

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

CHILD CUSTODY AND ACCESS

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Preface

1. Recommendations made by the Law Reform Commission of Hong Kong have brought about key changes to our laws affecting the family. The Commission's 1991 report on illegitimacy,¹ which proposed reforms to regularise the status of children, was implemented in 1993 in the Parent and Child Ordinance (Cap 429).² Two years later, the Commission's proposals for a new divorce regime³ resulted in major changes to the Matrimonial Causes Ordinance (Cap 179).⁴ One area which has remained largely untouched however, despite major developments overseas, is Hong Kong's law on the guardianship and custody of children, which dates back to the late 1970s.

2. In recent years, Hong Kong, like many other jurisdictions, has seen a dramatic rise in its rate of divorce.⁵ The serious impact that the legal process itself is recognised to have on families undergoing divorce, particularly where arrangements for the children must be made, has led jurisdictions like the United Kingdom, Australia and New Zealand to comprehensively recast their laws in this area.⁶ Other jurisdictions are also considering what reforms may be necessary.⁷

3. The topic of guardianship and custody of children was referred to the Law Reform Commission by the Attorney General and the Chief Justice in April 1995 in the following broad terms:

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

1 HKLRC, *Illegitimacy*, Topic 28, December 1991.

2 Ordinance No 17 of 1993.

3 HKLRC, *Grounds for Divorce and Time Restrictions on Petitions for Divorce Within Three Years of Marriage*, Topic 29, November 1992.

4 *le*, the Matrimonial Causes (Amendment) Ordinance (Ord No 29 of 1995).

5 In 1972, 354 divorce decrees absolute were granted in Hong Kong. By 1980, the figure had risen to 2,087. In 1990, 5,551 decrees absolute were granted, and in 2000, the figure had soared to 13,058. The number of divorce applications filed in 2003 was 17,295. (Figures supplied by the Judiciary of the HKSAR.)

6 In England, the Children Act 1989; in Scotland, the Children (Scotland) Act 1995; and in Australia, the Family Law Reform Act 1995. (See also the follow-up study on the Australian reforms by University of Sydney and Family Court of Australia, *The Family Law Reform Act 1995: The First Three Years* (Dec 2000).) New Zealand has recently enacted the Care of Children Act 2004, which will come into effect on 1 July 2005.

7 See, for example, in Canada: Canadian Parliamentary Special Joint Committee on Child Custody and Access, *For the Sake of the Children* (Dec, 1998), *The Government of Canada's Response to the Report* (May 1999), Dept of Justice Canada, *Federal Provincial Territorial Consultations on Custody, Access and Child Support in Canada* (March 2001).

4. In May 1996, the Commission appointed a sub-committee chaired by the Hon Ms Miriam Lau to consider the terms of reference and to make proposals to the Law Reform Commission for reform. The members of the sub-committee are:

Hon Ms Miriam Lau, GBS, JP Chairperson	Sole Practitioner Miriam Lau & Co
Master de Souza Deputy Chairman	Master High Court
Miss Rosa Choi	Assistant Principal Legal Aid Counsel Legal Aid Department
H H Judge Chu	Judge District Court
Ms Robyn Hooworth (up to 28 August 2001)	Mediator
Mr Anthony Hung	Partner Lau, Kwong & Hung, Solicitors
Ms Jacqueline Leong, SC	Barrister
Dr Athena Liu	Associate Professor Faculty of Law University of Hong Kong
Mr Thomas Mulvey, JP	Consultant
Mrs Cecilia Tong	Regional Officer (Retired) Social Welfare Department
Ms June Wee	Barrister
Miss Wong Lai-cheung	Counsellor

5. Ms Paula Scully was the secretary to the sub-committee until February 1999, when Ms Michelle Ainsworth, Deputy Secretary of the Commission, took over that role.

6. In the course of its detailed consideration of the law and practice in this area, the sub-committee identified a number of key topics for review. These included the approach of the law and the courts to custody and access arrangements for children, the use of dispute resolution procedures in family cases, parental child abduction and guardianship of children on the death of a parent.

7. The sub-committee published an extensive consultation paper on *Guardianship and Custody* in December 1998 addressing these topics and setting out a wide range of proposals for reform. Fifty-one submissions were received during the three-month consultation exercise. Those who responded included members of the legal profession, social workers, welfare organisations, youth groups, women's groups, counsellors, mediators,

educational institutions, government departments and private individuals. The list of respondents is at Annex 1. We are grateful to all those who commented on the consultation paper.

8. In January 2002, the Commission published its report on *Guardianship of Children*, the first in a series of four reports under this reference. A second report, on *International Parental Child Abduction*, was published in April 2002. The Commission's third report in the series, on *The Family Dispute Resolution Process*, was published in March 2003. This fourth and final report covers the child custody and access aspects of the reference.

9. Chapter 1 of this report considers child custody law in its wider social and legal contexts. Hong Kong's existing law and procedure on custody and access is examined in Chapters 2 to 4. Chapters 5 to 8 look at newer legislative models for child custody and access that have been adopted in other jurisdictions.

10. Our conclusions and recommendations for reform in this area are set out in Chapters 9 to 14 of this report.

Chapter 1

Background to the law in this area

"All too often, [we] are confronted with reports of marriage or de facto relationship breakdowns that involve bitter and sometimes tragic disputes over the children. ... The children can become pawns in a power struggle between their parents or can be used as vehicles for one or both parents to express unresolved and ongoing dissatisfaction with the breakdown of the domestic relationship."¹

"Some separating couples ... find themselves unable to distinguish between their personal bitterness about the breakdown of the relationship and the necessity of focusing on the future well being and contentment of their children."²

Introduction

1.1 Unlike other areas of the law, the law of divorce involves not only a legal process, but also a social and psychological one. The impact of the choices made by divorcing parents, and the decisions handed down by the family courts, continue to be felt in the lives of the parties concerned for years after the event. Substantial research confirms that children in particular are negatively affected by undergoing the experience of their parents' divorce.³ As the Australian Family Law Council comments, *"the children ... are often caught in a dilemma for which they bear no responsibility, but which causes them great personal anguish."*⁴

1.2 Hong Kong's current law on child custody and access dates back to the 1970s, and is based on a legal model formerly adopted in a number of other common law jurisdictions.⁵ The underlying approach of this custody model is to divide up between the divorcing parents a perceived bundle of parental *"rights"* over the children, and to do so with the children's

1 Australian Family Law Council, *Patterns of parenting after separation* (Apr 1992), para 1.01.

2 Same as above.

3 See discussion below, at paras 1.8 to 1.21.

4 Australian Family Law Council, above, at para 1.01.

5 For example, England, Scotland and Australia, which have all now adopted a more modern *"joint parental responsibility"* legal model for determining post-divorce arrangements for children.

best interests in view. Unfortunately, this legal focus on the allocation of parental rights and authority has tended to polarise the post-divorce involvement of the parents in the lives of their children, with one parent assuming the dominant role in the children's upbringing and making all the key decisions affecting them, while the other is left with a relatively minor parental role to fulfil. Over time, this can lead to the access parent maintaining only minimal contact with the children, or eventually drifting out of their lives altogether.

1.3 In other common law jurisdictions, there has been a shift away from this legal emphasis on the rights and authority of each of the parents over their children, towards a more child-focused concept of *"joint parental responsibility."* This newer approach, which emphasises the obligations rather than the rights of the parents, and stresses the rights of the children to maintain a continuing relationship with both parents after divorce, is examined in this report as a possible model for Hong Kong's future legislation in this area.

1.4 In this chapter, we consider first the wider social context of divorce and examine the emotional process which usually takes place for the parties concerned. We then introduce in more detail the changing legal paradigm of the joint parental responsibility model. The role of the state in the divorce process is addressed later in this chapter, including the state's responsibility to intervene by providing ways of handling matrimonial disputes which are the least detrimental to parties concerned. We also discuss the broader legal framework of children's and parents' rights under the United Nations Convention on the Rights of the Child and the Hong Kong Bill of Rights Ordinance (Cap 383).

The wider social context of divorce

Divorce as a complex process⁶

1.5 Lawyers tend to see divorce as a legal process under which a couple dissolve their marriage contract and become free to remarry. Therapists, on the other hand, tend to see divorce as a psychological process. There is also now the ecological perspective on divorce, where it is viewed 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)."*⁷

6 Paras 1.5 to 1.21 of this report are based on 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* (Apr 1996).

7 Irving and Benjamin, *Family mediation - contemporary issues* (1995), at 9.

Stages of divorce

1.6 Researchers categorise the process of divorce in different terms. Bohannan⁸ suggested there are six categories: emotional, legal, economic, co-parental, community and psychic. Wiseman⁹ refers to five psychological stages: denial, loss, anger, reorientation and acceptance. It is important to put the resolution of custody cases in this broader context.

1.7 An ecological perspective involves viewing the divorce as a process that unfolds over time, and recognising that at different times the parties may be at different stages in the process. For example, one parent may be at the stage of denying there is a problem and refusing to accept the need for a divorce, while the other parent feels hostile. It is also important to appreciate that the particular stage of the *legal* process is not necessarily reflected in the concurrent *psychological* state of the spouses involved, and, more importantly, their children. It is therefore preferable to look at divorce through a holistic model which embraces both the legal and psychological processes and the ecological perspective mentioned above.

Impact of divorce on children

1.8 There are social and financial consequences to divorce. Researchers have found that the majority of spouses involved in difficult divorces temporarily become less adequate and can even abandon their parental role.¹⁰ Parents who may not be coping in the short term with a divorce have the added pressure of handling children on whom the psychological effect is even greater.

"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."¹¹ Children often react to divorce with feelings of anger, terror or guilt. They grieve for the lost parent and fear further losses and catastrophies.¹² Helping children cope with dramatic changes in the family is an important task for the custodial parent. To this responsibility is

8 *Divorce and after* (1971).

9 "Crisis theory and the process of divorce," *Social Casework* (1975) 56(4), at 205 to 212.

10 Isaacs *et al*, "Social networks, divorce and adjustment; a tale of three generations," *Journal of Divorce* (1986) vol 9, 1 to 16. "Under the intense stress of the divorcing process, a substantial proportion of previously adequate parents become increasingly insensitive to the children's needs or completely abandon their parenting responsibilities with devastating consequences for child adjustment": Irving and Benjamin, above, at 64.

11 Honing, "Stress and coping in children (Part 1)," *Young Children* (1986) 41(4), 50 to 63.

12 Wallerstein, "Children of divorce; stress and developmental tasks," in Garnezy & Rutter (eds) *Stress, coping and development of children* (1983).

added personal adjustment, shifts in family roles and household routines, and an overload in terms of economic burden."¹³

1.9 The majority of children show clear indications of distress and disruption during and after their parents' divorce.¹⁴ They are more likely to experience external problems such as aggression or disobedience. They also experience internal feelings of fear, blame, lowered self esteem, depression and insecurity.¹⁵ Pre-adolescent boys show more distress than girls¹⁶ while adolescent girls are more affected than boys. 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 parents' divorce.)¹⁷

1.10 Researchers conclude that the consequences of divorce for children are likely to vary according to the parent-child relationship and the children's gender, age and social class.¹⁸ The interacting processes that may determine a child's adjustment to divorce are summarised by Benjamin and Irving¹⁹ as:

- (a) the reciprocal adjustment of the custodial parent and the child living with 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.

13 Garbarino *et al*, *Children and families in the social environment* (1992, 2nd ed), at 155 to 156.

14 Hetherington, "Coping with family transitions; winners, losers and survivors," *Child Development* (1989) 60, 1 to 14, cited in Irving and Benjamin, above, at 58.

15 Wallerstein, above. Conflict arising out of divorce can affect children's functioning at school: Bisnaire, Fireston & Rynard, "Factors associated with academic achievement in children following parental separation," *American Journal of Orthopsychiatry* (1990) 60, at 67 to 76. They may be more likely to use psychiatric and other mental health services: 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, at 573 to 584. (Though this may not be so applicable in Hong Kong, where there is still possibly greater resistance to going outside the family for therapeutic support in a time of crisis.)

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

17 Grynych and Fincham, "Marital conflict and children's adjustment; a cognitive-contextual framework," *Psychological Bulletin* (1990) 108, at 267 to 290.

18 Irving and Benjamin, *Family mediation - contemporary issues* (1995), at 61.

19 Same as above, at 63.

1.11 The older research supported the belief that the more bitter and prolonged the conflict between the parents, the more damage was done to the child's adjustment.²⁰ Kelly suggests that conflict may not produce a consistent outcome in children, however. 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.²¹ Hodges has found that high parental conflict can undermine or disrupt the relationship between the non-custodial parent and the children.²² Conversely, a friendly parental relationship positively influences child adjustment and self esteem.²³ 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.²⁴

Effect of access on child's adjustment to divorce

1.12 Isaacs and others²⁵ have found that the way in which the first 12 months of separation and divorce are handled is critical, as in their studies, it affected the rate of child adjustment when measured at the end of the third year after divorce. With regard to access, they have found that having consistent, scheduled visits was more helpful to children's adjustment than frequency of access. Other data reveals that, *"scheduled visiting by non-custodial fathers was the single best predictor of child social competence by the end of year 3."*²⁶ Most children, like adults, will adjust successfully after two or three years. For a minority of children, however, the short-term consequences of a divorce can leave them vulnerable to long-term harm.²⁷

1.13 In apparently conflicting findings, some North American research showed that about half of all children who are in the custody of their mothers seldom or never see their father,²⁸ while more recent research has shown that 65% of fathers visited their children at least every other week.²⁹ It appears that access frequency is inversely related to the child's age and the time that has elapsed since separation.³⁰

20 Booth *et al*, "The impact of parental divorce on courtship," *Journal of Marriage and the Family* (1984) 65(4), 85 to 94. See also Irving and Benjamin, above, at 67.

21 "Current research on children's post-divorce adjustment; no simple answers," *Family & Conciliation Courts Review* (1993) 31(1), 29 to 49; Irving and Benjamin, above, at 68.

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

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

24 Guidubaldi and others, "The impact of parental divorce on children; report of the nationwide NASP study," *School Psychology Review* (1983) 12, 300 to 323.

25 Isaacs *et al* (1986), above.

26 Irving and Benjamin, above, at 69 to 70.

27 Same as above, at 72.

28 Furstenberg & Spanier, *Recycling the family; remarriage after divorce* (1984).

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

30 Arditti, "Differences between fathers with joint custody and non-custodial fathers," *American Journal of Orthopsychiatry* (1992) 62, 186 to 195.

1.14 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*³¹ have questioned the wisdom of granting access in these cases except on a very limited basis.

1.15 More recent research has stressed the importance of access for children, however. Most of this research *"suggests that child adjustment is directly related to visitation frequency; more frequent contact is associated with improved child adjustment."*³² 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.³³ Some studies report no relationship between the child's adjustment and the father's visiting.³⁴ It is accepted that the quality of the access will be influenced by the quality of the parent and child pre-divorce relationship. 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.³⁵

Long term harm caused by divorce

1.16 Some research studies have indicated that children of divorced parents are less internally well-adjusted than those who have not had that experience³⁶ and their intellectual and academic functioning can be reduced.³⁷ Benjamin and Irving agree with other researchers that *"a substantial minority of children suffer long term harm as a direct consequence of their parents' divorce."*³⁸ Wallerstein and Blakeslee note that younger children appear to be more acutely affected by the divorce at the time that it is occurring, while they do better in long term adjustment than older children, who are more likely to have taken a position on one parent's side.³⁹

31 Goldstein, Freud and Solnit, *Beyond the best interests of the child* (1973).

32 Hetherington, "Divorce; a child's perspective," *American Psychologist* (1979) 34, 851 to 858, referred to in Irving and Benjamin, above, at 66.

33 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* (1985) 24, 531 to 537.

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

35 Hetherington, Cox and Cox, "Effects of divorce on parents and children," in Lamb, *Nontraditional families; parenting and child development* (1982); Irving and Benjamin, above at 67.

36 According to findings of Wallerstein and Blakeslee, between 26% to 40% of boys and 15% to 25% of girls of divorced parents developed a history of delinquent behaviour: see Wallerstein and Blakeslee (1989), above.

37 In Wallerstein and Blakeslee's study, 50% of the boys went to college compared to 85% of their friends; see Irving and Benjamin, above, at 81.

38 See Irving and Benjamin, above, at 83.

39 Same as above.

1.17 Some researchers note that anger and hostility felt by the custodial parent towards the former spouse could result in the custodial parent seeking to damage the relationship between the non-custodial spouse, normally the father, and the children, particularly boys.⁴⁰ Once that relationship has deteriorated, it is more likely that child support for college education would be refused. Garber comments on the failure of many non-custodial parents to sustain their involvement as parents in the face of their children's anger and disappointment.⁴¹

1.18 Researchers have also found that children have difficulty adjusting to a custodial parent marrying again. This could, for example, result in conflict with the step-father, who is seen as a threat to the relationship between the children and the biological father.

1.19 Rutter's⁴² findings suggest that it is not the disruption of the bond with a parent that is of greatest significance, but the distortion of family relationships. The fear of separation in the intact home is replaced by an experience of actual separation from one or other parent, which might result in long-term insecurity in relationships.⁴³ A review of the effects of separation and divorce on child development by Richards and Dyson estimates that between 20 to 50 per cent of children of divorced parents showed degrees of upset which would require some degree of outside help.⁴⁴

1.20 Clulow and Vincent have observed that there are three main factors mitigating the effect of divorce on children:

- (a) a continuing relationship with both parents
- (b) the quality of parenting from the residential parent, and
- (c) the quality of what is created to take the place of the marriage that has ended.

Conclusions from research

1.21 It appears that certain key indicators from the research need to be kept in view by those professionally involved in the divorce process, including lawyers, judges, mediators or counsellors. It is clear that boys and

40 Same as above, at 86.

41 Garber, "Parenting responses in divorce and bereavement of a spouse," in Cohen, Cohler and Weissman (eds) *Parenthood: a psychodynamic perspective* (1984).

42 Rutter, "Parent child separation: psychological effects on children," *Journal of Child Psychology and Psychiatry* (1971) 12 at 233 to 60; and *Helping troubled children* (1975).

43 Richards, "Children and the divorce courts," *One-parent families* (1984) 7, 2 to 5; "Separation, divorce and remarriage: the experiences of children," in Guy (ed), *Relating to marriage*, National Marriage Guidance Council.

44 Richards and Dyson, *Separation, divorce and the development of children: a review*, Child Care and Development Group, University of Cambridge (1982), at 19.

girls have different needs and their adjustment is also age-related.⁴⁵ 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.⁴⁶ Benjamin and Irving suggest that it is useful to regard families as moving through a function/dysfunction continuum in the divorce process.⁴⁷

The changing legal paradigm in child custody and access

1.22 As we noted earlier in this chapter, a paradigm shift in thinking has occurred overseas in recent years, away from a focus in custody law on parental rights and authority, towards a focus instead on parental responsibilities and the rights of the child. This is reflected in legislation such as the English Children Act 1989, the Children (Scotland) Act 1995, the Australian Family Law Reform Act 1995, and in the United Nations Convention on the Rights of the Child.

Children's rights

1.23 Henaghan suggests that in analysing 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."*⁴⁸ 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?

45 Wallerstein and Blakeslee therefore 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"*: referred to in Irving and Benjamin, above, at 84.

46 Irving and Benjamin, above, at 440. This underscores the greater use of mediation in Hong Kong and overseas in resolving divorce disputes. For a full discussion of the relevant issues, see: HKLRC, *The Family Dispute Resolution Process* (Mar 2003).

47 This perspective is useful as family lawyers can be frustrated by the fact that their clients in a divorce case may not appear to behave rationally at times: Irving and Benjamin, above, at 442.

48 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, New Zealand (October 1994), at 32.

- Where does family responsibility end and state responsibility begin?⁴⁹

Changing family structures

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

1.25 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 and more on relatives or child care workers to look after the children, as she often has to return to work. Therefore, the old preference for women to have custody, as they were likely to stay at home and look after the children, has changed to a situation where both parents in Hong Kong are likely to be working long hours and the child is looked after by a domestic helper, 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.⁵⁰

1.26 A further issue that 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 within this extended family.

Joint custody

1.27 As we noted earlier, 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.⁵¹

1.28 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.

49 Same as above.

50 We will next look at the current law and practice in Hong Kong in Chapters 2 to 4.

51 In relation to the terms "*custody*" and "*access*," we note that the term "*custody*" can have unfortunate connotations of "*ownership*" of the child. As will be seen in subsequent chapters of this report, the neutral terms of "*residence*" and "*contact*" are generally used in jurisdictions applying the joint parental responsibility model in family proceedings.

1.29 It appears that joint physical custody is more likely to be successful where both parents are positively motivated, have a reasonable relationship and do not have dysfunctional patterns of behaviour towards each other. Also, joint custody may only be practicable where, for instance, there is adequate housing for the children at both parental homes and reasonable proximity between those homes.

The wider legal context of divorce

The role of the State

1.30 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.⁵² 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.

1.31 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.⁵³ However *"no matter how well intentioned, wholesale intervention into the life of families is not likely to serve the interests of children."*⁵⁴ 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.

1.32 Goldstein, Freud and Solnit⁵⁵ argue that parents should be presumed to have the capacity and responsibility to decide what is in the best interests of their children and the family. Parents should have the first opportunity to meet the needs of their children and maintain family ties without state intervention. Folberg⁵⁶ argues that the state doctrine of *parens patriae* enables the state to take responsibility for the welfare of the children only when parents cannot agree or cannot adequately provide for them.

52 Clulow and Vincent, *In the child's best interests; divorce court welfare and the search for a settlement* (1987), at 206.

53 Saskatchewan Law Reform Commission, *Tentative proposals for custody law reform: Part I, substantive law* (Aug 1979) Preface, at iii.

54 Same as above, at iv.

55 *Before the best interests of the child* (1979).

56 "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.

*"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. ... 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."*⁵⁷

1.33 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 which the state should have to intervene in the family and how it exercises its discretion in implementing those powers.

Hong Kong Bill of Rights Ordinance (Cap 383)

1.34 The Hong Kong Bill of Rights, enacted in the Hong Kong Bill of Rights Ordinance (Cap 383),⁵⁸ lays down some parameters for the exercise of the powers of the state to intrude into the lives of family members. Article 14 of the Hong Kong Bill of Rights, which is equivalent to article 17 of the International Covenant on Civil and Political Rights,⁵⁹ 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."

1.35 Article 19 of the Hong Kong Bill of Rights⁶⁰ 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 of marriage, provision shall be made for the necessary protection of children. It recognises that spouses have equal rights and responsibilities in relation to marriage and dissolution.

1.36 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 his family, society and the State."* These provisions need to 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 Hong Kong Bill of Rights.

57 Clulow and Vincent, above, at 17 to 18.

58 See section 8 of the Ordinance, which lists the various articles of the Hong Kong Bill of Rights.

59 International Covenant on Civil and Political Rights ("ICCPR").

60 Equivalent to article 23 of the ICCPR.

United Nations Convention on the Rights of the Child

1.37 The United Nations General Assembly adopted the Declaration of the Rights of the Child in 1959. In 1989, the UN Convention on the Rights of the Child⁶¹ was adopted. The People's Republic of China ratified the Convention that year, and it was ratified by the United Kingdom in 1991. The Convention was extended to Hong Kong in 1994. To-date, approximately 190 countries have ratified the Convention.

1.38 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."* 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."*⁶²

1.39 The Convention refers to the Declaration of the Rights of the Child, where it stipulates 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."*

1.40 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.⁶³

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

61 United Nations Convention on the Rights of the Child ("UNCRC").

62 Note that it respects the child's right to contact with both parents.

63 Article 18, UNCRC.

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

Chapter 2

The current law and practice in Hong Kong - an overview

Introduction

2.1 In this chapter we begin our examination of the substantive law on child custody and access in Hong Kong and how the law operates in practice.

2.2 Hong Kong's legislation in this area is contained in a number of Ordinances, including the Guardianship of Minors Ordinance (Cap 13), the Matrimonial Causes Ordinance (Cap 179), the Matrimonial Proceedings and Property Ordinance (Cap 192), the Separation and Maintenance Orders Ordinance (Cap 16) and others.¹ The relevant provisions of these Ordinances are examined in detail in the next chapter.

2.3 In this chapter, we focus on the important legal concepts on which much of this legislation is based. We discuss the principles which govern the granting of custody and access orders in family cases, and review the procedures for obtaining a divorce in Hong Kong.

The legal parent-child relationship

2.4 There are certain key concepts on which the legal parent-child relationship is based. Unfortunately, these have come to be expressed in the law through *"a confusing array of terms in both statutes and cases."*² An overview of these various concepts, and how they are applied in practice, is set out below.

1 There are also relevant provisions in the Matrimonial Causes Rules (Cap 179) ("MCR"), the Domestic Violence Ordinance (Cap 189) ("DVO"), the Adoption Ordinance (Cap 290) and the Protection of Children and Juveniles Ordinance (Cap 213) ("PCJO"): see discussion in Chapter 3, below.

2 See A Liu, *Family Law for the Hong Kong SAR* (Hong Kong University Press, 1999), at 211 to 212. This has led, in one judge's view, to *"a bureaucrat's paradise and a citizen's nightmare."* See Sachs LJ in *Hewer v Bryant* [1970] 1 QB 357, at 371.

