is actually a privilege derived from the principle that "where a third party receives information in confidence with a view to conciliation, the courts will not compel him to disclose what was said without the parties' agreement."[217] This is a new category based on the public interest in the stability of marriage. The court distinguished privilege from duties of confidence.

2.162 The English Court of Appeal concluded that:

> *"evidence may not be given in proceedings under the Children Act 1989 of statements made by one or other of the parties in the course of meetings held or communications made for the purpose of conciliation save in the very unusual case where a statement is made clearly indicating that the maker has in the past caused or is likely to cause serious harm to the well-being of a child .... [A trial judge] will admit it ... only if, in his judgment, the public interest in protecting the interests of the child outweighs the public interest in preserving the confidentiality of attempted conciliation."*[218]

2.163 The Hong Kong Court of Appeal gave some support to mediation and conciliation when it held in *W v W*[219] that the evidence given by a psychologist as a mediator

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212 *Family Law; Ground of Divorce*; (Law Com No 192: 1990) at paragraph 5.29 to 5.48.

213 *In re D (Minors),* [1993] 2 WLR 721, at 728.

214 Sir Thomas Bingham, *ibid* at 724.

215 *Idem.*

216 *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280, 1299G.

217 Sir Bingham in *In re D* , *supra* at 726, and relying on *Mc Taggart v Mc Taggart* [1949] P.94, and *D v NSPCC* [1978] AC 171.

218 *In re D*, *ibid* at 729.

219 [1994] 1 HKC 430.

and conciliator about the relationship between the spouses was privileged. However, the wife had waived her privilege by referring to opinion and advice contained in the conciliator's affidavit. The court below should not have heard evidence from the conciliator without the clear and unequivocal agreement of both parties.[220]

2.164 The Court of Appeal felt obliged to correct errors made by the parties and their legal advisers in relation to the conciliator's affidavit. The evidence of alleged threats made in attempted conciliation should not have been given.[221] The court confirmed that the privilege given to a conciliator in matrimonial cases was a privilege based on the public interest in the stability of marriage and needed to be protected.[222] The court did not accept the submission that the conciliator was an expert and thus able to give evidence as to the husband's state of mind when he entered into an agreement from which he now wished to resile. It ordered editing of the affidavit.

Hearsay

2.165 The Law Reform Commission of Hong Kong has recommended that the rule against hearsay should be abolished in all civil proceedings to which the strict rules of evidence apply.[223] The strict rules of evidence do not seem to be applied in any proceedings involving the welfare of children in the Court of First Instance or District Court. This appears to be the case whether it be in wardship proceedings, proceedings under the Matrimonial Causes Ordinance (Cap 179) or proceedings under the Guardianship of Minors Ordinance (Cap 13).

Part C - The Court in Practice

Standard procedures in divorce

2.166 It is not possible to limit this part to dealing only with custody matters as the arrangements for children are an integral part of the divorce process. The following are the usual steps taken for divorce:

1. The applicant spouse files a petition for divorce in the Family Court Registry.

2. The respondent spouse is served the petition and may reply to it.

3. In some case there may be urgent applications for interim orders such as interim access, custody or maintenance.

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220 This was in reliance on *In re D (minors)* [1993] 1 FLR 932.

221 *Ibid* at 936.

222 The court relied on *D v NSPCC* [1978] AC 171, 226 and 236.

223 *Report on Hearsay Rule in Civil Proceedings* (1996: Topic 3).

4. Affidavits may be filed at this stage though it is recommended that the report of the social welfare officer is obtained first.

5. The matter comes into the court list for a decree *nisi*.

6. Usually the divorce decree is undefended, though there may be disputes concerning property, maintenance, custody or access.

7. If the divorce is undefended, the petitioner will be called to verify the accuracy of the petition and the statements concerning the arrangements for any children. This is in open court. The respondent may or may not attend. If he does attend, the judge will confirm whether he wishes to defend the proceedings.

8. If there has been agreement on custody, access and other matters then the judge can approve the agreement and make final orders. However, an application for the decree absolute can only be made 6 weeks later. The decree absolute will not issue for another two months approximately.

2.167 Concern has been expressed that long divorce lists mean that the judge has little time to consider the arrangements for the children in cases where the parties have reached agreement.[224] In those cases there are no social inquiry reports.

No agreement

2.168 If no agreement has been reached on custody or access then the case will be adjourned to a call over date. Directions can be given on such matters as a social welfare officer's report, or expert report of a child psychologist. It is preferable that affidavits are not lodged until after the court welfare officer's report or the psychologist's report is available. This is because some cases will settle as the parties will decide to abide by the recommendation of the officer's report. At the next call over, the report will be available to the judge and the parties.

2.169 The report, which can take some months to prepare,[225] is prepared by one of the 16 officers attached to the Child Custody Services Unit. The unit prepared 709 reports in 1995-1996.[226] While the report is awaited the status quo is maintained, which operates to the disadvantage of the spouse who does not have physical custody. The welfare officer will meet the family and see the child separately with each parent and his report is based on his observations and assessment, "which is as it should be".[227]

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224 Article in the South China Morning Post, of the 21 or 22 December 1991.

225 Warren and Francis, *Divorce and Separation in Hong Kong,* (1995) at 86. However, Social Welfare Department have informed us that the current time is six to eight weeks.

226 The respective numbers for 1993/4 were 831 and 626 for 1994/5.

227 *W v W* [1981] HKC 466, 468, relying on *Thompson v Thompson* (The Times, 2 March 1975), unreported.

Inevitably, it will contain hearsay. This is "unobjectionable when it is in respect of uncontroversial matters".[228]

2.170 While the court will seek reports from a welfare officer, it will not generally seek a psychiatric report. In *C v H* the High Court refused to order a psychiatric report on two children, who were born outside marriage and who were wards of court, "as no adequate reason had been put forward for subjecting both girls to a psychiatric examination". It was accepted that the girls were not in need of any psychiatric care.[229]

2.171 Fuad J agreed with Cross J in *Re S (Infants)*[230] "that if both parties agree on the need for a medical examination and the person who should conduct it, normally the court would accede to their wishes." Fuad J also expressed concern that:

> *"if orders of the kind sought here were given in ... ordinary cases, parties and their advisers might be driven to the conclusion that the court will feel that a case has been properly prepared unless an expert medical report has been obtained; and if one is to be obtained, should it be sought from a physician ..., a psychiatrist, a paediatrician, or an educational psychologist?"*[231]

2.172 Where an examination is felt to be necessary for a special reason, then the particular expertise required to assist the court will be readily apparent and the court will be able to make an appropriate order.[232] Fuad J approved of the father seeking the consent of the court before examining the children. He referred to Willmer LJ in *B(M) v B(R)*[233] who strongly urged "that parents who are in dispute with each other should at least cooperate in jointly instructing a doctor or paediatrician or psychiatrist in the event of it being thought desirable to obtain an expert opinion."[234]

2.173 If the matter settles after the submission of the social welfare officer's report, then an order can be made by consent. If it still has not settled, the court will give directions as to what affidavits or affirmations should be filed, and for the attendance of the officer or psychologist for cross-examination. The Social Welfare Department have informed us that in 1995/96 officers were required to attend court on 70 occasions.[235] A mutually convenient date for the contested hearing will be allocated by the court registry after filing of the affidavits date.

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228 Bokhary J, *ibid*, referring to *Rayden on Divorce* (13th ed. 1979), 1037.

229 [1981] HKC 433.

230 [1967] 1 WLR 396,405 and 407.

231 *Ibid* at 436.

232 *Ibid* at 436.

233 [1968] 1 WLR 1182, 1185.

234 *Supra* at 435.

235 The respective numbers for 1993/94 were 44 occasions, and 66 occasions in 1994/95. This should be contrasted with the large number of reports, which shows the strong role the reports play in settlement of disputes.

2.174 While those cases which are not settled are a minority, they usually involve more bitterness. Children can have a symbolic significance which makes this type of litigation bitter and protracted.[236] It can lead to subsequent child abduction. Delay over a custody battle worsens the trauma for both children and spouses. In one study, it was found that it took 17 months on average to resolve the custody battle.[237]

Variation

2.175 Because the court has jurisdiction to ensure that the welfare of the child is the paramount consideration, it is possible to apply to vary a custody or access order even if this was made by consent. Justification for such a variation can include, for example, a change in the living arrangements of the parent by remarriage or the need for more flexible arrangements as the children grow older.

Pre-trial reviews

2.176 Order 25 of the High Court Rules provides for a Summons for Directions, which can be used to establish pre-trial reviews. Pre-trial reviews or settlement conferences provide for meetings between the parties and the judge, with or without their lawyers, to help identify the issues that are actually in dispute. Such meetings can also be used to encourage a settlement of the dispute, though this does not seem to be used in Hong Kong for that purpose. The judge' s role is that of facilitator.

Existing support services

2.177 The Secretary for Home Affairs in a press statement on the 25 May 1995 emphasised that it was government policy, not to encourage divorce, but to devote "considerable resources to expanding and strengthening services in support of the family". Marriage counselling and mediation constituted an integral part of the family case work services provided by the Social Welfare Department and subvented organisations".[238] These services were available in the 62 Family Services Centres run by non-governmental agencies and Social Welfare Department. These centres are convenient to major housing centres. Additional case workers were being recruited.

2.178 The government was also committed to make information on marriage counselling and mediation services more available and accessible to potential clients. The information would be available at the Divorce Registry, Legal Aid offices, Police stations,

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236 Wallerstein and Blakeslee, *Second Chances: Men and Women a decade after divorce,* (1989).

237 Johnston and Campbell, *Impasses of Divorce: The dynamics and resolution of family conflict,* (1988).

238 This statement of the Department that it has a mediation service must have been intended to refer to mediation in an informal sense of trying to reach a settlement with the assistance of a social worker. It cannot mean formal mediation, as none of their workers at that time had been trained as mediators.

the Social Welfare Department, District Offices, relevant non-governmental organisations and legal practitioners in the family law area. Since 1994, 19 Family Activity and Resource Centres have been established as drop-in centres for families. A Family Care Demonstration and Resource Centre was established in 1994 to give practical skills to married couples in small group sessions on family care and home management.

2.179 It is understood that the Social Welfare Department will be in a better position to offer mediation for custody or other disputes arising from a divorce once some of their social welfare officers complete their training as professionally qualified mediators in 1998. The Health and Welfare Bureau have given a policy commitment in the 1997 Policy Address that a mediation service will be established in 1998-1999 in the Child Custody Services Unit to help divorcing and separating couples to resolve disputes over matters of child custody or access.

Hong Kong community mediation programmes

2.180 Three community agencies now operate family mediation services, the Hong Kong Catholic Marriage Advisory Council (HKCMAC), Hong Kong Family Welfare Society[239] and the Resource Mediation Service.[240] The HKCMAC run a counselling/mediation service out of the Kowloon Office of the Legal Aid Department one and a half days a week and a part-time service in the Hong Kong Island Legal Aid Office.

2.181 McInnis stated that the link to the legal system had been strengthened by the HKCMAC project in the Legal Aid Department which could receive referrals directly from the Legal Aid Scheme.[241] The objective of the establishment of the HKCMAC service in the Legal Aid Department was "to divert applicants for legal aid from the court at an early stage".[242] The HKCMAC project was introduced as a three year pilot project funded by the Jockey Club and was estimated to cost HK$300,000 in the first year. Its objective was to help couples separate without bitterness and resolve custody and property matters. The then assistant director of the Applications and Processing Division of the Legal Aid Department said that the scheme should help ease the department's workload.[243]

2.182 In fact HKCMAC handled 68 mediation cases in 1996/97 and 58 cases in 1997/98. The January-September 1997 legal aid statistics indicate that matrimonial legal aid certificates constituted 42.6% of the 12,004 civil certificates granted. Comparing these statistics with those for HKCMAC Marriage Mediation Counselling Service, it is clear that the vast majority of legal aid clients do not avail themselves of this free counselling or mediation service.

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239 A Divorce Mediation Service was established in March 1997.

240 This is attached to the Resource Counselling Centre, formerly known as the Marriage and Personal Counselling Service, which operates in Central.

241 McInnis, "Alternative Dispute Resolution" in Wacks(ed), *The Future of the Law in Hong Kong*, 405 (1993).

242 McInnis, *idem.*

243 Hong Kong Standard, 19 August 1987.

Conclusion

2.183 It can be seen that the provisions concerning custody, access and guardianship of children are scattered through a number of ordinances, with some inconsistencies between them. It is necessary to address the problems with these substantive provisions. The broader context as to how disputes involving custody, access and guardianship of children are dealt with within the existing adversarial system, and the alternatives to it, will be dealt with in later chapters.

Chapter 3

Comparative Law: England and Wales

Children Act 1989

3.1 The English Children Act 1989 substantially replaced the existing private law governing the custody and upbringing of children and the public law concerning voluntary and compulsory care and supervision. Statutes repealed by the Act include the Guardianship of Minors Act 1971, the Guardianship Act 1973 and the Children Act 1975.

3.2 The 1989 Act had two main aims, namely, to gather together in one place, "all the law relating to the care and upbringing of children and the provision of social services for them, and to provide a consistent set of legal remedies which will be available in all courts and in all proceedings."[244] The Children Act 1989 represented a shift in the relationship between the family and state agencies for the purpose of preventing harm to children. This was a move from concerns about child care and child abuse to one of child protection.[245]

3.3 Before the Children Act 1989, children's law had developed on an ad hoc basis through both statute and case law. The law had become more and more complicated and technical without any underlying general philosophy. Remedies and procedure varied according to the jurisdiction invoked and the court involved. There were, for example, separate statutes conferring different powers on the courts to make orders relating to children, in divorce proceedings, in proceedings for financial relief before magistrates, and in proceedings which were solely concerned with disputes about children.[246]

Parenthood and guardianship

3.4 Before the 1989 Act, parental rights and duties were based upon the concept of guardianship rather than parenthood. Guardianship gave power over a child's upbringing to parents. Parental or natural guardianship was originally confined to the father of a legitimate child. The Guardianship of Infants Act 1925 gave the mother "like powers" to those of the father to apply to the court in any matter affecting the child but stopped short of making her a joint guardian during the father's lifetime. The Guardianship Act 1973 provided that the mother's rights and authority were the same as the father's but did not equate her position to the natural guardianship of the father, which had never been expressly abolished.

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244 See Hoggett, "The Children Bill: The Aim" [1989] Fam Law 217.

245 Parton, *Governing the Family, Child Care, Child Protection and the State,* (1991), 3.

246 Bromley & Lowe, *Bromley's Family Law* (1992) 250.

3.5 The 1989 Act has abolished the common law rule that a father was the natural guardian of his legitimate child.[247] It confers equal parenthood on married parents in the form of parental responsibility. Mothers and fathers therefore have equal status with respect to the upbringing of the child.

3.6 Parenthood is now regarded as the primary concept and distinguished from guardianship. As explained by Bromley and Lowe, guardianship can now be said to be:

> *"the legal process by which a person is given parental responsibility for a child on the death of one or both of the child's parents. In short a 'guardian' is someone who has been formally appointed to take the place of the child's deceased parent."*[248]

Parental responsibility

3.7 The philosophy of the Children Act 1989 is to promote the family so far as is consistent with the welfare of the child. It rests on the belief that children are generally best looked after within the family, with both parents playing a full part and without resort to legal proceedings.

3.8 The Children Act 1975 used the phrase "parental rights and duties" to describe all the rights and duties a mother and father had in relation to a legitimate child and his property. The English Law Commission considered that to talk of parental "rights" was not only inaccurate, as a matter of juristic analysis, but also a misleading use of ordinary language. The House of Lords had held that the powers which parents have over their children exist only so that they may perform their responsibilities to them.[249]

3.9 The 1989 Act therefore replaced the existing terminology by the phrase "parental responsibility" which is defined in the Act as "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property."[250] The concept of "parental responsibility" signifies a shift "from the proprietorial connotations of 'rights' towards a more enlightened view which emphasises that children are persons rather than possessions."[251]

3.10 The acquisition of parental responsibility is crucial in determining which persons have decision-making authority concerning a child. It is this legal status which is all important, however close or distant the *de facto* relationship with the child may be. A grandparent, physically caring for a child, may have less power and authority in law than an absent parent who scarcely ever sees the child. It is for this reason that court orders are needed to regulate the acquisition and exercise of parental responsibility. However, it is by

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247 Section 2(4).
248 Bromley & Lowe, *op cit* at 395.
249 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.
250 Section 3(1).
251 Bainham, *Children - The Modern Law* (1993) 63-4.

no means clear what legal action (if any) may be taken to prevent interference with parental responsibility.[252] Those with parental responsibility have the right to consent to the child's marriage.[253] However, the concept of parental responsibility does not include rights of succession to the child's property.[254]

3.11 Freeman is critical of the concept of "parental responsibility":

> *"The innocuous phrase 'parental responsibility' secretes within it three messages. First, that parents are decision-makers rather than children. The decision in Gillick v West Norfolk and Wisbech Area Health Authority[255] limited the power of parents to make decisions for their mature children. The Act appears to have overturned this principle.... but there is no procedure which allows them to participate in decision-making where there is a dispute in court.*
>
> *Secondly, the emphasis on responsibility as more important than rights is affirmed.... The third message ... is that parents and not the State have responsibility for children.... If the hidden agenda is one of social engineering, viz. that by encouraging parents to believe that they always have responsibility will mean that they will take their responsibility more seriously, the prospects of success must be slim. There is no reason to believe that giving parents greater freedom will guarantee that the standard of care will improve."*[256]

Persons with parental responsibility

Married parents

3.12 The Children Act 1989 provides that where a child's mother and father were married to each other at the time of the birth, they shall each have parental responsibility for their child.[257]

Non-parents

3.13 Those who are not parents do not have parental responsibility as of right but can acquire it in a number of ways. Thus, a person taking office as a guardian has parental responsibility for the child concerned.[258] Similarly any person, who is not a parent or

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252 *Ibid* at 64-5.

253 Marriage Act 1949, section 3(1A), added by Schedule 12, paragraph 5(2) of the Children Act 1989.

254 Section 3(4)(b) of the Children Act 1989.

255 [1986] AC 112.

256 Freeman, "In the Child's best Interests? Reading the Children Act Critically", 45 CLP 173, 185-7(1992).

257 Section 2(1).

258 Section 5(6).

guardian of the child, has parental responsibility for the duration of a residence order which has been made in his favour.[259] An order of parental responsibility does give status to that person.[260] However, such acquisition of responsibility will not entitle him to consent to an application for an order freeing the child for adoption or to agree to an adoption order nor may he appoint a guardian.[261]

3.14 Notwithstanding separation or divorce, each parent continues to have parental responsibility even if a residence order has been made in favour of one of them.[262] Each will still be able to exercise parental responsibility without having to consult the other, and the Act does not give either the right to veto the other' s action.

Scope of "child"

3.15 Parental responsibility exists in respect of a "child", that is, a person under the age of 18.[263] It is a moot point whether responsibility exists for a married child. The Act is silent on when parental responsibility begins. In the absence of any indication to the contrary, Bromley and Lowe suggested that references to "child" in the Act mean a live child. Accordingly, it was submitted that no one has parental responsibility until the child is born and fathers have no rights over foetuses.[264]

Scope of parental responsibility

3.16 The concept of parental responsibility was defined by referring to all the rights, claims, duties, powers, responsibilities or authority, which statute and common law for the time being confer upon parents. The Act does not provide a list of these rights *et al* as the English Law Commission considered that it would be practically impossible. The list must change from time to time to meet differing needs and circumstances. The *Gillick* case[265] demonstrated that it must also vary with the age and maturity of the child and the circumstances of each individual case.[266]

3.17 Some have deprecated this strategy.[267] However, White, Carr and Lowe submitted that:

> *"the Act has adopted the right strategy. In practice, the law has worked reasonably well without such a list. The inestimable advantage*

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259 Section 12(2).
260 *Re S (A Minor) (Parental Responsibility)* [1995] 3 FCR 564.
261 Section 12(3).
262 Section 2(6).
263 Section 105(1).
264 Bromley & Lowe, *Bromley's Family Law* (1992), 330.
265 [1986] AC 112.
266 Law Com, *Family Law Review of Child Law, Guardianship and Custody*, (1988, No 172), paragraph 2.6.
267 For example, Jones (1989) 139 NLJ 728, Lyon [1989] Fam Law 49, 50.

of the scheme laid down by the 1989 Act is that it provides a single, modern and appropriate concept which is applied throughout the statute law affecting children."[268]

Acquisition of parental responsibility

Unmarried parents

3.18 Where the parents are unmarried at the time of the child's birth, only the mother has parental responsibility as of right but the father can acquire it in the following ways:[269]

(a) upon taking office as a guardian of the child appointed under the Act;[270]
(b) by obtaining a parental responsibility order from the court;[271]
(c) by making a parental responsibility agreement with the mother;[272] and
(d) by obtaining a residence order in which case the court is bound to make a separate parental responsibility order.[273]

3.19 The Law Commission was concerned that unmarried mothers, who normally bear primary responsibility for the care of their children, might be subjected to interference and harassment by "unmeritorious" men. As explained by Balcombe LJ:

> *"the position of the natural father can be infinitely variable; at one end of the spectrum his connection with the child may be only the single act of intercourse (possibly even rape) which led to conception; at the other end of the spectrum he may have played a full part in the child's life from birth onwards, only the formality of marriage to the mother being absent. Considerable social evils might have resulted if the father at the bottom end of the spectrum had been automatically granted full parental rights and duties ...."*[274]

3.20 The father is likely to apply to the court for an order that he shall have parental responsibility for the child if the mother is unwilling to share responsibility with him voluntarily.[275] An application may be made in respect of a child under the age of 18.[276] The courts have set out some criteria for evaluating applications for parental responsibility by unmarried fathers. Account is taken of the degree of commitment which the father had shown to the child, the degree of attachment between the father and the child, and the

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268 White, Carr & Lowe, *A Guide to the Children Act 1989* (1990), paragraph 2.6.
269 Section 2(2).
270 Section 5(6).
271 Section 4(1)(a).
272 Section 4(1)(b).
273 Section 12(1).
274 *Re H (Illegitimate Child: Father: Parental Rights) (No 2)* [1991] 1 FLR 214, 218.
275 Children Act 1989, section 4(1)(a).
276 Section 105(1).

reasons for the father applying for the order.[277] If he has met these criteria then *prima facie* the order is in the child's interests.[278] The effect of the order is to give the father an equal say in all matters of the upbringing of the child.[279] That is not to say that he is entitled to interfere in matters within the day-to-day management of the child's life or to override the decisions of the mother.[280] If the father wishes to have the child in his care, he has to apply for a residence order.

Parental responsibility agreements

3.21 Section 4 of the Family Law Reform Act 1987 gave power to make an order that an unmarried father could have the same parental status as the mother as if they were married.[281] However, such judicial proceedings may be "unduly elaborate, expensive and unnecessary unless the child's mother object[ed] to the order".[282]

3.22 A "parental responsibility agreement" under section 4(1)(b) of the 1989 Act provides a simple and straightforward means for unmarried parents to acknowledge their shared responsibility for the upbringing of their child. It also brings the legal position into line with the factual situation where the father and mother are raising a child together.

3.23 The making of the agreement has the same effect as a court order. Both an agreement and an order may only be brought to an end by a court order made on the application of anyone with parental responsibility, or on the application of the child himself where the court is satisfied that he has sufficient understanding to do so.[283]

3.24 The agreement has to be signed by the mother and father in the presence of a witness who must be a Justice of the Peace, Justice's Clerk or authorised officer of the court.[284] It will take effect after it has been filed with the Principal Registry of the Family Division of the High Court. It is available for inspection by anyone. The Agreement Form contains the following warning: "The making of this agreement will seriously affect the legal position of both parents. You should both seek legal advice before completing this form."

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277 *Re H (Illegitimate Children: Father)* [1991] 1 FLR 214, CA, *Re H (A Minor) (Contact and Parental Responsibility)* [1993] 1 FLR 484, CA, *S v R (Parental Responsibility)* [1993] Fam Law 339.

278 *Re E (A Minor) (Parental Responsibility)* [1994] 2 FCR 709.

279 In 1996, 5587 parental responsibility orders were made, despite 232,663 births outside marriage that year. The father's details were included on the birth certificates for 78% of births outside marriage. See further Lord Chancellor's Department Consultation Paper on *Procedures for the determination of paternity and on the law of parental responsibility for unmarried fathers,* April 1998.

280 *Re P (Child) (Parental Responsibility Order)* [1993] 2 FCR 689.

281 Cf Guardianship of Minors Act 1971, section 9(3).

282 Law Com No 172, (1988) paragraph 2.18.

283 Section 4(3). The order may not be revoked while a residence order in favour of the father continues: section 12(4).

284 Section 4(2); Parental Responsibility Agreement Regulations 1991 (SI 1991/No 1478); and SI 1994 /No 3157.

3.25 The purpose of these formalities is to ensure that, as far as possible, both parents understand the importance and effects of their agreement, to advise them to seek legal advice and to inform them about the ways in which the agreement can be brought to an end. There is the fear that mothers may be bullied into conferring rights upon the fathers at a time when they are particularly vulnerable to pressure. Such formalities go some way to avoiding allegations of duress. There is no investigation of whether the agreement is in the child' s best interests or why the parents are entering into it when an agreement is registered. Indeed there is no effective check on whether, for example, the man is the father of the child concerned. The court' s role is purely administrative and not judicial.

3.26 Bainham questioned how far these agreements will be used in practice:

> *"Parents living together amicably may see no advantage in formalising their arrangements, especially since some people choose to cohabit precisely because of their dislike of the formalities which attach to marriage. They may also be unaware of the disparity in their respective legal positions or the provision for agreements. There is yet a further possibility that the mother may not be sufficiently confident about the relationship, or the father's parenting role, that she would wish to dilute her own legal control by sharing parental responsibility."*[285]

3.27 Nevertheless, parental responsibility agreements have proved to be popular with a considerable number of applications for first registration.[286]

Duration of parental responsibility orders or agreements

3.28 Parental responsibility orders and agreements remain in force until the child reaches the age of 18, even though the parties may have been living together or subsequently separate.[287] However, such an order or agreement may be brought to an end earlier by an order of the court upon the application of any person who has parental responsibility for the child.[288] The child himself may also apply with leave of the court "if it is satisfied that the child has sufficient understanding to make the proposed application".[289] The court cannot end a parental responsibility order while a residence order in favour of the unmarried father is in force.[290]

Guardianship

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285 Bainham, *Children: The Modern Law,* (1993) 166.

286 It was reported that 1510 parental responsibility agreements were registered during the first year: NLJ (Nov 27, 1992) 1638. About 3000 agreements have been registered each year since then.

287 Section 91(7)(8).

288 Section 4(3).

289 Section 4(4).

290 Section 12(4).

3.29 The law of guardianship was a product of common law, equity and statute. Parents and guardians had similar but not identical powers.[291] The law has been simplified and is now governed by the 1989 Act exclusively.[292] The term "guardian" is now restricted to non-parents. Guardians now have parental responsibility.[293] The rationale is that the power to control a child's upbringing should go hand in hand with the responsibility to care for him. It was expected that guardians would take over complete responsibility for the care of a child if the parents die.

3.30 A guardian may appoint another individual to take his place as the child's guardian in the event of his death.[294] The English Law Commission noted that "[if] appointing a guardian is an aspect of responsible parenthood, it can be no less an aspect of responsible guardianship."[295]

Parental appointment of guardians

3.31 In the past, each parent could appoint a testamentary guardian to replace him on his death.[296] The appointment took effect even if the other parent was still alive. However, if the survivor objected, he could apply to the court to prevent the appointee from taking office. The guardian could also apply if he considered the survivor unfit to have custody of the child. The court could then order that the guardian or parent may act alone or both to act jointly.

3.32 Under the Children Act 1989, a parent with parental responsibility[297] may appoint an individual to be the child's guardian in the event of his death.[298] Appointments can be made only in respect of children under the age of 18.[299] Although there is no express prohibition against making an appointment in respect of a married child, it is not clear whether the courts would make such an appointment in practice. It seems that more than one individual may be appointed.[300] An additional guardian may also be appointed at a later date.[301]

When the appointment takes effect

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291 *Family Law Review of Child Law: Guardianship,* Law Com (1985: Working Paper No. 91), paragraph 2.26.

292 Section 5(13).

293 Section 5(6).

294 Section 5(4).

295 Law Com No 172, paragraph 2.25.

296 Guardianship of Minors Act 1971, section 4. The provisions of this Act are similar to the provisions of the Guardianship of Minors Ordinance (Cap 13).

297 Therefore, an unmarried father without such responsibility would be excluded.

298 Section 5(3)(4).

299 Section 105(1). Query whether an appointment would take effect once the child is married.

300 Interpretation Act 1978, section 6(c).

301 Section 6(1).

3.33 The appointment will take effect immediately upon the death of the appointing person if that person was the only parent with parental responsibility at the time of his death.[302] But if there is a surviving parent with parental responsibility, then the appointment will normally take effect upon the death of the sole surviving parent.[303] The exception is when the deceased parent had a residence order in his favour and the surviving parent did not. In such circumstances, the appointment will take effect immediately upon the death of the appointing person.[304]

3.34 The purpose of the Act is to prevent the appointee attempting to exercise a control which cannot and should not be his if the child is not living with him. Where the child had been living with both parents, the survivor does not have to share responsibility with the person appointed although he is always free to seek the assistance of the latter if he wishes to do so. Any unnecessary conflicts between the survivor and the person appointed could thus be minimised. In the event that the person appointed wishes to challenge a decision of the surviving parent, he may apply to the court for an order under section 8 of the 1989 Act. However, if the surviving parent had also appointed a guardian, there can be conflicts between the two separately appointed guardians on the subsequent death of the survivor.

3.35 As regards this exception, the English Law Commission held the view that if a parent has a residence order in his favour, he should be able (and indeed encouraged) to provide for the child' s future upbringing in the event of his death by appointing a guardian.[305] The Act therefore provides that in such circumstances the appointment by that parent will have immediate effect even though there is a surviving parent.[306] The guardian will have to share parental responsibility with the latter. Any dispute as to the child' s upbringing such as his residence will have to be resolved by the court.

3.36 Although the policy of the Act may seem right where the child was living with both parents in a united household, different considerations apply where the parents were divorced or separated and the deceased parent making the appointment had a residence order in his favour but the surviving parent did not. Bainham has the following comments to make:

> *"The thinking seems to be that the deceased parent should be able, through guardianship, to preserve the 'advantage' of the residence order after his death. It is questionable how far this can be squared with the central principle of continuing parental responsibility.*
>
> *Apart from the residence issue, the non-residential parent is as much a parent as was the deceased residential parent. To make him share parental responsibility with a guardian may seem inappropriate where he has continued, in fact, to be actively connected with the child. It*

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302 Section 5(7)(a).
303 Section 5(8).
304 Section 5(7)(b), (8)(b), (9).
305 *Ibid,* paragraph 2.28.
306 Section 5(7).

would arguably have been more consistent with the general aims of the legislation to have placed the onus on the guardian to seek immediate appointment where it could be demonstrated that this was in the child's best interests.

Another difficulty is that the rule appears to create uncertainty about who is entitled to take over the physical care of a child. An initial dispute over where the child is to live would, therefore, appear to require a residence order to resolve it. This could have been avoided if the survivor held sole parental responsibility unless and until challenged by the guardian". [307]

3.37 The Scottish Law Commission also commented that the exception makes no provision for the position where the spouses were separated or divorced but where there was no residence order.[308] For example, although the father may have abandoned his family, and no residence order was obtained by the mother, he nevertheless has sole parental responsibility for the child and the onus will be on the appointee to challenge this position. The opinion of the Scottish Commission was that in such cases, it might be desirable for the appointment of guardian to take effect immediately on the death of the appointing person even though there is a surviving parent somewhere.

Method of appointment

3.38 The 1989 Act prescribes a simple method of appointment to encourage parents to appoint guardians.[309] It is no longer necessary for appointments to be made by deed or will. However, the document of appointment must be in writing and signed by the person making the appointment. The document must be signed at his direction, and in the presence of two witnesses who should each attest the signature. An appointment made by a will which is not signed by the testator must be signed at the direction of the testator and witnessed in accordance with the provisions of section 9 of the Wills Act 1837.[310]

Revocation of appointment

3.39 Appointments by parents or guardians may be revoked by one of the following methods:

(a) by making another appointment unless it is clear that the purpose is to appoint an additional guardian,[311]
(b) by a written document revoking the appointment,[312] or

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307 Bainham, *Children - The Modern Law* (1993) 191-2.

308 Scottish Law Commission, *Parental Responsibilities and Rights, Guardianship and the Administration of Children's Property*, Discussion Paper No 88 (1990), paragraph 3.11.

309 Section 5(5).

310 Section 5(5)(a).

311 Section 6(1).

312 Section 6(2).

(c) by destruction of the document with intention to revoke the appointment.[313]

If the appointment is made in a will, it is revoked if the will is revoked.[314] Section 4 of the Law Reform (Succession) Act 1995 provides that, unless a contrary intention is shown in the instrument of appointment, any appointment by the deceased testator of the former spouse as guardian is deemed to have been revoked at the date of the divorce. This also applies to nullity.[315]

Disclaiming the appointment

3.40 The Act provides for a right to disclaim appointments made by a parent or guardian but not to those made by the court.[316] The disclaimer must be made by an instrument in writing, signed by the appointee and made "within a reasonable time of his first knowing that the appointment has taken effect". It must also be recorded in compliance with any regulations that may be made by the Lord Chancellor.

Court appointment of guardians

3.41 The court may appoint an individual to be a child' s guardian if the child has no parent with parental responsibility, or a parent or guardian with a residence order in his favour died while the order was in force.[317] The former applies to orphans or where there is an unmarried father without parental responsibility. The latter applies where the child may have a surviving parent without a residence order.[318] It seems that the court may exercise its power to appoint even though the deceased had made an appointment and may do so either to add or to substitute a new guardian.[319]

3.42 There is no requirement that leave of the court must first be obtained before an application to be appointed a guardian can be made. In addition, the court has a power to make an appointment of its own motion.[320] It seems that once family proceedings have been initiated, any interested person, including the child himself, may seek the appointment of another individual to be a guardian.[321] A court may call for welfare reports to assist it in deciding on the appointment or discharge of a guardian.[322]

Removal of guardians

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313 Section 6(3).

314 Section 6(1)-(4).

315 The 1995 Act has effect as regards an appointment made by a person dying on or after 1 January 1996. See Family Proceedings (Amendment) Rules (SI 1996, No 816) (L.1) for changes to the relevant forms.

316 Section 6(5) and 6 (6).

317 Section 5(1) and (2).

318 Section 5(9).

319 Cretney & Masson, *Principles of Family Law* (5th ed, 1990) 508.

320 Section 5(2).

321 White, Carr & Lowe, *op cit* at paragraph 2.39.

322 Section 7.

3.43 Any appointment of a guardian, whether by a parent, guardian or the court, may be brought to an end by order of the court in one of the following ways:

(a) on the application of any person with parental responsibility;
(b) on the application of the child with leave of the court; or
(c) upon the court's own motion in any family proceedings, if the court considers that it should be brought to an end.[323]

The court may appoint a new guardian to replace the one removed.

Termination of guardianship

3.44 Guardianship automatically terminates when the child reaches the age of 18.[324] Whether the guardian's duties determine upon the child's marriage is a moot point. Although the Act does not contain any express limitation, the court may well decide that there is no scope for the operation of guardianship. Even if the guardianship continues, it is unlikely that a guardian would be permitted to interfere with the activities of a married child.[325]

Guardian of the estate of a child

3.45 Apart from guardians of the person, there are also guardians of the estate who are appointed to protect the child's property. The English Law Commission noted that guardians of the estate may be appointed specifically to administer an award made to a child by the Criminal Injuries Compensation Board in respect of injuries caused by the parents, or where a child becomes entitled to a foreign legacy or money from a pension fund or insurance policy and either his parents are dead or for some reasons cannot give an adequate receipt.[326]

3.46 The Law Commission stated that:

> *"following the Law of Property and Settled Land Acts 1925 guardianship of the estate became less significant because a legal estate in land can no longer be held by a minor but instead is held by trustees as statutory owners ... a guardian has the right to recover rents and profits from the minor's land."* [327]

3.47 The Commission explained that this means that:

> "*he can control the income due to the infant and any of the personal profit to which the infant is legally as well as beneficially entitled, but is not entitled to receive or exercise powers over property to which the*

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323 Section 6(7).
324 Section 91(7) and (8).
325 White, Carr & Lowe, *op cit* at paragraph 2.52.
326 Law Com Working Paper, (1985: No. 91) paragraph 2.23, footnote 95.
327 Paragraph 2.23.

infant has only beneficial title, except income as it becomes payable."[328]

3.48 The Commission argued that trusteeship would adequately and more appropriately fill any gap.[329] However, the government disagreed and the 1989 Act preserves the High Court's power to appoint guardians of the estate of any child but only in accordance with rules of court.[330]

3.49 Under the rules of court,[331] only the Official Solicitor can be appointed as the guardian of the estate of a child. The appointment can be made only when the consent of the persons with parental responsibility has been signified to the court or when such consent cannot be obtained or may be dispensed with. Furthermore appointments may be made only in the following circumstances:

(a) where money is paid into court on behalf of the child (in accordance with directions given under rule 12(2), control of money recovered by a person under disability),
(b) where the Criminal Injuries Compensation Board notifies the court that it has made or intends to make an award to the child,
(c) where a foreign court notifies the court that it has ordered or intends to order that money be paid to the child,
(d) where the child is entitled to proceeds of a pension fund, and
(e) where such an appointment seems desirable to the court.

In practice such appointments are confined to cases where the parents are dead or where it is unsuitable for them to be involved.[332]

The power to act independently

3.50 More than one person may have parental responsibility at the same time.[333] It is usual for the child's parents to have parental responsibility at the same time but the previous law was not clear whether they may act independently. The Children Act 1989 provided that where more than one person has parental responsibility, each of them may act independently in meeting that responsibility without the need to consult the other except where statute expressly requires the consent of more than one person.[334]

3.51 The general aim of the Act is to encourage both parents to feel concerned and responsible for the welfare of their children. Although it is preferable that parents should

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328 *Idem.*
329 Law Com No 172, paragraph 2.24.
330 Section 5(11) and (12).
331 Rules of the Supreme Court, Order 80, rule 13.
332 As when the injuries to the child had been caused by the parents.
333 Section 2(5).
334 Section 2(7); section 13(1) and (3).

have a legal duty to consult one another on major matters in the children's lives, because this would increase parental co-operation and involvement after separation or divorce, the English Law Commission noted that this seemed both unworkable and undesirable:

> *"The person looking after the child has to be able to take decisions in the child's best interests as and when they arise. Some may have to be taken very quickly.... The child may well suffer if that parent ... has to go to court to resolve the matter, still more if the parent is inhibited ... by the difficulties of contacting him or of deciding whether what is proposed is or is not a major matter requiring consultation. In practice, where the parents disagree about a matter of upbringing the burden should be on the one seeking to prevent a step which the other is proposing, or to impose a course of action which only the other can put into effect, to take the matter to court. Otherwise the courts might be inundated with cases, disputes might escalate well beyond their true importance, and in the meantime the children would suffer."*[335]

3.52 Bainham made the criticism that by failing to provide for consultation and a right of veto, the Act, while in form appearing to favour joint parenting following breakdown, "in substance reinforces the already superior *de facto* position of the person with physical care".[336] The following are his comments:

> *"If, therefore, a major aim of the reformed legislation is to strengthen and encourage dual parenting we might have expected to see ... provisions relating to co-operation or consultation.... The Act not only fails to embrace consultation, it also removes the former right of objection which parents had during marriage.... But the implication is nonetheless, that joint* ***independent*** *rather than* ***co-operative*** *parenting, is the normative standard ... reflected in the law."*[337]

3.53 Elsewhere, Bainham made the following observation:

> *"It is possible to offer the tentative view that, in asserting parenthood as a primary and gender-neutral status and in making it so difficult for either parent to divest himself or herself of parental responsibility, the Children Act has given tacit encouragement to the notion of equal co-parenting*."[338]

3.54 Of course the right to act independently must be read with the duty not to act in a way that would be incompatible with an order. The right to act independently does not mean that a parent can ignore the need to consult the other parent on important issues.

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335 Law Com No 172, paragraph 2.10.

336 Bainham [1990] Fam Law at 193.

337 Bainham 53 MLR, 211-2, (1990).

338 Bainham, *Children: The Modern Law*, 61-2.

Glidewell LJ said in *Re G (a minor)(Parental Responsibility: Education)*[339] that "the mother having parental responsibility was entitled to and indeed ought to have been consulted about the important step of taking her child away from day school ... and sending him to boarding school. It is an important step in any child's life and she ought to have been consulted". There had been no prior order so she could not claim that the father was acting incompatibly with a prior order.

Joint responsibility principle

3.55 The English Law Commission considered that parents should not lose their ability to take decisions about their children simply because they are separated or in dispute with one another. The Act therefore supports the idea that "once a parent always a parent" and that the primary responsibility for deciding on the upbringing of the child should remain with the parents even upon their separation.

3.56 A person who has parental responsibility for a child does not cease to have that responsibility solely because some other person, such as a step-parent, grandparent or foster parent, subsequently acquires parental responsibility.[340] The parents are only prevented from acting in ways which would be incompatible with an order made with respect to the child under the Act.[341]

3.57 The philosophy of the Act is that a parent who does not have the child living with him should still be regarded as a parent so that he can be given information and an opportunity to take part in the child's upbringing. He cannot exercise a power of veto over the other, but can refer any dispute to the court if necessary. It also encourages his involvement with the child and thus promotes the child's welfare. Thus, the granting of parental responsibility to, say an unmarried father, would result in the child's school inviting him to parents' functions, sending him school reports, giving him a voice in choosing future schools, or in any issue of major medical treatment, or changing the child's surname.[342] The retention of parental responsibility after divorce was intended to minimise conflicts.

Delegation of parental responsibility

3.58 A person with parental responsibility may not surrender or transfer any part of that responsibility to another person save by a court order. However, he may delegate some or all of that responsibility to one or more persons acting on his behalf.[343] Such delegation can be made to another person who already has parental responsibility or to those who have not, such as a responsible person in schools or holiday camps or foster parents.

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339 [1994] 2 FLR 964. CA.

340 Section 2(6).

341 Section 2(8).

342 *Re P (Child) (Parental Responsibility Order)* [1993] 2 FCR 689.

343 Section 2(9).

3.59 The English Law Commission recommended such a provision for the following reasons:

(a) Parents should feel free to agree between themselves the arrangements which they believe best for their children, whether or not they are separated, and

(b) It would be helpful if, for example, a school can feel confident in accepting the decision of a person nominated by the parents as a temporary "guardian" for the child while they are away.[344]

3.60 Since such arrangements are not legally binding, they can be revoked or modified at will. Moreover, delegation will not affect the liability of the person making such arrangements which may arise from failure on his part to discharge his responsibilities to the child.[345]

Carers without parental responsibility

3.61 Anyone with actual care of a child but who does not have parental responsibility may "do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare".[346] This clarifies the position of those who have actual care of a child without having parental responsibility for him in law.

3.62 The English Law Commission gave the example of medical treatment.[347] If the child is left with friends while the parents go on holiday, it would obviously not be reasonable for the friends to arrange major elective surgery, but it would be reasonable to arrange treatment in the event of an accident to the child. As Bainham sees it, the essence of the distinction would appear to be that emergency or routine medical care would be covered by the section, but procedures with long-term or irreversible implications would require the consent of a person with parental responsibility.[348]

Welfare principle

3.63 Section 1(1) of the Children Act 1989 provides:

"When a court determines any question with respect to -

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344 Law Com No 172, paragraph 2.13.
345 Section 2(11).
346 Section 3(5).
347 Law Com No 172, paragraph 2.16.
348 Bainham, *Children - The Modern Law* (1993), 251.

(a) the upbringing of a child;[349] *or*

(b) the administration of the child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration."

First and paramount consideration

3.64 The former law required the court to regard the welfare of the child as the "first and paramount consideration".[350] The word "first" had caused confusion because it had led some courts to balance other considerations *against* the child's welfare rather than to consider what light they shed upon it. Although the word "first" was effectively made redundant,[351] a modern formulation was seen as necessary to clarify the law. The 1989 Act, accordingly, omits the word "first" and the child's welfare is now the only consideration in cases where section 1 applies.

3.65 The English Law Commission recommended a modification to the paramountcy principle so that the interests of the child whose future happens to be in issue in the proceedings before the court should not in principle prevail over those of other children likely to be affected by the decision. Their welfare should also be taken into consideration.[352] However, this was not implemented in the Act. This is perhaps because the requirement to consider the welfare of *any* child could divert the court's attention from its duty towards the welfare of the child before it.

Criticisms of "welfare" principle

3.66 Cretney and Masson explained that the welfare principle is not without problems:

> *"The lack of a consensus view on what children's welfare demands or of adequate scientific information about what ensures healthy psychological development enables those who take the decisions [judges] to impose their own subjective views. In addition the lack of a comprehensible and predictable standard makes it more difficult for couples to reach settlements by negotiation. This may increase the number of disputed cases and the intensity of disputes."*[353]

3.67 Nevertheless, they agreed that:

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349 Upbringing is defined by section 105(1) to include "the care of the child but not his maintenance".

350 Guardianship of Minors Act 1971, section 1.

351 *J v C* [1970] AC 668; *Re C (a minor)* (1979) 2 FLR 177, 184; *Re KD (A minor) (Ward: Termination of Access)* [1988] AC 806.

352 Law Com No 172, paragraphs 3.13-4.

353 Cretney and Masson, *op cit* at 525-6.

"the welfare principle is widely supported because it represents an important social and moral value, that children who are necessarily vulnerable and dependent must be protected from harm.... Any change in the standard could put children's welfare at risk because it would inevitably reduce the emphasis given to welfare."[354]

Checklist of factors

3.68 Section 1(3) of the 1989 Act contains a statutory checklist of factors to assist the courts in carrying out their duty. It provides:

"In the circumstances mentioned in subsection (4),[355] *a court shall have regard in particular to:*

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
(b) his physical, emotional and educational needs;
(c) the likely effect on him of any change in his circumstances;
(d) his age, sex, background and any characteristics of his which the court considers relevant;
(e) any harm which he has suffered or is at risk of suffering;
(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
(g) the range of powers available to the court under this Act in the proceedings in question."

Advantages

3.69 The checklist was perceived as a means of providing greater consistency and clarity in the law and as a step towards a more systematic approach to decisions concerning children. It was hoped that all the professionals involved would use the same basic factors to implement the welfare principle. Both parents and children would also find the list helpful in finding out how judicial decisions are made and to focus their attention on relevant issues. As it would enable the parties to prepare and give relevant evidence at the outset, the delay and expense of prolonged hearings or adjournments for further information could be avoided.[356]

3.70 Dame Margaret Justice Booth supported the use of a checklist:

"By this checklist the statute enjoins the court, in exercising its discretion, to keep in the forefront of its mind the child with which it is concerned. In some instances when difficult findings of fact have to be

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354 *Ibid* at 526.

355 The circumstances are that the court is considering whether to make, vary or discharge a section 8 order and this is opposed by any party to the proceedings.

356 Law Com No 172, paragraph 3.18.

made, for example, as to the perpetration of sexual abuse, or when adult relationships are complex or personalities are strong, it is easy for the focus of attention to move away from the child whose future is at stake and to become concentrated instead on the adults involved. The provision has the salutory effect of bringing the court back on course."[357]

Disadvantages

3.71 Since the list is not exhaustive and the court may consider other relevant circumstances not enumerated in the list, a considerable amount of discretion remains vested in individual judges.[358] The checklist does not ascribe weight to the factors enumerated in it. A judge may therefore attach greater importance to one factor than the others.

3.72 The checklist only applies to contested applications to make, vary or discharge an order under section 8.[359] It does not apply to guardianship. If the checklist applied to uncontested cases as well, it would increase the burden of the courts as they would then be obliged to investigate such cases in depth. This would encourage the courts to intervene unnecessarily in the arrangements proposed for children.[360] The non-intervention principle requires that the courts should not intervene if all parties are in agreement as to what should happen to the child.

Views of the child

3.73 The courts are under a duty to have regard to the child's wishes and feelings when determining any question with respect to the upbringing of a child.[361] Gallagher had the following comments to make:

"Where this parent [who has day to day responsibility for the child] has a truly positive attitude towards contact (or at worst an entirely neutral attitude) it is rare to find a child expressing vehement views against contact. Those parents who do not wish contact to take place are increasingly aware of the significance of s 1(3)(a) of the Act. Such parents are often heard to say that they do not object 'in principle' to contact, but that contact is a distressing event for the child and that that is why the child is against it."[362]

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357 Dame Margaret Justice Booth, "The Children Act 1989 - the Proof of the Pudding", Statute Law Review, vol 16, No 1, (1995) at 16.

358 Bainham, *Children - The Modern Law* (1993) 44.

359 Section 1(4).

360 Law Com No 172, paragraph 3.19.

361 Section 1(3)(a).

362 Gallagher, "Say goodbye to Daddy," Sol J, 17 Sept 1993, 906-7.

Welfare reports

3.74 Whenever a court is considering *any* question with respect to a child under the 1989 Act, it may ask a probation officer or a local authority to report "on such matters relating to the welfare of that child as are required to be dealt with in the report".[363] Although welfare reports serve the crucial function of providing the court with an independent assessment of the facts and finding out the wishes and feelings of the child, there is no presumption in favour of making one.[364] The Law Commission did not recommend that the court should be under a duty to order a report in every case because this would cause unnecessary delays in some cases and would strain limited resources.

3.75 The Lord Chancellor may make regulations specifying matters which, unless the court orders otherwise, must be dealt with in the report.[365] This is aimed at maintaining consistency in practice. A report may be made in writing or orally as the court requires.[366] This provision is intended to maintain flexibility. Statements in a report may not be ruled inadmissible because of the rule against hearsay.[367]

Evidence by children

3.76 The court may hear the unsworn evidence of a child if the child understands that it is his duty to speak the truth and has sufficient understanding to justify his evidence being heard.[368] In civil proceedings before the High Court or a county court and family proceedings in a magistrates' court, evidence given in connection with the upbringing, maintenance or welfare of a child shall be admissible notwithstanding any rule of law relating to hearsay.[369]

Parental agreements and the non-intervention principle

3.77 A court must not make an order under the Children Act 1989 "unless it considers that doing so would be better for the child than making no order at all".[370] In other words, the court will have to be satisfied in every case that it is in the child's interests that an order be made. The court may decide not to make an order because the arrangements proposed by the parties are satisfactory.

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363 Section 7(1).

364 Contrast this with the statutory presumption of representation by a guardian *ad litem* in public law cases.

365 Section 7(2).

366 Section 7(3).

367 Section 7(4). Cf section 17 of the Guardianship of Minors Ordinance (Cap 13) in Hong Kong.

368 Section 96(2).

369 Section 96 (3) and (4); Children (Admissibility of Hearsay) Order 1993, SI 1993/ No 621. In contempt proceedings concerning family proceedings, an applicant seeking to rely on the hearsay evidence of children is required to demonstrate that the proposed evidence shows a substantial connection with the upbringing, maintenance or welfare of a child: cf *C v C (Contempt: Evidence)* [1993] 1 FLR 220 (CA).

370 Section 1(5).

3.78 This principle is in line with the notion of parenthood as a continuing responsibility. Parents are expected to make arrangements for the upbringing of the child after separation and divorce. Court orders should be reserved for cases where the parties failed to reach a satisfactory agreement. This reflects the philosophy of the 1989 Act in respecting the integrity and independence of the family unless the making of an order has a demonstrable benefit to the child.[371] Where the parties have reached an agreement, the court will have to be especially convinced that it is for the child's welfare that an order should be made.

Advantages

3.79 The English Law Commission explained the merits of the principle as follows:

> *"The proportion of contested cases is very small, so that orders are not usually necessary in order to settle disputes. Where a child has a good relationship with both parents the law should seek to disturb this as little as possible. There is always a risk that orders allocating custody and access (or even deciding upon residence and contact) will have the effect of polarising parents' roles and perhaps alienating the child from one or other of them."*[372]

Disadvantages

3.80 However, Cretney and Masson are critical of this principle:

> *"there must be a degree of tension between [the principle of non-intervention] and the welfare principle.... Where the parents are in agreement the court may take the view that there should be no further enquiry and no order, and thus fail to address issues of the child's wishes and welfare."*[373]

3.81 The practical impact of refusing to make an order was illustrated in *B v B (Grandparent: Residence Order)*[374] where a grandmother sought a residence order for a child who was residing with her, with the mother's consent. The education authorities had been reluctant to accept her authority and had insisted on the mother's consent; concern was expressed about the necessary consent for emergency medical treatment and the mother had been impulsive which might lead to her seeking to remove the child from the care of the grandmother. It was therefore better for the child, and would give her some stability, if the residence order was made in favour of the grandmother.

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371 Article 8 of the European Convention on Human Rights provides that every one has the right to respect for his private and family life.

372 Law Com No 172, paragraph 3.2.

373 Cretney & Masson, *op cit* at 563.

374 [1992] Fam Law 490.

Duty to approve arrangements

3.82 Section 41 of the Matrimonial Causes Act 1973 , as amended by the Children Act 1989,[375] provides that in any divorce, nullity or judicial separation proceedings, the court has a duty to consider whether, in the light of the arrangements proposed for the upbringing and welfare of the children, it should exercise any of its powers under the Children Act 1989.[376]

3.83 Where it appears that a court should exercise its powers, but it is not in a position to exercise that power without giving further consideration to the case, and there are exceptional circumstances in the interests of the child that the court should give a direction under that section, the court may direct that the decree absolute of divorce or nullity or a decree of judicial separation cannot be made until the court allows it. The duty under section 41 applies only to those children under the age of 16, save where the court expressly directs otherwise.[377] There is therefore no automatic suspension of the decree absolute.

3.84 The procedure under the 1989 Act is that the District Judge will examine the statement of arrangements for children and any written representations filed by the respondent. If the judge is satisfied that the court need not exercise its powers under the 1989 Act, he should certify accordingly. If he is not so satisfied, then he can direct that (a) further evidence be filed, (b) a welfare report be ordered or (c) both parties, or either of them, attend before him. In case the parent refuses to comply with the direction, the judge might delay the decree absolute. The scrutiny process is therefore very much a "paper exercise" conducted by the judge once he has given his certificate that the petitioner is entitled to a decree *nisi*.[378]

Criticisms of the new provision

3.85 Freeman worried that the interests of the children would be overlooked:

> *"Provided the statement of proposed arrangements is not outrageous, whatever the parents have agreed will be rubber-stamped. Will the much-vaunted 'wishes and feelings of the child'[379] get a look in? The child will not be independently represented.... The opportunity to strengthen section 41 and convert the high-sounding language of section 1 from rhetoric to reality has been missed."*[380]

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375 Schedule 12, paragraph 31.

376 This is similar to our section 18 of the Matrimonial Proceedings and Property Ordinance (Cap 192).

377 Section 41(3) of the Matrimonial Causes Act 1973 as amended.

378 Family Proceedings Rules 1991, rule 2.39.

379 See section 1(3)(a).

380 Freeman, *op cit* at 210.

Family Law Act 1996

3.86 The Family Law Act 1996 reformed the provisions on the arrangements for children.[381] The function of the court under section 41 of the Matrimonial Causes Act 1973 has been retained, though the list of factors which a court should take into account in deciding whether it should exercise its powers under the 1989 Act are extended.[382] They now include a requirement to have regard to the wishes and feelings of the child in the light of his age and understanding and the circumstances in which those wishes were expressed. The conduct of the parents towards the upbringing of the child becomes relevant. The court must also have regard to any risk to the child attributable to the location of future living arrangements, any person living with the parent,[383] or any other arrangements for his care and upbringing.

3.87 A new principle is introduced that, in the absence of evidence to the contrary:

> *"the welfare of the child will be best served by:*
>
> *(i) his having regular contact with those who have parental responsibility for him and with other members of his family; and*
>
> *(ii) the maintenance of as good a continuing relationship with his parents as is possible."*[384]

3.88 The court cannot make the divorce order unless it is satisfied about the parties' financial arrangements for the future, including the children. Schedule 1 provides for an exemption from this requirement (except for satisfying the court under section 11 about the children), where agreement has not been reached because of the ill health, disability or injury of one of the parties or the child and delay would be "significantly detrimental to the welfare of any child of the family" or "seriously prejudicial to the applicant".

Types of orders

3.89 Under the 1989 Act, the court may make orders in any family proceedings in which a question arises with respect to the welfare of any child.[385]Section 8 of the 1989 Act provides for four types of orders:

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381 Section 11.

382 The welfare of the child is paramount in the court exercising its discretion.

383 This may be, for example, if a boyfriend of a mother who has a residence order in her favour, had been convicted of sexual abuse of other children.

384 Section 11(4)(c).

385 Section 10(1).

(1) a residence order means an order settling the arrangements to be made as to the person with whom a child is to live,

(2) a contact order, which is similar to an access order, allows the child to visit or stay with the other person,

(3) a specific issue order means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child, and

(4) a prohibited steps order means that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court.

3.90 The previous system of orders was criticised as being more concerned with whether one parent could control what the other parent did while the child was with the other, than with ensuring that each parent properly met his responsibilities while the child was with him.[386] Instead of concentrating on the allocation of abstract rights, section 8 orders are aimed at settling practical questions. The courts no longer have to deal with issues such as who should have legal custody or actual custody. This is in line with the philosophy of the Act that the law should interfere as little as possible where the parents are already able to co-operate in bringing up their children. As the making of section 8 orders will not affect the parental responsibility of both parents, it would "lower the stakes" so that the issue will not be one in which "winner takes all" or more importantly "loser loses all".[387]

3.91 Some commentators expressed concern that the reforms would encourage interference by the parent who does not have a residence order but who nevertheless retains parental responsibility. However, the parental responsibility of the non-residential parent may be little more than symbolic.[388] His ability to exercise such responsibility may effectively be removed by the court because no action may be taken which is incompatible with a court order[389] and the power of the court to make specific conditions in residence orders is wide.[390]

Residence order

3.92 A residence order is an order "settling the arrangements to be made as to the person with whom the child is to live."[391] The order may simply name the person with whom the child is to live or set out the arrangements in greater detail. Despite the narrow

386 Law Com No 172, paragraph 4.8.
387 Law Com No 172, paragraph 4.5.
388 Bainham, *The New Law: The Children Act 1989* (1990) at paragraph 3.10.
389 Section 2(8).
390 Cretney & Masson, *op cit* at 544-5.
391 Section 8(1).

definition of "residence order", the courts seem to have interpreted the ambit of such an order widely. In *Re P (Child) (Parental Responsibility Order)* Wilson J stated that an order of residence "invests the mother with the right to determine all matters which arise in the course of the day-to-day management of this child's life."[392]

3.93 A residence order may be made in favour of two or more persons who do not themselves live together. In such cases, the order may specify the periods during which the child is to live in the different households.[393] Time-sharing arrangements are therefore possible under the Act.[394] However, the courts have not encouraged these arrangements. The Court of Appeal stated that it would need to see a positive benefit for the children from such a sharing before finding the circumstances so unusual as to justify such an order.[395]

3.94 A residence order ceases to have effect if both parents live together for a continuous period of more than 6 months.[396] Although this might be seen as an impediment to reconciliation, the English Law Commission considered that it was unrealistic to keep in force an order that the child should live with one parent rather than the other when the child was living with both parents. If the parents separate again, the circumstances may well be different and it would be wrong to place one in an automatically stronger position than the other.[397]

Surname of the child

3.95 It is an automatic condition of all residence orders that the child's surname should not be changed without either the written consent of each person with parental responsibility or the leave of the court.[398] The English Law Commission took the view that the child's surname is an important symbol of his identity and his relationship with his parents. It is clearly not a matter on which the parent with whom he lives should be able to take unilateral action.[399] It is not necessary to obtain the child's consent to the change of his surname though the child may apply for a prohibited steps order or specific issue order to prevent the change.

Removal from jurisdiction

3.96 It is also an automatic condition of all residence orders that the child should not be removed from the United Kingdom for longer than one month without the written

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392 [1993] 2 FCR 689.

393 Section 11(4).

394 The Court of Appeal in *Riley v Riley* [1986] 2 FLR 429 disapproved time-sharing arrangements on the ground that children require a settled home. This decision has effectively been overruled by the Act. Note that there is no provision that the making of a joint residence order entails an obligation by the carers to consult with each other though this can be specified in the order.

395 *A v A (Minors: Shared Residence Order)* [1995] 1 FCR 91.

396 Section 11(5).

397 Law Com No 172, paragraph 4.13.

398 Section 13(1).

399 Law Com No 172, paragraph 4.14.

consent of any person with parental responsibility or the leave of the court.[400] Taking the child abroad for long periods can affect his relationship with the other parent.

3.97 The person in whose favour a residence order is made may remove the child for a period of less than one month. This is intended to allow him to make arrangements for holidays without having to seek the permission of the non-residential parent and without having to give notice. Although there is no limit on the number of temporary removals, the non-residential parent who worries that the child might be removed permanently may seek a prohibited steps order or ask the court to attach conditions to the residence order.

Unmarried father

3.98 An unmarried father can apply for a residence order in respect of his child. If his application is successful and he does not then have parental responsibility by agreement or court order, the court must also make a separate parental responsibility order.[401] The rationale is that it would be wrong to deny him the full range of parental responsibilities if he is allowed to live with the child. The court may bring the parental responsibility order to an end only after the residence order is no longer in force.[402]

Contact order

3.99 A contact order "means an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other".[403] Whereas the former access order is adult-centred, permitting another person to visit the child, a contact order was child-centred, requiring the person with whom the child lives to allow contact. Contact orders usually permit reasonable contact but may specify the times, frequency and location of visits. The words "otherwise to have contact with each other" indicate that the court may order some other form of contact, including letters or telephone calls.

Specific issue order

3.100 The specific issue order "means an order giving directions for the purpose of determining a specific question which has arisen, or may arise, in connection with any aspect of parental responsibility for a child".[404] The object is not to give one parent or the other a "right" to determine a particular point but to enable either parent to apply to the court for a particular dispute to be resolved in accordance with the welfare principle. Even if a person does not have parental responsibility, say an unmarried father, he can still apply

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400 Section 13(1)(2).

401 Section 12(1)(3). The same principle applies to an applicant who is not the parent or guardian of the child: section 12(2).

402 Section 12(4).

403 Section 8(1).

404 *Idem.*

for a specific issue order concerning such issues as major medical treatment and schooling of the child. The court may order that one of the parties should be free to make the specific decisions. It may also attach a condition to a residence or contact order that certain decisions may not be taken without informing the other or giving the other an opportunity to object.[405]

Prohibited steps order

3.101 A prohibited steps order "means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court".[406] The aim of providing for prohibited steps orders is to incorporate the most valuable features of wardship into the statutory jurisdiction.

3.102 There are occasions where it is necessary for the court to play a continuing parental role. When the court makes a child a ward of court, there is the vague requirement that no "important step" may be taken without the leave of the court. A prohibited steps order is more specific and the court will spell out those matters which will have to be referred back to the court. The child's education and medical treatment are matters that could be resolved with such an order.[407]

3.103 A limitation on both specific issue and prohibited steps orders is that they must concern an aspect of parental responsibility. Neither order should be made with a view to achieving a result which could be achieved by a residence or contact order.[408] This is to guard against the slight risk, particularly in uncontested cases, that the orders might be used to achieve the same practical results as residence or contact orders but without the same legal effects.[409]

Supplementary provisions

3.104 In making a section 8 order, the court may:

(a) include directions about how it is to be carried into effect;
(b) impose conditions that must be complied with by any person:
    (i) in whose favour the order is made;

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405 The English Law Commission was of the view that to give one parent in advance the right to take a decision which the other parent will have to put into effect is contrary to the whole tenor of the modern law, in particular, the disapproval of the old form of "split" orders giving custody to one and care and control to the other: Law Com No 172, paragraph 4.18.

406 Section 8(1).

407 Where there is a residence or contact order, the power to impose conditions may avoid the need for a prohibited steps order.

408 Section 9(5). So, for example, a specific issue order which ordered that children be returned from the father to the mother was contrary to section 9(5) - *M v C (Children Orders: Reasons)* 14 October 1992, FD, reported at [1993] Fam Law 433.

409 Law Com No 172, paragraph 4.19.

(ii) who is a parent or otherwise has parental responsibility for the child; or

(iii) with whom the child is living,

(c) specify the period for which the order, or any provisions in it, is to have effect, or

(d) make such incidental, supplemental or consequential provisions as it thinks fit.[410]

3.105 The power to give directions is principally designed for the court to ensure a smooth transition in those cases in which it orders a change in the existing arrangements.[411] It may be used to ensure that there is a delay before the child's residence is changed or to define more precisely what contact is to take place under a contact order.

3.106 The power to attach conditions and other incidental or supplemental provisions enables the court to resolve particular disputes or direct how such a dispute is to be dealt with in the future. Brophy points out that, though the Law Commission recommended conditions be attached to residence or contact orders in difficult cases, this was not intended to give the parent the right to be consulted in advance on all important decisions which the other parent will have to put into effect.[412] The exercise of this power is a more practical and realistic way of dealing with a problem than was the former "split" order of giving custody to one parent and care and control to the other. It does not allocate "rights" for the future.[413] One of the conditions that may be attached to a residence or contact order is that decisions may not be taken without informing the other person or giving him a right to object.

3.107 The power to specify the period for which the order, or any provision in it, is to have effect is intended to preserve the more flexible position under the Matrimonial Causes Act 1973, in which no rigid distinction was drawn between "interim" and "final" orders.[414] In fact, the Act makes it clear that the court may make a section 8 order at any time during the course of the proceedings even though it is not in a position to dispose finally of those proceedings.[415] There is therefore no longer any distinction between interim and final orders.

Relevant child

3.108 The court can make a section 8 order with respect to "any child" about whose welfare a question arises in family proceedings.[416] The court may make an order in respect of a child who is not treated by the parties as a child of their family.[417]

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410 Section 11(7).

411 Law Com No 172, paragraph 4.22.

412 Brophy, "Custody law, Child care and inequality in Britain", Smart and Sevenhuijsen (ed), in *Child Custody and the Politics of Gender,* 225, 240 (1989).

413 *Ibid* at paragraph 4.23.

414 *Ibid* at paragraph 4.24.

415 Section 11(3).

416 Section 10(1).

3.109 A child is defined as a person under the age of 18.[418] However, unless there are exceptional circumstances,[419] a section 8 order cannot be made in respect of a child who has reached the age of 16 nor can any order be expressed to have effect beyond a child's sixteenth birthday.[420] An order ceases to have effect when the child reaches the age of 16 unless it is expressed to extend beyond the child's sixteenth birthday.[421] Where the court so directs, the order will cease to have effect when the child reaches the age of 18.[422]

3.110 The English Law Commission explained that 16 is the age at which children may leave school and seek full-time employment and become entitled to certain benefits or allowances in their own right. The older the child becomes, the less just it is to attempt to enforce against him an order to which he has never been a party.[423]

Circumstances in which orders may be made

3.111 There are three ways in which orders relating to children may be made:

(a) on application in the course of family proceedings,[424]
(b) on the court's own motion in the course of family proceedings,[425] and
(c) on a free-standing application in the absence of any other proceedings.[426]

3.112 The types of orders which could be made and the persons entitled to apply for them are the same in all family proceedings. The object is to provide a unified scheme which is consistent and clear so that everyone may know his position. Wherever possible orders should be made in the course of existing proceedings about the family. This was designed to avoid wasteful duplication and to ensure that all applications relating to the same child can be dealt with together as far as possible.[427]

Family proceedings

3.113 The court is empowered to make a section 8 order "in any family proceedings in which a question arises with respect to the welfare of any child".[428] The

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417 Whether a child is a "child of the family" is still important for determining whether a person who is not a parent or guardian may seek an order without the leave of the court: s 10(4)(a), (5)(a).
418 Section 105(1).
419 For example, persons over 16 who are immature or who are mentally handicapped.
420 Section 9(6)-(7).
421 Section 91(10).
422 Section 91(11).
423 Law Com No 172, paragraph 3.25.
424 Section 10(1)(a).
425 Section 10(1)(b).
426 Section 10(2).
427 Law Com No 172, paragraph 4.33.
428 Section 10(1).

definition of "family proceedings" covers almost all proceedings in which issues affecting the upbringing of a child might be raised.[429] Included in the definition are proceedings under the inherent jurisdiction of the High Court in relation to children. These are principally wardship proceedings. This would reduce the use of wardship in cases where active supervision of the court is not required. If wardship proceedings are brought, the court may dispose of them by means of a section 8 order. The English Law Commission explained that:

> *"It is a major objective of these proposals to reduce the need to resort to the wardship jurisdiction of the High Court. In many cases, wardship is invoked, not because of any need for the court to exercise continuing parental responsibility, but because no other proceedings are available. Once they are, the court itself may be more inclined to decline jurisdiction or at least dispose of the proceedings in this way."*[430]

3.114 Proceedings under the Matrimonial Causes Act 1973 are also included. This widens the court's powers in respect of children in proceedings for divorce, judicial separation or financial relief, so that the full range of orders under section 8 may be made where the petition is dismissed, the claim for financial relief is unsuccessful or a variation of a maintenance agreement is sought.[431]

Application by third parties

3.115 Under the old law, there were "haphazard limitations" on applications by guardians and a "confusing array of provisions" which allowed people other than parents and guardians to seek custody and access.[432] Such restrictions could be avoided by making the child a ward of court. The 1989 Act aimed to reduce the need to use wardship, to remove the technical rules on *locus standi* and to ensure that anyone with a genuine interest in a child's welfare may apply to the court in family proceedings.

3.116 Section 9 restricts the application for a section 8 order to persons other than a local authority. However this should be seen in the context of a separation of powers between the public and private law in the Children Act 1989, despite the Act bringing together both types of law. Section 9 also restricts a local authority foster parent from applying unless the authority consents and that he is a relative. Alternatively the child must have lived with him for at least three years.

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429 Section 8(3) and (4). "Family proceedings" include proceedings under the Matrimonial Causes Act 1973, the Domestic Violence and Matrimonial Proceedings Act 1976 and Part III of the Matrimonial and Family Proceedings Act 1984.

430 Law Com No 172, paragraph 4.35.

431 Cretney & Masson, *op cit* at 543.

432 Law Com No 172, paragraph 4.39.

3.117 Section 10 allows the application for an order under section 8 by a person entitled to apply or a person who has obtained the leave of the court to make the application.

Applications without leave

3.118 There are 3 categories of persons who may apply for any section 8 order as of right:

(a) parents (including unmarried fathers),
(b) guardians, and
(c) those in whose favour a residence order is in force.[433]

3.119 Section 10(5) sets out the criteria for applications for residence or contact orders without leave:

(a) any party to a marriage (whether or not subsisting) in relation to whom the child is a child of the family,[434]

(b) any person with whom the child has lived for a total of at least 3 years ending within the past 5 years,[435] and

(c) any person who:

(i) in any case where a residence order is in force with respect to the child, has the consent of each of the persons in whose favour the order was made,

(ii) in any case where the child is in the care of a local authority, has the consent of that authority, or

(iii) in any other case, has the consent of each of those (if any) who have parental responsibility for the child.[436]

3.120 Any person who has applied for an order or is named in a contact order is entitled to apply for the variation or discharge of the order.[437] Rules of court may prescribe further categories of person who may apply for an order as of right.[438]

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433 Section 10(4).

434 Section 10(5)(a). This category includes a step-parent. As for the meaning of "child of the family", see section 105(1).

435 Section 10(5)(b) and (10).

436 Section 10(5)(c).

437 Section 10(6).

Applications with leave

3.121 Applicants who require the leave of court fall into three categories:

(a) local authority foster parents,[439]
(b) other persons with no right to apply,[440] and
(c) children concerned in the proceedings.