"Child" or "minor"

2.5 In the Guardianship of Minors Ordinance (Cap 13), the term "*minor*" is used to denote "*child*." Section 3 of the Interpretation and General Clauses Ordinance (Cap 1) defines a "*minor*" as a person who has not yet attained 18 years.

2.6 In the Matrimonial Proceedings and Property Ordinance (Cap 192), the term "*child*" is used, and is defined as including an illegitimate or adopted child of one or both parties to a marriage.³ The Ordinance goes on to define "*child of the family*" as a child of both of the parties to a marriage as well as "*any other child who has been treated by both those parties as a child of their family.*"⁴

"Parent" or "guardian"

2.7 The original legal concept of parenthood appears to have been that of "*guardianship*," a very old concept based more upon the protection of family landholdings than upon the protection of children.⁵

2.8 Guardianship implies 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 the child and on all aspects of his welfare. Usually a guardian has the right to have custody of the child, which means the right to his physical care and control. 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 to support the child.

2.9 Strictly speaking, the terms "*parent*" and "*guardian*" may be used synonymously. However a "*guardian*" more commonly refers to someone (not a parent of the child) who is appointed by will or by court order to have guardianship of the child when one or both of his parents dies.

*"The general understanding is that such a person acts as a parent substitute ... and arguably should have the same rights and authority as a parent."*⁶

3 Matrimonial Proceedings and Property Ordinance (Cap 192) ("MPPO"), section 2.

4 Same as above. For a recent case considering the meaning of "*child of the family*," see *F v F* [2003] 1 HKLRD 836, at 872B to 874J, *per* Hartmann J (CFI). The issue was considered in this case in the context of making financial provision for children of the family upon divorce.

5 Liu, above, at 212.

6 Same as above, at 213.

Parental "rights and authority"

2.10 To characterise the parent-child relationship, the term "*rights and authority*" of the parents towards the child is used in the Guardianship of Minors Ordinance (Cap 13).⁷ Though not defined in the Ordinance itself, these rights can be found at common law and in statute. They include:⁸

- the right to live with the child and control the child's day-to-day upbringing
- the right to the physical "possession" and "services" of the child
- the right to choose the child's education
- the right to choose the child's religion
- the right to choose the child's surname
- the right to inflict moderate punishment on the child
- the right to consent to medical treatment for the child
- certain rights to enter into contracts on the child's behalf
- the right to act for the child in legal proceedings
- the right to administer the child's property
- the right to appoint a testamentary guardian for the child
- the right to consent to an application for a passport for the child
- the right to arrange for the child to leave or emigrate from the jurisdiction
- the right to consent to the child's marriage⁹
- the right to consent to the child's adoption.¹⁰

2.11 There is a general principle of equality of parental rights and authority between the mother and the father when it comes to the exercise of these rights.¹¹

7 Eg, sections 3 and 4 of the Guardianship of Minors Ordinance (Cap 13) ("GMO"). See also, Liu, above, at 213.

8 See generally: S Cretney, *Principles of Family Law* (1997, 6th ed), at 578 to 580 and 609 to 625; Liu, above, at 213 and 217 to 228; and English Law Commission Working Paper, *Family Law; Review of Child Care Law; Guardianship* (1985) Law Com No 91, at para 2.25.

9 See the Marriage Ordinance (Cap 181), as amended by the Law Reform (Miscellaneous Provisions and Minor Amendments) Ordinance (Ord 80 of 1997).

10 See the Adoption Ordinance (Cap 290).

11 Liu, above, at 229. Eg, section 3(1)(b) of the GMO states that, in relation to the custody or upbringing of a child, the rights and authority of the mother and father are equal, except where the child is born out of wedlock. In this latter case, the rights of the father are limited unless he applies for a court order under section 3(1)(d) of the Ordinance for some or all of the rights and authority that a father of a legitimate child would have.

2.12 Also, the respective rights and authority of the parents may be exercised independently, *"by either without the other."*¹² Liu explains the implications of this:

*"In other words, one parent can, for example, decide which school and Sunday church a child should attend, or which doctor to consult, without consulting the other. This rule is designed to allow each parent, particularly the one who has day-to-day care and upbringing of the child, to exercise responsibility and make decisions without having to consult the other, and the onus is on the objecting parent to raise such an objection in court ... "*¹³

2.13 Although the principle of parental rights and authority is broad in its scope, it is, however, still subject to the *"welfare principle,"*¹⁴ so that the exercise of parental rights should be governed by what is in the best interests of the child. Liu comments:

*"[P]arental 'rights' reflects a misconception of the nature of the parent-child relationship. To the extent that the law enables parents to decide how to bring up their children without interference from others, it does so primarily because this is a necessary part of the parents' responsibility for that upbringing and in order thus to promote the welfare of their children."*¹⁵

2.14 It has also been observed that the significance of parental rights and authority diminishes as the child grows older.¹⁶ Lord Denning has described parental rights as:

*"[A] dwindling right which the court will hesitate to enforce against the wishes of the child, the older he is. It starts with the right of control and ends with little more than advice."*¹⁷

2.15 With regard to parental rights in the wider legal context, we saw in the previous chapter that a number of overseas jurisdictions have been moving away from the parent-focused *"parental rights and authority"* concept in recent years, towards the more child-focused concept of *"parental responsibility."*¹⁸ This change of emphasis in the law relating to children,

12 Section 3(1)(b), GMO.

13 Liu, above, at 229. See section 4(2) of the GMO which outlines how disagreements between parents on issues affecting the child's welfare are to be dealt with. Either party may apply to the court for directions, and the court may make such order as it thinks proper.

14 This is discussed in more detail later in this chapter.

15 Liu, above, at 216.

16 Same as above, at 217.

17 *Hewer v Bryant* [1970] 1 QB 357, at 369.

18 As reflected in the English Children Act 1989 (discussed in Chapter 5, below), the Children (Scotland) Act 1995 (discussed in Chapter 6, below), the Australian Family Law Reform Act 1995 (discussed in Chapter 7, below) and the United Nations Convention on the Rights of the Child.

and the extent to which it should be adopted in Hong Kong, is one of the principal themes of this report.¹⁹

What is meant by 'custody' and 'access'

Custody

2.16 "Custody" comprises the bundle of rights that parents have over their children. This includes the right to "care and control"²⁰ and the right to make all important decisions affecting the child, such as decisions regarding his education, religion and medical treatment.²¹

2.17 The parent granted custody or even simple "care and control" of the child upon separation or divorce is referred to as "the custodial parent." The parent not granted care and control, or custody in its wider sense, is usually granted "access" to the child and is referred to as "the non-custodial parent." The custodial parent "has a duty to ensure, protect and promote the best interests of the child."²² The custodial parent may or may not be obliged to consult the non-custodial parent on major decisions affecting the child.²³

2.18 Section 2 of the Matrimonial Proceedings and Property Ordinance (Cap 192) provides the only statutory definition of custody, and simply states that: " 'custody' ... in relation to a child, includes access to the child."

2.19 In some jurisdictions, an award of legal custody refers only to being granted physical custody of the child (that is, the authority to determine where the child will live on a daily basis), as both parents retain rights as guardians of the child. As noted earlier in this chapter, these rights include the right to be consulted on all major matters affecting the upbringing of the child, such as on health matters, education and religious welfare.

19 It is discussed at length in later chapters.

20 This is an aspect of custody of a child which is usually confined to "the right to physical possession and control of the infant's movement," or, "daily care and control": see Liu, above, at 213 and 278. In other words, it means having the day-to-day physical care and supervision of the child.

21 See, regarding the law of custody generally: Liu, above, at 276 to 284; P Hewitt (ed), A Liu, M McDonagh, S Melloy & S Warren, *Hong Kong Legal Practice Manuals: Family* (Sweet & Maxwell, 1998), above, at 159 to 174 and 207 to 234; E Francis & S Warren, *Divorce & Separation in Hong Kong: Your Guide to Law and Procedure* (Oxford University Press, 1995), at 74 to 80.

22 Liu, above, at 277.

23 See: *Dipper v Dipper* [1980] 2 All ER 722 and *Lo Chun Wing-yee v Lo Pong-hing* [1985] 2 HKC 647; but compare *Boulter v Boulter* [1977-1979] HKC 282 and *Wong Chiu Ngar-chi v Wong Hon-wai* [1987] HKLR 179. See also the discussion of these issues in Liu, above, at 276 to 279.

2.20 In Hong Kong, however, legal custody appears to be considered as equivalent to guardianship, with orders for "*sole custody*" being commonly made.²⁴ The effect of a sole custody order "*is to transfer most, if not all, parental rights and authority to the custodial parent exclusively.*"²⁵ As a result, the parent having physical care and control of the child also retains all rights to make decisions on the child's upbringing, without consulting the non-custodial parent. The non-custodial parent retains rights of access and the duty to support the child financially,²⁶ but generally must apply to the court if he wants to be consulted on matters relating to the child's welfare.²⁷

Access

2.21 Access is the right to have contact with the child, such as through letters, emails, telephone calls, visiting the child, taking him out or having him to stay from time to time. As we saw above, the right of access is included within the broader right of custody itself.²⁸ The degree of access granted can differ, depending on the circumstances of the case.²⁹ McDonagh states:³⁰

"The usual order is one of 'reasonable access' and the parties are left to sort out between themselves the details of how and when access will take place. ...In the event that the parties cannot agree arrangements for access, the court can make an order for defined access." (Emphasis added.)

2.22 Francis and Warren elaborate further on these terms:³¹

"Reasonable access [is an] arrangement whereby parties agree that the parent without care and control can see the child whenever it is reasonable and agreeable by both parties. The timetable for access is agreed upon by the parents rather than imposed by the court and arrangements can be flexible. ... Defined access [is] where the time, and sometimes place, of the access is specified in the court order – for example, every Saturday from 10 a.m. to 4 p.m., the child to be collected from and delivered to the mother's address."

24 Liu, above, at 276.

25 Same as above, at 276 to 279.

26 Liu states, at 276, that the non-custodial parent also retains "*the right to succeed on the child's intestacy, the right as a guardian on the death of the other parent, the right to appoint a testamentary guardian, and to veto adoption.*"

27 Same as above, at 278.

28 See section 2, MPPO.

29 *Wong Chiu Ngar-chi v Wong Hon-wai* [1987] HKLR 179 and *Re Ryker (infants)*, High Court, Miscellaneous Proceedings No 1184 of 1980 (1982), cited in Liu, above, at 276 to 277.

30 In Hewitt (ed) and others, above, at 160 to 161.

31 Francis & Warren, above, at 80 to 81; see also discussion in Francis & Warren, at 82 to 84.

2.23 Sometimes the court may order "*supervised access*." This is where access by the non-custodial parent is supervised by the custodial parent or a relative, or some other third party such as a social welfare officer.³² This would only be ordered where there is a compelling case, such as a perceived danger to the child of abduction, abuse or neglect.³³

2.24 As access is a generic term and is not defined in the relevant Ordinances, most of the law in relation to access is to be found in case precedent.³⁴

2.25 It is important to note that access is regarded as the right and privilege of the child, not the parent.³⁵

Sole custody order

2.26 As we have noted earlier, custody in Hong Kong seems to be treated as equivalent to guardianship, with sole custody orders being commonly made. The non-custodial parent in these circumstances is effectively excluded from having any decision-making role on matters affecting the welfare of the child.³⁶

2.27 The order for sole custody has practical implications on a day-to-day basis as well. For example, schools will not generally send a child's school reports to the non-custodial parent. There are also potential problems if the non-custodial parent has to take the child for urgent medical treatment during a period of access, as the access parent's capacity to give consent to the treatment may become an issue.

2.28 Liu observes that, in some sole custody cases, the parent-child relationship between the child and the non-custodial parent may be effectively ended by a change in the custodial parent's personal circumstances:³⁷

"The competing rights of a custodial parent and a parent with access was considered in Hunt v Hunt.³⁸ There the father had custody and the mother was given access to her children. The father, an army officer, was posted to Egypt and intended to take the children with him. The mother sought to restrain the father from doing so on the grounds that the move would

32 Liu, above, at 277.

33 Francis & Warren, above, at 81.

34 Hewitt (ed) and others, above, at 177.

35 See Hewitt (ed) and others, above, at 161; Francis & Warren, above, at 81.

36 See *Lo Chun Wing-yee v Lo Pong Hing* [1985] 2 HKC 647. The non-custodial parent does retain the following rights, however: the right to succeed on the child's intestacy; the right to appoint a testamentary guardian for the child; and the right to veto the child's adoption: see Liu, above, at 276.

37 Liu, above, at 278.

38 (1884) 28 Ch D 606.

frustrate access. It was held that a custodial parent could not be so restrained."

Split orders

2.29 Another type of custody order, the "*split order*,"³⁹ vests daily care and control in one parent and gives custody, in the sense of wider decision-making power, to the other parent. Liu comments that this order "*aims to preserve a role for the absent (but yet custodial) parent on major decisions concerning the child's upbringing.*"⁴⁰ She goes on to note, however, that a split order "*is unworkable where parents cannot agree and co-operate on matters relating to the upbringing of the child.*"⁴¹

2.30 In *Lo Chun Wing Yee v Lo Pong Hing*,⁴² the original custody order had been a split order. However, the post-divorce relationship between the parents had deteriorated and the parties could no longer co-operate with each other. The mother therefore 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. The judge observed that:

*"[C]ourts 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."*⁴³

2.31 The judge stated that in this case, sole custody would facilitate the management of affairs for the welfare and benefit of the child and enable decisions to be made promptly.⁴⁴

Joint custody

2.32 Joint custody is where the court grants custody to both parents, although physical care and control is usually granted to only one of them.⁴⁵

39 See the case example of *Dipper v Dipper* [1980] 2 All ER 722.

40 Liu, above, at 279.

41 Same as above.

42 [1985] 2 HKC 647.

43 Same as above, from the headnote.

44 Same as above, at 651, *per* Liu J. The court also ordered the mother, if she took the child outside Hong Kong on vacation, to give an undertaking to return the child to Hong Kong at the end of every vacation. She was also to give a quarterly report to the father under the headings of education, health and activities of the child.

45 See the facts of *Lo Chun Wing-yee v Lo Pong-hing*, above.

Liu explains the rationale behind the joint custody order: that instead of one party being given the right to decide important matters affecting the upbringing of the child, both parties are given that right. *"Such order symbolises divorced or separated parents playing a joint role in the upbringing of the child, and neither is excluded."*⁴⁶

2.33 It appears that the English courts were in the past always reluctant to grant such orders, holding that they were only appropriate where there was a reasonable prospect that the parties would co-operate.⁴⁷ One such case was *Jussa v Jussa*, in which Wrangham J stated that:⁴⁸

"Where you have a case such as the present case, in which the father and mother are both well-qualified to give affection and wise counsel to the children for whom they are responsible, and where they appear to be of such calibre that they are likely to co-operate sensibly over the child for whom both of them feel such affection ... it seems to me that there can be no real objection to an order for joint custody."

2.34 Until recent years, this order was *"almost unknown"* in Hong Kong,⁴⁹ as it was seen as implying joint physical custody and thus *"competing homes, causing confusion and stress on the child."*⁵⁰ It was also seen as implying a duty on the parent having care and control to consult the other parent on *all* matters concerning the child. As we will see later in this report, it is possible to apply the joint custody model in such a way that these perceived limitations do not exist.

The court's approach to custody and access - the welfare of the child

The welfare principle

2.35 The concept of *"the welfare of the child,"* though not defined in legislation, is said to lie *"at the heart of all litigation regarding children."*⁵¹ Other terms used in this context which have a similar meaning include *"the interests of the child"* and *"the best interests of the child."*⁵²

46 Liu, above, at 279 to 280.

47 Same as above.

48 [1972] 2 All ER 600, at 603.

49 Liu, above, at 279. It should be noted that, if the recommendations contained in this report are adopted, orders along the lines of joint custody orders will become much more common in Hong Kong. See also Liu, at 279 to 280, on this point.

50 Same as above, at 280.

51 Hewitt (ed) and others, above, at 162, para 7.17.

52 See Liu, above, at 246.

2.36 The purpose of *"the welfare principle"* is to guide the court in its decision-making in cases involving children.⁵³ Its effect is to require the court to take into account what is in the best interests of the child over and above what is best for any adults involved in the litigation.⁵⁴

2.37 The welfare principle is said to be an evolving concept which encapsulates the widest possible meaning.⁵⁵ It is not confined to considerations of money and physical comfort for the child, but includes consideration of his social, intellectual, moral and religious welfare, as well as his ties of affection.⁵⁶

2.38 As we will see further in the next chapter, the Guardianship of Minors Ordinance (Cap 13) is one of the Ordinances which governs court proceedings relating to the custody and upbringing of children.⁵⁷

2.39 Section 3 of the Ordinance sets out the principles that govern the conduct of court proceedings where the Ordinance applies. Section 3(1) states that:

"In relation to the 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-

- (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"*

53 See below in relation to section 3(1), GMO. Although the welfare principle is considered to have general application throughout proceedings relating to children, the principle is not applicable in the following types of proceedings: an injunction under the DVO or the Adoption Ordinance (Cap 290); some wardship proceedings; proceedings related to sections 12 or 13 of the Parent and Child Ordinance (Cap 429) or section 34(1) of the PCJO: see Liu, above, at 247.

54 It is therefore also sometimes referred to as *"the paramountcy principle"*: Liu, above, at 246.

55 Same as above, at 247 to 248. See also on the welfare principle, Hewitt (ed) and others, above, at 210 to 211.

56 *Re McGrath (infants)* [1893] 1 Ch 143, at 148, *per* Lindley LJ, also cited in Liu, above, at 248.

57 Including the provision of maintenance for them. The Ordinance regulates the custody rights of fathers in relation to illegitimate children (Part V, GMO) and the administration of property belonging to or held in trust for children (Parts II and IV, GMO). The Ordinance also deals with the appointment, powers and removal of guardians (Part III, GMO).

2.40 This provision clearly indicates that the welfare of the child is to be the first and paramount consideration of the court in determining custody issues and other matters relating to the upbringing of a child.

2.41 Unfortunately, the Ordinance does not provide any statutory definition of "*welfare*," nor does it provide any comprehensive list of the factors or considerations which the court should take into account in determining what constitutes the welfare or best interests of the child. This does not mean that cases are decided in a vacuum, however.⁵⁸

Factors in determining the welfare of the child

2.42 Cases on point suggest that there are certain key factors to which the courts have regard.⁵⁹ These include:

- the wishes and rights of the child (considered in relation to his age and level of understanding);
- the child's physical, emotional and educational needs;
- the desirability of maintaining continuity of care for the child and the likely effect on him of any change in circumstances;
- the child's age, sex, background and particular personal characteristics;
- any harm that he has suffered or is at risk of suffering; and
- the capacity of each parent, or relevant third party, to care for the child and to meet his needs.⁶⁰

2.43 Each of these factors is considered below.

Wishes of the child

2.44 This is obviously a difficult and sensitive area. The legislation requires the court to take into consideration the wishes of the child, but prescribes no methods for ascertaining these wishes. Older cases show a tendency for judges to interview the children themselves in chambers to ascertain their wishes,⁶¹ but it is now recognised that this discretion to see the

58 Liu, above, at 251.

59 Same as above, at 249 to 264. See also Hewitt (ed) and others, above, at 210 to 214.

60 These factors have been encapsulated in statutory form in section 1(3) of the English Children Act 1989, discussed in detail, later, in Chapter 5.

61 See the cases cited by Liu, above, at 251 on this point, including: *Re Y* [1946-1972] HKC 278 (1971); *Re Kwok Micah (a minor)*, High Court, Miscellaneous Proceedings No 3040 of 1984 (1985); *Re Chan Heung (an infant)*, High Court, Miscellaneous Proceedings No 349 of 1983 (1983); *L v L* [1970] HKLR 556; *Re Huthart (infants)*, High Court, Miscellaneous Proceedings No 1037 of 1981 (1984); and *Wong Yip Yuk-ping v Wong Sze-sang*, Court of Appeal, Civil Appeal Action No 116 of 1985 (1985).

children "should be exercised cautiously and should in no sense be automatic or routine."⁶² As one judge has commented:

"The difficulty [was] that there was an inherent contradiction in seeing the children for the purpose of ascertaining their wishes⁶³ whilst, at the same time, being required to report to their parents anything material which the children said. The children ... are in an impossible dilemma, which can only add to the emotional trauma to which they are already subject. Any expression of a preference for one parent inevitably involves disloyalty to the other."⁶⁴

2.45 In any event, the weight the court might ascribe to any wishes expressed by the child depends upon the child's age and level of understanding.

"A six-year-old child's wishes could often be ephemeral, changing from day to day in which case little or no weight should be given to his preferences. Conversely, the wishes of a 15-year-old boy, unless they were plainly contrary to his long-term welfare, could not be ignored lightly."⁶⁵

2.46 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. The social welfare report prepared for the case will usually contain advice for the court on any wishes expressed by the child.

Physical, emotional and educational needs

2.47 The needs of children will vary depending upon their particular age and sex. Liu comments, "[p]hysical and emotional needs are of paramount importance to an infant, whereas discipline and education can be crucial to a young child."⁶⁶

2.48 In *Re Huthart (infants)*,⁶⁷ care and control of an 11 year old girl was given to the father, who, compared to the mother, was seen to have a sensible appreciation of the need to properly discipline his daughter. The

62 Liu, above, at 252, referring to *B v B (minors) (interviews and listing arrangements)*, above.

63 As to the significance of the use of the term "wishes," see the later discussion in Chapter 12, below, at paras 12.5 to 12.9 (Recommendation 42).

64 Wall J in *B v B (minors) (interviews and listing arrangements)* [1994] 2 FLR 489, at 495, referred to in Liu, above, at 251 to 252.

65 Liu, above, at 252. See also the cases of *Re Lee Cheuh-wah (an infant)*, High Court, Miscellaneous Proceedings No 2678 of 1983 (1984), and *C v C*, Court of Appeal, Civil Appeal Action No 44 of 1988 (1988), by way of illustration.

66 Liu, above, at 253. See also Hewitt (ed) and others, above, at 213.

67 High Court, Miscellaneous Proceedings No 1037 of 1981 (1984).

importance of education was stressed in *May v May*,⁶⁸ where the care and control of two boys, aged eight and six, was given to the father because, amongst other things, *"he had placed greater emphasis on their character development through academic achievement and discipline in the home than had the mother and her lover with whom she was living."*⁶⁹

Maintaining the status quo

2.49 Liu notes that maintaining the status quo, or *"the state in which things are,"* has become a vital consideration in welfare,⁷⁰ and includes maintaining existing relationships, emotional bonds and physical environment. This was not always the case, as in the past, *"judges would dismiss a child's grief in parting with the primary care-giver as transitory."*⁷¹ It is now recognised that:

*"[D]isruption of the status quo and the separation of the child from his psychological parent may be highly detrimental to his mental and physical well-being."*⁷²

2.50 What this means in practice is that when a couple separates, the parent who continues to look after the child may have an advantage over the other parent, as *"the court is likely to confirm the existing arrangement, rather than order a transfer of custody."*⁷³ Not surprisingly, this principle of maintaining the status quo *"presents a strong argument against a party who has lost contact with a child."*⁷⁴

2.51 An example of this in operation is the case of *Re Lee Cheuh-wah (an infant)*,⁷⁵ where, even though the father had effectively kidnapped the child a few years before, the court was reluctant to disturb the status quo once the child was found living with his paternal grandparents, as he appeared well-settled and happy.

2.52 The importance of maintaining the status quo is much reduced, of course, where a child is close to both parents and familiar with their respective homes. It is recognised that in these cases, *"the disruption caused as a result of a change in custody will be much less."*⁷⁶

68 [1986] 1 FLR 325 (CA).

69 L Pegg, *Family Law in Hong Kong* (3rd ed, Butterworths, 1994), at 253. See also Liu, above, at 254 and Hewitt (ed) and others, above, at 212 to 213.

70 Liu, above, at 254.

71 Same as above, citing *Re Thain* [1926] 1 Ch 676.

72 Liu, above, at 254, referring to the research comprised in J Goldstein, A Freud, A J Solrict, *Beyond the Best Interests of the Child*, Burnett Books (London, 1979).

73 Liu, same as above.

74 Same as above.

75 High Court, Miscellaneous Proceedings No 2678 of 1983 (1984).

76 *Liu Lau Oi-yuk v Liu Chian-hsiong*, Court of Appeal, Civil Appeal Action No 126 of 1997 (1997), per Saunders DJ.

Age, sex, background and characteristics of the child

2.53 Liu comments that the age of the child is relevant in that it relates to his needs, which in turn may point to which parent is best suited to fulfil those needs. She notes that judicial statements can be found to the effect that: *"all things being equal, a child of tender years should be with its mother."*⁷⁷

2.54 As with the other *"welfare"* considerations, this issue cannot be considered in isolation but must always be looked at in light of the other facts of the case. In Hong Kong, where it is common for both parents to be in full-time employment and for children to be largely looked after by relatives or domestic helpers, considerations such as these may well affect how this *"judicial statement of general experience"* is applied.⁷⁸

2.55 Related to this *"tender years doctrine"* is a principle that:

*"[Y]oung siblings should, wherever possible, be brought up together in the same household so that they can be of emotional support to each other. If a judge decides against young children being kept together, such decision merits some explanation."*⁷⁹

Any harm the child has suffered or is at risk of suffering

2.56 This factor is relevant where:

*"[A] parent has neglected or abused (sexually or physically) the child and the court needs to balance the importance of the child maintaining a relationship with that parent against the risk of being harmed by such relationship."*⁸⁰

2.57 As a result, a parent who has sexually abused his child may be denied access by the court. This is not always the case, however.⁸¹ Liu contrasts the cases of *Re R (a minor) (child abuse: access)*⁸² with *L v L (child abuse: access)*.⁸³ In the former, it was held that any benefit to the child of access by the father had no weight compared to the possible risk of further

77 Liu (text), above, at 256. *"Tender years"* does not necessarily mean only very young children. In one case, it was held to apply to children of seven and nine years old: *Wong Yip Yuk-ping v Wong Sze-sang*, Court of Appeal, Civil Appeal Action No 116 of 1985 (1985). See also Hewitt (ed) and others, above, at 213.

78 See Liu, above, at 257, where some of the relevant cases are discussed.

79 Same as above. The following cases are referred to in support of this principle: *W v W* [1981] HKC 466; *Re Y (minors)* [1984] HKLR 204; *C v C (minors: custody)* [1988] 2 FLR 291; and *Re Ryker (infants)*, High Court, Miscellaneous Proceedings No 1184 of 1980 (1982) – where both the tender years doctrine and non-separation principle were simultaneously applied.

80 Liu, above, at 258.

81 Same as above, at 258 to 259.

82 [1988] 1 FLR 206.

83 [1989] 2 FLR 16: see Liu, above, at 258 to 259 for further analysis of these cases.

sexual abuse by him. In the second case, the court found that, although the father had sexually abused his three year old daughter, a close bond nonetheless existed between them and access was granted to the father subject to further review.

The capacity of each parent or third party to meet the child's needs

2.58 In a custody dispute, the court favours the parent who has established strong emotional ties with the child, appreciates the child's needs and is capable of meeting them.⁸⁴

2.59 Where the dispute is between a parent and a third party (such as a grandparent or foster parents), the extent to which blood ties are important is unclear.⁸⁵ In one case, where care and control of a child was granted to the child's foster parents rather than to his parents, the court stated that, nonetheless:

*"[N]atural parents have a strong claim to have their wishes considered; first and principally, no doubt, because normally it is part of the paramount consideration of the welfare of the infant that he should be with them, but also because as the natural parents they have themselves a strong claim to have their wishes considered as normally the proper persons to have the upbringing of the child they have brought into the world."*⁸⁶

First and paramount consideration

2.60 All of the factors above are taken into account by the court in determining what constitutes the welfare or best interests of the child.

2.61 As noted earlier in this chapter, the welfare of the child is to be *"the first and paramount consideration"* of the court in hearing any proceedings under the Guardianship of Minors Ordinance (Cap 13). Lord MacDermott, in *J v C*,⁸⁷ approached the term thus:

"[R]eading 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

84 Liu, above, at 259. See also Hewitt (ed) and others, above, at 214.

85 Liu, same as above.

86 *J v C* [1969] All ER 788, at 832, referred to in Liu, above, at 259.

87 [1970] AC 710, at 711.

paramount consideration because it rules upon or determines the course to be followed."

Judicial discretion

2.62 In relation to the various factors which constitute welfare, Liu observes that there are *"no arithmetical points systems or quantitative formulae"* for assessing these factors. *"The courts are dealing with the lives of human beings, and these cannot be regulated by any rigid prescriptions."*⁸⁸

2.63 As each case turns upon its own unique facts, judicial precedent can play only a minor role in decision-making in this area. The courts therefore have very wide discretion in determining what is in the best interests of the child. Mnookin elaborates on the difficult task facing the judge in these cases:⁸⁹

"[S]hould [best interests] be viewed from a long-term or a short-term perspective[?] The conditions that make a person happy at age seven to ten may have adverse consequences at age thirty. Should the judge ask himself what decision will make the child happiest next year? Or at thirty? Or at seventy? Should the judge decide by thinking about what decision the child as an adult looking back, would have wanted made? ... [H]ow is the judge to compare 'happiness' at one age with 'happiness' at another age[?]"

Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. Should the judge be primarily concerned with the child's happiness? Or with the child's spiritual and religious training? Should the judge be concerned with the economic 'productivity' of the child when he grows up? Are the primary values of life in warmth, interpersonal relationships, or in discipline and self-sacrifice? Is stability and security for a child more desirable than intellectual stimulation?

These questions could be elaborated endlessly. And yet, where is the judge to look for the set of values that should inform the choice of what is best for the child? Normally, the custody statutes do not themselves give content or relative weights to the pertinent values. And if the judge looks to society at large, he finds neither a clear consensus as to the best child-rearing strategies nor an appropriate hierarchy of ultimate values."

88 Liu, above, at 251, citing the case *Re F (an infant)* [1969] 2 Ch 238.

89 Mnookin, "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975) 39 *Law & Contemporary Problems* 226, at 260, cited in Liu, above, at 263.

2.64 Bainham further highlights the subjective nature of the welfare principle, asserting that what is or is not in a child's best interests really depends upon who is asking the question. He states that the crucial issue is not the concept of welfare itself but the choice of decision-makers:⁹⁰

"Thus there are those who assert that the psychological well-being of children following divorce is best protected by 'exclusive' custodial arrangements which provide them with the security of one psychological parent. But, equally, there are others who take the apparently diametrically opposed position that children fare best where contact with both divorcing parents is maximised and maintained. It is, perhaps, inevitable that individual value judgments must intrude to some extent into the determination of a child's best interests."

2.65 For reasons such as these, commentators have variously described the principle of the welfare of the child as an inherently subjective, "notoriously indeterminate,"⁹¹ and a still evolving,⁹² concept.

The divorce process in Hong Kong

2.66 So far in this chapter we have examined the concepts and principles on which the law of custody and access is based. We now turn to review the procedure for obtaining a divorce in Hong Kong.⁹³

Relevant legislation

2.67 The legislation governing divorce is largely contained in the Matrimonial Causes Ordinance (Cap 179).⁹⁴ Section 3 of the Ordinance specifies the conditions on which Hong Kong courts will have jurisdiction to consider a particular divorce case. Section 11 provides that the sole ground for divorce is that "*the marriage has broken down irretrievably*," and notes the two separate procedures by which a divorce may be instituted, that is, by petition or by joint application. Section 11A sets out the range of "*facts*" on which the ground for divorce may be established under the petition process. Section 11B sets out the facts for establishing divorce by joint application.

90 Bainham, above, at 43. See Liu, above, at 249.

91 Liu, same as above.

92 Liu, above, at 248.

93 For a useful discussion of the law and relevant court procedures, see: Liu, above, at Chapter 4; Hewitt (ed) and others, above, especially Chapters 7 and 9; and Francis & Warren, above, especially Chapters 5 to 7.

94 Relevant rules and forms also appear in the MCR. Further, the Separation and Maintenance Orders Ordinance (Cap 16) ("SMOO") has application in relation to Chinese customary marriages and concubinage relationships: see later discussion in Chapters 3 and 13, below.

2.68 It should be noted that the law in this area was substantially amended in 1995⁹⁵ to implement most of the recommendations contained in the Commission's 1992 report, *Grounds for Divorce and the Time Restrictions on Petitions for Divorce Within Three Years of Marriage*.⁹⁶ In particular, the Commission had recommended in its report:

- significant reductions to the periods that parties were required to wait before applying for divorce;⁹⁷
- the abolition of the fact of desertion (which recommendation did not find its way into the amending legislation); and
- the introduction of an alternative procedure for applying for divorce, known as the "*joint application*."

2.69 The current legislative provisions in this area are discussed below.

Establishing the relevant 'grounds' for divorce

Jurisdiction of the court

2.70 Under section 3 of the Matrimonial Causes Ordinance (Cap 179), parties are eligible to apply for a divorce in Hong Kong if they satisfy one of the following conditions:

- either party to the marriage is domiciled in Hong Kong at the date of the petition or application for divorce;
- either party to the marriage has been habitually resident in Hong Kong for three years immediately preceding the date of the petition or application; or
- either party has a substantial connection with Hong Kong at the date of the petition or application.

Sole ground for divorce and facts to establish it

2.71 As we saw above, section 11 of the Ordinance provides that:

"The sole ground for presenting or making a petition or application for divorce shall be that the marriage has broken down irretrievably and proceedings for divorce shall be instituted either-

95 By the Matrimonial Causes (Amendment) Ordinance 1995 (No 29 of 1995), which commenced operation in 1996 (see LN 277/1996).

96 HKLRC Topic 29, Nov 1992.

97 From two years' separation down to one year where the respondent consented to divorce, and from five years' separation down to two years where there was no consent. We also recommended that the three-year time bar preventing newly married couples from applying for divorce be reduced to one year.

- (a) *by a petition for divorce; or*
- (b) *by an application for divorce."*

2.72 Where the parties propose to petition for divorce, the five facts on which irretrievable breakdown may be established under section 11A of the Ordinance are:⁹⁸

- 'adultery'⁹⁹
- 'unreasonable behaviour'¹⁰⁰
- 'one-year separation with consent'¹⁰¹
- 'two-years' separation without consent,¹⁰² and
- 'one-year desertion.'¹⁰³

Divorce by joint application

2.73 In formulating the recommendations for its 1992 report,¹⁰⁴ the Commission was conscious of the growing overseas trend towards neutral and non-adversarial systems of divorce.¹⁰⁵ Although it concluded that Hong Kong's mixed fault and non-fault divorce regime should be largely retained, it nonetheless went further and proposed the introduction of a new, additional, non-petition based divorce process of divorce by joint application. Unlike the pre-existing divorce by petition, this new divorce process would be a joint and consensual one.¹⁰⁶

98 For a fuller discussion of the five facts to establish irretrievable breakdown, see: HKLRC (Topic 29, Nov 1992), above, especially at Chapters 2, 6 and 8; Liu, above, at 103 to 124; and Hewitt (ed) and others, above, at 71 to 73.

99 Of the respondent. The other leg of this fact is that the petitioner finds it intolerable to live with the respondent, though this need not necessarily be as a result of the adultery: see discussion in Liu, above, at 105 to 107. See also Hewitt (ed) and others, above, at 71 to 72.

100 Although this is the accepted abbreviation for this fact, the behaviour itself need not be unreasonable. As Liu clarifies (above, at 108 to 110), the law requires the petitioner to prove "*that the respondent has behaved in such a way that the expectation that the [particular] petitioner continue to live with the respondent [is] unreasonable.*" See also Hewitt (ed) and others, above, at 72.

101 The 'consent' required is to the divorce decree. Although precise statistics on which facts are cited are unfortunately not available, it is likely that this is the most common fact on which divorce petitions in Hong Kong are based: see HKLRC (Topic 29, Nov 1992), above, at 98, and Liu, above, at 135.

102 Under this fact, "*the respondent's consent to the [divorce] decree being granted is not needed and the petitioner can divorce the respondent against his or her will*": Liu, above, at 116.

103 This fact may be appropriate where the separation between the parties has not been consensual. It should be noted, however, that this fact is apparently rarely used today, and the law in this area is archaic and complex - which was why the Commission recommended its abolition: see HKLRC (Topic 29, Nov 1992), above, at 24 to 26, 86 and 92, and Liu, above, at 116.

104 HKLRC (Topic 29, Nov 1992), above, especially at Chapters 6, 8 and 9.

105 See analysis by Liu, above, at 135.

106 Same as above, at 136.

2.74 As we saw earlier, this divorce by application process is now provided for in section 11B of the Matrimonial Causes Ordinance (Cap 179). Liu explains the effect of the provision:

*"The court ... must still be satisfied that the marriage has broken down irretrievably. [In the joint application process, the] evidence required to prove irretrievable breakdown of marriage can be satisfied by (a) the parties have lived apart for a continuous period of one year, or (b) one year prior to the making of the application, a notice in the prescribed form, signed by both parties, was given to the court, and that the notice has not been withdrawn."*¹⁰⁷

2.75 Significantly, the second option under this process, divorce by mutual consent by way of notice, does not require the parties to live in separate accommodation. In proposing this alternative option, the Commission had taken into account the difficult housing situation in Hong Kong.¹⁰⁸

Procedural steps in the divorce process

2.76 Having reviewed the different circumstances on which a divorce action in Hong Kong may be based, we now turn to examine the various procedural steps involved.

Filing of petition or application

2.77 The first step in the divorce process is for the applicant spouse to file a petition for divorce in the Family Court Registry, or for the parties to submit a joint application for divorce.¹⁰⁹

2.78 The petition is served on the respondent spouse who may reply to it. In some cases, there may be urgent applications for interim orders, such as interim custody, access or maintenance. Once pleadings are closed, the petitioner files a notice seeking the fixing of a date for the hearing of the *decree nisi*.¹¹⁰ The matter then comes into the court list.

107 Same as above.

108 HKLRC Topic 29, Nov 1992, at 71.

109 See sections 11, 11A and 11B, MCO.

110 This is the interim divorce decree. The final divorce decree is called the *decree absolute*.

Special procedure

2.79 For divorces by petition or application where the divorce itself is not contested, the "*special procedure*," or "*divorce by administrative process*," will apply.¹¹¹

*"This means that the Registrar will consider the evidence filed by the petitioner, and if he is satisfied that the petitioner has sufficiently proved the contents of the petition, a day will be fixed for the pronouncement of the decree by a judge in open court, there being no need for any party to appear on that day."*¹¹²

Decree nisi

2.80 At the *decree nisi* hearing, the judge can approve the agreement on custody, access and other matters, and make final orders. However, even where the parties have reached agreement, the judge still has a duty to positively consider the welfare of the children to the marriage, and must declare that he is satisfied with the proposed arrangements for them before the *decree absolute* can be granted.¹¹³

2.81 Where there are matters still in dispute between the parties, the petitioner will be called at the *decree nisi* hearing to verify in open court the accuracy of the petition and the statements made concerning the arrangements for the children. The respondent may or may not attend the hearing. If he does attend, the judge will confirm whether the respondent agrees with the proposed arrangements and custody and access orders, or whether he wishes to defend the proceedings. If no agreement has been reached by the parties on custody or access, the case will be adjourned to a "*call over*" date.

Call over

2.82 The call over is to obtain directions from the court for the filing of evidence in disputed custody cases. The court will issue directions on what steps should be taken before the case is ready for hearing, such as whether the preparation of a social welfare officer's report, or an expert report by a child psychologist, is required.¹¹⁴

111 See Rules 33(2A) and 47A MCR. See also discussion in Liu, above, at 134 to 135. Prior to the Matrimonial Causes (Amendment) Rules 2001 (LN 270 of 2001), which commenced operation on 25 January 2002 (see LN 13/2002), the special procedure divorce was not available where there were children of the marriage, or where the fact of unreasonable behaviour was relied on as grounds for divorce: see Liu, above, and Hewitt (ed) and others, above, at para 4.58.

112 Liu, above, at 134.

113 See section 18, MPPO. These arrangements include the arrangements for custody, education and financial provision: section 18(6), MPPO.

114 Hewitt (ed) and others, above, at para 4.75, and Francis & Warren, above, at 86.

2.83 The social welfare officer's report is prepared by one of the officers attached to the Family and Child Protective Services Units¹¹⁵ of the Social Welfare Department, and can take some weeks or months to prepare.¹¹⁶ The social welfare officer will meet with the family and see the child separately with each parent. The social welfare officer's report will be based on his observations and assessment. While the social welfare report is awaited, the status quo is maintained.¹¹⁷

Next call over

2.84 At this hearing, any report requested will be available to the judge and the parties. If the matter settles after the submission of the social welfare officer's report, then an order can be made by consent.

2.85 If the matter still has not settled, the court will give directions as to what affidavits or affirmations should be filed, and whether the attendance of the social welfare officer or psychologist will be required for cross-examination. A mutually convenient date for the contested hearing will be allocated by the court registry after the filing of the affidavits.

Contested hearing

2.86 This is usually heard by the judge in chambers. The court will review the evidence, particularly the recommendations contained in the social welfare officer's report, to determine what custody and access orders should be made.¹¹⁸

Decree absolute

2.87 Six weeks after the granting of a *decree nisi*, an application for the *decree absolute* can be made. The *decree absolute* will issue approximately two months later.¹¹⁹

115 Formerly the Child Custody Services Unit.

116 Francis & Warren, above, at 86.

117 As we noted earlier on the application of the welfare principle, maintaining the status quo is considered a significant factor in the child's welfare. Therefore, for the purposes of the future custody and access order which will be made, maintaining the status quo throughout the course of the proceedings can operate to the disadvantage of the spouse who does not have physical custody.

118 Although those custody cases which do not settle are in the minority, they usually involve the most bitterness and distress. Children can have a symbolic significance which makes this type of litigation bitter and protracted: Wallerstein & Blakeslee, *Second Chances: Men and Women a decade after divorce* (1989). Delay over a contested custody case worsens the trauma for both children and spouses. Custody battles can also lead to subsequent child abduction.

119 The court may not make the divorce decree absolute, however, unless it has made a declaration of satisfaction under section 18(1) of the MPPO in relation to the arrangements for any children of the family: see above, at para 2.80.

Subsequent variation of orders relating to children

2.88 Because the court has jurisdiction to ensure that the welfare of the child is the paramount consideration in proceedings which involve children, 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 child grows older.

Recent developments in divorce procedure

2.89 We saw in the discussion above that significant reforms took place in Hong Kong in the mid 1990s in relation to the facts constituting grounds for divorce. More recently, various proposals have been put forward with the aim of further streamlining and reducing the adversarial nature of divorce proceedings in Hong Kong. These recent developments, which include the wider promotion of mediation services and a pilot scheme on ancillary relief procedures reform, are discussed later in Chapter 4.

Chapter 3

The current law and practice in Hong Kong - relevant legislation

Introduction

3.1 As we outlined earlier in this report, the rights of children to have their best interests protected in family proceedings are theoretically guaranteed both at the constitutional level¹ and in local statute.² In practice, however, the situation may be less certain.

3.2 We noted in the previous chapter that the key concepts in this area have come to be expressed in the law through *"a confusing array of terms in both statutes and cases."*³ Allied to this, Hong Kong's legislation in the area of child custody is contained in a number of Ordinances, including the Guardianship of Minors Ordinance (Cap 13), the Matrimonial Proceedings and Property Ordinance (Cap 192), the Matrimonial Causes Ordinance (Cap 179), the Separation and Maintenance Orders Ordinance (Cap 16) and others.⁴ As Liu comments:

"The law governing the reallocation of parental rights and authority (or responsibility) on family breakdown is confusing due to the overlapping and varied jurisdictions involved under different Ordinances.⁵ ... The circumstances in which custody will be dealt with by the court depends on the Ordinance invoked."⁶

3.3 There is therefore considerable scope for unintended gaps in the law and inconsistency of approach by the courts in matters relating to the

1 In United Nations conventions and in the Hong Kong Bill of Rights Ordinance (Cap 383): see Chapter 1, above.

2 See section 3, Guardianship of Minors Ordinance (Cap 13) ("GMO"), discussed above, at para 2.38 and subsequent paras. This provision enunciates the principle that the welfare of the child should be the paramount principle guiding the courts in matters involving children.

3 Dr Athena Liu, *Family Law for the Hong Kong SAR* (Hong Kong University Press, 1999), at 211 to 212. As previously noted, in one judge's view, this has created *"a bureaucrat's paradise and a citizen's nightmare"*: *Hewer v Bryant* [1970] 1 QB 357, at 371 *per* Sachs LJ, cited in Liu, above, at 212.

4 There are also related provisions in the Matrimonial Causes Rules (Cap 179) ("MCR"), the Protection of Children and Juveniles Ordinance (Cap 213) ("PCJO"), the Domestic Violence Ordinance (Cap 189) ("DVO") and the Adoption Ordinance (Cap 290): see discussion below.

5 Liu, above, at 289.

6 Same as above, at 275.

custody of children. The focus of this chapter is to review the various legislative provisions affecting child custody and access in Hong Kong, and to outline a number of shortcomings that have been identified with their operation.

Guardianship of Minors Ordinance (Cap 13)

3.4 As we saw in the previous chapter, the Guardianship of Minors Ordinance (Cap 13) is one of the Ordinances which governs court proceedings relating to the custody and upbringing of children. The Ordinance declares that the welfare principle applies to all proceedings relating to custody of children.⁷ It regulates the custody rights of fathers in relation to illegitimate children,⁸ deals with the provision of maintenance for children and governs the administration of property belonging to or held in trust for children.⁹ The Ordinance also regulates the appointment, powers and removal of guardians for children.¹⁰

Applications for custody and access

3.5 Section 10(1) of the Guardianship of Minors Ordinance states that:

"The court may, on the application of either of the parents of a minor ... or the Director of Social Welfare, make such order regarding -

(a) the custody of the minor; and

(b) the right of access to the minor of either of his parents,

as the court thinks fit having regard to the welfare of the minor and to the conduct and wishes of the parents."

3.6 This provision limits those who may apply to the court for custody and access orders to the parents of the child and the Director of Social Welfare. Other relatives, such as grandparents, aunts and uncles, or foster parents, have no standing to apply for custody orders themselves, but may have custody awarded in their favour if they can persuade the Director of Social Welfare to apply on their behalf.¹¹

7 Section 3, GMO

8 See Part V, GMO.

9 See Parts II and IV, GMO.

10 See Part III, GMO. These aspects of the Ordinance are discussed in detail in our earlier report on guardianship: see HKLRC, *Guardianship of children* (Topic 30, Jan 2002).

11 Liu, above, at 282.

3.7 A custody order may be made only with respect to "*a minor*," and does not extend beyond the child's reaching the age of 18.¹² An order for access may be granted only to a parent of the child.

3.8 An order of custody or access can be discharged, varied, revived after suspension or suspended by a subsequent court order. This type of subsequent application may be made by either parent or a guardian of the child, or on the application of any other person having legal custody of the child.¹³

3.9 Section 17 of the Ordinance provides that, where the court is considering an application under section 10 of the Ordinance, the court can order the Director of Social Welfare to arrange for an officer of his department to make a report to the court on any matter which appears to the court to be relevant to the case.¹⁴ This report, sometimes termed a "*welfare report*,"¹⁵ usually involves an investigation of the child's particular circumstances and includes recommendations on what future arrangements may be in the best interests of the child.¹⁶

Care order

3.10 Under section 13(1)(b) of the Ordinance, if there are exceptional circumstances making it impracticable or undesirable to entrust the custody of the child to the parents or any other individual, then the court may commit the child to the care of the Director of Social Welfare. The court must hear the representations of the Director before ordering a child to be committed to the Director's care.¹⁷ In making the care order, the court can also order either parent to pay maintenance for the child to the Director.¹⁸ As with custody orders, a care order may continue until the child reaches 18 years of age.

3.11 It is noted that there is no provision 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.¹⁹

12 The term "*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. By contrast, orders for maintenance of the child may extend beyond the child's 18th birthday where, for example, the child is still undergoing education or training: see section 12A, GMO. See also section 10, Matrimonial Proceedings and Property Ordinance (Cap 192) ("MPPO").

13 Section 10(4), GMO. Such an application may be made "*before or after the death of either parent*."

14 A power to the court to call for a social welfare report is also contained in rule 95(1), MCR.

15 For example, see Liu, above, at 284.

16 For a detailed discussion of social welfare reports, see Liu, above, at 264 to 267.

17 Section 15(1), GMO.

18 Section 13(2), GMO.

19 Though it might be argued that section 10, GMO is broad enough for parents to apply for access.

Supervision order

3.12 Where a person is granted custody under section 10(1) of the Ordinance, but it appears to the court that there are exceptional circumstances making it desirable that the child should be under the supervision of an independent person, the court may order that the child be placed under the supervision of the Director of Social Welfare.²⁰ Although the scope of a supervision order is not defined in the Ordinance, the duties of the supervisor appear to include advising, assisting and befriending the supervised person.²¹

3.13 A supervision order may be varied, discharged, suspended or revived on the application of either parent or a guardian, or by any person granted custody of the child under section 10, or on the application of the Director of Social Welfare when he has a supervision order in his favour.²² As with custody and care orders, a supervision order may extend only up to the child reaching 18 years of age.

Guardianship

3.14 Part III of the Guardianship of Minors Ordinance (Cap 13) deals with the appointment, removal, and powers of guardians.