3.122 For those persons who do not fall into the categories of entitlement set out in subsection (4), section 10(9) provides that in deciding whether to grant leave or not, the court shall have particular regard to the following:

(a) the nature of the proposed application,
(b) the applicant' s connection with the child,
(c) the risk that the child' s life might be disrupted to such an extent that he would be harmed by the proposed application, and
(d) where the child is being looked after by a local authority:
    (i) the authority' s plans for the child' s future, and
    (ii) the wishes and feelings of the child' s parents.[441]

Child as a party

3.123 Where an application for an order under section 8 is made by the child concerned, under section 10(8), the court will grant leave only if it is satisfied that the child "has sufficient understanding to make the proposed application."[442] Such a requirement is designed to ensure that the application is the child' s, not that of any adult. Where a child is not given leave it may still be possible for him to be joined as a party to the proceedings.[443] This was a jurisdiction to be reserved for the resolution of matters of importance concerning the child.[444]

3.124 The child can also apply for leave to begin or defend proceedings, under the 1989 Act and under the High Court' s inherent jurisdiction, without a next friend or guardian *ad litem* by filing a written request setting out reasons for the application or by making an oral request at any hearing.[445] This relaxed the rule which prohibited a minor from bringing or defending proceedings otherwise than through a next friend or guardian *ad litem*. The child may also proceed without a next friend or guardian *ad litem* where a solicitor

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438 Section 10(7).
439 Section 9(3)-(4).
440 Section 10(1)(a)(ii).
441 Section 10(9).
442 Section 10(8).
443 Cretney & Masson, *op cit* at 558-9.
444 An application for leave for a specific issue order by a 14 year old to go on holiday with her friends was rejected in *Re C (Minor : Leave to Apply for Orde)* [1994] 1 FCR 837.
445 Rule 9 (2A) of the Family Proceedings Rules 1991, added by SI 1992/456.

considers that the child is able, having regard to his understanding to give instructions and the solicitor has accepted instructions to act for the child.[446]

Rationale for leave

3.125 The requirement of leave is intended to protect the child and his family against unwarranted interference in their comfort and security, while ensuring that the child's interests are properly respected. The English Law Commission remarked that:

> *"There will hardly ever be a good reason for interfering in the parents' exercise of their responsibilities unless the child's welfare is seriously at risk from their decision to take, or more probably not to take, a particular step, and only the people involved in taking that step for them would have the required degree of interest (the obvious example is medical treatment).... The new scheme will enable such issues to come before the courts whenever there is good reason to believe that the child's welfare will benefit."*[447]

Other powers of the court

Supervision orders

3.126 Before the 1989 Act, the court could, of its own volition, make a supervision or care order if there were "exceptional circumstances making it desirable that the child should be under the supervision of an independent person".[448] Such provisions failed to reflect the different purposes for which supervision orders were made; namely, those in favour of local authorities where the purpose was to protect the children from harm, and those in favour of a welfare or probation officer where the purpose was to give short-term help to the parents to cope with their separation or divorce, and to facilitate co-operation between them in the future.[449] The 1989 Act clarifies the situation by giving the court a choice between making a "section 37 direction" to the local authority and a "family assistance order" to serve the two different purposes.

Family Assistance orders

3.127 The purpose of the order is "to formalise the involvement of a welfare officer for a short period in helping the family to overcome the problems and conflicts associated with their separation or divorce".[450] It is available in any family proceedings whenever the court has power to make a section 8 order, whether or not such an order has

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446 *Idem.*

447 Law Com No 172, paragraph 4.41.

448 For example, Matrimonial Causes Act 1973, section 44 (1).

449 Law Com No 172, paragraph 5.12.

450 *Ibid* at paragraph 5.19.

been made.[451] It can be made only by the court acting upon its own motion. The parties may, however, request the court to make an order during the course of the proceedings.[452]

3.128 The order requires either a probation officer or an officer of the local authority to be made available to "advise, assist and (where appropriate) befriend anyone named in the order".[453] The persons who may be named are the child, his parents or guardians, anyone with whom the child is living, or anyone in whose favour a contact order is in force. The court must be satisfied that "the circumstances of the case are exceptional" and that everyone named in the order other than the child consents to it.[454]

3.129 The officer only has power to refer to the court the question of whether a section 8 order which is in force should be varied or discharged.[455] Any question concerning child abuse or neglect should be referred to the local authority for action. Since the order is intended to provide short-term assistance, the order will have effect for six months unless the court specifies a shorter period.[456] However, there is nothing to stop the court making a further order.

Section 37 directions

3.130 Under the previous law, the court could, upon its own motion, make a supervision or care order in exceptional circumstances in private law proceedings. This ran against the policy under the 1989 Act that the local authority had the primary statutory responsibility for child protection. The 1989 Act, accordingly, removed that power but gave the court a limited power to trigger the local authority into action.

3.131 Under section 37, where in any family proceedings a question arises with respect to the welfare of any child, and:

> *"it appears to the court that it may be appropriate for a care or supervision order to be made with respect to him, the court may direct the appropriate authority to undertake an investigation of the child's circumstances".*

The authority must then consider whether they should apply for a care or supervision order, provide assistance for the child or his family, or take any other action with respect to the child. They must report to the court within eight weeks. Where the authority eventually decide not to apply for an order, the court has no power to make a care or supervision order.

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451 Section 16(1).

452 According to Bromley, *op cit* at 373. It would seem then that the parties cannot apply to court solely for a family assistance order.

453 Section 16(1)(2).

454 Section 16(3).

455 Section 16(6).

456 Section 16(5).

3.132 Pending the result of the investigation, the court may make an interim supervision or care order.[457] This avoids the disadvantage of delay while ensuring that a full order is not made without the authority knowing what the problem is and what will be expected under the order.[458]

Separate representation

Guardians ad litem

3.133 Whereas child representation in public law cases is the rule rather than the exception, it is the exception rather than the rule in private law cases. The court is required to appoint a guardian *ad litem* to represent the child only in specified proceedings "unless satisfied that it is not necessary to do so in order to safeguard his interests".[459] Specified proceedings are proceedings which involve public intervention and include the following:

(a) applications for the making of a care or supervision order,

(b) where the court has given a direction under section 37 for the local authority to investigate the child's circumstances and the court has made, or is considering whether to make, an interim care order,

(c) where the court is considering whether to make a residence order with respect to a child who is the subject of a care order, and

(d) applications in respect of contact between a child in care and any person.

3.134 The guardian *ad litem* is under a duty to safeguard the interests of the child in accordance with the rules of court.[460] He is required to appoint a solicitor to act for the child unless one has already been appointed.[461] Instructions to the solicitor should be given by the guardian. The guardian must file a report advising on the interests of the child at the end of his investigation.

Family Law Act 1996

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457 Section 38(1)and (2).

458 Law Com No 172, paragraph 5.16.

459 Section 41(1). See also rule 9(5) of the Family Proceedings Rules 1991.

460 Section 41(2)(b). The guardian *ad litem* is required to advise on the wishes of the child, whether the child is of sufficient understanding for any purpose, the options available to the court in respect of the child and any other matter on which the court seeks his advice: rule 4.11(4) of the Family Proceedings Rules 1991, (SI 1991/1247).

461 *Ibid,* rule 4.11(2).

3.135 Section 64 of the Family Law Act 1996 gives power to the Lord Chancellor to make regulations for separate representation in proceedings under Part II and IV of the Act[462] or the Domestic Proceedings and Magistrates' Courts Act 1978. The regulations may provide for representation in certain specified circumstances.

Appointment of a solicitor

3.136 If no guardian *ad litem* is appointed in proceedings under the 1989 Act[463] the court may appoint a solicitor to represent the child.[464] However, where a guardian *ad litem* has been appointed but the child wishes and is able to give instructions on his own behalf[465] and the instructions conflict with those of the guardian, a solicitor who has been appointed must take instructions from the child.[466] The child must have sufficient understanding to instruct a solicitor and wish to instruct one.[467]

3.137 Dame Margaret Justice Booth had the following views:

> *"In some cases it may not be ... in the child's best interests for him to see all the documents or hear all the evidence - but if he is a party can he be stopped from seeing relevant material or excluded from court? ... Can the adversarial system ... cope with this direct intervention of the child or will it have to give way to a more inquisitorial form of hearing? And if a child can instruct a solicitor directly in family proceedings, why not in other litigation in which he is involved?"*[468]

Enforcement of section 8 orders[469]

3.138 Under the Magistrates' Courts Act 1980, section 8 orders made by a magistrates' court can be enforced by fining persons in default or committing them to prison

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462 Part II deals with divorce and separation, Part IV with family homes and domestic violence cases.

463 Rule 4.12 *op cit* and rule 12 of the Family Proceedings Courts (Children Act 1989) Rules 1991, (S1 1991/1395).

464 Section 41(3) and (4).

465 There is no rule as to how old a child must be before he can be considered able to give instructions. Bromley and Lowe suggested that as a rule of thumb, a child aged 10 or above might be expected to be capable: Bromley & Lowe, *Bromley's Family Law* (1992), 520.

466 *Op cit*, rule 4.12(1).

467 Section 41(4)(b).

468 Dame Margaret Justice Booth, "The Children Act 1989 - the Proof of the Pudding", Statute Law Review, vol. 16, No 1, (1995), at 17-8.

469 See generally, Lowe 4 Journal of Child Law 26, (1992).

until the default is remedied or for a period not exceeding two months.[470] The court may act on its own motion or by complaint.[471]

3.139 In the county court and the High Court, breach of an order may be punished as contempt of court. The contemnor may be imprisoned for up to two years for breach of a High Court order, his property may be sequestered or he may be fined.[472] It is a requirement that a penal notice[473] must have been attached to the order in question.[474] It must be proved beyond reasonable doubt that the defendant broke the order knowingly.[475]

3.140 Where a person is required by a section 8 order to give up a child to another person and the court that made the order is satisfied that the child has not been given up, it may make an order authorising an officer of the court to enter premises (with force if necessary), search for the child, take charge of him and deliver him to that other person.[476]

3.141 Enforcement powers should be regarded as remedies of the last resort. Cretney and Masson observed that:

> *"In practice, the courts appear reluctant to use their enforcement powers except to ensure that children are returned to their residential carer.... Contact orders pose even more severe enforcement problems; a residential parent who refuses to permit contact may be imprisoned but this will rarely be in the interests of the children.... Before enforcing contact the court may attempt to make it more acceptable by defining or reducing it.... The court may make a family assistance order in the hope that a welfare officer can produce an acceptable arrangement and may even threaten a change in the child's residence."*[477]

Delay

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470 Children Act 1989, section 14 and Magistrates' Courts Act 1980, s 63(3). Section 14 of the Children Act 1989 mentioned only residence orders but section 63(3) of the Magistrates' Courts Act 1980 should apply to other section 8 orders because these were orders "to do anything other than the payment of money or to abstain from doing anything": *P v W* [1984] Fam Law 32.

471 Contempt of Court Act 1981, section 17, schedule 3.

472 Contempt of Court Act 1981, section 14.

473 That is a notice warning the person against whom the order is made that disobedience to the order constitutes a contempt of court which is punishable by imprisonment.

474 Rules of the Supreme Court, Order 45 r 7(4); County Courts Rules, Order 29, r 1(3) as amended by the Family Proceedings Rules 1991, r 4.21A.

475 For procedure, see Rules of the Supreme Court, Order 45 r 5 and Order 52; County Courts Rules 1981 Order 29 r 1. The court may sit in private where the application for an order for committal arises out of proceedings relating to wardship or wholly or mainly to the guardianship, custody or upbringing of an infant, or rights of access to an infant: RSC Order 52 r 6.

476 Family Law Act 1986, section 34 as amended by Children Act 1989, schedule 13, paragraphs 62 and 70.

477 Cretney & Masson, *op cit* at 580-581.

3.142 The 1989 Act provides that "[in] any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child".[478] In proceedings in which any question of making a section 8 order arises, the court is required to draw up a timetable with a view to determining the question before it without delay and to give such directions as it considers appropriate for the purpose of ensuring that the timetable is adhered to.[479] The court is under an obligation to oversee the progress of the case and to presume that all delay is prejudicial to the child's interests unless the contrary is shown. There are occasions where delay might be beneficial to the child's welfare, as when the benefit derived from a thorough welfare report outweighs the adverse effects of delay in obtaining it.

3.143 The procedure for drawing up the timetable which specifies the periods within which the various steps must be taken is governed by the rules of court.[480] Under the rules, a definite return date must be fixed before the end of any hearing of the case until the application is finally disposed of. Once the time has been fixed it cannot be extended except by leave of the court.[481]

Rationale for timetable

3.144 The English Law Commission explained the need for a timetable as follows:

> *"Prolonged litigation about their future is deeply damaging to children, not only because of the uncertainty it brings for them, but also because of the harm it does to the relationship between the parents and their capacity to co-operate with one another in the future. Moreover, a frequent consequence is that the case of the parent who is not living with the child is severely prejudiced by the time of the hearing. Regrettably, it is almost always to the advantage of one of the parties to delay the proceedings ... and ... to make difficulties over contact in the meantime."*[482]

Jurisdiction

3.145 The Children Act 1989 created a new jurisdictional structure to deal with children cases, "under which, for the first time, all proceedings relating to the same child can

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478 Section 1(2).

479 Section 11(1).

480 That is the Family Proceedings Rules 1991 which govern proceedings in the High Court and county court, and the Family Proceedings Courts (Children Act 1989) Rules 1991 which govern proceedings in the magistrates' courts.

481 See also Practice Direction of 22 November 1993 on the duty of parties to give time estimates for the hearing of proceedings relating to children, [1994] 1 All ER 155.

482 Law Com No 172, paragraph 4.55. Delay reinforces the status quo and makes it difficult to argue for a change.

be heard together in the same court, and the same rules will apply in all courts and all proceedings (apart from wardship, which will, however, be largely restricted to the private law field)."[483]

3.146 A concurrent jurisdiction for the High Court, the County Court and the Magistrates Family Proceedings Court to hear all children proceedings is created by section 92(7) which provides that, for the purposes of the Act, wherever reference is made to "the court" what is meant is "the High Court, a county court or a magistrates' court". The broad objective was "to achieve, as far as possible, uniformity of orders, flexibility and consistency in the procedure and remedies applying in different levels of court".[484]

Allocation of proceedings

Commencement

3.147 The objective of speedy and efficient case management is implemented by the new "start" and "transfer" provisions. Under Schedule 11, paragraph 1(1) and (2), the Lord Chancellor is empowered to make orders regulating the level of court or the description of court within a tier in which proceedings under the 1989 Act may be started.

3.148 Article 3 of the Children (Allocation of Proceedings) Order 1991 provides that certain "specified proceedings", that is those concerning local authorities must be started in the magistrates' court. These are the only proceedings where the 1991 Order regulates the court level at which proceedings must be started. However, the vast majority of proceedings under the 1989 Act are "self-allocating" as the largest percentage of cases will be originated in divorce proceedings which must be made to the divorce county court. "There is no formal regulation on the initial court allocation of free standing applications for section 8 orders or orders under Part 1 of the 1989 Act".[485]

Transfer

3.149 Rules of court control the allocation of cases between the different courts and facilitate the vertical and lateral transfer of proceedings or parts of proceedings either between tiers of courts or between courts within the same tier.[486] Proceedings can be transferred sideways, that is, for example, from one magistrates' court to another.

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483 Scott, "Problems in Court Structures and Processes", 44 CLP 15, 24-5 (1993).

484 Bainham, *Children: The Modern Law*, at 68-9.

485 *Idem*

486 Section 92(6) and Schedule 11 paragraphs 1, 2. Transfers are governed by the Children (Allocation of Proceedings) Order 1991. Before ordering a transfer, the transferring court must consider that it is in the best interests of the child because the receiving court is likely to accelerate the hearing, or because it is appropriate for the proceedings to be heard with other proceedings pending in the receiving court or "for some other reason". Dame Margaret Justice Booth, *op cit* at 18-19.

3.150 The Children (Allocation of Proceedings) Order 1991 defines the criteria which may lead to transfer:

> *"If the case is exceptionally grave, important or complex; if the case should link to other family proceedings in the other court already; if the transfer is likely significantly to accelerate the determination of the proceedings in particular circumstances including where delay would seriously prejudice the interests of the child".*

3.151 The Lord Chancellor has the power under Schedule 11, paragraph 2, to order that in specified circumstances the whole or part of specified proceedings may be transferred to another court (whether or not at the same level). Proceedings may be transferred at any stage. It is intended that children's cases in the higher courts should be heard by members of the judiciary who, by reason of their experience and training, are specialists in family work.

3.152 The Lord Chancellor has power, with the concurrence of the President of the Family Division, to make directions (1) allocating particular types of family proceedings to a particular level (or order) of judge, and (2) allocating a particular type of proceedings to a specific individual judge. "The intention is to create a nominated group of Circuit and District judges (formerly county court registrars) who will specialise in specific types of family proceedings and to whom, by direction, particular cases may be assigned."[487]

Privacy

3.153 The Children Act 1989 provides that rules may be made under the Magistrates' Courts Act 1980 to provide for cases to be heard in private when exercising any of its powers under the 1989 Act.[488] It does not, however, make any provisions for the higher courts to sit in private. White, Carr and Lowe expected that the practice of the High Court to deal with applications in chambers under the Rules of the Supreme Court would continue when hearing applications under the 1989 Act.[489]

Publicity

3.154 It is an offence for anyone to publish any material intended to identify any child as being involved in any children's proceedings before a magistrates' court or that child's address or school.[490] It is a defence for the accused to prove that he did not know, and had no reason to suspect, that the published material was intended to identify the child. The court or the Lord Chancellor may lift the restriction if satisfied that the child's welfare requires it.[491]

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487 Scott, "Problems in Court Structures and Processes", 44 CLP 15, at 25 (1993).

488 Section 97(1).

489 White, Carr & Lowe, *op cit* at paragraph 9.24. See Rules of the Supreme Court, Order 90, rule 7.

490 Section 97(2)-(6).

491 Section 97(4). This is intended to apply to cases where it is in the child's interests that the facts be disclosed.

3.155 As for the higher courts, the Administration of Justice Act 1960 prohibited the publication of information relating to proceedings before any court sitting in private in cases where the proceedings:

(a) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors,
(b) are brought under the Children Act 1989, or
(c) otherwise relate to the maintenance or upbringing of any minor.[492]

3.156 The provision prohibits publication of the contents of any reports made in connection with the hearing and of proofs of witnesses and submissions made during proceedings. It does not prevent publication of the names and addresses or photograph of the child nor of details about the order.[493]

Wardship

Public proceedings

3.157 The statutory power of the High Court to place a ward of court in the care (or under the supervision) of a local authority under the Family Law Reform Act 1969 has been repealed.[494] Furthermore, the High Court no longer can exercise its inherent jurisdiction to require a child to be placed in the care (or put under the supervision) of a local authority, or to require a child to be accommodated by a local authority.[495]

3.158 The High Court is also prevented from exercising its inherent jurisdiction so as to make a child who is the subject of a care order a ward of court.[496] It is now clear that a child in care does not become a ward upon the making of a wardship application.[497] There is, however, nothing to stop the High Court from exercising its inherent jurisdiction to decide a specific question concerning a child in care.

3.159 In addition, the High Court may not exercise its inherent jurisdiction "for the purpose of conferring on any local authority power to determine any question which has

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492 Administration of Justice Act 1960, section 12 as amended by the Children Act 1989, schedule 13, paragraph 14.

493 White, Carr & Lowe, *op cit* at paragraph 9.29. The High Court may, nevertheless, impose specific restrictions under its inherent jurisdiction. See further, especially for relevant judgements, *Clarke Hall & Morrison on Children*, vol. 1 paragraphs 303-330.

494 Section 100(1).

495 Section 100(2)(a)(b). All the High Court can do is to direct a local authority to investigate the child's circumstances under section 37.

496 Section 100(2)(c). Where the child is in care, no one may seek a section 8 other than a residence order: section 9(1).

497 Supreme Court Act 1981, section 41(2A), added by Children Act 1989, schedule 13, paragraph 45(2). On the other hand, the making of a care order with respect to a ward brings that wardship to an end: section 91(4).

arisen, or which may arise, in connection with any aspect of parental responsibility for a child".[498]

Private proceedings

3.160 The 1989 Act does not directly affect the use of wardship by private individuals. Wardship falls within the definition of "family proceedings" in the Act[499] and may still be used to resolve private issues relating to children. The aim of the Act is to incorporate the most valuable features of wardship into the statutory jurisdictions thereby reducing the need to invoke the High Court's inherent jurisdiction.[500] As the courts are given wide powers under section 8 in all family proceedings, there is now less need to rely on wardship. Thus any interested party who wants to protect a child's health and welfare may either use wardship or apply for a prohibited steps or specific issue order in family proceedings.[501]

3.161 Dame Margaret Justice Booth suggested that the use of wardship proceedings or the inherent jurisdiction of the High Court should now be regarded as exceptional. She stated:

> *"It should be resorted to only when it becomes apparent to the judge that the question ... in relation to a child's upbringing or property cannot be resolved under the statutory procedures ... or when the child's person is in a state of jeopardy and he can only be protected by the status of wardship[502] or where that status will prove a more effective deterrent than the ordinary sanctions of contempt of court".[503]*

3.162 Cretney and Masson pointed out that wardship (or the court's inherent jurisdiction) is still valuable for the following cases:[504]

(a) where the superior skill and authority of the High Court is required (unless the rules relating to transfer succeed in allocating cases appropriately),

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498 Section 100(2)(d).

499 Section 8(3)(a), that is, the inherent jurisdiction of the High Court in relation to child.

500 Law Com No 172, paragraph 4.18-20; *Hansard* HL Deb, 6 Dec 1988, Vol 502, col 493.

501 For instance, to justify medical treatment on children without parental consent, the medical profession may obtain the court's authority to act against parents' wishes either in wardship or by seeking a specific issue order. A parent who wants to prevent the medical profession from giving treatment to his child may also do so in wardship or by seeking a prohibited steps order.

502 Once an originating summons is issued, the child becomes a ward of court and no "important step" in the child's life can be taken without the court's consent.

503 Dame Margaret Justice Booth, *op cit* at 19.

504 Cretney & Masson, *op cit* at 579. Wardship is only one use of the High Court's inherent *parens patriae* jurisdiction. It is open to the High Court to make orders under its inherent jurisdiction in respect of children other than through wardship. See Bromley & Lowe, *op cit* at 459.

(b) where the speed with which orders can be obtained is critical,
(c) where injunctions are required to control the behaviour of a third party (unless reforms of the domestic violence legislation are introduced),[505] and
(d) where some ongoing supervision by the court may be desirable.

Chapter 4

Comparative Law: Scotland

4.1 This Chapter examines the Scottish Law Commission proposals in their *Report on Family Law*[506] and the subsequent legislation implementing their recommendations. The Children (Scotland) Act 1995 does not merely follow the precedent set by the English Children Act 1989. The Scottish Commission had the opportunity to see what aspects of the 1989 Act were working and those that were not. There have been calls over the years in Hong Kong from family lawyers and others that Hong Kong should follow the Children Act 1989. Much can be gained in analysing why the Scottish Law Commission did not follow some of the English provisions and this has guided us in drawing up the most appropriate proposals for reform in Hong Kong.

Parental responsibilities

4.2 The Children (Scotland) Act 1995 changed the law on the responsibilities and rights of parents. Section 1 provides that a parent has a responsibility to his child:

(a) to safeguard and promote the child' s health, development[507] and welfare,

(b) to provide in a manner appropriate to the stage of development of child

(i) direction,
(ii) guidance to the child,

(c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis, and

(d) to act as the child' s legal representative.[508]

4.3 A child or a person on his behalf may sue for breach of those responsibilities.[509] Section 1(4) provides that these new parental responsibilities supersede

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505 See Part IV of the Family Law Act 1996.

506 (1992: No. 135).

507 The United Nations Convention on the Rights of the Child, 1989 refers in article 18 to the parental "responsibility for the upbringing *and development* of the child".

508 The Commission had recommended that this provision gave the parent capacity to administer, in the interests of the child, any property belonging to the child. See 2.6.

common law duties but not statutory duties. Examples of such statutory duties are those relating to financial support under the Family Law (Scotland) Act 1985, the Child Support Act 1991 and those relating to education under the Education (Scotland) Act 1980.[510]

Objectives

4.4 The Scottish Law Commission had suggested that the objectives of a statutory statement of parental responsibilities were likely to be:

(a) that it would make explicit what was already implicit in the law,

(b) that it would counteract any impression that a parent had rights but no responsibilities, and

(c) that it would enable the law to make it clear that parental rights were not absolute or unqualified, but were conferred in order to enable parents to meet their responsibilities.[511]

4.5 There was very strong majority support for a clear *statutory* statement, despite the fact that the common law already recognises that there are general parental responsibilities.[512] Article 5 of the United Nations Convention on the Rights of the Child refers to:

> *"the responsibilities ... of parents ... to provide, in a manner consistent with the evolving capacities of the child appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention."*

4.6 Article 5 concentrates on the child's rights under the Convention. The Commission felt that since this principle was already recognised in Scottish law, the legislation should incorporate this principle:

> *"Appropriate direction and guidance might relate not only to the exercise by the child of his or her rights (such as his or her contractual rights under the Age of Legal Capacity (Scotland) Act 1991) but also, and importantly, to the child's responsibilities and indeed generally to the child's activities and decisions".*[513]

The Commission recommended that this responsibility should last until the age of 18.[514]

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509 Section 1(3).
510 *Ibid* at 2.13.
511 Scottish Law Commission, *Report on Family Law* (1992: No. 135) at 2.1.
512 *Ibid* at 2.2.
513 *Ibid* at 2.4.
514 *Ibid* at 2.10.

Age

4.7 The age at which legal parental responsibilities cease depends on the nature of those responsibilities. The Commission suggested that "it is not unrealistic to talk of a parental responsibility to safeguard and promote, *so far as is practicable,* the health, development and welfare of a child of 16 or 17 who is living independently". Other children might still be undergoing education or training after the age of 16 or 17 but still are financially dependent on their parents.[515]

4.8 The Commission explained its justification for different parental responsibilities for different ages thus:

> *"We recognise that it is less tidy to have different parental responsibilities ending at different ages than to have a uniform age. Nonetheless we think that the reality of family life is that certain parental responsibilities of a supportive, protective or advisory nature continue after the child attains the age when he or she has considerable legal capacity and freedom of action ... Recognising that certain parental responsibilities continue after the age of 16 does not require an extension of parental rights in relation to the residence and upbringing of a young person to continue beyond that age ...."*[516]

4.9 Most of the Commission's recommendations on age were incorporated into section 1(2)(a) and (b) of the Act. Section 1(2) in fact provides that the responsibilities under section 1(1)(a), (b)(i), (c), (d)[517] should last until 16 and only the responsibility for providing guidance to the child should last until 18 years. Parental rights are only applicable to a child under 16 years, including the right to give guidance. This differs from the recommendations made in the Commission's report, but there is no explanation given in the Bill's explanatory memorandum for this divergence.

Child's legal representative

4.10 The responsibility to act as the child's legal representative and administer the child's property (provided that it was appropriate and in the child's best interests) includes giving legally effective consent, entering into important contracts, and raising or defending court actions, where the child is not legally capable of acting on his or her own behalf. A young person acquires full capacity to enter into legal transactions at the age of 16, so this should be the appropriate cut off point.[518]

4.11 The Commission recommended that the right of legal representation should be defined as "the right to administer the child's property and to act, or give consent, on behalf of the child in any transaction having legal effect where the child is incapable of acting

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515 *Ibid* at 2.9.
516 *Ibid* at 2.12.
517 See *supra*.
518 *Ibid* at 2.11.

or consenting on his or her own behalf". This was incorporated into section 15(5)(a) and (b) but the words "having legal effect." were omitted.[519]

4.12 The Commission's definition of legal representation is similar to the existing definition of guardianship under the Age of Legal Capacity (Scotland) Act 1991. This provides that:

> *"a parent's guardianship is his or her right to manage the child's property, enter into contracts on the child's behalf, litigate on the child's behalf, and generally to act on the child's behalf in any legally relevant matter where the child is incapable of acting on his or her own behalf".*[520]

Guardianship lasts until the child is 16.

Parental rights

4.13 To balance out the responsibilities, there is a provision for parental rights in section 2. It may appear confusing to state that the parent has certain rights "in order to enable him to fulfil his parental responsibilities". The Commission explained that:

> *"Many consultees considered that the emphasis of the law in this area should be on parental responsibilities rather than parental rights and that it would fit in well with this view to emphasise that parents had parental rights in order to enable them to fulfil their parental responsibilities".*[521]

4.14 Section 2 provides that these rights are:

> *"(a) to have the child living with him or otherwise to regulate the child's residence;*
> *(b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;*
> *(c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and*
> *(d) to act as the child's legal representative."*[522]

The parent can sue or defend proceedings in relation to the rights.[523]

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519 *Ibid* at 2.27.
520 As paraphrased at 2.15.
521 *Ibid* at 2.14.
522 The section is implementing recommendations at 2.35.
523 Section 2(4).

4.15 Under the existing Scottish law, parental rights of guardianship, custody and access last until the child is 16. The Commission recommended that the rights referred to in the new legislation should also last until the child is 16, even though some parental responsibilities may continue for longer.[524]

4.16 The definition of "parental rights" in the Law Reform (Parent and Child) (Scotland) Act 1986 also refers to: "any right or authority relating to the welfare or upbringing of a child conferred on a parent by any rule of law". The Commission argued that it was unsatisfactory to expect non-lawyers to understand a definition of parental rights "which says, in effect, that parental rights are what the common law says they are, without providing further assistance".[525] However, specific statutory rights do not need to be included in a general definition of parental rights.[526] The specified parental rights supersede common law rights but not statutory rights.[527]

Concept and language of custody

4.17 The Commission referred to section 8 of the Law Reform (Parent and Child) (Scotland) Act 1986 for its definition of custody:

> *"the right of a person to have the child living with him or her (or otherwise to regulate the child's residence) and to control the child's day to day upbringing. 'Child' in relation to custody means a child under the age of 16 years".*[528]

4.18 The Commission referred to:

> *"comments from well-informed and experienced consultees to the effect that the existing concept of custody was not well understood .... It is by no means clear whether the right to control the child's day to day upbringing is part of custody or an independent parental right. It seems too that some parents who have obtained an award of sole custody think that that gives them all the parental rights in relation to the child to the complete exclusion of the other parent."*[529]

Removal of a child from the jurisdiction

4.19 Section 2(3) deals with this issue:

> *"Without prejudice to any court order, no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any*

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524 *Ibid* at 2.34.
525 *Ibid* at 2.18.
526 *Ibid* at 2.19.
527 Section 2(5). Such rights would include the right to nominate a testamentary guardian.
528 As paraphrased in 2.16.
529 *Ibid* at 2.28.

such child outwith, the United Kingdom without the consent of a person described in subsection (6) below."

4.20 Subsection (6) refers to a person (whether or not a parent of the child), who for the time being has a right under subsection (a) (entitled to control the child's residence) or (c) (with whom the child has contact on a regular basis) except that where both parents are such persons, then both their consent is required for removal or retention.

4.21 Subsection (6), though rather clumsily drafted, at least appears to draw a distinction between parents who are on good terms who would need to give joint consent, and parents who are not living together. It should be noted that a court order is not required as proof so the only question is what proof would be needed that one parent was not living with the child but still maintaining regular contact with him.

4.22 The Commission explained that this provision:

> *"would be useful to remove any doubts about the removal of a child to a foreign country by one parent alone without the consent of the parent with whom the child is living is a wrongful removal for the purposes of the Hague Convention on the Civil Aspects of International Child Abduction. We do not intend the right of independent action by one parent to provide grounds for any argument that he or she is within his or her rights, and not in breach of anyone else's rights, in removing the child without the other parent's consent."*[530]

Court order prevails

4.23 Section 2(8) of the 1989 Act provides that: "The fact that a person has parental responsibility for a child shall not entitle him to act in any way which would be incompatible with any order made with respect to the child under this Act."

4.24 In a similar spirit to the above section, the rights and responsibilities are further balanced by a provision in section 3(4) of the 1989 Act that these do not entitle a parent to act in any way which would be incompatible with a court order relating to a child or supervision or his property. Section 3(4) of the Scottish Act incorporated both of the English provisions.

Delegation

4.25 The Commission agreed that there should be similar provisions to sections 2(9), (10) and (11) of the Children Act 1989. This was implemented in section 3(5) which provides that:

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530 *Supra* at 2.56.

"Without prejudice to section 4(1) of this Act, a person who has parental responsibilities or parental rights in relation to a child shall not abdicate those responsibilities or rights to any one else but may arrange for some or all of them to be fulfilled or exercised on his behalf; and without prejudice to that generality any such arrangement may be made with a person who already has parental responsibilities or rights in relation to the child concerned;

(6) the making of an arrangement under subsection (5) above shall not affect any liability arising from a failure to fulfil parental responsibilities ...."

Unmarried fathers

4.26 However, sections 3 and 4 of the Children (Scotland) Act 1995 draw a distinction between unmarried and married fathers, similar to the English Children Act 1989. An unmarried father does not have parental responsibility unless provided by agreement between the parents[531] or by court order. Norrie criticised these provisions: "One could ... accept that a sinful (i.e. unmarried) father ought to be denied rights because of his sin, but it is surely illogical to argue that a sinful father should ... be absolved of his responsibilities".[532] His response on the proposed agreements is that these agreements have not proved popular in England.

Medical treatment

4.27 Section 3(5) of the Children Act 1989 provides that:

"A person who:

(a) does not have parental responsibility for a particular child; but
(b) has care of the child,

may (subject to the provisions of the Act) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare."

4.28 The Commission considered that such a provision should be included in the Scottish legislation, and gave as an example of its possible application the situation of a young child being sent to stay with relatives or friends for a holiday. A provision such as section 3(5) would ensure that the adult with temporary care of the child could arrange for medical treatment if the child had an accident. It would be useful for step-parents and foster

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531 Section 4.

532 "Parental Responsibilities and Parental Rights," Journal of the Law Society of Scotland, September 1995, 340, 341.

parents. The Commission also gave the example of a step-parent or foster parent with actual care or control of a five-year old child who should be able to give consent to any medical treatment or procedure (such as an immunisation at school) which is in the child's interests and to which the child is not capable of consenting on his or her own behalf.

4.29 However, concern was expressed by consultees as to whether the English provision would be clear enough to cover consent to medical treatment. The Commission recommended that this should be clarified in the legislation. However, the Commission did not recommend the inclusion of teachers in a school. "A teacher should not, for example, be able to give a blanket consent to the immunisation of a whole class of school children".[533]

4.30 Section 5 provides:

> *"Subject to subsection (2) below, it shall be the responsibility of a person who has attained the age of 16 years and who has care or control of the child under that age, but in relation to him either has no parental responsibilities or rights or does not have the parental responsibility mentioned in section 1(1)(a) of this Act,* [534] *to do what is reasonable in all the circumstances to safeguard the child's health, development or welfare; and in fulfilling his responsibility under this section the person may in particular even though he does not have the parental right mentioned in section 2(1)(d) of this Act, give consent to any surgical, medical or dental treatment or procedure where:*
>
> *(a) the child is not able to give such consent on his own behalf and*
> *(b) it is not within the knowledge of the person that a parent of the child would refuse to give the consent in question."*

4.31 Subsection (2) indicates that the section does not apply to a teacher in a school. Since 1991 children over the age of 16 years in Scotland have effectively had full legal capacity to consent to medical treatment or medical procedures[535] or otherwise. This differs from the narrower approach adopted in England. It should be noted that section 2(4) of the Age of Legal Capacity Act 1991 already provides:

> *"A person under the age of 16 years shall have legal capacity to consent on his own behalf to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending him, he is capable of understanding the nature and possible consequences of the procedure or treatment".*

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533 *Ibid* at 2.59.

534 This would cover people such as baby-sitters or child-minders.

535 Medical procedures would include a blood donation.

Views of the child

4.32 The Commission considered whether a parent or other person exercising parental rights should be under an obligation (similar to a local authority who has a child in its care) to ascertain and have regard to the child's wishes and feelings.[536]

4.33 Article 12(1) of the United Nations Convention on the Rights of the Child provides that:

> *"States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."*

4.34 The Commission preferred the term "views" to "wishes and feelings" as:

> *"it recognises that a young person may be ... capable of balancing his ... immediate wishes and feelings against long term considerations and the interests of others and [then] coming to a considered view as to what was the right course of action in the circumstances."*[537]

They also preferred the term "maturity" rather than "understanding" "because it recognises that more than just cognitive ability may have to be taken into account".[538]

4.35 Even though the Commission found this view attractive, there were practical difficulties as it would be unrealistic to require a parent to consult on all decisions, however minor, relating to the child. In any case, it would be difficult to impose any sanction for non-compliance: "The parent's position is different from that of a local authority, which is accountable to the public and subject to judicial review".[539]

4.36 Consultees gave majority support for such a proposal which was then incorporated into section 6 of the Act, even though there were reservations expressed that it would be vague and unenforceable. However, it was seen as an important declaration of principle.[540] Norrie argued that "legally speaking, it is difficult to see how the obligation in s 6 can be enforced ... this provision is symbolic and educative and in these terms is not unimportant".[541]

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536 *Supra* at paragraph 2.61.
537 *Ibid* at 2.63.
538 *Idem.*
539 *Ibid* at 2.62.
540 *Ibid* at 2.64.
541 *Supra* at 341.

4.37 Reflecting the change in ideology of the United Nations Convention on the Rights of the Child, section 6(1) provides that any person taking any major decision relating to a child in the exercise of any parental responsibility or right should, whenever practicable, ascertain the views of the child regarding the decision and give due consideration to them, having regard to the child's age and maturity. It seems clear that a decision about the future arrangements for the care of a child after divorce would constitute a "major decision".[542] The decision maker must also take account of the views of "any other person who has parental responsibilities or parental rights in relation to the child". A child of or above 12 is presumed to be of sufficient age and maturity.

Age of maturity

4.38 Section 6(1)(b) provides a presumption that a child of the age of 12 or more has sufficient age and maturity to form a view regarding a major decision. The Commission expressed concern that third parties should not be prejudiced by any failure of a parent or guardian to consult the child before dealing with the property of a child under the age of 16. This was provided the transaction was entered into in good faith. The Commission's recommendations[543] were incorporated into section 6(2), which provides as follows:

> *"A transaction entered into in good faith by a third party and a person acting as legal representative of a child shall not be challengeable on the ground only that the child, or a person with parental responsibilities or parental rights in relation to the child, was not consulted or that due consideration was not given to his views before the transaction was entered into".*

Views of the child

4.39 Article 12(2) of the United Nations Convention on the Rights of the Child provides that:

> *"For this purpose,[544] the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."*

4.40 The Commission made recommendations in the light of article 12 of the United Nations Convention, which are now incorporated into section 11(7) and (10) of the

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542 Sutherland, "A voice for the child", Journal of the Law Society of Scotland, vol 41, No. 10, October 1996, at 391.

543 *Ibid* at 2.66.

544 "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

Act. The Commission noted that in section 1 of the Children Act 1989 a court is bound, in *opposed* proceedings for a "section 8 order" to have regard to, among other things, the ascertainable wishes and feelings of the child.

4.41 The Commission argued that:

> *"the fact that the two adult parties to ... a divorce action are content with proposed arrangements for the child does not necessarily mean that it is any less important to have regard to the child's views. ... There are many cases in which evidence of the child's views is before the court even although the application relating to parental rights ends up by being unopposed. It seems to us that it would be difficult to justify a provision which appeared to regard the child's views as of less importance merely because an application was, or ended up being, unopposed."*[545]

4.42 The Commission recommended that:

> *"Rules of court should ensure that a child who is capable of forming his or her own views and who wishes to have his or her views put directly before a court in any proceedings relating to parental responsibilities or rights, or guardianship or the administration of the child's property, has a readily available procedural mechanism for doing so."*[546]

4.43 Section 11(7) provides that:

> *"In considering whether or not to make an order ... (relating to parental responsibilities or rights, or guardianship or the administration of a child's property) the court:*
>
> *(b) taking account of the child's age and maturity, shall so far as practicable*
> *(i) give him an opportunity to indicate whether he wishes to express his views;*
> *(ii) if he does so wish, give him an opportunity to express them; and*
> *(iii) have regard to such views as he may express."*

4.44 Section 11(10) provides that:

> *"Without prejudice to the generality of paragraph (b) of subsection(7) above, a child twelve years of age or more shall be presumed to be of*

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545 *Supra* at 5.26.

546 *Ibid* at 5.29 (for example, by lodging a minute).

sufficient age and maturity to form a view for the purposes both of that paragraph and of subsection (9) above."

This was intended to reflect "the long-standing Scottish approach to the views of minors above the age of puberty but would also, and more importantly, recognise the actual capacities of most young people in that age group."[547]

Separate representation

4.45 Section 11(9) provides: "Nothing in paragraph (b) of subsection (7) above requires a child to be legally represented, if he does not wish to be, in proceedings in the course of which the court implements that paragraph."

4.46 The Commission suggested that, even though the child is the "central figure", it is unrealistic to recommend that separate legal representation had to be arranged in every case where a court was considering parental responsibilities and rights.

> *"However attractive such an idea may be in theory it would certainly be ruled out on grounds of cost to the legal aid fund. There would be similar objections to any solution which made a report on the child's views mandatory in every case."*[548]

Guardianship

Appointment of guardians by parent

4.47 The Commission did not find difficulty with the existing law which provided that:

> *"the parent of a child may appoint any person to be guardian of the child after his death, but any such appointment shall be of no effect unless the appointment is in writing and signed by the parent; and the parent at the time of his death was guardian of the child or would have been such guardian if he had survived until after the birth of the child."*[549]

4.48 Section 7(1) of the Children (Scotland) Act 1995 provides that a parent can appoint a guardian for the child in the event of the parent's death, provided the appointment is in writing.

Appointment by existing guardian

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547 *Ibid* at 5.25.

548 *Ibid* at 5.29.

549 Section 4 of the Law Reform (Parent and Child) (Scotland) Act 1986 as amended by section 10 and Schedule 1 paragraph 41 of the Age of Legal Capacity (Scotland) Act 1991.

4.49 The Commission supported the inclusion of a provision similar to section 5(4) of the Children Act 1989. Thus, an elderly grandparent, who is sole guardian and who is anxious about the arrangements for the child after her death, could appoint a replacement.[550] Section 7(2) provides that:

> *"A guardian of a child may appoint a person to take his place as guardian in the event of the guardian's death, but such appointment shall be of no effect unless in writing and signed by the person making it".*

Views of child on appointment of guardian

4.50 The Commission received submissions that, where a child was of sufficient age and maturity, his views should be taken into consideration by a guardian proposing to appoint a replacement, or to an appointment of a guardian by a parent. Section 7(6) provides that:[551]

> *"Without prejudice to the generality of subsection (1) of section 6 ..., a decision as to the appointment of a guardian under subsection (1)[552] or (2)[553] above shall be regarded for the purposes of that section (or of that section as applied by subsection (5) above) as a major decision which involves exercising a parental right".*

4.51 The Commission suggested that a child who objected to the appointment of a guardian could apply to court for the termination of the appointment and, if necessary, the appointment of someone else.[554] However, the Act does not explicitly give the child that right.

Revocation of appointment

4.52 The Commission recommended that a power of revocation of an appointment of a nominated guardian should be provided for on similar lines to the provisions in section 6(1) to (4) of the Children Act 1989.[555] Section 8 implements this recommendation.

When appointment should take effect

4.53 The Commission felt that it was important, in the interests of the child as well as the guardian, that the guardianship of a child should not be imposed on anyone who was

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550 *Ibid* at 3.4.
551 *Ibid* at 3.5.
552 By a parent.
553 By an existing guardian.
554 *Ibid* at 3.5.
555 *Ibid* at 3.7.

unwilling to accept it. Scottish law provides that some act needs to be done expressly by a minute or letter of acceptance addressed to the executors of the deceased parent or impliedly (from acts which are not consistent with any other intention) to accept the office of guardian.

4.54 The Children Act 1989 in England is different as an appointment takes effect automatically but can be later disclaimed by an instrument in writing, which has to be registered in a prescribed way. The Commission did not agree with this provision as it would involve the guardian, who may not have been consulted about the appointment, in the inconvenience and expense of obtaining legal advice.[556]

4.55 Section 7(3) provides that: "An appointment as guardian shall not take effect until accepted, either expressly, or impliedly by acts which are not consistent with any other intention."

4.56 The Commission recommended that "the rule that where two or more persons have any parental right each of them may exercise it without the consent of the other or others, unless the deed or decree conferring the right provides otherwise" should apply where there were two or more guardians.[557] Section 7(4) provides that: "If two or more persons are appointed as guardians, any one or more of them shall, unless the appointment expressly provides otherwise, be entitled to accept office, even if both or all do not accept office."

Surviving parent

4.57 If a testamentary guardian has been appointed, then after the death of the appointing parent, the surviving parent continues to have full parental responsibilities and rights. The Commission suggested that:

> *"in many cases it would be expected that the guardian would be content for the surviving parent to exercise parental responsibilities and rights but the guardian would be available, in reserve, just as an absent parent would be, in case of emergencies."*

4.58 However, in some cases there might be conflict between the guardian and the parent. For example, "the mother may have been divorced from the father, and may have appointed her mother or her new husband as guardian. On the mother's death the father's wish to have the child living with him may be resisted by the grandmother or stepfather."[558]

4.59 The Commission felt that whether this type of case resulted in litigation depended more on the relationships between the parties, "rather than on whether the law

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556 *Ibid* at 3.8.

557 *Ibid* at 3.15.

558 *Ibid* at 3.10.

has a rule precluding a guardian from accepting office during the life of the surviving parent."[559]

4.60 However, the Commission noted that section 5(8) of the English Children Act 1989 provides that an appointment of a guardian by one parent does not take effect until the other parent dies or ceases to have parental responsibility for the child. If the appointing parent before his death had a residence order in force then the appointment does take effect. The Scottish Commission were concerned that there would be situations where the parents of a child are separated and yet have no residence order in force. "The father, for example, may simply have abandoned his family".[560]

4.61 This is also inconsistent with the policy that no order should be made unless this is necessary in the interests of the child. Section 3(2) of the Law Reform (Parent and Child) (Scotland) Act 1986 provides that a court should not make any order relating to parental rights "unless it is satisfied that to do so will be in the interests of the child". There is a similar provision in section 1(5) of the Children Act 1989.

4.62 A parent who is on good terms with the other parent can provide that an appointment of a guardian is not to take effect until after the other parent's death. The Commission recommended a more flexible solution which allows a guardian to accept office even if there is a surviving parent in existence, unless the appointing parent has made specific provision otherwise.[561] The legislation also provides that the other parent's responsibilities and rights subsist.[562]

Responsibilities and rights of guardian

4.63 The Commission noted that under the existing law the parent's right of guardianship differed from the rights conferred on non-parental guardians. "The parent's guardianship did not need to include rights in relation to the child's person and day to day upbringing, which the parent had anyway as parent". The Commission suggested that a non-parental guardian might need to have such rights.[563] The Commission agreed with the provision in the Children Act 1989 that a guardian should be given the normal parental responsibilities and rights to enable him or her to fulfil these responsibilities.[564] They accepted the view of the English Law Commission that "parenthood should become the primary concept. Any necessary distinctions between parents and guardians who act in loco parentis could then clearly be drawn ...."[565]

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559 *Idem.*

560 *Ibid* at 3.11.

561 *Ibid* at 3.12.

562 Section 7(1)(b).

563 This was in agreement with section 3(5) of the English Children Act 1989.

564 *Supra* at 3.13.

565 Paragraph 2.3 of *Family Law, Review of Child Law, Guardianship and Custody*, (Law Com. No. 172), July 1988.

4.64 Section 7(5) provides that a guardian will have parental rights and responsibilities[566] subject to an order under section 11[567] or section 86.[568]

Termination of guardianship

4.65 The Commission suggested that:

> *"although a person should be free to accept or refuse the guardianship of a child, the interests of the child require that, once the guardian has unequivocally accepted office, he or she should not be able to surrender or transfer his or her responsibilities, other than by means of an appropriate court order or orders".*[569]

4.66 Section 8(5) provides that:

> *"Once an appointment of a guardian has taken effect, under section 7 of this Act, then, unless the terms of the appointment provide for earlier termination, it shall terminate only by virtue of:*
> *(a) the child concerned attaining the age of 18 years;*
> *(b) the death of the child or the guardian; or*
> *(c) the termination of an appointment by a court order under section 11...."*

Types of orders

4.67 Section 11 defines the types of orders which are available. These differ slightly from those to be found in section 8 of the English Children Act 1989:

> (1) A "residence order" is : *"an order regulating the arrangements as to:*
> *(i) with whom; or*
> *(ii) if with different persons alternately or periodically, with whom during what periods,*
> *a child under the age of sixteen years is to live."*
>
> (2) A "contact order" is : *"an order regulating the arrangements for maintaining personal relations and direct contact between a*

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566 Section 7(5).

567 An order of the court which can deprive or modify the rights and responsibilities.

568 This provides for parental responsibilities and rights to be transferred to a local authority, the equivalent of the Social Welfare Department in Hong Kong

569 *Supra* at 3.16

child under that age and a person with whom the child is not, or will not be, living."

(3) A "specific issue order" is: *"an order regulating any specific question which has arisen, or may arise, in connection with any of the matters mentioned in paragraph (a) to (d) of subsection (1)...."*[570]

4.68 Section 11(4) also refers to an order for interdict, which is somewhat similar to the "prohibited steps order" of section 8 of the English Children Act 1989:

> *"an interdict prohibiting the taking of any step of a kind specified in the interdict in the fulfilment of parental responsibilities or the exercise of parental rights relating to a child or in the administration of a child's property."*

4.69 Section 11(2) provides that these orders are without prejudice to the generality of the court's powers to make such orders as it thinks fit. The Commission also recommended that it should be made clear that a court, in an order relating to parental responsibilities or rights or guardianship, may deprive a person of some or all of his parental responsibilities or rights or appoint or remove a guardian. This has been separately provided for by section 11(2) (a) and 11(2)(h) respectively. Norrie suggested that this could be used to remove a parent's right to enter into legal transactions on behalf of a child but not the right to look after the child.[571]

4.70 The Commission concluded that:

> *"It is clear that the use of this type of order is not a panacea. We hope that the changes recommended here may contribute in some small measure to a change in perceptions and to an increasing recognition that both parents remain parents, and have a role to play as such, even if their own relationship has unfortunately broken down and their child can no longer live with both of them at the same time."*[572]

Persons who can apply

4.71 The Commission noted that the Law Reform (Parent and Child) (Scotland) Act 1986 already allowed "any person claiming interest" to apply for an order relating to parental rights.[573] Section 11(3) allows any person to seek an order unless they are a local authority or a person who has had parental responsibilities and rights removed by an order

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570 These include parental responsibilities, rights, guardianship and the administration of a child's property.

571 *Supra* at 342.

572 *Ibid* at 5.6

573 *Ibid* at 5.7

under Part II[574] or by adoption. Norrie explained that "this means that, for example, a parent whose child has been adopted cannot use s 11 to acquire back his or her responsibilities and rights given up or lost at the adoption".[575]

4.72 Section 11(5) clarifies that the child concerned may apply for an order relating to parental responsibilities or rights, guardianship or the administration of his or her property.

Avoidance of unnecessary orders

4.73 The concern about unnecessary orders relating to parental rights is also recognised even though Scotland has already a provision, by section 3(2) of the Law Reform (Parent and Child) (Scotland) Act 1986, providing that a court "shall not make any order relating to parental rights unless it is satisfied that to do so will be in the interests of the child". The Commission felt that this should be strengthened. This is because of the "new emphasis on orders which, so far as possible, do not deprive either parent of any parental rights".[576] Section 11(7)(a) provides that the court:

> *"shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order[577] unless it considers that it would be better for the child that the order be made than that none should be made at all".*

4.74 Norrie explained the importance of this shift in thinking thus-

> *"a divorcing parent who wants to be the child's sole carer must seek to show why the other parent should have responsibilities and rights taken away rather than showing why he or she, the applicant, should be allowed to be sole carer".*

4.75 Section 11(8) puts a duty on the court, where there are orders relating to the administration of a child's property to qualify the principle of subsection (7) by protecting the position of third parties who have acquired any property of the child, or any right or interest in relation to it, in good faith and for value.[578]

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574 This deals with applications by local authorities.

575 *Supra* at 342.

576 *Ibid* at 5.17.

577 Relating to parental responsibilities, parental rights, guardianship or the administration of a child's property, subject to section 14 (1) and (2) of the Act. This deals with the jurisdiction of the Act.

578 This is implementing 5.18.

Checklist of factors

4.76 The English Children Act 1989 does provide a checklist in section 1(3) and (4). The Commission noted a divergence of views expressed to them on the issue of a statutory checklist:

> *"Most respondents favoured a statutory checklist but there was significant opposition from legal consultees who feared that it could lengthen proceedings and cause judges to adopt a mechanical approach to going through the list even in, say, an application for a minor variation in an order."*

4.77 The Commission did not favour a lengthy statutory checklist. They suggested that even if there was not such a list in primary legislation, legal advisers and social workers could use their own checklists. In any event, the welfare principle was all encompassing. Their recommendations were accepted and no checklist is included in the Children (Scotland) Act 1995. However, the Commission recommended that the child's own views ought to be taken into account and should not be seen as already included in the welfare principle.

Duty to approve arrangements

4.78 Scotland has a similar provision to Hong Kong that a court must be satisfied in any divorce proceedings as to the arrangements made for any children of the marriage under the age of 16 in section 8 of the Matrimonial Proceedings (Children) Act 1958. The Commission criticised this provision :

> *"on the ground that the time of the legal divorce is rather late for bringing home to the parties their responsibilities for their children.... It places a duty on courts without giving them the means of fulfilling it. It may raise unrealistic expectations about what can be achieved. In practice there is no way in which a court can be fully satisfied that the arrangements for children are satisfactory."*

4.79 However, the Commission did not recommend that an independent welfare report in all cases was the solution as it would be "an extremely expensive and wasteful use of resources", as there may be no dispute about parental responsibilities or rights in some cases.[579]

4.80 The Commission agreed with the English Law Commission's view that:

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[579] *Ibid* at 5.31.

"requiring the court to find the arrangements satisfactory may be imposing higher standards on those who divorce than on those who remain happily married."

4.81 The Commission's views were grounded in a minimum interventionist stance:

"section 8 intervenes more in the child care arrangements of those who divorce than of those who remain unhappily married but live apart. It also treats those who marry and divorce as being more in need of intervention than those who cohabit and then split up."[580]

4.82 The Commission concluded that the more modest duty, contained in section 41 of the Matrimonial Causes Act 1973 as substituted by the Children Act 1989, should be introduced. However, the Commission recommended that the court should be given power to make orders even if they were not applied for similar to section 10(1)(b) of the 1989 Act. "This is consistent with a child-centred approach to parental responsibilities and rights, although no doubt it would be rare for this power to be exercised."[581] This recommendation was inserted into section 11(3)(b) of the Act.

Child of the family

4.83 Section 12(4) provides that:

"In this section 'child of the family,' in relation to the parties to a marriage, means:

(a) a child of both of them; or

(b) any other child, not being a child who is placed with those parties as foster parents by a local authority or voluntary organisation, who has been treated by both of them as a child of their family".

Effect of orders

4.84 Section 12(2) of the Children Act 1989 provides that:

"Where the court makes a residence order in favour of any person who is not the parent or guardian of the child concerned that person shall have parental responsibility for the child while the residence order remains in force."

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580 *Ibid* at 5.33.

581 *Ibid* at 5.35.

4.85 The Commission was strongly pressed to incorporate a similar provision in Scotland as, "if a court decided that a child was to live with, say, a grandmother, it was entirely appropriate that the grandmother should have parental responsibilities and rights." However the Commission had reservations: "We think that it would be better not to talk of a residence order 'in favour of' someone. That re-introduces the idea of winners and losers which the new terminology seeks to abandon."[582] The following recommendation of the Commission has been included in section 11(12) of the Act:

> *"Where a court makes a residence order to the effect that a child is to live with a person who is not a parent or guardian of the child concerned, that person should have parental responsibilities and rights in relation to the child while the residence order is in force".*

4.86 The Commission considered the position of step-parents *vis a vis* the children of their spouse. "The availability of a non-exclusive package of parental responsibilities and rights, conferred in a way which is as non-threatening to the absent parent as possible, could be particularly useful for step-parents".

4.87 The following recommendation of the Commission was incorporated into section 11(11):

> *"A court order by which any person acquires any parental responsibility or right should deprive any other person of any parental responsibility or right only in so far as the order expressly so provides and only to the extent necessary to give effect to the order."*[583]

4.88 Section 11(5) of the Children Act 1989 provides that a residence order in favour of one parent ceases to have effect if the parents live together for a continuous period of more than six months. Section 11(6) the Children Act 1989, makes a similar provision for contact orders. Such provisions only received limited support on consultation as they were seen as unnecessary or arbitrary, as the couple might separate again after 7 months. The Commission did not make a recommendation for similar provisions.[584]

Change of surname

4.89 Section 13 of the Children Act 1989 restricts any change in a child's surname or removal of the child from the United Kingdom when a residence order is in force with respect to that child.

4.90 The Commission suggested that change of a surname could be dealt with by means of a specific issue order granting parental rights, including the right to change the name.[585] The Commission felt that the existing practices met the situation. The Commission

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582 *Ibid* at 5.37.
583 *Ibid* at 5.39.
584 *Ibid* at 5.40.
585 *Ibid* at 5.41.

argued that the existence of a residence order should not lead to a special rule as many separated parents will not have applied for a residence order. They did not want to encourage more applications for court orders because of the "no order" principle.

Removal

4.91 Under the Child Abduction Act 1984 it is an offence for a person connected with a child to take the child out of the United Kingdom without the appropriate consent if there is a court order awarding custody of the child to any person. The Commission recommended that this be changed to include a reference to a residence order in respect of a child. This has been done in Schedule 4, paragraph 34 and 37. The Commission recommended that given the existing provisions whereby Scottish courts have wide powers to grant orders prohibiting the removal of a child from the United Kingdom or any part of it, no provision similar to section 13 of the Children Act 1989 was required.[586]

586 *Ibid* at 5.41.

Delay

4.92 Section 1(2) and 11 of the Children Act 1989 contain provisions to assist in preventing delay in proceedings relating to the residence or upbringing of children. The Commission took the view that:

> *"While we have every sympathy with the objective, our view is that this issue, which is essentially procedural, is best dealt with at the level of rules of court. We are aware that the courts already give priority to custody proceedings and that they make considerable efforts to dispose of such cases as expeditiously as possible."*[587]

Therefore no statutory provision was needed.

Conclusion

4.93 It can be seen that in some significant matters the Scottish Commission, and the legislation implementing their recommendations, have diverged considerably from the English Children Act 1989. It is still too early to assess the impact of the Scottish legislation as Part I of the Act only came into force on 1 November 1996.[588] The sub-committee were impressed with some of the Scottish provisions and have adopted some of these as proposals for consultation.

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587 *Ibid* at 5.42.

588 Part 1 deals with parental rights, responsibilities and guardianship.

Chapter 5

Comparative Law: Australia and New Zealand

5.1 This chapter examines how substantive provisions in legislation can protect the needs and interests of children, including their separate representation. There is merit in separating the substantive issues of guardianship and custody from the way that disputes are resolved by the adversarial system or from alternatives such as mediation, which will be dealt with in chapters 7 to 11. This chapter will deal with the important recent reforms in Australia that mirror some of those of the Children Act 1989. It will also cover some New Zealand reforms.

Australia

Australia and the Children Act 1989

5.2 The Family Law Council of Australia issued a report in March 1994 on the *UK Children Act 1989*.[589] It indicated that many of the objectives of the Children Act 1989 were consistent with the general aims of the Family Law Council as outlined in its previous report on *Patterns of Parenting after Separation.*[590] These were:

1. The ongoing priority of the "welfare" principle,[591]
2. the non-order approach,
3. shared parental responsibility, and
4. appointment of guardian in specified circumstances.

5.3 The Council recognised that "it would be unrealistic to assume that by changing the terminology used in the Family Law Act [1975] separating parents who had previously been unable to co-operate would begin to do so overnight."[592]

5.4 The Council divided parents into three categories:

> *"(1) separating parents who are able to make arrangements for the ongoing care of their children;*
>
> *(2) separating parents who will need assistance through mediation, conciliation and other support services in making arrangements for the ongoing care of their children; and*

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589 In its report entitled *The Operation of the (UK) Children Act 1989*.

590 Paragraph 17 of the report on *The Operation of the (UK) Children Act 1989*, March 1994. The report, *Patterns of Parenting After Separation* was published in April 1992.

591 Later they recommended a change to "best interests" to be consistent with international conventions.

592 Paragraph 23 of the 1994 report.

(3) separating parents who are unable to cooperate to the extent where they can agree on arrangements for the ongoing care of their children."[593]

Language

5.5 This report noted that, even though no detailed evaluation of the impact of the change of language made by the Children Act 1989 had been conducted, no significant adverse effects had been reported. Professor Brenda Hoggett, though being cautious about the impact of language on increasing participation by fathers, suggested that "the retention of parental responsibility also improves the status of the other parent while the children are with him".[594]

5.6 Sir Stephen Brown, President of the Family Division of the High Court told the Family Law Council that "anecdotal evidence from solicitors suggested that clients find the new terminology less adversarial which assists in resolving disputes."[595] The Law Society of England and Wales reported that the private law provisions of the Children Act "have attracted widespread support".[596]

Parental responsibility

5.7 The Council also recommended that:

"(a) the Family Law Act be amended to include the ... concept of parental responsibility..; and

(b) the Act should make it clear that parental responsibility does not cease on separation and that the best interests of the child will generally require continuing contact with both parents and complementary parenting skills."[597]

5.8 The Council recommended that a "guardianship order would be made where necessary".[598] This would cover the situation which arises after a parent's death. The Council's *Patterns of Parenting After Separation* report had recommended that this concept be retained.[599]

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593 *Idem.*

594 Quoted at paragraph 26 of the report on *The Operation of the (UK) Children Act 1989* (1994) report.

595 *Ibid* at paragraph 27.

596 *Ibid* at paragraph 30.

597 *Ibid* at recommendation 5, paragraph 54.

598 *Ibid* at paragraph 38.

599 *Ibid* at paragraph 53.

Parenting orders

5.9 The Family Law Council recommended the adoption of a change in terminology away from the custody/access model, so as to "adequately ... reflect the significant change in philosophy which is proposed by the amendments".[600] Orders should be called "parenting orders". These orders would be made "for the purposes of settling arrangements in respect of the child's residence", "for continuing contact" with both parents, and would contain any "special purpose" arrangements which the court considers necessary. This would cover the type of orders referred to as "specific issue orders" and "prohibited steps orders" in the English legislation.[601] The Council also recommended that the concept of "welfare" be replaced by "best interests".[602] It referred to Article 3 of the UN Convention of the Rights of the Child which used this concept and the fact that "the term 'welfare' has particular connotations which detract from its use in this context".[603]

Family Law Reform Act 1995

5.10 This Act adopted the recommendations of the Family Law Council's report on the Children Act 1989. The Explanatory Memorandum of the Bill stated that the rights of custody and access tended "to foster notions of ownership in children." The Family Law Reform Act came into force on 11 June 1996.

Objectives

5.11 Section 60B of the Act provides that:

> *"(1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.*
>
> *(2) The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:*
> *(a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and*
> *(b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and*

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600 Recommendation 3 of the 1994 report.
601 Section 8 of the Children Act 1989.
602 Recommendation 4 (paragraph 49) of the 1994 report.
603 *Ibid* at paragraph 40.

(c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
(d) parents should agree about the future parenting of their children."

Parental responsibility and parenting orders

5.12 Parental responsibility is defined by section 61B as meaning "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children." Each parent of a child under 18 has parental responsibility, and this is not affected by any change in the parents' relationship, such as, for example, divorce or separation.[604] Section 61D makes it clear that a parenting order does not derogate from parental responsibility, except to the extent expressly provided for in the order or such as is necessary to give effect to that order.

5.13 A parenting order may be made in favour of a person other than the child's parents.[605] Application for such an order may be made by the child himself, either or both parents, or "any other person concerned with the care, welfare or development of the child."[606]

5.14 Section 64B(2) provides that a parenting order may deal with one or more of:

"(a) the person or persons with whom a child is to live;
(b) contact between a child and another person or other persons;
(c) maintenance of a child;
(d) any other aspect of parental responsibility for a child."

5.15 An order dealing with point (a) is a "residence order"; while point (b) is a "contact order"; and point (c) is a "child maintenance order."[607] To the extent that the parenting order deals with "any other aspect of parental responsibility for a child", it is termed a "specific issues order." A specific issues order "may, for example, confer on a person (whether alone or jointly with another person) responsibility for the long-term care, welfare and development of the child or for the day-to-day care, welfare and development of the child."[608]

Breaches of orders

5.16 Where a residence order is in force, section 65M(2) provides that:

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604 Section 61C, Family Law Reform Act 1975.
605 Section 64C.
606 Section 65C.
607 Section 64B(3), (4) and (5).
608 Section 64B(6).

"A person must not, contrary to the order:

(a) remove the child from the care of a person; or

(b) refuse or fail to deliver or return the child to a person; or

(c) interfere with the exercise or performance of any of the powers, duties or responsibilities that a person has under the order".

5.17 In the case of a contact order, section 65N(2) provides that:

" A person must not:

(a) hinder or prevent a person and the child from having contact in accordance with the order; or

(b) interfere with the contact that a person and the child are supposed to have with each other under the order".

5.18 As regards a specific issues order, section 65P(2) provides that a person "must not hinder the carer in, or prevent the carer from, discharging that responsibility."

Orders by consent in favour of non-parent

5.19 Section 65G(2) sets out special conditions for making residence orders or specific issues orders by consent in favour of non-parents. The court must not make the proposed order unless:

"(a) these conditions are satisfied:

(i) the parties to the proceedings have attended a conference with a family and child counsellor or a welfare officer to discuss the matter to be determined by the proposed order; and

(ii) the court has considered a report prepared by the counsellor or officer about that matter; or

(b) the court is satisfied that there are circumstances that make it appropriate to make the proposed order even though the conditions in paragraph (a) are not satisfied."

5.20 Section 63B places the importance of settlement and agreement on a statutory basis. It encourages the parents of the child:

"(a) to agree about matters concerning the child rather than seeking an order from a court; and

(b) in reaching their agreement, to regard the best interests of the child as the paramount consideration".

Parenting plan

5.21 Section 63C(1) defines a parenting plan as:

"an agreement that:

(a) is in writing; and

(b) is or was made between the parents of a child; and

(c) deals with a matter or matters mentioned in subsection (2)."

5.22 Section 63C(2) provides that a parenting plan may deal with:

"(a) the person or persons with whom a child is to live;

(b) contact between a child and another person or other persons;

(c) maintenance of a child;

(d) any other aspect of parental responsibility for a child."

Provisions of a parenting plan which deal with any of points (a), (b) and (d) are "child welfare provisions."[609] Provisions of a parenting plan that deal with point (c) are "child maintenance provisions."[610]

5.23 Parenting plans may not be varied, but may be revoked by a later agreement.[611] In order to revoke the plan, the subsequent agreement must be in writing and registered with the court.[612] Parenting plans may themselves be registered with the court, in compliance with the procedure laid down by Rules of Court.[613] The application must be accompanied by a copy of the plan, the information required by the Rules of Court, and:

"(i) a statement, in relation to each party, that is to the effect that the party has been provided with independent legal advice as to the meaning and effect of the plan and that is signed by the practitioner who provided that advice; or

(ii) a statement to the effect that the plan was developed after consultation with a family and child counsellor ... and that is signed by the counsellor."[614]

Death of parent with whom child lives

5.24 Section 65K deals with what happens when a parenting order that includes a residence order does not make provision for the death of the parent with whom the child lives. In such circumstances, the surviving parent cannot require the child to live with him or her, but can apply for an appropriate residence order to be made.

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609 Section 63C(4).

610 Section 63C(5).

611 Section 63D(1) and (2).

612 Section 63D(3).

613 Section 63E(1) and (2).

614 Section 63E(2).

Court's power to make parenting order

5.25 Section 65D gives a broad discretion to the court to "make such parenting order as it thinks proper" and to discharge, vary, suspend or revive some or all of an earlier parenting order. In exercising its discretion, the court will be guided by the "best interests" principle and the factors set out in section 68F.

Best interests and checklist of factors

5.26 Section 65E provides that in deciding whether to make a particular parenting order, the court "must regard the best interests of the child as the paramount consideration". "Interests" is defined in section 60D as including "matters related to the care, welfare or development of the child".

5.27 In 1983 the Family Law Act 1975 was amended to include a checklist of factors to be taken into account which limit the very wide discretion given to judges. Turner argued that:

> *"the inclusion of these factors has made not one iota of difference for the law still does not specify the amount of importance to be paid to each. What is more, there was added a 'catch-all' factor - any other circumstance which in the opinion of the court is of significance".*[615]

5.28 The Family Law Council recommended that the checklist already contained in section 64(1)(bb) of the Family Law Act 1975 should be amended to take some extra matters into account.[616] Section 68F of the Family Law Reform Act 1995 now provides that the court must consider:

> *"(a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;*
> *(b) the nature of the relationship of the child with each of the child's parents and with other persons;*
> *(c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:*
> *(i) either of his or her parents; or*
> *(ii) any other child, or other person, with whom he or she has been living;*

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615 "Custody and Access: are children's interests being protected?", Children Australia, vol. 15, No.4, December 1990. 13, at 14.

616 Recommendation 4 at paragraph 49 of the 1994 report. This included section 1(3)(d) of the English Act "to enable children of different cultural or ethnic backgrounds to be better covered", and section 1(3)(a) which used "maturity and understanding" but it picked up the language of the United Nations Convention on the Rights of the Child. See chapter 3 further on the English legislation.

(d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;

(f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;

(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:

(i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or

(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;

(h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(i) any family violence involving the child or a member of the child's family;

(j) any family violence order that applies to the child or a member of the child's family;

(k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(l) any other fact or circumstance that the court thinks is relevant."

Where the court is considering making an order to which all parties consent, the court may consider these factors, but is not bound to do so.[617]

No-order principle

5.29 The Council argued that the no-order principle, as set out in section 1(5) of the Children Act 1989, in relation to private law matters is too inflexible. This section provides that where a court is considering whether or not to make an order, it shall not make the order unless it considers that doing so would be better for the child than making no order at all. The English Law Society advised the Council that "the no-order principle can lead to difficulties in some cases, particularly where there is a threat of child abduction or where the parent with whom the child is living wants to obtain local authority housing".[618]

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617 Section 68F(3), Family Law Reform Act 1975.

618 *Ibid* at paragraph 47.

5.30 This is the only explanation provided in the report by the Council for not adopting the English provision. Instead, they recommended that it would be appropriate to direct that a court, in considering the best interests of the child, should take into account whether to make no order would, in all the circumstances, be preferable to making an order.[619] Section 64(1)(ba) already provided that the court should make an order that is least likely to lead to the institution of further proceedings.

Delay

5.31 The Council recommended that the Family Law Act be amended to include a provision requiring the court to process matters relating to children in a timely and expeditious manner.[620] This has not been implemented.

Involving the child

5.32 The Family Law Council, in their 1995 Discussion Paper, *Involving and Representing Children in Family Law*, suggested that there were three aspects to involving the child:

> *"(a) to give children the opportunity, as far as this is practical, to express their wishes in relation to decisions which will directly affect them;*
> *(b) involvement in the processes which arise from the functioning of the Family Law Act, as appropriate; and*
> *(c) ensuring that children do not feel a sense of exclusion from decisions or matters which directly affect them."*[621]

5.33 The Family Law Council suggested that this approach was justified, not only from the research literature on how children handle divorce but in following the spirit of the United Nations Convention on the Rights of the Child. The child's wishes can be brought to the court's attention by being included in a counsellors report, by appointment of a separate representative, by a court expert's report, by interviewing the child, or (rarely) by proceedings issued by the child or on his behalf.