3.15 In brief, the Ordinance provides that the surviving parent shall be the child's guardian, either alone, or with a guardian appointed by the deceased parent,²³ usually by will.²⁴ If the surviving parent does not object to the testamentary guardian acting, the surviving parent and the testamentary guardian act together as joint guardians.²⁵ Where no testamentary guardian has been appointed by the deceased parent, or the person appointed as testamentary guardian refuses to act or has died, the court may appoint a guardian to act with the surviving parent.²⁶

3.16 In our earlier report on *Guardianship of children*,²⁷ we discussed various shortcomings with the law in this area and made a number of recommendations for reform.²⁸ These proposals are discussed briefly in the next chapter. Two further aspects of the Ordinance's guardianship provisions which may require reform, and which relate particularly to circumstances of parental rights and authority, are outlined below. These

20 Section 13(1)(a), GMO.

21 See section 34B of the PCJO, discussed below.

22 Section 14(2), GMO.

23 Section 5, GMO.

24 Pursuant to section 6, GMO.

25 Section 6(2), GMO.

26 Section 5(a) and (b), GMO.

27 HKLRC, *Guardianship of children* (Topic 30, Jan 2002).

28 Same as above, at Chapter 2 (concerning problems with the law) and Chapter 4 (as to our recommendations for reform).

concern the removal of the surviving parent as guardian and the rights of an unmarried father as surviving parent.

Removal of the surviving parent as guardian

3.17 If the surviving parent objects to the appointment of the testamentary guardian, or if the testamentary guardian considers that the surviving parent is unfit to have custody of the child, the testamentary guardian may make an application to the court under section 6(3) for the court to determine the matter. In answer to the application, the court may either refuse to make any order (in which case the surviving parent remains the sole guardian - his 'veto' of the testamentary guardianship prevailing), or the court may make an order, either that the testamentary guardian act jointly with the surviving parent, or, under section 6(3)(b)(ii), that the testamentary guardian shall be the sole guardian of the minor. This latter provision appears to imply that the surviving parent's guardianship rights can be completely removed in response to the application.

3.18 Section 11 deals with the situation once the testamentary guardian has been appointed sole guardian to the exclusion of the surviving parent. Under this section, the court can order custody, presumably to the testamentary guardian, and access to the child by the surviving parent. The welfare principle applies in the making of these orders. The court can also order the surviving parent to make periodical or lump sum payments for the child, or to transfer property.

Unmarried father as surviving parent

3.19 Where the minor has no parent or guardian or person having parental rights with respect to him, the court can appoint a third party as guardian under section 7 of the Ordinance. "*Parent*" is defined in section 2 as a father or mother. The natural, or unmarried, father of the child, however, is not to be treated as father unless he is already entitled to custody of the child by virtue of an order under section 10 of the Ordinance, or he enjoys rights or authority in respect of the child pursuant to an order under section 3(1)(d) of the Ordinance.²⁹

3.20 The question then arises whether the natural father, with an order of parental rights granted in his favour under section 3(1)(d) 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 that:

"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 appointor is entitled to the custody of the minor as under paragraph (a)[order of custody by an order under section 10(1)],

²⁹ See section 21, GMO. The order under section 3(1)(d) grants to the natural father some or all of the rights and authority "*that the law would allow him as father if the minor were legitimate.*"

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."

3.21 If the natural father is the "surviving parent," he then becomes the guardian of the child under section 5, either alone or jointly with any testamentary guardian, or a guardian appointed by the court. If there is a dispute between the two guardians, the court can give such directions as it thinks appropriate under section 9 of the Ordinance.

Criticisms of the Guardianship of Minors Ordinance (Cap 13)

No provision for third parties to apply for custody or access

3.22 In relation to applications for custody and access, section 10(1) seems unduly restrictive in not allowing persons such as a grandparent, other relative, or foster parent to apply for a custody or access order. It would be simpler to allow relevant persons to apply in the District Court to be granted custody or access. In our view, 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 leave of the court to apply.³⁰

Director of Social Welfare's position

3.23 Section 10 is also unclear as to whether the Director of Social Welfare, who may apply for custody and access orders, may be granted a custody order in his own right.³¹ By contrast, section 15(2) of the Ordinance provides that:

"In relation to an order under section 13(1)(b)³² or to an order under section 13(2) requiring payment to be made to the Director of Social Welfare, sections 10(3),³³ (4), 19³⁴ and 20³⁵ 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

30 Alternatively, the section could be replaced by provisions along the lines of sections 8 and 10 of the English Children Act 1989: see Chapter 5 below.

31 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 (Ord No 65 of 1986). The explanatory memorandum to the Amendment Bill merely states that the amendment provides "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."

32 An order committing the child to the care of the Director of Social Welfare.

33 The effect of section 10(3) is that while the child's parents live together, any order made in respect of the child will be unenforceable between them. Further, if they continue to live together for more than three months, such order will cease to have effect. This does not, however, affect an order in favour of a non parent, which continues to remain in effect and be enforceable.

34 This provides for a person liable to pay maintenance to inform a named person of a change in address.

35 This deals with attachment of income to satisfy a maintenance order.

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."

3.24 Section 15(2) therefore appears to support the interpretation that the Director of Social Welfare can be awarded custody of the child, except that the term preferred appears to be "*care order*," as under section 13(1)(b).

Clarification needed regarding removal of the surviving parent as guardian

3.25 In relation to the guardianship aspects of the Ordinance, we stated earlier that our report on *Guardianship of children*³⁶ had outlined a number of problems with the law in this area and had made several proposals for reform.³⁷ In the context of the current report, we have identified two further areas of concern in relation to the law on guardianship of children.

3.26 We saw earlier that where there is a dispute between the surviving parent and the testamentary guardian, the testamentary guardian may make an application under section 6(3) of the Ordinance for the issue to be determined by the court. One result of such an application may be that the court can appoint the testamentary guardian to be the sole guardian of the minor under section 6(3)(b)(ii). Given the significant consequences to the surviving parent of such an order, we consider that clarification may be needed in the legislation if it is intended that the surviving parent's guardianship rights can be fully removed in response to a section 6(3) application. Similarly, under section 11, which deals with the situation once the testamentary guardian has been appointed sole guardian to the exclusion of the surviving parent, the surviving parent appears to retain only potential access rights to the child, while his rights as guardian - to be consulted on any major matters affecting the upbringing of the child - are removed.

3.27 By contrast, the non-custodial parent in divorce proceedings generally retains his rights as guardian and can apply to the court to enforce these rights if denied by the custodial parent. It seems unfair that under the guardianship provisions a sole guardian who is not one of the parents can effectively exclude the guardianship rights of the surviving parent except for the right of access.³⁸

36 HKLRC, *Guardianship of children* (Topic 30, Jan 2002).

37 These reform proposals are briefly outlined and discussed in Chapter 4, below.

38 The English Law Commission argued in a working paper that the High Court had a limited right to remove a natural parental guardian. It was observed that 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 in the upbringing of the child, though his rights were never completely abrogated. The English Law Commission also noted that there were no recent cases on these grounds. See: *Family Law: Review of Child Law: Guardianship* (1985: Eng Law Com No 91), at paras 2.7 and 2.19.

Provision needed to specify unmarried father can be surviving parent

3.28 It would also assist if a provision were inserted in the Ordinance clarifying that once an unmarried father is granted parental rights under a court order, 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) of the Ordinance provides for the granting of limited rights. The court would therefore also have the discretion to order that an unmarried father may have access rights under section 10, or the right to be consulted on some limited matters affecting the child, such as emigration, but not to be treated as a guardian or "*surviving parent*."

Matrimonial Causes Ordinance (Cap 179)

3.29 This Ordinance is the principal Ordinance governing the granting of divorce in Hong Kong.³⁹ It sets out the ground for divorce and the relevant facts which must be proven to establish it. The Ordinance also provides for the two alternative procedures for divorce, one by petition and the other by joint application, which must be followed by the parties.⁴⁰ The Ordinance does not, however, provide any specific power to the court concerning custody or access of a child except in relation to the powers of the Director of Social Welfare.⁴¹

Care order

3.30 Section 48A provides a power to the court to commit a child to the care of the Director of Social Welfare in exceptional circumstances. Although the term "*care*" is not defined in the Ordinance, it is used in section 48A in the context of the court making custody arrangements for the child.⁴² As with the care provisions in section 13(1)(b) of the Guardianship of Minors Ordinance (Cap 13), 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.⁴³ Before making the order,

39 The Ordinance ("MCO") also deals with the court's jurisdiction in judicial separation and nullity proceedings, and ancillary relief proceedings for maintenance from a deceased parent's estate.

40 For an outline of the divorce process in Hong Kong, see Chapter 2, above, at paras 2.66 to 2.89.

41 The court's powers to award custody and access orders for children are found instead in section 10 of the GMO, discussed above, section 19 of the MPPO, discussed below, and section 5 of the Separation and Maintenance Orders Ordinance (Cap 16) ("SMOO"), discussed below. See also the discussion in Liu, above, at 275.

42 Section 48A(1), MCO.

43 As noted above, the Ordinance does not include any power to the court to award custody, including to a third party such as a grandparent or other relative. Presumably, it was thought that section 10 of the GMO was sufficient to cover this. However, as we saw earlier, section 10 denies third parties a right to apply to the court for custody. A third party must instead rely on the parents or the Director of Social Welfare to make an application on the third party's behalf.

the court must hear representations from the Director of Social Welfare, including representations as to any financial arrangements which need to be made for the child.⁴⁴

3.31 Section 48A(4) provides for the care order to remain in force until the child reaches the age of 18. A power to vary or discharge the order is also provided.⁴⁵ Section 48A(3) states 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.*"

Supervision order

3.32 As with section 13(1)(a) of the Guardianship of Minors Ordinance (Cap 13), section 48 of the Matrimonial Causes Ordinance provides that, where the court has jurisdiction to make a custody order⁴⁶ and there appear to be exceptional circumstances making it desirable that the child should be under the supervision of an independent person, the court may order that the child be under the supervision of the Director of Social Welfare.⁴⁷ As observed previously, although the term "*supervision*" is not defined, the duties of the supervisor appear to include advising, assisting and befriending the supervised person.⁴⁸

3.33 A supervision order under section 48 may be made only with respect to a child who has not yet attained 18 years of age and ceases to have effect as soon as a child reaches that age.⁴⁹ Supervision orders may be varied or discharged by subsequent court order.⁵⁰

Criticisms of the Matrimonial Causes Ordinance (Cap 179)

No provision for access to a child in care

3.34 There is no provision for the court to grant access to a parent or other person to see a child placed in the care of the Director of Social Welfare, even though each parent or guardian of a child who is in care or being supervised is under an obligation to inform the Director if they change their address.⁵¹ It may have been assumed that there was no need to specify such a power to grant access, as the parents or others could seek access

44 Section 48A(2), MCO.

45 Section 48A(5), MCO.

46 Under this Ordinance (see discussion below of "*care*" orders under section 48A, MCO) or under the MPPO (see discussion below of section 19 of that ordinance). Custody is not, however, defined in the MCO, nor is there a reference to access.

47 Section 48 of the MCO is therefore similar to section 13 of the GMO, discussed above.

48 See section 34B of the PCJO, discussed below.

49 Section 48(4), MCO.

50 Section 48(3), MCO.

51 Section 48B, MCO.

from the Director of Social Welfare who would reach a voluntary agreement with them on this issue. Alternatively, it may have been thought that the parent could make an application for access under section 10 of the Guardianship of Minors Ordinance (Cap 13).

3.35 Despite the fact that the Director of Social Welfare may informally permit access to a child under his care, in our view there remains a need to clarify the legal position by allowing parents or guardians or a relevant third party to take proceedings for access to children in the care of the Director. This is particularly so where the only ground under the Ordinance for removing the child from parental custody and placing him in the care of the Director is that there are exceptional circumstances making it "*impracticable or undesirable*" for the child to be entrusted to either of the parents or to any other individual.⁵² This is a lesser standard than the present grounds for taking a child into care under the Protection of Children and Juveniles Ordinance (Cap 213),⁵³ where section 34(2) of that Ordinance sets out specific and serious grounds for removal, including assault or sexual abuse.

Grounds for placing child in care should be same as in PCJO

3.36 We are also of the opinion that the grounds for committing a child to the care of the Director of Social Welfare in private law disputes between parents⁵⁴ should be the same specific and serious grounds as those specified in section 34(2) of the Protection of Children and Juveniles Ordinance (Cap 213).

No provision to take the views of the child into account

3.37 We note that there is no provision for ascertaining the wishes of the child or taking these into account when the issue of the child being placed in care arises.

Matrimonial Causes Rules (Cap 179)

3.38 As we saw in the preceding discussion, there is nothing in the Matrimonial Causes Ordinance itself which provides a right to apply to the court for custody of children. There are, however, relevant provisions in the Matrimonial Causes Rules.⁵⁵

52 Section 48A(1), MCO.

53 See discussion below.

54 Pursuant to section 48A, MCO.

55 That right is found in the provisions of the GMO, discussed above, and the MPPO, discussed below. Relevant provisions are also contained in the SMOO, discussed below.

Applications by third parties

3.39 Rule 92(1) of the Matrimonial Causes Rules (Cap 179) provides that an application for an order relating to the custody or education of a child, or for his supervision under section 48 of the Matrimonial Causes Ordinance (Cap 179), shall be made to a judge. Under rule 92(2), a registrar may deal with an application for an order relating to the custody or education of a child where the terms have been agreed between the parties. A registrar may also deal with an application for an access order where the other party consents to give access and *"the only question for determination is the extent to which access is to be given."*⁵⁶ In each case, the registrar may choose either to make the order or to refer the application to a judge.

3.40 Rule 92(3) lists persons who may apply to the court for an order relating to the child's custody, education or supervision without obtaining leave from the court to apply.⁵⁷ The list includes the guardian of any child of the family and any other person who has the custody or control of the child pursuant to a court 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 with regard to the child.

3.41 Rule 92(4) provides that if there is a dispute concerning the care and control of, or access to, a child, the judge may refuse to admit any affidavit (written sworn statement) unless the author of the affidavit is available to give oral evidence. The language of the rule appears to be confined to care and control or access to a child, and does not refer to custody.

3.42 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 may have to the question of custody, care and supervision of children unless it is alleged that some form of improper behaviour is taking place in the children's presence.)

3.43 Under rule 92(7), there is a general power for the court to give directions as to the filing and service of pleadings, and as to the further conduct of the case.⁵⁸

56 Yet section 48 makes no reference to access.

57 The rule states that they may apply *"by summons."*

58 Rule 92(7), MCR.

Powers of the Director of Social Welfare

3.44 Rule 93 of the Matrimonial Causes Rules provides that where the Director of Social Welfare makes an application under section 48 of the Matrimonial Causes Ordinance (Cap 179) for the variation or discharge of an order made under that section, or for directions as to the exercise of his powers under such an order, the Director may make the application by letter to the court in situations of urgency *"or where the application is unlikely to be opposed."* In either circumstance, the Director need only notify any interested party of his application to the court if *"practicable."*

Social welfare officer's report

3.45 Under rule 95 of the Matrimonial Causes Rules (Cap 179), a judge or registrar may refer a case for investigation and report by the Director of Social Welfare on any matter arising in matrimonial proceedings which concerns the welfare of a child. Any party to an application to which rule 92 applies may, prior to the hearing, 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. Where a report is to be prepared, rule 95(3) empowers the Director of Social Welfare to inspect the court file. When the report is completed and filed in court, the parties must be notified by the registrar and may inspect and apply for a copy of the report on payment of a fee.

Proceedings in other courts

3.46 Under rule 96 of the Matrimonial Causes Rules, an applicant for an order in relation to a child must, at the time the application is made, file a statement of the nature of any other proceedings concerning the same child pending in the Court of First Instance, District court or magistrate's court. No provision is made, however, for consolidation of proceedings concerning the same child.

Separate representation

3.47 Under rule 108 of the Matrimonial Causes Rules, the court has a broad discretion to order that a child ought to be separately represented in any matrimonial proceedings. The court can appoint the Official Solicitor to represent the child if the Official Solicitor consents.⁵⁹ The court can also, on

59 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"*: see *Hong Kong Law Digest* (Oct 1993), at J89.

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.⁶⁰ Rule 108(2) provides 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 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,⁶¹ a guardian *ad litem* is a professional officer appointed to protect the child.

3.48 Rule 72 of the Matrimonial Causes Rules allows for separate representation of children where an application is made to vary a *"settlement"* order.⁶² The rule compels the court to appoint separate representation for the child *"unless it is satisfied that the proposed variation does not adversely affect the right or interest of any children."* In contrast to rule 108 above, it is stated in rule 72 that the children 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* for the child for the purposes of the application for the variation of settlement order. A certificate similar to that in rule 108(2) has to be filed for the proposed *"proper person."*⁶³ The certificate must be filed by the solicitor acting for the child.

3.49 Rule 72(2) 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 of the Matrimonial Causes Rules in terms of a range of financial orders, including maintenance orders, orders for settlement or transfer of property and orders for variation of settlement.

Criticisms of the Matrimonial Causes Rules (Cap 179)

Powers of Director of Social Welfare

3.50 We observed earlier that, under rule 93 of the Matrimonial Causes Rules, the Director of Social Welfare may make the application by letter to the court in situations of urgency *"or where the application is unlikely to be opposed."* We noted that in either situation the Director need only notify an interested party of the application if it is *"practicable."* We do not think that this provides adequately for interested parties. We contend 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 situation.

60 Rule 108(b), MCR.

61 For example, the United Kingdom and New Zealand.

62 No definition of a settlement order is provided. The only reference to a settlement order is to a settlement of property order under section 6(1)(b) of the MPPO.

63 We note that the terms *"proper person"* and *"fit person"* are both mentioned in the rule, without definition or explanation of the difference between them.

Separate representation for children

3.51 It appears inequitable that provision is made under rule 72 of the Matrimonial Causes Rules (Cap 179) for a child to be separately represented by a solicitor or counsel in financial and property matters, but not in custody or guardianship disputes under rule 108. It also seems curious that the Official Solicitor has no discretion to refuse to be appointed as representative for the child under rule 72 relating to property matters, but has that discretion under rule 108 relating to custody.

3.52 We further consider that a separate right should 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 would coincide with the interests of the person separately representing the child.

Matrimonial Proceedings and Property Ordinance (Cap 192)

3.53 The Matrimonial Proceedings and Property Ordinance (Cap 192) generally governs financial provision and property adjustment on divorce.⁶⁴ However, sections 18 and 19 of the Ordinance are relevant to custody and guardianship of children.

Arrangements for the children

3.54 Section 18(1) restricts the court's right to make a decree of divorce or nullity absolute unless the court is satisfied:

"(b) that ... (i) arrangements for the welfare of every child [named in the divorce application] have been made and are satisfactory or are 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)."*⁶⁵

64 Liu, above, at 363.

65 In relation to the circumstances outlined in section 18(1)(c), MPPO, section 18(2) provides that the court must first obtain an undertaking from either or both of the parties to bring the question of the arrangements for the children before the court within a specified time.

3.55 The consequence of making a divorce decree absolute without making an order expressing satisfaction with the arrangements for the children is that the divorce decree is void.⁶⁶

3.56 Section 18(6) states that, *"welfare, in relation to a child, includes the custody and education of the child and financial provision for him."* Section 2 of the Ordinance defines *"custody"* to include access, and defines *"education"* to include training.

Custody orders

3.57 Under section 19 of the Ordinance, the court is given a wide discretion to make orders in relation to custody and education. Section 19(1) states that:

"(1) The court may make such order as it thinks fit for the custody and education of any child of the family who is under the age of 18 -

(a) in any proceedings for divorce, nullity of marriage or judicial separation, before, by or after the final decree;

(b) where such proceedings are dismissed after the beginning of the trial, either forthwith or within a reasonable period after the dismissal;

and in any case in which the court has power by virtue of this subsection to make an order in respect of a child it may instead, if it thinks fit, direct that proper proceedings be taken for making the child a ward of court."

3.58 As we saw in the previous chapter, there are different types of custody orders that the court can grant. These include:

- sole custody orders, where the non-custodial parent may be granted access to the child but is effectively excluded from having any decision-making role on matters affecting the child's welfare;⁶⁷

66 Section 18(3), MPPO. This provision goes on to state, however, that the validity of the decree cannot be challenged on the grounds that the conditions of subsection (1) and (2) were not satisfied.

67 See Chapter 2, above, at paras 2.26 to 2.28.

- joint custody, where one parent may be granted daily care and control of the child but both parents retain custodial rights to make decisions affecting the child;⁶⁸ and
- split orders, where daily care and control of the child may be granted to one parent, but the custody of the child, and the decision-making power over his welfare, may be granted to the other.⁶⁹

3.59 In line with section 3 of the Guardianship of Minors Ordinance (Cap 13) discussed in the previous chapter,⁷⁰ the welfare of the child is to be the first and paramount consideration of the court in the making of any custody orders under the Ordinance.⁷¹ Under section 19(5) of the Matrimonial Proceedings and Property Ordinance the court may exercise its power to make custody orders in respect of the child "*from time to time*," and has the power to discharge, suspend or vary the orders pursuant to section 19(6).

Child of the family

3.60 The court's powers extend to any "*child of the family*." Section 18(5) of the Ordinance 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 of the Ordinance 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*."

3.61 Section 19(2) 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 had been a party to the proceedings.⁷²

Age

3.62 As we saw above, section 18 requires the court to be satisfied that the arrangements for the child are the best that can be achieved under the circumstances. It defines a child of the family to whom the section applies as being a minor child who is below the age of 16 years, or who is "*receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also in gainful*

68 Same as above, at paras, 2.32 to 2.34.

69 Same as above, at paras 2.29 to 2.31.

70 Same as above, at paras 2.38 to 2.41.

71 See section 48C, MCO.

72 Section 19(2) MPPO. 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.

employment."⁷³ By contrast, section 19(1) of the Ordinance gives power to the court in divorce proceedings to make orders for custody and education in respect of "*any child of the family who is under the age of 18.*"

3.63 Section 10 of the Ordinance, which concerns the making of financial provision for children of the family, states that the court is empowered to make orders for a child over 18 years of age where the child is or will be "*receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment,*"⁷⁴ or where "*there are special circumstances which justify the making of the order or provisions.*"⁷⁵

Unfit parent

3.64 In the context of the making of custody orders, the court is given power under section 19(3) to make an order that either party to the marriage is unfit to have custody of the child. This order may be included in the decree of divorce or judicial separation. 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 the custody or the guardianship of the child. The Ordinance does not, however, provide that, as a consequence of that order, a custody order may be made in favour of a third party who is a fit person. (As we saw earlier, only the Guardianship of Minors Ordinance (Cap 13) allows the Director of Social Welfare as a third party to apply for custody of a child.) Instead, section 19(1) gives power to the court to direct that proceedings be taken to make the child a ward of the court.⁷⁶

Criticisms of Matrimonial Proceedings and Property Ordinance (Cap 192)

Third party applications for custody

3.65 As with the other matrimonial Ordinances, there is no specific provision in the Matrimonial Proceedings and Property Ordinance (Cap 192) to allow third parties to be granted custody of the child, even in cases where the custodial parent has died and the non-custodial parent has been declared unfit to have custody.

73 Section 18(5)(a), MPPO.

74 Section 10(3)(a), MPPO.

75 Section 10(3)(b), MPPO.

76 Under section 20 of the MPPO, the court may exercise its section 19 powers where it has already ordered maintenance for the child under section 8 of the Ordinance, and one of the spouses has wilfully neglected to maintain a child.

Wishes of the child

3.66 We also note that there is no specific provision for the wishes of the child to be taken into account when the court is considering making orders under the Ordinance.⁷⁷

Age

3.67 There appears to be some inconsistency in the age limitations applied by the various provisions of the Ordinance. We note, in particular, that the age limit of 16 years is applicable in respect of the provisions of section 18, while 18 years is specified as the age limit for the purposes of section 19 of the Ordinance.

Separation and Maintenance Orders Ordinance (Cap 16)

3.68 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 1895⁷⁸ which was enacted to give power to a magistrate to protect a married woman whose husband had been convicted of assaulting her or who was a habitual drunkard. The focus of the Ordinance is on granting a separation order and an ancillary order for maintenance for the wife and children. An order of custody is a prerequisite to an order of maintenance for the children.

3.69 The Ordinance is apparently rarely used today, although it may be used by 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).⁷⁹

Application for orders

3.70 Under section 5(1)(b) of the Separation and Maintenance Orders Ordinance, the District Court has the power to make various orders, including that the applicant is no longer bound to cohabit with the other party to the marriage, and that the legal custody of any child of the marriage may be committed to the husband or to the wife until the child reaches 18 years of age. Section 12 deals with continuation of payments for the maintenance of children beyond 18 years of age if they are in training or education or there

77 Though we note that section 48C of the MCO refers to section 3 of the GMO, and that section 3(1)(a)(i)(A) of the GMO makes specific reference to the court taking account of the wishes of the child.

78 1895 c 39 section 6, UK; 1925 c 51 section 1(4) UK.

79 The definitions of "*wife*" and "*married woman*" in section 2 include these categories of relationships.

are special circumstances which justify the making of the order.⁸⁰ This would include a child who is suffering from a mental or physical disability.

3.71 The application for orders under the Ordinance is grounded on allegations of misbehaviour, as set out in section 3. These 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

3.72 Section 6(1) of the Ordinance prohibits the making of an order for "*legal custody*" if it is proven that the applicant for custody has committed an act of adultery. This prohibition does not apply, however, if the spouse of the applicant has "*condoned, or connived at, or by his or her wilful neglect or misconduct conduced to such act of adultery.*"⁸¹ The bar of adultery appears to apply only to the applicant, not to the respondent.

Variation or discharge of orders

3.73 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. However, following changes made to the legislation in 1997, the provision goes on to state that if there is an application to discharge an 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.⁸² In line with this approach, section 7(5) states that, in making an order under these circumstances, "*the court shall have regard primarily to the best interests of the children.*"⁸³

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

Fault-based approach of the Ordinance

3.74 As can be seen, the whole Ordinance reflects a fault-based approach to determining the issues between the spouses, and so raises a concern that it may deal inadequately with the interests of the children.

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

81 Section 6(1), SMOO.

82 Section 7(4)(b), SMOO (as inserted by section 12 of Ord No 69 of 1997).

83 As inserted by section 12, Ord No 69 of 1997.

While amendments made to the Ordinance in 1997⁸⁴ have redressed a number of defects, 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. 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.

Definition of children

3.75 Section 5(1)(b) of the Ordinance limits its custody jurisdiction to "*children of the marriage*." There is no definition of this term so it is not clear whether this includes children born outside wedlock but who are accepted as children of the marriage.⁸⁵

Definition of custody

3.76 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 unclear whether the non-custodial parent would be denied access if he or she were guilty of adultery.

Third parties

3.77 There is no reference to a third party being able to apply for, or be granted, custody of a child, nor is there a power given to the court to commit a child to the custody of the Director of Social Welfare.

Protection of Children and Juveniles Ordinance (Cap 213)

3.78 The Protection of Children and Juveniles Ordinance provides civil and criminal remedies for the protection of children. It is necessary to consider the provisions of the Ordinance in the context of custody and access, as situations may arise where an overlap of orders may occur between those issued under the Ordinance and those resulting from matrimonial proceedings.

3.79 For example, a child who is the subject of court orders following his parents' divorce may subsequently become in need of care or protection under the provisions of the Ordinance, and be removed from the custodial parent's home or from the parent who is exercising access. Alternatively, allegations against a parent of physical or sexual abuse of a child which result in care or supervision orders being issued may prompt the other parent to

84 By Ord No 69 of 1997.

85 There is a definition of "*child*" and "*child of the family*" in section 2 of the MPPO: see above, at para 3.60.

seek a divorce. In both examples, the question of access by either of the parents to the child in care may then arise in the Family Court.

Powers in relation to a child in need of care or protection

Police power to detain a child and deliver him to place of refuge

3.80 Section 34E of the Ordinance allows a police officer⁸⁶ to detain a child who is suspected of being in need of care or protection pursuant to section 34(2) of the Ordinance, and to deliver him to a "place of refuge"⁸⁷ or to such other place as he may consider appropriate.

Power to appoint legal guardian and make care and supervision orders

3.81 Where a child is in need of care or protection, section 34(1) of the Ordinance empowers the juvenile court to:

- "(a) appoint the Director of Social Welfare to be the legal guardian of such child or juvenile; or*
- (b) commit [the child or juvenile] to the care of any person whether a relative or not, who is willing to undertake the care of him, or of any institution which is so willing; or*
- (c) order his parent or guardian to enter into recognizance to exercise proper care and guardianship; or*
- (d) without making such order or in addition to making an order under paragraph (b) or (c), make an order placing him for a specified period, not exceeding 3 years under the supervision of a person appointed for the purpose by the court"*

3.82 While the juvenile court may make such an order on its own motion, the right to apply for such an order is restricted to 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.⁸⁸ A parent of the child or a third party cannot apply for such an order. The court can, however, order

86 Of the rank of station sergeant or above, or another person authorised in writing by the Director of Social Welfare: see section 34E(1), PCJO.

87 The places of refuge designated for the purposes of the PCJO are listed in the schedule to the Protection of Children and Juveniles (Place of Refuge) Order (Cap 213). Section 34E(5) provides that where a child is detained in a place of refuge, the person in charge has "the like control over the child or juvenile as the parents and shall be responsible for his maintenance." A child may be detained in a place of refuge for up to 48 hours until he can be brought before the juvenile court: section 34E(2) and 34E(3), PCJO. The court can order that the detention be extended for up to 28 days in the first instance while further inquiries are made about the child. (Additional extensions of the detention may also be granted, but the aggregate must not exceed 56 days continuous detention.) See section 34E(4), PCJO.

88 Section 34(1), PCJO.

that the child be committed to the care of a relative or any other person who is willing to undertake the care of the child.⁸⁹

Definition of a child in need of care or protection

3.83 Section 34(2) states that a child or juvenile in need of 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."

Access to children in care

3.84 There is nothing in the Ordinance to indicate whether a parent can apply for access to a child who has been removed to a place of refuge under section 34E or made the subject of a care order. Section 34(5), however, 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."*

This would presumably empower the Director of Social Welfare to allow or refuse an application by parents for access to a child.⁹⁰

3.85 Section 36 of the Ordinance further provides that nothing in section 34⁹¹ shall oust the jurisdiction of the Court of First Instance *"to make*

89 Section 34(1)(b), PCJO.

90 The reference to "order" appears curious as it purports to give a quasi-judicial discretion to the Director of Social Welfare.

91 And sections 35 (power of Director of Social Welfare to protect children and juveniles from moral or physical danger) or 45A (child assessment procedure), PCJO.

any order in relation to the appointment of a guardian of or otherwise in relation to the custody or control of or access to any child or juvenile."⁹²

3.86 Section 39 gives the Secretary for Health Welfare and Food power to make regulations concerning, *inter alia*, "visits to children and juveniles,"⁹³ but nothing is stated about access orders.

Child assessment

3.87 Section 45A of the 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.⁹⁴ A child or juvenile can be removed for the purposes of assessment for a period from 12 to 36 hours.⁹⁵

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

Applications to be appointed as guardian of the child

3.88 It is submitted that section 34 of the Ordinance may be criticised for restricting applications by interested persons, such as family members or neighbours, from being appointed as guardians for a child in need of care and protection. As stated earlier, they cannot apply unless they are authorised to do so by the Director of Social Welfare. This would take time and defeats what is presumably a principal purpose of the section: to protect children in emergency situations.

3.89 There is nothing in section 34 making the parent or guardian of a child a party to the care and protection proceedings, nor is there any provision as to a right of appeal. Furthermore, parents have no right to legal aid in care and protection situations, as legal aid only relates to proceedings and not to legal advice which may be required.⁹⁶

92 This section does not, however, mention the powers of the District Court concerning these issues.

93 See section 39(1)(f), PCJO.

94 It is interesting that the term "*psychiatrist*" is 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 developmental issues.

95 Section 45A(5) to (7), PCJO. 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.

96 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.

Access to a child in care

3.90 As we saw earlier, there is nothing in the Ordinance to indicate whether a parent can apply for access to a child who has been removed to a place of refuge under section 34E, or who is being made the subject of a care order. There has also been concern expressed as to whether a parent has a right of access to a child taken for assessment under section 45A of the Ordinance.⁹⁷

3.91 It would appear, however, that although the court has no power to order access under the Ordinance when making the original care order, it may be able to do so on an application for a variation order. Section 34C(1) allows the court to vary an order under section 34(1)(a), (b) or (c) on the application of *"a parent or guardian, or of any person or institution to whose care a child or juvenile has been committed."* Section 34C(2)(b) allows the court to insert any requirement which could have been included in the original order. Section 34C(6) provides that if there is an application to discharge or vary an order made under section 34(1)(a) (which would have appointed the Director of Social Welfare as guardian of the child), the juvenile court has the power:

*"whether or not it discharges the order of appointment, 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."*⁹⁸

3.92 It appears inconsistent that the court can grant access to the child when *varying* an existing care order, but cannot do so under the Ordinance when the original care order is made.⁹⁹

Inconsistencies between the PCJO and the matrimonial Ordinances regarding care and supervision orders

3.93 As we saw earlier in this chapter in relation to the Matrimonial Causes Ordinance (Cap 179),¹⁰⁰ there is an inconsistency between the grounds for committing a child to the care of the Director of Social Welfare in private law proceedings and those in public law proceedings under this Ordinance. A similar inconsistency may arise in relation to court jurisdiction. Sections 23 and 24 of the Guardianship of Minors Ordinance (Cap 13) give jurisdiction to the District Court or the Court of First Instance in relation to types of proceedings taken under that Ordinance.¹⁰¹ No reference is made to the jurisdiction of the juvenile court. Theoretically, the same child could be

97 See Liu, "The Protection of Children and Juveniles Ordinance: An Overview" (1995) *Hong Kong Law Journal*, Vol 25, Part 3, at 343.

98 It may also discharge or vary any order or requirement made by the Director of Social Welfare under section 34(5) of the Ordinance.

99 One way that a parent may be able to gain access to a child who has been made the subject of a care order is to apply under section 10 of the GMO, discussed earlier in this chapter.

100 Para 3.36, above.

101 Section 23, GMO.

the subject of proceedings in the juvenile court and the District Court with regard to the making of care or supervision orders. 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.

Wishes of the child

3.94 There is no provision for the wishes of the child to be taken into account in the making of any orders under the Ordinance, although the parent or guardian's wishes can be taken into account in the requirements laid down in supervision orders under section 34A.

Separate representation

3.95 As we saw earlier in this chapter, there is provision for separate representation for children in private law proceedings, but there is no provision for the court to order separate representation for children in the Protection of Children and Juveniles Ordinance (Cap 213). Where separate representation may be required, the juvenile court may, under provisions in the Official Solicitor Ordinance (Cap 416), request the Official Solicitor to step in and act *"for any party involved in proceedings under the ... Ordinance ... relating to the care and protection of a child or juvenile."*¹⁰²

Age

3.96 The interpretation section of the Protection of Children and Juveniles 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.

3.97 It is interesting to note that section 34(6A) imposed different age limits for male and female children in respect of orders in force in 1978¹⁰³ under section 34(1)(b) (committing a child to the care of any person or institution), section 34(1)(c) (for a child's parent or guardian to enter into recognizance to exercise proper care and guardianship) and section 34(1)(d) (placing the child under supervision). Section 34(6A) provided that these orders would have ceased for a male child at the age of 16, and at 18 for a female child unless she had married under that age. Liu comments¹⁰⁴ that this provision appears to have been in breach of article 20 of the Hong Kong Bill of Rights.¹⁰⁵

102 Schedule 1, Part 3 of the Official Solicitor Ordinance (Cap 416).

103 At the commencement of the Protection of Women and Juveniles (Amendment) Ordinance 1978 (Ord No 32 of 1978).

104 "The Protection of Children and Juveniles Ordinance: An Overview" (1995) *Hong Kong Law Journal*, vol 25, Part 3, 343, at 361.

105 See Hong Kong Bill of Rights Ordinance (Cap 383), section 8, where the various articles of the Hong Kong Bill of Rights are listed.

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

Other relevant legislation

Domestic Violence Ordinance (Cap 189)

3.99 The Domestic Violence Ordinance provides for the making of non-molestation orders against a person in order to protect a child from further molestation.¹⁰⁶ Such an order can exclude the other person from the matrimonial home.¹⁰⁷ The Ordinance applies to cohabiting couples and any child living with the applicant for the order. 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.¹⁰⁸

Criticisms of the Domestic Violence Ordinance (Cap 189)

3.100 There is no provision as to the effect of an injunction under the Ordinance on existing orders of custody or access.¹⁰⁹ We feel that it is essential that there be a provision for automatically suspending or varying access orders where a person has been made subject to a non-molestation order or excluded from the home for molesting a child. The onus would then be on the person excluded to apply for an order to resume access. Otherwise, the custodial parent of a child who has been molested by the other parent will have to apply for an order to suspend or vary the access order in addition to applying for the injunction to stop the molestation.

3.101 In Chapter 11 of in this report, we look in more detail at recommendations to improve the effectiveness of domestic violence legislation in custody and access situations.

Adoption Ordinance (Cap 290)

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

106 Section 3(1)(b), DVO.

107 Section 3(1)(c), DVO. The definition of child was changed to a person under 18 years of age by section 25 of the Law Reform (Miscellaneous Provisions and Minor Amendments) Ordinance (Ord No 80 of 1997).

108 Section 3(2), DVO.

109 Although there is a saving as to the existing jurisdiction of the Court of First Instance and the District Court in section 9, DVO.

3.103 In *Re Phillips*,¹¹⁰ an adoption order was sought by the stepfather in relation to children whose parents had divorced. The children's natural father had previously obtained an access order from the court after his divorce from the children's mother. He opposed the making of the adoption order and argued that the making of such an order would unreasonably deprive him of the right of access granted to him by the court. The mother had argued that, unless an adoption order was made, the children would not be entitled to British citizenship and so would not have a right of abode in Britain. The High Court held that the children's natural father was not unreasonably withholding his consent to the adoption of the children by the step-father. There was nothing out of the ordinary in the fact that the mother had remarried, and no reason why the children could not live harmoniously with the step-father without the need for adoption. The welfare of the child was only one of the conditions to be taken into account in considering adoption. A further condition was that the consent of the parents must be given unless the court considered there were grounds for dispensing with that consent. The court added that a desire to change the children's surname was not a legitimate ground for adoption, nor was it generally in the interests of the children.¹¹¹

110 [1987] 1 HKC 503.

111 Same as above, at 507, in reliance on *Re D minors* [1973] 3 All ER 1007.

Chapter 4

The current law and practice in Hong Kong - recent developments in family law

Introduction

4.1 We saw in the discussion in Chapter 2 that significant reforms took place in Hong Kong in the mid 1990s in relation to the facts constituting the ground for divorce. More recently, various proposals have been put forward with the aim of further streamlining and reducing the adversarial nature of divorce proceedings in Hong Kong. These recent developments, and other more general reform initiatives in the area of family law, are discussed below.

The use of mediation in family proceedings

4.2 Statistics indicate that around ten percent of the total number of divorce cases which arise in Hong Kong each year¹ involve disputes on ancillary matters that need to be settled in court.² Many of these will also include custody and access disputes.

4.3 Of the remaining majority of cases, the parties will reach agreement on what arrangements should be made for the children without the need to resort to court. This is almost invariably in the children's best interests, as it avoids placing *"an additional burden on a child who may be suffering emotional traumas as a consequence of the marital breakdown."*³ Agreement in these cases is achieved either through personal mutual compromise, mediated agreement or solicitor-negotiated settlement. Where personal mutual compromise is not possible, agreements arrived at with the aid of mediation may be an effective way of resolving matters in dispute between the parties without unduly increasing the hostility between them.

1 In 2001, 13,425 divorces were granted. This represents a six-fold increase over the 2,060 divorces granted in 1981. See Hong Kong Polytechnic University, *Evaluation Study on the Pilot Scheme on Family Mediation: Interim Report* (Apr 2002), at para 4. The number of divorce applications filed in 2003 was 17,295: see "Caseload of the District Court" on the Hong Kong Judiciary website at www.judiciary.gov.hk.

2 See the Commission's report: HKLRC, *The Family Dispute Resolution Process* (Mar 2003), at para 2.1.

3 P Hewitt (ed), A Liu, M McDonagh, S Melloy & S Warren, *Hong Kong Legal Practice Manuals: Family* (Sweet & Maxwell, 1998), at para 9.5.

4.4 Unlike solicitor-negotiated settlements, where the respective parties and their lawyers can sometimes adopt a "win/lose" approach to matters that must be resolved, mediation attempts to assist the divorcing couple to reach a settlement that is based on their mutual best interests and those of their children. This "win/win" approach, which encourages a more amicable continuing relationship between the parties for the sake of their children, combined with the cost-saving potential that mediation presents (both to the parties concerned and to those administering the courts), has prompted significant interest in recent years in the use of mediation to resolve family disputes. Some of the recent initiatives in Hong Kong in this area are outlined below.⁴

Pilot study on the use of mediation in the Family Court

4.5 A three-year pilot scheme on family mediation was introduced in May 2000 in the Family Court. The purpose of the pilot study was to provide an alternative to litigation in resolving disputes arising from breakdown of marriage, and *"to test the acceptability and effectiveness of mediation in Hong Kong in helping divorcing couples to reach their own settlement that is responsive to their own needs, and to the needs of their children and their spouse."*⁵

4.6 Information and mediation sessions were provided free of charge under the scheme, and participants were given a choice of mediators from the Social Welfare Department, non-governmental organizations and those in private practice.⁶ The Judiciary commented that the more settlement-oriented approach adopted under the scheme allowed the separating or divorcing couples to reach mutual agreements for the custody and maintenance of their children as well as resolution of financial matters.⁷

4.7 During the three years of the study, 790 couples received and completed mediation. Of these, 627 couples reached full or partial agreement over disputes on matters, such as spousal and child support, child custody and property division. The Judiciary advised that the success rate for the scheme was nearly 80 percent.⁸

4.8 The scheme was closely monitored by the Judiciary and the Hong Kong Polytechnic University was commissioned to conduct an

4 Others include the research study carried out by the Mediation Centre of the Hong Kong Family Welfare Society which reported in March 2003: see Hong Kong Family Welfare Society Mediation Centre & RWH Kwan, *Research Report on Divorce Mediation: An Outcome Study* (Mar 2003).

For a further discussion of the recent initiatives in this area, see S Melloy, "Family Law Crossroads: Where to from here? An analysis of the current proposals for change" (2003) *Hong Kong Law Journal*, Vol 33, Part 2, 289 to 311.

5 From Judiciary Press Release, "Pilot Scheme on Family Mediation Extended" (30 Apr 2003).

6 Same as above.

7 *Hong Kong Judiciary Annual Report 2002*, at 50.

8 Judiciary Press Release, above.

evaluation study on the effectiveness of the scheme. In summarising the findings of the scheme's interim evaluation report in April 2002, the Judiciary observed that:

"The evaluation study reveals that the public prefer family mediation service to litigation, and consider that the scheme should be widely promoted as a means to resolve family disputes. The great majority of the users of the service also gave positive feedback on the mediation service they received, eg, saving in time and costs, acquiring a clearer understanding on how to proceed with divorce constructively, lessening of tension in the dispute resolution process, and better communication between both parties to facilitate reaching of agreements and sustaining of the agreements."⁹

4.9 Despite these favourable conclusions, the pilot scheme on family mediation in the Family Court was discontinued on 31 July 2003.¹⁰

Law Reform Commission report on the family dispute resolution process

4.10 In March 2003, the Law Reform Commission published a report entitled *The family dispute resolution process*,¹¹ which examined the various approaches which could be adopted in resolving family disputes, and focused particularly on the use of mediation. The report made a number of recommendations to strengthen family mediation services and to enhance the family litigation process.

4.11 The Commission noted in the report that the emotional harm experienced by parties involved in family proceedings, especially the children, could be greatly reduced if mediation was used to resolve the matters in dispute between the parties.¹² The report's proposals were aimed at minimising the adversarial nature of family proceedings so as to promote the best interests of the child.

9 *Hong Kong Judiciary Annual Report 2002*, above, at 51. See also the useful discussion of the interim report's findings in S Melloy (2003), above, at 292 to 297.

10 See Practice Direction 15.10 (Family Mediation) which sets out the arrangements to replace those formerly applying under the Pilot Scheme. The Practice Direction came into force on 1 August 2003 and superseded the earlier Practice Direction 15.10 which had been in effect since 2 May 2000.

For a discussion of the concerns generated by the cessation of the mediation pilot scheme at the Family Court, see Melloy (2003), above, at 296 to 298.

11 HKLRC, *The family dispute resolution process* (Rep, Mar 2003). This was the Commission's third report under its reference on the guardianship and custody of children. (The current report, on child custody and access, is the fourth and final report in this series.) The recommendations in the Commission's third report are also discussed in Melloy (2003), above, at 297 to 302.

12 HKLRC (Rep, Mar 2003), above, at Chapter 1.

4.12 The Commission also proposed that the use of family mediation should be strongly supported and encouraged by the courts and the Administration in Hong Kong.¹³

Support services for family mediation

4.13 In relation to support services for family mediation, the Commission endorsed the Pilot Scheme on Family Mediation discussed above (still at that time underway at the Family Court), and recommended that providing access to, and promoting, mediation services should be an integral part of the Family Court system.¹⁴

4.14 In line with the arrangements operating under the Pilot Scheme, the report recommended that free, court-based, information sessions should be provided to parties contemplating divorce to inform them about family support services and available alternatives to litigation, such as mediation.¹⁵

4.15 The report also recommended that:¹⁶

- counselling conferences should be introduced, which would assist divorcing parties to resolve emotional conflicts which may be preventing them from reaching agreement on practical issues, particularly the future custody and access arrangements for their children; and
- solicitors should be under an obligation to advise their clients about the availability of information sessions, counselling and mediation services.

The general role of mediators

4.16 On the general role of mediators, the report's recommendations aimed at ensuring that mediation in Hong Kong operated in accordance with clear guidelines and with adequate resources so that the integrity of the process and the quality of mediation services would be maintained.

4.17 The report included recommendations¹⁷ relating to the training of mediators, their system of accreditation, guidelines on separation of roles for mediators who are also lawyers and social welfare officers, and mechanisms to allow the views of children to be considered in the mediation process. The Commission also recommended that legal aid should be available for mediation.

13 Same as above, at Chapter 5.

14 Same as above.

15 Same as above.

16 Same as above.

17 Same as above, at Chapter 6.

The family litigation process

4.18 In relation to the family litigation process, the Commission proposed a new, streamlined court process for dealing with family cases. A key feature of this process was the application of case management strategies to minimise delay, as delay is obviously contrary to the best interests of the child. Recommendations in this area included:¹⁸

- more powers to judges to manage the course of family proceedings and to control costs;
- the introduction of target times for the disposal of civil cases concerning children;
- the holding of issues and settlement conferences to further promote agreement between the parties; and
- the introduction of target times for the production of social welfare reports.

Other related matters

4.19 The Commission also recommended¹⁹ that more statistics on child-related cases should be maintained by the Family Court. However at the same time, children's privacy should be protected by a practice direction to control the release of unreported judgments concerning children. The report endorsed the adoption of codes of practice for lawyers dealing with family cases, especially those involving children.

Further developments relating to the court process in family matters

Expansion of the special procedure divorce process

4.20 In Chapter 2 of this report,²⁰ we looked briefly at the "*special procedure*" for divorce²¹ which now applies to all uncontested divorce cases.²² The effect of this procedure is that the divorce will be processed

18 Same as above, at Chapter 7.

19 Same as above.

20 Chapter 2, above, at para 2.79.

21 See Rules 33(2A) and 47A, MCR.

22 Estimated now to be around 95% of all divorce cases: see Liu, above, at 135. The special procedure was extended to include divorces where there are children of the family by the Matrimonial Causes (Amendment) Rules 2001 (LN 270 of 2001), which commenced operation on 25 January 2002 (see LN 13/2002). As noted previously, this amendment also extended the special procedure to cover cases where (the previously excluded fact of) unreasonable behaviour was cited as grounds for divorce: see rule 33(2A), MCR. See also Hewitt (ed) and others, above, at para 4.58.

largely 'on the papers,' with no requirement for the parties to attend the *decree nisi* hearing.

4.21 Liu comments²³ that the advantages of the special procedure are that it:

- (a) does away with the largely ceremonial but public incantation in respect of uncontested divorces;
- (b) reduces the time it takes for a litigant to obtain a divorce when the dissolution of the marriage is not a contested issue; and
- (c) allows the court to focus on the substantive issue of the children's welfare by having a private hearing during which that issue can be canvassed in a more informal and relaxed atmosphere.

Reform of ancillary relief procedures in matrimonial proceedings

4.22 As we saw above,²⁴ it is estimated that approximately ten percent of the total number of divorce cases in Hong Kong each year involve disputes on ancillary matters which need to be settled in court. It was generally considered that the ancillary relief procedure which had been operating in matrimonial proceedings here for some 30 years *"allowed too much leeway for litigants to adopt an antagonistic approach to the other party, hence prolonging the emotional trauma of divorce and often resulting in the dissipation of family assets in costs."*²⁵

4.23 In November 1999, the Chief Justice appointed a Working Group chaired by the Hon Mr Justice Hartmann to consider reform of the ancillary relief procedures in Hong Kong, *"with a view to making them quicker, cheaper, less adversarial and more conducive to a culture of settlement."*²⁶ Following its consideration of the issues, the Working Group recommended a set of reformed ancillary relief procedures, based broadly on the English Family Proceedings Rules 1999. This is now being tested by a two-year pilot scheme in the Family Court.²⁷

23 Liu, above, at 135.

24 See above, at para 4.2.

25 *Hong Kong Judiciary Annual Report 2002*, at 51. See also: *"The Judiciary Administrator's Presentation at the Special Finance Committee Meeting on 25 March 2003,"* at para 10, available on Judiciary of Hong Kong website at: www.info.gov.hk/jud/fc_questions.

26 *Hong Kong Judiciary Annual Report 2002*, at 52.

27 The Pilot Scheme for the Reform of Ancillary Relief Procedures in Matrimonial Proceedings commenced operation on 29 December 2003: see Judiciary Press Release, 27 Dec 2003, available on Judiciary of Hong Kong website at: www.info.gov.hk/jud/. The Pilot Scheme was implemented by the Matrimonial Causes (Amendment) Rules 2003 (see LN 209 of 2003), which came into force on 29 Dec 2003 (see LN 256 of 2003), and Practice Directions 15.11 (Financial Dispute Resolution Pilot Scheme), issued 27 Nov 2003 and 15.11A (Application of Financial Dispute Resolution Pilot Scheme), issued 5 Aug 2004.