Wishes of the child

5.34 Section 68G(2) of the Family Law Act 1975 deals with how the court informs itself of the wishes expressed by a child:

> *"The court may inform itself of wishes expressed by a child:*

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619 *Ibid* at paragraph 48.
620 Recommendation 2, paragraph 22.
621 *Ibid* at paragraph 3.06.

(a) by having regard to anything contained in a report given to the court under subsection 62G(2); or
(b) subject to the Rules of Court, by such other means as the court thinks appropriate."

5.35 Section 68H goes on to provide that "nothing in this Part permits the court or any person to require the child to express his or her wishes in relation to any matter".

Separate representation

5.36 The term "separate representative" usually describes a lawyer representing a child in family law proceedings. This is similar to the role played by the Official Solicitor under the Matrimonial Causes Rules (Cap 179). The Family Law Council reviewed the role of the "separate representative" in the light of the United Nations Convention on the Rights of the Child.

5.37 Section 68L(1) of the Family Law Act 1975 provides for separate representation in any proceedings in which the welfare or best interests of the child is a relevant consideration. The Family Law Reform Act 1995 amended the term "separate representative" to "child's representative".[622]

5.38 During 1993/1994, the Family Court of Australia and of Western Australia appointed about 1,800 separate representatives to protect children.[623] The Council noted that children often feel excluded from decisions which affect them. In Australia the role of the separate representative is to make submissions to the court on the best interests of the child, whether or not they reflect the wishes of the child. In order to carry out this role, the separate representative obtains a report from an officer of a State in relation to the welfare of the child, seeks information from the school and local agencies and obtains an expert's report from appropriate persons such as a child psychiatrist.[624]

5.39 The Council noted that separate representatives are appointed at different stages in the proceedings and there was little uniformity on when was the appropriate time.[625] The Legal Aid Commissions in various States organised the provision of separate representatives. The Council felt there was a need for a co-ordinated approach to case management in order to protect the interests of the child, and to avoid delay, duplication and omissions.[626] A comprehensive training and accreditation system should be in place.[627] A training program has been developed in 1996 by the Family Law Section of the Law Council of Australia, the Family Court and the Legal Aid Commissions.

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622 Section 68M(1).
623 *Ibid* at paragraph 1.09.
624 *Ibid* at paragraph 4.15.
625 *Idem.*
626 *Ibid* at paragraph 4.49.
627 *Ibid* at paragraph 4.29-4.33.

Advocacy

5.40 The Council recommended that "there is room for a broader advocacy of the child's interests than simply the representation of the child in court".[628] They suggest that a co-ordinator should organise the appropriate report on the child's best interests and explain the processes to the child. This role could be met by existing professionals such as court counsellors or state welfare officers. This would ensure that appropriate support is given to the different separate representatives and that the "wider needs of the child are met and, where necessary, co-ordinated".[629] The Council also recommended that more appropriate titles would be the Child's Representative, Child's Advocate, Official Solicitor, or Counsel for the Child.[630]

Criteria for appointment of separate representative

5.41 The case of *Re K*[631] set out the circumstances in which a separate representative should be appointed as follows:

1. Where there is an apparently intractable conflict between the parents,

2. where the child is apparently alienated from one or both parents,

3. where there are real issues of cultural or religious difference affecting the child,

4. where the conduct, either of one or both parents or some other person having significant contact with the child is alleged to be anti social to the extent that it seriously impinges on the child's welfare,

5. where there are issues of significant medical, psychological, psychiatric illness or personality disorder in relation to either party or a child or other person having significant contact with the child,

6. in any case where it appears neither parent seems a suitable custodian,

7. where a child of mature years is expressing strong views which, if given effect to, would change a long standing custodial arrangement or result in a complete denial of access a parent,

8. where a parent proposes permanently removing a child from the jurisdiction or to such a place within the jurisdiction as to greatly restrict or, for all practical purposes, exclude the other party from the possibilities of access,

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628 *Ibid* at paragraph 5.20.

629 *Ibid* at 5.21.

630 *Ibid* at paragraph 5.27.

631 [1994] FLC 92-461 at 80, 773-80, 775, summarised at Attachment B of the report.

9. where it is proposed to separate siblings,
10. where none of the parties are legally represented,

11. where the court's welfare jurisdiction is being exercised, in particular relating to the medical treatment of children, and the child's best interests are not adequately represented by one of the parties, and

12. in cases involving allegations of child abuse, whether physical, sexual or psychological.

Guidelines

5.42 The existing guidelines of the Family Court describe the duty of the separate representative as, *inter alia* "to ensure that all matters and witnesses relevant to the child's welfare are before the court and to assist the court to reach a decision that is in the child's best interests".[632] Representatives should ensure that proceedings are not delayed by the parties and that the child is not subjected to unwarranted psychological testing.

5.43 It is important that the separate representative is perceived as an officer of the court and as neutral and independent of the parties. The separate representative can cross-examine relevant witnesses to ensure that all the information relevant to the best interests of the child are brought out. In certain cases, a child may be mature enough to be represented as a party to the proceedings. The original report of the Family Law Council recommended that in such a case, an advocate for the child receiving instructions directly from the child would be appropriate. This would not be the role of the separate representative.[633]

Court orders for separate representation

5.44 Section 68L(3) of the Family Law Act 1975 makes provision for court orders for separate representation. The court may make such an order:

> *"(a) on its own initiative; or*
> *(b) on the application of:*
> *(i) the child; or*
> *(ii) an organisation concerned with the welfare of children; or*
> *(iii) any other person".*[634]

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632 "Guidelines Promulgated by the Family Court for separate representatives of children appointed pursuant to section 65 of the Family Law Act", Attachment A of the Family Law Council Discussion Paper, *Involving and Representing Children in Family Law*, (May 1995).

633 *Representation of Children in Family Law Proceedings*, June 1989, Paragraph 17. In contrast, the separate representative would act as *amicus curiae* to ensure that all the relevant evidence on the welfare of the child would be placed before the court.

634 Section 68L(3).

Examination of the child

5.45 Section 68M deals with the making of an order that a child be made available for examination where there is a "child's representative." It is similar to the power to order a child assessment under section 45A of the Protection of Children and Juveniles Ordinance (Cap 213), though the exercise of the latter power is limited to the Director of Social Welfare.[635] On application by the child's representative, the court may order that the child be made available for psychological or psychiatric examination for the purpose of preparing a report to be used by the child's representative in connection with the proceedings.[636] The order may be directed to:

> *"(a) a parent of the child; or*
> *(b) a person who has a residence order or a contact order in relation to the child; or*
> *(c) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development."*[637]

Domestic violence

5.46 The subject of domestic violence is relevant to the issue of what happens to pre-existing orders for contact or access, when subsequent orders are made to restrain a spouse from communicating with the other spouse or the children. The different States of Australia have their own laws on domestic violence. By way of example, the Crimes (Family Violence) (Amendment) Act 1990 in Victoria allows a third party to apply for an intervention order on behalf of anyone under 17. The order extends to people who are in relationships but not living in the same household and to relatives of family members. The amendments enable 14 to 17 year olds to initiate intervention orders on their own behalf.

Informing court of relevant family violence orders

5.47 The interaction between a contact order and a pre-existing family violence order is dealt with in the Family Law Reform Act 1995. Section 68J(1) provides that the court must be informed of this type of order before making a contact order. Failure to so inform the court does not, however, affect the validity of any order made by the court.[638]

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635 See chapter 2.
636 Section 68M(2).
637 Section 68M(3).
638 Section 68J(3).

Risk of family violence

5.48 In considering what order to make, the court is obliged by section 68K(1) to ensure that the order is consistent with any family violence order and does not expose a person to an unacceptable risk of family violence.

Inconsistencies between contact orders and family violence orders

5.49 Section 68Q sets out the purposes of this part of the Act as being:

> *"(a) to resolve inconsistencies between Division 11 contact orders and family violence orders; and*
> *(b) to ensure that Division 11 contact orders do not expose people to family violence; and*
> *(c) to respect the right of a child to have contact, on a regular basis, with both the child's parents where:*
> *(i) contact is diminished by the making or variation of a family violence order; and*
> *(ii) it is in the best interests of the child to have contact with both parents on a regular basis."*

5.50 Section 68R makes provision for dealing with an order for contact that is inconsistent with a family violence order. In such circumstances, the court must explain the order to both the applicant and the respondent and any other person against whom the family violence order is directed. The explanation must be in readily understood language:

> *"(a) the purpose of the section 68R contact order; and*
> *(b) the obligations that the order creates; and*
> *(c) the consequences that may follow if a person fails to comply with the order; and*
> *(d) the court's reasons for making an order that is inconsistent with a family violence order; and*
> *(e) the circumstances in which a person may apply for the order to be revoked or varied."*[639]

5.51 In addition, the court must:

> *"(a) include in the section 68R contact order a detailed explanation of how the contact provided for in the order is to take place; and*
> *(b) as soon as practicable, but not later than 14 days after making the section 68R contact order, give a copy of that order to:*
> *(i) the applicant and the respondent in the proceedings for the section 68R contact order; and*

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639 Section 68R(3).

(ii) if the person against whom the family violence order is directed is not covered by subparagraph (i) - that person; and

(iii) if the person protected by the family violence order is not covered by subparagraph (i) - that person; and

(iv) the Registrar of the court that made or last varied the family violence order; and

(v) the Commissioner or head (however described) of the police force of the State or Territory in which the person protected by the family violence order resides."[640]

Failure to comply with a requirement of section 68R does not, however, affect the validity of a contact order.[641]

Contact orders to prevail

5.52 Section 68S provides that contact orders are to prevail over inconsistent family violence orders to the extent of the inconsistency. The applicant, the respondent or any person protected by, or against whom, a family violence order is directed may apply for a declaration as to the extent to which the contact order is inconsistent with the family violence order.[642]

5.53 This section is controversial. We do not fully understand the rationale for such an order as we have not been able to trace the history of the provision. The explanatory memorandum refers to the principle of respecting the child's right to have regular contact with both parents in circumstances where contact is diminished by the making or variation of a family violence order and it is in the best interests of the child to have regular contact with both parents. The family violence orders are made under State or Territory law which do not come under the Federal jurisdiction, except for Western Australia.

5.54 The protection of a spouse and family must be more important than maintaining regular contact with the child. If the level of conflict between the spouses is high, then access can become a weapon used by one parent against the other, and this cannot serve the interests of a child. It is also noted that the best interests is only one criterion to be balanced by two others in section 68Q. This seems surprising when the "best interests" consideration is normally treated as paramount in disputes about access or contact.

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640 Section 68R(4).

641 Section 68R(5).

642 Section 68S(2).

New Zealand

New Zealand child support and access

5.55 There is now child support legislation in New Zealand, Australia and England which takes the calculation of child support away from judges and instead vests the discretion in an administrative agency that uses *formulae* to compute the contribution by the non-custodial parent. In New Zealand some credit for child support is given if the child spends 146 nights with that non-custodial parent. This influences custody and access orders which may or may not be in the best interests of the child. If the motivation is to reduce child support payable to the other spouse, then this is an improper basis for access or shared physical parenting:

> *"The experience of some women strongly suggests that custody and access applications are increasingly related to the amount of child support required by Inland Revenue, rather than an interest in contact with the children."*[643]

5.56 On the other hand, research has shown that when access has been denied, maintenance for the child and spouse tends to become erratic and may stop. In ordering maintenance for children, the court should consider the impact on custody and access arrangements.

Children in the New Zealand Family Court

Welfare of the child

5.57 The court has a duty to treat the best interests of the child as the paramount concern.[644] The court has a duty to satisfy itself that the arrangements for the child are the best that circumstances will permit.[645] The court has few guidelines for determining this issue.[646] Theoretically, the court should have more information available at a hearing as the court frequently appoints Counsel for the Child and requests specialist reports. In practice, the court has only had to proceed with a hearing in 27% of cases in 1988, compared to 52% in 1982.[647]

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643 Neilson, "Women as Family Court consumers", in *Rights and Responsibilities,* papers from Symposium on Rights and Responsibilities of the Family, Wellington, October 1994, 156.

644 Section 33 of the Guardianship Act 1968.

645 Section 45(1) of the 1980 Act.

646 Wilson, "Alternative Dispute Resolution", Auckland University Law Review, vol. 7 (2), 362, 363, at 367, (1993) refers to Hall, *The welfare of the child: a literature review*, Family Court Custody and Access Research report No. 1 (1989), 17.

647 Chart, "Some New Zealand initiatives in Alternative Dispute Resolution". Commonwealth Law Ministers conference, Auckland (1990), 605, at 608.

Wishes of the child

5.58 The Guardianship Act 1968, as amended, now makes it mandatory for the Family Court to ascertain the wishes of the child if the child is capable of expressing them. It is also mandatory to take account of the wishes "to such an extent as the court thinks fit, having regard to the age and maturity of the child". Henaghan noted that the majority of custody, access and guardianship disputes are resolved by counselling and mediation, and yet there is no legal requirement for the child's views to be taken into account in those processes.[648]

5.59 While there is a statutory requirement to take the child's wishes into account in any court disposition, care must be taken that those views are genuinely expressed and are not the result of blandishments or other inducements held out to the child by one of the parents. Equally, questions asked of the child to determine his views must be carefully worded:

> *"For children to be treated with respect and dignity, their views must mean their views, not their responses to adult questions based on the needs of an adult dispute resolution process".*[649]

Counsel for the Child

5.60 Chart noted that it is usual for the legal counsel appointed to represent the child to attend the mediation conference.[650] Counsel for the Child can also undertake informal conciliation or mediation between the parents. In practice, the counsel "plays a critical role in ensuring the child's interests are protected".[651]

5.61 The court must appoint Counsel for the Child if there is to be a contested hearing in custody or access matters, unless no useful purpose would be served by such an appointment.[652] There has been much debate about whether counsel represents the child's wishes, which would be consistent with article 12 of the United Nations Convention on the Rights of the Child, or whether counsel represents what counsel thinks is best for the child.[653]

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648 Henaghan, "The 1989 United Nations Convention on the Rights of the Child", in *Rights and Responsibilities,* papers from Symposium on Rights and Responsibilities of the Family, Wellington, October 1994, 32, 36.

649 *Idem.*

650 Section 30.

651 Chart, *supra* at 606.

652 Section 30 of the Guardianship Act 1968 as inserted by section 18 of the Guardianship Amendment Act 1980.

653 Henaghan *supra* at 36.

5.62 Flatley warned that the reduction in resources for the Counsel for the Child which has occurred in recent years in New Zealand, was a false economy.[654] If firm directions and decisions are not made at an early stage, the case is more likely to go for a defended hearing and then may be settled at the last minute by the counsel assisting the parties. Ludbook suggested three roles for the Counsel for the Child: independent overview; advocate; and mediator.[655] Flatley responded by stating that in practice Counsel for the Child have to combine all three approaches. He therefore recommended that "rigorous" training in issues of child development and law are required as the principles of social work decision-making play an important role in this work.[656]

Conflict of interest

5.63 Counsel for the Child are family law specialists, they may in future be called upon to act for one of the parties. Also, many of the lawyers are members of the regional legal aid committee and they may be required to make decisions about legal aid for the family in dispute. Indeed, one committee asked Counsel for the Child for an opinion as to the chances of success of one of the parties in the proceedings. He concluded "this intermingling of duties and responsibilities creates difficulties and impinges on the rights of family members as parties to proceedings".[657] The decision on legal aid should be made independently of those involved in that area of law.[658] Certainly, there seems to be a conflict in counsel representing the child's interests and subsequently acting in another capacity for the child's family.

Children's right to initiate proceedings

5.64 Henaghan argued that children could apply to initiate proceedings under the provision that "any other person" can apply to court.[659] Even though this may be doubtful, children over 16 can clearly apply for a review of any decision by a parent or guardian on any important matter. The Guardianship Act 1968, as amended in 1991, enables a child of any age to apply to be placed under the guardianship of the Family Court in custody and access proceedings because of the difficulties created by these proceedings, or their duration.[660] The court can appoint an agent to care for the child. This provision was used by an 18 year old to free herself from the domination of her mother.[661] However, the legislation does not allow a child to apply for access to the non-custodial parent. Henaghan

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654 "Family law practice; the preventative versus the reactive approach", in *Rights and Responsibilities,* papers from Symposium on Rights and Responsibilities of the Family, Wellington, October 1994, 161.

655 *New Zealand Guide to Family Law,* (1988), at 149.

656 S*upra* at 161.

657 *Ibid* at 162.

658 *Ibid* at 162.

659 This is section 11 of the Guardianship Act 1968. Henaghan in *Rights and Responsibilities;* papers from Symposium on Rights and Responsibilities of the Family, Wellington, October 1994, 36, at 37.

660 Section 9A (1) and (3) of the Guardianship Amendment (No. 2) Act 1991 inserted into the Guardianship Act 1968.

661 *X v X and X* - Family Court of Hastings, 20 August 1992, Judge Inglis, unreported.

commented on the irony that unwilling children can be ordered by a court order to see a parent, but unwilling parents cannot be ordered to see their children.

Role of Counsel for the Child

5.65 The prominent role of Counsel for the Child in the New Zealand system, despite the criticisms, is a way of protecting the interests of the child, rather than leaving that role exclusively to the judge, albeit aided by a social welfare officer's report. The Counsel for the Child often plays a mediating role for the parents in trying to persuade them to focus on the child's needs.

5.66 Nielson suggested that the role of Counsel for the Child is a very powerful one which "in effect ... usurps the role of both parents. For women, it represents a further loss of control which is sanctioned by the Family Court."[662] She argued that: "many lawyers and women claim that it is very difficult to have these counsel removed, even if they prove to be totally inappropriate in specific cases".[663]

Guardian ad litem

5.67 Flatley recommended the adoption of the English system of *guardian ad litem* from his experience of working as a family lawyer in England and New Zealand. The *guardian ad litem* is trained in child psychology, behavioural and educational development. The guardian brings information from all the institutional carers together. Flatley argued that, in general, this multi-disciplinary decision making is absent from Family Court proceedings in New Zealand.

Women and children's perspective of the Family Court

5.68 An interesting perspective is given by Neilson[664] on her experience of working with women and children who are consumers at the Family Court. She suggested that the court and lawyers worsen the situation by "explicitly or implicitly threatening women with the loss of their children" if they try to set limits to access. The responsibility for ensuring that access is successful is left on the primary parent. Officials at the Family Court "often ... fail to challenge men's assumption that they have the right to own and control the children. Men who abused their power in the marriage see the children as the means by which contact with the mother is maintained".[665]

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662 Neilson, "Women as Family Court consumers", in *Rights and Responsibilities;* papers from Symposium on Rights and Responsibilities of the Family, Wellington, October 1994, 156 at 158.

663 *Supra* at 158.

664 *Idem.*

665 *Ibid* at 157.

5.69 Many women do not feel that they are heard by professionals in the Family Court system, including their own lawyers, who prefer to listen to another professional's interpretation of the problem. Often decisions are made by the court and custody or access arrangements are imposed without any attempt to establish whether these actually work or not.[666] The challenge for all professionals attached to the Family Court is the tendency to pigeonhole clients in categories that are predetermined by their experience and their training. They may interpret a client's behaviour as being difficult and obstructive to access rather than sensing the underlying fear that is genuine.

5.70 There is also a risk that professionals with strong views about joint parenting will fail to identify signals that indicate that there is a power imbalance or sufficient dysfunction that will predict difficulties with access arrangements or potential violence at access pickup times. The professionals must identify predictors of behaviour that will show the likelihood of protracted conflict around access arrangements, which will influence them in creative orders such as, no order for access temporarily until one or both parents get anger management training or counselling, supervised access, temporary orders which have automatic reviews built into the order, and continuing supervision and reports to the court, somewhat akin to putting the parents on probation.

5.71 The court can end up focusing on persuading the recalcitrant spouse to allow access, which can become a power struggle with this spouse, and lose the focus on the best interests of the child. There is an assumption that access, even under conditions of conflict, is still in the best interests of the child. Social workers may play a supervisory role but there may be insufficient resources to enable access to take place after office hours. We have not been able to ascertain whether any of the difficulties with access and family violence or dysfunction described by Neilson occur in Hong Kong, due to the dearth of research here.

Women's perspective of access orders

5.72 Neilson stated that women who contact her organisation often complain that:

> *"their concerns over their former partner's parenting skills are sometime dismissed on the basis that the woman is being neurotic and over-protective. When concerns are raised, it is often assumed that women wish to deny access rather than exert some control over access arrangements".*

5.73 Her recommendations are as follows:

1. Limits should be set on the father's access to the child which would put him in contact with the mother, and she should not be made totally responsible for facilitating access;

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666 *Idem.*

2. the need for fathers to have basic child rearing skills and a suitable physical environment should be recognised;

3. the court and Counsel for the Child should take seriously what mothers say about access arrangements;

4. the term "Child Advocate" should be used, rather than "Counsel for the Child";

5. Child Advocates need not exclusively be lawyers but if they are not, they should receive training in family law;

6. lawyers who are Child Advocates should undergo specialist training in appropriate aspects of psychology, sociology, child development, counselling and mediation skills;

7. Child Advocates should be chosen on the basis of their personal qualities, particularly their wide range of experience and their capacity for empathy;

8. they should "attend to the views of the primary care-giver" when arrangements are being made for access and custody;

9. Child Advocates should make specific recommendations to facilitate access in relation to transportation and housing for the child, and where there are deficiencies in child rearing skills;

10. Child Advocates should contact the primary care-giver every six months to ensure that access arrangements are working satisfactorily and that whatever changes are necessary as the child develops are made appropriately;

11. Child Advocates should meet the children;

12. there should be procedures for changing the Child Advocate if either parent finds him unsatisfactory;[667]

13. Child Advocates should work within a specific budget and time-frame, which would limit the delay in decision making and ensure that adequate investigation was carried out; and

14. Child Advocates should understand the dynamics of domestic violence and power imbalances.[668]

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667 The problem with this suggestion is the risk of a parent constantly challenging the child advocate as the parent is aggressive and conflictual. However, a maximum of one change for each parent should be considered in case there is a personality clash between the parent and the counsel.

668 *Supra* at 159-160.

5.74 Her views must be seen in the context of the high rates of domestic violence in New Zealand. However, Neilson is also addressing the concerns of many women that, if they are the *de facto* primary care-giver, the court should give more recognition to that reality instead of giving more rights over the child to the other parent who may abuse access as a way of continuing the conflict.

5.75 The secretary to the sub-committee visited the Family Court in January 1996 and found that the mediation conferences were in effect settlement conferences. However, there was an informal and relaxed atmosphere, where the parties were asked individually to give their views to the judge. Some parties were more forthcoming than others. The Counsel for the Child played a strong role in voicing concerns for the child. During a break, in the absence of the judge, counsel played a mediating role which resulted in clarification and settlement of some of the issues in a highly complex case where the couple had a background of extreme conflict between them.

Chapter 6

Options for Substantive Law Reform in Hong Kong

Introduction

6.1 This chapter brings together a range of options for reform of the law on guardianship and custody which we believe are necessary to protect and ensure the best interests of children, in accordance with the United Nations Convention on the Rights of the Child. Some of these reforms have already been suggested in Hong Kong. Others draw on experience in other jurisdictions, including legislative measures such as the English Children Act 1989, the Children (Scotland) Act 1995 and the Australian Family Law Reform Act 1995. The adoption of the reforms we propose will necessitate considerable legislative amendment, both to the Guardianship of Minors Ordinance (Cap 13) and to guardianship and custody provisions in a number of other matrimonial ordinances.

6.2 Family law and family dispute resolution systems are at a critical stage of their history with many choices as to the way forward. There is a shift to an emphasis on parental responsibility; the encouragement of parenting plans; and more attention to the voice of the child in the whole process, either directly, or through increased use of separate representation. The sub-committee believes that there are considerable lessons to be learned from comparative experiences, and it is fully convinced that its underlying principle, that the reforms proposed should be tailored to the needs of Hong Kong, has been adopted.

Part A - General principles

Objectives

6.3 The English Law Commission formulated[669] the following principles which should govern guardianship and custody law and proceedings:

> *(i) "to separate, as far as it is possible, the issues relating to the children from those relating to any remedies sought between the parents or other adults involved, and to give priority to the former;*
>
> *(ii) to recognise and maintain the beneficial relationships already established between the child, other children in the family and his parents or other adults who have been important to him and to encourage the continuation of these relationships to the*

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669 *Review of Child Law: Custody,* (Working Paper No. 96: 1986) at paragraph 3.7.

maximum extent possible in the light of changed family circumstances;

(iii) to promote a secure and certain environment for the child while he is growing up, in which the confidence and security of the person who is bringing him up may be an important element;

(iv) to protect the child from the risk of harm to his physical or mental health, his proper physical, intellectual, social or emotional development, or his general well-being;

(v) to recognise, to the greatest possible extent, the child's own point of view, by ascertaining his wishes and feelings wherever practicable and giving due consideration to them, according to his age and understanding;

(vi) to ensure that, where parental responsibility is divided or shared, the people concerned understand what legal responsibilities and powers they can and should exercise in relation to the child;

(vii) to secure that, to the greatest extent possible, the legal allocation of powers and responsibilities reflects a state of affairs which is workable and sensible in everyday life."

6.4 The English Commission recommended that priority should be given to principle number (iii) rather than (ii) if there was a conflict.[670] We consider that these objectives provide a useful guide in determining appropriate reforms for Hong Kong.

Welfare principle

6.5 The definition of welfare in section 1 of the Guardianship of Minors Act 1971, whereby the welfare of the child was the first and paramount consideration, was changed in section 1 of the Children Act 1989 to delete the reference to "first", as the courts had not put weight on this and it had caused confusion.[671]

6.6 In Hong Kong, section 3 of the Guardianship of Minors Ordinance (Cap 13) continues to use the terminology of the 1971 Act, and requires the court to regard the welfare of the child as "the first and paramount consideration." This formulation of the welfare principle is also adopted in Section 48C of the Matrimonial Causes Ordinance (Cap 179) as applying to that ordinance and the Matrimonial Proceedings and Property Ordinance (Cap 192). Welfare is defined in section 18(6) of the Matrimonial Proceedings

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670 *Ibid* at paragraph 3.8.

671 *J v C* [1970] AC 668. See discussion on the welfare principle in chapters 2 and 3 of this Consultation Paper.

and Property Ordinance (Cap 192)[672] to include the custody and education of the child and financial provision for him. Section 5 of the Separation and Maintenance Orders Ordinance (Cap 16) has been recently amended to provide that "in making an order …the court shall have regard primarily to the best interests of the children".[673]

6.7 It is arguable that the welfare principle in section 3 of the Guardianship of Minors Ordinance (Cap 13) does not apply to guardianship proceedings. This is because the welfare principle is limited to proceedings, *inter alia*, dealing with the "upbringing" of a minor.[674] The sub-committee agree that the word "first" is unnecessary and may cause confusion. **For the removal of doubt, we recommend that it should be made clear that the welfare principle guides all proceedings concerning children, including questions of guardianship, maintenance or property.**

Best interests

6.8 The concept of welfare is retained in the Children Act 1989 and the Children (Scotland) Act 1995. However, the Australian Family Law Council recommended that the term "best interests" was more in conformity with the language of the United Nations Convention on the Rights of the Child.[675] The Council recommended that:

> *"the adoption of wording of international conventions, to which Australia is a signatory, should as far as possible, apply in relation to wording in all cases where an international convention of relevance applies".*[676]

This recommendation was adopted in section 65E of the Australian Family Law Reform Act 1995. **The sub-committee recommends that the term "best interests" is more appropriate for modern conditions in Hong Kong than the term "welfare". It is also more in compliance with our international obligations under the United Nations Convention on the Rights of the Child. Section 3(1)(a)(i) of the Guardianship of Minors Ordinance (Cap 13) should be amended to read "shall regard the best interests of the minor as the paramount consideration…" Consequential amendments should be made to the other matrimonial ordinances.**

Statutory checklist of factors

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672 Section 2 provides that "custody" includes access and "education" includes training.

673 Section 5(3), as inserted by the Marriage and Children (Miscellaneous Amendments) Ordinance (Ord No 69 of 1997).

674 See subsection (1).

675 Article 3.

676 Report, *The Operation of the (UK) Children Act 1989*, recommendation at paragraph 49. March, 1994.

6.9 Should there be a checklist of factors to guide the court in making a decision in guardianship and custody proceedings? Or should the scope for decision-making for the judge be left unfettered? Or is his scope for decision-making limited because he feels he should follow the recommendations of the social welfare officer's report on custody or access? Section 1(3) of the Children Act 1989 provided a checklist of factors for the court to pay particular regard to when making a decision in contested section 8 applications and in all applications by the local authority for care and supervision orders.[677] Section 68F(2) of the Australian Family Law Act 1975, as amended,[678] provides a checklist to assist the court in determining a child's best interests.[679]

In favour

6.10 The arguments in favour of a checklist are: it would provide greater consistency and clarity; it is more systematic; all professionals could use the same checklist; and parents and children would know the basis of the judge's decision.[680] Those who commented on the Scottish Law Commission's proposals were in favour, with the exception of the legal profession.[681] The Irish Guardianship of Infants Act 1964 has defined welfare under various criteria - physical, social, intellectual, moral and religious. These criteria may seem out-dated today compared to the psychological emphasis of the English list.

Against

6.11 The arguments against were outlined by the Scottish Law Commission: it may lengthen proceedings; judges may take a mechanical approach; legal advisers and social workers would use their own checklist anyway; and the welfare principle was all encompassing.[682]

6.12 On balance, the sub-committee were of the view that the checklist would also assist social welfare officers in preparing their report for the court, as they could use the list to ensure that all aspects of the best interests of the child were encompassed in the report. Judges would be able to identify more clearly where they differed from the social welfare officer's report when they give reasons why they have not followed its recommendations. There would be less allegations made of judges applying their own subjective judgement, or cultural values. **We recommend a statutory checklist of factors to assist the judge in exercising his discretion in determining custody or guardianship proceedings.**

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677 The local authority is roughly equivalent to the Social Welfare Department. See chapter 3 *supra* for the detailed checklist.

678 This was amended by the Family Law Reform Act 1995.

679 It is set out in detail in chapter 5, *supra*.

680 Paragraph 5.21 of the Scottish Law Commission, *Report on Family Law* (Scot Law Com 1992: No.135).

681 *Ibid* at paragraph 5.23.

682 *Ibid* at paragraph 5.22.

6.13 Members of the sub-committee felt that the checklist must reflect cross-cultural issues, as the Australian Family Law Act 1975 has attempted to do. **The sub-committee recommend the adoption of the checklist set out in section 1(3) of the English Children Act 1989, which is shorter and more precise than section 68F(2) of the Australian Family Law Act 1975. The sub-committee also recommend that section 68F(b) (in part), and (f) (in part) of the Australian Act be incorporated into a composite section based on section 1(3) of the English Children Act 1989.**

6.14 The sub-committee welcome views on whether section 68F(2)(d) of the Australian Act should also be adopted though at this time we reach no conclusion on whether it should be included.[683] The draft is at Annex 1 of the Consultation Paper.

No-order principle

6.15 This principle is contained in section 1(5) of the Children Act 1989 - the court must not make an order unless "it considers that doing so would be better for the child than making no order at all". The rationale for the principle is that the court should not intervene except where the parties fail to agree future arrangements for the child.[684] The Scottish provision in section 11(7)(a) is similar. The Australian provision in section 68F(2)(k) of the Family Law Act 1975 provides: "whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child." The rationale of the Family Law Council in not recommending the adoption of the English provision was that there were practical difficulties, as an order relating to the residence of the child may be needed for applications by the parents for separate units of local authority housing.[685]

6.16 The sub-committee understands that similar requests may be made by government departments in Hong Kong such as the Housing Department and Housing Society. The sub-committee recognise that divorcing parents in Hong Kong want some recognition by way of an order regulating the arrangements for the child, whether these are by agreement or imposed by the court. Given Hong Kong's mobile population, a court order regulating residence and contact is of particular importance in giving security to the parents that the child would not be removed unlawfully by either of them. **The sub-committee note the rationale for the no-order principle but recommend that it should not be adopted in Hong Kong as it is unsuitable for local conditions.**

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683 It provides that account be taken of the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis. Note the influence of the wording of Article 9.3 of the United Nations Convention on the Rights of the Child. See *infra*.

684 For fuller arguments on the pros and cons of the principle , see chapter 3 *supra*.

685 This was based on the advice of the English Law Society. See chapter 5 *supra* in relation to the Family Law Council report, *The Operation of the (UK) Children Act 1989*, at paragraph 48.

Part B - Parental responsibility and rights

Concept of parental responsibility

6.17 Before the Children Act 1989 parental rights and duties in England were based on guardianship. The emphasis was on rights and authority over a child, rather than on parental responsibility for his welfare. It was also not possible to say that the powers and responsibilities of guardians were the same as those of the parents.[686] On the death of a parent a testamentary guardian[687] would act with the surviving parent.

6.18 The Children Act 1989 abolished the concept of guardianship, except for guardianship of a child by a third party after the death of a parent. It substituted the concept of parental responsibility. This is defined in section 3(1) of the Children Act 1989 as "all the rights, duties, powers, responsibilities and authority which by law a parent has in relation to the child and his property". [688] **We recommend that the concept of parental responsibility is more appropriate for the best interests of a child than guardianship, except that the concept of guardianship should be retained to deal with the responsibilities for a child by a third party after the death of a parent.**

Language

6.19 Unlike the English provision, sections 1 and 2 of the Children (Scotland) Act 1995 makes separate provision for parental responsibilities and parental rights respectively and explains them in some detail.[689] The focus on the language of rights and authority in the existing Hong Kong legislation and the common law is not appropriate. However, we suggest that it is helpful to retain a separate definition of parental rights as such a definition is a guide to parents, children and the court of the parameters of their rights and powers. **We recommend the adoption of a provision on the lines of sections 1 and 2 of the Children (Scotland) Act 1995 as two separate sections, one on rights and one on responsibilities.**

6.20 However, we should make clear that we do not propose that the different ages in the Children (Scotland) Act 1995 should be adopted. **We recommend that the age of eighteen should apply to all the situations referred to in sections 1 and 2 of the Children (Scotland) Act 1995.[690]**

Father as natural guardian

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686 See *Family Law Review of Child Law: Guardianship,* English Law Com (1985: Working Paper No. 91) at paragraph 2.26. See chapter 3 *supra*.

687 This is a person appointed by the parent, by deed or will, before he died to look after the child.

688 Section 3 of the Children Act 1989.

689 See chapter 4 *supra* for full text.

690 See Annex 1 *infra*.

6.21 At common law a father was the natural guardian of his legitimate child. Even though the mother has equal rights and authority by section 3(1)(b) of the Guardianship of Minors Ordinance, the common law right of the father has never been abolished in Hong Kong.[691] The language of section 3(1)(b) of the Guardianship of Minors Ordinance is no longer appropriate since the enactment of the Sex Discrimination Ordinance (Cap 480). Section 2(4) of the Children Act 1989 provided that "the rule of law that a father is the natural guardian of his legitimate child is abolished".

6.22 **We recommend that the common law right of the father to be natural guardian of his legitimate child should be abolished, on the lines of section 2(4) of the English Children Act 1989, as it is no longer appropriate in Hong Kong. Thus, we also recommend the repeal of section 3(1)(b) of the Guardianship of Minors Ordinance.**

Married parents

6.23 Section 2(1) of the Children Act 1989 provides that where a child's mother and father were married to each other at the time of his birth, they shall each have parental responsibility for their child. Some concern was expressed by members of the sub-committee as to whether this section excluded those parents who married after the birth of a child. Such a child would be legitimated by the marriage of his parents under the Legitimacy Ordinance (Cap 184). **We recommend the adoption of a provision on the lines of section 2(1) of the English Children Act 1989, but amended, for the removal of doubt, to include reference to parents married subsequent to the birth of the child.**

Acquisition of parental responsibility by unmarried fathers

6.24 It is difficult to obtain information as to what percentage of children are born outside marriage in Hong Kong. The true number may not be known, because it may be increased by children born to unmarried illegal immigrant mothers from the Mainland, who then leave the child with the father who has right of abode in Hong Kong. We understand that there may even be cases where children born to a father who is married to another woman are taken into the father's home and treated as a child of the family.

6.25 In Hong Kong, an unmarried father does not automatically become a guardian or obtain parental responsibility. He can apply under section 3(1)(d) of the Guardianship of Minors Ordinance (Cap 13) for parental rights and authority.[692] **We recommend that the language of section 3(1)(c)(ii) and (d) of the Guardianship of Minors Ordinance (Cap 13) should be changed to reflect the new language of responsibilities rather than rights. Thus an unmarried**

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691 However, it is noted that the court can appoint a testamentary guardian to be the sole guardian of a child, which removes the surviving parent as guardian. The implications of this are not spelt out in the Guardianship of Minors Ordinance. See *infra*.

692 See chapter 2 *supra*.

father would be able to apply for an order granting him parental responsibility.

Acquisition of parental responsibility and rights

6.26 In England where parents are unmarried at the time of the child's birth, only the mother has parental responsibility as of right but the father can acquire it in the following ways:[693]

(a) Upon taking office as a guardian of the child appointed under the Act,[694]
(b) by obtaining a parental responsibility order from the court,[695]
(c) by making a parental responsibility agreement with the mother,[696] and
(d) by obtaining a residence order, in which case the court is bound to make a separate parental responsibility order.[697]

Semi-automatic acquisition of parental responsibility and rights

6.27 The term "automatic rights and responsibility" can be used to describe the granting of status to an unmarried father by virtue of the birth of his child, without his having to take any further step. The burden would then be on the mother to apply to court to take away or diminish the exercise of the father's rights. This is the law in Australia.

6.28 The sub-committee use the term "semi-automatic" to mean that the unmarried father can obtain parental rights and responsibility by taking some positive step, such as signing the birth register, or entering into a parental responsibility agreement. **We recommend that an unmarried father should be capable of acquiring parental rights and responsibilities by signing the birth register. This should be included in the list in the proposed legislation which delineates the acquisition of parental responsibility.[698] We do not recommend the automatic acquisition of parental responsibility or rights by unmarried fathers.**

Parental responsibility agreements

6.29 A parental responsibility agreement signed by unmarried parents ensure that the father can continue to exercise parental responsibility in the event of the mother's death. He would then become a guardian automatically without having to be appointed as testamentary guardian by the mother. **We recommend that unmarried parents should be encouraged to sign parental responsibility agreements to ensure the best interests of their child.**

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693 Section 2(2) of the Children Act 1989. See chapter 3 *supra*.
694 Section 5(6).
695 Section 4(1)(a).
696 Section 4(1)(b).
697 Section 12(1).
698 See list *infra*.

6.30 Where an unmarried father has acquired parental responsibility and rights by signing the birth register or a parental responsibility agreement, but there is no continuing relationship between the parents, the unmarried mother should be encouraged to appoint a testamentary guardian who will act to take care of the child in the event of the mother's death.[699] **We recommend that unmarried mothers should be encouraged to appoint a testamentary guardian for their children.**

Permanency of parental responsibility

6.31 Notwithstanding separation or divorce, each parent continues to have parental responsibility under the Children Act 1989 even if a residence order has been made in favour of one of them.[700] There is no provision for parental responsibility to be removed. The concept of custody is abolished. Instead, the court makes an order determining the child's residence and, if necessary, a specific issues order.[701] The law recognised that it was in the best interests of children that their parents continue to exercise parental responsibility after divorce.

Parent acting independently

6.32 The Children Act 1989 provides that where more than one person has parental responsibility, each of them may act independently in meeting that responsibility, without the need to consult the other except where statute expressly requires the consent of more than one person.[702]

6.33 It may seem contradictory to have a concept of parental responsibility continuing after divorce together with a provision that each parent can act independently. There may be concern that this may lead to disputes between parents as they will not consult each other before exercising this right. We are of the view that parents should consult each other on major decisions concerning the child. **We recommend the adoption of a provision on the lines of section 2(7) of the Children Act 1989, but restricted to the day-to-day care and best interests of the child.** Thus, a parent with a residence order in his favour could act independently for the day-to-day issues concerning the child and the other parent could do likewise when he is exercising contact with the child.

Scope of parental responsibility

6.34 Even though the English legislation does not give a power of veto or impose a duty to consult or notify the other parent when major decisions are being made for the child, the courts have tried to balance the best interests of the child with the autonomy of a

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699 Section 4(1)(b).

700 Section 2(6).

701 See chapter 3 *supra*.

702 Section 2(7). See also section 13(1) and (3).

parent acting independently. In *Re G (a minor) (Parental Responsibility: Education)*,[703] Glidewell LJ said that:

> *"the mother having parental responsibility was entitled to and indeed ought to have been consulted about the important step of taking her child away from day school ... and sending him to boarding school. It is an important step in any child's life and she ought to have been consulted".*

There had been no prior order so she could not claim that the father was acting incompatibly with a prior order.

6.35 To balance the adoption of section 2(7) of the Children Act 1989, and to reduce the number of disputes between parents after separation or divorce, we also recommend that one parent should consult the other when it comes to making major decisions for the child. It is preferable if major decisions could be made jointly by the parents. However, day-to-day decisions do not need notification to, or consent by, the other parent.

6.36 Rather than giving a veto to the other parent, it would generate less friction if legislation specified those decisions where the other parent's express consent was required, and those decisions where only notification to the other parent was required.

6.37 The legislation should include the definition of a major decision and list the classes of major decisions. There should be three lists: the first, a general list of parental responsibilities; the second, a list of major decisions requiring express consent; and the third, a list of major decisions requiring notification.

6.38 We propose that the following should be included in the general list of parental responsibilities. These are all generally accepted by legal commentators:

1. The duty to provide day-to-day care for the child,

2. the duty to ensure that appropriate medical assistance is sought when necessary,

3. the power to give or withhold consent to medical treatment,

4. the right to discipline the child,

5. the duty to ensure the child receives education,

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703 [1994] 2 FLR 964, Court of Appeal.

6. the right to change the surname,

7. the right to bring the child up in a particular religion,

8. the right to give consent to marriage,

9. the right to consent to adoption or be notified of the adoption process,
10. the right to appoint a guardian for the child in the event of the parent' s death,

11. the duty to maintain the child,

12. the duty to protect the child,

13. the duty to allow access/ contact between the child and other persons exercising parental responsibility,

14. the right to remove from the jurisdiction, either permanently or temporarily, and

15. the right to act as next friend in the taking or defending of proceedings.[704]

Second list

6.39 The second list sets out when consent is required. If consent is not forthcoming, a court order will be required. We consider that this list should be as follows:

1. Consent to change the surname,

2. consent to the adoption process,

3. consent to removal out of the jurisdiction for more than one month, and

4. consent to permanent removal out of the jurisdiction.

Third list

6.40 The third list specifies where notification is required. We consider that the list should be as follows:

1. Notification of a major operation or long-term medical or dental treatment,

2. notification of a major change in schooling,

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[704] A person under 18 years cannot issue or defend proceedings in his own name but must have an adult, who is called "next friend" to act for him.

3. notification of bringing the child up in a particular religion,

4. notification of consent to marriage,

5. notification of moving house,

6. notification of removing from the jurisdiction temporarily but less than one month,

7. notification to the other parent if there are going to be changes in domicile or nationality, and

8. notification of any other major or important decisions in the life of the child.

6.41 We agreed that the common law probably provided that doctors could proceed with an emergency medical operation or procedure without any parental consent. In those situations where notification was needed for medical treatment, a short period of notice would suffice. A reasonable period of notice would be needed for notification of consent for marriage. The right to appoint a guardian for the child in the event of the parent's death should not require either notification or consent. Neither would consent or notification be required for acting as next friend in the taking or defending of proceedings.

Acting incompatibly

6.42 Section 2(8) of the Children Act 1989, provides:

> *"The fact that a person has parental responsibility for a child shall not entitle him to act in any way which would be incompatible with any order made with respect to the child under this Act."*

6.43 Where, for example, a residence order had been granted in one parent's favour, the other parent would be able to exercise his responsibilities to the full when he has the child with him, subject to his not acting incompatibly with that court order. Section 2(8) asserts the primacy of a court order with respect to a child. **We recommend that a provision on the lines of section 2(8) of the Children Act 1989 should be adopted.**

Delegation

6.44 Section 2(9) of the Children Act 1989 provides that parents may delegate, but not transfer or surrender, parental responsibility. Section 3(5) of the Children (Scotland) Act 1995 has a similar provision but worded slightly differently.[705] In contrast, section 4 of the Guardianship of Minors Ordinance (Cap 13) refers to the "giving up", in whole or in

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[705] See chapter 4 *supra*.

part, of rights and authority to custody, upbringing or administration of property. Section 4 is only enforceable when the parties are separated, and only when the court thinks it is for the child's benefit. In our view, the term "giving up" is unfortunate, and does not reflect the concept of continuing parental responsibility for a child even after separation or divorce.

6.45 We recommend that a provision on the lines of the section 2(9) to (11) of the Children Act 1989[706] be enacted, rather than section 3(5) of the Children (Scotland) Act 1995. The consequence of this reform is that section 4 of the Guardianship of Minors Ordinance (Cap 13) would be repealed, though we consider it would be useful to retain the last three lines of section 4(1).[707]

Continuing parental responsibility

6.46 Section 2(6) of the Children Act 1989 provides that a person does not lose parental responsibility just because someone else acquires it, for example, a step- parent or an unmarried father. Section 11(11) of the Children (Scotland) Act 1995 is worded differently and more realistically as it recognises that in making such an order there may be consequences for other persons with such responsibilities. **We recommend a provision on the lines of section 11(11) of the Children (Scotland) Act 1995.**

Part C - Acquisition of parental responsibility by guardians

Appointment

6.47 Section 6(1) of the Guardianship of Minors Ordinance (Cap 13) provides that a parent may appoint a guardian by deed or will. In contrast, section 5(5) of the Children Act 1989 provides that parents who have parental responsibility[708] may appoint guardians by a document in writing, with their signature attested by two witnesses, without the need to make a formal will or deed. This avoids technicalities and facilitates appointment, as many people do not make a will. We consider that a guardian should be able to be appointed by a simple process, which is not legalistic. **We therefore recommend the adoption of a similar provision to section 5(5) of the Children Act 1989.[709]**

6.48 We agreed that there must be a recognised system to enable a third party to determine that a person has acknowledged his appointment as a guardian. Concern was

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706 See Annex 1 *infra* for text.

707 The last three lines of section 4 (1) provide "but no such agreement between husband and wife shall be enforced by any court if the court is of opinion that it will not be for the benefit of the child to give effect to it".

708 This is under subsection 3. Thus an unmarried father would not be able to appoint a guardian unless he had been granted parental responsibility by agreement or court order.

709 Annex 1 *infra* for text.

expressed that a parent may appoint a person as testamentary guardian without having informed that person or obtained his consent. This was not in the best interests of the child. A requirement of formal consent would bring home to the guardian the seriousness of the parental responsibility that he was taking on for the child.

6.49 We recommend the introduction of a standard form for the appointment of a guardian, which should explain briefly a guardian's responsibilities, and be signed by the proposed guardian. These forms could be made available at the Legal Aid Department, and the District Offices where the Free Legal Advice Scheme of the Duty Lawyer Service operate. We also recommend that the guardian should have to accept office as guardian expressly or impliedly if he has not formally consented to act as guardian. This could also be achieved by the completion of a form.

Appointment by guardian

6.50 It does not seem that there is any statutory provision in Hong Kong allowing a guardian to appoint a guardian to act for him in the event of his death. In England, however, section 5(4) of the Children Act 1989 provides that a guardian may appoint a guardian to take his place as the child's guardian in the event of his death. **We recommend the adoption of a provision on the lines of section 5(4) of the Children Act 1989.**

Views of child on appointment of guardian

6.51 Section 7(6) of the Children (Scotland) Act 1995 provides that a decision on appointment of a guardian is treated as a major decision which involves exercising a parental right under section 6. Section 6 provides that the views of the child should, so far as practicable, be taken into account in making a major decision. This is more relevant to an older child and is a reasonable provision considering that, if the parents are divorced, the guardian will be caring for the child. **We recommend that a similar provision to section 7(6) of the Children (Scotland) Act 1995 be introduced.**

Disclaimer

6.52 Section 5 of the Guardianship of Minors Ordinance (Cap 13) gives power to appoint a guardian where a testamentary guardian refuses to act. There is no provision for a guardian to disclaim. In England, a guardian who does not want to act as such may disclaim by an instrument in writing under section 6(5) of the Children Act 1989. The Scottish Act provides that an appointment cannot take effect unless accepted expressly or impliedly by acts which are not consistent with any other intention.[710]

6.53 We recommend that there should be a system for withdrawing from acting as a guardian similar to the system for appointing a guardian.

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[710] Section 7(3) of the Children (Scotland) Act 1995.

If the proposed guardian had already consented to act, by signing the appropriate form, then he would have to formally disclaim it, if he did not want to act at a later time. The disclaimer should be formal, in writing, and notified to the executor or administrator of the estate. The Director of Social Welfare should be notified of the disclaimer if there is no executor, administrator or surviving parent, so that steps can be taken to protect the best interests of the child.

Court appointment

6.54 Section 7 of the Guardianship of Minors Ordinance provides for the court to appoint a guardian if the child has no parent, no guardian and no other person having parental rights with respect to him.[711] In England, section 5(1) of the Children Act 1989 provides that any individual who wishes to be a guardian may apply to the court to be appointed if the child has no parent with parental responsibility for him or a residence order had been made in favour of the parent who has now died.[712] It is consistent with the reforms proposed to adopt a provision on the lines of section 5(1) of the Children Act 1989.

6.55 We recommend that section 7 of the Guardianship of Minors Ordinance be repealed and a similar provision to section 5(1) of the Children Act 1989, with regard to the appointment of a guardian, be enacted.

When appointment of guardian takes effect

6.56 In England, guardians appointed by the parent or the court have parental responsibility under the Children Act 1989.[713] The Children (Scotland) Act 1995 has a similar provision.[714] Section 5(8) of the Children Act 1989 provided that the testamentary guardian only has parental responsibility after the death of the surviving parent,[715] unless the deceased parent had a residence order in his favour, or was the only parent with parental responsibility.[716]

Disadvantages of English provision

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711 This would be a reference to an unmarried father who had obtained an order under section 3 granting him parental rights or authority.

712 For full text see Annex 1 *infra.*

713 Section 5(6).

714 Section 7(5).

715 See discussion on this provision in chapter 3 *supra.*

716 Section 5(7)(b). The situation of one parent having parental responsibility would arise where an unmarried mother had not signed a parental responsibility agreement with the father, or the court had not ordered the father to have parental responsibility. See also chapter 3 *supra*. A dispute between the surviving parent and the guardian can be resolved by an application under section 8. See *infra.*

6.57 We identified some difficulty with this provision, as the testamentary guardian could not act if the deceased parent before his death had the child exclusively living with him but had not applied to court for a residence order. The parties may have had an informal agreement, or signed a mediation agreement which was not converted into a consent order. Limiting the care of a child to the surviving parent forces the testamentary guardian to go to court. Yet a surviving parent may have been irresponsible towards the child.

6.58 We noted the disadvantages of the English provision for these practical reasons.[717] The purpose of appointing a guardian was for the guardian to take office after the death of the parent making the appointment. It was thought futile for a parent to appoint a testamentary guardian if that guardian could only take office after the death of the surviving parent. The Scottish Law Commission felt that the appointed guardian should be allowed to act after the death of the appointing parent, even if the other parent is still alive.[718] Any dispute between the testamentary guardian and the surviving parent could be resolved by the court.

6.59 In Hong Kong, the role of the extended family in the upbringing of children is still apparent. It may be more appropriate that a guardian should be allowed to act, even if there is a surviving parent, as already provided for in sections 5 and 6 of the Guardianship of Minors Ordinance (Cap 13). It is in the best interests of a child that the testamentary guardian should not have to wait until after the death of the surviving parent to take steps to act as guardian of the child.

Advantages of English provision

6.60 As a matter of principle there are arguments in favour of adopting a provision on the lines of section 5(8) of the English Children Act 1989. Since we are already recommending joint parental responsibility, it may be suggested that it would be inconsistent to allow the deceased parent to continue to exercise parental responsibility through the testamentary guardian. It may be regarded as being akin to passing on the child like a piece of property, instead of allowing the surviving parent to take over full parental responsibility.

6.61 If the testamentary guardian is unhappy with the way the best interests of the child are being cared for by the surviving parent, he could apply to court for a residence order.[719] **We recommend that if a parent had obtained a residence order prior to his death, then a testamentary guardian appointed by that parent should be able to act automatically as testamentary guardian on that parent's death. If the contact parent is unhappy with this situation he can apply to court to determine the residence of the child.**

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717 The Scottish Law Commission also took this view. See chapter 3 *supra*.

718 See section 6(2) of the Guardianship of Minors Ordinance (Cap 13).

719 See recommendation on residence orders *infra*.

6.62 We also recommend that a testamentary guardian should be able to act on the death of the parent who appointed the testamentary guardian if the child was residing with that parent prior to his death. Thus the appointment of the testamentary guardian would not take immediate effect on the death of the parent but a pro-active step of obtaining the court's permission would have to be taken by the guardian. This option is more practical and avoids the rigidity of section 5(8) of the English Children Act 1989 of depriving the testamentary guardian of his responsibilities until after the death of the surviving parent.

Veto of surviving parent

6.63 There is a need for change to the right of the surviving parent to veto the testamentary guardian under section 6(2) of the Guardianship of Minors Ordinance (Cap 13).[720] It seems that the appointment of a testamentary guardian has no effect if the surviving parent objects. The result of this veto is that the testamentary guardian is forced to bring the matter to the court. The court may refuse to make an order which results in the surviving parent remaining sole guardian.[721] Alternatively, the court can order that the guardian act jointly with the surviving parent or to the exclusion of the surviving parent.[722]

6.64 The surviving parent does not have the right to take the initiative to go to court under this section. We cannot find any circumstances to justify barring the surviving parent from seeking a remedy from the court if he objects to the testamentary guardian acting. In those circumstances, the court will decide the matter, by applying the best interests principle.

6.65 We recommend that the right to veto of the surviving parent in section 6(2) of the Guardianship of Minors Ordinance (Cap 13) should be removed. Then, either the surviving parent or guardian could apply to a court under section 6(3) if there is a dispute between them on the best interests of the child.

Removal or replacement of guardian

6.66 Section 8 of the Guardianship of Minors Ordinance provides that the High Court may remove or replace a testamentary guardian or any guardian appointed or acting under the ordinance, if it is satisfied that it is for the welfare of the child. Section 6(7) of the Children Act 1989 Act provides that the child, or any person with parental responsibility, or the court itself, may apply to terminate the appointment of a guardian. We considered whether it was necessary to adopt a provision on the lines of section 6(7) to be consistent with other reform proposals. **We recommend that section 8 of the Guardianship of Minors Ordinance should be retained, but that it should be amended to give similar powers to the District Court.**

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720 See chapter 2 *supra*.

721 This is under section 6(3)(a).

722 Section 6(3)(b).

Removal of surviving parent as guardian

6.67 If the court, under section 6(3)(b)(ii) of the Guardianship of Minors Ordinance, appoints the testamentary guardian as sole guardian, thus removing the surviving parent as a guardian, section 11 gives it power to make orders concerning custody, maintenance, and access by the surviving parent. The implications of making the testamentary guardian a sole guardian are the cessation of the surviving parent's rights except for access and the duty to maintain the child.

6.68 Whether this removes his rights as the natural guardian of his child is unclear as there has been no specific provision in Hong Kong clarifying that the rights of a father as natural guardian have been abolished.[723] Where the mother is the surviving parent she is not a natural guardian. It should be noted that a surviving parent is not entitled as of right to the custody or the guardianship of the child if the court has previously made an order that the surviving parent was unfit to have custody.[724] This order can be included in the decree of divorce or judicial separation.

6.69 In England, a surviving parent retains his parental responsibility even if a testamentary guardian is also acting. There is no provision in the Children Act 1989 depriving a parent of his parental responsibility. However, the court can make a residence order in favour of the guardian rather than the surviving parent. The English section 8 orders, which we recommend later, will ensure that the best interests of a child are protected even if circumscribing the surviving parent's rights and responsibilities almost results to a total restriction.

6.70 **We recommend that the right to remove the surviving parent as guardian under section 6 of the Guardianship of Minors Ordinance should be repealed.** It would be inconsistent with the adoption of parental responsibility and the confinement of the concept of guardianship to third parties on the death of a parent to retain power to remove a surviving parent as guardian of his child.

Unmarried father as surviving parent

6.71 The implications of the grant of the status of parental responsibility as discussed earlier[725] would be that the unmarried father could be treated as the surviving parent under the Guardianship of Minors Ordinance and also could appoint a guardian to act for the child in the event of his own death. However, for the purposes of clarification, **we recommend that a provision be inserted that once the natural father is granted parental rights or responsibility, whether by fulfilling the**

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723 See recommendation *supra* on its abolition.

724 Section 19(4) of the Matrimonial Proceedings and Property Ordinance (Cap 192). The court has power under section 19(3) to declare that a parent is unfit to have custody.

725 See *supra* in this chapter and also in chapter 2.

requirements for semi-automatic acquisition, or by a court order,[726] then he can be deemed to be the surviving parent under the Ordinance.[727]

Guardian of the estate

6.72 Section 18 of the Guardianship of Minors Ordinance (Cap 13) provides that a guardian of the person of the minor shall also be guardian of his estate except in those circumstances specified in subsection (2).[728] The English Law Commission recommended that trusteeship should fill any gaps in the provisions for guardian of the estate.[729] Section 5(11) of the Children Act 1989 preserved the power to appoint a guardian of the estate. Rules of court gave the right to exercise the power to the Official Solicitor. The Scottish Law Commission and the Children (Scotland) Act 1995 made detailed provisions as to the administration of a child' s estate which do not seem relevant to Hong Kong.

6.73 The Official Solicitor Ordinance (Cap 416) sets out the jurisdiction of the Official Solicitor with regard to property matters. We note the power in Order 80 rule 13 of the English Rules of the Supreme Court, which provides that only the Official Solicitor can be appointed as guardian of the estate of a child. There is no equivalent power in Hong Kong. However this does not seem to have hampered the Official Solicitor in the exercise of his duty. **We welcome views as to whether the Official Solicitor has sufficient powers to act as guardian of the estate. We invite submissions as to how the Hong Kong provisions work in practice and whether any reform is necessary.**

Part D - Types of orders for children

6.74 The new English orders were designed to focus on the practical arrangements for fulfilling responsibilities for the child with a view to minimising disputes between the parents, rather than the previous focus on one parent controlling the other parent while he had the child physically with him. For ease of reference the various overseas provisions relating to relevant orders concerning children will be set out under the relevant types of orders.

Australian provisions

6.75 The Australian Family Law Reform Act 1995 amended their Family Law Act 1975 by the introduction of "parenting orders" and the abolition of the concepts of custody and access. These are residence orders, contact orders and specific issue orders.

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726 Section 3(1)(d) of the Guardianship of Minors Ordinance as amended.

727 He also could be treated as a guardian if the present law is retained though we have earlier recommended that the concept of guardianship be reserved for third parties appointed to act on death, and not to surviving parents.

728 A guardian of the estate only may have been appointed by the High Court.

729 English Law Commission, *Family Law, Review of Child Law; Guardianship and Custody*, (1988: Law Com No 172) paragraph 2.24.

The latter order deals with any aspect of parental responsibility other than maintenance, residence or contact.[730]

Custody orders

6.76 The language of custody orders implies something akin to ownership of a child. The fact that the common law, accepted in Hong Kong, gives the custodial parent virtually all the rights concerning the upbringing of the child inevitably leads to more cases being contested in the courts.[731]

6.77 To say to the non-custodial parent that the only right he retains is to have access, and some undefined residual rights which he can only exercise if he finds out that these rights are being infringed by the custodial parent, is to invite continuing conflict between the parents. In some countries both parents retain guardianship rights and the right of custody has been confined to physical custody with a duty to consult the non-custodial parent on important matters affecting the upbringing of the child. We suggest that this does not go far enough, as retaining guardianship to cover both parenting and the situation of caring for a child after the death of a parent leads to confusion.

6.78 It is also more consistent with our other recommendation on parental responsibility that the existing orders of custody be repealed. **We recommend the repeal of provisions dealing with custody orders.**

Residence order

6.79 Obviously there has to be a provision in the proposed legislation governing the child' s residence, and for a parent to take responsibility for a child on a daily basis. The English provision states that a residence order is an order settling the arrangements as to the person with whom a child is to live.[732] The Scottish provision states that it is:

> *"an order regulating the arrangements as to:*
>
> *(i) with whom; or*
> *(ii) if with different persons alternately or periodically, with whom during what periods,*
> *a child under the age of sixteen years is to live".*[733]

6.80 A residence order is conceptually different from a custody order and is more similar to an order of care and control **We recommend that legislation provide for a residence order.**

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730 See section 64B (6) of the Family Law Act 1975.

731 We noted the comment in the recent book, Hewitt (ed) *Hong Kong Legal Practice Manual-Family*, which states "custody equates to the legal parental rights and responsibilities borne by the parents of the child". (1998) at 160.

732 Section 8 of the Children Act 1989.

733 Section 11(2)(c) of the Children (Scotland) Act 1995.

Definition of residence order

6.81 We prefer the greater detail of the language of residence orders in the English and Scottish legislation to that in the Australian provision. However, we consider that an even more detailed definition of residence order is needed for Hong Kong. We noted the existing order of "care and control" which "equates to having the day-to-day care and responsibility for the child".[734] We saw some merit in retaining the existing language of "care" but not that of "control," which has some negative connotations.

6.82 We were attracted to the Australian section 64B(6) which uses the term "day-to-day care, welfare and development" in the definition of a specific issues order, but we concluded that "development" had more long-term implications which were not appropriate for a residence order.

6.83 We recommend that the definition of a residence order incorporate a reference to the parent in whose favour the order is made having responsibility for "the day-to-day care and best interests of the child". We recommend that the definition would be "a residence order is an order settling the arrangements as to the person with whom a child is to live and who has the day-to-day care and best interests of the child."

Non-parents

6.84 Section 12(2) of the Children Act 1989 Act provides that if a residence order is made in favour of a non-parent then he is granted parental responsibility, with all that it implies. **We consider section 12(2) of the Children Act 1989 to be a useful provision, and we recommend enactment of a similar provision in Hong Kong.**

Contact order

6.85 Section 8 of the Children Act 1989 provides that a contact order allows the child to visit or stay with the other person. A Scottish contact order is:

> *"an order regulating the arrangements for maintaining personal relations and direct contact between a child under that age and a person with whom the child is not, or will not be, living."*[735]

6.86 We considered the English and Scottish definitions of contact orders. We had some concern with the words "to allow" in the English provision in case it was interpreted by parents to mean that the residential parent exercised some control over access by the non-residential parent to the child. In contrast, the Scottish section referred to

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734 *Idem.*

735 Section 11(2)(d) of the Children (Scotland) Act 1995.

the child's right to be with the other parent. The more neutral language of this section was similar to Article 9.3 of the United Nations Convention on the Rights of the Child.

6.87 We recommend the adoption of a provision on the lines of the Scottish definition of the contact order.[736] We also recommend that this proposed section would provide that the contact parent would have the right to act independently for the day-to-day care of the child when he is exercising contact with the child.

Specific issue order

6.88 Section 8(1) of the Children Act 1989 defines a specific issue order as an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child. The Scottish section 11(2)(e) defines it as: "An order regulating any specific question which has arisen, or may arise, in connection with any of the matters mentioned in paragraph (a) to (d) of subsection (1) ...."[737]

6.89 In contrast to the English or Scottish definitions, the Australian "specific issues" order extends to any aspect of parental responsibility other than residence, contact or maintenance. It may confer "on a person (whether alone or jointly with another person) responsibility for the long-term care, welfare and development of the child or for the day-to-day care, welfare and development of the child".[738]

6.90 The English wording gave the court unrestricted discretion to make an order for the welfare of the child.[739] We expressed a preference for the English definition to the Scottish definition as it was crisper, and gave considerable leeway and flexibility. We prefer the term "specific issues order " to "specific issue order." **Accordingly we recommend that a provision on the lines of the English definition of the specific issue order be enacted.**

Prohibited steps order

6.91 The English definition of a prohibited steps order provides that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court. The Scottish provision states:

> *"an interdict prohibiting the taking of any step of a kind specified in the interdict in the fulfilment of parental responsibilities or the exercise*

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736 See Annex 1 *infra*.

737 These include parental responsibilities, rights, guardianship and the administration of a child's property.

738 Section 64B(6) of the Family Law Act 1975 as inserted by the Family Law Reform Act 1995.

739 See Annex 1 *infra*.

of parental rights relating to a child or in the administration of a child's property."[740]

6.92 There is no similar provision in the Australian Family Law Act 1975. The Scottish provision refers to a type of order that is not known in our law, similar to an injunction. Therefore, the most suitable definition for Hong Kong is the English definition. **We recommend that a provision on the lines of the definition of prohibited steps orders in section 8(1) of the Children Act 1989 be enacted.**

Supplementary requirements

6.93 When making a section 8 order, section 11(7) of the Children Act 1989 gives power to the court to include directions or conditions specified therein.[741] This would be, for example, to organise supervised contact for the child with the parent where there has been a history of violence or abuse in the family. No similar requirement is provided for in the Children (Scotland) Act 1995. This is a useful power to assist the court in structuring orders to meet the best interests of a child and minimise future disputes. **We recommend the adoption of a similar provision to section 11(7) of the Children Act 1989.**

Right of third party to apply

6.94 It has been noted in Chapter 2 that section 10 of the Guardianship of Minors Ordinance (Cap 13) causes problems for third parties such as grandparents or other carers in applying to the court for orders of custody or access. Such orders may be necessary to protect the child's best interests for example, where a single parent leaves his or her child to be brought up by the grandparents and subsequently demands the child back. It is also in the child's best interests to maintain contact with both sets of grandparents, particularly in Hong Kong where the extended family is important.

6.95 The third parties have to rely on either a parent or the Director of Social Welfare applying on their behalf for such orders. Alternatively, wardship proceedings can be taken by the carer, or the Official Solicitor may intervene. The Matrimonial Causes Rules (Cap 179) do provide that a guardian or a person who has custody, control or supervision of a child can apply for an order under section 48 of that ordinance.[742]

6.96 The Scottish provision provides that any person can seek an order, other than a person whose parental rights were removed by an order in favour of a local authority or by adoption.[743] Section 10 of the Children Act 1989,[744] which deals with those who can

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740 Section 11(2)(f) of the Children (Scotland) Act 1995.

741 See chapter 3 *supra*.

742 This is for a supervision order. See *infra* in relation to an application by an individual to be appointed as the guardian *ad litem*, with authority to take proceedings on the child's behalf under rule 108 of the Matrimonial Causes Rules.

743 Section 11(3) of the Children (Scotland) Act 1995.

744 See chapter 3 *supra*.

apply for a section 8 order without leave and those who can apply once leave is granted, is more relevant to the social realities of Hong Kong. However, the provision restricting the right to apply without leave to "any person with whom the child has lived for a total of at least three years"[745] seems restrictive for Hong Kong where the extended family plays a much larger role than in England.

6.97 The limitation in section 10 of the Guardianship of Minors Ordinance (Cap 13) on the right of third parties to apply to court should be removed. We see no justification for obstacles preventing interested third parties from applying for orders concerning children. We recommend a provision on the lines of section 10 of the English Children Act 1989, with the amendment of subsections (5)(b) and (10) to provide that no leave would be required if the child has lived with the applicant for a total of one year out of the previous three years. The one year period need not necessarily be a continuous period, but must not have ended more than three months before the application.

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[745] Section 10(5)(b) and (10). For full text see Annex 1 *infra*.

Arrangements for the children

6.98 The provision dealing with arrangements for children is contained in section 18 of the Matrimonial Proceedings and Property Ordinance (Cap 192).[746] In England, section 41 of the 1973 Act, as amended by the Children Act 1989,[747] and section 11 of the Family Law Act 1996 provides that in any divorce, nullity or judicial separation proceedings, the court has a duty to consider whether, in the light of the arrangements proposed for the upbringing and welfare of the children, it should exercise any of its powers under the Children Act 1989. The court is now required to have regard to the wishes and feelings of the child in the light of his age and understanding and the circumstances in which those wishes were expressed[748]. In the absence of evidence to the contrary the court will have regard to the fact that:

> *"the welfare of the child will be best served by:*
> *(i) his having regular contact with those who have parental responsibility for him and with other members of his family; and*
> *(ii) the maintenance of as good a continuing relationship with his parents as is possible."*[749]

6.99 The statement of arrangements for children will not normally be subjected to judicial scrutiny. However, the court may direct that the decree absolute of divorce, or nullity or judicial separation be stayed where there are exceptional circumstances which justify the court giving such a direction in the best interests of the child.[750] Section 12 of the Children (Scotland) Act 1995 is similar. It has been suggested that the English and Scottish provisions comply with the principle of reducing intervention by government in the lives of families.[751]

6.100 We prefer to retain section 18 of the Matrimonial Proceedings and Property Ordinance but we recommend that it is amended to include that the court shall have regard to the views of the child and the desirability of a child retaining contact with both parents, as is set out in section 11(4) of the English Family Law Act 1996.

6.101 Parents should have to prove to the Judge that arrangements for the children are the best that can be arranged. The Judge should examine the future plans as to the child's place and country of residence and the proposed contact with both parents, especially if one parent proposes to emigrate from Hong Kong. If that burden on the court is

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746 This is similar to section 41 of the Matrimonial Causes Act 1973. Criticisms of the English Law Commission on this matter in Chapter 3 have been noted.

747 Schedule 12, paragraph 31 of the Children Act 1989.

748 Section 11(3) of the Family Law Act 1996.

749 Section 11(4)(c) of the Family Law Act 1996.

750 See chapter 3. *supra*.

751 See chapter 3 *supra*.

lessened by the English section, then we do not think it is desirable from the child's point of view. We also recommend that for consistency with the other ages adopted in other provisions in matrimonial legislation, section 18(5)(a)(i) should be amended to refer to the age of eighteen.

Family proceedings

6.102 Section 10(1) of the Children Act 1989 in England gives the court a specific power to make section 8 orders in any family proceedings.[752] This would include wardship. This may reduce the need for wardship where orders under section 8 can be made in lieu. **A similar provision to section 10(1) of the Children Act 1989 is recommended for inclusion in Hong Kong's legislation. It would also be useful to have a definition of family proceedings.**

Change of surname

6.103 Section 13(1)(a) of the Children Act 1989 provides that it is an automatic condition of a residence order that the child's surname should not be changed without the written consent of each person with parental responsibility or with the leave of the court. There is no similar requirement in legislation in Hong Kong. **We recommend that a provision on changing a child's surname on the lines of section 13(1)(a) of the Children Act 1989 be enacted.**

Part E - The voice of the child

General principles

6.104 The Family Law Council suggested that there were three aspects to involving the child in the dispute resolution system:

> *"(a) to give children the opportunity, as far as this is practical, to express their wishes in relation to decisions which will directly affect them;*
>
> *(b) involvement in the processes which arise from the functioning of the Family Law Act, as appropriate; and*
>
> *(c) ensuring that children do not feel a sense of exclusion from decisions or matters which directly affect them."*[753]

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752 See Annex 1 *infra*.

753 Discussion Paper, *Involving and Representing Children in Family Law* (May 1995) at paragraph 3.06. See chapter 5 *supra*.

6.105 This approach was justified on the basis of the research literature on how children handle divorce, and also to comply with the United Nations Convention on the Rights of the Child. The child's wishes can be brought to the court's attention by being included in a social welfare officer's report or other court expert's report; by appointment of a separate representative; by interviewing the child; or (rarely) by proceedings issued by the child or on his behalf.

Wishes of the child

6.106 The only clear reference to the wishes of the child is contained in section 3 of the Guardianship of Minors Ordinance (Cap 13). This provides that in any proceedings relating to the custody or upbringing of a minor or his property the court shall give "due consideration to - . . the wishes of the minor . . ."

6.107 There is only an implication that a similar stricture applies to proceedings under the Matrimonial Causes Ordinance (Cap 179) or the Matrimonial Proceedings and Property Ordinance (Cap 192). Section 48C of the Matrimonial Causes Ordinance only refers to that part of section 3 of the Guardianship of Minors Ordinance which deals with the welfare principle as being the first and paramount principle, and not to that part dealing with wishes of the child. Yet, section 3(1)(a) of the Guardianship of Minors Ordinance refers to "[in] any proceedings before any court (whether or not a court as defined in section 2)". That definition is confined to the High Court (now the Court of First Instance) or the District Court.

6.108 Section 1(3)(a) of the Children Act 1989 provides that the court is under a duty to have regard to the child's wishes and feelings considered in the light of his age and understanding. It is one of the factors in the checklist which was considered earlier. Article 12.1 of the United Nations Convention on the Rights of the Child provides that:

> *"States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."*

Views of the child

6.109 The Scottish Law Commission preferred the term "views" to the term "wishes and feelings" which was enacted in the Children Act 1989 as:

> *"it recognises that a young person may be ... capable of balancing his ... immediate wishes and feelings against long term considerations*

and the interests of others and [then] coming to a considered view as to what was the right course of action in the circumstances".[754]

6.110 We recommend that a provision on the views of the child should apply to all proceedings concerning children. It would also be clearer if each matrimonial ordinance specifically referred to the need to hear the views of the child. We recommend that the language of the United Nations Convention on the Rights of the Child should be adopted so that the term "views" rather than "wishes" of the child is enacted in matrimonial legislation.[755]

How and when child's views taken into account

6.111 Section 3(1)(a)(i)(A) of the Guardianship of Minors Ordinance (Cap 13) makes clear that the court need only give consideration to a child's wishes "if, having regard to the age and understanding of the minor and to the circumstances of the case, it is practicable to do so". Section 1(1) of the Children Act 1989 refers to wishes in the context of "where a court determines any question ...." This was criticised by the Scottish Commission,[756] as restricting wishes to be taken into account only when a section 8 application is opposed. It is important that the child's wishes are taken into account even if an order is not being opposed by one parent.

Scotland

6.112 The Scottish section on views is free-standing as there is no checklist in the Scottish legislation. It also deals with the mechanism for expressing the views. Section 11(7) of the Children (Scotland) Act 1995 provides that:

> *"... in considering whether or not to make an order under subsection (1) above*[757] *and what order to make, the court ... taking account of the child's age and maturity, shall so far as practicable:*
>
> *(i) give him an opportunity to indicate whether he wishes to express his views;*
> *(ii) if he does so wish, give him an opportunity to express them; and*
> *(iii) have regard to such views as he may express".*

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754 *Ibid* at paragraph 2.63.

755 We are referring here to the Guardianship of Minors Ordinance, (Cap 13), Matrimonial Causes Ordinance (Cap 179), Matrimonial Proceedings and Property Ordinance (Cap 192), Separation and Maintenance Orders Ordinance (Cap 16), and the Domestic Violence Ordinance (Cap 189).

756 Paragraph 5.26 of the *Report on Family Law*, (1992: Scot Law Com No 135). See chapter 4 *supra*.

757 This is relating to parental responsibilities or rights, or guardianship or the administration of a child's property.

6.113 The Australian provision on the child's wishes is incorporated into the amended checklist of section 68F of the Family Law Act 1975, to be considered with all the other factors in the checklist.[758] **Considering our earlier recommendation that a statutory checklist of factors should be established, we recommend that the child's views should be one element in the checklist of factors rather than a free-standing section. The child's views should be balanced with the other factors when the judge is making a decision in the child's best interests. We recommend the repeal of section 3(1)(a)(i)(A) of the Guardianship of Minors Ordinance (Cap 13).**

How the views of a child are expressed

6.114 Section 3(1)(a)(i)(B) of the Guardianship of Minors Ordinance refers to the court looking at material information, including a social welfare officer's report. The relevant Australian provision states:

> *"68G. (2) The court may inform itself of wishes expressed by a child:*
>
> *(a) by having regard to anything contained in a report given to the court under subsection 62G(2); or*
> *(b) subject to the Rules of Court, by such other means as the court thinks appropriate".*[759]

6.115 We recommend that a child should be given the facility to express his views if he wishes, whether directly or indirectly.[760] Once he has indicated a desire to express views, then the court must hear his views.

6.116 We suggest that it would be useful to set out the mechanisms for ascertaining and expressing the child's views. We recommend adopting a provision on the lines of the Australian section 68G(2), but adapted to insert "views" rather than "wishes."[761] With the adoption of this provision, we recommend the repeal of section 3(1)(a)(i)(B) of the Guardianship of Minors Ordinance.

Children not required to express views

6.117 Section 68H of the Family Law Act 1975 in Australia provides that the court or any person is not permitted to require the child to express his or her wishes in relation to any matter. **We recommend that children should not be required to express their views. To do so would place children under pressure by one or both parents to take sides in a dispute concerning the children's best**

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758 See chapter 5 *supra*.

759 This would deal with separate representatives.

760 This is via a report from a social welfare officer, psychiatrist or psychologist.

761 See Annex 1.

interests. However, we do not see the need for statutory provision to that effect on the lines of the Australian section 68H.

Age of maturity for the purpose of obtaining views

6.118 Section 11(10) of the Children (Scotland) Act 1995 provides a presumption of maturity for a child of 12 or above.[762] **We recommend that there should be no age limit and the court should have unfettered discretion in deciding whether to hear a child's views, irrespective of his age. We do not think that section 11(10) of the Children (Scotland) Act 1995 would be suitable for local conditions as such a presumption may be too inflexible in particular cases.**

Separate representation

6.119 A separate representative is a lawyer appointed to represent a child in family law proceedings.[763] In Hong Kong that role, to a certain extent, is fulfilled by the Official Solicitor.[764] The duties of the Official Solicitor under the Official Solicitor Ordinance (Cap 416) include acting as guardian *ad litem* or next friend to a person under disability of age.

6.120 It may be said by some that it is futile to appoint a separate representative or a guardian *ad litem* as the court already orders a report from a social welfare officer where the parents cannot agree on the best interests of a child. It may be useful to set out the difference between their duties. In *re S,*[765] Butler-Sloss L.J., in referring to the functions of a child welfare officer[766] and a guardian *ad litem* (GAL), said:

> *"The functions are not identical, although they do have many features in common: each has a duty to report to the court; each has a duty to consider the welfare or interests of the child; each may be cross-examined on any report which they give. However, a child welfare officer is not a party to the proceedings whereas a GAL is.... Nevertheless, each has a similar duty to the court, which is to advise the court as to what is best for the child independently of the other parties to the proceedings, and each of them is independent of all the other parties to the proceedings. The reports of both should be given the same consideration by the court".*

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762 Section 11(10) provides that: "Without prejudice to the generality of paragraph (b) of subsection (7) above, a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view for the purposes both of that paragraph and of subsection (9) above."

763 This is the term used in Australia. In England and Hong Kong the term used is the "Official Solicitor". In New Zealand the term "Counsel for the Child" is used.

764 See chapter 2 *supra*.

765 In *re S* [1992] 2 F.C.R. 554.

766 This is equivalent to our social welfare officer.

6.121 Of course it may not be necessary for the child to be separately represented by a lawyer. In England, in public law cases, where it is mandatory to appoint a guardian *ad litem*, he is not obliged to use a lawyer but can do so. It may be that a social worker may be able to handle the dispute, depending on the context, without a lawyer. However, in other situations the guardian *ad litem* may need legal representation. Our legislation and rules refer to acting as guardian *ad litem* as well as separate representation.

6.122 Section 64 of the English Family Law Act 1996 provided that a separate representative can be appointed in any family proceedings, including an application for a non-molestation order. Regulations yet to be made may specify the circumstances of the appointment.[767] This was different to the Children Act 1989 which had limited the use of a guardian *ad litem* to public law proceedings. It is also interesting that the term "separate representative", which is not defined, is used rather than guardian *ad litem*.

Rule 108

6.123 Under rule 108 of the Matrimonial Causes Rules (Cap 179) the court has a broad discretion to order that a child ought to be separately represented in any matrimonial proceedings. It can appoint the Official Solicitor, if he consents, or, "on the application of any other proper person, appoint that person, to be guardian *ad litem* with authority to take part in the proceedings on the child's behalf".[768]

6.124 Rule 108(2) provides that a solicitor must certify that the proposed applicant "has no interest in the proceedings adverse to that of the child and that he is a proper person to be such guardian". There is an argument that a relative who is applying for custody could not be seen to be sufficiently independent to represent the best interests of the child as a guardian *ad litem*. In other jurisdictions, a guardian *ad litem* is a professional officer, usually a social worker, appointed to interview the child and represent his views and best interests to the court.

Rule 72

6.125 Rule 72 is confined to ordering separate representation by a solicitor, or solicitor and counsel, and appointing the Official Solicitor or other fit person to be guardian *ad litem* for an application for a variation of a settlement order or any other application for ancillary relief. Such applications are financial and property matters.

Anomalies

6.126 **In chapter 2 we made a recommendation that the anomalies in rule 72 and rule 108 of the Matrimonial Causes Rules (Cap 179) as to the**

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[767] At the third reading, when the provision was being moved, the government representative said that these circumstances may be where the interests of a child may be in conflict with those of either or both parents and that such a conflict presents a potential risk to the child's welfare. *Hansard*, H.C. vol. 279, col. 579-580, 17 June 1996.

[768] Rule 108(1)(b).

appointment of a separate representative or guardian *ad litem* be addressed. There is no power in rule 108 to direct separate representation by lawyers unlike rule 72. The Official Solicitor has to consent to being appointed under rule 108, though this is not required for rule 72. Rule 108 refers to a "proper person" acting as guardian *ad litem* while rule 72 refers to a "fit person". Neither term is defined. It seems ironic that there is no provision referring to separate representation by a lawyer in a matrimonial dispute, and yet there can be for financial and property matters.

6.127 In rule 72 it is clear that the solicitor is acting for the child and he has to file the certificate that the proposed guardian has no interest adverse to the child. In rule 108 the solicitor is acting for the applicant who is seeking to be appointed guardian "with authority to take part in the proceedings on the child's behalf". "A solicitor" has to certify that the applicant is a proper person with no adverse interest to the child, though it is not clear whether this must be the solicitor representing the applicant, or whether it can be a solicitor who takes no further part in the proceedings.

6.128 In fact, rule 108 comes under that part of the rules which is headed "Other Applications", rather than under that part headed "Applications relating to Children". On one reading it may seem that the policy intention was that the "matrimonial proceedings" referred to in rule 108 do not include custody proceedings. However, it is in exactly these type of proceedings that appointment of a separate representative or a guardian *ad litem* would be appropriate. In any event, the courts seem to have appointed the Official Solicitor in custody proceedings. **For the removal of doubt it should be made clear that a separate representative can be appointed in any dispute on the parental responsibility or guardianship of a child.**

Guardian ad litem

6.129 **In chapter 2 we suggested that it would be more appropriate if a person conferred with the role of guardian *ad litem* was a professional person with experience in children's issues rather than any individual who is a "proper" or "fit" person.** We have already recommended that non-parents should be able to apply for orders concerning children.[769] Such non-parents would not be regarded as guardians *ad litem*.

Hartmann Working Group

6.130 Proposals for change to rule 72 of the Matrimonial Causes Rules (Cap 179) were made to the *Working Group To Review Practices and Procedures Relating To Matrimonial Proceedings* (Hartmann Working Group). The members were of the opinion that the rule already provided flexibility to appoint persons other than the Official Solicitor. There were less than 10 cases where the Official Solicitor was appointed to provide separate representation in 1995. The judges could not recall appointing someone other than

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769 See *supra*.

the Official Solicitor as guardian *ad litem*. It was argued that there was therefore no need to change the rule.[770]

6.131 We note the views of the Hartmann Working Group. However, there was a consensus among members of the sub-committee that Rule 108 of the Matrimonial Causes Rules was too narrow. We noted the differences between rule 108 and the Chief Justice' s *Separate Representation of Infants-Practice Direction*":[771]

> *"Where it is felt by a Court to be desirable or necessary that an infant shall be separately represented in any proceedings, the Director of Legal Aid, in the exercise of his powers as Official Solicitor, shall, unless the Court otherwise directs, be appointed as guardian ad litem where no other person is available for appointment."*

6.132 Section 68L(3) of the Australian Family Law Act 1995 makes provision for a court to order separate representation in proceedings in which a child's best interests are the paramount, or a relevant, consideration:

> *"(a) on its own initiative; or*
> *(b) on the application of:*
> *(i) the child; or*
> *(ii) an organisation concerned with the welfare of children; or*
> *(iii) any other person".*

6.133 We are attracted to the simplicity of section 68L(3), and the fact that it is incorporated into primary legislation reflects the importance of ensuring separate representation for children. **We recommend that rule 108 of the Matrimonial Causes Rules be repealed and that a provision on the lines of section 68L(3) of the Family Law Act 1995 as amended be enacted. We also recommend that the restrictions on who can make application for an order, contained in section 10 of the Children Act 1989, should also apply to this provision.**

Criteria for appointment of a separate representative

6.134 Article 12.2 of the United Nations Convention on the Rights of the Child provides that:

> *"For this purpose,[772] the child shall in particular be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an*

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770 At 13.2.

771 Reported in Hong Kong Law Digest, October 1993, at J89.

772 This is referring back to Article 12.1 which deals with a child expressing his views. For text see *supra*.

appropriate body, in a manner consistent with the procedural rules of national law."

6.135 The criteria for appointing a separate representative for a child can be stated in legislation, regulations or a Practice Direction. This would give guidance to the court and encourage more frequent appointments. Counsel could be appointed where there are allegations of child sexual abuse, or violence in the family; where the child is in fact living with a person other than a parent (for example, a grandparent); where siblings are proposed to be split between the parents; in other complex cases such as where parents are in extreme conflict or highly dysfunctional. The criteria for appointing a separate representative could also include cases where the custody investigation, or the evidence supplied by the parties, appear to be inadequate.

6.136 The Australian list of criteria is useful as a checklist for guiding the court on the circumstances where it is appropriate to appoint a separate representative.[773] Since we were undecided whether the criteria should be included in legislation or not, submissions are invited from the public in this consultation exercise. We also recommend that a separate representative of the child should be appointed on a more frequent basis in Hong Kong.

Guidelines for duties of separate representative

6.137 Separate representation of children, by way of Counsel for the Child, is a prominent feature of the New Zealand family dispute resolution system. The Boshier report recognised that every effort should be made to ensure that the resource of counsel for the child is used effectively.[774] To help in this, "the court [should] adopt a more flexible approach to the appointment of counsel, by considering at each phase of a case whether an appointment is necessary and for what purpose."[775] At the outset of the case the tasks which are expected of counsel need to be specified with clarity.[776]

6.138 The Australian Family Court has guidelines which specify that the duty of the separate representative is, *inter alia,* "to ensure that all matters and witnesses relevant to the child's welfare are before the court and to assist the court to reach a decision that is in the child's best interests".[777] They should ensure that proceedings are not delayed by the parties, and that the child is not subjected to unwarranted psychological testing. The child should be interviewed, but with a younger child a court counsellor could assist. The

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773 The criteria were set out in *Re K* [1994] FLC 92-461 at 80. See chapter 5 *supra*.

774 Boshier, *New Zealand Family Law Report*, executive summary (1993). See summary in Boshier, same title as the report, in Family and Conciliation Courts Review, vol 33, No 2, April 1995, 182-193.

775 *Ibid* at paragraph 10.11.9.

776 *Ibid* at paragraph 10.11.8.

777 "Guidelines Promulgated by the Family Court for separate representatives of children appointed pursuant to section 65 of the Family Law Act", Attachment A of the Family Law Council Discussion Paper, *Involving and Representing Children in Family Law*, (May 1995).

separate representative may take a different view from that of the court counsellor and is not bound by his report.

6.139 In England the Solicitors Family Law Association (SFLA) had a code for the conduct of family lawyers who interview or represent children. Certainly any guidelines adopted in Hong Kong should apply to lawyers or social workers acting as separate representatives or guardians *ad litem* and not just to the Official Solicitor.[778]

6.140 We recommend the adoption of the Australian guidelines for setting out the duties of the Official Solicitor or separate representative or other person acting as guardian *ad litem* in Hong Kong. This would be useful in clarifying the exact nature of the roles.

[778] The Official Solicitor has power to appoint legal practitioners to act or conduct proceedings on his behalf, under section 5 of the Official Solicitor Ordinance (Cap 416).

Child as a party

6.141 Section 10 of the Guardianship of Minors Ordinance (Cap 13) provides that on application "of either of the parents of a minor (who may apply without next friend)" the court can make a custody or access order. This seems to be the only statutory provision.[779] Section 10(8) of the Children Act 1989 in England provides that where the person applying for leave to take a section 8 order is the child concerned, "the court may only grant leave if it is satisfied that he has sufficient understanding to make the proposed application…" The English Family Proceedings Rules 1991 allow a child to participate without a next friend or guardian *ad litem* on certain conditions. There has been some criticism of this provision as being difficult to operate.[780] There may be some problems with the capacity of the child to give instructions. However, a solicitor can refuse to act for a child in those circumstances. In any event, the court would retain discretion to appoint the Official Solicitor instead of allowing the child to act as a party.

6.142 We recommend that, in principle, provided the leave of the court was sought, the child should be allowed to become a party to proceedings which concern him and where he has sufficient understanding to instruct solicitor and counsel to represent him. We recommend a provision on the lines of section 10(8) of the Children Act 1989 and rule 9(2A) of the Family Proceedings Rules 1991.

Costs

6.143 We were informed that the Official Solicitor asks for an indemnity for costs before he consents to act.[781] If the Official Solicitor is not involved, the applicant can apply for legal aid on behalf of the child. **For those cases where the person representing the child is not the Official Solicitor, we recommend that the court be given power to order the parties to bear the costs of the separate representative or guardian *ad litem*.**

Part F - Reforms to relevant matrimonial ordinances

Separation and Maintenance Orders Ordinance (Cap 16)

6.144 An applicant under the Separation and Maintenance Orders Ordinance (Cap 16) has to establish fault-based grounds before an order for maintenance, separation or custody is made. The Ordinance also deals inadequately with the children.[782] We understand from practitioners that this ordinance is rarely used, though it can be used to obtain a separation by those women who are a party to a customary marriage or a union of

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779 Order 90 rule 6 of the Rules of the High Court refers to the situation where the minor is not the plaintiff in proceedings under the Guardianship of Minors Ordinance.

780 See chapter 3 *supra*.

781 Section 6 of the ordinance gives him that power.

782 See chapter 2 *supra*.

concubinage, who cannot apply for a divorce or decree of judicial separation under the Matrimonial Causes Ordinance (Cap 179).[783] A recent text states that the most common applications are by wives seeking maintenance who do not wish to divorce or pursue judicial separation.[784]

6.145 The amendments made by the Marriage and Children (Miscellaneous Amendments) Ordinance (Ord. No. 69 of 1997) have redressed many of the defects of this ordinance. It remains to be seen how the courts will resolve the apparent conflict between the mandatory requirement of section 6, prohibiting an order, *inter alia*, of custody when there is adultery, and the obligation to take the best interests of the children into account in the making of any order under section 5(1), including an original order of custody under section 5(1)(b).

6.146 We welcome submissions on whether the Separation and Maintenance Orders Ordinance (Cap 16) is of any practical use, rather than embarking on detailed recommendations for its reform.

Domestic Violence Ordinance (Cap 189)

6.147 There is no provision in the Domestic Violence Ordinance or the Guardianship of Minors Ordinance as to the effect of an order for an injunction on existing orders of custody, guardianship or access. Section 3(2) does provide that the court shall have regard to, *inter alia*, the needs of any child living with the applicant. The impact on access orders of an injunction excluding a spouse from the home needs to be addressed.[785] While recognising that it is in the best interests of the child to have regular contact with both parents we take the view that the protection of a spouse and children from violence must be more important than maintaining regular contact. If the level of current conflict between the spouses is high, then contact can end up being a weapon between the parents, and this cannot serve the best interests of a child.

6.148 It would be useful if, for example, there were a provision suspending access or contact orders where a non-molestation order has been made against a respondent parent, or an order excluding him from the home until there was an application by the excluded parent for an order to resume or vary access. Otherwise, the applicant parent of a child will have to apply for an order to suspend or vary the access or contact order, at the same time as the application for the injunction. The court should also have the flexibility to make consequential orders of residence or any other aspect of parental responsibility that meets the best interests of the child.

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783 The definition in section 2 includes these categories of relationships.

784 Hewitt (ed), *Hong Kong Legal Practice Manual - Family,* (1998) at 23, though unfortunately it does not refer to the amendments made by the Marriage and Children (Miscellaneous Amendments) Ordinance (Ord. No. 69 of 1997).

785 See chapter 2 *supra*.

6.149 We recommend that the court should be given power, when making an injunction under the Domestic Violence Ordinance (Cap 189), to suspend a prior access or contact order or vary a prior order so as to make a supervised access or contact order, which avoids the risk of the parents coming into physical contact with each other. The court should also be given power to make consequential orders determining the residence of a child or any other aspect of parental responsibility that meets the best interests of the child.

6.150 We also recommend that there should be an onus on the parties to disclose prior relevant orders when applying for an injunction to avoid orders being made that were inconsistent with prior custody, access, residence or contact orders.

Age

6.151 We agreed that it seemed indefensible to maintain the age of marriage at 21 years with young people maturing at an earlier age in Hong Kong. **With the exception of one of our members, we recommend that the age of marriage be reduced to 18 without parental consent and the minimum age of 16 be retained.**

6.152 It seems that a wardship order ceases at 18 as the Rules of the High Court (Cap 4) refer to a minor, which is defined in the Interpretation and General Clauses Ordinance (Cap 1) as a person under 18. However, the High Court Ordinance does not specifically state that a wardship order ceases at 18. The Law Reform Commission in its report on the Legal Effects of Age[786] recommended that wardship orders cease at the age of 18 years. We suggest that it is useful for legislation to clearly specify the duration of orders.

6.153 We recommend that a provision be enacted clearly specifying that the duration of wardship orders ceases at 18 years. It may also be useful to make clear that the jurisdiction of the Official Solicitor ceases at the age of 18 years, except for persons suffering a disability beyond that age.

English provisions

6.154 In England, a child is defined as a person below the age of 18 years.[787] However, a section 8 order does not extend beyond the age of 16 years unless it expressly so provides.[788] Part of the justification for this was that a child can leave school to take up employment at that age. The Scottish provision is confusing in that parental responsibilities last until 16 but the parent's responsibility for providing guidance lasts until 18. Parental rights last until 16. **For the sake of consistency, we recommend that parental**

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786 *Young Persons - Effects of Age in Civil Law* (Topic 11, 1986).

787 Section 105 (1) of the Children Act 1989.

788 Section 91 (10).

responsibility for children, and provisions on the lines of section 8 orders (such as orders for residence, contact or specific issues), should cease when the child reaches 18 years.

Director of Social Welfare' s powers

6.155 Since our terms of reference are confined to private law we did not undertake a review of the Protection of Children and Juveniles Ordinance (Cap 213) except in so far as it was relevant to the intervention of the Director of Social Welfare in guardianship, custody or access disputes. We have seen in chapter 2 that care and supervision orders in favour of the Director can be made under the matrimonial ordinances.[789] He can also be involved in custody or access proceedings under section 10 of the Guardianship of Minors Ordinance (Cap 13).

6.156 We started our review of the powers of the Director of Social Welfare from the principle of equality of treatment between children who are separated from a parent as a result of a divorce and those separated as a result of being made subject to a care and protection order. As far as possible, children dealt with under different ordinances should only receive different treatment if this can be justified on the grounds of fairness, or because it is necessary in order to protect them. This is in line with Article 9 of the United Nations Convention on the Rights of the Child.[790]

6.157 Article 9.3 states that:

> *"State Parties shall respect the right of the child who is separated from one or other parties to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child' s best interests."*

Definition

6.158 There is no definition of a care order or supervision order in the matrimonial ordinances. It would be useful to have such a definition rather than have to study the Protection of Children and Juveniles Ordinance to see the parameters of the powers of the Director under such orders. **We recommend that there should be a definition of a care order and a supervision order in the matrimonial ordinances. We also recommend the retention of the power to order care and supervision orders in guardianship disputes and any disputes concerning the best interests of a child.**

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789 See sections 13-15 of the Guardianship of Minors Ordinance (Cap 13) and sections 48-48B of the Matrimonial Causes Ordinance (Cap 179).

790 Article 9.1 provides that "State Parties shall ensure that a child shall not be separated from his . parents . except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child".

Contact

6.159 Section 34C(6) of the Protection of Children and Juveniles Ordinance (Cap 213) only allows the court to make a contact order on an application to vary or discharge a care order. Section 10 of the Guardianship of Minors Ordinance (Cap 13) allows the court to make an access order on the application of the parents or the Director. There is no clear provision allowing a child who is the subject of a care order to have access to his parents. **Therefore, we recommend that parents whose children are made the subject of care orders under the matrimonial ordinances should be entitled to have orders made to secure regular contact between them and their children. We also recommend that section 34C(6) of the Protection of Children and Juveniles Ordinance (Cap 213) be amended to allow the court to make an order for contact when a care order is being made.**

Assessment

6.160 Under section 45A of the Protection of Children and Juveniles Ordinance (Cap 213) the Director of Social Welfare has power to order assessment of a child by a doctor, clinical psychologist or social worker, or the court can so order. There is no similar power when an application for a care order under the matrimonial ordinances is being made. **We recommend that a District Judge should have the power under the matrimonial ordinances to order that a child should be assessed before making a care order, as is provided in section 45A of the Protection of Children and Juveniles Ordinance (Cap 213). The Director should also have the power to order assessment in these proceedings in accordance with section 45A.**

Grounds

6.161 If there are exceptional circumstances making it impracticable or undesirable to entrust the minor to the parents or any other individual, then the court may commit him to the care of the Director of Social Welfare.[791] The court can also order supervision in exceptional circumstances for minors.[792] **Applying the equality of treatment principle, we recommend that the Director should only be entitled to apply for a care order or supervision order in private law proceedings on the same grounds as those in section 34(2) of the Protection of Children and Juveniles Ordinance (Cap 213).**[793] **All these anomalies between the Director's powers in relation to care and supervision orders under the Guardianship of Minors Ordinance (Cap 13) and the Matrimonial Causes**

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791 Section 13(1)(b) of the Guardianship of Minors Ordinance. There is a similar provision in section 48 of the Matrimonial Causes Ordinance.

792 Section 13(1)(a) of the Guardianship of Minors Ordinance. There is a similar provision in section 48A of the Matrimonial Causes Ordinance.

793 The grounds are set out in chapter 2 *supra* .

Ordinance (Cap 179), and his powers under the Protection of Children and Juveniles Ordinance (Cap 213) should be resolved.

Protection of Children and Juveniles Ordinance (Cap 213)

6.162 As the same children could potentially come before the court in public and private law proceedings, it is important that the discrimination between the children in the different statutory regimes be minimised, unless it can be justified for policy reasons and in the best interests of the child. Thus, provisions in the matrimonial ordinances that are in the best interests of the child should be extended to proceedings taken under the Protection of Children and Juveniles Ordinance (Cap 213) for care and protection orders or supervision orders. We have already recommended giving a right to apply for contact under the Protection of Children and Juveniles Ordinance (Cap 213).

Child's views

6.163 There is no provision in the Protection of Children and Juveniles Ordinance for taking account of the views of a child. **We recommend that the views of a child should be taken into account in proceedings under that ordinance.**

Third parties

6.164 Section 34 of the Protection of Children and Juveniles Ordinance provides that the juvenile court on its own motion or on application of the Director or a person authorised by the Director can make a care or supervision order. The word "person" includes any public body and any body of person, corporate or unincorporate.[794] It is consistent with our previous recommendations on the right of third parties concerned with the welfare of a child to allow them to also apply for orders under the Protection of Children and Juveniles Ordinance. **We recommend that section 34 of the Protection of Children and Juveniles Ordinance should be amended to allow an application for a care and protection order or supervision order to be made by third parties. The same criteria for applications by third parties, already adopted for private law proceedings, should be adopted for such public law proceedings.**

Ex parte applications by Director

6.165 Rule 93 of the Matrimonial Causes Rules (Cap 179) provides that an application by the Director of Social Welfare for the variation or discharge of an order or for directions as to the exercise of his powers, may, in case of urgency or where the application is unlikely to be opposed, be made by letter addressed to the court and the Director shall, if practicable, notify any interested party of the intention to make the application.[795]

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[794] Section 3 of the Interpretation and General Clauses Ordinance (Cap 1).

[795] There is a similar provision in rule 61D of the District Court Civil Procedure (General) Rules (Cap 336) for cases under the Guardianship of Minors Ordinance (Cap 13).

6.166 In accordance with the principles of natural justice, we suggest that the relevant interested parties should be notified of a hearing, even if the Director retains an initial power to apply *ex parte* in an emergency. **We recommend that Rule 93 of the Matrimonial Causes Rules (Cap 179), and rule 61D of the District Court Civil Procedure (General) Rules (Cap 336), be amended to allow for an *ex parte* application in case of emergency, but an *inter partes* hearing should proceed if the application was opposed.**

Separate representative for public law proceedings

6.167 Schedule 1, Part 3 of the Official Solicitor Ordinance (Cap 416) provides for the Official Solicitor "if requested by the Juvenile Court, to act for any party involved in proceedings under the Protection of Women and Juveniles Ordinance (Cap 213) relating to the care and protection of a child or juvenile". **We take the view that the provision in the Official Solicitor Ordinance (Cap 416) for representation in Schedule 1, Part 3, is inadequate.**

6.168 We recommend that the criteria for appointing a separate representative for a child in private law proceedings[796] should be accepted as the criteria for appointment of a separate representative in care or supervision proceedings. As a matter of principle, separate or legal representation in care and protection proceedings should be available for children, and it should be at the discretion of the juvenile court judge or magistrate whether it was appropriate in a particular case.

Legal aid

6.169 If parents can have legal aid for representation in a custody or access dispute between themselves, there is no logical reason why parents should not be eligible for legal aid for disputes between the parents and the Director of Social Welfare, where the Director is applying for care or supervision orders under the matrimonial ordinances. A means and merits test should apply, with the merits test being that legal representation should be warranted when it is likely that a child would be removed from residing with the parents under a care or supervision order.

6.170 Applying the principle of equality of treatment, then parents should be entitled to legal representation in the juvenile court where care and protection orders or supervision orders are being applied for. The Duty Lawyer Service would be the appropriate service for this court as the Legal Aid Department do not provide representation in the magistrate's court. Thus, there will be cases where the child is represented by the Official Solicitor and the parents by the Duty Lawyer Service or the Legal Aid Department.

6.171 We recommend that parents should be granted legal representation by the Duty Lawyer Service in the juvenile court and by the Legal Aid Department in the Family Court or the Court of First Instance if they fulfil the eligibility requirements where care or supervision orders are applied for, whether under the matrimonial ordinances or the Protection of Children and Juveniles Ordinance (Cap 213).

6.172 We also recommend that there should be legal representation for children and parents in wardship proceedings where the applicant is

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796 See *supra*.

the Director or other public agency, as the effect of the order is to take away the responsibility of the parents.

Guidelines for duties of separate representatives

6.173 Earlier, we recommended the adoption of the Australian guidelines for setting out the duties of the Official Solicitor or separate representative or other person acting as guardian *ad litem*. **We recommend the adoption of the Australian guidelines for setting out the duties of lawyers representing children and parents in the juvenile court for care and protection and supervision orders. We also recommend that special training in how to interview and represent children and parents be provided to lawyers for these types of cases.[797] Only lawyers with this special training should handle these sensitive and complex cases. We intend that these recommendations should also apply to care and supervision orders being made under the matrimonial ordinances in the Family Court.**

Power to refer for social welfare investigation

6.174 The power to refer for social welfare investigation in matrimonial proceedings is contained in Rule 95 of the Matrimonial Cause Rules (Cap 179) with a similar provision, applying to any proceedings, contained in rule 61F of the District Court Civil Procedure (General) Rules (Cap 336). Both rules are confined to any matter concerning the welfare of the child. We had considered whether it was necessary that they should specify that they apply to guardianship and wardship, though it could be argued that the court has an inherent power to request such a report in wardship. We concluded that the existing powers were sufficient.

Enforcement of orders

6.175 With the increasing mobility of local families, considerable concern has been expressed by family law practitioners about enforcement or recognition of local custody or access orders outside the Hong Kong Special Administrative Region, both in the Mainland, and overseas. The Hague Convention on the Recognition of Divorces and Legal Separation 1971 has been extended to Hong Kong by sections 55-62 of the Matrimonial Causes Ordinance (Cap 179). This recognises divorces in other contracting states but does not cover findings of fault or orders of custody ancillary to the divorce proceedings.[798]

6.176 The Judgements (Facilities for Enforcement) Ordinance (Cap 9) and Foreign Judgements (Reciprocal Enforcement Ordinance) (Cap 319)[799] deal with enforcement of civil judgements from the United Kingdom, jurisdictions listed in the schedules or subsidiary legislation, which include Commonwealth and non-Commonwealth

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797 See chapter 5 referring to the training of separate representatives in Australia.

798 Section 61 (3).

799 This ordinance defines a judgment *in personam* as excluding matrimonial matters and guardianship of infants.

countries. Mainland China is not included. Article 267 and 268 of their 1991 Civil Procedure Law allows for foreign judgements to be recognised and enforced on the basis of either a treaty or reciprocity.

6.177 We recommend that a mechanism for mutual legal assistance for the enforcement of orders for custody, access, residence and contact, and orders for the return of a child removed unlawfully from Hong Kong, be arranged with the Mainland.

Consolidation of ordinances

6.178 Strictly speaking, consolidation is the exercise of bringing together in a single piece of legislation all provisions dealing with the particular subject, and does not include reform of the existing law. In practice, however, consolidation and reform often go hand in hand. At the moment the provisions for children are scattered throughout many ordinances, as we saw in chapter 2.

6.179 We take the view that Hong Kong' s private law provisions on guardianship and custody should comply with the principles set out in the United Nations Convention on the Rights of the Children, the Basic Law and the International Covenant on Civil and Political Rights. One advantage of consolidation (apart from making the law more accessible both to the public and to legal practitioners) is that it would give the Administration an opportunity to ensure that all legislation governing children does so comply. The problem is in determining which ordinance is the most suitable for the insertion of new principles. We accept that detailed proposals on how to amend the existing legislation are essentially matters for the Law Draftsman. We do not make recommendations on whether the public law provisions should be consolidated with the private law provisions, as in any event the public law provisions are outside our remit.

6.180 We think it is important that, as far as possible, the provisions dealing with disputes relating to children, arrangements on divorce, guardianship, disputes with third parties, or disputes between parents without accompanying divorce proceedings, should be consolidated into one existing ordinance. With the exception of one of our members, we propose that our recommendations and the existing substantive provisions on guardianship and custody should be incorporated into one consolidated ordinance. There should also be one definition of "child" and of "child of the family" applying across the ordinances.

Policy co-ordination

6.181 It is important that there is appropriate policy co-ordination for the needs of children and the family. It hinders operational efficiency, implementation of new policies and co-ordination when the policy responsibility is split between two bureaux, the Health and

Welfare Bureau and the Home Affairs Bureau. The Health and Welfare Bureau is responsible for the Guardianship of Minors Ordinance (Cap 13), and the Protection of Children and Juveniles Ordinance (Cap 213) and shares responsibility with the Security Bureau for the Domestic Violence Ordinance (Cap 189). The Home Affairs Bureau has responsibility for the Matrimonial Causes Ordinance (Cap 179), the Matrimonial Proceedings and Property Ordinance (Cap 192), and the Separation and Maintenance Orders Ordinance (Cap 16).

6.182 We recommend that a single policy bureau should take over responsibility for creating and implementing policy for families and children and, in particular, all the matrimonial and children's ordinances. It is a matter for the Administration to decide whether it should be the Health and Welfare Bureau or the Home Affairs Bureau.

Part II - Non-adversarial Dispute Resolution Process

Chapter 7

Introduction to Non-adversarial Dispute Resolution Process

7.1 Part II of the Consultation Paper deals with the way custody, access, and guardianship disputes are dealt with by non-adversarial dispute resolution processes, particularly mediation. In most countries mediation is becoming the preferred method of resolution for such disputes. Thus it is necessary to explain what mediation is and how it differs from existing methods of dispute resolution such as negotiation or litigation. This will be dealt with in this chapter.

Adversarial process

7.2 Saposnek stated that:

> *"by any standard of common sense, as well as the accumulated research data showing that children need ... a cessation of inter parental conflict, the adversarial process must rank very low as a method of making satisfactory and lasting post divorce parenting arrangements ...."*[800]

7.3 The impact of the adversarial process can be minimised by encouraging the use of alternative methods at an early stage so that only the most entrenched cases go to trial. Time factors are critical for a child, so early settlement or, if that is not possible, an early hearing should be encouraged. The Irish Law Reform Commission noted that there were certain advantages to the adversarial process for those cases that could not be diverted to alternative methods of dispute resolution. It was the most effective way of testing the credibility of witnesses, and it reduced excessive judicial interference.[801]

7.4 Perhaps more critical than changes in the substantive provisions of the law on guardianship and custody is the way that these types of disputes are handled by the professionals involved in the legal system and the parents themselves. If the language of the law is changed to reflect parental responsibility but the same adversarial system exists, with minimal support services attached to the court,[802] acrimonious affirmations filed by the

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800 Saposnek, *Mediating Child Custody Disputes*, 13-17 (1983).

801 Consultation Paper, *Family Courts*, (March 1994), at paragraph 4.13.

802 The social welfare officer has only an investigative role laid down by legislation. Section 3(1)(a)(i)(B) of the Guardianship of Minors Ordinance (Cap 13). There are no counselling or mediation services attached to the Family Court in Hong Kong. Obviously there are counselling services provided by the Social Welfare Department and the non governmental agencies but the services are voluntary and rely on parents' self referral.

parents, and parents and lawyers engaged in combative attitudes, then it is arguable that the best interests of children are not being promoted.

Mediation as a family dispute resolution process

Contrast between family mediation and negotiation

7.5 A lawyer's usual method of dispute resolution is "turbocharged negotiation."[803] The lawyers negotiate with each other at arm's length, with the parties being kept out of face to face negotiation with each other.[804] "The attorney is the primary interpreter to the client of what is fair, based upon what might happen in court."[805]

7.6 Mediation is guided by an assumption that parties can reach agreement and that their solution is unique and does not need to be governed by fixed principles of law. Mediation uses negotiation techniques with the mediator facilitating and guiding the parties' own negotiation process. The focus is on what the couple think is fair.

7.7 In a negotiation the lawyers advise and negotiate a settlement on behalf of the parties. Negotiation usually relies on the adoption of different positions by the parties and on a win/lose strategy. There can be an adversarial and competitive approach to the conflict. In contrast, the focus in family mediation is to define issues in mutual co-operative terms and it is based on the interests of the parties rather than their rights.

7.8 Some research has shown that mediation is more successful than negotiation. Pearson and Thoennes reported that 80% of a group of disputants assigned to mediation reached agreement compared to 50% of the group assigned to adjudication who negotiated an out of court agreement.[806] The atmosphere in mediation is non-adversarial. The mediator controls the process in a way that allows the parties to show mutual respect but he has no decision making power. Ground rules have been agreed in advance which minimise confrontation. This is not to say that mediation does not allow the ventilation of emotion. Mediation can allow this to happen in a safe and non-threatening way.

Research on negotiation and settlement[807]

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803 Donovan, Leisure *et al*, *ADR Practice Book,* (1990) at 7.2.

804 Paragraphs 7.3-39 were substantially taken from an unpublished dissertation by Paula Scully, *Obstacles to Referral, Planning and Implementation of Family Mediation as a Dispute Resolution Process in Hong Kong; Reflections based on Foreign Systems,* April 1996.

805 Erickson, "The Legal Dimension of Divorce Mediation" in Folberg and Milne (ed) *Divorce Mediation; Theory and Practice,* (1988).

806 "Mediation of contested child custody disputes", Colorado Lawyer, (1982), 11(2), 337-355, and "Mediating and litigating custody disputes; a longitudinal evaluation", 17 Family Law Quarterly, 197-524 (1984).

807 Williams, *Legal Negotiation and Settlement*, (1983).

7.9 "The principal institution of the law is not trial, it is settlement out of court".[808] In the United States District Courts in 1980 only 6.5% of cases reached trial, 93.5% terminated without trial, mostly by negotiated settlement agreements.[809]

> *"Because we know that roughly 95 percent of all civil litigation settles, the smart client and competent attorney must focus on how early in the litigation process a fair settlement can be reached in these cases."*[810]

7.10 Deadline pressures were perceived differently in certain specialised areas of law. 29% of the commercial disputes were settled without filing proceedings, while 13.8% of divorce cases were so settled. However:

> *"it is trial [that] provides the leverage or threat that pushes opposing parties into settlement discussions and agreements."*[811]

Counselling, therapy and mediation

7.11 It is useful to distinguish the different roles of therapists, mediators and counsellors. The public, and indeed lawyers, often confuse the different roles and services. One common error is to assume that counselling is only relevant when a party wishes to reconcile. Another common error is to think that a mediator acts as a counsellor. Basic principles of mediation, such as empowerment, consideration of the best interests of all family members, co-operative problem solving, and equitable distribution of assets, are compatible with the theory and practice of marital and family systems therapy.[812] Client responsibility, prevention of emotional damage and fair play are some of the values of therapists. The emphasis on communication skills is common to both counselling and mediation.

7.12 However, family mediation must be distinguished from counselling or therapy. Robinson noted:

> *"In counselling and psychotherapy the orientation is often towards understanding the past as a way of managing the present. In family therapy the focus is usually on the present as a way of managing the future differently. In mediation the orientation is distinctly future-oriented."*[813]

7.13 Mediation has different goals to therapy. The goal of therapy, including divorce counselling, is: "to help the individuals resolve emotional problems so as to become

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808 Ross, *Settled out of court* (1980, 2nd ed), at 3.

809 Williams, *supra*, at 1.

810 Wulff, "A Mediation Primer", in Donovan, Leisure, Newton & Irvine, *ADR Practice Book* (1990).

811 Williams, *supra* at 1-2.

812 Kaslow, "The psychological dimension of divorce mediation" in Folberg & Milne, *Divorce Mediation - Theory and Practice* (1988) at 87.

813 Robinson, *Family Transformation through Divorce and Remarriage* (1991) at 189.

more comfortable and functional in their lives".[814] The focus of mediation is on decision making that achieves the optimum result for both parties. The process is also different. The mediator assesses the process to formulate strategies to facilitate decision making; "the therapist makes a more extensive assessment to promote insight and change in behaviour."[815]

7.14 Mediation provides the opportunity to express emotions and frustrations which may be blocking negotiations and to address the underlying concerns in a controlled environment. This does not turn it into therapy. The couple are not there to go over the past and work out unresolved emotional issues. Mediation may have to be postponed until these issues are resolved by working with a therapist or counsellor. As Marriott and Brown put it:[816]

> *"... family mediation is a process in its own right, and it is clear that there should be no hidden agenda to provide therapy or counselling for people whose contract is for family mediation; nor is it likely that properly trained family mediators will confuse these roles."*

Roles of the mediator

7.15 Lawyers need to know the differences between the role of mediators and other professionals before they can recommend a new process to clients. CDR Associates, who train mediators,[817] refer to the following roles:

(1) The opener of communication channels. The parties may not be used to communicating openly or freely. The mediator will facilitate keeping the channels open,

(2) the legitimizer. The mediator gets the parties to recognise the rights of the other to be involved in the process,

(3) the process facilitator. The mediator is providing the procedure, guiding the exercise of the ground rules, and acting as referee,

(4) the trainer. Mediation can be a subtle process of educating those parties who lack confidence in the art of negotiating,

(5) the resource expander. The mediator provides assistance to the parties to expand their settlement options and linking them with outside experts such as accountants and lawyers,

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814 Brown, "Divorce mediation in a mental health setting" in Folberg and Milne, *supra* at 131.

815 *Idem.*

816 *ADR Principles and Practice*, (1993) at 190.

817 In Boulder, Colorado, United States.

(6) the problem explorer. The mediator assists them to adopt creative strategies to problem solving that are mutually satisfactory,

(7) the agent of reality. The mediator maintains the reasonableness and practicality of implementation of the proposals for settlement, and

(8) the leader. The mediator takes the initiative to keep the negotiations flowing.

Functions of a mediator

7.16 These are divided into procedural, substantive, and communicative functions.

Procedural functions :

1. Using joint or separate meetings with the parties,

2. influencing the climate and duration of meetings,

3. chairing meetings and keeping order,

4. sequential discussion and grouping of issues, and

5. adjourning meetings if a party needs time to cool off, or is not ready to continue with the process.

Communicative functions:

1. maintaining open and clear communication,

2. translating and transmitting information,

3. exploring alternative solutions advanced by the parties,

4. communicating the rigidities of positions,

5. communicating a party' s commitment to an agreement, and

6. communicating movement between the parties.

Substantive functions:

1. determining priorities of the parties,

2. reality testing,

3. deflating extreme positions,

4. developing the habit of reaching agreement,

5. assessing the consequences of an impasse against the values of the remaining issues,

6. finalising and ratifying the agreement, and

7. monitoring the agreement.

Misconceptions by lawyers of the role of the mediator

7.17 Lawyers can have misconceptions of the role of the mediator in the process such as:

1. The mediator' s job is to give each party an assessment of the strengths and weaknesses of their legal claims;

2. the mediator plays quite a passive listening role and hopes to generate settlement by promoting understanding and empathy among the litigants;

3. because the mediator is impartial, he will prod each party to make a comparable number of concessions; and

4. a mediator is only interested in a settlement and does not care whether its substantive terms are fair.[818]

Research on the merits of mediation

7.18 The merits of mediation identified by researchers are summarised as follows:

1. Economical decisions;

2. rapid settlements;

3. mutually satisfactory outcomes.[819] In one survey 77% of the parties expressed extreme satisfaction with mediation. No more than 40% in any of

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818 *Idem.*

819 Pearson and Thoennes, "Mediation of contested child custody disputes," Colorado Lawyer, 11(2), (1982) 337-355.

the mediation or adversarial samples reported being satisfied with the court process;

4. high rate of compliance. McEwen and Maiman,[820] and Pearson and Thoennes[821] found that parties are more likely to follow through with a mediated settlement than comply with those imposed by a third party decision maker like a judge;[822]

5. workable and implementable decisions. As the details of implementation are included in a mediation agreement, which often is omitted from a court order, whether by consent or not, this can enhance the likelihood of compliance;[823]

6. comprehensive agreements;

7. learning creative problem solving strategies and procedures;

8. greater degree of control and predictability of outcome;

9. personal empowerment. Cook, Rochl and Shepard[824] found that people who negotiated their own settlement felt more powerful than those who used others to negotiate for them;

10. as mediation is a win/win strategy, it is more suitable for preserving an ongoing parenting relationship for the children in a more amicable way;

11. interest based mediation agreements can result in a settlement that is more satisfactory than a compromise decision in which they share losses and gains;

12. mediated settlements tend to hold over time. The researchers found that if a dispute occurs later the parties were more likely to utilise a co-operative way of problem solving than to use an adversarial approach;[825] and

13. irrespective of the different programs or location in the world, the studies show a high degree of client satisfaction.

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820 "Mediation in Small Claims Court: Achieving Compliance Through Consent," Law & Society Review, 18(1), at 11-50. (1984).

821 "Mediating and Litigating Custody Disputes: A Longitudinal Evaluation," Family Law Quarterly, (1984), 17, 497-524.

822 If relitigation is a criterion for compliance, only 4-12% relitigated - Irving & Benjamin *Family Mediation: Theory and Practice of Dispute Resolution*. (1987).

823 Bingham, *Resolving Environmental disputes: A decade of experience.* Conservation Foundation (1986).

824 *Neighbourhood Justice Centers Field Test: Final Evaluation Report* (1980).

825 Pearson and Thoennes (1984) *supra.*

7.19 Kelly concluded that "the real value of mediation lies in its ability to affect the quality and future direction of the spousal relationship, particularly with regard to the ability to co-operate after divorce and the more realistic perception of each other's anger."[826]

Factors in the effectiveness of mediation

7.20 However, mediation is not the panacea for all ills. Mediators accept that not all disputes are appropriate for mediation, and that litigation will continue to have a role for certain types of cases. The conditions under which mediation is most effective are:

1. The parties have a history of co-operation and problem solving;
2. they do not have a long history of adversarial relations or prior litigation;
3. the parties have been able to agree on some issues;
4. their mutual hostility and anger is moderate or low;
5. they have an ongoing relationship;
6. their desire for settlement of the dispute is high;
7. the parties accept the intervention and assistance of the mediator;
8. there is external pressure to settle (time, unpredictable outcome, diminishing benefits);
9. there are adequate resources to effect a compromise; and
10. parties have some leverage on each other (ability to reward or harm).

Recent review of research

7.21 Irving and Benjamin, despite recently reviewing 51 research studies,[827] were cautious about comparing studies as practice varied considerably, even within North America. They suggested differences across five dimensions:

1. Court based public mediation versus private mediation;

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826 Kelly, "Mediation and Adversarial Divorce: Initial Findings from a Longitudinal Study" in Folberg & Milne, *Divorce Mediation : Theory and Practice* (1988) 447 at 453.

827 "Research in Family Mediation: Review and Implications", Mediation Quarterly, vol.13, Fall (1995), No.1, 53. This article is an abridged and revised version of Chapter 10 in Irving and Benjamin, *Family Mediation-Contemporary Issues*, (1995).

2. the characteristics of client groups;
3. the models of mediation practice;
4. the local statutory regime; and
5. the identity and training of mediators.

7.22 The research they studied was divided into process studies,[828] outcome studies,[829] and studies that have tried to isolate predictors of successful mediation, that is, what type of client is likely to reach agreement.

Mediation agreement rates

7.23 In an excellent summary of studies of outcomes, Benjamin and Irving concluded that the rate of complete agreement reached through mediation was 40-60% and partial agreement 10-20%. The overall agreement rate was 50%-80% with most studies closer to the higher figure. The rates were quite consistent, whether court based, private, voluntary, or mandatory, or whether it involved couples with a history of marital violence or intense marital conflict. Also, mediation clients in the United States and England were more likely to reach voluntary agreement than those involved in litigation, and to do so in fewer sessions and less time. Mediated agreements were more comprehensive, more in favour of shared parenting and more access to the non custodial parent.

Client satisfaction

7.24 Clients were asked about satisfaction with outcome and the process of service delivery. Most studies reported satisfaction rates of 60%-80%. Kressel concluded that "these levels of user satisfaction are comparable, and perhaps even higher than those reported for public satisfaction with other types of professional services". The rate of satisfaction for legal services in divorce was reported to be 65%.[830]

Co-parental relations

7.25 The findings on whether the relationship between parents improved in the sense of decreased conflict and improved communication are mixed depending on different services, whether court based or not. The court based clients had few resources and more serious problems. Benjamin and Irving concluded that "only services that employ a therapeutic model of service, and thus are designed to effect such changes and allot adequate time to do so, are likely to report changes in co-parental relations".[831]

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828 This studies what mediators actually do in providing the service. They rely on transcripts of sessions.

829 This includes, agreement rates, client satisfaction, gender differences, co-parental relations, cost and follow-up studies.

830 *The Process of Divorce: How Professionals and Couples Negotiate Settlements* (1985) at 187.

831 Benjamin and Irving at 62, *supra*. It should be noted that Irving's model is therapeutic mediation.

Costs

7.26 The research generally supported the claim that a mediated settlement is likely to be less costly. Pearson and Thoennes found that the average cost of mediation among those who reached agreement was US$ 1630 compared to US$ 2360 for those who went through litigation.[832] However, Ogus, Walker and Jones-Lee in England[833] and Richardson in Canada,[834] found that, while mediation was slightly more costly, it also was more effective in client satisfaction and agreement rates.

Follow-up

7.27 These studies focused on satisfaction, compliance with mediation agreements, post divorce adjustment and re-litigation. Up to two years later, a substantial proportion of mediation clients remained satisfied with the process and outcome. They also made changes to their agreement by mutual consent. Studies involving follow-up at four months, one year, and two years found that mediation clients were more satisfied with the content of their agreements and thought that mediation was fairer than those who had outcomes from litigation. The re-litigation rates among mediation clients have been lower than among those who litigated their disputes. This has implications for diversion of cases from the court into mediation. The studies that tried to identify common predictors towards settlement in mediation varied so much that it seems impossible to reach agreement on the optimum predictors.

7.28 Irving and Benjamin referred to what Thoennes and Pearson had identified as a double standard:

> *"litigation is expected to produce only a settlement whereas mediation - in some cases, only **two hours** in duration - is expected, in addition, to transform intense marital conflict into affectionate cooperation, and intense distress into positive post divorce family adjustment".*[835]

Unsuitability of mediation

7.29 Mediation is unsuitable, or the parties are not ready for it, where there is violence,[836] or threatening behaviour followed by an unwillingness to negotiate, a lack of

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

833 Report of the Conciliation Project Unit, *The Costs and Effectiveness of Conciliation in England and Wales*, (1989).

834 *Court-based Divorce Mediation in Four Canadian Cities: An overview of Research Results*, (1988).

835 Thoennes and Pearson, "Response to Bruch and McIsaac," Family and Conciliation Courts Review, (1992), 30, (1) at 142-3, quoted in Irving and Benjamin, *op cit* at 69.

836 It is now thought that violence *per se* should not automatically exclude the parties from mediation - see chapter 9.

communication and trust, dominance and power imbalance or an unresolved separation,[837] a history of psychiatric illness, alcohol or drug abuse, or child sexual abuse.

Power

7.30 The mediator works:

> *"to help the couple both retain and redistribute more equitably the power between them, usually as regards the children and the money, while in psychotherapy and family therapy the practitioner assists the individual to take more power and the family to find ways of using it more effectively and mutually."*[838]

7.31 Mediation also empowers the couple as they retain autonomous decision making, even if it is "in the shadow of the law".[839] In one of the surveys of the Family Court of Australia, 79% of the parties were experiencing moderate to high relationship conflict, yet a mediated agreement was reached in 82% of cases.[840]

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837 This is where one party may want a reconciliation or has failed to come to terms with the fact that his marriage is over.

838 Robinson, *supra* at 189.

839 As used by Mnookin and Kornhauser, "Bargaining in the Shadow of the Law; the Case for Divorce", Harvard Law Journal, Vol. 88(5), (1979) 950-7.

840 Bordow and Gibson, *Evaluation of the Family Court Mediation Service*, Research Report No. 12, (March 1994).

Chapter 8

Comparative Dispute Resolution Process: England and Wales

Introduction

8.1 This chapter will look at the development of mediation (formerly called conciliation) in England and recent reforms in the law of divorce and such ancillary matters as disputes over children. There are considerable lessons for Hong Kong in looking at the English experience of implementing changes to the system of handling disputes over children. England has found that changing the language of legislation, as was done in the Children Act 1989, though it has helped to reduce the acrimony between parents when they divorce, must be supported by changes to the dispute resolution system.

8.2 The focus of the English reforms is on encouraging mediation as a way of resolving disputes between the spouses before proceedings for divorce get under away. It is hoped that this will reduce the number of contested cases which the adversarial system will have to deal with. The arrangements for the children will be expected to be made before a divorce order can be applied for or made. The fact that such arrangements have been made will also be evidence that the marriage has broken down.

8.3 English family laws, especially since the Children Act 1989, "have been moving away from the traditional adversarial notions of rights and justice towards that of welfare."[841] The emphasis on incompatibility rather than fault has encouraged negotiation. This shift in the moral climate and in the purposes served by the divorce law assists a climate where conciliation can grow.

History of mediation

8.4 Mediation has had a long history in England.[842] As far back as the Finer Committee report[843] conciliation was recommended as an established part of the divorce court procedure. The conciliation movement steadily gathered momentum in the first half of the 1980's. There was also an Inter-Departmental Committee on Conciliation which reported in November 1983. The Booth committee in July 1985 endorsed the value of out of court conciliation.[844] With the publication of the Booth report[845] and the statement of the

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841 Davis, "Conciliation and the Professions", vol. 13, Fam Law, 6, (1983).

842 Paragraphs 8.4-5, 8.9-11, and 8.19-8.36, were substantially taken from an unpublished dissertation by Paula Scully, *Obstacles to Referral, Planning and Implementation of Family Mediation as a Dispute Resolution Process in Hong Kong; Reflections based on Foreign Systems,* April 1996.

843 *Report of the Committee on One-Parent Families*, (1974).

844 The Hon Mrs Justice Booth, *Report of the Matrimonial Causes Procedure Committee* (1985).

845 *Idem.*

President of the Family Division,[846] a clear demarcation line was drawn between conciliation services and the activities of welfare officers.

Children Act 1989 Practice Direction

8.5 To reflect the changes of the Children Act 1989, a new Practice Direction was issued in 1992. This provided that a district judge at any time while considering arrangements for children could direct a conciliation appointment. Applications for residence or contact orders under section 8 would be compulsorily referred for an appointment.[847] An application for a prohibited steps or specific issue order would be referred only if the applicant requests it. A summons for wardship where orders under section 8 are sought, may be referred for a conciliation appointment.

8.6 The district judge rather than the registrar attends with the parties and legal advisers. The parties alone attend before the welfare officer if the dispute is not settled at the initial meeting before the district judge and welfare officer. If the conciliation is unsuccessful, the Practice Direction provides that:

> *"the district judge will give directions (including timetabling) with a view to the early hearing and also disposal of the application. In such cases the district judge and court welfare officer will not be further involved in that application."*[848]

8.7 If the conciliation appointment has been concluded then the district judge who had been considering the arrangements for the children will issue a certificate that the court has complied with section 41 of the Matrimonial Causes Act 1973. Provision is also made that urgent applications will be referred to the district judge of the day to decide whether the parties are to be referred to conciliation.

Special procedure

8.8 The special procedure system, under which undefended divorces were granted without the parties' attending, applied to the vast majority of divorce petitions. A children's appointment system was also introduced so that the children's upbringing could be fully investigated.[849] Then, in a schedule to the Children Act 1989, the children's appointment provision was abolished.[850] Now the arrangements for the children are examined in private "and almost invariably in the absence of the parties or their representatives by a district judge whose role is greatly circumscribed".[851]

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846 Sir John Arnold in 1985.

847 See chapter 3.

848 *Practice Direction (Family Division: Conciliation),* [1992] 1 WLR 147.

849 Matrimonial Causes Rules 1977, SI 1977/ 334, rules 33(3) and 48.

850 Schedule 12, paragraph 31.

851 Cretney, "Family Law - a bit of a racket", NLJ Practitioner, January 26 1996, 91, 93.

Value of mediation

8.9 Parker and Parkinson suggested that conciliation could take place while waiting for legal aid to be granted or a court hearing date.[852] Conciliation encouraged direct communication between the spouses and this encouraged them to negotiate future arrangement for the children. Conciliation can help where an "emotional" divorce has not yet taken place in conjunction with the legal and financial divorce. If the "emotional divorce" does not take place then the spouses "remain enmeshed in conflict with harmful consequences not only for themselves but also for their children".[853]

8.10 Parker and Parkinson stressed early intervention as "research clearly indicates that if access is not agreed at an early stage it is more difficult to establish regular access subsequently, after contact has been broken between the children and the parent who left home."[854] Another research finding was that the arrangements parents make at the time of separation generally set the pattern for the future.[855] They concluded that "ideally conciliation and legal advice should proceed in tandem, each helping the other to provide the maximum assistance to couples in the process of separation and divorce".[856] Suggestions about children's needs and feelings may be more acceptable to parents if they are offered by a neutrally placed conciliator who has an explicit professional concern for the family as a whole.[857]

8.11 Davis suggested that the introduction of formal mediation appointments by the court was important because such procedures "provide a tangible manifestation of the court's commitment to a settlement seeking approach". Mediation should not be merely seen as an efficient processing of a dispute. As most cases settle anyway mediation should be assessed in terms of its impact on the timing and quality of divorce settlements.

Divorce law reform

8.12 The Lord Chancellor's Department, in a White Paper, *Looking to the Future - Mediation and the Ground for Divorce*,[858] suggested the following reforms:

(1) "No fault" divorce should be introduced,

(2) there should be increased information about the divorce process through mandatory divorce information sessions,

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852 *Supra* at 272.

853 *Idem.*

854 *Ibid* at 273.

855 Mitchell, *Children in the middle*, (1985).

856 Parker and Parkinson, "Solicitors and Family Conciliation Services-a basis for professional co-operation", 15 Fam Law (1985) 270 at 274.

857 *Idem.*

858 (April 1995: Cmnd 2799), HMSO. The department had published a Consultation Paper of the same name in December 1993 (Cmnd 2424).

(3) couples will be expected to use mediation rather than litigation to resolve their disputes about divorce and ancillary matters,

(4) couples in receipt of legal aid will have to use mediation unless they come within exclusion criteria (for example, violence) set by government, and

(5) legally aided clients will have limited access to legal advice and no representation on the basis that mediation will have resolved their disputes.

Newcastle research-child focused mediation

8.13 Sixty two per cent of clients attending the mediation services surveyed were concerned only with child contact. Sixty per cent of mothers had sole custody, and 8% of fathers had sole custody. In 28% of cases the children lived with both parents and in 4% they shared time between parents.[859] The researchers showed concern as to the limited amount of time spent in comprehensive mediation addressing children' s issues. If the parties presented pre-arranged plans for the children they would generally be accepted but financial pre-arranged plans were usually opened up for further discussion.[860] The average time for a child focused mediation was 3 hours compared to 12.7 hours for comprehensive mediation.[861]

8.14 The clients in child focused mediation were less satisfied with the outcome than the clients in comprehensive mediation - 38% were satisfied and 26% were dissatisfied. In comprehensive mediation over 50% were satisfied and 18% were dissatisfied. However, in looking at the broad objectives of mediation, beyond just focusing on the outcome, higher satisfaction was noted. In the child focused mediation, 61% agreed that it protected the best interests of children (5% disagreed), and it "sorted out custody and access" in 60% (10% disagreed). It also helped improve communication (53%) (though 12% disagreed) and it clarified areas of disagreement (59%) (6% disagreed).

Family Law Act 1996

8.15 The Family Law Act 1996 implemented the proposals contained in the White Paper. Part one deals with the general principles of the legislation and Part two deals with changes to the substantive law on divorce and separation. Part three introduces amendments to the Legal Aid Act 1988 to include legal aid for mediation in family matters. A number of practical details have been left to the regulations which are not yet completed. Even though it was enacted in July 1996, the timetable for implementation was anticipated to be 1998/99. This was to give time for the pilot projects to proceed and to be evaluated. An Advisory Board on Family Law has been established to advise on the implementation

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859 Ogus, Walker and Jones-Lee, *Report to the Lord Chancellor on the costs and effectiveness of conciliation in England and Wales*, (March 1989) at 43.

860 At 42.

861 At 48-9.

and operation of the Family Law Act 1996, including the mediation and information meeting pilots.

Information meeting

8.16 Section 5 provides that a statement of marital breakdown must be filed by a party or the parties before a marriage is taken to have broken down irretrievably. Section 8 provides that the party making such a statement must attend a compulsory information meeting not less than three months before making the statement.[862] The other party must attend before making any application with respect to a child of the family to the court or contesting any application. In response to the heavy criticism of the group information sessions, there will be an information meeting for each couple.

8.17 An information meeting pilot project commenced in June 1997 in five locations. New pilots have been launched in October 1997 and January 1998. Further details are to be contained in the subsidiary legislation. In particular, the regulations will ensure that information about marriage support services, the importance of the welfare of the child, mediation, the availability of independent legal advice, legal aid, and the divorce process is furnished to the parties.[863] The parties will also have the opportunity of attending a marriage counsellor after the information meeting.[864]

8.18 There will be three gatekeepers - the information meeting, lawyers,[865] and the court who can refer the parties for an information meeting about mediation.[866] This information meeting is distinct from the information meeting provided under section 8[867] and seems more like a preliminary meeting prior to an intake session for mediation. Its purpose is to enable "an explanation to be given of the facilities available to the parties for mediation ... and of providing the parties with an opportunity to agree to take advantage of those facilities".[868]

Green Paper on legal aid reform

8.19 In England mediation is now perceived as the preferred method of dispute resolution for divorce and children' s cases which have consumed a disproportionate share of the legal aid budget. Therefore, it is not surprising that a government, wishing to expand

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862 Exceptions will be prescribed in the regulations. In Parliament the Lord Chancellor gave examples such as the housebound, the disabled, those who risked violence by going to a particular place and those in custody.

863 Section 8(9).

864 Section 8(6)(b).

865 Section 12(2) gives power to the Lord Chancellor to make rules requiring a legal representative to certify whether he has informed his client about the availability of mediation and marriage support services, and whether he has given his client names and addresses of persons who can help with reconciliation and mediation.

866 Section 13.

867 Section 8(6) defines an information meeting to mean "a meeting organised for the purpose of providing those attending with relevant information about matters which may arise in connection with the provisions of, or made under, this Part or Part III and giving an opportunity to attend a marriage counsellor and encouraging the parties to attend him or her."

868 Section 13 (a) and (b).

mediation as a dispute resolution method, would use monies diverted from the legal aid funding of litigation. It is useful to consider the Government' s legal aid policy outlined in the Green Paper on legal aid and provisions in the Family Law Act 1996.[869]

Legal aid for family mediation

8.20 The Lord Chancellor proposed in the Green Paper that suppliers of mediation, will be eligible for contracts for legal aid services. "The Government does consider, …that family mediation is both more effective and more suited to resolving the kinds of problems that arise in most family cases than representation in negotiations by solicitors, or litigation".[870] The monitoring and auditing system would study outcome measures,[871] for court and non-court based solutions.[872] Specifically, for family cases, advisers would have to assess the likely effectiveness of mediation, based on the importance of the case to the individual, the cost/benefit and the availability of alternatives.

Refusal to mediate

8.21 Mediation would not be compulsory but advisers would have to record acceptable reasons for refusal to mediate.[873] Acceptable reasons would be listed in guidelines and include cases involving domestic violence or care orders.[874] So, "point blank refusal to mediate would not be considered a good reason, and the solicitor would not be able to represent a client who could offer no reason for their decision not to choose to mediate."[875] This view is justified by relying on research:

> *"that shows that at least one party usually starts off by refusing even to consider mediation, but once they have visited a mediation service and had a personal explanation of how mediation works and of its benefits, they change their minds and are willing to at least to attempt mediation".*[876]

Family Law Act 1996 and mediation

8.22 Section 27(3) provides that legal aid for mediation will not be granted unless "mediation appears to the mediator suitable to the dispute and the parties and all the circumstances". The Act also provides that a person shall not be granted legal representation unless he has attended a meeting with a mediator to determine the suitability

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869 *Legal Aid - Targeting Need* (1995: Cmnd 2854).

870 *Supra* at paragraph 9.7.

871 Outcome measures look at case results, time taken/delay and client satisfaction. They would look at success rates but would not assume that all cases should be successful.

872 Green Paper, *supra* at paragraphs 6.42-6.48.

873 *Ibid* at paragraphs 9.7 and 9.8.

874 *Ibid* at paragraph 9.8.

875 *Idem.*

876 *Ibid* at paragraph 9.11.

of mediation and if it is suitable, "to help the person applying for representation to decide whether instead to apply for mediation".[877] Relevant exceptions are proceedings under those parts of the Children Act 1989 dealing with protection. Provision is made in section 28(3) for the legally assisted person to pay a contribution towards the costs of mediation. Regulations may provide that the mediation costs be recovered by the statutory charge.[878]

8.23 A lot of the details for legal aid for family mediation are left to the regulations.[879] These provide that the mediator should assess the means of the client before providing mediation. Notwithstanding any privilege between them, the mediator is not precluded from disclosing to the Legal Aid Board "any information which relates to mediation" provided to a legally assisted person, which enables the Board to discharge its functions.[880] The implementation plan for piloting of franchise contracts by the Legal Aid Board for family mediation services commenced in May 1997.[881]

8.24 Any contract for the provision of mediation must require that the mediator complies with a code of practice.[882] The mediator must be required:

> *"to have arrangements designed to ensure that the parties are encouraged to consider:*
> *(a) the welfare, wishes and feelings of each child; and*
> *(b) whether and to what extent each child should be given the opportunity to express his or her wishes and feelings in the mediation."*[883]

Access to Justice - the Woolf report

8.25 The changes in England in the family dispute resolution system and the legal aid system are paralleled by changes proposed in the civil justice system of the courts. Even though Lord Woolf, in his interim report on the civil justice system in England and Wales,[884] did not deal specifically with reform of the family court system, his proposed reforms have

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877 Section 15(3F)(b) of the Legal Aid Act 1988 as inserted by section 29 of the Legal Aid Act 1996. The implementation of section 29 will be piloted in two areas initially which will assist in planning implementation throughout the country.

878 The statutory charge ensures that legal costs are recovered from the legally aided client out of an award of monies or the recovery of property. This seems to be a concession as the Law Society had opposed the absence of a charge where the parties went to mediation.

879 The Legal Aid (Mediation in Family Matters) Regulations 1997, (SI 1997; 1078) in force on 1 May 1997.

880 Rule 5, *ibid*.

881 *Franchising family mediation services*, Legal Aid Board, February 1997.

882 An example would be the mediator ensuring that parties participate freely and not influenced by fear of violence or harm - see section 13B(7) of the Legal Aid Act 1988 as inserted by section 27 of the Family Law Act 1996.

883 Section 13B(8) of the Legal Aid Act 1988 as inserted by section 27 of the Family Law Act 1996.

884 *Access to Justice*, Interim Report to the Lord Chancellor, June 1995.

relevance for case management, and for making alternative systems of dispute resolution (ADR) available and encouraging their use.

8.26 The first relevant recommendation is:

> *"Where there is a satisfactory alternative to the resolution of disputes in court, use of which would be an advantage to the litigants, then the courts should encourage the use of this alternative; for this purpose, the staff and the judiciary must be aware of the forms of ADR which exist and what can be achieved."*

Lord Woolf recognised that "the role of ADR can be of great value to the parties and the court in achieving expedition and the saving of expense to the parties and the saving of resources for the court".[885]

8.27 His objectives have relevance to Hong Kong. These include:

(a) The parties should settle their disputes before resorting to court whenever it is reasonable to do so. Where litigation is unavoidable, it should be conducted with a view to encouraging settlement at the earliest appropriate stage, and

(b) where there is an appropriate ADR mechanism which is capable of resolving a dispute more economically and efficiently, then the parties should be encouraged not to commence or pursue proceedings until after they have made use of that mechanism.[886]

Legal Aid

8.28 Lord Woolf recognised that the absence of legal aid for ADR may be a reason for its relatively low use. He suggested that the use of an ADR scheme should be taken into account, if available, when a legal aid certificate for court is being considered.[887]

8.29 In his final report, *Access to Justice,*[888] he recommended legal aid funding for pre-litigation resolution of disputes and for ADR. At the case management conference and pre-trial review the parties should be required to state whether the question of ADR has been discussed and, if not, why not, and if so, with what result. In deciding on the future conduct of a case, the judge should be able to take into account the litigant's unreasonable refusal to attempt ADR. Additionally the court should take into account whether the parties behaved unreasonably in the course of ADR.

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885 Chapter 18, paragraph 25, *ibid*.

886 *Ibid* at Chapter 4, paragraph 7.

887 *Ibid* at Chapter 18, paragraph 35.