4.24 Providing an overview, the Judiciary has advised that:

*"[T]he reformed procedures may be divided into three phases, each phase concluding with a 'milestone' court hearing. Phase One commences with the filling of an application for ancillary relief and concludes with the holding of the First Appointment. Phase Two proceeds from the First Appointment and concludes with the Financial Dispute Resolution (FDR) hearing. Phase Three proceeds from the FDR hearing, if that is not fully successful, and concludes with the trial."*²⁸

4.25 An essential function of the court at the First Appointment is to fix a date either for the FDR hearing or for the trial, thereby setting a timetable for the proceedings. It should be noted that, at the FDR hearing, the judge sits essentially in the role of a "conciliator," not an adjudicator. At the end of the FDR hearing, the court may make any appropriate consent orders. If no settlement is reached, "the court will then fix a date for trial (by another judge) and give any further necessary directions."²⁹

Other reform proposals relating to child custody and access arrangements

Law Reform Commission report on guardianship of children

4.26 In January 2002, the Commission published a report on Guardianship of children,³⁰ which dealt with the law relating to the appointment of guardians for children in the event of the death of one or both parents. The Commission's focus in reviewing the law of guardianship was on recommending ways to simplify the existing law and procedures so that more parents would be encouraged to take the positive step of making guardianship arrangements for their children.

4.27 The report identified a variety of shortcomings with the law in this area, including:³¹

- the high degree of formality required for the appointment of testamentary guardians for children;

28 *Hong Kong Judiciary Annual Report 2002*, at 52.

29 Same as above, at 52 to 53. For further commentary on the scheme, see also: "The Financial Dispute Resolution Pilot Program: The View from the Bench" in *Hong Kong Lawyer* (Feb 2004), at 92 and Melloy (2003), above, at 305 to 310.

30 HKLRC, *Guardianship of children* (Rep, Jan 2002). This was the first of the Commission's four reports under the current reference.

31 HKLRC (Rep, Jan 2002), at Chapter 2.

- the limited provisions allowing third parties, such as grandparents, to apply to be appointed guardians;
- the power of surviving parents to veto testamentary guardians from acting unless the guardian takes the matter to court;
- the lack of any provision to allow a testamentary guardian to appoint a testamentary guardian to act for him in the event of his death, and
- the lack of any provision to allow a testamentary guardian, once appointed, to formally disclaim his appointment.

4.28 Amongst the report's recommendations, the Commission proposed that the procedures necessary for parents to appoint guardians for their children should be simplified, and that the court's powers to appoint and remove guardians for children should be widened.

4.29 The report recommended:³²

- the introduction of a more simple, standardised procedure for the appointment of guardians for children;
- a widening of the court's power to appoint guardians for children, so that any person might apply to be made a guardian of a child, not only in cases where the child had no parent with parental responsibility for him, but also in cases where a custody order for the child had been made in favour of the parent who has now died;
- removal of the current right of the surviving parent to veto a testamentary guardian from acting, so that either the surviving parent or the guardian might apply to the court if there was a dispute between them on the best interests of the child;
- that a testamentary guardian who had been appointed by the parent who had custody of the child should be able to act automatically as guardian for the child on the death of that parent;
- that, as far as practicable, the views of the child on the appointment of the guardian should be taken into account;
- that a child's guardian should be able to appoint a guardian for the child in the event of the guardian's death;
- that there should be a system for withdrawing from acting as guardian similar to the system for appointing a guardian; and

32 Same as above, at Chapter 4.

- that the High Court's power to remove or replace a guardian in the best interests of the child should be extended to the District Court.

Law Reform Commission report on international parental child abduction

4.30 The Commission published a second report under its guardianship and custody reference in April 2002, on the topic of International parental child abduction.³³ The focus of this report was the law relating to the abduction of children across international borders by parents in contested custody cases.

4.31 The report noted that although statistics indicated that there were not many cases of parental child abduction in Hong Kong each year, every case that did occur was highly traumatic for the parties involved, because once a child was taken out of the jurisdiction, it could be very difficult for the left-behind parent to secure his return.³⁴

4.32 The recommendations contained in the report were aimed at improving Hong Kong's current legal protections against child abduction, so as to better support the operation here of the Hague Convention on the Civil Aspects of International Child Abduction. This convention, which had been in force in Hong Kong since September 1997, provides that children abducted from one Convention-member state to another should be located and returned to their home jurisdictions as quickly as possible.

4.33 The Commission's recommendations included:³⁵

- the introduction of legislative restrictions on removing a child from the jurisdiction without the required consents;
- a specific power to the court to order the disclosure of the whereabouts of a child;
- a specific power to the court to order the recovery of a child; and
- a specific power to the authorities to hold a child suspected of being abducted so that he could be returned to the custodial parent or taken to a place of safety.

33 HKLRC, *International Parental Child Abduction* (Rep, Apr 2002).

34 Same as above, at para 1.8.

35 Same as above, at Chapter 6.

4.34 The Commission also proposed:³⁶

- an expansion of legal aid availability and a speeding up of the processing of legal aid applications for Hague Convention cases;
- a review of the adequacy of the current provisions in Hong Kong regarding stay of custody proceedings pending the outcome of related Hague applications; and
- a review of the provisions regarding the confidentiality of information relating to Hague proceedings.

36 Same as above, at Chapter 7.

Chapter 5

Comparative Law: England and Wales

"The Children Act 1989 is undoubtedly one of the most radical and far-reaching reforms of the private and public law affecting children."¹

Introduction

5.1 In England, the passage of the Children Act in 1989 substantially replaced the existing private law on the custody and upbringing of children as well as the previous public law governing children in care. The Act reshaped many of the fundamental concepts of the law relating to children and became the model for several more recent child law regimes adopted in other jurisdictions.²

Position prior to the Children Act 1989

5.2 Before the 1989 Act, the law relating to children had developed on an *ad hoc* basis through statutory amendment and case law. This had rendered the law both complicated and technical without any underlying general philosophy. Remedies and procedure varied according to the jurisdiction invoked and the court to which the proceedings were presented.³ Ayrton and Horton commented:⁴

"The mass of legislation which existed prior to the implementation of the [Act] had over the years served to distort both the procedures and principles to be applied in children cases. Ever expanding case law offered guidance as best it could."

1 A Bainham, *Children - The New Law* – The Children Act 1989 (1990), at para 1.1.

2 Eg, the Children (Scotland) Act 1995, the Family Law Reform Act 1995 in Australia and New Zealand's Care of Children Act 2004 (which will come into operation on 1 July 2005). See the discussion of these items of legislation in, respectively, Chapters 6, 7 and 8 below.

3 Bromley & Lowe, *Bromley's Family Law* (1992), at 250. For example, different statutes conferred differing 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.

4 L Ayrton & M Horton, *Residence and contact: A practical guide* (1996), at 1.

5.3 It was against this backdrop that the English Law Commission initiated its 'Review of child law' reform programme in 1984. A series of studies followed,⁵ culminating in 1988 with the publication of the Commission's *Review of child law: Report on guardianship and custody*.⁶ This became the basis for most of the private law reforms comprised in Parts I and II of the 1989 Act⁷ which are the main focus of this chapter.

5.4 On the public law side, a similarly comprehensive review was carried out in 1984 and 1985 by an inter-departmental working party set up on the recommendation of the House of Commons Social Services Committee.⁸ This resulted in the 1987 Government White Paper, *"The law on child care and family services"*,⁹ which in turn became one of the main sources for Parts III, IV and V of the Act.¹⁰ Other influences on the legislation included a series of public inquiries that were held in the 1980s into cases of children being taken into care or dying at the hands of their carers,¹¹ as well as the landmark House of Lords decision in 1986 of *Gillick v West Norfolk and Wisbech Area Health Authority*.¹² This case established that parental rights must yield to children's rights when children reach sufficient understanding to make their own decisions.¹³

5.5 Given Royal Assent in November 1989, the Children Act 1989 came into force in October 1991.¹⁴ In terms of its legislative impact, it repealed in full eight post-war statutes¹⁵ and substantially amended a number of others.

5 English Law Commission, *Review of child law: Guardianship* (1985, Working Paper No 91), *Review of child law: Custody* (1986, Working Paper No 96), *Review of child law: Care, supervision and interim orders in custody proceedings* (1987, Working Paper No 100), *Review of child law: Wards of court* (1987, Working Paper No 101).

6 English Law Commission, *Review of child law: Guardianship and custody* (1988, Report Law Com No 172).

7 For a fuller discussion of the background to the 1989 Act, see Bainham, above, at paras 1.6 to 1.17.

8 The Working Party's review was entitled, *Review of child care law*. See Bainham, above, at para 1.7.

9 Cmnd 62.

10 Bainham, above, at para 1.7.

11 Same as above, at para 1.10. These inquiries included: *A child in trust: Report of the Panel of Inquiry investigating the circumstances surrounding the death of Jasmine Beckford* (London Borough of Brent (1985)); *A child in mind: Protection of children in a responsible society, Report of the Commission of Inquiry into the circumstances surrounding the death of Kimberley Carlile* (London Borough of Greenwich (1987)); and *Whose child? The report of the public inquiry into the death of Tyra Henry* (London Borough of Lambeth (1987)). The inquiries also included the Cleveland inquiry (Lord Justice Butler-Sloss, *Report of the Inquiry into Child Abuse in Cleveland 1987* (1988, Cm 41)), which had exposed the "apparent over-zealous treatment by protection agencies in Cleveland" of cases of alleged child sexual abuse in that region. Of the Cleveland inquiry, Bainham comments, "In particular, it highlighted the absence of adequate legal safeguards for parents where their children were summarily removed from them under emergency procedures": Bainham, above, at para 1.10.

12 [1986] 1 AC 112.

13 See also the commentary on the case by Bainham, above, at para 1.11.

14 For further discussion, see Ayrton & Horton, above, at xi.

15 Including the Guardianship of Minors Act 1971, the Guardianship Act 1973 and the Children Act 1975.

The aims of the Children Act 1989

5.6 The 1989 Act had two main aims. These were:

- 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;¹⁶ and
- to provide a consistent set of legal remedies available in all courts and in all proceedings affecting children.¹⁷

5.7 The Act sought to achieve these aims in private law through the following reforms:¹⁸

- the abolition of orders for custody and access, which were replaced by new forms of court order known, respectively, as "*residence*" and "*contact*" orders;
- the abolition of the legal concept of "*parental rights*," with the legal status of parenthood defined in terms of "*parental responsibility*;"
- a clear distinction was drawn between parenthood and guardianship, with parents ceasing to be the legal guardians of their children;
- in the unmarried family, the introduction of important reforms designed to improve the legal standing of fathers; and
- the advancement of the legal standing of relatives and other non-parents having an interest in particular children. This was brought about by the introduction of a much more flexible regime providing non-parents with access to the courts for the purpose of seeking the new range of orders introduced by the Act.

5.8 In terms of public law, the Children Act 1989 represented a major shift in the relationship between the family and state agencies for the purpose of preventing harm to children. The state's focus was changed under the Act from concern about child care and child abuse to concern about child protection.¹⁹

16 See Hoggett, "The Children Bill: The Aim" (1989) *Fam Law* 217.

17 Same as above.

18 As summarised in Bainham, above, at para 1.1.

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

The general principle of parental responsibility

Meaning and scope of parental responsibility

Parenthood and guardianship

5.9 Before the 1989 Act, parental rights and duties were based on the concept of guardianship rather than parenthood. Guardianship gave to parents the power to determine all aspects of a child's upbringing. Historically, parental or natural guardianship was originally confined to the father, not the mother, 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. Much later, 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.

5.10 The 1989 Act abolished the common law rule that a father was the natural guardian of his legitimate child.²⁰ It conferred equal parenthood on married parents in the form of parental responsibility. Married mothers and fathers were therefore given equal status under the Act with respect to the upbringing of their children. Parenthood was now regarded as the primary concept and was distinguished from guardianship. As explained by Bromley and Lowe, guardianship is now confined to:

*"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."*²¹

Parental responsibility defined

5.11 The philosophy of the Children Act 1989 was to promote the family so far as it was consistent with the welfare of the child. This rested on the belief that children are generally best looked after within the family, with both parents playing a full part in the child's upbringing and without resort to legal proceedings.²²

5.12 The former Children Act 1975 had used the phrase "*parental rights and duties*" to describe all the rights and duties that a mother and father had in relation to a legitimate child and his property. The English Law Commission considered that to speak of parental "*rights*" was not only inaccurate as a matter of juristic analysis, but was also a misleading use of

20 Section 2(4), English Children Act 1989 ("1989 Act").

21 Bromley & Lowe, above, at 395.

22 S M Cretney & J M Masson, *Principles of family law* (1997, 6th ed), at 775.

ordinary language.²³ In the 1986 *Gillick* case, the House of Lords had held that the powers which parents have over their children existed only so that they may perform their parental responsibilities for them.²⁴

5.13 The 1989 Act therefore replaced the existing terminology of parental "*rights*" and "*authority*" 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.*"²⁵ 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.*"²⁶

5.14 The 1989 Act does not provide a list of these rights, claims, duties, powers, responsibilities or authority that statute and common law have, for the time being, conferred upon parents. This was because the English Law Commission considered that it would be practically impossible to do so, as such a list would necessarily change from time to time to meet differing needs and circumstances.²⁷ Some have criticised this strategy and consider that a form of list should have been provided,²⁸ while others have commented that omitting any statutory list of rights, claims, duties, powers, responsibilities or authority was the correct approach.²⁹

Acquisition of parental responsibility

5.15 Parental responsibility exists in respect of a "*child*," that is, for the purpose of the Act, a person under the age of 18.³⁰ The question of who has acquired parental responsibility in any particular case is crucial in determining which persons have decision-making authority for the child. It is this legal status of parental responsibility which is important, regardless of how close any *de facto* relationship with the child may be. Consequently, a grandparent who physically cares for a child on a daily basis 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.³¹

23 English Law Commission (1988), above, at para 2.4.

24 *Gillick v West Norfolk and Wisbech Area Health Authority*, above.

25 Section 3(1), 1989 Act.

26 Bainham, above, at 63 to 64.

27 English Law Commission (1988), above, at para 2.6. The *Gillick* case further demonstrated that parental responsibility must vary with the age and maturity of the child and the circumstances of each individual case.

28 For example, Lyon [1989] *Fam Law* 49, at 50.

29 White, Carr & Lowe, *A Guide to the Children Act 1989* (1990), at para 2.6.

30 Section 105(1), 1989 Act.

31 Bainham, above, at 64 to 65.

Married parents

5.16 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.³² Notwithstanding separation or divorce, each parent continues to have parental responsibility even if a residence order (similar in some ways to a custody order) has been made in favour of one of them.³³ Each parent 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.

Unmarried parents

5.17 Where the parents are unmarried at the time of the child's birth, only the mother has parental responsibility for the child as of right, but the father can acquire it in the following ways.³⁴

- (a) by becoming registered as the child's father on the birth register;³⁵
- (b) by taking office as a guardian of the child appointed under the Act;³⁶
- (c) by obtaining a parental responsibility order from the court;³⁷
- (d) by making a parental responsibility agreement with the mother;³⁸ and
- (d) by obtaining a residence order in respect of the child, in which case the court is bound to make a separate parental responsibility order for him.³⁹

5.18 In considering to what extent parental responsibility should be conferred on unmarried fathers, the English 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.⁴⁰ 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

32 Section 2(1), 1989 Act.

33 Section 2(6), 1989 Act.

34 Section 2(2), 1989 Act.

35 Section 4(1), 1989 Act, as amended by section 111 of the Adoption and Children Act 2002.

36 Section 5(6), 1989 Act.

37 Section 4(1)(a), 1989 Act.

38 Section 4(1)(b), 1989 Act.

39 Section 12(1), 1989 Act.

40 English Law Commission (1988), above, at para 2.20.

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"⁴¹

5.19 Where the mother of a child is unwilling to share responsibility with the unmarried father voluntarily, the unmarried father may apply to the court for a parental responsibility order.⁴² 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 has shown to the child, the degree of attachment between the father and the child and the reasons for the father applying for the order.⁴³ If he has met these criteria then *prima facie* the order is in the child's interests.⁴⁴ The effect of the order is to give the father an equal say in all matters concerning the upbringing of the child. 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.⁴⁵ If the father wishes to have the child in his care, he has to apply for a residence order.

Non-parents

5.20 Those who are not parents do not have parental responsibility of a child as of right, but can acquire it in a number of ways. A person taking office as a guardian, or a "*special guardian*,"⁴⁶ has parental responsibility for the child concerned.⁴⁷ Similarly, any person who is not a parent or guardian of the child will have parental responsibility for the duration of a residence order which has been made in his favour.⁴⁸ This legal status for non-parents has some limitations, however; it will not entitle the non-parent to consent to the child's adoption, nor to appoint a guardian for him.⁴⁹

41 *Re H (Illegitimate Child: Father: Parental Rights) (No 2)* [1991] 1 FLR 214, at 218.

42 Section 4(1)(a), 1989 Act.

43 *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.

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

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

46 See sections 14A to 14G, 1989 Act. This was a new concept introduced by section 115 of the Adoption and Children Act 2002. In contrast to adoption situations, in special guardianship, parental responsibility and decision-making powers can be conferred on the third party without removing the legal status of the parents as parents of the child, though they may retain limited parental responsibility themselves: section 14C, 1989 Act. Special guardianship orders can be varied or discharged on application to the court: section 14D, 1989 Act.

47 Section 5(6), 1989 Act.

48 Section 12(2), 1989 Act. See also: *Re S (A Minor) (Parental Responsibility)* [1995] 3 FCR 564.

49 Section 12(3), 1989 Act. Note the new simplified procedure under section 4A of the 1989 Act for the acquisition of parental responsibility by step-parents (added by section 112 of the Adoption and Children Act 2002).

Parental responsibility agreements

5.21 Where unmarried parents agree to share parental responsibility for the upbringing of their child, a "*parental responsibility agreement*," under section 4(1)(b) of the 1989 Act, provides a simple and straightforward means to acknowledge this in law.

5.22 The making of the agreement has the same effect as a court order. Significantly, 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 bring the application.⁵⁰

5.23 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.⁵¹ The agreement takes effect after it has been filed with the Principal Registry of the Family Division of the High Court and 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.*"

5.24 The purpose of these formalities is to ensure that, as far as possible, both parents understand the importance and effects of their agreement. There is a concern that mothers may be bullied into conferring rights upon fathers at a time when they are particularly vulnerable to pressure. The necessary formalities surrounding the making of parental responsibility agreements therefore go some way towards avoiding such allegations of duress. It must be noted, however, that when an agreement is registered there is no investigation of whether the agreement is in the child's best interests or why the parents are entering into it. There is also no effective check on whether, for example, the man is the father of the child concerned. The court's role in relation to the agreement process is purely administrative and not judicial. Bainham questioned how far parental responsibility agreements would be used in practice,⁵² but it appears that they have proved popular.⁵³

50 Section 4(3), 1989 Act. Under section 12(4), the order may not be revoked while a residence order in favour of the father continues.

51 Section 4(2), 1989 Act; Parental Responsibility Agreement Regulations 1991 (SI 1991/1478); and SI 1994/3157.

52 Bainham (1990), above. at 166. He states: "*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.*"

53 It was reported that 1,510 parental responsibility agreements were registered during the first year following the commencement of the Children Act 1989 provisions: *NLJ* (Nov 27, 1992) at 1638.

5.25 Parental responsibility orders and agreements remain in force until the child reaches the age of 18, regardless of whether the parties may have remained together or have separated.⁵⁴ Such an order or agreement may be brought to an end earlier, however, by an order of the court following the application of any person who has parental responsibility for the child.⁵⁵ The child himself may also apply with leave of the court if the court "*is satisfied that the child has sufficient understanding to make the proposed application.*"⁵⁶ The court cannot end a parental responsibility order while a residence order in favour of the unmarried father is in force.⁵⁷

The implications of parental responsibility

Joint responsibility principle

5.26 The English Law Commission considered that parents should not lose their ability to make decisions about their children simply because they were 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 following their separation.

5.27 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.⁵⁸ 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.⁵⁹

5.28 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 parent, 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. The granting of parental responsibility to an unmarried father, for example, would result in the child's school inviting him to parents' functions, sending him school reports, giving him a voice in choosing future schools. It would also give him a voice in any issue of major medical treatment, or changing the child's surname.⁶⁰ The retention of parental responsibility after divorce was intended to minimise conflicts.

54 Section 91(7)(8), 1989 Act.

55 Section 4(3), 1989 Act.

56 Section 4(4), 1989 Act.

57 Section 12(4), 1989 Act.

58 Section 2(6), 1989 Act.

59 Section 2(8), 1989 Act.

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

The power to act independently

5.29 Obviously, more than one person may have parental responsibility for the child at the same time.⁶¹ It is usual for the child's parents to have parental responsibility at the same time but the previous law was not clear on whether they could act independently. 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.⁶²

5.30 As we have seen above, the general aim of the Act is to encourage both parents to feel concerned and responsible for the welfare of their children. Although it may be preferable that parents should have a legal duty to consult one another on major matters affecting the children's lives,⁶³ the English Law Commission noted that this seemed both unworkable and undesirable.⁶⁴

"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 [the other parent] 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."

5.31 Bainham criticised this approach. He commented that, by failing to provide for consultation and a right of veto, the Act, while it appeared in form to favour joint parenting following breakdown, *"in substance reinforces the already superior de facto position of the person with physical care."*⁶⁵ He stated:

"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,

61 Section 2(5), 1989 Act.

62 Section 2(7); section 13(1) and (3), 1989 Act.

63 As this should lead to increased parental co-operation and involvement after separation or divorce.

64 English Law Commission (1988), above, at para 2.10.

65 Bainham (1990) *Fam Law*, at 193.

*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.*⁶⁶

5.32 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. Glidewell LJ said, in *Re G (a minor) (Parental Responsibility: Education)*,⁶⁷ 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."*⁶⁸

Delegation of parental responsibility

5.33 A person with parental responsibility may not surrender or transfer any part of that responsibility to another person save by a court order.⁶⁹ However, he may delegate some or all of that responsibility to one or more persons acting on his behalf.⁷⁰ Such delegation can be made to another person who already has parental responsibility, or to those who do not, such as responsible persons in schools or holiday camps, or foster parents.

5.34 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 are best for their children, whether or not they are separated, and
- (b) it would be helpful if, for example, a school could feel confident in accepting the decision of a person nominated by the parents as a temporary "*guardian*" for the child while they are away.⁷¹

66 Bainham, (1990) 53 *MLR*, 211 to 212.

67 [1994] 2 *FLR* 964 (CA).

68 In that case, there had been no prior order so she could not claim that the father was acting incompatibly with a prior order.

69 However, in some instances, *additional* parental responsibility for the child may be granted by agreement. For example, an unmarried father may acquire parental responsibility in addition to the mother by virtue of a parental responsibility agreement made between them; so too may a step-parent acquire parental responsibility for a child by agreement with the birth parents. See, respectively, sections 4(1)(b) and 4A, 1989 Act.

70 Section 2(9), 1989 Act.

71 English Law Commission (1988), above, at para 2.13.

5.35 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 (the parent, for example) for any failure on his part to discharge his responsibilities towards the child.⁷²

Carers without parental responsibility

5.36 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.*"⁷³ This clarifies the position of those who have actual care of a child without having parental responsibility for him in law.

5.37 The English Law Commission gave the example of medical treatment.⁷⁴ 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 medical treatment for the child in the event of an accident. As Bainham sees it, the essence of the distinction is 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 someone with parental responsibility.⁷⁵

The general principle of the welfare of the child

The welfare principle

5.38 The child's welfare has long been established as the court's paramount consideration in proceedings involving children. The classic interpretation of this principle⁷⁶ was given by Lord MacDermott in 1969 in the case of *J v C*,⁷⁷ where his Lordship stated:

"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 as that term has now to be understood. That is the first consideration because it is of first importance and the

72 Section 2(11), 1989 Act.

73 Section 3(5), 1989 Act.

74 English Law Commission (1988), above, at para 2.16.

75 Bainham (1990), above, at 251.

76 See comments of Ayrton & Horton, above, at 21.

77 [1969] 1 All ER 788.

paramount consideration because it rules on or determines the course to be followed."⁷⁸

5.39 Lord MacDermott was referring to the principle as it was formerly enunciated in the Guardianship of Minors Act 1971.⁷⁹ This required the court to regard the welfare of the child as the *"first and paramount consideration."*⁸⁰ The word *"first"* had caused confusion, however, as 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 by subsequent interpretation of the welfare principle,⁸¹ a modern formulation of the principle was seen as necessary to clarify the law. Accordingly, the 1989 Act omits the word *"first"* so that the child's welfare is now the only consideration in cases where section 1 of the Act applies.⁸²

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

"When a court determines any question with respect to -

- (a) the upbringing of a child;⁸³ 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."