888 This was issued on 26 July 1996.

8.30 Lord Woolf recognised that lawyers may interpret a suggestion to use ADR as a sign of weakness. Therefore, he encouraged judges to suggest to the parties that substantial costs might be avoided by the use of ADR. This is only to occur when the parties have not discussed ADR. Lord Woolf reserved for consultation the question whether an unreasonable refusal to resort to ADR should be a relevant factor in deciding costs. In his final report he suggested that orders for costs should reflect not only the outcome of proceedings, but also the way in which the parties or their legal representatives have conducted their cases.

8.31 Other recommendations were that the Lord Chancellor and the Court Service should treat it as one of their responsibilities to make the public aware of the possibilities which ADR offers. Lord Woolf's reports stressed the need for the system to become more responsive to the needs of litigants. This would be achieved by providing more information to litigants through leaflets, videos, telephone helplines and information technology. Court staff will provide information and help to litigants on how to progress their cases, and there will be ongoing monitoring and research on litigant's needs.[889] Since then the Lord Chancellor's Department published a comprehensive booklet in plain English, *Resolving Disputes Without Going To Court*.

Response of the Law Society

8.32 The English Law Society conceded that it may be legitimate to require parties to consider mediation before using the courts where mediation can be justified on the ground of cost effectiveness and does not undermine public confidence.[890] The Law Society accepted that "the state's obligation to provide an authoritative means of resolving disputes need not imply unrestricted access to the courts for all disputes."[891] However, any restriction must apply to all potential litigants not just to those who are legally aided. This ensures equal access to justice and avoids alternative schemes degenerating into second rate alternatives used only by the poor.[892] However, to ensure fairness, which requires equal access and choice, compulsory mediation is unacceptable.[893]

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889 Further information is available on the Internet, at http://www.open.gov.uk/lcd/civil/final/overview.htm

890 *Making Justice Work*, Law Society submission to the Lord Chancellor's Department's fundamental review of expenditure on civil litigation and legal aid, (June 1994), Paragraph 2.11.

891 *Ibid* at paragraph 3.27.

892 *Ibid* at paragraph 3.28.

893 *Ibid* at paragraph 2.12.

Settlement by lawyers

8.33 The Law Society urged more measures to promote earlier settlements.[894] In defence of solicitors, it said that if they were only motivated by money, they would not settle 95% of cases, albeit at a late stage. It acknowledged that court-door settlements were particularly inefficient as they do not save very much in costs unless the trial was scheduled to last some weeks as brief fees and cancellation fees for experts often still had to be paid.[895]

Court annexed mediation

8.34 The Law Society was disappointed that Lord Woolf did not make specific recommendations on a court-based pilot project in mediation. Until there was more research into ADR and a wider network of mediators, a judge would not be able to properly assess a litigant's refusal to undergo ADR.[896] The Law Society recommended proper funding for experimental schemes of court annexed mediation "to gather enough experience to demonstrate what benefits can be secured".[897]

Commentary on the Woolf Report

8.35 No mention was made in the Woolf Reports of the option of a "Multi-Door Courthouse".[898] The Beldam Report of the Bar Council on ADR[899] suggested that this option "demonstrates the usefulness of mediation as an adjunct to the traditional court process and to provide a possible target of employing court facilities to assist parties to resolve disputes in the most effective manner ...."[900] That report also recommended "Settlement Weeks".[901] There is no mention in Lord Woolf's report of this option. Woolf criticised the present court system as being unequal, expensive, uncertain, slow, complicated, fragmented and adversarial.

8.36 Woolf acknowledged that judges and court personnel will need training to implement the proposals. Nothing was said about training for solicitors. Unrepresented litigants will be helped by videos, electronic kiosks and library facilities. There would also be court based advice centres. Woolf did not go so far as to propose the integration of mediation services into the court service or court ordered mediation.

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894 The Law Society's first submission to Lord Woolf's Review of Civil Justice, March 1995.

895 *Making Justice Work*, *supra* at paragraph 8.1.

896 "The Law Society's Provisional Response", August 1995. Paragraph 9.

897 *Ibid* at paragraph 3.24.

898 This would be a one-stop shop for giving information on dispute resolution options and referring clients to the most appropriate section of the court to handle their case.

899 25 October 1991. See *Arbitration,* August 1992, 178 for a good summary.

900 *Ibid* at 182.

901 This is where cases are chosen from the court lists and attempts made to try and settle them with the assistance of mediators. The judiciary and lawyers need to support it, as considerable numbers of cases can be chosen in one week for this exercise.

Middleton report

8.37 Sir Peter Middleton was appointed by the new English government to conduct a review of civil justice and legal aid.[902] He reported in September 1997. He mainly supported the implementation of the Woolf Reports. He saw the interaction of the civil justice and legal aid reform programmes as being mutually consistent and reinforcing. "Better control of legal aid will help to release resources to allow more funding to alternative dispute resolution, information services, court-based advice and targeted help for litigants-in-person". Certainly, if reforms to the dispute resolution system for handling custody and guardianship cases, as suggested in this Consultation Paper, are to be implemented fully, reform of the legal aid system in funding mediation will also be required.

Conclusion

8.38 Lord Woolf acknowledged that "the key problems are cost, delay and complexity which stem from the uncontrolled nature of the litigation process." These problems are not unique to the civil justice system. The English reforms, which are still in the process of being implemented, should continue to be addressed as they provide much assistance to the sub-committee in considering proposals for reform of our family dispute resolution system and resistance to reform. However, Hong Kong' s cultural conditions and its own systems must be taken into account in addressing the relevance of the reforms suggested by the Lord Chancellor' s Department, Lord Woolf' s reports or Sir Middleton' s report. The report and recommendations of the *Chief Justice's Committee on the desirability of introducing a court-annexed mediation scheme in Hong Kong* are relevant in this context and should also be considered, and its recommendations should be adapted for the Family Court in Hong Kong.[903]

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902 See Internet site - http://www.open.gov.uk/lcd/middle/summary. htm.

903 August 1993. See chapter 12.

Chapter 9

Comparative Dispute Resolution Process: Australia and New Zealand

9.1 The first part of this chapter examines the considerable changes in Australia in the past few years in the way that disputes over children are resolved by alternative methods to the adversarial system. The position in New Zealand is examined in the second part of the chapter.

Australia

Jurisdiction

9.2 There is often debate as to whether a Family Court should have a unified jurisdiction which includes all matters affecting a family, for example, taking children into care, as well as divorce matters. The Family Court of Western Australia has jurisdiction over federal and state matters while in other states the state court only deal with such aspects of family law as, for example, family violence orders or children in care. Broadly speaking, in Western Australia the Registrar or magistrate hears undefended divorce lists, directions, applications for interim orders of custody and access, injunctions, maintenance and summary access proceedings. This leaves the judges to hear defended property, custody and access proceedings for final orders, defended divorce proceedings, contempt of court, Hague Convention applications and other interim matters of a complex nature.[904]

Aims and objectives of the Family Court

9.3 In the 1993-94 Program Performance Statement of the Attorney General' s Portfolio, the objectives of the Family Court were defined as being "to serve the interests of the Australian community by providing for the just and equitable administration of justice in all matters within the court jurisdiction".[905] In furtherance of those ends, waiting times were established for certain stages of proceedings,[906] and the Family Court simplified its forms to make them more user-friendly in response to a report from the Court.[907]

9.4 The need to enhance the "just and equitable administration of justice" has led to an increasing emphasis on alternatives to litigation as a means of solving family

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904 Paragraph 2.14 of the Family Law Council report, *Magistrates in Family Law*, July 1995.

905 Attorney General' s Portfolio, Program Performance Statement 1993-1994, at 160.

906 *Ibid,* at 163.

907 *Report of the Simplification of Procedures Committee* (1993).

disputes. This was reflected in the report of the Joint Select Committee of the Commonwealth Parliament on the Family Law Act,[908] which recommended that:

> *"100 the provisions of the Courts (Mediation and Arbitration) Act 1991 be expanded to encourage and implement the development of alternative dispute resolution mechanisms, not within the existing adversarial system but as realistic alternatives available at any time.*
>
> *101 agreements made between parties using alternative dispute resolution processes should not be subject to scrutiny or approval of the courts prior to signature by the parties.*
>
> *102 the legislation [should] provide for the review by the Family Court of any agreement reached between the parties in the event that there is a dispute in relation to agreements reached, such review to be subject to a time limit.*
>
> *103 the Family Court of Australia and the legal profession [should] take an active role in identifying matters which may be more suitable for resolution by alternative disputes resolution mechanisms."*

9.5 In its 1994 report on *Access to Justice, An Action Plan*, the Access to Justice Advisory Committee included a "Draft Court Plan" which included the following objectives:

> (1) adopting consistent simplified procedures and practices which set performance standards and minimise delay and costs to litigants,
>
> (2) ensuring equitable access to court services for all potential clients,
>
> (3) promoting fairness and the avoidance of bias,
>
> (4) ensuring staff are aware of and meet customer needs effectively, and
>
> (5) ensuring that the availability of resources reflects court priorities in access to justice and customer service.[909]

Mediation and the Access to Justice Report

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908 *The Family Law Act 1975: Aspects of its Interpretation and Operation* (1992), recommendations at 320.

909 These are strategies 1a-1e of the "Draft Court Plan" (1994), reported at paragraph 15.14 of the Access to Justice Committee' s report, *infra*.

9.6 The Access to Justice Advisory Committee's remit was to seek ways to enhance access to justice and make the legal system fairer, more efficient, and more effective.[910] One aspect of their study was consideration of the role which could be played by mediation. The Committee recognised that there were arguments against the use of court-annexed mediation,[911] but recommended that these be taken into account in:

> *"the framing of official programs intended to encourage resort to ADR. This can be achieved, at least to some extent, by encouraging appropriate training for mediators and establishing screening processes to identify parties whose disputes are unsuitable for mediation".*[912]

Arguments against court-annexed mediation

9.7 The Access to Justice report outlined the arguments against court-annexed mediation as follows:

(1) *"It is claimed that courts are places of public authority, where judges make decisions that are enforced by sanctions. These qualities are ... inherently incompatible with the philosophy of ADR, which is based on the consensual resolution of disputes."*[913]

The report's response was that this was not an argument against court-annexed mediation itself, but rather against courts having the power unilaterally to refer parties to mediation.[914]

(2) The involvement of judges in ADR will erode respect for the judiciary: "ADR attached to courts devalues the very nature of judicial decision-making and changes the focus of courts as sovereign decision-makers".[915]

(3) Some techniques of mediation, such as private caucus sessions with each party, are inconsistent with the judicial process, which must be public and scrupulously fair to both sides.[916]

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910 In British Columbia, in 1988, the Justice Reform Committee produced a report, *Access to Justice*, whose goal was to "cause the justice system ... to be accessible, understandable, relevant and efficient to all those it seeks to serve".

911 They outlined these as privatisation of disputes, power imbalances, cost savings by government, and second class justice.

912 *Supra* at paragraph 11.6.

913 *Ibid,* paragraph 11.45.

914 They noted that no Federal court has the power to so refer, without the consent of the parties.

915 Street, "The Court system and Alternative Dispute Resolution Procedures" 1 Australian Dispute Resolution Journal 5, 10, (1990).

916 Street, "The Courts and Mediation - a Warning", 2 Australian Dispute Resolution Journal 203. (1991).

The Chief Justice of the Federal Court responded by saying that in the five years that it had been available, no complaints had been received that the ADR system allowed improper access to the Court.[917]

Arguments in favour of court-annexed mediation

9.8 The arguments in favour of court-annexed mediation identified by the Access to Justice Advisory Committee were:

(1) Reduction of costs, as disputes are settled earlier. As a result, the court's capacity to cope with its caseload will be increased,

(2) ADR gives an opportunity to make better use of existing resources, and

(3) It enhances the acceptability and quality of decisions.[918]

9.9 The Access to Justice Advisory Committee concluded by endorsing the Joint Select Committee's recommendation of a shift to ADR in family matters, "provided that appropriate steps continue to be taken to minimise the risk of gender bias in mediations in family law matters". They acknowledged that ADR made a substantial contribution to access to justice, and stressed that adequate resources should be made available to implement their recommendations.[919]

Standards and evaluation

9.10 Even though the Committee did not agree with an official accreditation scheme, it did consider that the Australian government should:

> *"take such measures as are consistent with the independence of the judiciary to ensure the quality, integrity, accountability and ... accessibility of the ADR programs offered in the Family Court, ... and through the Family Mediation Program."*[920]

9.11 The Committee recommended that this obligation could best be fulfilled by establishing a specialist ADR body to advise government and the courts on ADR policy issues, including minimum standards for their programmes. This body should also consider establishing a national database containing information about programmes, agencies, practitioners and training.[921] Most importantly, the Australian government must ensure that federal ADR programmes were regularly and rigorously evaluated to ensure they were

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917 See Comment (1993) 67 ALJ 941, 942.

918 *Supra* at paragraph 11.49.

919 *Ibid* at paragraph 11.2.

920 *Supra* at paragraph 11.52.

921 This was first proposed by the New South Wales Law Reform Commission, in their report, *Training and accreditation of mediators*, September 1991.

achieving their objectives without systemic disadvantages for any user groups.[922] The evaluation would include a comparison with unstructured negotiation outside the court system, and with conventional litigation through the court system itself. The evaluation should also address client satisfaction, and the cost effectiveness of the programmes in comparison with other modes of dispute resolution.

Goals of court-annexed mediation

9.12 The Committee noted the concern expressed by the New South Wales Law Reform Commission,[923] that the guidelines for the operation of court-annexed schemes should ensure that case management and reduction of court delays are not the sole, or primary, reasons for implementation of ADR programmes. If this were so, there would be a danger that parties might be coerced into mediation.

9.13 The Committee recommended that the principles set out in the Society of Professionals in Dispute Resolution' s (SPIDR) report on *National Standards for Court-Connected Mediation Programs* should form the basis of the minimum standards for Federal programmes.[924] These standards would be included in court charters, which would specify standards of service to be provided to members of the public.[925]

Implementation of the Access to Justice report

9.14 The Federal government issued a "Justice" statement in May 1995 in which it committed itself to making dispute resolution services more widely available. Funding was allocated to 24 new family mediation services throughout Australia over a four year programme. Funding was also allocated to expand community based family mediation services. In a national poll in July 1995, only 17% of Australians were aware of the availability of family mediation services. In December 1995 a community education programme was launched to inform the community about the availability of such services. A National Alternative Dispute Resolution Council (NADRAC) was established in November 1995 to develop a comprehensive policy framework for the expansion of alternative dispute resolution.

Family Law Reform Act 1995

9.15 The Government responded to reform proposals by shifting the focus of the family law system from litigation to non-adversarial dispute resolution processes.[926] The Family Law Reform Act 1995 (the 1995 Act) reflected this shift, and came into force in 1996.

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922 *Supra* at paragraph 11.53.

923 Report on training, *supra*.

924 SPIDR reported in 1991. The principles are outlined in paragraph 11.59 of the *Access to Justice* report.

925 See paragraph 15.1 of the *Access to Justice* report, *ibid*.

926 It issued a report - *The Family Law Act 1975 : Directions for Amendment*, (1993).

9.16 The 1995 Act provided a mechanism for community based counselling and mediation organisations to become approved organisations under the Family Law Act 1975. The immunity, confidentiality and admission provisions that already protected court mediators were extended to these approved organisations. Increased budget provisions were made to implement the legislation. Section 13E placed a duty upon the Minister to publish a list of approved organisations.

9.17 The 1995 Act introduced the term "primary dispute resolution" to refer to arbitration, counselling and mediation. This was intended to emphasise that these were the primary, rather than the "alternative", dispute resolution processes for family law disputes.[927]

Counselling services of the Family Court

Counselling

9.18 The Family Law Act 1975 made provision for court counselling services to support the family, both before and during the court process, and to assist them to adjust to court orders.[928] All counsellors attached to the court programme, or in approved counselling organisations, are now called family and child counsellors to emphasise the child' s needs.

9.19 A party to a marriage can seek counselling from a family and child counsellor by applying to the Family Court by notice. Such an application can be made without any other proceedings being taken.[929] On receiving the notice, the court service "shall arrange ... for the parties to be interviewed .. for the purpose of ... the improvement of their relationship to each other or to any of the children".[930] There are also provisions for a parent or a child to seek such counselling from the court service,[931] or a person may request the service direct from a family and child counsellor without a notice.[932]

9.20 If, when making an order or granting an injunction, the court considers it to be in the interests of the parties or their children to attend upon a family and child counsellor, the court must direct or advise either or both parties to so attend.[933]

9.21 The court can also advise parties to attend counselling if it may improve their relationship to each other or to any of their children.[934] The court must consider whether or not to advise the parties in proceedings, other than those relating to children under Part VII,

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927 Section 14E of the 1975 Act as inserted by the Family Law Reform Act 1995, (the 1995 Act).
928 *Ibid* at section 14.
929 Section 15 of the Family Law Act 1975.
930 *Ibid* at section 15(2).
931 Section 62E of the 1975 Act.
932 *Ibid* at section 62D as substituted by the 1995 Act.
933 Section 16A as substituted by the 1995 Act.
934 Section 16B as substituted by the 1995 Act.

of counselling to assist them and their children to "adjust to the consequences of marital breakdown".[935]

Conciliation counselling

9.22 The 1975 Act contains provisions for a party to proceedings about children to seek counselling to discuss their care, welfare and development, and to try to resolve the differences between the parties.[936] Conciliation counselling differs from mediation.[937] Conciliation counselling is designed to encourage a couple to talk together to reduce conflict and to encourage agreement of practical issues, particularly issues concerning residence and contact. Conciliation counselling has broader aims than mediation, in that it can include counselling to help parents and children to adjust to the separation and work through their anger and hurt. Section 65L provides that counsellors may be required to supervise or assist compliance with parenting orders, for example, supervising contact:

> *"It is a process whereby separating parents are encouraged and assisted to make joint decisions about the future welfare of their children ... Counsellors are required to maintain a focus on the best interests of the children and to educate parents accordingly".*[938]

Conciliation conference

9.23 Section 62F of the Family Law Act 1975 gives a discretion to the court, in relevant proceedings,[939] to direct parties to participate in a "conciliation conference" to endeavour to resolve their differences, and to discuss a child's care, welfare and development. It is also possible to have voluntary conciliation counselling prior to issuing proceedings. Subject to certain exceptions, a parenting order cannot be made unless the parties have attended a conciliation conference.[940] The clients only have to agree that they will attend together, not that they will actually conciliate.[941] However, the parties are under an obligation to make *bona fide* endeavours to reach agreement.[942] Failure to attend a conciliation conference when ordered by the court can be regarded as contempt of court.[943]

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935 Section 16C.

936 *Ibid* at section 62C as substituted by the 1995 Act.

937 Paragraphs 9.22-3, 9.27-8, 9.31-5, 9.39, 9.44-7, 9.56-63, 9.76-9.89, 9.92-5, and 9.107-108 were substantially taken from an unpublished dissertation by Paula Scully, *Obstacles to Referral, Planning and Implementation of Family Mediation as a Dispute Resolution Process in Hong Kong; Reflections based on Foreign Systems,* April 1996.

938 Brown, "The Family Court's Conciliation Programme" (1992), quoted in Davies *et al*, "A study of client satisfaction with Family Court Counselling in cases involving domestic violence", Family and Conciliation Courts Review, vol. 33. No.3, July 1995, 324.

939 This is concerning the care, welfare and development of a child who is under 18.

940 *Ibid* at section 65F as substituted by the 1995 Act. The exceptions are orders by consent, interim or urgent orders, where attendance would be impracticable or there are special circumstances such as family violence.

941 Charlesworth, Turner and Foreman, *Lawyers, Social Workers and Families*, (1990), at 185.

942 Order 24 r 1(3) of the Family Law Rules.

943 *R v Cook; Ex p Twigg* (1980) 147 CLR 15.

9.24 If no agreement is reached, or if a person fails to attend the conference, the counsellor or welfare officer will report that fact to the court.[944] Otherwise evidence of anything said at these conferences is not admissible in any court.[945] However, the counsellor does send a memorandum to the court indicating the outcome of the conciliation counselling and offering guidance on future management of the case. This does not disclose privileged information.[946]

9.25 Property matters must also be referred to a conciliation conference before a registrar, and it is possible for both children's and property matters to be considered at a joint conciliation conference conducted by registrars and counsellors.[947]

Welfare reports

9.26 There are provisions under section 62G(1) of the 1975 Act for the court to order welfare reports. The court can order the parties to attend before a welfare officer for the preparation of the report. This report may be received in evidence.[948] Different counsellors are used for this function, some courts going so far as to employ outside agencies to make the reports.[949]

Court annexed mediation

9.27 Section 19A of the Family Law Act 1975 empowered potential litigants to apply to the Family Court for the appointment of a "family and child mediator".[950] Section 19AA allows a person to make such a request direct to a family and child mediator. The court is under an obligation to provide this assistance if it has such a service. Section 19B gave power to the Family Court to refer proceedings to a mediator with the consent of the parties. The court has an obligation to advise the parties to seek the help of a family and child mediator if it considers that this may help the parties to resolve their dispute.[951] The court may adjourn the proceedings to enable attendance at mediation.[952]

9.28 Mediation was first made available in 1992, and is now available in five cities.[953] Mediation may now be conducted by a single mediator.[954] Mediators are drawn from the ranks of those with either a legal or social science background.[955]

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944 See section 62F(5) and Charlesworth, *supra*, at 51.

945 Section 62F(8) and Order 24(5) of the Family Law Rules.

946 Brown, *infra* at 17.

947 According to Brown, "Developing and implementing Family Court Services: The Family Court of Australia", paper presented at the Second World Congress on Family Law and the Rights of Children and Youth, June 1997.

948 Section 62G(8) and Order 25(5) of the rules as amended in 1996.

949 Graham Hall, "Newcastle revisited by way of the Antipodes," Justice of the Peace, vol. 154(24), (1990).

950 The Courts (Mediation and Arbitration) Act 1991 added Part IIIA to the Family Law Act 1975 and this was further amended in the 1995 Act.

951 Section 19BA(1) as inserted by section 17 of the Family Law Reform Act 1995.

952 Section 19BA(2).

953 Melbourne, Dandenong, Adelaide, Brisbane and Sydney.

Duty to provide information and advice

9.29 Both lawyers and judges are placed under a duty to consider the possibility of a reconciliation.[956] They are also required to consider whether or not to advise persons who are considering instituting proceedings about the primary dispute resolution methods that could be used to resolve any matter in dispute.[957] There is a similar requirement in respect of counselling for the parties and their children to adjust to the consequences of marital breakdown,[958] and counselling to adjust to the consequences of Part VII orders.[959]

9.30 The lawyer for the applicant must provide a court approved document which sets out particulars of any mediation and arbitration facilities available at the Court or elsewhere.[960] The lawyer for the applicant must also serve it on the respondent.[961] If the parties are not represented, court staff are under a similar duty.[962] Lawyers may refer clients directly to the mediation service.

Information sessions

9.31 If mediation is requested by one of the parties, then the Director of Family Mediation of the Family Court may direct both parties to attend an "information session".[963] Parties may also be ordered to attend information sessions if the court or registrar is of opinion that "it would be advantageous to do so".[964] These sessions are run by a registrar (a lawyer) and counsellor. They outline the range of options available for resolving disputes and:

> *"give a more detailed overview of the mediation process. Educational components are also included covering the separation process, communication patterns, children's reactions to separation in the context of child development, couple suitability for mediation and the range of issues that can be mediated".*[965]

9.32 By way of example of the process in action, at an information session attended in Brisbane in February 1995, members of the court counselling service used flip

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954 Order 25A(2)(a), as inserted in 1996.

955 *Ibid* at paragraph 11.17.

956 *Ibid* at sections 14 and 14CD.

957 *Ibid* at sections 14C and 14F and G.

958 *Ibid* at section 16C(3).

959 Section 62B(3).

960 Order 25A, rules 21(2) and (4). This is a document referred to in section 19J(2) which must be given to the parties on request to the appropriate officer of the Family Court, or when persons propose to institute proceedings.

961 Order 25A, rule 21(4).

962 Section 19 J(2), Family Law Rules, Order 25 A, rule 21(3).

963 See Order 25A, rule 3 of the Rules.

964 Order 24 (5)(1).

965 Gibson, "Mediation of Family Disputes in the Family Court of Australia", Paper at the Fifth National Family Law Conference, Perth, September 1992.

charts to provide information, and answered questions on the legal and psychological process. There were information packs available on the divorce process.

Intake interview

9.33 After the information session, if the couple request mediation, then a mediator will interview the parties "to ascertain the willingness and ability of each party to participate in the mediation process".[966] The Director of Family Mediation of the Family Court has stated "a reasonable power balance in the relationship between the people seeking an agreement is essential to constructive negotiation".[967] The first mediation session is arranged at a joint pre-mediation interview, which also discusses any information that may need to be shared and sets agendas for the mediation sessions.

Safeguards

9.34 Order 25A, rule 5, of the Family Court Rules provides some safeguards by setting out factors to be taken into account in deciding whether a dispute is suitable for mediation:

> *"(a) the degree of equality (or otherwise) in the bargaining power of the parties;*
>
> *(b) the risk of child abuse (if any);*
>
> *(c) the risk of family violence (if any);*
>
> *(d) the emotional and psychological state of the parties;*
>
> *(e) whether one of the parties may be using the mediation option to gain delay or some other advantage; and*
>
> *(f) any other matter relevant to the proposed mediation."*

9.35 Gibson suggested two further factors should be taken into account, though these are not included in rule 5:

> (1) whether one of the parties has impaired functioning due to alcohol or drug abuse, psychiatric illness or mental instability, and
>
> (2) whether there is a history of broken agreements affecting trust.

9.36 If mediation is deemed unsuitable, then Order 25, rule 6 provides that the parties will be informed of the other primary dispute resolution methods available. The

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966 *Supra* at paragraph 11.19. See Order 25A r 4. The court mediator can also direct the parties to attend an interview.

967 Gibson, "Mediation of Family Disputes in the Family Court of Australia", 20 September 1993, at the launch of the service.

mediator is required under Order 25A, rule 12, to advise the parties that they should obtain legal advice as to their rights, duties and obligations, at the commencement of mediation, and at any other time if the mediator considers it appropriate, and at the conclusion of mediation and before any agreement become legally binding. The mediator can direct the parties to prepare or produce any documents that the mediator considers necessary or appropriate.[968]

Goals

9.37 The goals of mediation are set out in Order 25, rule 10, of the Family Court Rules:

> *"(1) A mediation conference must be conducted:*
>
> *(a) as a decision making process in which the court mediator assists the parties by facilitating discussion between them so that they may:*
> *(i) communicate with each other regarding the matters in dispute; and*
> *(ii) find satisfactory solutions which are fair to each of the parties and (if relevant) any children; and*
> *(iii) reach agreement on matters in dispute; and*
>
> *(b) in accordance with any general directions given by the Principal Director of Mediation".*

9.38 Anything said in a mediation conference or meeting to a court mediator, community or private mediator is not admissible in court.[969] A family and child mediator has the same protection and immunity as a Judge of the Family Court in the performance of his functions.[970]

Lawyer' s involvement in mediation

9.39 Order 25A, rule 11, provides that parties may be accompanied by their lawyers. Where lawyers are involved in the process, Altobelli argued there is a greater chance of settlement.[971] He referred to the case conferencing scheme, operated by the Legal Aid Commission of New South Wales at the Parramatta registry of the Family Court, where there is co-mediation with a family lawyer mediator and social scientist mediator:

> *"Legal representatives are an integral part of the mediation conference. Anecdotal evidence points to the significant contribution*

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968 Rule 10 (2).
969 Section 19N.
970 Section 19M.
971 See *infra.*

played by legal representatives in assisting the parties to achieve settlement".[972]

9.40 This is borne out by a New South Wales study, referred to by Altobelli, which found that 71% of cases with active lawyer participation settled. Unfortunately, those cases which do not settle take up a disproportionate amount of court time, resulting in delays of 12 to 24 months before a hearing in the case of the Sydney registry.[973]

Mediation pilot project evaluation (1994)

9.41 In 1992 a pilot mediation project (the Family Court Mediation Service) was established in Melbourne to provide comprehensive mediation services in addition to the existing conciliation services. The service was "comprehensive" in that any issue in dispute could be made the subject of mediation. Referrals under the project were voluntary. In 1994, the success of the pilot project was assessed in a report issued by the Family Court of Australia Research and Evaluation Unit.[974]

Comprehensive mediation

9.42 The fact that the pilot project provided a comprehensive service allowed issues relating to both children and property to be mediated at the same time. The evaluation report found that there was a higher proportion of cases resolved where more than one issue was brought to mediation. Eighty-eight per cent of multiple issue disputes reached agreement, compared to 73% for single issue disputes. Only a small number of cases were mediated in which only issues relating to children were considered.

Reasons for choosing mediation

9.43 The evaluation report found that a critical factor which persuaded parties to resort to mediation was a desire to avoid court proceedings and their associated costs. Sixty-eight per cent chose mediation to avoid court costs and the adversarial nature of litigation, though 75% were prepared to go to court if mediation did not settle the matter.[975]

Satisfaction

9.44 Of the 82% of cases that achieved some measure of settlement in mediation, 71% settled all matters in dispute and 11% settled one major matter. Eighty-seven per cent of clients reported satisfaction that the decision reached at the mediation was a fair one. Seventy-nine per cent felt that each party had an equal influence over the agreement, while

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[972] Altobelli, "Mediation in family law", Australian Family Lawyer.

[973] Altobelli, Talk on "Australian Mediation" to the Mediation Group, Hong Kong on 8th August 1994.

[974] Bordow and Gibson, *Evaluation of the Family Court Mediation Service*, Family Court of Australia Research and Evaluation Unit, Research Report No.12, (March 1994).

[975] *Supra* at 5.

78% said that the mediated agreement was close to the legal information they were given before the process began.

9.45 Only 5% felt that the mediators had pressured them into agreement. Nineteen per cent felt that they would have reached a more favourable settlement by going to court. The report noted that, though there were inconsistencies, mediation did improve the post-dispute climate and had beneficial effects on the adjustment of members of separating families. The high level of settlement rates showed that the voluntary nature of the referral to mediation seemed to have encouraged the parties to come to agreement, and certainly did not make them take the process less seriously.

Durability of agreements

9.46 Follow-up interviews some eight months after agreement confirmed that 86% of agreements were still in place. Of the 14% that were not, most were re-negotiated through a lawyer, with only one case requiring court intervention. In contrast, 42% of clients who failed to reach a mediated agreement needed a court hearing.[976] This data is supported by other researchers, who have found a "survival rate" of mediation agreements of between 50% and 88%.[977] The Australian statistics on litigation rates for mediated cases are also consistent with other research studies, which found litigation arose in between 4% and 12% of mediated cases which had reached agreement, and between 17% and 35% of cases where mediation had failed[978].

9.47 Thirteen months after mediation, a study in the evaluation report of court records revealed that: "Less than 5% of successfully mediated cases, compared to 27% of those who failed to reach a mediated settlement, had turned to court for adjudication ...."[979] Of those who did achieve a mediated agreement, 23% had resorted to litigation unrelated to the mediated issues.[980]

Sources of referral

9.48 The evaluation report concluded that:

> *"While mediation should remain voluntary, the role and referral criteria used by the important gatekeepers to the service (legal profession, courts and other non-legal organisations) must be more clearly understood and, if necessary, more standardised. To enhance client-initiated contact there is a need for public education about the*

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976 It is interesting to note that 31% of those who failed to reach agreement subsequently recorded a consent order, and only 27% contested the issues that had been raised in mediation. *Ibid* at 92.

977 *Ibid* at 93. The report refers to Irving & Benjamin, (1987); Pearson & Thoennes, (1984) amongst others.

978 McIsaac, (1981); Pearson & Thoennes, (1984) and Irving & Benjamin, (1987).

979 *Supra* at 7.

980 These related to divorce proceedings concerning old matters. See further at 92.

existence, purpose and benefits of mediation as an alternative dispute resolution strategy."[981]

9.49 It should be noted that 51% of the referrals were from a solicitor[982] or legal aid, 24% were from the family court staff, and 13% from other agencies, which included legal advice centres. Sixty-five per cent of female clients and 54% of male clients had consulted or retained a lawyer at the time they attended mediation.[983]

Timing of mediation

9.50 The evaluation report found that mediation is most successful when carried out before proceedings have issued. In one research study referred to in the evaluation report, those who attempted mediation prior to involvement with the court recorded a success rate of 79%, compared with 44% for those mediated after court proceedings had terminated.[984]

9.51 The Family Court survey concluded that:

> *"couples with current court applications have a significantly reduced chance of a successful outcome. The presence of a 'litigation shadow' is not conducive to positive outcomes and has the potential to interfere with the couple's capacity to be reasonable and conciliatory on the issues under discussion".*

Comments on Family Court evaluation

9.52 The Access to Justice Advisory Committee found the evaluation report on the Family Court Mediation Service pilot project encouraging, but noted that "it did not attempt to ascertain why combined property and custody disputes appear to have a higher rate of settlement than matters raising only one of those issues".[985] The Committee indicated that a possible explanation was that given by Neely,[986] that women may be pressurised by their husbands to compromise their property entitlements in order to gain custody. The committee also criticised the fact that the research "did not include any comparative analysis of other mediation programs". They warned that as the co-mediation model is unique, care must be taken with comparisons with other models.[987]

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981 *Ibid* at 8.

982 Section 16A of the Family Law Act 1975 then stated that the Family Court and legal practitioners had an obligation to direct the parties' attention to facilities provided by the court to assist them and their children to adjust to marital breakdown. This had, no doubt, an influence on early referral to mediation by lawyers. The report was completed before the amendments to the 1975 Act introduced by the 1995 Act.

983 *Supra* at 6.

984 *Ibid* at 24.

985 *Access to Justice, An Access Plan*, Report of the Access to Justice Advisory Committee (1994), Paragraph 11.26.

986 "The primary caregiver parent rule; child support and the dynamics of greed" (1984), 3 Yale Law and Policy Review 168.

987 Paragraph 11.26 *supra*.

Federally funded family mediation - Melbourne evaluation (1995)

9.53 Since 1988, the Legal Aid and Family Services Division (LAFS) of the Commonwealth Attorney General's Department has funded a Family Mediation Program, administered by community organisations who provide family and child mediation services. There are 17 such services.

9.54 In January 1995, LAFS issued a report which reviewed the effectiveness of the Family Mediation Program as compared to the Family Court Mediation Service, and profiled the different client groups.[988] The review was conducted in a similar manner to the evaluation of the Family Court Mediation Scheme carried out by Bordow and Gibson, referred to earlier in this chapter It evaluated two agencies funded by the LAFS, Marriage Guidance Victoria and the Family Mediation Centre, together with the Family Court mediation service.

Costs

9.55 Unfortunately, the survey was unable to make reliable comparisons with the costs of litigation. The only way this could be assessed would be by matching mediation and non-mediation cases right through the court system.[989] The clients attending mediation at one particular centre had lower incomes and these reported that legal costs, even though moderate in some cases, impacted significantly on them.[990]

Sources of referral

9.56 An average of 50% of clients came to the agencies by referral, rather than by personal choice.[991] The source of referral varied according to the agency. For example, solicitors and Legal Aid were the highest source of referrals to the Family Court service (51%) and to the Family Mediation Service (47%).[992] The mediation scheme attached to the Family Court attracted a higher proportion of referrals from lawyers than the other agencies. It should also be noted that the staff there provided seminars for lawyers to "participate in legal education programs and encourage feedback from legal practitioners".[993] In total, out of a sample of 55 cases from agencies other than the Family Court mediation service, 21 were referred by solicitors or Legal Aid. Family or friends

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988 *Federally-Funded Family Mediation in Melbourne - Outcomes, Costs and Client Satisfaction*. Attorney General's Department, January 1995.

989 *Idem.*

990 *Supra* at xv.

991 *Ibid* at 42.

992 *Ibid* at 43.

993 *Ibid* at xviii.

accounted for 11% of referrals, self/media were 9% and the Family Court referred only 4% to other agencies.[994]

Expectations

9.57 What was surprising were the clients' expectations of mediation in the non-Family Court mediation agencies. Only 8% of men, and 15% of women, had an expectation of a fair agreement. The highest expectation (43% for men and 29% for women) was that there would be an "impartial third person and a neutral, stable environment". The next highest expectation (12% for men and 26% for the women) was to improve communication. In contrast, the Family Court mediation service was dominated by an expectation of a fair agreement (48% for men and 46% for women). The figures for the "impartial third person and a neutral, stable environment" criteria were 21% for men and 19% for women.

9.58 Clients were asked what factors they believed had prevented them from working out their problems between themselves. The highest figures related to the ex-partner's attitude. Lawyers were cited as a factor in preventing resolution of the dispute by between 12% and 15% of men and between 0% and 5% of women, varying with the agency attended. The "children's wishes" were cited in relation to one agency by 12% of men and 5% of women. Only 12% to 19% agreed that they would have reached a more favourable settlement by going to court. An average of 75% felt that the mediation agreement was "close to the legal information they had received" about the parameters of settlement.

Agreements on child-related issues

9.59 In the combined sample of 27 cases from the two non-Family Court mediation services, 41% reached full agreement, 37% partial agreement and 22% did not reach agreement.[995] Only five cases in this sample involved custody disputes. Forty per cent of the sample reached full agreement on child-related issues, 40% reached partial agreement, and 20% did not reach agreement. With access disputes, 77% of the sample cases from the two non-Family Court mediation services reached full agreement, 8% partial agreement and 15% no agreement.

9.60 In the Family Court mediation service, in a sample of 66 cases, 88% reached full agreement and 8% reached partial agreement. Ninety-four per cent of custody disputes reached full agreement, 3% partial agreement and 3% no agreement. Ninety-two per cent of access disputes in the sample from the Family Court mediation service reached full agreement, 7% partial agreement and 1% no agreement.

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994 *Ibid* at 43.

995 *Ibid* at 51.

Satisfaction

9.61 When satisfaction was measured in respect of child related issues, the highest rate of satisfaction was reported in response to a question, "I felt that the agreement regarding children was practical, realistic and workable". This varied between 64% and 87%, depending on the agency attended. Between 42% and 75% agreed with the statement, "mediation helped us to agree about the time children will spend with the parent they don' t live with".

9.62 Clients recorded very high rates of satisfaction with the professional skills and impartiality of the mediators, the adequacy of information received and with the impact of mediation on their relationship. Over 75% reached agreement. Those taking part in the survey "reported a significant shift in their perceived dependence on lawyers and the courts in the handling of new problems relating to their separation".[996] Improvements for children were reported by 40% of the follow-up sample, compared with 37% in the Family Court survey of 1994.[997] Ninety per cent of clients in the follow-up sample stated that they would be willing to use mediation services again.

Durability of agreements

9.63 In a six month follow-up survey, changes to agreements concerning parenting issues were made in 31% of cases. Sixty per cent of those who changed their agreement were responding to the changing needs of their children. Overall, 14% of those who reached agreement said that the agreement had since broken down.

Federally funded family mediation - Sydney evaluation (1996)

9.64 In 1996, LAFS commissioned an evaluation of the Sydney Family Court Mediation Section,[998] and community mediation services. The latter consisted of the Centracare Family Mediation Program, the Couple and Family Mediation Service of Relationships Australia (NSW), and the Unifam Family Mediation Service.[999]

Costs and funding of mediation

9.65 There was strong endorsement by the clients interviewed that the main reason for choosing mediation was the wish to avoid additional legal costs. Perceptions of relatively low costs appeared to be an attractive reason for many clients to choose mediation. For some, however, costs were problematic. A few referred to the double burden of paying for mediation which failed to resolve the dispute and then paying for litigation.

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996 *Ibid* at xi.

997 *Ibid* at 84.

998 This had been established in 1993.

999 Moloney, Fisher, Love and Ferguson, *Managing Differences: Federally - Funded Family Mediation in Sydney: Outcomes, Costs and Client Satisfaction*, July 1996. For LAFS.

9.66 To compare the cost of mediation with the cost of litigation in the Family Court, a method of costing was adopted that identified the tasks, personnel, time and costs for each step in the two methods of dispute resolution. For litigation, the estimated cost of personnel in the Family Court amounted to A$902.51.[1000] This figure compared with estimates of A$479.32 and A$627.70 for non-Family Court mediation, depending upon which model of mediation was adopted. For mediation in the Family Court Mediation Section the estimate was A$884.35.[1001]

9.67 Recommendation 12 of the Sydney evaluation report concluded that:

> *"Continued Federal Government funding of family mediation is important as it will continue to provide an incentive to use services which produced good outcomes that hold up over time. Because for some families with children, costs associated with the divorce itself can be a critical factor in determining post-separation physical and emotional survival, subsidised family mediation services should be seen as a sound low cost investment in the future of separating families."*

Reasons for referral

9.68 Custody was an issue for 29% of men and 31% of women, though 50% of both identified parenting issues as the reason for going to mediation. Surprisingly for those who see mediation as predominantly dealing with parenting issues, property disputes were an issue for 68% of males and 72% of females. Nearly half the cases were referred by solicitors of the Legal Aid Commission. A further 23% were self-referred.

Satisfaction

9.69 Satisfaction with the professionalism of the mediators, their perceived impartiality, the quality of the mediator-client relationship and the perception of being heard was very high. Almost all clients agreed that they had received enough information to protect their own best interests during mediation.[1002] Despite some negative criticisms of the mediation process, "the overwhelming sense of the replies is one of strong positive endorsement for the unique features of mediation."[1003]

Agreement rates

1000 This estimate does not include the costs leading to a final judicial determination because in this case it has been assumed that the matter settled at the formal negotiation stage of each process.

1001 Staff costs are higher in the Family Court. For example, a mediator (Deputy Registrar) and a mediator (counsellor) have been cost at A$43.31 per hour and A$33.29 per hour respectively. This compares with a staff mediator in the non-Family Court mediation agencies costs at A$24.00 per hour.

1002 *Summary of the 1996 report, supra* at 15.

1003 *Ibid* at 17.

9.70 Full agreement was reached in 44% of cases. A further 39% of cases reached partial agreement and 17% failed to reach agreement. For custody disputes, full agreement was reached in 74% of cases. Agreement was reached for access in 60% of cases and in 61% of parenting disputes.

Durability of agreements

9.71 When those who had concluded mediation agreements were followed up by the researchers three months later they indicated that there were changes to the agreement in 33% of cases, mainly in respect of parenting issues. Only 8% of these changes were due to a breakdown of the agreement. Forty per cent sorted out the changes themselves and 25% were assisted by their lawyers. Twelve and a half per cent received help from further mediation or counselling. Mediation contributed to a more positive relationship with the other parent in 34% of cases.[1004]

9.72 Three months after conclusion of the mediation, an application to contest matters dealt with in the mediation agreement had been filed in court in only 11% of cases. Only 2% of cases had completed a contested hearing. The researchers concluded: "The figures suggest that low numbers of mediated cases progress through to contested lists and very low numbers complete a contested hearing."[1005]

Domestic violence and mediation

9.73 Concern has been expressed as to whether screening procedures at intake are sufficient to identify cases that are unsuitable because of domestic violence.

9.74 A 1996 research study by LAFS[1006] recommended that the mediation agencies must recognise:

> *"the high prevalence of violence or abuse ... by ensuring that all mediators and other staff are appropriately trained in understanding and identifying issues relating to family violence; all agencies should have intake, referral, mediation, follow-up and other procedures appropriate to the needs of clients whether or not clients proceed to mediation".* [1007]

Domestic violence policy of the Family Court

9.75 There is a duty on approved mediators to consider the risk of child abuse and family violence in deciding whether to mediate or not.[1008] The obligation to report abuse is confined to child abuse.[1009] The guidelines indicate that if there is current violence, the parties will not be accepted for mediation. If it is not current, but there has been a strong

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1004 The figures for Bordow and Gibson's 1994 research was 40% and 43% for the 1995 study.

1005 *Ibid* at 24.

1006 *Research/Evaluation of Family Mediation Practice and the Issue of Violence*, Legal Aid and Family Services Division of the Attorney General's Department, August 1996.

1007 Executive Summary, *ibid* at iv.

1008 Order 25A Rule 5 of the Family Law Rules.

1009 Section 67ZA of the Family Law Act 1975 as substituted by the 1995 Act.

history of family violence, the parties will not usually be accepted for mediation unless the victim can convince the mediator that he or she is able to negotiate on a reasonably equal footing. The policy states that "it is inappropriate to deny the mediation service to the survivor of violence if that individual can beneficially use the service to deal with a dispute".[1010]

Legal aid for family cases

9.76 A number of Legal Aid Commissions (including those in Queensland, Victoria and New South Wales) have developed mediation and conferencing schemes in which family law clients must participate as a condition of a grant of legal aid. In the Northern Territory, legal aid applicants must attend the Family Court Counselling service. The Legal Aid Commissions in the Australian Capital Territory, South Australia, and Tasmania will not normally provide assistance unless there are genuine attempts to settle a dispute.[1011] Where there is no in-house mediation conferencing scheme, cases are referred by Legal Aid Commissions to the mediators at the Family Court. The Legal Aid Commission of New South Wales indicated that 70% of the disputes referred to mediation conferencing in their pilot project were resolved.[1012]

Legal aid conferencing in Queensland

9.77 The legal aid conferencing scheme in Queensland is a compulsory process for a family law legally aided client which provides an opportunity for disputants, with their solicitors present, to resolve a dispute.[1013] A conference can be held when Family Court counselling has been exhausted, where there is a willingness to negotiate, and where it is cost effective. Conferencing is a combination of mediation, conciliation and arbitration. It is conciliation in the sense that the chairman manages the negotiation and makes recommendations. It is arbitration in that, in the absence of settlement, the chairman makes a recommendation regarding the right of each party to continue to receive legal aid funding and it is mediation in that the chairman is a neutral third party attempting to facilitate settlement of the dispute.

9.78 In 1992/3, 849 conferences were held for family law disputes. Of these, 444 (or 65.4%) settled by way of a recommendation for legal aid to file consent orders, or a recommendation of "no aid" as the parties preferred no further legal action. From 1 July 1993 to 30 March 1994, there were 636 conferences, out of which 326 fully settled and 84 partly settled.

1010 "Family Court of Australia Mediation - Family Violence Policy and Guidelines" January 1993, at paragraph 2.25.

1011 *Ibid* at paragraph 11.39 and footnote 65.

1012 Annual report 1994 at page 3.

1013 This information was given by Donna Cooper, Conference Co-ordinator, during a visit to Brisbane in February 1995, and also in written notes prepared by Bernadette Rogers.

Legal aid conferencing procedures

9.79 Conferences are held after the receipt of a legal aid application and once means eligibility has been determined, but before the commencement of proceedings. Where resolution is not reached, a report on the legal merits is provided by the chairman of the conference to the Legal Aid Office to assist in the determination of future funding. The 1994 guidelines provided that aid might be suspended.

9.80 A conference can be heard at any time during the dispute. Until the conference is held, legal aid is temporarily suspended. The parties are invited to attend a conference before any other grant of legal aid is made and before proceedings are issued. A conference can also take place a few weeks before trial. Chairmen have "been trained in mediation techniques". They are solicitors, barristers or social scientists who have practised professionally for two years at least. The conference may be co-chaired by two chairmen from different professional backgrounds. "The combination of mediation techniques and professional expertise proves most helpful for clients who have difficulty in accepting the advice given to them by their solicitor".[1014]

Child abuse or domestic violence

9.81 In cases involving domestic violence, telephone conferencing is offered, or the parties are kept in separate rooms. In such cases, or cases involving child abuse or psychiatric illness, a member of the Department of Family Services and the Separate Representative for the child shall attend. The 1994 guidelines indicated that normally cases are excluded from conferencing if there are current proceedings dealing with allegations of child sexual abuse, or a domestic violence non-contact order is in existence, or where a power imbalance between the parties is apparent.

Involvement with solicitors

9.82 Clients generally attend conferences with their solicitors and this is encouraged as it ensures that "clients have support and appropriate advice when they make decisions".[1015] Involving solicitors also educates them on the process so that they can properly prepare their clients and promote the process to their clients. Rogers noted that it is the experience of all Legal Aid Commissions that it is often difficult to convince both parties to voluntarily enter the process. She stressed that preparation for the conferences and positive attitude by intake officers and solicitors were critical for the success of the programme.

Early Intervention Conferencing

9.83 Early Intervention Conferencing (EIC) was designed to assess the impact of requiring clients in custody and access disputes to attend a conference before being given

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1014 Rogers, *Legal Aid Office (Queensland) Conferencing Program,* 1993.

1015 *Idem.*

legal aid. The application for legal aid must have been for the commencement of a custody and access application and the conference took place at an earlier stage to the legal aid conferences referred to above. Williams noted that as the fiscal constraints on the Legal Aid Office grew, so too did the use of conferencing as a filter mechanism.[1016]

9.84 Between December 1990 and April 1992, the Queensland scheme was independently evaluated by Williams. The first stage of Williams' research involved an interview with the parties, their lawyers and the chairman immediately after the EIC. The second stage involved a survey of legal aid clients 6 to 12 months after the EIC. Williams found that clients considered the process "fair and understandable, yielding decisions in the best interests of the children."[1017] The solicitors and chairmen "overwhelmingly supported the applicability of conferencing for custody and access matters", that is EIC' s.

9.85 Williams found that clients preferred to conference rather than appear in court, so that, even though there was a mandatory requirement to attend a conference, "there was a strong element of voluntary participation making the activity mediation-like."[1018] The clients agreed that the conference had enhanced their understanding of the dispute, their legal rights and the other party' s position. However, a significant number reported that their relationship with their ex-partner after the conference had deteriorated. Williams commented that "a better understanding of the disputes and legal rights does not guarantee durability of a workable post-cohabitation relationship". Williams concluded that conferences are more likely to settle if the solicitors involved are supportive of the process.

Follow-up study

9.86 A follow-up survey found no significant decline in support for conferencing. It found that the durability of agreements was relatively high.[1019] Three-quarters of those interviewed indicated that their agreement was still in place, though there were some problems with custody and access. Of the custody agreements, 90% were working. About two thirds of respondents said that their access agreements were still working six to 12 months later. Williams commented that this appears to depend more on the relationship between the parties than the mechanism used to reach agreement.

9.87 Over two-thirds of the parties said they would recommend the conference process to others. The success of the process depended equally on professional input and the process itself. Williams commented:

> *"the quality of the conference process and the outcome it achieves are a function of the quantity and quality of the resources committed by*

1016 Williams, Discussion Paper, *Conferencing in Family Law; a Discussion of the Process and Evaluation at the LAO,* Brisbane, 1992.

1017 *Idem.*

1018 Williams, *ibid* at 5.

1019 This is because many of the parties had left the addresses so they could not be followed up.

the legal and social work professions, as much as the attributes of the clients themselves".[1020]

Williams found those professionals involved in the process overwhelmingly supportive of conferencing for custody and access matters.

Legal Aid Settlement Conferences

9.88 In November 1994, the Legal Aid Office announced the establishment of a scheme for Settlement Conferences. These would be similar to the existing Legal Aid Conferences, but intended for those cases which fell outside the current custody/access guidelines. Legal aid could be granted where the parties have not been separated in the preceding 6 weeks**;** where there is no "genuine" dispute about custody;[1021] where a previous agreement reached at a legal aid conference has not been adhered to;[1022] where aid is sought to vary custody orders less than two years old or to vary existing access orders; or where there is not strictly a "denial" of access.[1023]

Access mediation scheme

9.89 The Legal Aid office in Brisbane also operates a voluntary "Access Mediation" scheme run by in-house social workers.[1024] It targets those who are outside the guidelines for a Legal Aid or Settlement Conference. However, they must complete counselling first if they have already commenced it. The scheme is also for those who want to update access arrangements already reached in a Legal Aid Conference, Settlement Conference, or by a consent order, or where the wishes of children over the age of 12 are the major factors.

Conclusion

9.90 These are interesting developments in Australia. The combination of funding for community mediation programmes and for Family Court programmes shows some recognition by the Federal Government of the research results that mediating in the "shadow of the law" may not be as successful as early intervention prior to the issue of proceedings.

1020 At 8.

1021 Where it is considered that it would promote the interests of the children and where there is an access issue attached.

1022 This would be where there has been a substantial change in circumstances since the last conference.

1023 This is if attempting resolution will promote the children' s interests.

1024 Dispute Resolution Newsletter, Issue No. 1, November 1994.

New Zealand

Conciliation counselling

9.91 The New Zealand Family Court was established in 1981. Alternative dispute resolution processes have developed quite differently in New Zealand to those in Australia. The first level of dispute resolution is counselling at the court or privately. If this does not settle the matter, then a mediation conference is held, the aim of which "is to demonstrate to a couple that settlement of the dispute is their responsibility".[1025] If the mediation conference fails to bring resolution to the dispute, then the final step is adjudication.

9.92 Counselling is available on request by one of the spouses,[1026] or by "mandatory referral" after an application for a separation order.[1027] Discretionary counselling is available when the court considers, at any stage of the proceedings, that such counselling may promote reconciliation or conciliation.[1028] Section 10(4) of the Family Proceedings Act 1980 provides that a judge may direct referral to conciliation counselling in an application under the Guardianship Act 1968 relating to custody of a child.

9.93 However, counselling can be dispensed with if the Family Court judge gives a direction that violence has been used or threatened against a spouse or child, or if delay or other reasonable cause exists.[1029] The counselling takes place through marriage guidance or private counsellors, but outside the court premises.[1030]

Duty of lawyers

9.94 Referral to conciliation counselling may also come from legal advisers who have a statutory duty to encourage conciliation.[1031] The solicitor must certify, on setting down any family proceedings or custody matter, that he has carried out his responsibilities to ensure that the spouse:

> *"(a) is aware of the facilities that exist for promoting reconciliation and conciliation, and*

1025 Wilson, "Alternative Dispute Resolution", Auckland University Law Review, vol. 7 (2), 362, 363, (1993).

1026 Section 9 of the Family Proceedings Act 1980.

1027 Section 10. Section 19 places a duty on the court in all proceedings between a couple and proceedings concerning custody or access, to consider the possibility of reconciliation or conciliation, and to take such further steps as may assist in promoting reconciliation, or conciliation.

1028 Section 19.

1029 *Supra* at section 10 (3).

1030 Approximately 25-30% is provided by marriage guidance counsellors, 55% by private practitioners and the rest by community agencies. See Maxwell, *Family Court Counselling Services and the changing New Zealand family*. Family Court Counselling Research Report No.1 (1989), at 62.

1031 Section 8.

(b) take such further steps as in the opinion of the barrister or solicitor may assist in promoting reconciliation or, if reconciliation is not possible, conciliation".[1032]

Research on conciliation counselling

9.95 In 1987, 35% of requests for conciliation counselling came through a solicitor.[1033] Maxwell' s research found that positive outcomes were more likely when there had been joint sessions; when the referral was made under section 9; and when there were six or more sessions.[1034] Many disputes were settled at the conciliation counselling stage, which can "incorporate mediatory efforts as well as pure counselling".[1035] In a 1987 sample of cases, 77% of couples reached full or partial agreement in conciliation counselling. Between 1982 and 1988, requests for conciliation counselling increased from one third to one half of the counselling case load. "This increase in the voluntary use of conciliation has paralleled a decline in the volume of defended court hearings".[1036] However only 43% reached agreement after the court had referred the parties to conciliation counselling.

Counselling Co-ordinator

9.96 The Family Courts Act 1980 established the post of Counselling Co-ordinator, whose duty (set out in section 8) is to facilitate the proper functioning of the Family Court and of counselling and related services, such as mediation.[1037] Subsection (3) provides that the Co-ordinator is an officer of the court.

9.97 One of the Family Court Judges[1038] has stated that the Counselling Co-ordinator has played a pivotal role in the Family Court and has been critical to its success. Judge Cartwright noted that "in all parts of New Zealand where there is a counselling co-ordinator attached to the Family Court the level of judicial work in Court has dropped markedly". The Co-ordinator had humanised the "otherwise bureaucratic face of the Court". The lawyers had also taken advantage of the service by referring clients to the Co-ordinator for appropriate referral to a counsellor or other agency.[1039]

1032 Section 8(a) and (b) respectively of the Family Proceedings Act 1980.

1033 Chart, "Some New Zealand initiatives in Alternative Dispute Resolution". Commonwealth Law Ministers conference, Auckland (1990), 605.

1034 Section 9 of the Family Proceedings Act 1980 provides for counselling at the request of either party to the marriage. *Supra* at 85.

1035 Davidson, "Family Court Counselling and Mediation: the vexed question of standards and personnel in New Zealand" (1986), 1 FLB 73, 75.

1036 Maxwell, *supra* at 54.

1037 In some countries, like New Zealand and Ireland, the courts are subsumed under a Department of Justice. In Hong Kong the Courts are independent of the Department of Justice.

1038 Her Honour Cartwright, "The New Zealand Family Court in operation: legislation", Commonwealth Law Bulletin, January 1986, at 239-40.

1039 *Ibid* at 240.

Referral for counselling

9.98 There are 40 Co-ordinators based at 24 Family Courts who make referrals to 500 individuals or agencies throughout New Zealand. Counselling is provided by marriage guidance counsellors (between 25%-30%), private practitioners with social work or clinical psychology experience and training (55%) and a variety of community agencies.[1040]

9.99 The Co-ordinator can refer cases for counselling when it is apparent that there will be a contested dispute. Virtually all custody, access, guardianship and domestic violence applications are referred for counselling or mediation. Proceedings are held in abeyance, unless there are very urgent applications, until the counsellor advises the court that counselling cannot resolve the dispute.

9.100 A research report by the Policy and Research Division of the Department of Justice[1041] found that very few people refused to attend, though wives complained of a reluctance by men to attend. One Co-ordinator said that 90% of clients she had referred for counselling had attended.

9.101 One shortcoming of the existing law highlighted by the Co-ordinators is the fact that section 9 cannot be used for those whose marriage has been dissolved because referral must be "in respect of the marriage". Co-ordinators recommended that referral should also be available for disputes over custody and access which arise after divorce.

Case management and the Co-ordinator

9.102 The case manager's role is to ensure that the case progresses smoothly by supervision of the process at every stage. A practice note from the Principal Family Court Judge designated the Counsel for the Child (who is the child's separate representative) as the case manager in every proceedings. Notwithstanding this clear direction, in a research report on the Family Court Judges,[1042] four of the judges saw the Co-ordinator as having the role of case manager.[1043]

9.103 There is therefore considerable practical importance in the early appointment of Counsel for the Child to ensure effective management of the case. The research noted that Counsel for the Child is sometimes only appointed at a very late stage, after the appointment has been suggested by the family counsellor in the case. If the Co-

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1040 Information disclosed by Maxwell in *Family Court Counselling and the Changing New Zealand Family* (1989), Policy and Research Division of the Department of Justice.

1041 Harland, *Counselling Co-ordinator's Group Discussion*. Family Court Custody and Access Research Report (No 5: 1991)

1042 *A Survey of Family Court Judges,* Report No 6, October 1993.

1043 This confusion as to the role of the Co-ordinator extended to other areas. The research report found that many of the judges thought that the Co-ordinator played additional roles such as arranging or advising on specialist referrals and Counsel for the Child. Other roles thought to fall within the Co-ordinator's area of responsibility included emergency counselling and providing information to the public.

ordinators had more time to assess the case at an early stage, they could have made recommendations for the appointment of Counsel for the Child at the outset of the proceedings

Mediation and the Co-ordinator

9.104 It is important to note that the Co-ordinator also refers cases to mediation, though the legislation does not in fact mention this service. Chart' s report[1044] noted that the bulk of counselling work involved conciliation with a view to reaching settlement. Indeed, Maxwell found that 77% of couples reached full or partial agreement through these referrals.[1045] It is unfortunate that the terminology still uses only the terms "counselling" and "conciliation" rather than also including mediation.

9.105 The Boshier report[1046] called for a separate Family Conciliation Service in which mediation counselling would be available to assist the mediation process if necessary. The Counselling Co-ordinators would have a key role, being responsible for "early classification and referral of cases and public education". Extra clerical assistance would enable them to concentrate on client contact, case assessment and referral, liaison with professional groups and public education activities.

Mediation conference

9.106 Where the parties have been unable to resolve their problems with a court counsellor, spouses who have made an application for a separation or maintenance order,[1047] or an application for custody or access to a child,[1048] are able to request a mediation conference, or it may be requested by a Family Court judge.[1049] The registrar then sets a time and place for the conference, which takes place in a courtroom, special conferences room or the judges chambers. "While attendance is compulsory, the parties cannot be compelled to actively participate".[1050] Section 17 of the Family Proceedings Act 1980 gives power to direct attendance at mediation but it has rarely proved necessary to invoke this power.[1051] The parties' lawyers can attend with them if the clients so request.

9.107 The mediation conference is often preceded by the preparation of specialist reports. These reports are available to the Chairman (who is a Family Court Judge), the

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1044 Paper to the Commonwealth Law Ministers Conference "Some New Zealand Initiatives in Alternative Dispute Resolution", Auckland 1990.

1045 See *supra*.

1046 This is summarised in Boshier, "New Zealand Family Law Report", Family and Conciliation Courts Review, Vol. 33, No.2, April 1995, 182-193.

1047 Section 13(1)(a) of the 1980 Act.

1048 Section 13 (1)(b) of the Family Proceedings Act 1980.

1049 Chart, "Some New Zealand Initiatives in ADR", Paper to the 1990 Meeting of the Commonwealth Law Ministers.

1050 Section 13(2)(b) of the Family Proceedings Act 1980.

1051 Chart, *supra* at 606.

lawyers, and usually the parties. If this does not resolve the matter, a hearing date may be set. Even then, cases are sometimes resolved at a pre-trial conference.

9.108 Between 1982 and 1988, the number of counselling referrals increased from 37.5% to 78.6%, while the number of mediation conferences dropped from 26% to 14.8%.[1052] Section 14(2) of the Family Proceedings Act 1980 provides that the objectives of the mediation conference are the identification of the matters at issue between the parties and the resolution of those issues by agreement. The family court judge who chairs the conferences can make binding orders if agreement is reached. If there is no agreement, section 16 allows the same judge to adjudicate at the subsequent hearing of the case unless he withdraws or the parties request him to do so.

[1052] Maxwell, *supra* at 52.

Chapter 10

Comparative Dispute Resolution Process: Canada and the United States

Canada

Jurisdiction of Family Court

10.1 The Canadian Law Reform Commission recommended that the Family Court should become a Unified Family Court that would have jurisdiction over all civil matters affecting family such as child neglect, declarations, custody, guardianship, maintenance, property and divorce.[1053] The Ontario Law Reform Commission made similar recommendations but included criminal charges arising under the Criminal Code from family disputes. Unified Family Court pilot projects were established some years after the report. By 1995 several provinces had adopted a Unified Family Court model in which all matters relating to the family are heard by superior court judges.[1054]

Support services for families

10.2 In Manitoba, "Manitoba Family Conciliation" operated by the Family Services Department, has developed short term, goal-oriented workshops for children aged nine to 12 whose parents are divorced or separated.[1055] There are six sessions dealing with the internal and external reactions to divorce. The children are encouraged to share their experiences and give each other support. There is also a group for children aged 8 to 10 whose parents are involved in post-divorce conflict. This has 8 to 10 sessions and helps them develop coping strategies.

Manitoba Compulsory Access Assistance Program

10.3 Between 1989 to 1993, this programme operated to assist families with severe access compliance problems, by diverting them into counselling by the court services. It was a pilot project funded by the Ministry of Justice, Manitoba Family Services and the Federal Department of Justice. The families were dysfunctional and mediation had failed or was inappropriate. Its goals were:

1053 Law Reform Commission of Canada , *The Family Court*, (1974: Working Paper No.1), 7-9, and the Report of the same name (1976: No.6).

1054 Gall, *The Canadian Legal System*, (4th ed, 1995) at 190.

1055 Henning, "Children' s Workshops; A new concept in Direct Services for children of Separation and Divorce", (July 1987), reported in Alberta Law Reform Institute, *Court-Connected Family Mediation Programs in Canada,* Research Report (May 1994: No.20), 26.

1. To assist children to have a positive continuing relationship with the access parent,

2. provide a safe, non threatening environment for the access to occur,

3. reduce parental hostility,

4. assist the custodial parent to expect reliable and consistent access, and

5. assist the access parent to maintain or re-establish a long term relationship with the children.[1056]

10.4 Referrals came from judges, court staff, lawyers, parents and community agencies. The services were provided by an interdisciplinary team of a lawyer, counsellor and consultant psychologist. The lawyer would initiate contempt charges against parties who failed to participate. There was supervised access by volunteers. Cases of child abuse were screened out.

10.5 After an intake interview, where certain criteria had to be met[1057] a pre-service meeting took place. The parties, their lawyers, the programme lawyer and the counsellor attended. Assessment then took place with interviews of the family, and contact was established with agencies that had already dealt with them. The team then met to decide whether access would be recommended and, if so, a plan was developed. This could be in the form of therapy or counselling of the child, an individual parent, or the parents together, or supervised access. If the parents did not agree with the plan then there was a final settlement meeting with the parents and their lawyers. If no settlement was reached then the programme lawyers could begin contempt proceedings. There was a separate children' s programme to assist children in learning how to deal with the conflict and to rebuild self esteem.

10.6 These cases were from families where there was a high level of conflict. It is arguable that these families need considerable direction and control from the court to minimise and set limits for unacceptable behaviour.

Mediation in Canada

10.7 The growth in mediation needs to be seen in the context of family law reform in recent years in which the substantive law has changed away from a fault focused system to one recognising the reality of marriage breakdown without fault allocation.[1058] This has led to less emphasis on an adversarial system. Procedurally it has led to more emphasis on

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1056 *Access Assistance Program: Evaluation Report*, (1993), at 7, reported in Alberta Research Report (1994: No.20) at 27.

1057 For example, a court order with specific details of access was required - an order of reasonable access was not enough.

1058 Landau, Bartoletti, & Mesbur, *Family Mediation Handbook* (1987), 2.

negotiation and pre-trial conferences to assist early resolution of disputes. Research that has identified damage to children arising from the conflict between parents has also encouraged the movement away from litigation.

10.8 Landau *et al* reported an estimate that there are 1.5 million children in the United States and 150,000 in Canada affected by separation each year.[1059] In Canada, "mediation can be arranged or ordered by consent in most provinces, but only in Winnipeg and Edmonton can couples be ordered to attend at least one meeting with a mediator".[1060]

Ontario

10.9 The Ontario Children Law Reform Act 1990 gave power to the court to order mediation with respect to custody and access disputes.[1061] Section 31 of the Children Law Reform Act 1990 provides: "upon an application for custody of or access to a child, the court, at the request of the parties, by order may appoint a person selected by the parties to mediate any matter specified in the order". The mediator must consent to the appointment and to filing a report to the court within a specified time. The children can also be seen by a mediator.[1062] Section 3 of the Ontario Revised Family Law Act 1986 makes similar provision for child support, custody, access, and property.

Open and closed mediation

10.10 The parties have a choice whether they prefer open or closed mediation. In open mediation, discussions are not confidential and a mediator can be summonsed to give evidence. The terms of the mediation agreement are disclosed to the court. For those issues that are not resolved the mediator can report on the process and the obstacles to the agreement. Recommendations about the resolution of these issues can also be included.[1063] The parties are entitled to a copy of the report.

10.11 If the mediation was closed, then anything said in the sessions cannot be given in evidence except with the consent of all parties. The terms of the agreement can be disclosed but not the mediation process nor any recommendations made. If issues were not resolved that fact is simply stated without going into why there was no resolution. The court has power to make orders for the payment of the mediator' s expenses.

1059 Paragraphs 10.8-38 were substantially taken from an unpublished dissertation by Paula Scully, *Obstacles to Referral, Planning and Implementation of Family Mediation as a Dispute Resolution Process in Hong Kong; Reflections based on Foreign Systems,* April 1996.

1060 *Ibid* at 3.

1061 R.S.O. 1990, c 12, s 31.

1062 Landau *et al, supra* at 27.

1063 *Ibid* at 168.

Hamilton project

10.12 The Hamilton project was established to implement recommendations contained in a report of the *Attorney General's Advisory Committee on Mediation in Family Law*.[1064] The Attorney General established a Court Reform Task Force to organize the project. Comprehensive family mediation was offered. The mediators who were social workers were assisted by lawyers. The mediators received training in property and financial matters and learned how to identify legal issues that needed the advice of independent lawyers. Local lawyers offered voluntary assistance. If financial issues were to be mediated, couples had to obtain independent legal advice. The intake procedure screened for domestic abuse.

Reform proposals

10.13 The Ontario Civil Justice Review conducted by the Chief Justice of the Ontario Court of Justice and the Ministry of the Attorney General, advocated videos on family law and procedure.[1065] "Viewing of this video would become a mandatory pre-condition for entering the family law court process, with the exception of emergency applications".[1066] This would encourage early intervention which may lead the parties in the right direction to try and resolve matters in dispute.

10.14 The Review also recommended that in the original Notice of Application to be filed to initiate proceedings, an applicant would have to state what previous efforts to use alternative dispute resolution had been attempted, and if not, to state why they were not appropriate. A "resolution focused process" for family law would be assisted by settlement conferences and trial management conferences which had in fact been piloted in some courts.

10.15 The Final Report[1067] recommended a mandatory case conference before interim relief is sought, subject to the exception of emergency applications. Individual timetables would be established for each case. Outstanding issues would be identified and memoranda of agreements completed, future events in the court process would be scheduled and referral to ADR considered. The revised court process stresses the importance of mediation by its initial screening and diversion mechanisms during the course of proceedings. The report noted the expansion of a unified Family Court to five areas of the province. The video referred to earlier would be accompanied by oral presentations by legal and mental health professionals.[1068] The Final Report concluded by recommending a separate Family Justice Review because of the complexity of family law.

1064 February 1989. See Alberta Research Paper no.20, *infra* at 30.

1065 *Civil Justice Review First Report*, (1995).

1066 *Ibid* at 276.

1067 *Civil Justice Review Final Report*, November 1996.

1068 As part of the goal of disseminating more information on family law, Ottawa has launched its first Family Law Information Centre with one- stop access to information on a broad range of family law topics. See Internet site, http://www.newswire.ca/government/ontario/english/releases/March1998.

Alberta

10.16 The pattern of mediation services growing out of counselling services attached to the court is also mirrored in the Family Conciliation services (FCS) of Edmonton, Alberta.[1069] Initially the FCS had two stages, the first was crisis intervention which explored the possibility of reconciliation and the second was mediation once the parties had decided to go for divorce. The majority of cases were reported to be at the second stage. A pilot custody mediation project was begun in 1985. As the mediation services have increased, counselling services have decreased to 5% of the services offered.[1070] Since 1991 there has been a custody mediation service throughout the province of Alberta.

Custody Mediation Project

10.17 The custody mediation project deals with cases where custody or access is in issue in the Court of Queen' s Bench or Surrogate Court. The objectives are to:

> *"determine whether closed mediation can achieve a reasonable rate of settlement relatively promptly ... and where an open assessment is necessary, to provide expert opinion to the court on issues of custody and access".* [1071]

Assessment

10.18 If closed confidential mediation does not resolve the dispute, the mediator recommends an "open assessment". The assessor takes over from the mediator and interviews the parties, the children and any other relevant persons. All relevant social, educational, medical, psychological and psychiatric information is included in the report. The assessor is a psychologist or a social worker with a minimum of a Masters in social work (MSW). Communication is not confidential and can be used by the assessor to prepare a custody assessment report. This is admissible in evidence. The assessor can make a recommendation on custody or access. If the parties accept this recommendation then the case settles but if not then it goes for hearing. The parties have to pay for the assessment unless they receive a subsidy from Legal Aid.

10.19 The court counsellors also employ mediation, counselling and negotiation skills to assist families in resolving disputes over children.[1072] The orientation seminar is optional and besides explaining the custody mediation programme, it provides material on

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1069 Alberta Law Reform Institute, *Dispute Resolution: A Directory of Methods, Projects and Resources*, Research Paper (July 1990: No.19), 48.

1070 Research Paper (1994: No.20), at 21.

1071 Family Conciliation Services, *Further Amended Description of the Edmonton Custody Mediation Project*.

1072 Alberta Law Reform Institute, *Court-Connected Family Mediation Programs in Canada*, Research Paper (May 1994: No.20).

the needs of children, their reaction to divorce and options for parenting. In that sense it is a combination of an information session and a parent education programme.

10.20 The Edmonton Judicial District now operates "Parenting After Separation" seminars sponsored by the Alberta Court of Queen's Bench, the Department of Justice, and the Department of Family and Social Services pursuant to a Practice Note issued by the Chief Justice of that court. Lawyers assist the programme co-ordinators.[1073]

Montreal

10.21 The Montreal family mediation service (MFMS) is a free service offering comprehensive mediation.[1074] Custody and access mediation were not offered on their own by the service as it was anticipated that financial issues were impossible to isolate from custody and access issues. Richardson's study of mediation services in several cities, on behalf of the Department of Justice, found that women and children fared better with a mediated settlement, especially in Montreal with its comprehensive mediation programme which resolved all the issues.[1075] It was also the most effective service as it was separate from other support services and did not have to compete with other services like the provision of custody assessments or reports. It was also the most structured.

10.22 The service employs mediators and a lawyer whose role is a legal consultant to the mediators and clients. He reviews the draft memorandum of agreement drawn up by the mediators. He also advises the parties to obtain separate independent legal advice. The memorandum of agreement has no legal effect and is sent to the parties' lawyers for ratification prior to the court approving it.[1076] The service have a code of professional conduct which is regarded as "essential for family mediation to be accepted by the legal community".[1077]

Court and mediation

10.23 In Quebec the amended Code of Civil Procedure, 1993, allows the court to adjourn a contested family matter and refer the parties to mediation where the parties consent. Before making the order, the court is required to:

> *"take into account the particular circumstances of the case, and in particular the fact that the parties have already met a certified mediator, the balance of power in place, the interests of the parties and of their children".*[1078]

1073 Internet site-http://www.courts.gov.bc.ca/SC/Annual 97/FAMILY.

1074 Alberta Paper (1994) at 33.

1075 *Court-based Divorce Mediation in Four Canadian Cities: An overview of Research Results* (1988).

1076 Research Paper (July 1990: No.19), 55.

1077 *Idem.*

1078 Article 815.2.1. Research Paper No 20, *supra* at 32.

Manitoba

10.24 In Manitoba, the court can make a referral to a conciliation officer or any other person with the parties' consent.[1079] Family Conciliation Service is operated by the Family Services Department in co-operation with the court. Legal aid and social services agencies can also make referrals. In practice, Landau *et al* noted that the Unified Family Court in Winnipeg requires one mandatory mediation session before the parties are permitted to litigate custody and access.[1080] Section 52(4)[1081] provides that a conciliation officer shall attempt to resolve the issues, with a judge's assistance, if required. If a settlement cannot be reached the officer reports this fact to the court. A judge can order conciliation workers to prepare home assessment to help determine the best interest of children. However if the family has already been in mediation, a different worker prepares the assessment. If there is closed mediation, then the officer shall not be required to produce any written statement to the court.

British Columbia

10.25 The Family Relations Act of British Columbia permits the court to appoint a family court counsellor to assist in resolving the dispute.[1082] These counsellors offer mediation, counselling and dispute resolution which is not limited to custody issues.[1083] The counsellor is empowered to offer any advice or guidance that will assist in resolving the dispute. If the counsellor receives information in confidence from a party or child then he cannot be compelled to disclose it to the court. A report cannot be prepared for the court without the parties' consent.

10.26 The Attorney General's Department is proposing a Dispute Resolution Office which is to expand the use of ADR in the courts and in particular to introduce community based, client focused alternatives to court for custody and access disputes.[1084] Parent education, mediation and family conferences are to be provided with the ultimate objective of establishing a network of Family Justice Centres which are to be expanded throughout the province. In fact, in some areas pilot projects have already operated with judges assisting with parent education programmes.[1085] Counsellors, lawyers and judges refer parties to the programmes.

1079 Alberta Research Paper (1994) at 24.

1080 Queen's Bench Act, RSM 1970, c 280.

1081 Re-enacted 1982-83-84, c 81, s 4.

1082 Alberta Research Paper (1994) at 21.

1083 RSBC 1979, c 121, s 3.

1084 Speech by the Attorney General, "Strategic Reforms of British Columbia's Justice System" June 1997.

1085 Internet site, http://www.courts.gov.ca/SC/Annual1997/FAMILY.

Saskatchewan

10.27 Saskatchewan court services currently provides parent education programmes, supervised access and custody investigations and assessments.[1086] In 1995 Saskatchewan passed legislation requiring both parties to attend a mandatory mediation orientation and screening session.[1087] The session is held individually with each party by staff from the Family Law Division of the Department of Justice. The client is also told about the parent education programme. After each client has attended the session a certificate of completion is filed in the court. The parties may choose to go to mediation or proceed with the court process. If they do not attend the session, the judge may adjourn and order attendance or they may opt to attend voluntarily. The registrar cannot schedule a pre-trial conference until the certificate of completion is filed.

10.28 If only one attends the session that person can request a certificate of non-attendance of the other party from the mediator. The other party may then be ordered to attend by the court or their pleadings can be struck out. They are encouraged to maintain contact with their lawyers to ensure that mediation agreements are in compliance with the law. The research showed that the vast majority of those attending the screening session found them informative and helpful.[1088]

10.29 The Department of Justice of Saskatchewan established a Mediation Services Branch in 1988.[1089] By 1993 it had employed 24 mediators and covered family law, business and family partnerships, and estate issues. In 1990, the Children' s Law Act provided that, at the request of either the applicant or the respondent, the court may appoint a mediator to resolve contested access and custody issues.[1090] The mediator must consent to act. Lawyers have an obligation to inform their clients of mediation facilities. The mediation programme can take referrals from the medical profession, the public and other government agencies.[1091] The mediator ensures that the lawyers for each party agree to the referral to mediation, and he informs them of progress during the mediation and copies correspondence sent to the clients. Fees are payable and some financial support is given through Legal Aid.

Duties of lawyers to give information

10.30 Section 9(2) of the Federal Divorce Act 1985 requires lawyers who act in divorce proceedings to inform their clients "of mediation facilities known to him or her that

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1086 Saskatchewan Justice, Policy, Planning and Evaluation Branch, *Promoting Resiliency in Children and Families - a Summary Paper on the Effects of Separation and Divorce*, (1998).

1087 Gupta, "The Mediation Screening and Orientation Program - the Saskatchewan Experience", Family Mediation, vol.6, no. 1, 1996.

1088 *Idem.*

1089 Alberta Research Paper (1994) at 21.

1090 Children Law Act, SS , c C-8.1, section 10.

1091 Alberta Research Paper, (1994: No.20) *supra* at 22.

might be able to assist the spouses in negotiating [the matters that may be the subject of a support order or a custody order]".

Information on services

10.31 In 1987 the Department of Justice prepared a publication[1092] which was to assist family lawyers to advise their clients of mediation, reconciliation and divorce services. This was to comply with the obligation on lawyers to furnish this advice to their clients.[1093] Across Canada, 53.2% of mediation and reconciliation services were reported to be private practice, 2.5% were through the Family Court, 11.8% were government services, 17.2% were law offices, 8.5% were non-profit community services, 4.9% were other services, and 1% were other court based services.

Canadian pre-trial conferences

10.32 The mechanism of pre-trial conferences can be geared to settlement or preparation for trial. In the latter case, it will be focused on identifying and discussing the issues in dispute. In Alberta, the focus is on trial preparation. The court, on application of a party or on its own motion, can direct that a conference consider "any other matters that may aid in the disposition of the action, cause or matter".[1094] The trial judge can conduct the conference.

10.33 In Ontario the court has power to consider "the possibility of settlement of any or all of the issues in the proceedings".[1095] The trial judge does not conduct the conference. Research showed that the rate of settlement increased by 10% and the overall productivity of the court was increased by 15%.[1096] The disadvantage of the procedures is that a lot depends on the skill of the judge to handle it appropriately and not exert pressure to settle. Indeed such conferences may delay or discourage private attempt at settlement:[1097]

> *"Pre-trial proceedings, which often occur before the parties are fully committed to resolution of their conflict in the courtroom, offer the best opportunity for blunting the edge of the adversarial nature of legal proceedings without abandoning what is of value in the existing system."*[1098]

1092 *An Inventory of Divorce Mediation and Reconciliation Services in Canada*, (1987).

1093 Section 9(2) of the Federal Divorce Act 1985.

1094 Rule 219(1)(d). In Alberta Law Reform Institute; *Dispute Resolution; A Directory of Methods, Projects and Resources*, Research Paper (July 1990: No.19,) at 29.

1095 Rule 50.0(a).

1096 Holland, "Pre-trial conferences in Canada", (1987), 7 Adv. Q. 416, 417.

1097 Alberta Research Paper no. 19 at 30, *supra*.

1098 Saskatchewan Law Reform Commission, *Proposals on Custody, Parental Guardianship and the civil rights of minors* (December 1981), at 16.

10.34 The Saskatchewan Law Reform Commission suggested that a provision be inserted in custody legislation for pre-trial conferences as follows:[1099]

> *"(A) Upon first appearance before the court in an application for custody, or at any time prior to the hearing of the application, the court may direct a pre-trial conference before the judge or other person designated by the court, for the purpose of:*
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> *(i) resolution or narrowing of issues;*
> *(ii) disclosure of the nature of the evidence which will be presented at the hearing;*
> *(iii) encouragement of settlement or conciliation; and*
> *(iv) settling procedures to be adopted in the proceedings including appointment of amicus curiae, and directions of a custody investigation.*
>
> *(B) (1) Upon consent of the parties, the pre-trial conference may be arranged by the registrar without an order of the court directing the conference.*
> *(2) The pre-trial conference shall be conducted informally, in such manner as the judge or other person presiding at the conference may direct.*
> *(3) The judge or other person who presides at a pre-trial conference shall prepare a memorandum of the matters agreed upon by the parties at the conference, and shall present the memorandum of such parties for their approval and shall file the memorandum.*
> *(4) No evidence disclosed at the pre-trial conferences shall be admissible as an admission made at the conference, or as part of a transcript or record of the conference without the consent of the parties".*

Evaluation of Canadian mediation schemes

10.35 Richardson's independent study for the Department of Justice found that the satisfaction rates for those who had mediated were 80-90%.[1100] Among those who did not attend mediation, 80% of men and 88% of women were satisfied with their lawyers' services. A full or partial settlement was reached in 64% of the mediated cases. The court records showed 49% of mediated cases reached complete settlement and another 15% reached partial settlement. Women achieved higher child support payments through mediation than litigation. However, the legal costs were higher overall for those who participated in mediation than for those who did not. Overall, joint custody agreements

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1099 *Ibid* at 17.

1100 *Court-based Divorce Mediation in Four Canadian Cities, An Overview of Research Results* (1988).

were four time more likely for mediated cases than for non-mediated cases. Respondents said that they believed joint custody was in the children' s best interests. 89% of men and 75% of women said they would choose joint custody again.[1101]

10.36 As regards post divorce impact there was little difference in the hostility between the mediation group and the litigation group. The study emphasised that there were time savings and clients had positive experiences in using mediation. Contested cases 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.

10.37 Despite the fact that lawyers supported mediation, the research of court files and interviews with mediators found that the actual referral rate from lawyers was 12%. While 85% of lawyers said they advised their clients of mediation, only 10.4% actually encouraged attempts at mediation. Less than 1% believed that property issues should be mediated and 14% would limit mediation to custody and access issues. However, it is likely that if this research study was duplicated now it would show different results as the Richardson study was in 1988.

10.38 The Irving and Benjamin study of 1977-1979[1102] found that lawyers believed that the conciliation service played a positive role in the legal process and the majority recommended continuation of the conciliation programme. They took this view as mediation "helped to clarify and narrow the issues, facilitate dispute resolution, avoid unnecessary litigation and reduce the emotional turmoil experienced by clients".[1103]

United States

Parent education programmes

10.39 In the 1980' s, voluntary and court ordered parent education programmes started to grow in the United States.[1104] Increasingly judges have supported these programmes and the legal community has also become more supportive by making referrals. Attendance by parents has grown to the extent that there are now 560 programmes in 40 states.[1105] In 1995 draft legislation was being considered in Texas, Colorado, South Carolina, Washington and Arizona.[1106] There are various goals of the programmes:

1101 However, the summary of the study provided in the Alberta Research Paper no. 20 does not give a definition of what is meant by joint custody.

1102 Irving, (ed) *Family Law; an Interdisciplinary Perspective*, (1981).

1103 Alberta Research Paper no. 20 *supra* at 48.

1104 Salem *et al*, "Parent Education as a distinct field of practice - the agenda for the future", Family and Conciliation Courts Review, Vol. 34, No.1, January 1996, 9.

1105 Braver *et al*, "The content of Divorce Education Programs". Family and Conciliation Courts Review, vol 34, No.1, January 1996, 41.

1106 Draft legislation in Arizona was not passed in the legislature though it was in Connecticut. See Bondi, "Legal Implementation of Parent Education Programs for Divorcing and Separating Parents", Family and Conciliation Courts Review, vol. 34, No.1, January 1996, at 86.

(1) Parent focused goals, for example, teaching parenting skills at the time of divorce,

(2) child focused goals, for example, increased awareness of the impact of divorce on children, and

(3) court focused goals, for example, to help resolve custody and access issues.

10.40 The fact that the research literature has shown the negative impact of conflict in divorce on children has favoured the growth of parent education programmes. The programmes emphasise the psychological process of divorce. All the programmes deal with post-divorce reaction of parents and children, children' s needs at different ages and the benefit of co-operative parents after divorce. However, the majority of children do not receive counselling in the programmes.

10.41 Only a few give legal information. Up to 55% of programmes have developed special programmes for victims of domestic abuse.[1107] When the programmes address emotional issues they are presented by mental health professionals. Other presenters include lawyers, mediators and community volunteers. There are certain standard packages that include videos, pamphlets and other simple literature that assist professionals in teaching the programmes. About 70% charge a fixed fee.[1108]

Mandatory attendance

Arguments in favour

10.42 Salem *et al* suggested courts should support parent education programmes as they recognised that the adversarial system can add further hostility to the divorce process between the parents. Such programmes also symbolise that the courts have a responsibility to help families beyond a narrow legal framework. Salem recommended mandatory attendance as the parents who most need it will not attend voluntarily. This will show parents that the court takes the welfare of the child seriously. It ensures that both parents get the information and it avoids lawyers having to advise clients whether to attend for not.

Research in favour of mandatory attendance

10.43 In Utah where it is not possible to obtain a divorce without attending such a programme, a research survey noted that 56% of parents reported feeling resentful at having to attend.[1109] However 93% of parents, having attended the programme, thought the

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1107 Braver *et al*' s survey at 15.

1108 Braver *et al* at 45.

1109 Utah made parent education programmes compulsory in 1994. Loveridge 1995, reported in Blaisure and Geasler, "Results of a survey of court-connected parent education programs in

programme was worthwhile and 89% thought it should be mandatory.[1110] 92% agreed that it had increased their understanding of the importance of being co-operative with each other and 90% stated that it would strengthen their efforts to work with the other parent.

10.44 Blaisure and Geasler recommended that, if a programme is mandatory, the court should provide a fee waiver and attendance waiver for parents with extenuating circumstances.[1111] The mandatory programme in their research had an average of 110 parents per month compared to 20 parents per month for voluntary programmes. They concluded that it may be easier to gain support for programmes that focused on children's needs rather than designed for parents who are in dispute.[1112]

10.45 Di Bias[1113] encouraged lawyers to become knowledgeable about parent education programmes and encourage parents and children to attend. She argued that the court already compel parents to participate in custody evaluation, and to attend therapy and counselling. Parents' rights must be considered:

> *"in conjunction with the best interests of the child .... Is it not better to educate parents so that they may make family decisions themselves without the need for intervention from the court?"*

10.46 Blaisure and Geasler's research found that more than three quarters of mandatory programmes are held in one session while 43% of voluntary programmes had three or more sessions. The mandatory sessions tended to use video tapes.[1114] Arbuthnot and Gordon found, from follow-up after a parent education programme, that the parents valued it as they learned useful parenting and communication skills. They recommended that the parents need to be actively engaged in the learning of new skills rather than just passive recipients of a video programme. They concluded that there were:

> *"encouraging findings that the programs result in lowered exposure of children to parental conflict and greater tolerance for the parenting role of the other parent, with attendant positive change in children well-being".*[1115]

Arguments against mandatory attendance

US counties," Family and Conciliation Courts Review, vol 34, No.1, January 1996, 23 at 35. Referred to at 18 of Salem's article *supra*.

1110 *Idem.*

1111 *Ibid* at 37.

1112 *Ibid* at 52.

1113 "Some Programs for children", Family and Conciliation Courts Review, vol 34, No.1, January 1996, 112, at 124-5.

1114 Blaisure and Geasler, *supra* at 55.

1115 Arbuthnot and Gordon, "Does Mandatory Divorce Education for Parents Work? - a six month outcome evaluation," Family and Conciliation Courts Review, vol 34, No.1, January 1996, 60, 79.

10.47 If attendance is mandatory the question arises as to what action is taken by the court for non-compliance. Extra resources to fund the programme has to be provided. If parents are consenting to child arrangements, it seems a waste of resources to force attendance. Some programmes only mandate attendance if there is a dispute over custody or access. Formal mandates exist in at least 396 jurisdictions in 35 states.[1116]

Compromise

10.48 One compromise is for judges to recommend particular parents to attend. Then participation is not mandatory but parents will take a recommendation seriously.[1117] The problem with this is that it is better if parents can attend as early at possible and it may be some time before a judge sees the couple.

United States parenting plans

10.49 Parenting plans have been promoted by the Florida Shared Responsibility Act 1982, and particularly developed by the Parenting Act 1987 in Washington State. The Washington State legislation will be focused on in this part. This changed the language of custody" to "residential care and decision making on parental responsibilities". Limits were provided on shared parenting and on future dispute resolution options where there was evidence of neglect, wilful abandonment, abuse (physical, sexual, or a pattern of emotional abuse) or domestic violence.[1118]

Compulsory parenting plans

10.50 Washington State legislation makes it compulsory for a parenting plan to be filed, either individually or jointly, 30 days before trial or within 180 days from the filing of the divorce, whichever first occurs. A standard parenting plan form must be completed, which deals with parental responsibility for the school year, holidays, birthdays and other major events. Decision making in the areas of education, religion and medical decisions must be outlined. In addition, parents must indicate which choice of dispute resolution they wish to opt for if there are future conflicts. This includes court, mediation and counselling. They can name the specific agency or person who will assist them to resolve the disputes.

10.51 A research study found that mediation was the option for 56% of parents, the court process for 16%, and counselling for 7%. 29% of parents named a specific agency or person.[1119] Over 50% of parents went beyond the minimum information required. Usually decision making on child care issues was added. Parents opted for shared decision making in 56% of plans, solely to the mother in 35% of plans, and solely to the father in

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1116 Blaisure and Geasler, *supra*.

1117 Schepard & Schlissel (1995) in New York state, Salem *supra* at 19.

1118 Tompkins, "Parenting Plans-a concept whose time has come", Family and Conciliation Courts Review, vol.33, no. 3, (1995), 286, 293.

1119 Tompkins refers at 294 to a research study by Ellis reported in the Michigan Journal of Law Reform, vol. 24-1 of 1990, (no title supplied).

9% of the plans. Primary residence with the mother dropped from 79% to 70% after the law went into effect. For fathers, it dropped from 18% to 10%. Shared residency on "a somewhat equal basis" increased from 3% to 20%.

10.52 The family lawyers were asked in the research study whether levels of parental conflict had changed since the adoption of parenting plans. 60% felt there was improvement and it helped parents focus on the needs of the children. 40% said there was no change.

Parenting plans as a mediatory process

10.53 Parenting plans can be seen as a mediatory process, as they are more likely to have been reached in mediation or by the joint agreement of the parties, but cannot be imposed by the court. There has been a shift into parenting plans as they have the advantage of being detailed and specifically tailored to the needs of a particular family.

10.54 Benjamin and Irving suggested a standardised evaluation process to ensure that parenting plans are fair and reasonable. If parents initially disagree on the formulation of a parenting plan, the system needs to really check that the parents cannot agree, as an initial refusal to consider settlement may at a later stage turn into a receptivity towards settlement. Mediation should be offered. If this did not resolve the dispute an assessment would explore the involvement of both parents in child care and generally identify the family's positive and negative features. Then an interim parenting plan should be tried for 12 months. It would then be finalised after appropriate adjustment.[1120]

Children's interests in mediation

10.55 Folberg referred[1121] to Isaac's research[1122] in Los Angeles county where 54.5% of mandatory mediations resulted in written agreements incorporated in court decrees. In contrast, a judge in San Francisco reported that over 90% reached such agreements.[1123] Folberg explained this by saying that in San Francisco the mediator makes a custody recommendation to the judge if the parties do not reach agreement. Folberg argued that a fair and just result has particular applicability to custody disputes, because mediated bargaining occurs between parents, and children are not represented and are rarely present.[1124] This is particularly important if the mediation is compulsory.

10.56 The New York State Law Reform Commission had recommended that contested custody cases would be referred to mediation, unless the judge determined that

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1120 *Family Mediation: Contemporary Issues*, (1995) at 457-8.

1121 "Mediation of child custody disputes," Columbia J of Law and Social Problems vol. 19; 413, 423. (1985).

1122 "The Family Conciliation Court in LA county," in *Alternative Means of Family Dispute Resolution* 131 (American Bar Association 1982).

1123 Judge King reported that of the first 1300 cases he mandated, less than one per cent returned to the courtroom unresolved.

1124 Folberg and Milne, *supra* at 432.

there was no reasonable possibility that mediation will promote settlement, or serve the best interests of the child.[1125] The analysis to date had failed to show that mediation had measurable effects on child adjustment, but those who mediated were more likely to select joint custody arrangements following divorce.[1126]

1125 *Ibid* at 433. The Commission recommendations are contained in the same article - recommendation no. 242 (b)(3).

1126 The Pearson & Thoennes studies. See summary in *Court - Connected Family Mediation Programs in Canada*, Research Paper (May 1994: No.20), Alberta Law Reform Institute, at 51.

Chapter 11

Comparative Dispute Resolution Process: Mainland China, Japan and Singapore

Mainland China

Substantive provisions

11.1 There are three areas of family law in Mainland China - (1) the Marriage Law of 1980 covering divorce, property division, child support and custody, (2) adoption and (3) succession.[1127] Since 1985 the National Legislators have paid more attention to the protection of women and children.[1128] There was a Juvenile Protection Law of 1991, and a Protection of Women Law in 1992.

11.2 Article 29 of the Marriage Law of Mainland China 1980 provides that children of a marriage remain the joint responsibility of the parents who "have the right and duty to bring up and educate their children". Both remain responsible for the child's living and educational expenses. In principle, children who are being breast-fed by the mother should go to her custody. However, when the child has been weaned, the People's Court will determine a dispute "in accordance with the rights and interests of the child and the actual conditions of both parents.".

Supreme Court guidelines

11.3 In 1993 the Supreme Court issued binding guidelines on how to apply the Marriage Law 1980. Generally children under two years shall go to the mother's custody unless the father and mother agreed otherwise and the healthy growth of the child is not adversely affected (for example, financial or health difficulty of the mother or she commit a crime or an abuse). If the child is over two years old then both parents are entitled to custody. The court shall employ a balancing test in which priority is given to the parent who is better able to take care of the child. The court will look at who has looked after the child before divorce, and who is better financially to bring up child. The child's relationship with one parent may be taken into account sometimes. The opinion of a minor above the age of 10 years will be taken into account. If the situation changes the parties can ask the court to make a new decision. The needs and interests of the children, the financial capacities and parent's agreement will be key factors.

1127 Notes taken at a Family Law Association Lecture on "Family Law in China" by Zhang Xian Chu, Lecturer at the Department of Law, City University of Hong Kong, former judge from Mainland China.

1128 The material on Mainland China and Japan was substantially taken from an unpublished dissertation by Paula Scully, *Obstacles to Referral, Planning and Implementation of Family Mediation as a Dispute Resolution Process in Hong Kong; Reflections based on Foreign Systems,* April 1996.

Statistics

11.4 Fifty per cent of all cases at all levels of the People's Court relate to family law matters. There has been a yearly increase of 8.75% in family cases since 1978. In 1995 the number of cases in all peoples courts was 1.2 million cases. In 1987 there were 608,000.

Divorce

11.5 There are no statistics on how many cases settle or are contested. There are several ways to divorce. The parties can agree not to go to court and then they attend the civil office to cancel the marriage registration.[1129] The court does not have records of how many case are divorced by this method.

People's Mediation Committee

11.6 Before going to court the parties can attend the people's mediation committee in their neighbourhood for voluntary mediation.[1130] If they cannot successfully mediate with the committee then they will go to the court at first level. Although it is not a mandatory requirement to go to extra-judicial mediation prior to a court hearing for divorce, in practice, Palmer reported that it seemed very difficult for unhappy spouses to escape the pre-trial attentions of the local mediation committee.[1131] Article 16 of the Law of Civil Procedure does provide that conciliation will be voluntary. Those who decline conciliation or those for whom conciliation has failed or those who have backed out of a settlement agreement may institute proceedings in a people's court.

11.7 Under article 25 of the Marriage Law 1980 parties can go for mediation to other relevant organisations such as their work units, the Marriage Registry or other peoples' agencies. People's mediation committees are important mechanism of social control and dispute resolution in the rural and city areas. By 1985 there were over 939,000 people mediation committees and more than 4.5 million mediators.[1132] They operate under the guidance of the basic level people's court and the government.[1133] The mediation committee supplement the work of the more formal courts where there is a shortage of trained lawyers.

11.8 The second method to obtain a divorce is to go to the court at first level. To commence a divorce the applicant must file a document in the court when there is no agreement produced by mediation with the people's mediation committee. The court will serve the document on the other party. This takes about two weeks. Before 1991 it could

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1129 Article 25 of the Marriage Law.

1130 *Ibid*, Article 25 and Article 16 of the Law of Civil Procedure 1991.

1131 Palmer, "Mediation in the People's Republic of China; some general observations" (1988) in Mackie (ed), *A handbook of dispute resolution,* (1991), 221.

1132 Palmer, *Ibid* at 223.

1133 Article 16 of the Law on Civil Procedure 1991.

be for an indefinite period as the parties had to mediate. Article 25 of the Marriage Law 1980 provides that "if one party alone desires a divorce, the organisation concerned may carry out mediation or the party may appeal directly to a people's court to start divorce proceedings".[1134]

Judicial mediation/conciliation

11.9 Where the parties cannot reach agreement, mediation conducted by the judge will take place before a hearing and the parties will be encouraged to reach agreement. Article 9 of the Law of Civil Procedure 1991 provides that the people's court shall conduct conciliation for the parties on a voluntary and lawful basis.

11.10 If they cannot reach agreement through mediation then a contested hearing will ensue. The Supreme People's Court have issued judicial interpretations called "Several Opinions on the Applicability of the Law of Civil Procedure" which provide directions to the people's court that it should render judgement without delay if the parties insist on not having conciliation. If they do reach agreement in mediation, the court will issue a conciliation statement which has the same legal effect as a court judgement.[1135] It is signed by the judge, sealed by the people's court and served on both parties. It then becomes legally effective, and has the same enforcement powers of an order.

Judge's role

11.11 The judge chairs the divorce case and conducts the proceedings. The judges are trained as mediators. Since the enactment of the Law of Civil Procedure in 1991, unless there is a special situation, a divorce can be granted in five to six months. In a family case the court will generally order the parties to share costs equally. However the court has a discretion if the husband is in a better financial position to order him to pay a greater share of costs.

11.12 Cohen noted the higher percentage of reconciliation achieved through mediation.[1136] The court is legally required to attempt a reconciliation before granting a divorce. If this is not acceptable the court will either reject the application or the court will attempt informal mediation prior to trial. In dealing with a divorce case, "the people's court shall carry out mediation; divorce shall be granted if mediation fails because mutual affection no longer exists".[1137] The court will try to get the parties to agree in mediation to custody and other matters.

1134 Palmer, "Mediation in the People's Republic of China; some general observation" in Mackie(ed) *A handbook of dispute resolution,* (1991) 221, 227.

1135 Article 89 of the Law of Civil Procedure 1991.

1136 See *infra.*

1137 Article 25 of the Marriage Law *supra*.

Enforcement of orders

11.13 A general principle is that foreign judgements have no legal effect as they are not recognised in a court. The parties will have to apply to a Chinese court for an order. However, Mainland China has signed about 30 judicial assistance agreements with foreign countries. A method to enforce a foreign court order is to send it through diplomatic channels to a lawyer agent. The lawyer will submit it to the Supreme Court, who will transfer it to the local court where the respondent lives. The local court will look at the order and check the procedural issues. For example was the respondent served fairly with the proceedings, was he represented in the foreign court, or did the foreign judicial process violate social and public order and morality? It is a public policy issue. The court does not review substantive issues.

Comments on Chinese family mediation

Role of mediators

11.14 Mediators are to follow government policy and law. In theory mediation is only to take place with the consent of all parties.[1138] Mediators are investigators and fact-finders.[1139] The dispute is seen as a social phenomenon. The mediator educates the parties in the law. Article 5 of the Regulations includes a duty to:

> *"disseminate through mediation such legal information as the law, statutes, rules, regulations and policies of the state and to educate people on the observation of law and order and the respect of social morality."*

11.15 The mediator can criticise or praise as one of their functions is the correction of problem producing behaviour. Mediation was promoted by Mao's theory of non-antagonistic contradictions[1140] which saw mediation as the acceptable method of handling contradictions among the people. Cohen recognised that mediators in China could "mobilize such strong political, economic, social and moral pressure upon one or both parties as to see little option but that of 'voluntary' acquiescence."[1141]

Voluntary or coercive

11.16 Clarke stated that:

1138 Article 6 of the Regulations governing the organisation of people's mediation committees, promulgated by the State Council on 17 June 1989.

1139 Cloke, "Politics and Values in Mediation; The Chinese Experience", reference mislaid.

1140 These occur between parties with fundamentally identical interests, i.e. the people.

1141 Cohen, "Chinese Mediation on the eve of modernisation". 54 California Law Review 1201 (1966).

> *"Chinese and Western commentators are aware of evidence that mediators often pressure or even coerce parties to accept a suggested settlement but this phenomenon is seen as aberrational and generally deplorable".*[1142]

However, Clarke, though recognising the importance of voluntariness in Chinese legislation and writings by academic commentators, holds the view that coercion may in fact be a vital part of a different competing logic operating within Chinese mediation institutions.[1143]

11.17 Clarke contended that the institution that deals with a dispute is more important than the mode of dispute resolution the institution might use.[1144] Clarke suggested that it is because of the weakness of the courts that other institutions become extremely important.

11.18 Clarke raised concerns expressed by Chinese commentators that:

(1) The emphasis on mediation has resulted in too much time being spent by the courts on attempting to mediate instead of adjudication,

(2) the courts are criticised for coming up with settlements not based on a clear understanding of the facts or law, and

(3) they ignore the principle of voluntariness and attempt to impose decisions through illegitimate pressure tactics.[1145]

11.19 Clarke explained that "the principle of voluntariness tends to yield in favour of the principle of fidelity to law and policy". Thus "it is plausible that an element of compulsion has come to be seen as acceptable by mediators because of the very obvious inadequacies of the court system".[1146] Clarke noted a trend of more persons turning to lawyers as mediators, though they are an arm of the state.[1147] Perhaps this is a way of avoiding state norms which must be applied by the peoples mediation committees.[1148]

Cultural factors

11.20 Bagshaw noted that:

> *"family relationships in China are vertical and at the same time are governed by mutual respect and interdependence. Notions of*

1142 "Dispute Resolution in China", Journal of Chinese Law, Vol. 5, No. 2 (1991) 245, 246.

1143 Clarke, *ibid* at 246.

1144 *Ibid* at 252.

1145 *Ibid* at 272.

1146 *Ibid* at 293.

1147 Though since the article was written, some private lawyers are being allowed to set up their own offices.

1148 *Supra* at 295.

harmony, reciprocity, mutuality and holism are valued as opposed to confrontation, competition and partialisation".[1149]

11.21 The Chinese mediators see their goal as upholding moral and legal obligations rather than meeting individual interests and needs. Marriage and its problems are not just the private concerns of the parties but as important to the interests of the community. "Under the Communist system, individual and family interests are subsumed under the national goals of development."[1150]

11.22 Even though Chinese mediators use terms like "informality, voluntariness and neutrality", Bagshaw argued that they exercise social control and publicise laws.[1151] The mediation services therefore have an implicit component of formality in a decentralised form, with the mediators behaving more like government bureaucrats than natural helpers.[1152]

"The socio-emotional and individual needs are largely ignored, with an emphasis on upholding the laws and the common good.... Whilst labelling what they do as 'neutral', Chinese mediators tend to make explicit and direct judgements and openly use a mixture of persuasion, education and coercion to convince the disputants to the correct political view".[1153]

11.23 However, Bagshaw recognised that societal and family values are also overtly and covertly promoted in Australia and other Western countries. Bagshaw questioned the extent to which Western mediation models are relevant to, or produce fair outcomes for non-western peoples.

"Western models of family mediation ... reflect a cultural bias towards rationality, individuality, an orientation to the future and an emphasis on formal agreement or outcome rather than on the relationship between the participants and the process."[1154]

Japan

Mediation in Japan

1149 *Infra* at 4. See also "Family Mediation Chinese Style," Australian Dispute Resolution Journal, (February 1995) 12.

1150 Bagshaw quotes Leung, "Family Mediation with Chinese Characteristics; a hybrid of informal service in China" Monograph series, "Social Welfare in China", No 1, Department of Social Work and Social Administration, Hong Kong University, (1991).

1151 Bagshaw, *infra* at 4.

1152 Leung, quoted by Bagshaw *infra* at 5.

1153 Bagshaw *infra* at 6.

1154 "Whose idea of fairness? Examining the impact of culture on the mediation process", Conference papers, Second International Mediation conference, "Mediation and Cultural Diversity", Adelaide January 1996, 1.

11.24 Mediation appears to be overtly value laden in Japan though the pressure to compel consensus can be more subtle in Japan than in Mainland China. Minamikata[1155] stated that 90% of divorces are by mutual consent and the remaining cases go through a mandatory attempt at mediation. This is designed to try and get a consensus view of the parties. His account is quite negative, with him concluding:

> *"The ambiguities which enable well meaning and committed mediators to give of their best may also confer a disturbing potential for abuse and oppression."*

11.25 Krapp stated that the Japanese mediators exercised a great deal of effort with a view to re-establishing harmony. Mediation can last from two months to an average of six months.[1156] Mediation is governed by the "Law for the determination of family affairs" and similarly entitled rules. "The processes at the Family Courts are informal and adaptable to the individual case." The public is excluded. Mediation is given an important role in the Family Courts and is mandatory for all family cases. Mediators are not considered as neutral third parties as they work with the judge who is part of the mediation committee.[1157]

11.26 The courts select a mediation committee which has more than one mediator and one judge. The judge is usually the president of the committee. In 1986, 40% of family mediators were women, in contrast to 10% of mediators for civil cases.[1158] Approximately 10% are lawyers but many family mediators are housewives. They do not receive specific training in mediation but have to be 40-70 years old. They have the status of government employees, and are employed part-time for two years. In 1987 there were 13,163 mediators working in the Family Courts.

Process

11.27 The mediation process can commence if only one of the parties applies. There is a fine if a party does not attend.[1159] In practice, the judge does not attend every mediation session. However, he has control over the process as each session is written up by one of the mediators and sent to him.[1160] The judge may have ordered investigation by a psychologist prior to the mediation and the results of the investigation will be passed onto the mediators.

1155 Kaji Chotei, "Mediation in the Japanese Family Court" in Dingwall and Eekelaar, (Eds) *Divorce mediation and the legal process* (1988) at 116.

1156 *Mediation, an alternative method of dispute resolution.* Publication of the Swiss Institute of Comparative Law (1991).

1157 Krapp, "Court-connected mediation in Japan". Second International Mediation Conference, Adelaide, January 1996, Conference proceedings, *supra* at 168.

1158 Krapp quotes the *Guide to the Family Court of Japan*, at 16, (1987), Supreme Court of Japan, Tokyo.

1159 50,000 yen maximum - approximately US$ 394.

1160 Krapp, *ibid* at 171.

11.28 Krapp attended a divorce mediation. In caucus the woman disclosed a secret bank account which she did not want disclosed to her husband. However, at the next session the mediators did disclose it as they took the view that anything disclosed to them is public knowledge as they are the "auxiliary" of the judge. The costs are very low, about US$11.80 for one session. The mediators can refuse to dissolve the marriage and so can a judge.

11.29 An agreement which is approved by the presiding judge is binding and enforceable as a judgement.[1161] If there is no agreement, the law authorises the judge to terminate the case by a judgement after listening to the parties and taking all the circumstances into account.[1162] He then acts as an independent judge of the court rather than as presiding officer of the mediation process. In practice it is rare to make a judgement. If there is no judgement the parties can file a claim. Then a different judge will adjudicate the claim.

Singapore

Singapore Family Court

11.30 In 1995 a Family Court was formally established with jurisdiction to hear divorce and ancillary matters such as custody, adoption and spousal violence.[1163] The Family Division now consists of 5 courtrooms, 7 chambers, 2 registries and 9 counselling and mediation chambers.[1164] Case-flow management such as status conferences and pre-trial conferences track progress in a case. The status conference is similar to the issues conference[1165]. At the pre-trial conference arrangements for referral to mediation, counselling or a joint conference can be made. If settlement is not possible a date for hearing is allocated so as to avoid these processes being used as delaying tactics. This conference can also be heard after the decree *nisi* to deal with ancillary matters.

Mediation and counselling

11.31 Mediation and counselling "are integrated into the case process and offered to the parties as an option" free of charge. The Subordinate Courts issued *Practice Direction No 1 of 1996* to offer mediation and counselling in the court. Subsequently the Women' s Charter (Amendment) Act 1996 provided statutory authority to the court to refer parties to mediation and counselling.[1166] The mediation agreement can be recorded before a judicial officer who checks that the agreement complies with the law. In 1996 mediation settled 89.7% of cases.

1161 Article 16, "Law for the Determination of Family Affairs".

1162 Article 24 *ibid*.

1163 This was by order under section 28A of the Supreme Court of Judicature Act to take effect from 1 April 1996.

1164 The information was obtained from the Family Court of Singapore.

1165 See chapter 6 *supra*.

1166 Section 47B.

11.32 More recent amendments to the Women's Charter[1167] have given the court power to direct or advise parties or their children to attend counselling if the court considers that it is in the best interests of the parents or children to do so. The Family Court makes referrals to two external counselling agencies or alternatively the in-house counselling service can be used which is free of charge.

11.33 Where the resolution of legal issues is blocked by emotional issues, joint conferences are held by a court counsellor and a judicial officer to try and settle all outstanding issues. Judicial officers have been conducting mediation of matrimonial property or cases with complex legal issues. In that case another judicial officer will hear the case if mediation fails. There is also a Family Court Support Group of volunteers trained in mediation, with a legal, psychology or social work background who help provide mediation services to the public. Custody and access issues are dealt with by in-house counsellors trained in mediation or by the Family Court Support Group.

Information sessions

11.34 The Family Court has information sessions which are free and open to the public. The services offered by the court and the goals of the Family Court are explained. There are plans to have more detailed information sessions which will be more focused on the divorce process, akin to the role of the Australian sessions.

11.35 Singapore is considering the introduction of parenting orders which will confer parental responsibilities but also require parents to attend courses to assist them with their parenting skills.[1168] In contested custody cases they will consider mandatory post-divorce counselling.

Singapore parenting plans

11.36 In Singapore, the Women's Charter (Parenting Plan) Rules 1997 (Cap 353) came into operation on 1 May 1997. The parties, before a petition for divorce is filed, "shall try to agree on the arrangements for the welfare of every dependent child …and to enter into an agreed parenting plan".[1169] If the parties are unable to agree on the arrangements, they may draw up a parenting plan with the advice and assistance of persons who are trained in matters relating to child welfare. At the time of the filing of the petition the parenting plan is also filed. If the petitioner is unable to agree a plan with the respondent a proposed parenting plan is filed by the petitioner.[1170] The court has the discretion to adopt

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1167 These came into effect on 1 May 1997.

1168 Chief Justice's Keynote Address, Introduction of the Seventh Workplan of the Subordinate Courts 1998/1999, "Subordinate Courts 21: Leading Justice into the New Millennium", delivered on 4 April 1998.

1169 Rule 3(1) of the Family Law Rules.

1170 *Ibid* at rule 4.

the whole or part of the parenting plan.[1171] A standard parenting plan is set out in the schedule to the rules.

[1171] *Ibid* at rule 6.

Chapter 12

Options for Reform of the Dispute Resolution Process for Guardianship and Custody in Hong Kong

Introduction

12.1 Developments in Australia and England have transformed the way children's cases are dealt with by the use of alternative dispute resolution. We set out the reforms required in the substantive law in chapter 6. Changing the substantive law to reflect a more modern approach to children's best interests and rights is not enough. Such a change will have little impact unless it is supported by proper support services at the Family Court, a choice of dispute resolution methods and procedural processes that encourage people to choose alternatives to litigation. We now deal with the reforms to the existing dispute resolution process and make recommendations on alternative dispute resolution such as mediation and parenting plans.

Part A - The family dispute resolution process

12.2 The choice for the resolution of child custody and guardianship disputes is between the traditional adversarial process (exemplified by the existing court-based approach adopted in Hong Kong) and the alternative dispute resolution process, most commonly associated with mediation. We have set out these different processes in chapter 7.

Delay

12.3 There are delays in allocating a date for full hearing.[1172] The performance standard is 90 days for the time taken from the issue of the petition to setting down for hearing in dissolution of marriage cases. No separate standard is set for the hearing of custody applications. The target for the divorce hearing is set by the Court Users' Committee for the Civil Courts.[1173]

12.4 The effect of delays caused by increasing pressure on court lists is that the status quo is maintained, to the detriment of the parent seeking change. Further delay can result from section 15 of the Legal Aid Ordinance (Cap 91), which provides for the stay of any proceedings pending an application for legal aid. We understand that the period of stay is a maximum of 42 days. This period is needed to investigate the means and merits of a legal aid application. Priority is given to emergency applications, but custody and access

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1172 One solicitor informed us that it could take six months.

1173 "Judiciary - Serving the Community", booklet (1996).

cases *per se* will not normally qualify for priority in a legal aid assessment unless there is some specific urgency in the matter. However, if legislation were to indicate that delay in such cases would be prejudicial to the best interests of the child, then more resources would need to be allocated to divert these cases into a priority list for assessing the grant of a legal aid certificate.

12.5 The principle that delay may prejudice the welfare of a child[1174] is bolstered by a provision in section 11 of the Children Act 1989 that the court is required to draw up a timetable when dealing with applications for orders under section 8. This statutory provision reflects the psychological need of a child to have certainty and to have an early decision made in relation to residence and contact. The Scottish Law Commission suggested that it was more appropriate to deal with the matter by rules of court.[1175]

12.6 To promote the best interests of the child, priority must be given to the hearing of disputes concerning children, that is, residence, contact, specific issues, prohibited steps, child abduction, wardship and guardianship. We recommend that, in the interim before legislation is enacted, target times be set for the disposal of custody, access and guardianship disputes. We recommend a statutory provision on the lines of sections 1(2) and 11 of the Children Act 1989.[1176]

Social welfare officer's report

12.7 Section 3(1)(i)(B) of the Guardianship of Minors Ordinance (Cap 13) provides that the judge shall give due consideration to "any material information including any report of the Director of Social Welfare available to the court at the hearing". Clulow and Vincent emphasised the importance of children and parents knowing what is happening and the likely consequences of taking different courses of action so that they can make informed choices about the future.[1177] To take account of this, it is important for delay to be avoided in the preparation of social investigation reports.

12.8 The Child Custody Services Unit of the Social Welfare Department should be adequately staffed so that there is minimal delay in preparing reports. This is particularly important because settlement is often delayed until the lawyers in the case have the opinion and recommendations of the report.

12.9 Some concern was also expressed by practitioners on varying quality of reports furnished to the court. Other countries, such as Australia, insisted on a minimum

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1174 Section 1(2) provides that "In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child".

1175 Scottish Law Commission, *Report on Family Law* (Scot Law Com 1992: No. 135) at 5.42.

1176 See Annex 1 *infra*.

1177 Clulow and Vincent, *In the Child's Best Interests? Divorce Court Welfare and the Search for a Settlement* (1987) at 214.

number of years of experience before a social worker could prepare investigation reports for the Family Court.

12.10 We recommend that more resources need to be put into the Child Custody Services Unit to minimise delays in investigating and preparing reports for the court. We also recommend a performance pledge that a report of the social welfare officer should be completed as expeditiously as possible, but should in any case not take longer than six weeks.

12.11 The sub-committee recommend that social welfare officers preparing reports for the Family Court should have a minimum of 3 years' experience in family and child care work, and their training should include the preparation of court reports.

Independent experts

12.12 Even though section 3(1)(i)(B) of the Guardianship of Minors Ordinance (Cap 13) provides that the judge shall give due consideration to "any material information" it may be that this is insufficient power to order an independent expert' s report in the face of opposition from one of the parties. The court should be able to order a report from an expert such as a psychologist, registered social worker or child psychiatrist at the request of only one of the parties, but be able to order the other party to comply so that the expert can interview the children and both spouses.

12.13 At the moment, one spouse can veto the request so that only the social welfare officer' s report can be ordered. This may be particularly important if allegations of physical or sexual abuse were made and medical or psychological examinations were needed. It should also be possible for the court on its own initiative to order an expert report from a person other than the social welfare officer.

12.14 We recommend that the court have a power to order a report from an independent expert, such as a psychologist, psychiatrist, paediatrician, registered social worker or other relevant expert.

Statistics and research

12.15 Young[1178] referred to research analyzing Hong Kong custody orders from 1978-1980 which showed a judicial preference for awarding custody to fathers. This would go against a worldwide trend.[1179]

1178 "Child Protection and Custody", Central Policy Unit seminar on 9 November 1994.

1179 Justitia, "Divorce in Hong Kong - a Statistical Approach" HKU, student publication (1982).

12.16 There were 14,482 petitions for divorce filed in 1997. There is no breakdown available of the proportion of family cases which relate to custody or property.[1180] The Family Law Association has proposed that a database be established to identify how many custody cases are agreed or disputed to assist policy making and law reform. The judiciary were reported to have supported this in principle but had reservations about manpower.

12.17 The dearth of statistics on the number of custody, access and guardianship proceedings that are issued, and how many are contested, needs to be addressed. It would be useful to have those statistics to identify the need for changing policy or increasing resources. Indeed, the Australian and New Zealand Family Courts have research divisions which produce research papers containing not only statistics but also analyses of consumer satisfaction, assessments of the impact of new laws, and general research on the operation of their Family Courts.

12.18 We also note that section 62 of the Personal Data (Privacy) Ordinance, (Cap 486) gives a specific exemption from the provision of data protection principles where data is kept for preparing statistics or carrying out research, the data is not used for any other purpose and the resulting statistics and research are not made available in a form that identifies the data subjects.

12.19 It would be very useful for the Law Reform Commission and for policymakers if statistics were kept, and research conducted, in the Family Court. We recommend that statistics of the number of custody, access or guardianship cases, including the numbers settled, and when they were settled, should be kept by the Family Court. This would assist in the planning of policies and their implementation.

Availability of judgments and privacy

12.20 We understand that family law practitioners are concerned about the paucity of judgments in family cases that are officially reported in Hong Kong. There are various reasons why this is so. Family cases are heard in chambers and there are some statutory provisions and a Practice Direction that restrict the availability of such judgments. Order 90 rule 4B of the Rules of the High Court provides that an application to make a minor a ward of court may be disposed of in chambers. Rule 7 makes similar provision for guardianship cases. Certainly the practice is to consider disputes concerning children in chambers.

12.21 If the court has given guidance on the interpretation of matrimonial ordinances in a previous case, having access to a report of that judgment may assist family law practitioners in advising their clients on possible courses of action, including the settlement of cases. It can encourage some consistency of approach, and enhance the predictability of outcomes, which assists early resolution of issues in dispute. Even though

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[1180] "Divorce privacy to be respected", Eastern Express, 26 December 1995.

there may be less reliance on precedents in guardianship and custody cases than in other areas of law,[1181] it would still be useful to increase the number of reported judgments in this area.

12.22 Practice Direction No. 27, *Reports on Chamber Proceedings,* provides that "no report should be made of any proceedings (including the judgment) held in Chambers (which are private proceedings) without the authority of the judge before whom the proceedings were conducted". If the judge considers that it should be released for publication, the parties can make representations to him.

12.23 The *Report of the Working Party on Civil Proceedings conducted in private*[1182] stated that Practice Direction No. 27 had fallen into disuse. Generally most reasoned judgments were available in the High Court Library for public inspection. "Judgments of an obviously confidential nature, such as those issued *in camera*, are not made available".[1183]

12.24 The purpose of the Judicial Proceedings (Regulation of Reports) Ordinance (Cap 287) is to regulate, *inter alia*, the publication of reports of judicial proceedings in such manner as to prevent injury to public morals. Section 3 provides that it shall not be lawful to print or publish any particulars in proceedings for nullity, divorce or judicial separation, other than the names, addresses and occupations of the parties and witnesses; a concise statement of the charges, defences and counter-charges in respect of which evidence has been given; and the decision and the judgment of the court. Section 3(4) states that the section does not apply to the publishing of reports of proceedings by any *bona fide* series of law reports, or a publication of a technical character *bona fide* intended for circulation among members of the legal or medical profession.

12.25 However, section 5(1) does provide that the publication of information relating to proceedings held in private is not contempt except where "the proceedings relate to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant". Despite this provision, subsection 2 proceeds to state that, without prejudice to subsection (1), the publication of the text of an order made by a court sitting in private shall not of itself be contempt except where the court expressly prohibits the publication.

12.26 Article 10 of the Hong Kong Bill of Rights, which incorporated the International Covenant on Civil and Political Rights into our domestic law, in the Bill of Rights Ordinance (Cap 383), makes provision for public hearing of proceedings, but excludes the press and public "when the interests of the private lives of the parties so requires." It also provides that any judgment shall be made public except where "the proceedings concern matrimonial disputes or the guardianship of children".

1181 This is because the decision of the judge has to meet the best interests of that particular child.

1182 It reported on 27 March 1997.

1183 At paragraph 5.8.

12.27 In Hong Kong some family judgments contain the full names and identifying details of the parties. Of course, some of these cases may have been appeals held in public in the Court of Appeal. In other unreported judgments which are released, the names of the parties on the front page of the judgment have been deleted, but sufficient identifying details are left in the body of the judgment, including names of witnesses, to facilitate identification of the parties and their children. We deplore this practice as it exposes the vulnerability of the parties, and in particular their children, to public scrutiny at a traumatic time in their lives when they are already trying to cope with divorce or separation. Leaving those details exposed in a judgment that may have been intended for release to legal practitioners only in the High Court Library does not prevent access by the press or an inquisitive member of the public.[1184]

12.28 In Ireland, unreported or reported judgments are always released to practitioners and law reporters in the legal libraries with the names of the parties and their children deleted, except for the first initial (for example, "Murphy" becomes "M"). All identifying details, such as addresses, schooling, place of employment, and even the names of witnesses, are also deleted. This does not cause confusion as long as the correct date of the judgment is available. It would be useful to issue a Practice Direction regulating the release of family judgments so that, in addition to deleting the names of the parties, other identifying details would also be deleted from the judgments.

12.29 If all the identifying details were deleted then the judgments in disputes concerning children could be made more widely available to legal practitioners, encouraging the growth of a family law jurisprudence and making more information available to solicitors and counsel advising clients on the way forward.

12.30 We recommend that a Practice Direction regulating the release of unreported judgments in disputes concerning children be issued to encourage their increased availability to legal practitioners. We also recommend that, for the protection of children and their parents, all identifying details, including the names of parties and their children, addresses, schooling, place of employment, and even the names of witnesses, should be deleted (except for the first initial) from all such judgments, whether unreported or reported.

Code of Practice for conduct of family cases

[1184] In an recent child abduction case in Hong Kong, where the female respondent murdered the child who was the subject of the proceedings, and then committed suicide, a magazine published a photo of the front page of the judgment, with the full name of the child revealed as the court had not taken steps to delete the child's name, though it had deleted the parents' names. The record number of the proceedings was also visible making it easier for the judgment to be located by other members of the press. Unfortunately, Practice Direction No.27 had not been complied with.

12.31 Currently there is no Code of Conduct and Practice for family lawyers in Hong Kong.[1185] The Family Law and Legal Aid Committee of the Law Society of Ireland recently issued a Code of Practice. Clause 4.3 reminds solicitors of their obligation to discuss reconciliation and mediation and the possibility of a separation by negotiation or consent settlement. Solicitors are encouraged to resolve disputes about children through mediation.

12.32 The English Solicitors' Family Law Association has a Code of Practice to assist lawyers as to their responsibility in interviewing and representing children. Fricker refers to an extract of the second general Code of Practice of that Association which states:

> *"It should become part of the family law culture for most parties to be induced into mediation where there are unresolved issues. The culture should be that litigation is perceived to be the last resort ... mediation should generally, within the legal profession and by the public, be perceived to be the most appropriate way to resolve most issues on which agreement has not been reached".*[1186]

12.33 A Family Lawyers' Code of Practice could include such principles as assisting a constructive settlement and placing the best interests of children as a first priority. This may encourage earlier settlement by solicitors and/or referral to a mediator for the resolution of disputes on guardianship and custody.

12.34 It is recommended that a Family Lawyers' Code of Practice be adopted in Hong Kong. This may encourage a more conciliatory approach by solicitors. We recommend that, in principle, there should be two codes, one for the conduct of family cases and the other for conducting cases where children are separately represented.

Case management and settlement

12.35 Case management shifts the responsibility of managing cases from the lawyers to the judges and facilitates early resolution, reduces delay and backlogs, reduces the cost of litigation and adds to the satisfaction of litigants.[1187] A settlement conference is one of the processes of case management that can encourage the right atmosphere for settlement at an early stage in the judicial process. Such conferences can be operated by judges or registrars, though at the moment there are no registrars for management of family cases. More intervention by earlier case management may encourage settlement. The judges would also have more time to scrutinize the arrangements for the children which are the subject of consent orders. Boshier warned that case management techniques should be

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1185 We understand that the Law Society Family Law Committee and the Family Law Association are examining the need for such a code for Hong Kong.

1186 Family Law, vol. 215 (April 1994).

1187 See definition in the report , *Civil Justice Review, First Report,* Ontario Attorney General and the Chief Justice of the Ontario Court of Justice, March 1995.

used as a means to effective dispute resolution and not as ends in themselves.[1188] Program objectives of:

> *"case management (and the reduction of court delay) should not be the sole or primary reason for implementation of a program, thereby reducing rather than enhancing the rights of the parties .... It is this objective which presents the greatest danger of coercion occurring."*[1189]

Practice Direction

12.36 The Court of First Instance Construction List Practice Direction and checklist requires parties to inform the court, at the summons for directions stage, "whether any and if so what attempts have been made to resolve the dispute or any part of it by mediation. This requirement does not entail disclosing the details of any mediation, only the fact of it having taken place."[1190] A pre-trial checklist must be completed, which asks the parties whether a pre-trial review would be useful. Each party is to receive a document, prepared with the approval of the Chief Justice, which sets out the benefits of mediation, explains how the services of a mediator can be obtained and states that if the mediation is not successful this will not affect the litigation. An Information Sheet must be completed which includes a question whether the lay clients have received this document from the Court. Some of the questions which focus on resolution are as follows:

Issues

"5.(a)	*Please provide a succinct list of issues in the case.*
(b)	*Are any of them capable of resolution by agreement?*
(c)	*Are any of the issues in the action suitable for trial as preliminary issues?..."*

Expert evidence

"7.(a)	*On what topic/issues may expert evidence be required?...*
(d)	*Is there scope for agreement?..."*

Trial

"8.(a)	*What is your present estimate of length of trial ?...*
9.	*Would a pre-trial review be likely to be helpful?*
10.	*Is there any way in which the Court can assist the parties to resolve their disputes without the need for a trial/full trial?*

1188 *Infra* at paragraph 7.2.3.

1189 Katz, "Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster Or Two Sides Of The Coin", Journal of Dispute Resolution, (1993) Vol. No.1, 1 at 71-2.

1190 HKLD [1992] H 111.

11. Have the lay clients received a copy of the notes from the court recommending mediation?

12. Have the parties attempted a mediation procedure? If not, is it suggested that they should attempt a mediation under the Hong Kong International Arbitration Centre's rules? Would they like the Court to assist in the appointment of a mediator or to appoint a mediator?

13. Have the parties been given details of the costs incurred to date and an indication of the fees likely to be incurred if this matter goes to a full hearing?"

A pre-trial check list can also include questions such as:

"1. Have you or counsel discussed with your client(s) the possibility of attempting to resolve this dispute (or particular issues) by Alternative Dispute Resolution?

2. Might some form of ADR procedure assist to resolve or narrow the issues in this case?

3. Have you or your client(s) explored with the other parties the possibility of resolving this dispute (or particular issues) by ADR?"[1191]

12.37 The Information Sheet must be lodged with the clerk of the construction judge not later than two days before the return date for the Summons for Directions. A copy must be given to each of the other parties.[1192]

12.38 We recommend that procedures at the Family Court be streamlined and that there be continuous monitoring of the system by effective case management. We recommend the introduction of a Practice Direction governing case management in the Family Court. Such a Direction would encourage more effective case management on an ongoing basis, and would encourage the diversion of cases from contested hearings to mediation. We do not think it is necessary at this juncture to decide the precise terms of such a Direction. However, the Construction List checklist and its associated Practice Direction form a useful model for the Family List.

12.39 We recommend that there should be a requirement that a pre-trial checklist be completed at the Summons for Directions stage of any case involving a dispute in relation to children. Time limits should be imposed for the delivery of any affidavits associated with the case in order to minimize delay. We also recommend that judges should be given more

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[1191] This is taken from the Commercial Court pre-trial checklist referred to in the *Practice Direction (Commercial Court: Alternative Dispute Resolution)*, The Times, December 17, 1993 and reported in Order 72, r 11 of the *White Book* at 1294.

[1192] HKLD [1992] H 111.

control to reduce the costs and delay in the system. Failure to conduct cases economically should result in appropriate orders for costs, including wasted costs orders.

Issues conference

12.40 The New Zealand Boshier report recommended the introduction of an issues conference at an appropriately early time which would order relevant reports, make appropriate orders and directions and define the issues.[1193] The parties would in advance have clearly defined the issues and the relief sought in a memorandum filed in court.[1194] An issues conference could be organised once it was clear that the respondent had filed an Answer contesting the proceedings.

Family settlement conference

12.41 Under the New Zealand proposals, when a report was available a settlement conference would be organised. The purpose of a family settlement conference would be: "to permit a judge to explore settlement options, and if no settlement seems possible to set down for hearing on terms which are appropriate to the case."[1195] It would be convened when all relevant materials were before the court. The lawyers and parties would attend. Counsel should be able to advise on the legal and other costs to date and the estimated cost if the matter were to proceed to a hearing. If further directions were required between the issues conference and settlement conference (for example, because of non-compliance with directions or failure to disclose) then another conference may be called but costs against the unsuccessful party would be awarded.[1196]

12.42 Issues and settlement conferences are designed to enable the judge to explore the nature of the dispute and to assist litigants in identifying options for resolution.[1197] In Hong Kong, the pressure on the court lists is such that the judges would not have the time to engage in settlement conferences, even if provision was made for such conferences in the rules. Even if the Hartmann Working Group recommendations on the first private call-over are implemented, this will not have much impact unless sufficient time is allocated to each case. In England, the final report of Lord Woolf[1198] suggested that the presence of clients at case management conferences, when past costs and future estimates are considered, "will be a powerful incentive to adopt a realistic approach."

12.43 There should be a clear distinction between issues conferences and settlement conferences as they have different purposes. It is also useful to make provision

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1193 "New Zealand Family Law Report" summarised in an article of that name in Family and Conciliation Courts Review, vol 33, No. 2, April 1995 (182-193).

1194 *Ibid* at paragraph 6.5.7.

1195 *Ibid* at paragraph 6.5.8.

1196 *Ibid* at paragraph 6.5.9.

1197 Boshier report at 7.2.8.

1198 *Access to Justice,* 26 July 1996 at pages 82-86.

for a conference focusing on trial management, which would be a formal pre-trial review in the event that a settlement conference fails.

Pre-trial conferences

12.44 The Saskatchewan Law Reform Commission suggested that a provision be inserted in custody legislation for pre-trial conferences. This provision combines the functions of issues conference and settlement conferences as follows:[1199]

> *"(A) Upon first appearance before the court in an application for custody, or at any time prior to the hearing of the application, the court may direct a pre-trial conference before the judge or other person designated by the court, for the purpose of:*
>
> *(i) resolution or narrowing of issues;*
>
> *(ii) disclosure of the nature of the evidence which will be presented at the hearing;*
>
> *(iii) encouragement of settlement or conciliation; and*
>
> *(iv) settling procedures to be adopted in the proceedings including appointment of amicus curiae, and directions of a custody investigation.*
>
> *(B) (1) Upon consent of the parties, the pre-trial conference may be arranged by the registrar without an order of the court directing the conference.*
>
> *(2) The pre-trial conference shall be conducted informally, in such manner as the judge or other person presiding at the conference may direct.*
>
> *(3) The judge or other person who presides at a pre-trial conference shall prepare a memorandum of the matters agreed upon by the parties at the conference, and shall present the memorandum of such parties for their approval and shall file the memorandum.*
>
> *(4) No evidence disclosed at the pre-trial conferences shall be admissible as an admission made at the conference, or as part of a transcript or record of the conference without the consent of the parties".*

12.45 We recommend that statutory provision be made for issues and settlement conferences tailored to the needs of Hong Kong. There ought to be a clear distinction between issues and settlement conferences. These conferences would be separate from mediation. A settlement conference would be a necessary step in the process unless there was a certificate filed by a party or the parties that an attempt at settlement in a

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[1199] Saskatchewan Law Reform Commission, *Proposals on Custody, Parental Guardianship and the Civil Rights of Minors* (December 1981), at 17.

settlement conference is likely to be unsuccessful and that costs would be wasted by such attendance.

12.46 If no settlement conference takes place there would still be a conference similar to a directions hearing at which directions for trial would be ordered. The judge could still suggest settlement at this stage. No evidence disclosed at these pre-trial conferences should be admissible as an admission in any subsequent hearing or proceedings, or as part of a transcript or record of the conferences without the consent of the parties.

Flow Chart for new court process

12.47 We have designed a Flow Chart at Annex 2 to assist in understanding the recommended new court procedures. The steps set out in the Flow Chart are necessary steps in case management with a time schedule set by the judge in consultation with the parties. The issues conference is similar to the call-over list in which directions are given, though we understand that at present if the parties file a consent summons there is no need for a directions hearing. The advantage of adopting the language of "issues conference" rather than retaining the language of "directions hearing", albeit with more powers, reflects the fact that the issues conference will also deal with mediation and focus more on the issues outstanding between the parties. The issues conference, like the existing directions hearing, will be a necessary stage of the process. **We recommend that the issues conference be substituted for the call-over list.**

Part B - Support services for the family dispute resolution process

Conciliation service

12.48 Previous reform proposals, including those by Leung and the report of the Task Group on a Family Court, were considered by the sub-committee. Leung suggested that a conciliation service was "an essential feature in a real Family Court".[1200] It was the principle of judicial independence that kept judges from descending into the arena to press for compromise. Indeed, there is a rule that the court should not be told that the parties have tried to settle if the case proceeds to trial. Leung proposed a transition period before the application for divorce where the parties would have an opportunity to reflect and resolve all ancillary matters with the assistance of conciliation, and counselling services. There would be an initial hearing before a judicial officer so that the dispute could be settled earlier. If this did not resolve the matter the court's power to investigate and adjudicate would not be affected. Pre-trial conciliation would be valuable in matrimonial cases.

[1200] "Divorce, what next?" Hong Kong Lawyer, January 1990, 53, 54. Miss Elsie Leung is now Secretary for Justice.

Court welfare service

12.49 The report of the Task Group on a Family Court recommended a multi-disciplinary approach in service delivery of support services, except for the final decision-making function of legal adjudication.[1201] The court welfare service would be an integrated part of the court system, as it is in New Zealand. The welfare officers would advise and act for the court and have a role distinct from the counsellors and conciliators.[1202]

Other support services

12.50 The report of the Task Group on a Family Court stated that "conciliation and counselling are the services that are ... at the root of establishing a proper Family Court system".[1203] The report recommended that an office should be provided at the Family Court for conciliators and counsellors to offer their services. This would facilitate a direct link with the court. Referral for counselling or conciliation could also be made to qualified persons outside the court. A conciliation service based in the court would help parties to deal with the emotional, practical and legal aspects of their dispute and to negotiate a settlement.[1204] The staff would liaise with the lawyers to "guarantee an early settlement and efficient case management".[1205] A Court Conciliation Co-ordinator would act as a liaison between the parties, their legal representatives, the court and conciliation agencies.

12.51 We generally approve and adopt the recommendations of the report of the Task Group on a Family Court on support services, but prefer to adopt the terms "mediation and mediators" rather than "conciliation and conciliators". Providing support by allocating more resources to mediation, information sessions and parent education complements the court process. It is necessary to connect these support services and resources to the court system to ensure court accessibility and accountability.[1206] We recommend that support services should be government funded.

Support services accommodation at the Family Court

12.52 We suggest that the accommodation for the Family Court should include comfortable consultation rooms which will protect the privacy of the parties and their children. This will improve the settlement environment of the court.

1201 *Proposal on the Establishment of a Family Court in Hong Kong*, Hong Kong Council of Social Services Task Group at paragraph 4.2.

1202 *Ibid* at paragraph 7.2.

1203 *Ibid* at paragraph 7.

1204 *Ibid* at paragraph 2.4.

1205 Paragraph 7.1.3.

1206 *Ontario Civil Justice Review, First Report*, *supra* at chapter 16.

12.53 We endorse the recommendation of the report of the Task Group on a Family Court. We suggest that there should be an office for counsellors and mediators who could be available for clients during normal office hours, and also to assist the court on the dates when there are call-over lists. The advantage of having such staff on duty at the court is that this may be more effective in achieving resolution than having the two sets of lawyers negotiating at the "door of the court", at a call-over or hearing. However, bargaining on the morning of a hearing should diminish if issues and settlement conferences are introduced.

12.54 We have already adopted the recommendations on support services of the report of the Task Group on a Family Court. We recommend the provision of accommodation at the Family Court for counsellors and mediators which would facilitate early referral to appropriate services.

Information on dispute resolution

12.55 The English Law Commission's review of custody[1207] suggested that: "improving upon the indirect effects of the court's duty would appear a more effective use of the resources available than strengthening its investigative functions."[1208] The Commission concluded that the courts should do more to put parents in touch with whatever services were available locally.

12.56 We recommend that the courts should do more to put parents in touch with support services. More publicity and education of the public is needed to encourage families to go for assistance to local Family Service Centres or other agencies at an early stage of conflict or when problems are first encountered.

12.57 The Hartmann Working Group recommended that information on mediation be included in the Information Kit on Marriage which was at that time being prepared by the Social Welfare Department. Legal practitioners also could give the Kit to their clients.[1209] This has now been issued and includes information listing addresses of existing counselling services for the use of the public. It refers to the fact that social workers were in the process of being trained as family mediators but does not identify any non-governmental agency providing a mediation service.

12.58 The Irish Law Reform Commission suggested that a Family Court Information Centre should be attached to every Family Court.[1210] This would provide information to clients about family support services, social welfare entitlements and services, legal aid and advice services, as well as basic information about the operation of the Family Court and the remedies available in it.[1211] Clients could also obtain information and advice concerning the availability and purpose of mediation. Information packs would be available to the public.

12.59 We recommend that the Family Court should provide information relating to court processes, support services and alternatives to litigation. Leaflets such as the Information Kit on Marriage should be available at the Family Court itself and in the lobby of the High Court Building.

Information on mediation

1207 *Family Law Review of Child Law: Custody,* (1986: Working Paper No.96) at 4.10. It also concluded that the court's procedure of approving arrangements for children had not been successful in any of its declared aims.

1208 *Ibid* at 4.13.

1209 Paragraph 12.4.

1210 Report on *Family Courts* (1996: No.52) at 7.07-11. In their Consultation Paper at paragraph 7.17 they had suggested an advice centre, but after consultation, their Final Report recommended an Information Centre.

1211 *Idem.*

12.60 Since mediation is a relatively new service it needs considerable publicity if it is to be used as a credible alternative to the adversarial process. Indeed, the Chief Justice' s report on court annexed mediation recommended that the court should be under a duty to actively promote mediation, with the Chief Justice approving a document setting out the benefits and procedure for mediation, and solicitors being placed under a duty to give that document to the parties. The Family Mediation Committee of the Hong Kong International Arbitration Centre has produced a leaflet on family mediation which has been sent to the Family Court. We suggest that the judiciary should endorse this information to encourage the use of mediation, rather than relying on non-governmental organizations to publicise such services.

12.61 We recommend that information pamphlets should be available at the Family Court and the family services centres, which should include information on the availability of, and encouragement to use, mediation as an alternative to litigation. Information on mediation services should be included in pamphlets such as the Information Kit on Marriage. The pamphlets and the Information Kit should be periodically updated. The court should be under a duty to actively promote mediation. The Chief Justice should approve a document which sets out the benefits and procedure for mediation.

Information session

12.62 Information sessions illustrate the range of options for managing disputes and:

> *"give a more detailed overview of the mediation process. Educational components are also included covering the separation process, communication patterns, children's reactions to separation in the context of child development, couple suitability for mediation and the range of issues that can be mediated."*[1212]

12.63 Section 8 of the English Family Law Act 1996 makes information meetings compulsory.[1213] The court has power to give a direction for parties to attend a meeting to explain the facilities for mediation and to give parties an opportunity to take advantage of mediation.[1214] We accept that such a service would be a service for the better protection and best interests of children. It would also assist the increasing number of respondents, in particular, who are not legally represented. We have referred to the research on the impact of marital conflict on children in chapter 1. In chapter 10 we referred to parent education programmes that have become compulsory in some states in the United States. We

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1212 Gibson, "Mediation of Family Disputes in the Family Court of Australia", Paper at the Fifth National Family Law Conference, Perth, September 1992.

1213 See chapter 8 *supra*.

1214 Section 13 of the English Family Law Act 1996.

considered whether there should be a compulsory information session but we decided that this may not yet be acceptable in Hong Kong as it is still a new process.

12.64 We recommend the introduction of a voluntary information session, which would be a service open to everyone. It would be attended by the parties before the filing of the petition in the majority of cases. It would encompass elements of the United States parent education programmes and the Australian information sessions.

12.65 At the information session parties could receive information and advice about family support services and alternatives to litigation such as mediation. Information to educate parents on the psychological process of divorce and its effect on children would also be included, by way of oral presentation, video and information packs. The presentation would be made by persons with counselling and mediation training. Clients should also be informed by solicitors, the Legal Aid Department and the Duty Lawyer Service of the availability of information sessions. The information on such services could be contained in a pamphlet approved by the Family Court.

Referral to information session

12.66 Encouragement by those involved in the family dispute resolution system, whether solicitors, judges, or indirectly, social workers, is necessary to ensure that as many parties as possible receive the benefit of attending information sessions. It will be possible to self-refer, though we anticipate that in the early days this will occur in only a minority of cases.

12.67 We recommend that solicitors should be placed under an obligation to inform their clients about the availability of the information session. We recommend that the Family Court Judges should have the power to refer the parties to attend an information session. This would not be an order as such but would be a power to suspend further progress on the proceedings pending such attendance.