5.41 Cretney and Masson comment that the welfare principle is not without its 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

78 Same as above, at 820.

79 See also Ayrton & Horton, above, at 21.

80 Guardianship of Minors Act 1971, section 1.

81 *J v C* [1970] AC 668; *Re C (a minor)* (1979) 2 FLR 177, at 184; *Re KD (A minor) (Ward: Termination of Access)* [1988] AC 806. As Ayrton & Horton, above, at 21, state, *"If a child's welfare is the court's paramount consideration it should clearly also be its first."*

82 The English Law Commission recommended a modification to the paramountcy principle so that the interests of the child who was the subject of the proceedings before the court should not, in principle, prevail over those of other children likely to be affected by the decision, whose welfare should also be taken into consideration: English Law Commission (1988), above, at paras 3.13 to 3.14. This was not implemented in the Act, 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.

83 *"Upbringing"* is defined by section 105(1) of the 1989 Act to include *"the care of the child but not his maintenance."*

*settlements by negotiation. This may increase the number of disputed cases and the intensity of disputes.*⁸⁴

Nonetheless, they agree that:

*"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 criteria could put children's welfare at risk because it would inevitably reduce the emphasis given to welfare."*⁸⁵

Duty to approve arrangements for the children

5.42 Before a decree absolute of divorce can be granted, the court must consider the future arrangements that have been proposed for the upbringing and welfare of the children,⁸⁶ to see whether these arrangements are acceptable or whether the court should exercise any of its powers under the Children Act 1989 to make particular orders in respect of the children.⁸⁷

5.43 In deciding whether it should exercise its powers under the 1989 Act, the welfare of the child is to be the court's paramount consideration.⁸⁸ The court is also to have regard to the following criteria.⁸⁹

- "(a) the wishes and feelings of the child considered in the light of his age and understanding and the circumstances in which those wishes were expressed;*
- (b) the conduct of the parties in relation to the upbringing of the child;*
- (c) the general principle 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*

84 Cretney & Masson, above, at 730.

85 Same as above, at 730 to 731.

86 Pursuant to section 41 of the Matrimonial Causes Act 1973, as amended by Schedule 12, para 31 of the 1989 Act. This provision also applies to nullity and judicial separation proceedings.

87 This is similar to our section 18 of the Matrimonial Proceedings and Property Ordinance (Cap 192). The duty under section 41 of the Act applies only to those children under the age of 16, save where the court expressly directs otherwise: section 41(3), Matrimonial Causes Act 1973.

88 Section 11(3), Family Law Act 1996.

89 Section 11(4), Family Law Act 1996.

(ii) *the maintenance of as good a continuing relationship with his parents as is possible."*

5.44 The court must also consider⁹⁰ any risk to the child attributable to the location of future living arrangements, any person living with the parent,⁹¹ or any other arrangements for his care and upbringing.

5.45 The procedure followed by the court in approving child arrangements is that the District Judge will examine the statement of arrangements for the children included in the application to the court, as well as 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 will certify accordingly. If he is not satisfied, he can then proceed to direct that further evidence be filed, that a welfare report be ordered, or that both parties, or either of them, attend before him before making any order.⁹²

5.46 As will be seen below, however, the principle of non-intervention by the courts in proceedings relating to children, which was introduced as part of the 1989 Act's reforms, has since had a significant impact on the court's role in approving the arrangements made for children. Ayrton and Horton have observed:

*"[The] principle of non-intervention has had the most profound effect upon matrimonial proceedings where orders for custody and access were readily made at old style children's appointments under s 41 of the Matrimonial Causes Act 1973. Orders in relation to children within matrimonial proceedings, where no separate application is brought before the court, are now the exception rather than the rule."*⁹³

The non-intervention principle

5.47 The English Law Commission observed that there had been a tendency in family law to assume that court orders concerning children would be necessary in most cases.⁹⁴ The Commission noted that this may have been necessary in the days when mothers required a court order if they were to acquire any parental powers at all, but that this situation had obviously changed. The Commission commented:

"Studies of both divorce and magistrates' courts have shown that the proportion of contested cases is very small, so that orders are not usually necessary to settle disputes. Rather,

90 Section 11(4)(d), Family Law Act 1996.

91 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.

92 Family Proceedings Rules 1991 (SI 1991/1247) ("FPR 1991"), rule 2.39.

93 Ayrton & Horton, above, at 1.

94 English Law Commission (1988), above, at para 3.2.

*they may be seen by solicitors as "part of the package" for their matrimonial clients and by the courts as part of their task of approving the arrangements made in divorce cases.*⁹⁵

5.48 The Commission acknowledged that in uncontested cases as well as contested cases an order may be needed in the children's own interests so as to give stability to the existing arrangements, to clarify the respective roles of the parents, to reassure the parent with whom the children will be living, and also to reassure the public authorities responsible for housing and income support that such arrangements have in fact been made.⁹⁶ They noted, however, that it would always be open to parents to separate and make arrangements for their children without going to court.

*"The proportion of relatively amicable divorces is likely to have increased in recent years and parents may well be able to make responsible arrangements for themselves without a court order. 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 ... will have the effect of polarising the parents' roles and perhaps alienating the child from one or other of them."*⁹⁷

5.49 As a consequence of the Commission's recommendations in this area, 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."*⁹⁸ In other words, the court will have to be satisfied in every case that it is in the child's interests that an order should be made. As we have seen above, the court may decide not to make an order because the arrangements proposed by the parties are satisfactory.

5.50 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. 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.

5.51 Cretney and Masson are critical of this approach, however:

"there is a degree of tension between [the principle of non-intervention] and the welfare principle... . Where the parents are in agreement the court will almost certainly take the view that

95 Same as above.

96 Same as above.

97 Same as above.

98 Section 1(5), 1989 Act.

there should be no further inquiry and no order, and thus fail to address issues of the child's wishes and welfare."⁹⁹

Welfare checklist

5.52 In cases where court orders are determined to be required, section 1(3) of the 1989 Act contains a checklist of factors to assist the court in carrying out its duty of implementing the welfare principle. It provides:

"In the circumstances mentioned in subsection (4),¹⁰⁰ 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;¹⁰¹*
- (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."*

99 Cretney & Masson, above, at 659. The practical impact of a court not making an order was illustrated in *B v B (Grandparent: Residence Order)* [1992] Fam Law 490, where a grandmother sought a residence order for a child who, with the mother's consent, was residing with her. The education authorities had been reluctant to accept the grandmother's authority and had insisted on the mother's consent for matters relating to the child. Concern was expressed about consent for emergency medical treatment which might be required, and that the mother had been impulsive in the past which might lead her to seek to remove the child from the care of the grandmother. The court concluded that it was better for the child, and would give her some stability, if a residence order were made in favour of the grandmother.

100 The circumstances are that the court is considering whether to make, vary or discharge an order made under the Act and this is opposed by any party to the proceedings.

101 Note the amendment to the definition of "harm" to a child under section 31 of the 1989 Act (in the context of care and supervision orders) by section 120 of the Adoption and Children Act 2002. "Harm" now includes the "impairment suffered from seeing or hearing the ill-treatment of another." The explanatory note to the relevant clause of the 2002 Bill states, "The amendment will apply to all proceedings where the court applies the 'welfare checklist' in section 1(3) of the 1989 Act. This includes proceedings for contact and residence orders": see House of Lords (Session 2001-2002) - Adoption and Children Bill - Explanatory Notes, para 282.

Advantages

5.53 The checklist was perceived by the English Law Commission 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. It was also hoped that both parents and children would find the list helpful in understanding how judicial decisions were made in this area. As the checklist might enable the parties to focus on the relevant issues and to prepare and give relevant evidence at the outset, it was also anticipated that the delay and expense of prolonged hearings or adjournments for further information could be avoided.¹⁰²

5.54 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 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 salutary effect of bringing the court back on course."*¹⁰³

Disadvantages

5.55 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.¹⁰⁴ Also, the checklist does not ascribe weight to the respective factors enumerated in it. A judge may therefore attach greater importance to one factor than to the others.

5.56 The checklist only applies to contested applications to make, vary or discharge an order under the Act.¹⁰⁵ If the checklist were to apply to uncontested cases as well, it would increase the burden on the courts as they would then be obliged to investigate such cases in depth. There is the concern that this would encourage the courts to intervene unnecessarily in the arrangements proposed for children.¹⁰⁶

102 English Law Commission (1988), above, at para 3.18.

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

104 Bainham (1990), above, at 44.

105 Section 1(4), 1989 Act.

106 English Law Commission (1988), above, at para 3.19. The non-intervention principle, discussed earlier in this chapter, requires that the courts should not intervene if all parties are in agreement as to what should happen to the child.

Welfare reports

5.57 Whenever a court is considering any question with respect to a child under the 1989 Act, it may ask an *"officer of the service"*¹⁰⁷ 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."*¹⁰⁸ Although welfare reports serve the crucial functions 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.¹⁰⁹ The English 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. A report may be made in writing or orally as the court requires.¹¹⁰

Delay

5.58 Another aspect of the welfare principle in practice relates to the court's duty to prevent delay in proceedings affecting children. 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."*¹¹¹

5.59 In any proceedings where the question of making a section 8 order (discussed later in this chapter) 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.¹¹² 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.¹¹³

107 le, an officer of the Children and Family Court Advisory and Support Service (CAFCASS). See discussion on CAFCASS appearing later in this chapter, at paras 5.149 to 5.150.

108 Section 7(1), 1989 Act.

109 Contrast this with the statutory presumption of representation by a children's guardian in public law cases. See later in this chapter, at paras 5.116 to 5.119.

110 Section 7(3), 1989 Act. Statements in a report may not be ruled inadmissible because of the rule against hearsay: section 7(4), 1989 Act. (Compare section 17 of the Guardianship of Minors Ordinance (Cap 13) in Hong Kong.)

111 Section 1(2), 1989 Act.

112 Section 11(1), 1989 Act.

113 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.

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. (See the FPR 1991, which govern proceedings in the High Court and county court, and the Family Proceedings Courts (Children Act 1989) Rules 1991 (SI 1991/1395), which govern proceedings in the magistrates' courts.) 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. (See also Practice Direction of 22 Nov 1993 on the duty of parties to give time estimates for the hearing of proceedings relating to children: [1994] 1 All ER 155.)

Rationale for the timetable

5.60 The English Law Commission explained the need for a timetable:

*"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."*¹¹⁴

Orders relating to children in family proceedings

Introduction

5.61 As we saw in the previous section, courts under the Children Act regime are directed *not* to make orders for children unless the court considers that to do so would be better for the child than making no order at all.¹¹⁵ In other words, *"the court is only to intervene in the child's life where there is a real problem in need of resolution and not simply as a matter of routine."*¹¹⁶ Therefore, orders will not usually be made where the parties are in agreement over the arrangements for their child, *"the logic being that the absence of any conflict no longer warrants the imposition of an order."*¹¹⁷

5.62 Where orders are required to be made,¹¹⁸ section 8 of the 1989 Act provides for four types of orders:

- (1) a *residence order* settles the arrangements to be made as to the person (who may be someone other than the child's parents) with whom the child is to live,
- (2) a *contact order* requires the person with whom the child lives to allow the child to visit or stay with the person named in the order,

114 English Law Commission (1988), above, at para 4.55. Delay reinforces the status quo and makes it difficult to argue for a change.

115 See Ayrton & Horton, above, at 1.

116 Same as above.

117 Same as above.

118 And the court may make orders in any family proceedings in which a question arises with respect to the welfare of any child: section 10(1), 1989 Act.

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

5.63 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 parent, than with ensuring that each parent properly met his responsibilities while the child was with him.¹¹⁹ Instead of concentrating on the allocation of abstract rights, section 8 orders are aimed at settling practical questions.¹²⁰ As the continuing parental responsibility of both parents is generally assumed, the courts are no longer required to deal with issues such as who should have legal custody or actual custody. This accords with the basic 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. Where the parents are having difficulty, section 8 orders, unlike the former custody and access orders, should "*lower the stakes*" so that the situation will not be one in which "*winner takes all*" or "*loser loses all*."¹²¹ The English Law Commission commented:

*"In framing a scheme of orders to replace the present law, we have had in mind throughout the clear evidence that the children who fare best after their parents separate or divorce are those who are able to maintain a good relationship with them both. The law may not be able to achieve this - indeed we are only too well aware of the limits of the law in altering human relationships - but at least it should not stand in their way."*¹²²

5.64 Concern was expressed by some commentators that the reforms would encourage interference by the parent who does not have a residence order but who nonetheless retains parental responsibility. In practice, the non-residential parent's continuing parental responsibility may be more symbolic than real, however,¹²³ as no action may be taken which is incompatible with any court order made.¹²⁴ Further, as we will see below, the power of the court to set specific conditions in residence orders is very wide.¹²⁵

119 English Law Commission (1988), above, at para 4.8.

120 Ayrtton & Horton, above, at 13.

121 English Law Commission (1988), above, at para 4.5.

122 Same as above.

123 Bainham (1990), above, at para 3.10.

124 Section 2(8), 1989 Act.

125 Cretney & Masson, above, at 673 to 677.

Residence order

5.65 A residence order is an order "*settling the arrangements to be made as to the person with whom the child is to live.*"¹²⁶ The order may simply name the person with whom the child is to live or set out the residential arrangements in greater detail.

5.66 Despite the narrow definition of "*residence order*," the courts 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 [residential parent] with the right to determine all matters which arise in the course of the day-to-day management of this child's life.*"¹²⁷

5.67 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.¹²⁸ Time-sharing arrangements are therefore possible under the Act, although the courts have not encouraged these arrangements.¹²⁹ The Court of Appeal has 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.¹³⁰

5.68 A residence order ceases to have effect if both parents live together for a continuous period of more than six months.¹³¹ Although this may 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. The Commission observed that if the parents were to separate again the circumstances may well be different, and that it would be wrong to place one (the former residential) parent in an automatically stronger position than the other parent.¹³²

Surname of the child

5.69 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.¹³³ The English Law Commission were of the view that the child's surname is an important

126 Section 8(1), 1989 Act.

127 [1993] 2 FCR 689.

128 Section 11(4), 1989 Act.

129 Prior to the 1989 Act, the English Court of Appeal in *Riley v Riley* [1986] 2 FLR 429 disapproved of time-sharing arrangements on the ground that children required a settled home. This decision has effectively been overruled by the Act. There is no provision in the Act 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.

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

131 Section 11(5), 1989 Act.

132 English Law Commission (1988), above, at para 4.13.

133 Section 13(1), 1989 Act.

symbol of his identity and his relationship with his parents. It is clearly not a matter on which the parent with whom the child lives should be able to take unilateral action.¹³⁴

Removal of the child from the jurisdiction

5.70 As taking the child abroad for long periods can affect his relationship with the other parent, 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 consent of any person with parental responsibility, or the leave of the court.¹³⁵

5.71 The person in whose favour a residence order is made may remove the child from the jurisdiction for a period of less than one month. This is intended to allow that parent to make arrangements for holidays without having to seek the permission of the non-residential parent and without having to give notice. There is no limit on the number of temporary removals which may be made. 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

5.72 An unmarried father can apply for a residence order in respect of his child. If his application is successful and he does not already have parental responsibility by agreement or court order, the court must also make a separate parental responsibility order in his favour,¹³⁶ the rationale being 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.¹³⁷

Contact order

5.73 A contact order is *"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."*¹³⁸ Whereas the former access order was adult-centred, permitting another person to visit the child, a contact order is child-centred, requiring the person with whom the child lives to allow contact with the other parent or other person named in the order. Contact orders usually permit

134 English Law Commission (1988), above, at para 4.14. When a change of surname is sought, 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.

135 Section 13(1)(2), 1989 Act.

136 Section 12(1)(3), 1989 Act. The same principle applies to an applicant who is not the parent or guardian of the child: section 12(2), 1989 Act.

137 Section 12(4), 1989 Act.

138 Section 8(1), 1989 Act.

reasonable contact but may specify the times, frequency and location of visits. The words *"otherwise to have contact with each other"* that are included in the definition indicate that the court may order some other form of contact, such as emails, letters or telephone calls.

Specific issue order

5.74 The specific issue order is *"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."*¹³⁹ 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 for a specific issue order concerning such matters as major medical treatment or the education of the child. In considering the application, the court may decide to order that each parent should be free to make such decisions whenever the situation arises. Alternatively, the court could attach a condition to a residence or contact order that certain decisions may not be taken without informing the other parent, or giving the other parent an opportunity to object.¹⁴⁰

Prohibited steps order

5.75 A prohibited steps order is *"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."*¹⁴¹ The aim of providing for prohibited steps orders is to incorporate the most valuable features of wardship (discussed later in this chapter) into the statutory jurisdiction.

5.76 There are occasions when it is necessary for the court to play a continuing parental role for the child. 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.¹⁴²

139 Same as above.

140 The English Law Commission was of the view that to give one parent in advance the right to make a decision which the other parent would have to put into effect, was contrary to the whole tenor of the modern law, in particular, its disapproval of the old form of *"split"* orders giving custody to one parent and care and control to the other: English Law Commission (1988), above, at para 4.18.

141 Section 8(1), 1989 Act.

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

5.77 Limitations on both specific issue and prohibited steps orders are that they must relate to an aspect of parental responsibility and that neither order should be made with a view to achieving a result which could be achieved by a residence or contact order.¹⁴³ 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 broad legal effects.¹⁴⁴

Supplementary provisions

5.78 In making a section 8 order, the court may:¹⁴⁵

- (a) include directions as to 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;
 - (ii) who is a parent or otherwise has parental responsibility for the child; or
 - (iii) with whom the child is living;and to whom the conditions are expressed to apply;
- (c) specify the period for which the order, or any provisions within it, shall have effect,
- (d) make such incidental, supplemental or consequential provisions as it thinks fit.

5.79 The power to give directions is principally designed for the court to ensure that a smooth transition occurs in those cases where it orders a change in the existing arrangements for the child.¹⁴⁶ The power to give directions 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.

5.80 The power to attach conditions and other incidental or supplemental provisions enables the court to resolve particular disputes or to direct how such a dispute is to be dealt with in future.¹⁴⁷ The English Law Commission gave a number of examples of how the power may be used in

143 Section 9(5), 1989 Act. So, for example, a specific issue order that ordered that children be returned from the father to the mother was contrary to section 9(5) of the Act: *M v C (Children Orders: Reasons)* 14 Oct 1992, FD, reported in [1993] *Fam Law* 433.

144 English Law Commission (1988), above, at para 4.19.

145 Pursuant to section 11(7), 1989 Act.

146 English Law Commission (1988), above, at para 4.22.

147 Same as above, at para 4.23.

practice.¹⁴⁸ If, for example, there were to be a dispute about which school a child should attend, the residence order could include a condition that the child attend a particular school. In another case, if there was a real fear that the non-residential parent might remove the child permanently from the country while contact was taking place, the contact order might include a condition prohibiting all removal. In a third example, if there was a real concern that the parent with whom the child was to live would not allow the child to have a blood transfusion if the need arose, then a condition of the residence order could require the residential parent to inform the other parent so that he could agree to it, or, *"the court could order that such transfusions be given on specified medical advice without such agreement."*¹⁴⁹

5.81 The power to specify the period that the order, or any provision within it, is to have effect, was intended to preserve the more flexible position under the Matrimonial Causes Act 1973, where no rigid distinction was drawn between *"interim"* and *"final"* orders.¹⁵⁰ In fact, the 1989 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.¹⁵¹ Under the Act, there is therefore no longer any distinction between interim and final orders.

Relevant child

5.82 The court can make a section 8 order with respect to *"any child"* about whose welfare a question arises in family proceedings.¹⁵² Included in this, the court may make an order in respect of a child who is not treated by the parties as a child of their family.¹⁵³

5.83 A child is defined under the Act as a person under the age of 18.¹⁵⁴ However, *unless there are exceptional circumstances*,¹⁵⁵ a section 8 order cannot be made in respect of a child who has already attained the age of 16, nor can any order be expressed to have effect beyond a child's sixteenth birthday.¹⁵⁶ Thus, an order ceases to have effect when a child reaches the age of 16 unless it is expressed to extend beyond the child's

148 Same as above.

149 Same as above. In the last example, the English Law Commission considered that the exercise of this power was 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.

150 Same as above, at para 4.24.

151 Section 11(3), 1989 Act.

152 Section 10(1), 1989 Act.

153 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: see section 10(4)(a) and 10(5)(a), 1989 Act.

154 Section 105(1), 1989 Act.

155 For example, persons over 16 who are immature or who are mentally handicapped.

156 Section 9(6) to 9(7), 1989 Act.

sixteenth birthday.¹⁵⁷ In this case, the order will cease to have effect when the child reaches the age of 18.¹⁵⁸

5.84 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.¹⁵⁹ They noted that the older the child becomes, the less just it was to attempt to enforce against him an order to which he has never been a party.¹⁶⁰

Circumstances in which orders may be made

5.85 There are three situations in which orders relating to children may be made:

- (a) on application in the course of family proceedings;¹⁶¹
- (b) on the court's own motion in the course of family proceedings;¹⁶² and
- (c) on a free-standing application in the absence of any other proceedings.¹⁶³

5.86 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.¹⁶⁴ Wherever possible, orders are to 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 could be dealt with together as far as possible.¹⁶⁵

5.87 As we saw earlier, 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.*"¹⁶⁶ The definition of "*family proceedings*" covers almost all proceedings in which issues affecting the upbringing of a child might be

157 Section 91(10), 1989 Act.

158 Section 91(11), 1989 Act.

159 English Law Commission (1988), above, at para 3.25.

160 Same as above.

161 Section 10(1)(a), 1989 Act.

162 Section 10(1)(b), 1989 Act.

163 Section 10(2), 1989 Act.

164 English Law Commission (1988), above, at para 4.33.

165 Same as above.

166 Section 10(1), 1989 Act.

raised.¹⁶⁷ Included in the definition are proceedings under the inherent jurisdiction of the High Court in relation to children, principally wardship proceedings. If wardship proceedings are brought, the court might dispose of them instead by means of a section 8 order. The English Law Commission hoped that this would, as a result, reduce the use of wardship in cases where active supervision of the court was not required. The 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."*¹⁶⁸

5.88 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. Thus the full range of orders under section 8 may also be made where the divorce petition is dismissed, the claim for financial relief is unsuccessful or a variation of a maintenance agreement is sought.¹⁶⁹

Persons who can apply

5.89 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.¹⁷⁰ The restrictions which existed could be avoided by making the child a ward of court. The 1989 Act aimed at reducing 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 would be able to apply to the court in family proceedings.

5.90 Section 10 allows an application for an order under section 8 to be made by a person "*entitled to apply*" for such an order, or a person who has obtained the leave of the court to make the application. Section 9

167 Section 8(3) and 8(4), 1989 Act. "*Family proceedings*" includes proceedings under the inherent jurisdiction of the High Court in relation to children (eg, wardship) and any proceedings under the following enactments: Parts I, II and IV, Children Act 1989 (which cover, respectively: parental responsibility and guardianship; orders for residence, contact, specific issue and prohibited steps; and care and supervision orders); Matrimonial Causes Act 1973 (divorce and nullity); Adoption Act 1976 and Adoption and Children Act 2002 (adoption); Domestic Proceedings and Magistrates' Courts Act 1978 (financial provision); Part III, Matrimonial and Family Proceedings Act 1984 (financial provision); Family Law Act 1996 (non-molestation and occupation orders); and sections 11 and 12, Crime and Disorder Act 1998 (child safety orders).

168 English Law Commission (1988), above, at para 4.35.

169 Cretny & Masson, above, at 671.

170 English Law Commission (1988), above, at para 4.39.

restricts the application for a section 8 order to persons other than a local authority.¹⁷¹

Persons entitled to apply without leave

5.91 There are three 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.¹⁷²

5.92 Section 10(5) sets out the criteria for persons who may apply for residence or contact orders without leave. These persons include:

- (a) any party to a marriage (whether or not subsisting) in relation to whom the child is a child of the family,¹⁷³
- (b) any person with whom the child has lived for a total of at least three years ending within the past five years,¹⁷⁴ 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 persons who may have parental responsibility for the child.¹⁷⁵

5.93 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.¹⁷⁶

171 This restriction 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 unless he is a relative of the child. Alternatively, the child must have lived with the foster parent for at least one year. (The former specified period of three years was shortened to one year by section 113 of the Adoption and Children Act 2002.)

172 Section 10(4), 1989 Act.

173 Section 10(5)(a), 1989 Act. This category includes a step-parent. As for the meaning of "*child of the family*," see section 105(1), 1989 Act.

174 Section 10(5)(b) and 10(10), 1989 Act.

175 Section 10(5)(c), 1989 Act.

176 Section 10(6), 1989 Act.

Rules of court may prescribe further categories of persons who may apply for an order as of right.¹⁷⁷

Applications with leave

5.94 Applicants who require the leave of the court to apply for a section 8 order fall into three categories:

- (a) local authority foster parents,¹⁷⁸
- (b) other persons with no right to apply,¹⁷⁹ and
- (c) children concerned in the proceedings.