Obligation on solicitors

12.68 The existing form 2A of the Matrimonial Causes Rules (Cap 179) requires the solicitor for the petitioner to certify whether or not he has discussed with his client the possibility of a reconciliation, and whether or not he has provided his client with the names and addresses of persons qualified to help effect a reconciliation.[1215] The Hartmann Working Group recommended that Form 2A include mediation, especially for disputes relating to maintenance, access and ancillary relief. However, it recommended that the rules amending this Form should not come into force until after a pool of qualified mediators were

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[1215] See rule 12 of the Matrimonial Causes Rules.

available "and after due consultation with all the relevant parties".[1216] Many countries put solicitors under a statutory obligation to inform and encourage their clients to consider the possibility of reconciliation and, failing that, counselling and mediation.[1217]

12.69 We recommend that solicitors should be obliged to inform and encourage their clients to consider the possibility of reconciliation, and the applicant (and the respondent when he is served with the pleadings) should be informed of the nature and purpose of counselling and mediation and offered a list of services for reconciliation, counselling and mediation. This information would be in a pamphlet approved by the Family Court.

The court's powers in relation to mediation

12.70 The report of the Chief Justice's committee on court annexed mediation[1218] recommended that the Arbitration Ordinance (Cap 341) be amended so that where the parties agree to go to mediation but cannot agree on a mediator the court could appoint a suitable mediator.[1219] They did not recommend that judges would become directly involved in mediation, though they accepted that more case management would indirectly assist settlement.

12.71 Section 19A of the Australian Family Law Act 1975,[1220] empowered potential litigants to file a notice in the Family Court seeking the appointment of a mediator. Section 19B gave power to the Family Court to refer proceedings to a mediator with the consent of the parties. A power to refer to a specified mediator with the consent of the parties, or, failing agreement on the mediator, to a mediator appointed by the court, is given in section 47B of the Singapore Women's Charter (Amendment) Act 1996. The court may give consideration to "the possibility of a harmonious resolution" and for that purpose refers the parties to mediation.

12.72 We recommend the adoption of the voluntary mediation recommendations of the report of the Chief Justice's committee on court annexed mediation, to the effect that the court should only be able to order the parties to attend mediation if they agree. Section 15A of the Matrimonial Causes Ordinance (Cap 179) allows the court to adjourn if

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1216 *Supra* at 12.5.

1217 Australia, New Zealand, Canada, and Ireland. Section 12 of the English Family Law Act 1996 gives power to the Lord Chancellor to make rules requiring legal representatives to inform parties of the availability of marriage support services and mediation and to give names and addresses of persons qualified to effect a reconciliation or in connection with mediation.

1218 *Report and Recommendations of The Chief Justice's Committee on The Desirability of Introducing a Court Annexed Mediation Scheme in Hong Kong and related matters*, August 1993.

1219 This would be broader than the existing section 2A of the Ordinance, which provides that where an arbitration agreement provides for the appointment of a conciliator by someone other than the parties (for example, the Secretary General of the Hong Kong International Arbitration Centre), and that person fails to appoint or refuses to appoint, then the court may appoint a conciliator.

1220 Inserted by the Courts (Mediation and Arbitration) Act 1991.

there is a reasonable possibility of reconciliation. There could be a similar provision to encourage mediation. We recommend a provision on the lines of section 19A of the Australian Family Law Act 1975 empowering potential litigants or parties to file a notice in the Family Court seeking the appointment of a mediator.

12.73 We also recommend that a provision be enacted that where the parties agree to go to mediation, but cannot agree on a mediator, the court could appoint a suitable mediator.[1221] **We agree that judges should not become directly involved in mediation. If one party does not consent to adjourn the case for mediation then the judge can use his best endeavours to encourage mediation.**

12.74 We also recommend that before a case is set down for hearing the parties should provide a certificate to satisfy the court that mediation was or was not considered, or that it was not appropriate.

Compulsory powers

12.75 In Hong Kong, the Chief Justice's committee suggested that further consideration, after wider consultation, should be given to (1) whether a court should have power to order the parties to attend a mediation procedure if the court thinks it appropriate, and (2) whether the judge should have power to refuse to set down an action until the parties had certified to the judge that they had attempted some form of mediation. The committee saw merit in giving the latter power to a judge. This power could be exercised on one party's application only, which would make the power quite coercive. The committee, after consultation with the Law Society and the Bar Association, concluded that at this stage it would not recommend compulsory powers to compel parties to attempt mediation. The report has not been implemented to date, but we accepted that its recommendations are relevant to our reform proposals for the resolution of custody and guardianship disputes.

12.76 We see some merit in giving power to a judge to refuse to set down an action until the parties have certified to the judge that they have attempted some form of mediation. We also note a recommendation that a judge should have power to recommend that the parties attempt to resolve matters through mediation, and if necessary in exceptional cases, to require them to do so.[1222] **However, we do not agree that mediation should be compulsory at this time. We welcome submissions from consultees on whether or not the Chief Justice's report's proposal on compulsory**

1221 This would be similar to the existing power of the court under section 12 of that Ordinance to appoint an arbitrator where the parties fail to agree on the arbitrator, or the latter refuses to act or in certain other circumstances.

1222 Paragraph 7.37 of the Irish Law Reform Commission Consultation Paper *supra.* This was not a recommendation in the final report though there is no reference to why the recommendation was dropped.

mediation should be adopted for the resolution of custody and guardianship disputes.

Counselling conference

12.77 In chapter 9 we referred to the Australian system of conciliation counselling and conciliation conferences which are quite different processes to mediation. Conciliation counselling takes place at a conciliation conference with a court counsellor which is designed to reduce conflict and encourage agreement of practical issues, particularly issues concerning residence and contact. The court counsellors are social workers or psychologists specially trained in dealing with relationship breakdown. Conciliation counselling has broader aims than mediation, in that it can include counselling to help parents and children to adjust to the separation and work through their anger and hurt. Parents are encouraged to make use of these processes to avoid having a contested hearing which only entrenches the conflict between them. We also referred to the New Zealand system of conciliation counselling.

12.78 Section 62F of the Australian Family Law Act 1975[1223] gives a discretion to the court, in relevant proceedings,[1224] to direct parties to a conciliation conference to discuss a child's care, welfare and development, and to try and resolve the differences between the parties. However, a parenting order cannot be made unless the parties have attended a conciliation conference, though there are exceptions.[1225] Property matters must be referred to conciliation before a registrar for an Order 24 conference.[1226] It is possible for a joint conciliation conference for children's and property matters to be conducted by registrars and counsellors.[1227]

12.79 We recognise the merit of conciliation conferences as a process of dealing both with the emotional and legal process of divorce. Our legal system has neglected taking cognisance of the emotional process of divorce. A mandatory counselling conference gives all parties the opportunity to resolve some of the issues that block parents from focusing on the best interests of the children. This should lead to less entrenchment of positions by the parties that can block resolution and earlier settlement of disputes. If parties settle their differences at a counselling conference then they can proceed to have a consent order drawn up and the need for mediation is avoided.

12.80 We recommend the introduction of a process similar to the Australian conciliation conference, but prefer the term "counselling

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1223 As substituted by the 1995 Act. The rules of court were amended in 1995. See Order 24 relating to conciliation conferences.

1224 This concerns the care, welfare and development of a child who is under 18.

1225 *Ibid* at section 65F as substituted by the 1995 Act. The exceptions are orders by consent, interim or urgent orders, where attendance would be impracticable or there are special circumstances such as family violence.

1226 Section 79(9).

1227 According to Brown, "Developing and Implementing Family Court Services: The Family Court of Australia", paper presented at the Second World Congress on Family Law and the Rights of Children and Youth, June 1997.

conference" in order to avoid any confusion with mediation. We recommend that the counselling conference be a necessary stage in the court process. It would be seen as an integral part of the case management process of the court system. We recommend that the Support Services Coordinator (SSC) should advise the judge in writing as to whether the parties have or have not attended the counselling conference, so that the next stage in the process can be initiated.

12.81 If there are disputes between parents on both financial and children's issues, then there should be a joint counselling conference dealing with such issues together. We recommend that the conferences could be run by mediators or counsellors, and should be publicly funded.

12.82 We note that our recommendations on the court processes are different to the recommendations in the Hartmann Working Group Report, which have not yet been implemented. It is a matter for the Administration to decide how to reconcile our recommendations with those of the Hartmann Working Group, and the extent to which each set of recommendations is to be implemented.

Support Services Co-ordinator

12.83 Section 8 of the New Zealand Family Courts Act 1980 provides that the duty of the Co-ordinator is to facilitate the proper functioning of the Family Court and of counselling and related services such as mediation.[1228] There are 40 Co-ordinators based at 24 Family Courts who make referrals to 500 individuals or agencies throughout New Zealand. The Co-ordinator will make the referral to specialist services where necessary.

12.84 Another key role is educating the community as to the services offered by the Family Court. The Boshier report recommended that one of the Co-ordinator's roles would be to act as intake officer in assessing a case for the appropriate resolution method.[1229] The Co-ordinator's functions would include client contact, early case classification, assessment and referral, liaison with professional groups and public education activities.[1230] The Co-ordinator would have a counselling background and be trained in mediation. The report of the Task Group on a Family Court also recommended a Conciliation Co-ordinator.

12.85 We recommend that the post of a Co-ordinator be created whose duty would be to facilitate the proper functioning of the services that will support the Family Court dispute resolution system. We set out his or her tasks in more detail below. We prefer the term "Support Services Co-ordinator" (SSC) to that of "Conciliation Co-ordinator" used in the report of the Task Group on a Family Court to avoid confusion with

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1228 See chapter 9 *supra*.

1229 *Supra* at paragraph 6.5.2.

1230 Boshier report *supra*.

reconciliation. Also, the SSC's task would extend beyond mediation to counselling conferences and referral of parties to counselling outside the court.

12.86 The SSC would assess the needs of the parties for counselling, a counselling conference or mediation. He or she would refer suitable cases to the appropriate persons, whether Social Welfare Department counsellors or mediators, community mediation or counselling services, professional mediators, counsellors, or other support services.

12.87 There would have to be more than one SSC, as they would also co-ordinate referrals to the information session and the counselling conferences. Reports of progress could be made to the SSC who would liaise with legal representatives. In order to make the appropriate referral the Co-ordinator can look at affidavits or information sheets or interview the parties if necessary. The Co-ordinator would obtain feedback from clients and the professionals involved so as to assess any need for improvement in the delivery of such services. The Co-ordinator would also liaise with the staff of the Social Welfare Department who provide reports to the court on the parties.

Mediation

12.88 The Law Reform Commission's report on divorce recommended that priority be given to promotion of marriage counselling, mediation and conciliation services.[1231] It also recommended that the Government give consideration to the future expansion and development of these services in Hong Kong.

12.89 The Hartmann Working Group supported mediation as an alternative to adjudication of family cases. However, because of the shortage of qualified mediators in Hong Kong at that time, it took the view that "it was premature to institute a court annexed mediation scheme. Nonetheless, this option should be examined again when a reasonable pool of professionally qualified mediators are available in Hong Kong".[1232]

12.90 It is true that problems of court congestion, delay and increasing costs will not be completely alleviated by the diversion of cases to mediation outside the court.[1233] Wright recommended that the problems can be addressed by the provision of a court annexed mediation scheme.[1234] The New South Wales Law Reform Commission[1235] recommended that court dispute resolution programmes must operate in accordance with clear guidelines and adequate resources, to ensure the integrity of the process and the quality of service.

1231 Paragraph 9.11 of *Report on Grounds for Divorce and the Time Restrictions on Petitions for Divorce within Three Years of Marriage* (1992: Topic 29).

1232 *Supra* at paragraph 12.3.

1233 Wright "Alternative Dispute Resolution and Case Management", Hong Kong Lawyer, (September 1994), 18, 19.

1234 *Idem.*

1235 *Alternative Dispute Resolution: Training and Accreditation of Mediators*, (1991: Report No. 67) at 70.

Social Welfare Officers and mediation

12.91 A secure professional and institutional base with a clear identity is essential to any service operating in the complex area of divorce. Otherwise staff will need to spend more resources on establishing and sustaining their own identity. The Montreal family mediation program in Canada was found by researchers to be the most effective and the most structured. The mediation service was a separate service and did not have to compete with other services, such as the provision of custody assessments or reports.[1236]

12.92 There is a need to clarify, in organisational terms, who is to carry responsibility for mediation services in the Family Court, to avoid confusion between the original role of a social welfare officer performing investigative roles and the new role of mediator, if performed by a social welfare officer. The roles of the three different processes (mediation, investigation and counselling) must be kept separate, so that integrity is preserved.[1237] A Registrar's Direction, *Children: Inquiry and Report by a Welfare Officer*[1238] succinctly dealt with the separation of functions as follows:

> *"It is the function of the Welfare Officer to assist the court by investigating the circumstances of the child concerned and the important figures in their lives, to report what he sees and hears, to offer the court his assessment of the situation and, where appropriate, to make a recommendation. In such circumstances, it is not the role of the Welfare Officer to attempt conciliation, although he may encourage the parties to settle their differences if the likelihood of a settlement arises during the course of his enquiries."*

12.93 The Social Welfare Department, if it is to operate a mediation service at the Family Court, needs to ensure appropriate guidelines for separation of these functions. Those who would become mediators should cease their roles as investigators and court reporters. They would need to build up experience in their new professional role, and this will be delayed if they are continuing to perform a court reporter role, albeit with different families. The families would trust the mediation service more if it is a separate service. Thus, if the dispute could not be resolved by mediation, the court reporters would not have access to the mediator's files to prepare a report for the court. We accept that there are resource implications, as different types of staff may be dealing with the one family.

12.94 The role of the social welfare officer as investigator or expert to the court is separate from a counselling or mediation role. We recommend that the Social Welfare Department establish appropriate

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1236 Richardson, *Court-based Divorce Mediation in Four Canadian Cities: An Overview of Research Results* (1988). See chapter 10 *supra*.

1237 Clulow and Vincent, *In the Child's Best Interests: Divorce Court Welfare and the Search for a Settlement* (1987).

1238 [1986] 2 FLR 171, (England).

guidelines to separate these functions. We recommend, by a majority of members, that a court mediation service should be established, staffed by professionally qualified mediators separate from the social welfare officers who carry out the service of executing social investigations and reports for the courts.

Other professions

12.95 Equally, a qualified mediator should not embark on counselling the client or otherwise engage in therapeutic tasks, as there will be confusion of roles. It is also necessary for the Law Society to draw up guidelines to ensure that a solicitor does not mediate a case where he has previously represented one of the parties, and that there is a clear separation of function between a solicitor acting as a mediator and acting in the capacity of a solicitor. Similar guidelines may need to be drawn up for barristers.

12.96 Other professionals involved in counselling or therapy, whether working in governmental or non-governmental agencies or privately, should adopt similar guidelines. We also recommend that other bodies such as the Law Society and the Bar Association should draw up appropriate guidelines to ensure the separation of roles of lawyers as lawyers, from lawyers acting as mediators.

12.97 The Boshier report recommended that, in difficult cases, some means of obtaining specialist input from psychologists or senior social workers while a mediation is ongoing may be needed. This would be "to help the parties focus on the needs and wishes of the children."[1239] It also recommended that the mediator could, at the parties' request, seek a report on the children from another professional.[1240] This might assist in settlement. **We recommend that family mediators have access to facilities to obtain an expert's report, with the parties' consent, to assist in difficult cases concerning disputes over children.**

Working Party

12.98 The sub-committee considered whether a Working Party to establish a pilot project for court annexed family mediation should be created. Such a Working Party should have relevant interested parties represented, including the Law Society, the Bar Association, the Director of Administration, the Legal Aid Department, the Legal Policy Division of the Department of Justice, the Judiciary, the Social Welfare Department, the Health and Welfare Bureau, the Home Affairs Bureau, the Mediation Group, and community mediation service providers. Its objectives would be to plan and implement a structure for a court

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1239 At 5.7.9 of the Boshier report *supra*.

1240 Paragraph 5.7.9 and 5.7.10 respectively of the Boshier report.

annexed family mediation scheme for the resolution of divorce and child custody disputes which would best reflect the needs of Hong Kong.

12.99 We also recommend that the Working Party should look closely at the special needs of children, and how best to protect them in mediation and in the Family Court. This also has implications for what type of Family Court would best balance the needs of the litigants, their children, the Judiciary and the court administration. **The sub-committee decided to recommend that a Working Party be established to plan and implement a pilot project for court annexed family mediation.**

Pilot project for court-annexed family mediation scheme

12.100 When we refer to a pilot project, we envisage an experimental undertaking of limited scope and duration prior to the implementation of a full-scale scheme. The English White Paper proposed the establishment of a pilot project before implementation of the reforms:

> *"The pilot will focus on ... the extent to which couples seek to save their marriage; the information-giving session; the use of an "informational" video, uptake of mediation and the number of mediators likely to be needed; the organisation of and quality assurance procedures for the delivery of mediation services; the use of lawyers, and their educational and training needs and the allocation of legal aid."*[1241]

12.101 The English Law Society proposed that a pilot project should be carried out before the introduction of legislation "to ensure that the lessons learned can be taken into account in drafting the legislation".[1242] This would cost and test the new proposals and address any deficiencies.[1243]

12.102 We recommend that mediation should be an integral part of the Family Court system. With a view to establishing mediation as a permanent method of dispute resolution, we recommend that a pilot project on court annexed family mediation be launched at the Family Court.

Pilot Scheme Working Group

12.103 Our initial view that a Working Party should be set up to consider a pilot project on court annexed family mediation was overtaken by events, as in October 1997 the Chief Justice, the Hon. Mr Justice Andrew Li, established a *Working Group to consider a Pilot Scheme for the Introduction of Mediation into Family Law Litigation in Hong Kong* (Pilot Scheme Working Group) chaired by the Hon. Mr Justice Hartmann.

1241 Brown and Jones: "Looking to the Future; a summary", [1995] Family Law 286, 289.

1242 *Fairness for Families* The Law Society's response to the White Paper, August 1995.

1243 *Ibid* at paragraph 4.24.

12.104 We welcome the establishment by the Chief Justice of the Pilot Scheme Working Group. We recommend that it consider our recommendations on mediation, case management and our suggested pilot project to determine how they may assist their own recommendations.

12.105 We suggest that a report be issued which will deal with the outcomes of the pilot project and make recommendations on which model for a family mediation court annexed scheme should be established permanently in Hong Kong. The scheme should also include a parent education program. Parenting plans should be encouraged by the court and other agencies.

12.106 The pilot scheme could test out various models for different types of cases, for example, access and custody cases. It could incorporate the tasks laid out by the Lord Chancellor in the White Paper outlined above. The pilot scheme could test out the future arrangements for family mediation services used by the court, mediation outcomes and the costs of mediation. It would be more realistic to assess the costs on the basis that mediation organisations are responsible for the full costs of overheads and mediators and administrators are paid at a market rate.[1244]

12.107 The sub-committee propose that the pilot project would employ mediators to mediate in-house. However, the project would also allocate a certain number of cases to private mediators on a fee per case basis, either directly or through a panel of private mediators in the Hong Kong International Arbitration Centre.[1245] Community mediation agencies should also be used. There would be the opportunity for parties to choose the mediator and, of course, parties might continue to organise mediation independently from the court and settle their differences away from the court process.

12.108 The pilot scheme should operate for three years. That should give sufficient time to test out models, promote the use of mediation, and generate enough mediation cases to be able to evaluate the project. That length would also tie in well with the time needed to draft and enact legislation to support the provision of family mediation.

12.109 It is essential that the Judiciary and Social Welfare Department work with the non-governmental agencies and consult widely on any proposed plan for a pilot project for a court annexed scheme. Any proposals should be explained and justified. The proposed pilot project scheme needs to be presented in a well researched way, tailored to local conditions.

Management committee

12.110 A management committee with representatives of the Family Court, the Judiciary Administrator, the Legal Aid Department, the Department of Justice, the Social Welfare Department, community mediation agencies, the legal and mediators' professions and organisations, and lastly the Co-ordinator, would oversee the implementation of the pilot

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1244 The English Law Society recommendations in *Fairness for Families ibid* at paragraph 5.12.

1245 The panel of mediators is administered by the Centre not by the Mediation Group even though the latter is a service of the Centre.

project. **We recommend a management committee to oversee the implementation of the pilot project.**

Training of mediators for a court scheme

12.111 The Boshier report recommended that "mediation be assured of a high profile in the Family Court system by insisting on high standards of selection, training, supervision and accreditation of mediators and ongoing accreditation requirements."[1246] **We agree with the emphasis of the Boshier report, and recommend that high standards of selection, training, supervision and accreditation should be required of family mediators in any court annexed mediation scheme in Hong Kong.**

Accreditation

12.112 The Mediation Group and the Hong Kong International Arbitration Centre have approved a system of accreditation for qualified family mediators. A panel of such mediators is now being established. It is hoped that all qualified family mediators, whether private, community mediators or mediators from the Social Welfare Department will be accredited by this system to ensure the consistency and quality of standards. Having this system approved by government and the Judiciary would make it easier for agencies to receive government funding or subvention. **We recommend that the current system of accreditation of qualified family mediators should be approved by government and the Judiciary.**

Screening and matching

12.113 Benjamin and Irving suggested that the critical question for policy makers was not whether mediation is useful, but how to use it to the best advantage by matching clients with the specific service model best suited to their needs.[1247] They recommended a screening process to achieve this end. If the referral and intake service does not make an appropriate "diagnosis", then the "treatment" suggested may be inappropriate and cause more problems and expense for the system.

12.114 When the characteristics of a case are matched to the appropriate dispute resolution process, then such processes as mediation and counselling conferences will be seen as complementing the formal court system. This increases the choice for the consumer and the professionals that advise them. "The availability of an effective alternative and a user friendly process may also have the effect of making lawyers more responsible and accountable in examining their own procedures and in effecting improvements...."[1248]

1246 Paragraph 5.7.7 of Boshier, "New Zealand Family Law Report" summarised in an article of that name in Family and Conciliation Courts Review, vol. 33, No. 2, April 1995 (182-193).

1247 "Research in Family Mediation", Mediation Quarterly, vol. 13, no.1, (Fall 1995), 53, 73.

1248 Finlay, "Family Mediation and the Adversary Process" Australian Journal of Family Law, vol 7, No.1, (1993), 63, 69.

Domestic violence and sexual abuse guidelines

12.115 The New Zealand Boshier report recommended that "ordinarily, where an application for domestic protection is made and where it is coupled with a guardianship application, mediation is inappropriate. Mediation could be directed if the applicant agreed."[1249]

12.116 The Boshier report also recommended that: "cases involving actual sexual abuse allegations should not be referred to the Family Conciliation Service,[1250] at least until the allegations are properly investigated and only then with the parties agreement and judge' s review of any agreement reached."[1251] **We recommend that guidelines for cases of domestic violence and child sexual abuse should be established to screen cases for family mediation on a similar basis to the Australian and New Zealand guidelines.**

Evaluation

12.117 An evaluation of the pilot project would be essential by independent researchers who would be allowed access to case files at the court and the agencies. All records should be computerized with compatible software to facilitate and exchange information for research purposes. Benjamin and Irving expressed some concern that when funding for research relies on policy makers, the level of funding tends to be directly related to the proportion of cases in which agreement is reached. Success is measured by the number of cases in which mediation leads to an agreed outcome. Such an approach is misleading, however, as success should not be defined only in terms of agreement rates, as research shows that even those who fail to reach agreement still gain some satisfaction from the process.[1252] **We recommend that the pilot project on court annexed family mediation should be independently evaluated.**

Community mediation

12.118 The Social Welfare Department provides family services through 42 family service centres and there are at least 23 such centres in the non-government sector. There are 19 family activity resource centres within existing community centres. They are an initial contact point for families. The family service centres and family activity resource centres should publicise the availability of mediation services. Some family service centres (in both sectors) should be designated to provide mediation services to assist the resolution of family conflict before approaches are made to court and the conflict has become entrenched. Until mediation becomes well known it may be more appropriate to attach it to these centres which already provide counselling to families, who can then be a source of referral.

1249 Paragraph 11.5.4, *supra*.

1250 That report had recommended a separate and distinct Family Conciliation Service working alongside the judicial branch of the Family Court.

1251 Paragraph 12.5.2 *ibid*.

1252 See chapter 7 *supra*.

12.119 When a family relationship is in crisis the legal system can be used, as it is perceived to be either the only service or the most appropriate. Therefore, more publicity and education of the public is needed to encourage families to seek assistance from local family service centres at an early stage of conflict, or when problems are first encountered. These local centres would be staffed, *inter alia*, with professionally qualified mediators who would not provide counselling services. This would assist the resolution of family conflict before approaches are made to court.

12.120 We recommend that community based family mediation services should be available to the public and that there be more publicity and education to encourage early referral to such services.

Approving community mediation

12.121 The Australian Family Law Reform Act 1995 provided a mechanism for community based counselling and mediation organisations to become approved organizations under the Family Law Act 1975. Section 13E places a duty upon the minister to publish a list of approved organizations.

12.122 We recommend legislative provisions similar to the provisions in the Australian Family Law Reform Act 1995 which provided a mechanism for community based counselling and mediation organisations to become approved organizations. We recommend that a similar scheme be established in Hong Kong with funding provided by government to approved organisations. The government would work in partnership with such organisations as regards the quality of the service, continuing supervision and training of the mediators and other relevant matters.

Child' s voice in the mediation process

12.123 Henaghan noted in New Zealand that the majority of custody, access and guardianship disputes were resolved by counselling and mediation and yet there is no legal requirement for the child' s views to be taken into account in those processes.[1253] However, the Boshier report recommended:

> *"that a new category of referral be introduced for parties engaged in mediation in the Family Conciliation Service, where the child' s ... wishes re(sic) custody and access are in question, and it is*

[1253] "The 1989 United Nations Convention on the Rights of the Child", "Rights and Responsibilities", Papers from the International Year of the Family, Symposium on Rights and Responsibilities of the Family, Wellington, October 1994, 32, 36.

inappropriate for the Mediator to seek this information him/ herself".[1254]

12.124 This can be done directly by the mediator interviewing the child, or indirectly by another worker interviewing the child. There are special protocols that need to be drawn up as to the appropriateness of interviewing the child, and in what circumstances.[1255] Kelly outlined the goals of giving attention to the child's voice as:

1254 *Supra* at paragraph 8.7.2.

1255 Kelly, "The Voice of Children in the Mediation Process", notes from a Pre-Conference Workshop of the Second International Mediation Conference, Adelaide, January 1996.

1. Bringing the child into focus for family decision-making,
2. obtaining input from the child relevant to parental decisions,
3. providing impartial clarification and education for the child as needed, and
4. providing feedback to parents as the voice of the child.

12.125 We have noted the mechanisms for listening to the views of the child in the litigation process. Section 11(7) of the Children (Scotland) Act 1995 provided that the court:

> *"taking account of the child's age and maturity, shall so far as practicable*
>
> *(i) give him an opportunity to indicate whether he wishes to express his views;*
>
> *(ii) if he does so wish, give him an opportunity to express them; and*
>
> *(iii) have regard to such views as he may express".*[1256]

12.126 We recommend the adoption of a provision on the lines of an amended section 11(7) of the Children (Scotland) Act 1995 to provide a mechanism for considering the children's views in the mediation process.[1257] **We also recommend that consideration be given to what mechanisms are needed to determine the child's views so that these can be brought to the mediator's attention.**

Legal aid and mediation

12.127 We note that the English Family Law Act 1996 provides statutory authority for their Legal Aid Board to provide mediation services.[1258] It also provides that legal aid for representation will not be granted unless the person has attended a meeting with a mediator to determine the suitability of mediation. We suggest that legal aid for family mediation should be provided in Hong Kong as it would promote early settlement and has potential savings for that large part of the budget for the Legal Aid Department which is spent on family disputes.[1259] The Legal Aid Department should draw up guidelines for their staff, both professional and otherwise, for improving the referral of clients to mediation services. This would also include encouraging the private solicitors on the Department's panel to refer clients to those services. Indeed, the 1991 *Evaluative Research Report on the Marriage Mediation Counselling Project of the Hong Kong Catholic Marriage Advisory Council* (HKCMAC) reported that 56% of the private solicitors briefed by the department who were interviewed supported a mediation service for cases involving children.

1256 Section 11(7) of the Children (Scotland) Act 1995.

1257 See Annex 1 *infra*.

1258 See chapter 8 *supra*.

1259 41.2% of the civil legal aid certificates granted in 1997 were for matrimonial cases. Out of a budget of HK$245 million for civil cases, 31% went on matrimonial cases.

12.128 We recommend that there should be statutory provision for legal aid to be made available for mediation of guardianship, custody and access disputes. We further recommend that, once that legislation is enacted, the Legal Aid Department should establish a proper scheme for the funding of family mediation which will include education, publicity and screening of potential cases.

Privilege and confidentiality

12.129 The term "privilege" is used in the sense that a person has the right in certain circumstances to withhold information from a court. The term "confidentiality" is used in the sense that a communication or information is recognised in law as being a ground for claiming privilege before the court. Confidentiality is essential in mediation to protect the integrity of the process, the parties' interests and to encourage settlement through full disclosure. The Code of Practice adopted by the Mediation Group, *Guidelines for Professional Practice of Family Mediators*, imposes an obligation of confidentiality on the mediator to protect the information revealed by parties in the mediation process, except in certain defined circumstances.[1260] It also indicates that the mediator will claim privilege if he or she is summonsed to attend court.

12.130 The Law Commission of England and Wales recommended a statutory privilege should be conferred on statements made during conciliation procedures. Statements made which indicate a risk of harm to a child would be privileged but not confidential.[1261] The Civil Evidence (Family Mediation) (Scotland) Act 1995 provides for the inadmissibility of evidence as to what occurred at a family mediation conducted by accredited family mediators.[1262]

12.131 Various countries provide in primary or subsidiary legislation or Practice Directions for privilege for settlement or conciliation conferences.[1263] There is also a common law privilege based on the public interest in the stability of marriage.[1264] The Hong Kong Court of Appeal held in *W v W*[1265] that the evidence given by a psychologist as a mediator and conciliator about the relationship was privileged.[1266]

1260 This is where the information discloses an actual or potential threat to human life or safety.

1261 *Family Law, Grounds of Divorce,* at paragraph 5.29 to 5.48. (1990: Law Com No.192).

1262 It implemented a Scottish Law Commission report, *Report on Evidence: Protection of Family Mediation,* Scot Law Com (1992: No.136).

1263 Section 18 of the New Zealand Family Proceedings Act 1980, section 19N of the Australian Family Law Act 1975 and Order 24(1)(8) of its Family Law Rules provide privilege for conciliation conferences. See the English *Practice Direction (Family Division: Conciliation Procedure)* [1982] 1 WLR 1420.

1264 Sir Bingham in the case of *In re D (Minors)* [1993] 2 WLR 721 at 726.

1265 [1994] 1 HKC 430.

1266 This was in reliance on *In re D (minors)* [1993]2 WLR 721.

12.132 There are precedents in Hong Kong for statutory privilege. Part II of the Labour Relations Ordinance (Cap 55) provides for conciliation to resolve employment disputes. If the dispute is not settled, a conciliation officer shall make a report to the Commissioner, setting out the facts agreed between the parties and those that appear to be in dispute.[1267] The Commissioner can then refer the dispute to a special conciliation officer who is a senior officer of the labour relations division. Section 9 provides privilege to the communications:

> *"anything communicated to a conciliation officer or special conciliation officer in connection with the performance of his functions under this ordinance shall not be admissible in evidence in any proceedings before an arbitration tribunal or board of inquiry, except with the consent of the person who communicated it to the conciliation officer or special conciliation officer".*

12.133 Section 80(6) of the Disability Discrimination Ordinance (Cap 487) provides that:

> *"Evidence of anything said or done by any person in the course of conciliation under this section (including anything said or done at any conference held for the purposes of such conciliation) is not admissible in evidence in any proceedings under this Ordinance except with the consent of that person."*[1268]

12.134 For the removal of any doubt, particularly if a court annexed mediation scheme is established, we recommend a statutory provision giving privilege to all qualified family mediators, similar to that provided in the Civil Evidence (Family Mediation) (Scotland) Act 1995.[1269]

Immunity from liability

12.135 Many Australian statutes provide immunity and protection from civil liability to mediators operating in court annexed mediation schemes or government agencies. The justification for providing this is that it may hinder the development of mediation if a mediator could be sued for negligence.[1270] It is also assumed that mediators attached to a court or approved organisation comply with certain standards of quality and accountability which reduce the chance that they will be sued. Section 19M of the Australian Family Law Act 1975 provides:

1267 Section 4.

1268 This is similar to Section 84(6) of the Sex Discrimination Ordinance (Cap 480).

1269 In Ontario, Newfoundland, the Yukon, Quebec and Saskatchewan, legislation protects the confidentiality of disclosures made during mediation by a court-appointed mediator from admission in evidence without the consent of the parties.

1270 Boulle, *Mediation: Principles, Process, Practice* (1996) 254.

"A family and child mediator,…has, in performing the functions of such a mediator…, the same protection and immunity as a Judge of the Family Court has in performing the functions of such a Judge".

12.136 We recommend that a provision granting immunity on similar lines to section 19M of the Australian Family Law Act 1975 should be introduced to protect qualified family mediators.

Legal advice

12.137 Under Order 25A, rule 12, of the Australian Family Law Act Rules, the mediator is required to advise the parties that they should obtain legal advice as to their rights, duties and obligations, at the commencement of mediation, and at any other time, if the mediator considers it appropriate, and at the conclusion of mediation and before any agreement become legally binding. This provision would be reassuring to lawyers, judges and clients. We also note that the English Family Law Act 1996 makes provision for mediators to be bound by a code of practice which includes a provision that each party is informed about the availability of independent legal advice.[1271] **We recommend that a provision on the lines of Order 25A, rule 12 of the Australian Family Law Rules should be adopted.**

Enforcement of mediation agreements

12.138 Concern has been expressed by lawyers about parties entering into mediation agreements without legal advice. The Court of Appeal in *W v W*[1272] confirmed that it would normally give effect to an agreement fairly arrived at which had the benefit of competent legal advice, unless there were substantial grounds for concluding that injustice had been done.

12.139 Parties are strongly encouraged to obtain independent legal advice so that they do not run the risk of an application by one of them to set aside the mediation agreement, or have difficulty enforcing it. The Law Society suggested that parties who reach a mediation agreement, without the benefit of independent legal advice, risk having the court set it aside unless there were amendments to section 14 of the Matrimonial Proceedings and Property Ordinance (Cap 192).[1273] Section 14 provides that a provision in a maintenance agreement restricting the right to apply to a court for an order concerning financial arrangements is void. In fact, section 15 gives the court power to alter the maintenance agreement. We take the view that care needs to be taken in the drafting of mediation agreements concerning financial arrangements so that it does not appear that the jurisdiction

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1271 Section 27 of that Act, inserting a provision into Section 13B(7)(d) of the Legal Aid Act 1988.

1272 [1994] 1 HKC430. See chapter 2 *supra*.

1273 This was in a submission to the Hong Kong International Arbitration Centre when it proposed establishing a family mediation service in 1992. See "Family mediation proposed", The New Gazette, July 1992.

of the court is being ousted. We do not see the need to amend section 14. We have already recommended that parties should be encouraged to obtain independent legal advice before completing a mediation agreement. **We do not see the need to amend section 14 of the Matrimonial Proceedings and Property Ordinance**.

Arrangements for children

12.140 We considered that it was necessary to set out how mediation agreements or parenting plans would fit into the existing court process. A divorce petition and a statement as to the arrangement for the children[1274] which are filed in the court are subject to the scrutiny of the judge to ensure compliance with section 18 of the Matrimonial Proceedings and Property Ordinance (Cap 192).[1275] A decree absolute cannot be made without the court being satisfied of these arrangements.

12.141 The court would look at the mediation agreement or parenting plan and the statement as to the arrangements of the children. The procedure would be similar to dealing with a consent order or decree, and in fact the mediation agreement may well be attached to a draft consent order. The parties would attend the court and the judge would ask them questions if he was not happy with the arrangements. The judge has a discretion to refuse to agree to the arrangements. This is reassuring to those who are concerned that parties may enter into arrangements in mediation or into parenting plans that do not meet the best interests of the children.

12.142 We recommend that rules of court facilitate mediation agreements being converted into consent court orders. This should assist both compliance with the terms of the agreement, and its enforcement in the event of the arrangements breaking down.

Parenting plans

12.143 In Washington State, a standard parenting plan form must be completed dealing with parental responsibility for the child's school year, holidays, birthdays and other major events.[1276] Decision making in the areas of education, religion and medical decisions must be outlined. In addition, parents must indicate which choice of dispute resolution they wish to opt for if there are future conflicts. This includes court, mediation and counselling.

12.144 Section 63C(2) of the Australian Family Law Act 1975, as inserted by the 1995 amendments, provides that a parenting plan may deal with residence, contact, and maintenance of a child and any other aspect of parental responsibility for a child. These detailed plans are specifically tailored to the needs of a particular family and can then be registered with the court. This is a preferable form of dispute resolution to the traditional order which gives custody to the mother with a vague "reasonable access" clause in favour

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1274 Form 2B as provided for in rule 9(3) of the Matrimonial Causes Rules.

1275 We have considered this provision *supra*.

1276 Tompkins in "Parenting Plans - A Concept Whose Time Has Come" Family and Conciliation Courts Review, Vol. 33. no.3, (July 1995), 286, 296.

of the father, even if the order is by consent. The parenting plans can be drawn up by a mediator, counsellor, social welfare officer[1277] or solicitor.

12.145 In Singapore, the Women's Charter (Parenting Plan) Rules 1997 (Cap 353) came into operation on 1 May 1997. Before a petition for divorce is filed, the parties "shall try to agree on the arrangements for the welfare of every dependent child …and to enter into an agreed parenting plan."[1278] If the parties are unable to agree on the arrangements, they may draw up a parenting plan with the advice and assistance of persons who are trained in matters relating to child welfare. At the time of the filing of the petition, the parenting plan is also filed. If the petitioner is unable to agree a plan with the respondent, a proposed parenting plan is filed by the petitioner.[1279] The court has the discretion to adopt the whole or part of the parenting plan.[1280] A standard parenting plan is set out in the schedule to the rules.

12.146 The shift away from parental rights, adversarial processes and terms to parental responsibility and more humanistic processes such as parenting plans should be encouraged in Hong Kong for the best interests of the child.

12.147 We recommend the adoption of a provision for parenting plans (which could be registered in the Family Court) similar to the provisions of the Australian Family Law Reform Act 1995. A section 18 declaration under the Matrimonial Proceedings and Property Ordinance (Cap 192) would still be made which could have the parenting plan attached. Parenting plans should be encouraged, and there should be a grace period when they would be voluntary. They should only become mandatory at a later stage to ensure their use on a more extensive basis.

1277 In Australia the parties must have obtained independent legal advice and the solicitor must sign a statement to that effect, or have received assistance from a family and child counsellor, who would be a similar role to our social welfare officer.

1278 Rule 3(1) of the Family Law Rules.

1279 *Ibid* at rule 4.

1280 *Ibid* at rule 6.

Part III - Child Abduction

Chapter 13

Child Abduction Law

13.1 Part III of the Consultation Paper focuses on the unlawful removal of a child by a parent from the jurisdiction of Hong Kong to another jurisdiction which is a signatory of the Hague *Convention on the Civil Aspects of International Child Abduction.* Part A will deal with this Convention. Part B outlines the current local criminal and civil law on abduction and removal from Hong Kong. Part C sets out some comparative reforms of the criminal and civil law on abduction.

Part A - Hague Convention

13.2 The Hague Conference on Private International Law adopted the *Convention on the Civil Aspects of International Child Abduction* ("the Hague Convention") in 1980. It had been on the agenda as a result of a Canadian initiative.[1281] At least 40 countries have become parties to the Hague Convention,[1282] including Australia, Canada, New Zealand, the United Kingdom and the United States.

13.3 The Child Abduction and Custody Ordinance (Cap 512) was enacted in May 1997 to implement the Hague Convention in Hong Kong. The Convention was extended to Hong Kong by the United Kingdom in June 1997. An agreement had been reached in the Sino-British Joint Liaison Group that the Convention would be extended to Hong Kong and also would continue to apply after resumption of the exercise of sovereignty by the People's Republic of China.

13.4 The Child Abduction and Custody (Parties to Convention) Order, made by the Chief Executive pursuant to section 4, came into operation on 16 January 1998.[1283] This lists the countries and territories that are contracting states to the Hague Convention. The order specified the 1 September 1997 as the date when the Hague Convention would come into force as between the Hong Kong Special Administrative Region (HKSAR) and the states and territories listed there. The Rules of the Supreme Court (Amendment) Rules 1998 [1284] incorporate the procedures for the disposal of cases under the Hague Convention in the Court of First Instance of the High Court.

1281 McClean, "Migratory divorce in a mobile society - child stealing, forum shopping and the child's interests", Conference Papers, 7th Commonwealth Conference, 18-23 September 1983, Hong Kong.

1282 McClean, "Progress in dealing with International Child Abduction", 18th meeting of Commonwealth Law Ministers, Mauritius, 15-19 November 1993.

1283 L.N. No. 36 of 1998.

1284 These were gazetted on 20 February 1998, at L.N. 119 of 1998.

Custody rights

13.5 The Hague Convention aims to ensure that a child that has been abducted to a contracting state will be returned to the country of its habitual residence. The removal or retention of the child is wrongful where it is in breach of custody rights arising in the other contracting state, by operation of law or by reason of an agreement.[1285]

13.6 It is important to note that the rights of custody are not limited to the parent with physical custody. It includes the right of a parent who does not have custody, to give or refuse consent to the removal of the child from the jurisdiction.[1286] So, for example, if there is a custody order in favour of the mother and it includes an order not to remove the child from the jurisdiction of habitual residence without the consent of the father or the court, then if this order is breached by the mother, the father can use the Hague Convention to seek the return of the child. Rights of access include the right to take a child for a limited period of time to a place other than the child' s habitual residence.[1287]

13.7 Indeed, the custody rights do not exclusively belong to a parent. They can be attributed to an institution, or any body, either jointly or alone.[1288] The Hague Convention is not limited to wrongful removal. It extends to wrongful retention.[1289] This is where, for example, a child is not returned to the custodial parent by the parent exercising rights of access.

Central Authority

13.8 A contracting state must designate a Central Authority for the purposes of the Hague Convention.[1290] In Hong Kong, this is the Secretary for Justice.[1291] This authority has the duty to take or cause to be taken all appropriate measures to obtain the voluntary return of the child, where the child is taken to that state.[1292] If it fails to reach an amicable settlement for the return of the child, it must initiate or facilitate proceedings being issued to obtain an order for the return of the child.[1293] Article 11 gives the right to the Central Authority or the applicant to request reasons for delay if the judicial or administrative authority has not reached a decision within 6 weeks.

13.9 Article 21 puts an obligation on the Central Authority to promote "the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise

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1285 Article 3 of the Convention. An example would be a separation or other similar agreement.

1286 This is the effect of Article 5.

1287 Article 5(b).

1288 This would be where there was a care or protection order in favour of the equivalent to the Director of Social Welfare.

1289 Article 3.

1290 Article 6.

1291 Section 5 designates the Attorney General but his functions are deemed to have been replaced by the Secretary for Justice after 1 July 1997. In fact, the functions are discharged by the Civil Litigation Unit of the Civil Division.

1292 Article 10.

1293 Article 7(f).

of those rights may be subject". The Central Authority also has a duty to take such steps to remove, as far as possible, all obstacles to the exercise of such rights. An application for access may be presented to the Central Authority in the same way as an application for the return of a child. The Hague Convention does not prevent an application directly to the court rather than to the Central Authority.[1294]

Refusal to return child

13.10 There are a number of grounds for refusal to return the child:

(1) the person claiming return was not actually exercising their custody rights, or had consented to or subsequently acquiesced in the removal or retention.[1295] This can be actively or passively. The latter occurs when there is such a lapse of time as to amount to acquiescence,

(2) there is a grave risk that the return of the child would expose him to physical or psychological harm or otherwise place the child in an intolerable situation,[1296] and

(3) if the child objects to being returned and has reached an age and a degree of maturity at which it is appropriate to take account of his views.[1297]

13.11 An analysis of practice for the Special Commission of the Hague Conference reported:

> *"allegations of misbehaviour on the part of the parent left behind, such as alcoholism, cruel behaviour or drug use, have been swept aside and left to be considered by the court in the state of the child's habitual residence after his or her return. This implies substantial trust in the process of the courts in that country and in the co-operation between the central authorities of the two countries, who can also help to ensure the child's safety during and following the return".*[1298]

13.12 McClean stated that the third ground for refusal is consistent with article 12 of the *United Nations Convention on the Rights of the Child*.[1299] That Convention does not apply to children over the age of 16 years.[1300] If an application for the return of a child is made after one year, return may be refused on the grounds that the child is now settled in

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1294 Article 29.

1295 Article 13(a).

1296 Article 13(b).

1297 Article 13.

1298 McClean *ibid* at paragraph 10 of the 1993 lecture.

1299 Article 12 provides "State parties shall assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the children."

1300 Article 4.

his new environment.[1301] The court orders the return of the child to the country concerned, not to the custody of the applicant.[1302]

13.13 Article 20 of the Hague Convention provides that a child's return can be refused if it would not be permitted by the fundamental principles of the requested state relating to the protection of fundamental freedoms and the protection of human rights. This article is not incorporated into the Child Abduction and Custody Ordinance.[1303]

Operation of the convention

13.14 A Special Commission reviewed the operation of the Hague Convention in January 1993. The Commonwealth Secretariat and 44 countries were represented. Even though the Hague Convention was working well, delay in legal proceedings was causing problems. The absence of legal aid, together with high legal fees, caused further difficulty.[1304]

Legal aid

13.15 Article 7 provides that Central Authorities shall co-operate with each other to secure the prompt return of the child. Article 7(g) provides that Central Authorities shall take all appropriate measures "where the circumstances so require, to provide or facilitate ... legal aid and advice, including the participation of legal counsel and advisers". Article 25 provides that persons from contracting states shall be entitled to legal aid and advice in any other contracting state on the same conditions as if they themselves were nationals of and habitually resident in that state. However, Hong Kong has entered a reservation, as it is entitled to do under Article 26.3,[1305] so that the costs are not obliged to be borne by the Secretary for Justice[1306] "or any other authority in Hong Kong except so far as they fall to be so borne by virtue of the grant of legal aid under the Legal Aid Ordinance (Cap 91)".[1307]

13.16 A previous review meeting in 1989 encouraged states:

> *"contemplating becoming parties to the convention ... to organise their legal and procedural structures in such a way as to ensure the effective operation of the convention and to give their central authorities*

1301 Article 12.

1302 *Re A (A Minor)(abduction)* [1988] 1 FLR 365.

1303 Thus, Article 20 cannot be relied on by the Central Authority or the courts as a ground for refusing to return a child who has been unlawfully taken to Hong Kong.

1304 McClean, (1993), *ibid* at paragraph 14. The third Special Commission (see *infra*) noted that the United States has developed an International Child Abduction Attorney Network (ICAAN) which offers *pro bono* representation for applications under the convention there.

1305 Section 13 of the Ordinance.

1306 It is usually the Central Authority that represents the innocent party in the proceedings though Article 29 of the Convention allows any person, institution or body to apply directly to court.

1307 This would mean that the Secretary for Justice is entitled to claim the costs of representing the applicant from him unless he fell within the means and merits test of the Legal Aid Scheme.

adequate powers to play a dynamic role, as well as the qualified personnel and resources, including modern means of communication, needed in order expeditiously to handle requests for return of children or for access."[1308]

13.17 McClean suggested that the very existence of the Hague Convention increases the number of voluntary returns.[1309] For example, the United States reported that in the first three years, there was a significant rate of voluntary returns equal to almost 60% of the number of court ordered returns (for incoming applications) and nearly 33% of the court ordered returns (for outgoing applications). The United States as at 1 July 1992 had 10 cases from Hong Kong. The Hague Convention has been the model for the *Inter-American Convention on the International Return of Children*, signed at Montevideo on 15 July 1989.

13.18 A balance has to be struck between the principle of giving respect to the comity of nations, by enforcing custody orders or rights, and the local court' s views of the welfare of the child. Article 19 provide that a decision relating to the return of the child is not to be taken as a determination on the merits of any custody issue.

13.19 There has been a failure in the past by the common law courts to develop a consistent approach to the handling of international child abduction cases. One of the reasons for this is that such cases are "fact-sensitive". It is difficult to elicit principles from these cases.[1310] The Convention only applies to wrongful removal or retention occurring after its entry into force in a contracting state. Thus, wrongful removals or retentions occurring prior to 1 September 1997 do not come within the protection of the Hague Convention.

13.20 McClean found that there are some qualifications to the primacy of the welfare principle:

(1) If two parents who are separated or divorced live in different continents, then the reality is that the "custody decision must often mean complete and final loss of the child to one of the parties, for access may be impracticable and wholly unsatisfactory",[1311]

(2) the welfare principle is not some international standard but instead a set of values of a particular legal system. Appealing to the welfare principle may encourage a court to deal with the merits of the case instead of accepting the foreign court' s decision,[1312] and

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1308 *Ibid* at paragraph 15.

1309 1993 article.

1310 McClean, "International Abduction of Children - towards an effective legal response", Conference Papers of the Ninth Commonwealth Law Conference, (1990) at 301.

1311 *Ibid* at 302 (1990).

1312 *Idem.*

(3) there is a dilemma for the court. If the court is going to fully examine all the factors contained in the welfare principle,[1313] it will have to gather evidence from the country of habitual residence, whose social work agencies may not have the necessary resources to investigate. Thus there will be delay which may prejudice the welfare of the child.

13.21 There was a third meeting of the Special Commission in March 1997 to review the operation of the Hague Convention. The Commission noted that the majority of the cases under the Hague Convention were children removed by their mothers from their own country of habitual residence. This was based on allegations of hardship and domestic violence by the father of the child. In response, the contracting states and their Central Authorities expressed a general willingness to accept responsibility for the safety of children returned under the convention and "to increase cooperation between courts and Central Authorities to ensure the protection of returning children and parents".[1314]

13.22 The Commission noted the increase in shared arrangements for children so that there may be no difference, in reality, between a joint custody order and liberal access arrangements. Yet the former would lead to a remedy for breach of rights of custody and the latter would not, except as a breach of access.[1315]

The European Convention

13.23 The *European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children*, more commonly called the Luxembourg Convention, was prepared under the auspices of the Council of Europe on 20 May 1980. Custody decisions, if enforceable in the state of origin, are enforceable in other contracting states. In certain cases this applies to decisions given after the removal of the child.[1316]

Part B - Hong Kong law on abduction and removal

Introduction

13.24 It is necessary to consider the local criminal and civil law on abduction and removal from Hong Kong to decide whether any proposals for reform are needed to give sufficient support to the operation of the *Hague Convention on the Civil Aspects of Child Abduction*. Indeed, the Third Special Commission considered that accession to the Hague Convention was an ideal time for states "to look at their enforcement and appeal

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1313 McClean refers to the list in section 3 of the Children Act 1989.

1314 *Report on the third meeting of the Special Commission to discuss the operation of the Hague Convention on the Civil Aspects of International Child Abduction*, Hague, 17 - 21 March 1997.

1315 See Article 21 *supra*.

1316 Articles 7 and 12. The latter provides for a decision which declares the removal to be unlawful.

procedures, which had to be rapid and reliable if the Convention was to be regarded as providing an effective remedy".

Criminal Law

Kidnapping

13.25 Theoretically, at common law, a parent can be found guilty of kidnapping his own child. The House of Lords, in *R v D*[1317], held that:

> *"the common law offence of kidnapping in relation to children under 14 remained unaffected by the statutory offence of child stealing so that where the ingredients of the offence, namely the taking or carrying away of one person by another by force or fraud without the consent of that other person and without lawful excuse, were proved, an offence was committed even though the victim was a child under the age of 14."*

13.26 However, the House of Lords did not want to encourage prosecution for this offence:

> *"As a matter of general policy, it was desirable that parents who snatched their own children in defiance of a court order should be dealt with in civil proceedings for contempt of court, save in exceptional circumstances where the parent's conduct was so bad that an ordinary right-thinking person would unhesitatingly regard it as conduct of a criminal nature."*

13.27 The sub-committee do not think that prosecuting parents for the common law offence of kidnapping would be useful, except in the most blatant cases. There would also be policy considerations if a prosecution was initiated against a person temporarily staying in Hong Kong, where the forum of dispute between the parents should preferably take place in their country of habitual residence.

Child stealing

13.28 If a child, under 14 years, is taken away from his parent or guardian, a person can be charged with child stealing, contrary to section 56 of the Offences against the Person Act 1861. This has been incorporated into Hong Kong law by section 43 of the Offences against the Person Ordinance (Cap 212). As it is a felony, a police officer has the power to arrest any person whom he suspects of committing the offence.

[1317] [1984] 1 AC 778.

13.29 The English Court of Appeal explained in *R v D*[1318] that Parliament had intended in 1861 that neither a father nor a mother should be prosecuted for child stealing, as it had inserted a proviso giving a defence to a person claiming *bona fide* possession of the child. In *R v D* there was a pre-existing order restricting the father' s rights. The House of Lords took the view that the offence of child stealing might be committed even where there was no court order. However, a prosecution for the offence of child stealing may be difficult to sustain as the parent would raise the defence of a *bona fide* claim to the child.

13.30 Section 126 of the Crimes Ordinance (Cap 200) provides for an offence of abduction of a girl under 16 against the will of her parent or guardian. This offence was probably designed to stop females being kidnapped and forced into prostitution. So, prosecution for either this offence or child stealing would not be useful ways to deal with cases of child abduction arising from parental disputes.

False imprisonment

13.31 A prosecution for false imprisonment was also successfully brought in the *R v D* case. This offence is committed when a person unlawfully and intentionally or recklessly restrains the freedom of movement of another from a particular place. It is certainly possible to prosecute a parent, but if the child is voluntarily accompanying the abducting parent, though the removal was unlawful under the Hague Convention, there may be difficulties sustaining a prosecution.

Contempt of custody orders

13.32 The only remedy for breach of a custody, access or guardianship order is contempt of court. We have already dealt with these powers in chapter 2. Order 52 rule 6 of the Rules of the High Court provides for applications for committal in guardianship, custody or access to be dealt with in private.

13.33 Lord Denning, in *Danchevsky v Danchevsky,*[1319] enunciated the principle that if there was a reasonable alternative method of enforcing an order which did not involve prison, then that should be used. Contempt is only useful if the offender is still within the jurisdiction and the original order has been served prior to the application for committal. By the time this is done, he may have already left the jurisdiction with the child.

Powers to detain for contempt

13.34 It would seem that there is a common law power of arrest to enforce the order of committal which allows the officer to arrest and bring the offender to prison. Despite this, the English Court of Appeal, in *Re B (Child Abduction: Wardship: Power to detain),*[1320] stressed the lack of powers of the court to deal with child abduction cases in the absence of a finding of contempt.

1318 The court is entitled to look at such history as an aid to statutory interpretation.

1319 [1974] 2 All ER 561.

1320 [1994] 2 FLR 479.

13.35 A person must have had the original court order served on him prior to the application for committal for contempt. There does not seem to be a limit on the term of imprisonment that the District Court and the Court of First Instance may impose, though section 21A of the High Court Ordinance (Cap 4) provides for committal for a maximum of three months for enforcement of a civil claim for the payment of money. Any person who breaches an injunction may be committed for contempt. A person with knowledge of the injunction, who assists in its breach, is also guilty of contempt.[1321]

Powers of arrest

13.36 In Hong Kong it would seem that the police only have the power of arrest if the person has already been ordered to be committed for contempt. Otherwise, the police cannot stop or detain a person unless he acts in a suspicious manner and is suspected of having committed an offence, or has actually committed the offence.[1322]

13.37 The police have no power to enforce an injunction as it is a civil remedy. The only other possibility is that the police may have a power of arrest if a breach of the peace is committed when the *ex parte* order of the court, whether it is wardship or an injunction, is being served on the respondent.

Power to detain

13.38 The Immigration Department can only prevent a child being removed from Hong Kong when they have a copy of the order prohibiting removal in their hands. They cannot stop someone leaving Hong Kong if no order prohibiting removal has been made, provided he has a valid travel document. Presumably they use their powers under section 26 of the Immigration Ordinance (Cap 115) to detain the parent and child.[1323] However, this is not a general power to detain for inquiries. The judgment in *Re B (Child Abduction: Wardship: Power to detain)*[1324] made clear that the courts have no power to detain a parent so as to provide an incentive for someone under his control to reveal the whereabouts of children and compelling him, and his associates, to produce them.

1321 *Seaward v Paterson* [1897] 1 Ch 545.

1322 Section 54 of the Police Force Ordinance (Cap 232).

1323 This provides that if a chief immigration officer is satisfied that inquiry for the purposes of the ordinance, other than the provisions relating to deportation, is necessary, and that such person may abscond if not detained, then he may be detained for not more than 48 hours.

1324 [1994] 2 FLR 479.

Civil Law

Preventing removal from Hong Kong

13.39 A Hong Kong custody or access order normally provides that a child should not be removed from the jurisdiction unless the consent of the other parent has been obtained, or a written undertaking is given to bring the child back to the territory. Rule 61E of the District Court Civil Procedure (General) Rules (Cap 336) provides that an application for an injunction may be made *ex parte* to restrain a parent or any other person from removing a child from Hong Kong, or out of their custody, care or control.[1325] Rule 94 (2) of the Matrimonial Causes Rules (Cap 179) allows an application to the court to prevent removal:

> *"(2) A petitioner or respondent ... may apply at any time for an order prohibiting the removal of any child of the family under 18 out of Hong Kong or out of the custody, care or control of any person ... without the leave of the court except on such term as may be specified in the order...."*

Injunction

13.40 It has recently been held in *B v B*[1326] that the jurisdiction of the court in section 37(1) of the Supreme Court Act 1981[1327] was wide enough to allow for an order to be made, limited in duration, restraining an individual from leaving the jurisdiction and to make consequential orders for surrender of passports. This could also apply after judgment to enforce orders. This jurisdiction assisted in enforcing all the court's procedures leading to the disposal of proceedings and also after judgment. The difficulty with this judgment is that it is only a High Court decision and the Hong Kong courts could decide not to adopt a similar interpretation.

Wardship

13.41 In Hong Kong an order of wardship can be obtained from the Court of First Instance of the High Court. The power is contained in section 26 of the High Court Ordinance (Cap 4). Wardship can be used to prevent a child's removal from the jurisdiction of Hong Kong without the consent of the court.[1328] The advantage of wardship is that the child becomes a ward as from the making of the application, which occurs when

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1325 The rule applies to proceedings under the Separation and Maintenance Orders Ordinance (Cap 16) and the Guardianship of Minors Ordinance (Cap 13).

1326 [1997] 3 All ER 258, Family Division of the High Court.

1327 "The High Court may by order ... grant an injunction in all cases in which it appears to the court to be just and convenient to do so".

1328 It is a contempt of court to remove a ward from the jurisdiction of the court - *Re J* (1913) 29. T.L.R. 456.

the summons is issued to ward the child (section 26(2), but this ceases on the expiration of such period as is prescribed by rules of court).

Seek and find order

13.42 The English Court of Appeal, in *Re B (Child Abduction: Wardship: Power to detain),*[1329] stated that the seek and find order, supported by a bench warrant, was a useful method of bringing to court a person who was believed to have the child, or who knew of his whereabouts, and to be party to his removal or retention. The court was entitled to make the order under the inherent jurisdiction of the court.

Habeas Corpus

13.43 This order is obtained where it is alleged that a person is being unlawfully detained, and is usually designed for persons unlawfully detained by the police or in a prison. The Court of First Instance can order on an *ex parte* application that the body of the person be produced and the grounds for his detention be certified by the person detaining him. If the person to whom the order is directed fails to comply or appear before the court, then the court may order his arrest and the police will then bring him to court.

13.44 Again, the problem is that the police have no role until the person fails to obey the civil order. The Hong Kong power is referred to in section 22A of the High Court Ordinance (Cap 4). It would be preferable if this remedy was not used to bring a parent and child before the court, merely because it provides some powers of arrest.

Protection of Children and Juveniles Ordinance

13.45 This Ordinance provides civil and criminal remedies for the protection of children. Under section 26 of the Protection of Children and Juveniles Ordinance (Cap. 213), it is an offence, punishable with two years imprisonment, for any person to take a child or juvenile unlawfully out of the possession of, and against the will of, the parent or guardian.[1330]

13.46 Even though section 35 of the Protection of Children and Juveniles Ordinance deals with protecting children and juveniles from moral or physical danger, it gives power to the Director of Social Welfare to make an order regarding control or custody where the child is about to be taken out of Hong Kong, by force, threats, false pretences and other forms of coercion. Historically, this section was designed to prevent prostitution but it does give power to the Director to intervene in an emergency, if a child was being kidnapped, and the police were hampered by their lack of powers.

13.47 Section 44(1) gives a power of entry and search to the Director "for the purpose of ascertaining whether there is therein any child or juvenile who is or may be liable

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1329 [1994] 2 FLR 479.

1330 This section originated in section 55 of the United Kingdom Offences against the Person Act 1861.

to be dealt with under the provisions of this Ordinance". By the same section, the Director is empowered "to remove any such child to a place of refuge, a hospital or such other place as he may consider appropriate." He must first have secured a warrant from a magistrate. Within 48 hours the child must be brought before the Juvenile court under section 34(1) or 34C.[1331] This may be useful where a custodial parent is trying to trace a child who is suspected to have been abducted by the non-custodial parent. The difficulty is that the Director cannot exercise these powers unless he would have grounds for taking care and protection proceedings or other proceedings.

Part C - Comparative law

United Kingdom

Child Abduction Act 1984

13.48 Since the existing criminal law was unsatisfactory in providing a remedy for the unlawful removal of a child, the Child Abduction Act 1984 was designed to fill that gap. Under section 1 it is an offence for a person connected with the child to take or send a child under the age of 16 out of the United Kingdom without appropriate consent. Because it is an offence to attempt to take a child out of the UK, the police can arrest anyone they reasonably suspect of the attempt without a warrant.[1332]

13.49 Subject to limited defences under section 1(5), the consent is required of each person who is the child's mother, father (if he has parental responsibility for the child), guardian, and any person in whose favour a residence order[1333] is in force, or who has custody of the child. The court can grant leave by virtue of the Children Act 1989. The more common consent will be that of the other parent. Even if there is no court order, the Act prohibits removal if the parent does not have the necessary consents.

13.50 The defences provided for are that the offender believed the other person consented, or would consent if he was aware of all the relevant circumstances, or that he has taken all reasonable steps to communicate with the other person but has been unable to communicate with him, or the other person has unreasonably refused his consent. The latter does not apply if there is a custody order in existence.

13.51 Section 13 of the Children Act 1989 provided that the consent of any other person who had parental responsibility was required only if the child was removed for longer than one month. However, no offence would be committed if the child is removed for up to one month by a person in whose favour there is a residence order, if they have not obtained the consent of the other parent who has parental responsibility. This was designed to allow

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1331 Section 44 (4A).

1332 According to Bromley and Lowe, *Bromley's Family Law* (8th ed, 1992) 484.

1333 See chapter 3.

parents to take their child on holiday without the necessity of going back to court if the other parent did not agree.

Prohibited steps order

13.52 The English courts can also order a prohibited steps order at any time in matrimonial proceedings under section 8(1) of the Children Act 1989.[1334] This is equivalent to an injunction prohibiting a person in whose favour a residence order is made from taking the child abroad, particularly in cases where abduction is feared.

13.53 Failure or refusal to return the child to the jurisdiction once this period has expired will constitute a wrongful retention of the child for the purpose of the Hague Convention. If such an order is in existence, then taking the child out of the jurisdiction for any period of time is an offence.[1335]

Passports

13.54 Section 37 of the Family Law Act 1986 provides that when there is a court order prohibiting removal of a child from the United Kingdom, the court may require any person to surrender any UK passport which has been issued to or contains particulars of the child. The Passport Agency provides procedures for lodging objections to the issue of passports for the child.

Power to order disclosure of whereabouts

13.55 Section 33 of the Family Law Act 1986[1336] provides that the court can order any person, who it has reason to believe may have relevant information on a child's whereabouts, to disclose it to the court where there is inadequate information as to the location of the child. A person is not excused from complying with the order by reason of the fact that to do so may incriminate him or his spouse of an offence, but any statement or admission made is not admissible against either of them in proceedings for any offence except perjury. The court has power to summon witnesses to appear before it to reveal the whereabouts, and if the witness refuses to answer, he is guilty of contempt and can be punished by fine or imprisonment.

13.56 The Family Proceedings Rules 1991 give the court power to order the whereabouts to be disclosed. The court can order any person who has information to attend and give evidence. If the child was made a ward of court, then a refusal to disclose the whereabouts would amount to a contempt of court.[1337]

1334 See chapter 3.

1335 Our proposal that section 8(1) be adopted for Hong Kong is considered in more depth in chapter 6, *supra*.

1336 As amended by Schedule 13, paragraphs 62 and 63 of the Children Act 1989.

1337 *Mustafa v Mustafa* (1967) The Times, 11 and 13 September.

13.57 It would seem that the power to order disclosure extends to solicitors who have confidential information of such whereabouts. There have been several English judgments ordering solicitors to disclose any information which might lead to the tracing of the child. In *Re B (Abduction: Disclosure),*[1338] the court ordered the father's solicitors to disclose the whereabouts of their client, and all documents in their possession, including those that might come into their possession in the future, relating to their client's whereabouts.

13.58 The court noted that a balance had to be struck between the duty owed by the solicitor to his client, a duty based on the welfare of the children and a duty to comply with a court order. A solicitor could not be ordered to lie to his client in order to find out where the children were. In any event, the information held by the solicitor would not be privileged as it would be overridden by the child's interests. Indeed, the current *Guide to the Professional Conduct of Solicitors in England and Wales* treats child abduction as a form of child abuse.[1339]

Recovery orders

13.59 Section 34 of the Family Law Act 1986 provides power to make an order for recovery of the child where a child has not been given up to the lawful custodian by the person who is in breach of a custody order. The police are authorised to take charge of the child and deliver him to the custodian. They also have authority to enter and search any premises where there is reason to believe the child may be found and to use such force as may be necessary to give effect to the order.[1340]

Scotland

13.60 The Scottish Law Commission reported in 1987, having had the opportunity of reviewing the Child Abduction Act 1984.[1341] They proposed an offence of taking or sending a child abroad in contravention of a court order.[1342] The Scottish Law Commission also recommended that the court should be able to make an order prohibiting removal of the child by any person in those instances where the court would have power to make a custody order.

13.61 They recommended that a police constable would have the power to arrest without warrant anyone whom he reasonably suspects of attempting to commit, committing or having committed the proposed offences.[1343] Section 7 of the Child Abduction Act 1984

1338 [1995] 1 FLR 774, CA.

1339 Annex 16B, *Guidance - confidentiality and privilege - child abuse and abduction*, (6th ed, 1993).

1340 Section 34(2).

1341 *Child Abduction,* (1987: Scot Law Com. No.102).

1342 *Ibid* at recommendation at 6.18.

1343 *Ibid* at 7.9.

already gave a power of arrest for an offence committed in Scotland of taking or sending a child out of the UK.

13.62 They also proposed an offence of taking or detaining a child from any person having lawful control. Excluded would be those acting with lawful authority or reasonable excuse.[1344] Those with lawful authority should include those with a right of custody and those with a right of access but only while acting within the scope of that right of access. We understand that their criminal law recommendations have not been implemented.

Ireland

Proposed reforms

13.63 In considering section 1 of the Child Abduction Act 1984, the Irish Law Reform Commission queried whether it was sufficient that a belief that the custodial parent would have consented should amount to a defence.[1345] This was especially so where the removing parent could have communicated with the custodial parent. They also expressed concern that the parent would be permitted to take a child out of the country even if he knows that the other parent would object. It was far too imprecise to have a defence that a person has unreasonably refused to consent. They accepted that having to get approval every time may be inconvenient for those living in border areas.

13.64 The Irish Law Reform Commission recommended that a precise definition of the offence should be formulated which, at the same time, does not place unrealistic restrictions on those having charge of children. They recommended a new offence which would be committed by anyone who takes or sends or keeps a child out of the jurisdiction, in defiance of a court order, or without the consent of each person who is a parent or guardian or to whom custody has been granted, unless the leave of the court has been obtained. They also suggested various defences similar to those in England. These particular recommendations have not been implemented.

Passport

13.65 The Irish Law Reform Commission also recommended that legislation should provide that a passport should not be issued without the consent of all legal guardians unless the other guardians have been notified or all reasonable efforts have been made to notify them. In those cases, the passport should only have a duration of one year. This recommendation was not implemented by the Child Abduction and Enforcement of Custody Orders Act 1991, which implemented the Hague Convention.

1344 *Ibid* at 4.30.

1345 Irish Law Reform Commission, *Report on the Hague Convention on the Civil Aspects of International Child Abduction and some related matters*, (No.12, 1985).

Irish Police Powers

Power to detain

13.66 Section 37 of the Child Abduction and Enforcement of Custody Orders Act 1991 gives power to the police to detain a child whom they reasonably suspect is about to be, or is being, removed from the State in breach of one of the following orders of a court in the State:

> *"(a) an order regarding the custody of, or right of access to, the child (whether or not such an order contains an order prohibiting the removal of the child from the jurisdiction without leave of the court) or any order relating to the child made by the court in the exercise of its jurisdiction relating to wardship of a child; and*
>
> *(b) a care order, an order made under section 12 (an interim order under the Hague Convention), or while proceedings for one of those orders are pending, or an application for one of those orders is about to be made."*

13.67 When the police detain the child, he must be returned to the custody of a person in favour of whom a court has made the order, unless the police have reasonable grounds for believing that that person will act in breach of such order, or, in a case where this does not apply, the police can deliver the child to the health board.[1346] The health board then have an obligation to bring the matter before the court to obtain orders concerning the child' s custody.

Power to order disclosure

13.68 Section 36 of the Irish Child Abduction and Enforcement of Custody Orders Act 1991 expanded on the power to order disclosure of whereabouts under section 33 of the UK Family Law Act 1986 by extending it to Convention cases.

Australia

13.69 Section 64(9) of the Family Law Act 1975 provides that where a custody order in respect of a child is in force, the court may issue a warrant which gives powers of entry, search and recovery of a child who has been abducted. Similar powers are given where an access order is in force. Thus the court has no power to issue a warrant unless it first determines the issue of custody or access.

[1346] Section 37(2) *ibid.*

13.70 Section 64A gives power to request information on the location of the child from the record of a government department provided a warrant has been issued. That section also allows the court to order a person to provide information to the Registrar. The court is not given power to order the production of actual records or information on the grounds of protection of privacy. This section does not apply only to children who are abducted in the formal sense, but includes children illegally removed from a party who is entitled to custody or access.

13.71 The Family Law Council report[1347] expressed concern about the use of *ex parte* warrants, especially where the parent had removed a child from the family home due to domestic violence. A parent who removes a child from the home because of violence and goes into hiding can be forced to reveal the whereabouts of the child. The Council suggested that the issues of privacy, restricted use of records, protection against violence and measures to protect information given to the court, all needed to be addressed in amending the Family Law Act provisions.

13.72 The Family Law Council referred to section 50 of the Children Act 1989 which gives power to the court to issue a recovery order. Any person who has parental responsibility for the child or the police can apply. The court gives a direction to a person to produce the child on request to any authorised person. This authorised person can then remove the child. Any person with information as to the child's whereabouts must disclose it if requested to do so. Section 50 also authorises search and entry of a premises to find the child. However, the report does not refer to the fact that section 50 only applies to children who are in care, or the subject of an emergency protection order, or in police protection.

13.73 The Family Law Council suggested that these provisions of the English Act were inadequate as they did not deal with the need to protect women against violent husbands or the issue of privacy of records kept by government agencies.[1348]

13.74 Instead, it proposed that there would be an application for a declaration that the applicant was a person with parental responsibility. Then, that person would seek a "location order" to have government agencies search their records to locate the address. The order would also give directions in relation to the short term care of the child until issues of residence and contact were resolved. The court could prohibit the abducting party from "moving on".[1349]

Location order

13.75 Section 67J(1) of the Family Law Reform Act 1975 defines a location order as an order of the court requiring a person to provide information on the child's

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1347 *The UK Children Act 1989*, (1994) at paragraph 75.

1348 Paragraph 79.

1349 This phrase is not explained in paragraph 81.

location.[1350] Section 67L provides that the child's best interests are the paramount consideration in making such an order. Section 67K sets out the persons who may apply for a location order:

> *"A location order in relation to a child may be applied for by:*
> *(a) a person who has a residence order in relation to the child; or*
> *(b) a person who has a contact order in relation to the child; or*
> *(c) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development; or*
> *(d) any other person concerned with the care, welfare or development of the child."*

13.76 The court can make a "Commonwealth information order" under section 67N to seek information on the child's location, which may be contained in government records.[1351] Subsection (4) provides that a location order stays in force for 12 months or such longer period as the court considers appropriate. The person to whom it applies must provide the information sought by the order as soon as practicable, or as soon as practicable after the person obtains it.[1352]

Recovery order

13.77 A recovery order is dealt with in Section 67Q. This requires the return of the child, grants stop and search powers to recover the child and delivers him to the appropriate person, and prohibits a person from removing a child. A recovery order also gives directions about the day-to-day care of the child until he is returned or delivered to another person. The persons who can apply for a recovery order are similar to those for a location order. The order can also authorise the arrest, without warrant, of a person who again removes or takes possession of a child.

Taking child overseas

13.78 Section 65Y deals with parental obligations if a residence order, contact order or care order has been made:

> *"(1) If a residence order, a contact order or a care order (the 'Part VII order') is in force, a person who was a party to the proceedings in which the order was made, or a person who is acting on behalf of, or at the request of, a party, must not, intentionally or recklessly, take or send, or attempt to take or*

1350 As inserted by the Family Law Reform Act 1995, which repealed the existing Part V11 of the 1975 Act.

1351 This is "commonwealth" in the sense of jurisdiction over States and Territories of Australia and not the wider Commonwealth.

1352 Subsection (5).

send, the child concerned from Australia to a place outside Australia except as permitted by subsection (2). Penalty: Imprisonment for 3 years; and

(2) Subsection (1) does not prohibit taking or sending, or attempting to take or send, the child from Australia to a place outside Australia if:

(a) it is done with the consent in writing (authenticated as prescribed) of each person in whose favour the Part VII order was made; or

(b) it is done in accordance with an order of a court made, under this Part or under a law of a State or Territory, at the time of, or after, the making of the Part VII order".

13.79 Section 65Z provides for similar obligations if proceedings for the making of residence order, contact order or care order are pending.

Amendments to comply with the Hague Convention

13.80 The Family Law Council recommended that, to comply with the *Hague Convention on the Civil Aspects of International Child Abduction*, there should be a deeming provision under which a "parenting order" would be regarded as a "custody" order for the purposes of child abductions.[1353] Section 42 of the Family Law Reform Act 1995 provides that, for the purposes of the Convention, each parent is regarded as having custody of the child; and a person who has a residence order in relation to a child should be regarded as having custody of the child. A person who, under a specific issues order, is responsible for the day-to-day care, welfare and development of a child should also be regarded as having custody of the child. A person who has a contact order should be regarded as having a right of access to the child.

Passport

13.81 Section 67ZD of the Australian Family Law Act 1975 now provides:

"If a court having jurisdiction under this part considers that there is a possibility that a child may be removed from Australia, it may order the passport of the child and of any other person concerned to be delivered up to the court upon such conditions as the court thinks appropriate."

Criminal law on abduction

[1353] *The UK Children Act 1989* (1994).

13.82 The Family Law Council have recently issued a Discussion Paper on the criminalisation of the law on parental abduction.[1354] If implemented, this would make it a criminal offence to remove a child even where there was no family law order in force. The Council note that countries which have criminal offences of child abduction can make use of Interpol and extradition laws to secure the return of the child. They also note that in cases of domestic abduction "the police are understandably reluctant to assist in circumstances where the events do not constitute a criminal offence."[1355]

13.83 On the other hand, making parental child abduction a criminal offence could be seen as an undue intrusion into the domain of the family, and the consequences of a criminal conviction can be severe.[1356] Exceptions and defences would have to be provided for, for example, where the parent taking the child is fleeing the other parent because of violence.

Conclusion

13.84 Serious consideration must be given to reforming the civil and criminal law so that Hong Kong can fulfil its international obligations under the *Hague Convention on the Civil Aspects of International Child Abduction*. Reform would benefit Hong Kong residents by protecting their children more fully from unlawful removal. Some experts regard the unlawful removal of a child as a form of child abuse, as the child suffers the trauma of being removed from his home and from the custodial parent, and perhaps other siblings, and taken to a foreign country with which he may be unfamiliar. Our options for reform will be dealt with in chapter 14.

1354 *Parental Child Abduction*, (February 1997).

1355 Paragraph 1.12.

1356 At paragraph 4.06.

Chapter 14

Options for Reform of Child Abduction Law in Hong Kong

Introduction

14.1 The substantive law on child abduction is set out in chapter 13. This chapter deals with the options for reform of the criminal and civil law proposed by the sub-committee of the Law Reform Commission.

Criminal law reforms

Offence of parental child abduction

14.2 We do not suggest that parental child abduction be criminalised on the lines of the Child Abduction Act 1984. New criminal offences could only be justified if there was a serious problem of children being abducted within Hong Kong, or to or from Hong Kong. We are not aware of such a problem at present.

Power to detain

14.3 The Immigration Department of the Hong Kong Special Administrative Region can prevent a parent and child departing from Hong Kong when they are aware of a court order prohibiting removal, but cannot arrest or detain them. They cannot stop a child leaving Hong Kong if no order prohibiting removal has been made, provided the child has a valid travel document. The parent might then try to leave Hong Kong by an illegal method. Therefore, we support a power to detain, which is needed until the court and the other parent can be notified. Section 37 of the Irish Child Abduction and Enforcement of Custody Orders Act 1991 gives power to the police to detain a child whom they reasonably suspect is about to be, or is being, removed from the State in breach of one of the following orders of a court in the State.

14.4 We recommend that a similar provision to section 37 of the Irish Child Abduction and Enforcement of Custody Orders Act 1991 be enacted in Hong Kong. However, we do not propose to go so far as to have a general power of arrest.

Civil law reforms

Removal of child from jurisdiction

14.5 The only specific provisions dealing with removal of a child from Hong Kong are contained in subsidiary legislation. Rule 94 of the Matrimonial Causes Rules (Cap 179) allows an application to the court to prevent removal. A similar provision is rule 61E of the District Court Civil Procedure (General) Rules (Cap 336).

14.6 Section 13(1) and (2) of the English Children Act 1989 makes it an automatic condition of a residence order that the child should not be removed from the United Kingdom for longer than one month without the written consent of any person with parental responsibility, or with the leave of the court. The person with a residence order may remove the child for less than one month without seeking permission of the other parent or having to give notice. This provision may be problematic in Hong Kong with the ease and frequency of travel out of the jurisdiction.

14.7 The sub-committee propose that there should be a provision in primary legislation to restrict removal of a child without the consent of the parent who has control of the child's residence or with whom the child has regular contact. We express a preference for the Scottish provisions, and would suggest that a provision along the lines of section 2(3) of the Children (Scotland) Act 1995 be adopted.

14.8 This would provide as follows:

> *"(1) Without prejudice to any court order, no person shall be entitled to remove a child from, or to retain any such child outside, the Hong Kong Special Administrative Region without the consent of a person described in subsection (2) below; and*
>
> *(2) The description of a person referred to in subsection (1) above is a person (whether or not a parent of the child) who for the time being has and is exercising in relation to him a parental right; except that, where both the child's parents are persons so described, the consent required for his removal or retention shall be that of them both."*

14.9 The parental rights referred to in subsection (2) would be to have the child living with him or otherwise to regulate the child's residence, or if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis. **We also propose that this section would apply in cases where proceedings had already been issued or court orders made concerning the child. It would**

also extend to any child of the family.[1357] **Rule 94(2) of the Matrimonial Causes Rules (Cap 179), which allows an application to the court to prevent removal, should also be enacted into primary legislation.**[1358]

Disclosure of whereabouts

14.10 Section 36 of the Irish Child Abduction and Enforcement of Custody Orders Act 1991 expanded on the power to order disclosure of the whereabouts of the child[1359] by extending it to cases under the *Hague Convention on the Civil Aspects of International Child Abduction.*

14.11 **We recommend a power to order the disclosure of the whereabouts of the child along the lines of section 36 of the Irish Child Abduction and Enforcement of Custody Orders Act 1991.**

Location and recovery orders

14.12 A location order requires a person to provide information on the child's location. A recovery order requires the return of the child, grants stop and search powers to recover the child and deliver him to the appropriate person, and prohibits a person from removing a child. **We recommend the adoption of provisions similar to those in Australia on location and recovery orders, as these would be useful in Hong Kong. The Australian sections on a recovery order are preferred to the English provisions**.[1360]

Surrender of passport

14.13 In the Irish case of the *State (KM & RD) v the Minister for Foreign Affairs*[1361] the High Court treated the denial of a passport as a breach of the right to travel, which was a personal right under Article 40.3 of the Irish Constitution.[1362] In another case, *Cosgrove v Ireland and Others,*[1363] the High Court held that a father's rights as joint guardian under the Guardianship of Infants Act 1964 had been breached as a passport had been issued for the child despite the father's objection. Section 37 of the English Family Law Act 1986 provides that when there is a court order prohibiting removal of a child from

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1357 This is defined in section 2 of the Matrimonial Proceedings and Property Ordinance (Cap 192) as a child of both parties or a child who has been treated as a child of their family.

1358 It is arguable that the rule may be *ultra vires* as there is no power in primary legislation to make such an order. For text, see chapter 13.

1359 This had been modelled on section 33 of the UK Family Law Act 1986. For text see chapter 13.

1360 For text, see chapter 13 and for text of proposed Hong Kong provision, see Annex 1.

1361 [1979] IR 73.

1362 "The State guarantees to respect, defend and vindicate the personal rights of the citizen".

1363 [1982] ILRM 48.

the United Kingdom, the court may require any person to surrender any passport which has been issued to or contains particulars of the child.

14.14 It would seem that refusing to issue a passport at the request of a parent may be in breach of the freedom of movement guaranteed by Article 31 of the Basic Law which provides that:

> *"Hong Kong residents ... shall have freedom to travel and to enter or leave the Region. Unless restrained by law, holders of valid travel documents shall be free to leave the Region without special authorization".*

14.15 We accept that the court has the inherent power to order the surrender of passports where there is a real risk that the child will be unlawfully removed from Hong Kong.[1364] No doubt the court has made such orders in the past. We also note that magistrates can order the surrender of all passports, Chinese re-entry permits and travel documents, when they release persons on bail.

14.16 However, Hong Kong is in a unique position that makes it difficult to legislate in this area: Hong Kong residents tend to travel in and out of Hong Kong, whether to the Mainland or elsewhere, with more frequency than residents of other countries; and there is only an identity card control between Hong Kong and the Mainland for Chinese permanent residents. It is therefore possible for certain persons to leave Hong Kong for another jurisdiction without a passport. It would be difficult for a court to order the surrender of an HKSAR identity card, given the requirements imposed on SAR residents to carry such a card.

14.17 **The sub-committee recommend the retention of the status quo though a minority of members recommend a power to order the surrender of all passports, Chinese re-entry permits and travel documents, where the court had made or was making an order prohibiting removal of the child. We note that the Australian section 67ZD of the Family Law Act 1995, which gave power to the court to order the surrender of the passport to the court, does not cover such situations as the length of removal of the passport.[1365] We reject the adoption of a similar proposal for Hong Kong.**

Notification of order to Immigration Department

1364 The English Court of Appeal, in a recent case, *In re A-K (Minors)(Foreign Passport: Jurisdiction)*, The Times, March 7th, 1997, held that it was well within the jurisdiction of the High Court to order the surrender of a foreign passport in order to protect the interests of children. The court had ordered that the husband' s passport be held by his own solicitor, and not released except with the mother' s agreement or order of the court.

1365 For text, see chapter 13.

14.18 Practitioners have expressed concern at the variation in practice as to whether the Immigration Department is informed or not of the making of a court order prohibiting the removal of the child without the written consent of the other parent or the court. In some cases, a parent does not inform the department as the parents are able to agree informally between themselves as to whether the child is removed for a holiday without the necessity of varying the court order, or having to correspond via solicitors. On the other hand, there are cases where a parent arrives at the departures area and is informed by immigration officials that he cannot depart with the child because the department has been notified of the order.

14.19 We do not consider that the Family Court Registry should be under an obligation to notify the Immigration Department of the court order. Neither should the Immigration Department be obliged to inform the other parent that they have received a copy of the court order.

14.20 We recommend that it should be the parents' responsibility to notify the Immigration Department that a court order has been made prohibiting the removal of the child from Hong Kong. It should be at the discretion of the parents whether the Immigration Department is notified or not. However, if one parent does notify the department of the order, it should be mandatory that they inform the other parent of the fact of notification.

Chapter 15

Summary of Recommendations

15.1 This chapter summarises the recommendations on the substantive law dealt with in chapter 6, the recommendations on non-adversarial dispute resolution processes in chapter 12 and the recommendations on child abduction law in Chapter 14.

Part A - General principles

Welfare principle

15.2 For the removal of doubt, we recommend that it should be made clear that the welfare principle guides all proceedings concerning children, including questions of guardianship, maintenance or property. (Paragraph 6.7)

Best interests

15.3 The sub-committee recommends that the term "best interests" is more appropriate for modern conditions in Hong Kong than the term "welfare". It is also more in compliance with our international obligations under the United Nations Convention on the Rights of the Child. Section 3(1)(a)(i) of the Guardianship of Minors Ordinance (Cap 13) should be amended to read "shall regard the best interests of the minor as the paramount consideration..." Consequential amendments should be made to the other matrimonial ordinances. (Paragraph 6.8)

Statutory checklist of factors

15.4 We recommend a statutory checklist of factors to assist the judge in exercising his discretion in determining custody or guardianship proceedings. (Paragraph 6.12)

15.5 The sub-committee recommends the adoption of the checklist set out in section 1(3) of the English Children Act 1989, which is shorter and more precise than section 68F(2) of the Australian Family Law Act 1975. The sub-committee also recommends that section 68F(b) (in part), and (f) (in part) of the Australian Act be incorporated into a composite section based on section 1(3) of the English Children Act 1989. The draft is at Annex 1 of the Consultation Paper. (Paragraph 6.13)

15.6 The sub-committee welcome views on whether section 68F(2)(d) of the Australian Family Law Act 1975 should also be adopted though at this time we reach no conclusion on whether it should be included.[1366] (Paragraph 6.14)

No-order principle

15.7 The sub-committee note the rationale for the no-order principle but recommend that it should not be adopted in Hong Kong as it is unsuitable for local conditions. (Paragraph 6.16)

Part B - Parental responsibility and rights

Concept of parental responsibility

15.8 We recommend that the concept of parental responsibility is more appropriate for the best interests of a child than guardianship, except that the concept of guardianship should be retained to deal with the responsibilities for a child by a third party after the death of a parent. (Paragraph 6.18)

Language

15.9 We recommend the adoption of a provision on the lines of sections 1 and 2 of the Children (Scotland) Act 1995 as two separate sections, one on parental rights and one on parental responsibilities. We recommend that the age of eighteen should apply to all the situations referred to in sections 1 and 2 of the Children (Scotland) Act 1995. The draft sections are in Annex 1. (Paragraph 6.19-20)

Father as natural guardian

15.10 We recommend that the common law right of the father to be natural guardian of his legitimate child should be abolished, on the lines of section 2(4) of the English Children Act 1989, as it is no longer appropriate in Hong Kong. Thus, we also recommend the repeal of section 3(1)(b) of the Guardianship of Minors Ordinance (Cap 13). (Paragraph 6.22)

Married parents

15.11 We recommend the adoption of a provision on the lines of section 2(1) of the English Children Act 1989, which provides that married parents shall have parental

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[1366] It provides that account be taken of the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis.

responsibility for their child. It should be amended, for the removal of doubt, to include reference to parents married subsequent to the birth of the child. (Paragraph 6.23)

Acquisition of parental responsibility by unmarried fathers

15.12 We recommend that the language of section 3(1)(c)(ii) and (d) of the Guardianship of Minors Ordinance (Cap 13) should be changed to reflect the new language of responsibilities rather than rights. Thus an unmarried father would be able to apply for an order granting him parental responsibility. (Paragraph 6.25)

Semi-automatic acquisition of parental responsibility and rights

15.13 We recommend that an unmarried father should be capable of acquiring parental rights and responsibilities by signing the birth register. This should be included in the list in the proposed legislation which delineates the acquisition of parental responsibility. We do not recommend the automatic acquisition of parental responsibility or rights by unmarried fathers. (Paragraph 6.28)

Parental responsibility agreements

15.14 We recommend that unmarried parents should be encouraged to sign parental responsibility agreements to ensure the best interests of their child. (Paragraph 6.29)

15.15 We recommend that unmarried mothers should be encouraged to appoint a testamentary guardian for their children. (Paragraph 6.30)

Parent acting independently

15.16 We recommend the adoption of a provision on the lines of section 2(7) of the Children Act 1989, allowing parents to exercise parental responsibility independently from each other but restricted to the day-to-day care and best interests of the child. (Paragraph 6.33)

Scope of parental responsibility

15.17 To balance the adoption of section 2(7) of the Children Act 1989, and to reduce the number of disputes between parents after separation or divorce, we also recommend that one parent should consult the other when it comes to making major decisions for the child. It is preferable if major decisions could be made jointly by the parents. However, day-to-day decisions do not need notification to, or consent by, the other parent. (Paragraph 6.35)

15.18 Rather than giving a veto to the other parent, it would generate less friction if legislation specified those decisions where the other parent's express consent was required,

and those decisions where only notification to the other parent was required. (Paragraph 6.36)

15.19 The legislation should include the definition of a major decision and list the classes of major decisions. There should be three lists: the first, a general list of parental responsibilities; the second, a list of major decisions requiring express consent; and the third, a list of major decisions requiring notification.[1367] (Paragraph 6.37)

Acting incompatibly

15.20 We recommend that a provision on the lines of section 2(8) of the Children Act 1989, which provides that a person with parental responsibility should not act incompatibly with an order concerning the child, should be adopted. (Paragraph 6.43)

Delegation of parental responsibility

15.21 We recommend that a provision on the lines of the section 2(9) to (11) of the Children Act 1989[1368] be enacted, rather than section 3(5) of the Children (Scotland) Act 1995. The consequence of this reform is that section 4 of the Guardianship of Minors Ordinance (Cap 13) would be repealed, though we consider it would be useful to retain the last three lines of section 4(1).[1369] (Paragraph 6.45)

Continuing parental responsibility

15.22 We recommend a provision on the lines of section 11(11) of the Children (Scotland) Act 1995 which states that any order shall have the effect of depriving a parent of rights and responsibilities only to the extent necessary to give effect to the order. (Paragraph 6.46)

Part C - Acquisition of parental responsibility by guardians

Appointment of guardian

15.23 We recommend the adoption of a similar provision to section 5(5) of the Children Act 1989 that parents who have parental responsibility may appoint guardians by a document in writing, with their signature attested by two witnesses, without the need to make a formal will or deed.[1370] We recommend the introduction of a standard form for the appointment of a guardian, which should explain briefly a guardian' s responsibilities, and be signed by the proposed guardian. These forms could be made available at the Legal Aid

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1367 The lists are set out in paragraphs 6.33-35.

1368 See Annex 1 *infra* for text.

1369 The last three lines of section 4 (1) provide "but no such agreement between husband and wife shall be enforced by any court if the court is of opinion that it will not be for the benefit of the child to give effect to it".

1370 See Annex 1.

Department, and the District Offices where the Free Legal Advice Scheme of the Duty Lawyer Service operate. We also recommend that the guardian should have to accept office expressly or impliedly if he has not formally consented to act as guardian. This could also be achieved by the completion of a form. (Paragraphs 6.47-9)

Appointment by guardian

15.24 We recommend the adoption of a provision on the lines of section 5(4) of the Children Act 1989 that a guardian may appoint a guardian to take his place as the child' s guardian in the event of his death. (Paragraph 6.50)

Views of child on appointment of guardian

15.25 We recommend that a similar provision to section 7(6) of the Children (Scotland) Act 1995 be introduced. Thus the views of the child should, so far as practicable, be taken into account in making the appointment of a guardian. (Paragraph 6.51)

Disclaimer

15.26 We recommend that there should be a system for withdrawing from acting as a guardian similar to the system for appointing a guardian. If the proposed guardian had already consented to act, by signing the appropriate form, then he would have to formally disclaim it, if he did not want to act at a later time. The disclaimer should be formal, in writing, and notified to the executor or administrator of the estate. The Director of Social Welfare should be notified of the disclaimer if there is no executor, administrator or surviving parent, so that steps can be taken to protect the best interests of the child. (Paragraph 6.53)

Court appointment

15.27 We recommend that section 7 of the Guardianship of Minors Ordinance (Cap 13) be repealed and a similar provision to section 5(1) of the Children Act 1989 be enacted. This provides that any individual who wishes to be a guardian may apply to the court to be appointed if the child has no parent with parental responsibility for him or a residence order had been made in favour of the parent who has now died.[1371] (Paragraph 6.55)

When appointment takes effect

15.28 We recommend that if a parent had obtained a residence order prior to his death, then a testamentary guardian appointed by that parent should be able to act automatically as testamentary guardian on that parent' s death. (Paragraph 6.61)

[1371] See Annex 1.

15.29 We also recommend that a testamentary guardian should be able to act on the death of the parent who appointed the testamentary guardian if the child was residing with that parent prior to his death. Thus the appointment of the testamentary guardian would not take immediate effect on the death of the parent but a pro-active step of obtaining the court' s permission would have to be taken by the guardian. (Paragraph 6.62)

Veto of surviving parent

15.30 We recommend that the right to veto of the surviving parent in section 6(2) of the Guardianship of Minors Ordinance (Cap 13) should be removed. Then, either the surviving parent or guardian could apply to a court under section 6(3) if there is a dispute between them on the best interests of the child. (Paragraph 6.65)

Removal or replacement of guardian

15.31 We recommend that section 8 of the Guardianship of Minors Ordinance (Cap 13) should be retained, but that it should be amended to give similar powers to the District Court. (Paragraph 6.66)

Removal of surviving parent as guardian

15.32 We recommend that the right to remove the surviving parent as guardian under section 6 of the Guardianship of Minors Ordinance (Cap 13) should be repealed. (Paragraph 6.70)

Unmarried father as surviving parent

15.33 We recommend that a provision be inserted that once the natural father is granted parental rights or responsibility, whether by fulfilling the requirements for semi-automatic acquisition, or by a court order, then he can be deemed to be the surviving parent under the Ordinance. (Paragraph 6.71)

Guardian of the estate

15.34 We welcome views as to whether the Official Solicitor has sufficient powers to act as guardian of the estate. We invite submissions as to how the Hong Kong provisions work in practice and whether any reform is necessary. (Paragraph 6.73)

Part D - Types of orders for children

Custody orders

15.35 We recommend the repeal of provisions dealing with custody orders. (Paragraph 6.78)

Residence order

15.36 We recommend that legislation provide for a residence order. (Paragraph 6.80)

Definition of residence order

15.37 We recommend that the definition of a residence order incorporate a reference to the parent in whose favour the order is made having responsibility for "the day-to-day care and best interests of the child". We recommend that the definition, adapted from section 8(1) of the Children Act 1989, would be "a residence order is an order settling the arrangements as to the person with whom a child is to live and who has the day-to-day care and best interests of the child." (Paragraph 6.83)

Non-parents

15.38 We consider section 12(2) of the Children Act 1989, which provides that if a residence order is made in favour of a non-parent then he is granted parental responsibility, to be a useful provision. We recommend enactment of a similar provision in Hong Kong.[1372] (Paragraph 6.84)

Contact order

15.39 We recommend the adoption of a provision on the lines of the Scottish definition of the contact order.[1373] We also recommend that this proposed section provide that the contact parent would have the right to act independently for the day-to-day care of the child when he is exercising contact with the child.[1374] (Paragraph 6.87)

Specific issues order

15.40 We recommend that a provision on the lines of the English definition of the specific issue order in section 8(1) of the Children Act 1989 be enacted.[1375] (Paragraph 6.90)

Prohibited steps order

15.41 We recommend that a provision on the lines of the definition of prohibited steps orders in section 8(1) of the Children Act 1989 be enacted.[1376] (Paragraph 6.92)

1372 See Annex 1.

1373 See Annex 1 *infra*.

1374 See Annex 1.

1375 See Annex 1. We prefer the term "specific issues", as used in the Australian legislation, rather than "specific issue".

1376 See Annex 1.

Supplementary requirements

15.42 We recommend the adoption of a similar provision to section 11(7) of the Children Act 1989 which gives power to the court to include directions or conditions when making an order under section 8(1). (Paragraph 6.93)

Right of third party to apply

15.43 The limitation in section 10 of the Guardianship of Minors Ordinance (Cap 13) on the right of third parties to apply to court should be removed. We recommend a provision on the lines of section 10 of the English Children Act 1989, with the amendment of subsections (5)(b) and (10) to provide that no leave would be required if the child has lived with the applicant for a total of one year out of the previous three years.[1377] The one year period need not necessarily be a continuous period, but must not have ended more than three months before the application. (Paragraph 6.97)

Arrangements for the children

15.44 We prefer to retain section 18 of the Matrimonial Proceedings and Property Ordinance (Cap 192) but we recommend that it is amended to include that the court shall have regard to the views of the child and the desirability of a child retaining contact with both parents, as is set out in section 11(4) of the English Family Law Act 1996. (Paragraph 6.100)

15.45 Parents should have to prove to the Judge that arrangements for the children are the best that can be arranged. The Judge should examine the future plans as to the child's place and country of residence and the proposed contact with both parents, especially if one parent proposes to emigrate from Hong Kong. We also recommend that for consistency with the other ages adopted in other provisions in matrimonial legislation, section 18(5)(a)(i) of the Matrimonial Proceedings and Property Ordinance (Cap 192) should be amended to refer to the age of eighteen. (Paragraph 6.101)

Family proceedings

15.46 A similar provision to section 10(1) of the Children Act 1989, which gives the court a specific power to make section 8 orders in any family proceedings, including wardship, is recommended for inclusion in Hong Kong's legislation.[1378] It would also be useful to have a definition of family proceedings. (Paragraph 6.102)

1377 See Annex 1.

1378 See Annex 1.

Change of surname

15.47 We recommend that a provision on changing a child's surname on the lines of section 13(1)(a) of the Children Act 1989 be enacted. (Paragraph 6.103)

Part E - The voice of the child

Views of the child

15.48 We recommend that a provision on the views of the child should apply to all proceedings concerning children. It would also be clearer if each matrimonial ordinance specifically referred to the need to hear the views of the child. We recommend that the language of the United Nations Convention on the Rights of the Child should be adopted so that the term "views" rather than "wishes" of the child is enacted in matrimonial legislation.[1379] (Paragraph 6.110)

How and when child's views taken into account

15.49 Considering our earlier recommendation that a statutory checklist of factors should be established, we recommend that the child's views should be one element in the checklist of factors rather than a free-standing section. The child's views should be balanced with the other factors when the judge is making a decision in the child's best interests. We recommend the repeal of section 3(1)(a)(i)(A) of the Guardianship of Minors Ordinance (Cap 13). (Paragraph 6.113)

How the views of a child are expressed

15.50 We recommend that a child should be given the facility to express his views if he wishes, whether directly or indirectly by a report from a social welfare officer, psychiatrist or psychologist. Once he has indicated a desire to express views, then the court must hear his views. (Paragraph 6.115)

15.51 We suggest that it would be useful to set out the mechanisms for ascertaining and expressing the child's views. We recommend adopting a provision on the lines of the Australian section 68G(2), but adapted to insert "views" rather than "wishes".[1380] With the adoption of this provision, we recommend the repeal of section 3(1)(a)(i)(B) of the Guardianship of Minors Ordinance (Cap 13). (Paragraph 6.116)

[1379] We are referring here to the Guardianship of Minors Ordinance, (Cap 13), Matrimonial Causes Ordinance (Cap 179), Matrimonial Proceedings and Property Ordinance (Cap 192), Separation and Maintenance Orders Ordinance (Cap 16), and the Domestic Violence Ordinance (Cap 189).

[1380] See Annex 1.

Children not required to express views

15.52 We recommend that children should not be required to express their views. To do so would place children under pressure by one or both parents to take sides in a dispute concerning the children's best interests. However, we do not see the need for statutory provision to that effect on the lines of the Australian section 68H. (Paragraph 6.117)

Age of maturity for the purpose of obtaining views

15.53 We recommend that there should be no age limit for determining maturity and the court should have unfettered discretion in deciding whether to hear a child's views, irrespective of his age. We do not think that section 11(10) of the Children (Scotland) Act 1995 would be suitable for local conditions as a presumption of maturity above the age of 12 may be too inflexible in particular cases. (Paragraph 6.118)

Representation of the child

Anomalies

15.54 We recommend that the anomalies in rule 72 and rule 108 of the Matrimonial Causes Rules (Cap 179) as to the appointment of a separate representative or guardian *ad litem* be addressed. (Paragraph 6.126)

15.55 For the removal of doubt it should be made clear that a separate representative can be appointed in any dispute on the parental responsibility or guardianship of a child. (Paragraph 6.128)

Guardian ad litem

15.56 We suggest that it would be more appropriate if a person conferred with the role of guardian *ad litem* was a professional person with experience in children's issues rather than any individual who is a "proper" or "fit" person. (Paragraph 6.129)

15.57 We recommend that rule 108 of the Matrimonial Causes Rules (Cap 179) be repealed and that a provision on the lines of section 68L(3) of the Family Law Act 1995 as amended be enacted.[1381] We also recommend that the restrictions on who can make application for an order, contained in section 10 of the Children Act 1989, should also apply to this provision. (Paragraph 6.133)

[1381] See text in chapter 6.133.

Criteria for appointment of separate representative

15.58 The Australian list of criteria for appointing a separate representative is useful as a checklist for guiding the court on the circumstances where it is appropriate to appoint a separate representative.[1382] Since we were undecided whether the criteria should be included in legislation or not, submissions are invited from the public in this consultation exercise. We also recommend that a separate representative of the child should be appointed on a more frequent basis in Hong Kong. (Paragraph 6.136)

Guidelines for duties of separate representative

15.59 We recommend the adoption of the Australian guidelines for setting out the duties of the Official Solicitor or separate representative or other person acting as guardian *ad litem* in Hong Kong.[1383] This would be useful in clarifying the exact nature of the roles. (Paragraph 6.140)

Child as a party

15.60 We recommend that, in principle, provided the leave of the court was sought, the child should be allowed to become a party to proceedings which concern him and where he has sufficient understanding to instruct solicitor and counsel to represent him. We recommend a provision on the lines of section 10(8) of the Children Act 1989 and rule 9(2A) of the Family Proceedings Rules 1991. (Paragraph 6.142)

Costs

15.61 For those cases where the person representing the child is not the Official Solicitor, we recommend that the court be given power to order the parties to bear the costs of the separate representative or guardian *ad litem*. (Paragraph 6.143)

Part F - Reforms to relevant matrimonial ordinances

Separation and Maintenance Orders Ordinance (Cap 16)

15.62 We welcome submissions on whether the Separation and Maintenance Orders Ordinance (Cap 16) is of any practical use, rather than embarking on detailed recommendations for its reform. (Paragraph 6.146)

Domestic Violence Ordinance (Cap 189)

1382 The criteria were set out in *Re K* [1994] FLC 92-461 at 80. See chapter 5 *supra*.

1383 See chapter 5 *supra*.

15.63 We recommend that the court should be given power, when making an injunction under the Domestic Violence Ordinance (Cap 189), to suspend a prior access or contact order or vary a prior order so as to make a supervised access or contact order, which avoids the risk of the parents coming into physical contact with each other. The court should also be given power to make consequential orders determining the residence of a child or any other aspect of parental responsibility that meets the best interests of the child. (Paragraph 6.149)

15.64 We also recommend that there should be an onus on the parties to disclose prior relevant orders when applying for an injunction to avoid orders being made that were inconsistent with prior custody, access, residence or contact orders. (Paragraph 6.150)

Age

15.65 With the exception of one of our members, we recommend that the age of marriage be reduced to 18 without parental consent and the minimum age of 16 be retained. (Paragraph 6.151)

15.66 We recommend that a provision be enacted clearly specifying that the duration of wardship orders ceases at 18 years. It may also be useful to make clear that the jurisdiction of the Official Solicitor ceases at the age of 18 years, except for persons suffering a disability beyond that age. (Paragraph 6.153)

15.67 For the sake of consistency, we recommend that parental responsibility for children, and provisions on the lines of section 8 orders (such as orders for residence, contact or specific issues), should cease when the child reaches 18 years. (Paragraph 6.154)

Director of Social Welfare' s powers

Definition

15.68 We recommend that there should be a definition of a care order and a supervision order in the matrimonial ordinances. We also recommend the retention of the power to order care and supervision orders in guardianship disputes and any disputes concerning the best interests of a child. (Paragraph 6.158)

Protection of Children and Juveniles Ordinance (Cap 213)

15.69 We recommend that parents whose children are made the subject of care orders under the matrimonial ordinances should be entitled to have orders made to secure regular contact between them and their children. We also recommend that section 34C(6) of the Protection of Children and Juveniles Ordinance (Cap 213) be amended to allow the court to make an order for contact when a care order is being made. (Paragraph 6.159)

Assessment

15.70 We recommend that a District Judge should have the power under the matrimonial ordinances to order that a child should be assessed before making a care order, as is provided in section 45A of the Protection of Children and Juveniles Ordinance (Cap 213). The Director should also have the power to order assessment in these proceedings in accordance with section 45A. (Paragraph 6.160)

Grounds

15.71 Applying the equality of treatment principle, we recommend that the Director should only be entitled to apply for a care order or supervision order in private law proceedings on the same grounds as those in section 34(2) of the Protection of Children and Juveniles Ordinance (Cap 213).[1384] All these anomalies between the Director' s powers in relation to care and supervision orders under the Guardianship of Minors Ordinance (Cap 13) and the Matrimonial Causes Ordinance (Cap 179), and his powers under the Protection of Children and Juveniles Ordinance (Cap 213) should be resolved. (Paragraph 6.161)

Child' s views

15.72 We recommend that the views of a child should be taken into account in proceedings under the Protection of Children and Juveniles Ordinance (Cap 213). (Paragraph 6.163)

Third parties

15.73 We recommend that section 34 of the Protection of Children and Juveniles Ordinance (Cap 213) should be amended to allow an application for a care and protection order or supervision order to be made by third parties. The same criteria for applications by third parties, already adopted for private law proceedings, should be adopted for such public law proceedings. (Paragraph 6.164)

Ex parte applications by Director

15.74 We recommend that Rule 93 of the Matrimonial Causes Rules (Cap 179), and rule 61D of the District Court Civil Procedure (General) Rules (Cap 336), be amended to allow for an *ex parte* application in case of emergency, but an *inter partes* hearing should proceed if the application was opposed. (Paragraph 6.166)

Separate representative for public law proceedings

15.75 We take the view that the provision in the Official Solicitor Ordinance (Cap 416) for representation in Schedule 1, Part 3, is inadequate. We recommend that the criteria for appointing a separate representative for a child in private law proceedings should

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[1384] The grounds are set out in chapter 2 *supra*.

be accepted as the criteria for appointment of a separate representative in care or supervision proceedings. As a matter of principle, separate or legal representation in care and protection proceedings should be available for children, and it should be at the discretion of the juvenile court judge or magistrate whether it was appropriate in a particular case. (Paragraph 6.167-8)

Legal aid

15.76 We recommend that parents should be granted legal representation by the Duty Lawyer Service in the juvenile court and by the Legal Aid Department in the Family Court or the Court of First Instance if they fulfil the eligibility requirements where care or supervision orders are applied for, whether under the matrimonial ordinances or the Protection of Children and Juveniles Ordinance (Cap 213). (Paragraph 6.171)

15.77 We also recommend that there should be legal representation for children and parents in wardship proceedings where the applicant is the Director or other public agency, as the effect of the order is to take away the responsibility of the parents. (Paragraph 6.172)

Guidelines for duties of separate representatives

15.78 We recommend the adoption of the Australian guidelines for setting out the duties of lawyers representing children and parents in the juvenile court for care and protection and supervision orders.[1385] We also recommend that special training in how to interview and represent children and parents be provided to lawyers for these types of cases.[1386] Only lawyers with this special training should handle these sensitive and complex cases. We intend that these recommendations should also apply to care and supervision orders being made under the matrimonial ordinances in the Family Court. (Paragraph 6.173)

Enforcement of orders

15.79 We recommend that a mechanism for mutual legal assistance for the enforcement of orders for custody, access, residence and contact, and orders for the return of a child removed unlawfully from Hong Kong, be arranged with the Mainland. (Paragraph 6.177)

Consolidation of ordinances

15.80 We think it is important that, as far as possible, the provisions dealing with disputes relating to children, arrangements on divorce, guardianship, disputes with third

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1385 See supra on the Australian guidelines.

1386 See chapter 5 referring to the training of separate representatives in Australia.

parties, or disputes between parents without accompanying divorce proceedings, should be consolidated into one existing ordinance. With the exception of one of our members, we propose that our recommendations and the existing substantive provisions on guardianship and custody should be incorporated into one consolidated ordinance. There should also be one definition of "child", and of "child of the family" applying across the ordinances. (Paragraph 6.180)

Policy co-ordination

15.81 We recommend that a single policy bureau should take over responsibility for creating and implementing policy for families and children and, in particular, all the matrimonial and children's ordinances. It is a matter for the Administration to decide whether it should be the Health and Welfare Bureau or the Home Affairs Bureau. (Paragraph 6.182)

Part G - The family dispute resolution process

Delay

15.82 To promote the best interests of the child, priority must be given to the hearing of disputes concerning children, that is, residence, contact, specific issues, prohibited steps, child abduction, wardship and guardianship. We recommend that, in the interim before legislation is enacted, target times be set for the disposal of custody, access and guardianship disputes. We recommend a statutory provision on the lines of sections 1(2) and 11 of the Children Act 1989.[1387] (Paragraph 12.6)

Social welfare officer's report

15.83 We recommend that more resources need to be put into the Child Custody Services Unit of the Social Welfare Department to minimise delays in investigating and preparing reports for the Family Court. We also recommend a performance pledge that a report of the social welfare officer should be completed as expeditiously as possible, but should in any case not take longer than six weeks. (Paragraph 12.10)

15.84 The sub-committee recommend that social welfare officers preparing reports for the Family Court should have a minimum of 3 years' experience in family and child care work, and their training should include the preparation of court reports. (Paragraph 12.11)

[1387] See Annex 1 *infra*.

Independent experts

15.85 We recommend that the court have the power to order a report from an independent expert, such as a psychologist, psychiatrist, paediatrician, registered social worker or other relevant expert. (Paragraph 12.14)

Statistics and research

15.86 It would be very useful for the Law Reform Commission and for policymakers if statistics were kept, and research conducted, in the Family Court. We recommend that statistics of the number of custody, access or guardianship cases, including the numbers settled, and when they were settled, should be kept by the Family Court. This would assist in the planning of policies and their implementation. (Paragraph 12.19)

Availability of judgments and privacy

15.87 We recommend that a Practice Direction regulating the release of unreported judgments in disputes concerning children be issued to encourage their increased availability to legal practitioners. We also recommend that, for the protection of children and their parents, all identifying details, including the names of parties and their children, addresses, schooling, place of employment, and even the names of witnesses, should be deleted (except for the first initial) from all such judgments, whether unreported or reported. (Paragraph 12.30)

Code of Practice for conduct of family cases

15.88 It is recommended that a Family Lawyers' Code of Practice be adopted in Hong Kong. This may encourage a more conciliatory approach by solicitors. We recommend that, in principle, there should be two codes, one for the conduct of family cases and the other for conducting cases where children are separately represented. (paragraph 12.34)

Case management and settlement

15.89 We recommend that procedures at the Family Court be streamlined and that there be continuous monitoring of the system by effective case management. We recommend the introduction of a Practice Direction governing case management in the Family Court. Such a Direction would encourage more effective case management on an ongoing basis, and would encourage the diversion of cases from contested hearings to mediation. We do not think it is necessary at this juncture to decide the precise terms of

such a Direction. However, the Construction List checklist and its associated Practice Direction form a useful model for the Family List. (paragraph 12.38)

15.90 We recommend that there should be a requirement that a pre-trial checklist be completed at the Summons for Directions stage of any case involving a dispute in relation to children. Time limits should be imposed for the delivery of any affidavits associated with the case in order to minimise delay. We also recommend that judges should be given more control to reduce the costs and delay in the system. Failure to conduct cases economically should result in appropriate orders for costs, including wasted costs orders. (paragraph 12.39)

Issues and settlement conferences

15.91 We recommend that statutory provision be made for issues and settlement conferences tailored to the needs of Hong Kong. There ought to be a clear distinction between issues and settlement conferences. These conferences would be separate from mediation. A settlement conference would be a necessary step in the process unless there was a certificate filed by a party or the parties that an attempt at settlement in a settlement conference is likely to be unsuccessful and that costs would be wasted by such attendance. (paragraph 12.45)

15.92 If no settlement conference takes place there would still be a conference similar to a directions hearing at which directions for trial would be ordered. The judge could still suggest settlement at this stage. No evidence disclosed at these pre-trial conferences should be admissible as an admission in any subsequent hearing or proceedings, or as part of a transcript or record of the conferences without the consent of the parties. (Paragraph 12.46)

Flow Chart for new court process

15.93 We have designed a Flow Chart at Annex 2 to assist in understanding the recommended new court procedures. The steps set out in the Flow Chart are necessary steps in case management with a time schedule set by the judge in consultation with the parties. We recommend that the issues conference be substituted for the current call-over list. (Paragraph 12.47)

Part H - Support services for the family dispute resolution system

Support services

15.94 We generally approve and adopt the recommendations of the report of the Task Group on a Family Court on support services, but prefer to adopt the terms "mediation and mediators" rather than "conciliation and conciliators". Providing support by allocating more resources to mediation, information sessions and parent education

complements the court process. It is necessary to connect these support services and resources to the court system to ensure court accessibility and accountability. We recommend that support services should be government funded. (Paragraph 12.51)

Support services accommodation at the Family Court

15.95 We recommend the provision of accommodation at the Family Court for counsellors and mediators which would facilitate early referral to appropriate services. (Paragraph 12.54)

Information on dispute resolution

15.96 We recommend that the courts should do more to put parents in touch with support services. More publicity and education of the public is needed to encourage families to go for assistance to local Family Service Centres or other agencies at an early stage of conflict or when problems are first encountered. (Paragraph 12.56)

15.97 We recommend that the Family Court should provide information relating to court processes, support services and alternatives to litigation. Leaflets such as the Information Kit on Marriage should be available at the Family Court itself and in the lobby of the High Court Building. (Paragraph 12.59)

Information on mediation

15.98 We recommend that information pamphlets should be available at the Family Court and the family services centres, which should include information on the availability of, and encouragement to use, mediation as an alternative to litigation. Information on mediation services should be included in pamphlets such as the Information Kit on Marriage. The pamphlets and the Information Kit should be periodically updated. The court should be under a duty to actively promote mediation. The Chief Justice should approve a document which sets out the benefits and procedure for mediation. (Paragraph 12.61)

Information session

15.99 We recommend the introduction of a voluntary information session, which would be a service open to everyone. It would be attended by the parties before the filing of the petition in the majority of cases. It would encompass elements of the United States parent education programmes and the Australian information sessions.[1388] (Paragraph 12.64)

15.100 At the information session parties could receive information and advice about family support services and alternatives to litigation such as mediation. Information to

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[1388] See chapters 8 and 10 for more information.

educate parents on the psychological process of divorce and its effect on children would also be included, by way of oral presentation, video and information packs. The presentation would be made by persons with counselling and mediation training. Clients should also be informed by solicitors, the Legal Aid Department and the Duty Lawyer Service of the availability of information sessions. The information on such services could be contained in a pamphlet approved by the Family Court. (Paragraph 12.65)

Referral to information session

15.101 We recommend that solicitors should be placed under an obligation to inform their clients about the availability of the information session. We recommend that the Family Court Judges should have the power to refer the parties to attend an information session. This would not be an order as such but would be a power to suspend further progress on the proceedings pending such attendance. (Paragraph 12.67)

Obligation on solicitors

15.102 We recommend that solicitors should be obliged to inform and encourage their clients to consider the possibility of reconciliation, and the applicant (and the respondent when he is served with the pleadings) should be informed of the nature and purpose of counselling and mediation and offered a list of services for reconciliation, counselling and mediation. This information would be in a pamphlet approved by the Family Court. (Paragraph 12.69)

The court' s powers in relation to mediation

15.103 We recommend the adoption of the voluntary mediation recommendations of the report of the Chief Justice' s committee on court annexed mediation, to the effect that the court should only be able to order the parties to attend mediation if they agree. Section 15A of the Matrimonial Causes Ordinance (Cap 179) allows the court to adjourn if there is a reasonable possibility of reconciliation. There could be a similar provision to encourage mediation. We recommend a provision on the lines of section 19A of the Australian Family Law Act 1975 empowering potential litigants or parties to file a notice in the Family Court seeking the appointment of a mediator. (Paragraph 12.72)

15.104 We also recommend that a provision be enacted that where the parties agree to go to mediation, but cannot agree on a mediator, the court could appoint a suitable mediator. We agree that judges should not become directly involved in mediation. If one party does not consent to adjourn the case for mediation then the judge can use his best endeavours to encourage mediation. (Paragraph 12.73)

15.105 We also recommend that before a case is set down for hearing the parties should provide a certificate to satisfy the court that mediation was or was not considered, or that it was not appropriate. (Paragraph 12.74)

Compulsory powers

15.106 We see some merit in giving power to a judge to refuse to set down an action until the parties have certified to the judge that they have attempted some form of mediation. We also note a recommendation that a judge should have power to recommend that the parties attempt to resolve matters through mediation, and if necessary in exceptional cases, to require them to do so. However, we do not agree that mediation should be compulsory at this time. We welcome submissions from consultees on whether or not the Chief Justice's report's proposal on compulsory mediation should be adopted for the resolution of custody and guardianship disputes. (Paragraph 12.76)

Counselling conference

15.107 We recommend the introduction of a process similar to the Australian conciliation conference, but prefer the term "counselling conference" in order to avoid any confusion with mediation. Conciliation counselling takes place at a conciliation conference with a court counsellor which is designed to reduce conflict and encourage agreement of practical issues. We recommend that the counselling conference be a necessary and integral part of the case management process of the court system. We recommend that the Support Services Coordinator (SSC) should advise the judge in writing as to whether the parties have or have not attended the counselling conference, so that the next stage in the process can be initiated. (Paragraph 12.80)

15.108 If there are disputes between parents on both financial and children's issues, then there should be a joint counselling conference dealing with such issues together. We recommend that the conferences could be run by mediators or counsellors, and should be publicly funded. (Paragraph 12.81)

Support Services Co-ordinator

15.109 We recommend that the post of a Co-ordinator be created whose duty would be to facilitate the proper functioning of the services that will support the Family Court dispute resolution system. We prefer the term "Support Services Co-ordinator" (SSC) to that of "Conciliation Co-ordinator" used in the report of the Task Group on a Family Court to avoid confusion with reconciliation. Also, the SSC's task would extend beyond mediation to counselling conferences and referral of parties to counselling outside the court. (Paragraph 12.85)

Social Welfare Officers and mediation

15.110 The role of the social welfare officer as investigator or expert to the court is separate from a counselling or mediation role. We recommend that the Social Welfare Department establish appropriate guidelines to separate these functions. (paragraph 12.105). We recommend, by a majority of members, that a court mediation service should be established, staffed by professionally qualified mediators separate from the social welfare officers who carry out the service of executing social investigations and reports for the courts. (Paragraph 12.94)

Other professions

15.111 Other professionals involved in counselling or therapy, whether working in governmental or non-governmental agencies or privately, should adopt similar guidelines. We also recommend that other bodies such as the Law Society and the Bar Association should draw up appropriate guidelines to ensure the separation of roles of lawyers as lawyers, from lawyers acting as mediators. (Paragraph 12.96)

15.112 We recommend that family mediators have access to facilities to obtain an expert's report, with the parties' consent, to assist in difficult cases concerning disputes over children. (Paragraph 12.97)

Working Party

15.113 The sub-committee decided to recommend that a Working Party be established to plan and implement a pilot project for court annexed family mediation. (Paragraph 12.99)

Pilot project for court-annexed family mediation scheme

15.114 We recommend that mediation should be an integral part of the Family Court system. With a view to establishing mediation as a permanent method of dispute resolution, we recommend that a pilot project on court annexed family mediation be launched at the Family Court. (Paragraph 12.102)

Pilot Scheme Working Group

15.115 We welcome the establishment by the Chief Justice of the Pilot Scheme Working Group. We recommend that it consider our recommendations on mediation, case management and our suggested pilot project to determine how they may assist their own recommendations. (Paragraph 12.104)

Management committee

15.116 We recommend a management committee to oversee the implementation of the pilot project. (Paragraph 12.110)

Training of mediators for a court scheme

15.117 We agree with the emphasis of the Boshier report, that "mediation be assured of a high profile in the Family Court system by insisting on high standards of selection, training, supervision and accreditation of mediators and ongoing accreditation requirements."[1389] and recommend that high standards of selection, training, supervision and accreditation should be required of family mediators in any court annexed scheme in Hong Kong. (Paragraph 12.111)

Accreditation

15.118 We recommend that the current system of accreditation of qualified family mediators should be approved by government and the Judiciary. (Paragraph 12.112)

Domestic violence and sexual abuse guidelines

15.119 We recommend that guidelines for cases of domestic violence and child sexual abuse should be established to screen cases for family mediation on a similar basis to the Australian and New Zealand guidelines. (Paragraph 12.116)

Evaluation

15.120 We recommend that the pilot project on court annexed family mediation should be independently evaluated. (Paragraph 12.117)

Community mediation

15.121 We recommend that community based family mediation services should be available to the public and that there be more publicity and education to encourage early referral to such services. (Paragraph 12.120)

Approving community mediation

15.122 We recommend legislative provisions similar to the provisions in the Australian Family Law Reform Act 1995 which provided a mechanism for community based counselling and mediation organisations to become approved organisations. We recommend that a similar scheme be established in Hong Kong with funding provided by government to approved organisations. The government would work in partnership with

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[1389] Paragraph 5.7.7 of Boshier "New Zealand Family Law Report" summarised in an article of that name in Family and Conciliation Courts Review, vol. 33, No. 2, April 1995 (182-193).

such organisations as regards the quality of the service, continuing supervision and training of the mediators and other relevant matters. (Paragraph 12.122)

Child' s voice in the mediation process

15.123 We recommend the adoption of a provision on the lines of an amended section 11(7) of the Children (Scotland) Act 1995 to provide a mechanism for considering the children' s views in the mediation process.[1390] We also recommend that consideration be given to what mechanisms are needed to determine the child' s views so that these can be brought to the mediator' s attention. (Paragraph 12.126)

Legal aid and mediation

15.124 We recommend that there should be statutory provision for legal aid to be made available for mediation of guardianship, custody and access disputes. We further recommend that, once that legislation is enacted, the Legal Aid Department should establish a proper scheme for the funding of family mediation which will include education, publicity and screening of potential cases. (Paragraph 12.128)

Privilege and confidentiality

15.125 For the removal of any doubt, particularly if a court annexed mediation scheme is established, we recommend a statutory provision giving privilege to all qualified family mediators, similar to that provided in the Civil Evidence (Family Mediation) (Scotland) Act 1995. (Paragraph 12.134)

Immunity from liability

15.126 We recommend that a provision granting immunity on similar lines to section 19M of the Australian Family Law Act 1975 should be introduced to protect qualified family mediators. (Paragraph 12.136)

Legal advice

15.127 We recommend that a provision on the lines of Order 25A, rule 12 of the Australian Family Law Rules, which states that a mediator is required to advise the parties that they should obtain legal advice as to their rights, duties and obligations, should be adopted. (Paragraph 12.137)

[1390] See Annex 1 *infra*.

Enforcement of mediation agreements

15.128 We do not see the need to amend section 14 of the Matrimonial Proceedings and Property Ordinance (Cap 192) to remove any apparent obstacle to enforcement of a mediation agreement. This section provides that a provision in a maintenance agreement restricting the right to apply to a court for an order concerning financial arrangements is void. (Paragraph 12.139)

Arrangements for children

15.129 We recommend that rules of court facilitate mediation agreements being converted into consent court orders. This should assist both compliance with the terms of the agreement, and its enforcement in the event of the arrangements breaking down. (Paragraph 12.142)

Parenting plans

15.130 We recommend the adoption of a provision for parenting plans (which could be registered in the Family Court) similar to the provisions of the Australian Family Law Reform Act 1995. A section 18 declaration under the Matrimonial Proceedings and Property Ordinance (Cap 192) would still be made which could have the parenting plan attached. Parenting plans should be encouraged, and there should be a grace period when they would be voluntary. They should only become mandatory at a later stage to ensure their use on a more extensive basis. (Paragraph 12.147)

Part I - Child Abduction Law

Power to detain

15.131 We recommend that a similar provision to section 37 of the Irish Child Abduction and Enforcement of Custody Orders Act 1991 be enacted in Hong Kong. However, we do not propose to go so far as to have a general power of arrest. (Paragraph 14.4)

Removal of child from jurisdiction

15.132 The sub-committee propose that there should be a provision in primary legislation to restrict removal of a child without the consent of the parent who has control of the child' s residence or with whom the child has regular contact. We express a preference for the Scottish provisions, and would suggest that a provision along the lines of section 2(3) of the Children (Scotland) Act 1995 be adopted. (Paragraph 14.7)

15.133 We also propose that this section would apply in cases where proceedings had already been issued or court orders made concerning the child. It would also extend to any child of the family. Rule 94(2) of the Matrimonial Causes Rules (Cap 179), which allows an application to the court to prevent removal, should also be enacted into primary legislation.[1391] (Paragraph 14.9)

Disclosure of whereabouts

15.134 We recommend a power to order the disclosure of the whereabouts of the child along the lines of section 36 of the Irish Child Abduction and Enforcement of Custody Orders Act 1991. (Paragraph 14.11)

Location and recovery orders

15.135 We recommend the adoption of provisions similar to those in Australia on location and recovery orders, as these would be useful in Hong Kong. The Australian sections on a recovery order are preferred to the English provisions.[1392] (Paragraph 14.12)

Surrender of passport

15.136 The sub-committee recommend the retention of the status quo though a minority of members recommend a power to order the surrender of all passports, Chinese re-entry permits and travel documents, where the court had made or was making an order prohibiting removal of the child. We note that the Australian section 67ZD of the Family Law Act 1995, which gave power to the court to order the surrender of the passport to the court, does not cover such situations as the length of removal of the passport.[1393] We reject the adoption of a similar proposal for Hong Kong. (Paragraph 14.17)

Notification of order to Immigration Department

15.137 We recommend that it should be the parents' responsibility to notify the Immigration Department that a court order has been made prohibiting the removal of the child from Hong Kong. It should be at the discretion of the parents whether the Immigration Department is notified or not. However, if one parent does notify the department of the order, it should be mandatory that they inform the other parent of the fact of notification. (Paragraph 14.20)

1391 For text, see chapter 13.

1392 For text, see chapter 13 and for text of proposed Hong Kong provision, see Annex 1.

1393 For text, see chapter 13.

Draft Sections for Proposed Children' s Bill

Background

1. This Annex sets out some of the relevant sections from the three comparative statutes, the English Children Act 1989, the Children (Scotland) Act 1995 and the Australian Family Law Act 1975 as amended by the Family Law Reform Act 1995. Some draft sections for a proposed Children' s Bill for Hong Kong are set out. The draft sections follow the chronological order of chapter 6.

Statutory checklist of factors

2. Section 1(3) of Children Act 1989 provides:

> *"In the circumstances mentioned in subsection (4), a court shall have regard in particular to:*
>
> *(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);*
>
> *(b) his physical, emotional and educational needs;*
>
> *(c) the likely effect on him of any change in his circumstances;*
>
> *(d) his age, sex, background and any characteristics of his which the court considers relevant;*
>
> *(e) any harm which he has suffered or is at risk of suffering;*
>
> *(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;*
>
> *(g) the range of powers available to the court under this Act in the proceedings in question."*

3. Section 68F of the Family Law Act 1975 as amended by the Family Law Reform Act 1995 provides:[1394]

> *"68F. (1) Subject to subsection (3), in determining what is in the child's best interests, the court must consider the matters set out in subsection (2).*

[1394] All the other Australian sections referred to were amended by the 1995 Act.

(2) The court must consider:

(a) any wishes expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's wishes;

(b) the nature of the relationship of the child with each of the child's parents and with other persons;

(c) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:

(i) either of his or her parents; or

(ii) any other child, or other person, with whom he or she has been living;

(d) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;

(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;

(f) the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant;

(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:

(i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or

(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;

(h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(i) any family violence involving the child or a member of the child's family;

(j) any family violence order that applies to the child or a member of the child's family;

(k) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(l) any other fact or circumstance that the court thinks is relevant.

(3) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2)."

4. **The recommended draft statutory checklist of factors based on section 1(3) of the Children Act 1989 will provide:**

"(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to:

(a) the ascertainable views of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, maturity, sex, social and cultural background and any characteristics of the child which the court considers relevant;

(e) any harm which he has suffered or is at risk of suffering;

(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;

(g) the nature of the relationship of the child with each of the child's parents and with such other persons;

(h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;

(i) the range of powers available to the court under this Ordinance in the proceedings in question."

Parental responsibilities

5. **The recommended draft section on parental responsibilities based on section 1 of the Children (Scotland) Act 1995 will provide:**

"1. (1) A parent has in relation to his child the responsibility:

(a) to safeguard and promote the child's health, development and best interests;

(b) to provide, in a manner appropriate to the stage of development of the child:

(i) direction;

(ii) guidance,

to the child;

(c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and

(d) to act as the child's legal representative,

but only in so far as compliance with this section is practicable and in the interests of the child.

(2) 'Child' means for the purposes of the section, a person under the age of eighteen years;

(3) The responsibilities mentioned in paragraphs (a) to (d) of subsection (1) above are in this Ordinance referred to as 'parental responsibilities'; and the child, or any person acting on his behalf, shall have title to sue, or to defend, in any proceedings as respects those responsibilities.

(4) The parental responsibilities supersede any analogous duties imposed on a parent at common law; but this section is without prejudice to any other duty so imposed on him or to any duty imposed on him by, under or by virtue of any other provision of this Ordinance or of any other enactment."

Parental rights

6. **The recommended draft section on parental rights based on section 2 of the Children (Scotland) Act 1995 will provide:**

"2. (1) A parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right:

(a) to have the child living with him or otherwise to regulate the child's residence;

(b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;

(c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and

(d) to act as the child's legal representative.

(2) Subject to subsection (3) below, where two or more persons have a parental right as respects a child, each of them may exercise that right without the consent of the other or, as the case may be, of any of the others, unless any decree or deed conferring the right, or regulating its exercise, otherwise provides.

(4) The rights mentioned in paragraphs (a) to (d) of subsection (1) above are in this Ordinance referred to as 'parental rights', and a parent, or any person acting on his behalf, shall have title to sue, or to defend, in any proceedings as respects those rights.

(5) The parental rights supersede any analogous rights enjoyed by a parent at common law; but this section is without prejudice to any other right so enjoyed by him or to any right enjoyed by him by, under or by virtue of any other provision of this Ordinance or of any other enactment.

(7) In this section, 'child' means a person under the age of eighteen years."

Delegation by parents

7. **The recommended draft section on delegation of parental rights and responsibilities based on section 2(9) to 2(11) of Children Act 1989 will provide:**

"(9) A person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf.

(10) The person with whom any such arrangement is made may himself be a person who already has parental responsibility for the child concerned.

(11) The making of any such arrangement shall not affect any liability of the person making it which may arise from any

failure to meet any part of his parental responsibility for the child concerned."

Appointment of a guardian

8. **The recommended draft section on the appointment of a guardian based on section 5(5) of the Children Act 1989 will provide:**

> *"(5) An appointment under subsection (3) or (4) shall not have effect unless it is made in writing, is dated and is signed by the person making the appointment or:*
>
> *(a) in the case of an appointment made by a will which is not signed by the testator, is signed at the direction of the testator in accordance with the requirements of section 9 of the Wills Act 1837; or*
>
> *(b) in any other case, is signed at the direction of the person making the appointment, in his presence and in the presence of two witnesses who each attest the signature."*

Court appointment of guardian

9. **The recommended draft section on the court appointment of a guardian based on section 5(1) of the Children Act 1989 will provide:**

> *"(1) Where an application with respect to a child is made to the court by any individual, the court may by order appoint that individual to be the child's guardian if:*
>
> *(a) the child has no parent with parental responsibility for him; or*
>
> *(b) a residence order has been made with respect to the child in favour of a parent or guardian of his who has died while the order was in force; or*
>
> *(c) the child was residing with a parent or guardian of his who has died."*

Definition of residence order

10. **The recommended draft section on the definition of a residence order based on section 8(1) of the Children Act 1989 will provide:**

> *"In this Ordinance:*
>
> *a residence order is an order settling the arrangements as to the person with whom a child is to live and who has the day-to-day care and best interests of the child."*

Definition of contact order

11. **The recommended draft section on the definition of a contact order based on section 11(2)(d) of the Children (Scotland) Act 1995 will provide:**

> *"A contact order is an order regulating the arrangements for maintaining personal relations and direct contact between a child under that age and a person with whom the child is not, or will not be, living."*

Specific issues order

12. **The recommended draft section on the definition of a specific issues order based on section 8(1) of the Children Act 1989 will provide:**

> *"a specific issues order is an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child."*

Prohibited Steps Orders

13. **The recommended draft section on the definition of a prohibited steps order based on section 8(1) of the Children Act 1989 will provide:**

> *"a prohibited steps order is an order that no step which could be taken by a parent in meeting his parental responsibilities or his parental rights for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court."*

Parental responsibility of non-parents

14. **The recommended draft section on the parental responsibility of non-parents based on section 12(2) of the Children Act 1989 will provide:**

> *"(2) Where the court makes a residence order in favour of any person who is not the parent or guardian of the child concerned*

that person shall have parental responsibility for the child while the residence order remains in force."

Family proceedings

15. **The recommended draft section dealing with family proceedings based on section 10(1) of the Children Act 1989 will provide:**

> *"(1) In any family proceedings in which a question arises with respect to the best interests of any child, the court may make a section 8 order with respect to the child if:*
>
> *(a) an application for the order has been made by a person who:*
>
> *(i) is entitled to apply for a section 8 order with respect to the child; or*
>
> *(ii) has obtained the leave of the court to make the application; or*
>
> *(b) the court considers that the order should be made even though no such application has been made."*

Right of third party to apply

16. **The recommended draft section dealing with the right of a third party to apply, based on section 10(5)(b) and (10) of the Children Act 1989, will provide:**

> *"(5) The following persons are entitled to apply for a residence or contact order with respect to a child:*
>
> *(b) any person with whom the child has lived for a period of at least one year;*
>
> *(10) The period of one year mentioned in subsection (5)(b) need not be continuous but must not have begun more than three years before, or ended more than three months before, the making of the application."*

How the views of the child are expressed

17. **The recommended draft section dealing with how the views of the child are expressed, based on section 68G(2) of the Australian Family Law Act 1975, will provide:**

> *"(2) The court may inform itself of views expressed by a child:*
>
> *(a) by having regard to anything contained in a report given to the court; or*

(b) subject to the Rules of Court, by such other means as the court thinks appropriate".[1395]

Delay

18. **The recommended draft section dealing with delay based on section 11 of Children Act 1989**[1396] **will provide:**

"(1) In proceedings in which any question of making a section 8 order, or any other question with respect to such an order, arises, the court shall (in the light of any rules made by virtue of subsection (2)):

(a) draw up a timetable with a view to determining the question without delay; and

(b) give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that that timetable is adhered to.

(2) Rules of court may:

(a) specify periods within which specified steps must be taken in relation to proceedings in which such questions arise; and

(b) make other provision with respect to such proceedings for the purpose of ensuring, so far as is reasonably practicable, that such questions are determined without delay."

Children's views in the mediation process

19. **The recommended draft section dealing with children's views in mediation based on section 11(7) of Children (Scotland) Act 1995 will provide:**

"(7) In considering the proposed agreement of the parties, the mediator, taking account of the child's age and maturity, shall so far as practicable:

(i) give him an opportunity to indicate whether he wishes to express his views;

(ii) if he does so wish, give him an opportunity to express them; and

(iii) have regard to such views as he may express."

1395 This would deal with separate representatives.

1396 Section 1(2) of the Children Act 1989 is also recommended and its text is a footnote in the relevant part of chapter 6 *supra*.

Removal of child from jurisdiction

20. **The recommended draft section dealing with removal of a child from the jurisdiction based on section 2(3) and (6) of the Children (Scotland) Act 1995 will provide:**

> *"(3) Without prejudice to any court order, no person shall be entitled to remove a child from, or to retain any such child outside the Hong Kong Special Administrative Region, without the consent of a person described in subsection (6) below.*
>
> *(6) The description of a person referred to in subsection (3) above is a person (whether or not a parent of the child) who for the time being has and is exercising in relation to him a right mentioned in paragraph (a) or (c) of subsection (1) above*[1397]*; except that, where both the child's parents are persons so described, the consent required for his removal or retention shall be that of them both."*

Location order

21. **The recommended draft section dealing with a location order based on section 67J of the Australian Family Law Act 1975 will provide:**

> *"(1) a location order is an order made by a court requiring:*
>
> *(a) a person to provide the Registrar of the court with information that the person has or obtains about the child's location; or*
>
> *(b) the Secretary of a Department, or an appropriate authority, to provide the Registrar of the court with information about the child's location that is contained in or comes into the records of the Department or appropriate authority."*

Who may apply for a location order

22. **The recommended draft section dealing with who may apply for a location order based on section 67K of the Australian Family Law Act 1975 will provide:**

[1397] For text see *supra* on parental rights.

"A location order in relation to a child may be applied for by:

(a) a person who has a residence order in relation to the child; or

(b) a person who has a contact order in relation to the child; or

(c) any other person concerned with the care, best interests or development of the child."

Recovery order

23. **The recommended draft section dealing with a recovery order based on section 67Q of the Australian Family Law Act 1975 will provide:**

"A recovery order is an order made by a court doing all or any of the following:

(a) requiring the return of a child to:

(i) a parent of the child; or

(ii) a person who has a residence order or a contact order in relation to the child; or

(b) authorising or directing a person or persons, with such assistance as he or she requires or they require, and if necessary by force, to stop and search any vehicle, vessel or aircraft, and to enter and search any premises or place, for the purpose of finding a child;

(c) authorising or directing a person or persons, with such assistance as he or she requires or they require, and if necessary by force, to recover a child;

(d) authorising or directing a person to whom a child is returned, or who recovers a child, to deliver the child to:

(i) a parent of the child; or

(ii) a person who has a residence order or a contact order in relation to the child; or

(iii) some other person on behalf of a person described in subparagraph (i), or (ii);

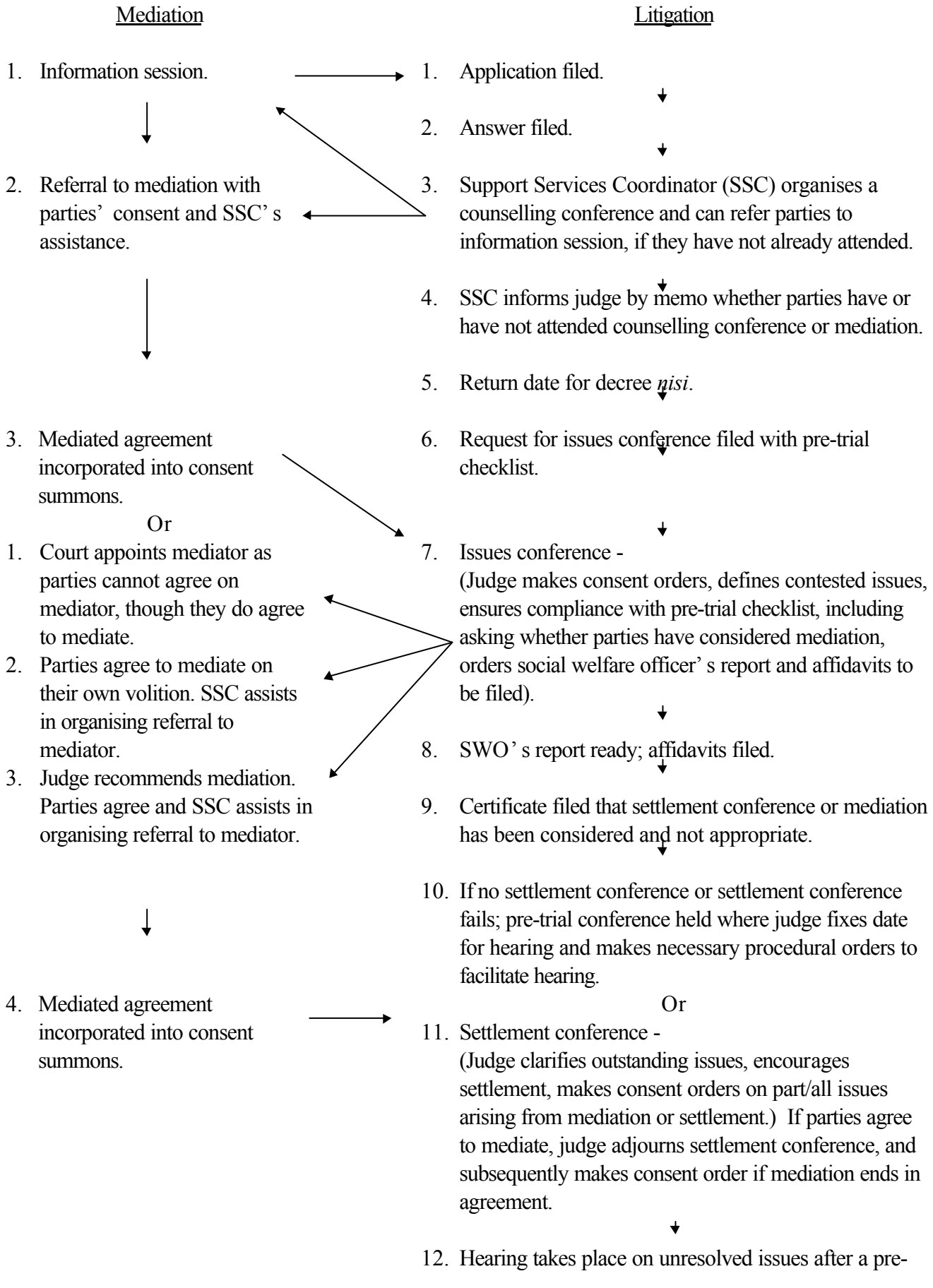
(e) giving directions about the day-to-day care of a child until the child is returned or delivered to another person;

(f) prohibiting a person from again removing or taking possession of a child;

(g) authorising the arrest, without warrant, of a person who again removes or takes possession of a child."

Annex 2

Proposed Case Management and Support Services Flow Chart for
Dispute Resolution Process



trial conference.