5.95 When the court is considering granting leave to those persons who do not fall into the categories of persons who may apply for section 8 orders as of right, the court is to have particular regard to the following factors:

- (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.¹⁸⁰

Child as a party

5.96 Where an application for an order under section 8 is made by the child concerned,¹⁸¹ the court will grant leave only if it is satisfied that the child *"has sufficient understanding to make the proposed application."*¹⁸² Such a requirement is designed to ensure that the application is the child's, not that of an adult influencing the child. Where a child is not given leave to

177 Section 10(7), 1989 Act.

178 Section 9(3) to 9(4), 1989 Act.

179 Section 10(1)(a)(ii), 1989 Act.

180 Section 10(9), 1989 Act.

181 Under section 10(8), 1989 Act.

182 Section 10(8), 1989 Act.

apply for an order it may still be possible for him to be joined as a party to the proceedings.¹⁸³

5.97 The child can also apply for leave to begin or defend proceedings under the 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.¹⁸⁴ This provision has relaxed the former 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 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.¹⁸⁵

Rationale for leave

5.98 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 commented 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."*¹⁸⁶

Enforcement of section 8 orders¹⁸⁷

5.99 Under the Magistrates' Courts Act 1980, section 8 residence orders made by a magistrates' court can be enforced by fining persons in default or committing them to prison, either until the default is remedied or for

183 Cretney & Masson, above, at 691. However, this jurisdiction was to be reserved for the resolution of matters of importance concerning the child. For example, an application for leave for a specific issue order by a 14 year old girl to go on holiday with her friends was rejected in *Re C (Minor: Leave to Apply for Order)* [1994] 1 FCR 837.

184 Rule 9.2A of the FPR 1991, added by SI 1992/456, rule 9.

185 Same as above.

186 English Law Commission (1988), above, para 4.41.

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

a period not exceeding two months.¹⁸⁸ The court may act on its own motion or by complaint.¹⁸⁹

5.100 In the county court and the High Court, breach of a court order may be punished as contempt of court.¹⁹⁰ 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.¹⁹¹ It is a requirement that a warning notice must have been attached to the order in question.¹⁹² It must be proved beyond reasonable doubt that the defendant knowingly broke the order.¹⁹³

5.101 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 the other person.¹⁹⁴

5.102 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, but a parent who is implacably opposed cannot expect the court to agree that this makes contact undesirable. The court may make a family assistance order in the hope that a welfare officer can produce an acceptable arrangement and may even

188 See section 14, 1989 Act, section 63(3), Magistrates' Courts Act 1980 and section 34(3), Family Law Act 1986. This power, in respect of residence orders only, is additional to any other enforcement measures available in the magistrates' court: see Ayrton & Horton, above, at 180.

189 Contempt of Court Act 1981, section 17(1) and schedule 3.

190 Including orders other than a residence order.

191 Contempt of Court Act 1981, section 14.

192 The notice must warn the person against whom the order is made that disobedience to the order constitutes a contempt of court which is punishable by imprisonment. See: Civil Procedure Rules 1998 (SI 3132) ("CPR") schedule 1, rule 50(3), Rules of the Supreme Court ("RSC") order 45, rule 7(4); and CPR schedule 2, rule 50(4), County Court Rules ("CCR") order 29, rule 1(3).

193 For the relevant procedure, see CPR schedule 1, rule 50(3), RSC order 45, rule 5, and RSC order 52; and CPR schedule 2, rule 50(4), CCR order 29, rule 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: CPR schedule 1, rule 50(3), RSC order 52, rule 6.

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

threaten a change in the child's residence or restrict some other aspect of parental responsibility."¹⁹⁵

Other powers of the court

Jurisdiction

5.103 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 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).*"¹⁹⁶

5.104 A concurrent jurisdiction for the High Court, the County Court and the Magistrates Family Proceedings Court to hear all children proceedings was created by section 92(7) of the Act. This 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."*¹⁹⁷

Supervision orders

5.105 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."*¹⁹⁸ 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.¹⁹⁹ The 1989 Act clarifies the situation by giving the court a choice between making a *"section 37 direction"* to the local authority or a *"family assistance order."*

195 Cretney & Masson, above, at 713 to 714. The judicial concept of the *"implacably"* opposed (or *"implacably hostile"*) parent has come under some criticism, however, particularly in the context of contact and domestic violence: see subsequent discussion in this chapter, and later, in Chapter 11.

196 Scott, "Problems in Court Structures and Processes" (1993) 44 *CLP* 15, at 24 to 25.

197 Bainham (1990), above, at 68 to 69.

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

199 English Law Commission (1988), above at para 5.12.

Family assistance order

5.106 The purpose of the family assistance 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."*²⁰⁰ 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 been made.²⁰¹ It can be made only by the court acting upon its own motion. The parties may, however, request the court to make a family assistance order during the course of the proceedings.²⁰²

5.107 The family assistance 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."*²⁰³ 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.²⁰⁴

5.108 The probation officer or an officer of the local authority has power only to refer to the court the question of whether a section 8 order which is in force should be varied or discharged.²⁰⁵ Any question concerning child abuse or neglect should be referred to the local authority for action. Since the family assistance order is intended to provide short-term assistance, the order will have effect for six months unless the court specifies a shorter period.²⁰⁶ There is, however, nothing to stop the court making a further order.

Section 37 direction

5.109 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 is contrary to the policy of the 1989 Act that the local authority has 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.

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

200 Same as above, at para 5.19.

201 Section 16(1), 1989 Act.

202 Bromley & Lowe, *Bromley's Family Law* (1992), at 373.

203 Section 16(1)(2), 1989 Act.

204 Section 16(3), 1989 Act.

205 Section 16(6), 1989 Act.

206 Section 16(5), 1989 Act.

"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. The authority must report to the court within eight weeks.

5.111 Where the authority eventually decides not to apply for an order, the court has no power to make a care or supervision order. Pending the result of the investigation, however, the court may make an interim supervision or care order.²⁰⁷ 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.²⁰⁸

Participation of the child

Child as a party

5.112 A child will not automatically be made a party to proceedings where his parent, or some other interested party, brings an application for a residence or contact order relating to him.²⁰⁹ As we saw above, however, there are circumstances where a child may apply for orders or otherwise be joined as a party to proceedings under the 1989 Act.²¹⁰

Views of the child

5.113 The statutory checklist of factors, which was discussed earlier in this chapter in relation to the welfare principle, places the court under a duty to have regard to the child's wishes and feelings when determining any question relating to the upbringing of a child.²¹¹

5.114 The English Law Commission commented:

"Children's views have to be discovered in such a way as to avoid embroiling them in their parents' disputes, forcing them to 'choose' between their parents, or making them feel responsible for the eventual decision. This is usually best done through the medium of a welfare officer's report, although most [of the

207 Section 38(1) and 38(2), 1989 Act.

208 English Law Commission (1988), above, at para 5.16.

209 Ayrton & Horton, above, at 111.

210 See earlier in this chapter, at paras 5.96 to 5.98.

211 Section 1(3)(a), 1989 Act.

consultees] agreed that courts should retain their present powers to see children in private."²¹²

5.115 On the extent to which the child's views might determine the matter, however, the Commission also noted:

*"if the parents have agreed on where the child will live and made their arrangements accordingly, it is no more practicable to try to alter these to accord with the child's views than it is to impose the views of the court. After all, united parents will no doubt take account of the views of their children in deciding upon moves of house or employment but the children cannot expect their wishes to prevail."*²¹³

Separate representation

5.116 Under section 41(1) of the Children Act 1989, the court is required to appoint a children's guardian²¹⁴ to represent the child in certain specified proceedings, *"unless satisfied that it is not necessary to do so in order to safeguard his interests."*²¹⁵ Specified proceedings are those which involve public intervention and include:

- (a) applications for the making of a care or supervision order,
- (b) cases 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) cases 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.

212 English Law Commission (1988), above, at para 3.23.

213 Same as above.

214 In 2001, the title *"child guardian"* replaced the title *"guardian ad litem"* in relation to public law proceedings (see rule 16 of the Family Proceedings (Amendment) Rules 2001, SI 2001/821 ("SI 2001/821")). The title *"guardian ad litem"* is still used, however, to describe an appointed representative for the child in private law proceedings: see rule 9.5, FPR 1991, as amended by rule 31, SI 2001/821.

215 Section 41(1) of the 1989 Act implemented para 57 of the Government White Paper, *The Law on Child Care and Family Services* (Jan 1987, Cm 62). This had proposed that a *guardian ad litem* (replaced by an officer of the service (CAFCASS)) should no longer only be appointed in care proceedings where there appeared to be a conflict of interest between the child and his parent or guardian. The court should be under a duty to appoint an officer of the service in all such cases, except where it appeared unnecessary to do so to safeguard the child's interests: see *Halsbury's Statutes of England*, Vol 6, at 471, "General Note." See also rule 9.5, FPR 1991, as amended by rule 31, SI 2001/821.

5.117 A children's guardian²¹⁶ is usually a professional person appointed by the court to act on behalf of the child.²¹⁷ Like the "*family and court reporter*" (formerly the "*court welfare officer*"²¹⁸), the children's guardian is under a duty to advise the court "*as to the manner in which the child's welfare is best served.*"²¹⁹ However, while the role of the family and court reporter is to adopt an impartial approach to the issues to be determined, the children's guardian is there to ensure that the child's perspective is actively pursued in court, for example, by calling parties to give evidence on behalf of the child.²²⁰

5.118 The children's guardian appointed in specified (public law) proceedings is under a duty to safeguard the interests of the child in accordance with the rules of court.²²¹ He is required to advise on the wishes of the child, whether the child is of sufficient understanding for any purpose, what options are available to the court in respect of the child, and any other matter on which the court seeks his advice.²²² The children's guardian is required to appoint a solicitor to act for the child unless one has already been appointed.²²³ Instructions to the solicitor should be given by the children's guardian,²²⁴ who must file a report advising on the interests of the child at the end of his investigation.²²⁵

5.119 If no children's guardian is appointed in proceedings under the 1989 Act, the court may appoint a solicitor to represent the child.²²⁶ However, where a children's guardian has been appointed but the child wishes and is able to give instructions on his own behalf,²²⁷ and the instructions conflict with those of the children's guardian, a solicitor who has been appointed must take

216 Or, more rarely, the guardian *ad litem*, who may be appointed to represent the child in private law proceedings: see rule 9.5, FPR 1991, as amended by rule 31, SI 2001/821. A recent practice direction in England has set out guidelines on when it is appropriate to make a child party to "*non-specified*" family proceedings (ie, those not related to care and other public law proceedings) and whether a guardian *ad litem* should be appointed: see *Practice Direction (Family Proceedings: Representation of Children)* [2004] 1 WLR 1180.

217 Children's guardians (in public law proceedings) are appointed from the Children and Family Court Advisory and Support Services system ("CAFCASS"). See discussion of CAFCASS later in this chapter. In private law proceedings, a guardian *ad litem* appointed to represent the child may be an officer from CAFCASS, the Official Solicitor or "*some other proper person*": see rule 9.5, FPR 1991, as amended by rule 31, SI 2001/821.

218 Family and court reporters are also officers of CAFCASS.

219 Ayrton & Horton, above, at 112.

220 Same as above.

221 Section 41(2)(b), 1989 Act.

222 Rule 4.11A(4), FPR 1991, as amended by SI 2001/821.

223 Rule 4.11A(1)(a), FPR 1991, as amended by SI 2001/821.

224 Rule 4.11A(1)(b), FPR 1991, as amended by SI 2001/821.

225 Rule 4.11A(7), FPR 1991, as amended by SI 2001/821.

226 Section 41(3) and 41(4), 1989 Act. See also rule 4.12, FPR 1991, as amended by SI 2001/821, and rule 12, Family Proceedings Courts (Children Act 1989) Rules 1991 (SI 1991/1395) ("FPC(CA 1989)R 1991").

227 There is no rule as to how old a child must be before he can be considered able to give instructions. Bromley & Lowe suggested that, as a rule of thumb, a child aged 10 or above might be expected to be capable: Bromley & Lowe, above, at 520.

instructions from the child.²²⁸ The child must have sufficient understanding to instruct a solicitor and wish to instruct one.²²⁹

5.120 Whereas child representation in public law cases under the Act is the rule rather than the exception, representation for the child is the exception rather than the rule in private law cases. As Ayrton and Horton comment:

*"It is fair to say that the separate representation of a child who is the subject of a private law application which has no public law element, will be appropriate only in a limited number of cases. In private law cases, a child's own views and feelings will usually be conveyed to the court through a welfare officer."*²³⁰

Evidence given by children

5.121 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.²³¹ 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 is admissible notwithstanding any rule of law relating to hearsay.²³²

Wardship

5.122 Wardship proceedings are unique in civil proceedings in that they are not concerned with the resolution of rights between litigants, but in doing whatever is necessary for the welfare of the child. Upon the making of a wardship application, the child becomes a "ward of court" and no major decisions affecting the child can be made without the consent of the court.²³³ Up until the advent of the Children Act 1989, wardship was an important aspect of the inherent jurisdiction of the High Court and had a significant role to play in child law. Under the Act, however, many of the elements of the wardship jurisdiction were incorporated into the statutory scheme, leaving wardship to fulfil a more residuary role.²³⁴

228 Rule 4.12(1)(a), FPR 1991, as amended by SI 2001/821.

229 Section 41(4)(b), 1989 Act.

230 Ayrton & Horton, above, at 111.

231 Section 96(2), 1989 Act.

232 Section 96(3) and 96(4), 1989 Act; Children (Admissibility of Hearsay) Order 1993, SI 1993/ No 621.

233 HKLRC, *International parental child abduction* (Rep, Apr 2002), at paras 2.15 to 2.16.

234 Cretney & Masson, above, at 707.

Public proceedings

5.123 In relation to public law aspects of child law, the former 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.²³⁵ Further, the High Court cannot now exercise its inherent jurisdiction to require a child to be placed in the care or put under the supervision of a local authority, or require a child to be accommodated by a local authority.²³⁶

5.124 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.²³⁷ It is now clear that a child in care does not become a ward upon the making of a wardship application.²³⁸ There is, however, nothing to stop the High Court from exercising its inherent jurisdiction to decide a specific question concerning a child in care.

5.125 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 arisen, or which may arise, in connection with any aspect of parental responsibility for a child."*²³⁹

Private proceedings

5.126 The 1989 Act does not directly affect the use of wardship by private individuals, however. Wardship falls within the definition of *"family proceedings"* in the Act²⁴⁰ 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.²⁴¹ 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.²⁴²

235 Section 100(1), 1989 Act.

236 Section 100(2)(a)(b), 1989 Act. All the High Court can do is to direct a local authority to investigate the child's circumstances under section 37.

237 Section 100(2)(c), 1989 Act. Where the child is in care, no one may seek a section 8 order other than a residence order: section 9(1).

238 Supreme Court Act 1981, section 41(2A), added by Children Act 1989, schedule 13, para 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), 1989 Act.

239 Section 100(2)(d), 1989 Act.

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

241 English Law Commission (1988), above, at paras 4.18 to 4.20; Hansard HL Deb, 6 Dec 1988, Vol 502, col 493.

242 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.

5.127 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 wardship²⁴³ or where that status will prove a more effective deterrent than the ordinary sanctions of contempt of court."²⁴⁴

5.128 Cretney and Masson pointed out that wardship or the court's inherent jurisdiction is still valuable for the following cases:²⁴⁵

- (a) where the superior skill and authority of the High Court is required (unless the rules relating to transfer succeed in allocating cases appropriately),
- (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),²⁴⁶ and
- (d) where some ongoing supervision by the court may be desirable.

Privacy

5.129 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.²⁴⁷ In the High Court and the county court, all hearings take place in chambers unless the court otherwise directs.²⁴⁸ If the court considers it expedient in the interests of the child to hear the proceedings in private, only the officers of the court, the parties themselves, their legal representatives and any other persons as specified by the court may attend the hearing.²⁴⁹

243 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.

244 Dame Margaret Justice Booth, above, at 19.

245 Cretney & Masson, above, at 706 to 707. 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, above, at 459.

246 See Part IV of the Family Law Act 1996.

247 Or the Adoption and Children Act 2002: see section 97(1), 1989 Act, as amended by the Adoption and Children Act 2002, section 101(3).

248 Rule 4.16(7), FPR 1991.

249 Rule 16(7), FPC(CA 1989)R 1991.

Publicity

5.130 It is an offence for anyone to publish any material which is intended to identify a child as being involved in any children's proceedings before a magistrates' court, or the child's address or school.²⁵⁰ 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 Chancellor²⁵¹ may lift the restriction if satisfied that the child's welfare requires the disclosure.²⁵²

5.131 As for the higher courts, the Administration of Justice Act 1960 prohibits 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 the Adoption and Children Act 2002, or
- (c) otherwise relate wholly or mainly to the maintenance or upbringing of a minor.²⁵³

5.132 The provision prohibits publication of the contents of any reports made in connection with the hearing of the case involving the child 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 made.²⁵⁴

Developments since implementation of the 1989 Act

Overview

5.133 In the years since the implementation of the major reforms under the Children Act 1989, concerns have been raised about some aspects of English child law. This has led to further reforms being introduced or

250 Section 97(2) to 97(6), 1989 Act.

251 Recent changes in ministerial responsibility have meant that the Lord Chancellor's Department has been abolished and replaced by the Department for Constitutional Affairs. This is headed by the Secretary of State for Constitutional Affairs. In addition, a new Minister for Children, Young Persons and Families has been established within the Department for Education and Skills: see UK Government press release, "Modernising Government - Lord Falconer appointed Secretary of State for Constitutional Affairs" (12 Jun 2003).

252 Section 97(4), 1989 Act.

253 Administration of Justice Act 1960, section 12, as amended by the 1989 Act, schedule 13, para 14.

254 White, Carr & Lowe, above, at para 9.29. The High Court may, nevertheless, impose specific restrictions under its inherent jurisdiction. See further, especially for relevant judgments, *Clarke Hall & Morrison on Children*, vol 1, paras 303 to 330.

proposed. These areas of debate and the related reform initiatives are outlined below.

Adoption and Children Act 2002

5.134 The Adoption and Children Act 2002, which was principally concerned with introducing a new regime to govern adoptions in England, also included a number of amendments to the Children Act 1989.²⁵⁵ These were: to provide for the acquisition of parental responsibility by an unmarried father who jointly registers with the mother their child's birth;²⁵⁶ to introduce a more simplified process for step-parents to acquire parental responsibility either through the courts or with consent;²⁵⁷ to allow a local authority foster parent to apply for a section 8 order if the child has lived with him for one year rather than three years;²⁵⁸ to provide for enhanced residence orders that extend to when a child reaches the age of 18;²⁵⁹ and, amongst other changes, to introduce a new concept of "*special guardianship*".²⁶⁰

5.135 A further significant change was an amendment to the definition of "harm" to a child under the 1989 Act, so that harm now includes the "*impairment suffered from seeing or hearing the ill-treatment of another*".²⁶¹ This amendment will apply to all proceedings where the court applies the 'welfare checklist' in section 1(3) of the 1989 Act, including proceedings for contact and residence orders.²⁶²

Contact orders

5.136 One area of English child law where important developments have been taking place is in relation to the granting of contact orders, particularly where there is evidence of family violence.²⁶³

255 See Adoption and Children Act 2002 ("2002 Act"), sections 111 to 122.

256 Section 111, 2002 Act, amending section 4, 1989 Act.

257 Section 112, 2002 Act, inserting (new) section 4A, 1989 Act.

258 Section 113, 2002 Act, amending section 9, 1989 Act.

259 Section 114, 2002 Act, amending section 12, 1989 Act.

260 Whereby, unlike adoption, parental responsibility and decision-making powers could be conferred on a third party without removing the legal status of the parents as parents of the child, though with limited parental responsibility themselves: see section 115, 2002 Act. Such special guardianship orders can also be varied or discharged on application to the court. See (new) sections 14A to 14G, 1989 Act.

261 Section 120, 2002 Act, amending section 31, 1989 Act.

262 The explanatory note to the relevant clause of the 2002 Bill states, "*The amendment will apply to all proceedings where the court applies the 'welfare checklist' in section 1(3) of the 1989 Act. This includes proceedings for contact and residence orders*": see House of Lords (Session 2001-2002) - Adoption and Children Bill - Explanatory Notes, para 282.

263 Because of the significant impact of these developments on our own recommendations in this area, this subject is also discussed later in more detail in Chapter 11 of this report.

Contact generally

5.137 In England, about 800,000 parents issue contact proceedings each year.²⁶⁴ Of these, most of the applicants are fathers. In recent times, a movement has been growing in England and overseas decrying the legal system's treatment of fathers in contact disputes. With the expanded role of women in the workforce, it is felt that the law must go further in recognising that, in many families, both the mother and the father are now the joint primary carers of their children, and that more should be done post-divorce to preserve this situation. An article by Sir Bob Geldof, appearing in the Sunday Times newspaper, highlights the relevant arguments.²⁶⁵

5.138 Huckle has noted that some reforms in this area are now being considered.²⁶⁶

"Under a forthcoming pilot scheme [to take place at the Inner London Family Proceedings Court], couples will attend briefings on post-separation parenting before obtaining a judicial hearing. Parents must attend mediation to formulate a parenting plan and contact arrangements. Full court hearings will be reserved for disputes incapable of resolution by other means and those involving violence or mental health issues."

Contact and family violence

5.139 On the other side of this debate, substantial commentary has also been written in recent years²⁶⁷ on how the child's presumed right to maintain contact with both parents under the Children Act regime has resulted in the courts appearing to favour contact between the absent parent and the

264 E Huckle, "Fathers' contact with children" (2003) NLJ 1365.

265 Sir Bob Geldof, "The father love that dare not speak its name," Sunday Times, 7 Sep 2003, extracted from a book by the University of Cambridge Socio-Legal Group: A Bainham, B Lindley, M Richards & L Trinder (eds), *Children and their families: Contact, rights and welfare* (Sep 2003, Hart Publishing). In the article, Geldof stresses the sadness, frustration and bitterness felt by millions of fathers who find themselves effectively cut off from their children following separation and divorce. He condemns the inflexibility manifested by the law and the courts which appear to be unable to envisage any creative solutions in this area. Similar comments have also been expressed by a member of the English judiciary: see, "Retilting the scales – a High Court judge stands up for fathers' rights," *The Economist*, 10 Apr 2004, at 47.

266 Huckle, above, at 1365.

267 I Weyland, "Judicial Attitudes to Contact and Shared Residence Since the Children Act 1989" (1995) 17 *Journal of Social Welfare and Family Law* 445; C Smart & B Neale, "Arguments Against Virtue - Must Contact be Enforced?" [1997] *Family Law* 332; Judge Victor Hall, "Domestic Violence and Contact" [1997] *Family Law* 813; Dr C Humphreys, "Judicial Alienation Syndrome - Failures to Respond to Post-separation Violence" [1999] *Family Law* 313; R Bailey-Harris, J Barron and J Pearce, 'From Utility to Rights? The Presumption of Contact in Practice' (1999) 13 *International Journal of Law, Policy and the Family* 13; F Kaganas & S Day Sclater, "Contact and Domestic Violence - The Winds of Change?" [2000] *Family Law* 630.

child, "almost regardless, at times, of the concerns of the mother or the past violent history of the parents."²⁶⁸

5.140 A programme of review of the law in this area by the Children Act Sub-committee of the Lord Chancellor's Advisory Board on Family Law²⁶⁹ resulted in various suggestions for change,²⁷⁰ including proposed good practice guidelines to require judges to be more cautious before ordering contact in cases involving domestic violence.²⁷¹ The guidelines were promulgated in April and May 2001 and the substance of the guidelines entered into case law in June 2000 as a result of a Court of Appeal judgment.²⁷²

5.141 Even prior to the introduction of the guidelines, Douglas noted that more recent cases in this area indicated "*that there [was] a concerted attempt to get the message across of the need to think carefully before ordering contact where there is a history of domestic violence.*"²⁷³ One means that the courts appear to have adopted in determining whether contact should be refused is to distinguish between legitimate and illegitimate fears or hostility of the party resisting the contact.²⁷⁴

5.142 The guidelines have now been incorporated into judicial training and the Lord Chancellor's Department (now the Department for Constitutional

268 G Douglas, "Balancing Rights," in A Bainham (ed), *The international survey of family law: 2001 edition* (2001, Family Law), 81 to 94, at 86. Such mothers, who may have suffered significant domestic violence, might still be characterised by the courts as irrationally "*implacably hostile*" to contact: see, for example, *Re J (A Minor) (Contact)* [1994] 1 FLR 729, at 736, *per* Balcombe LJ.

269 Children Act Sub-committee of the Lord Chancellor's Advisory Board on Family Law ("Children Act Sub-committee"): consultation paper, *Contact between children and violent parents* (Aug 1999); *Report to the Lord Chancellor on the question of parental contact in cases where there is domestic violence* (Apr 2000); consultation paper, *Making contact work* (Mar 2001); and *Making contact work; A report to the Lord Chancellor on the facilitation arrangements for contact between children and their non-residential parents and the enforcement of court orders for contact* (Feb 2002). See also Lord Chancellor's Department, *Government response to the Report "Making contact work"* (Aug 2002). On domestic violence generally, the UK Government recently published a position paper, *Safety and Justice: The Government's Proposals on Domestic Violence* (Jun 2003: Cm 5847). This was followed by the introduction of the Domestic Violence, Crime and Victims Bill in December 2003. For a discussion of the Bill's provisions, see: J McCulloch, "A curate's egg? The domestic violence Bill" (2004) *NLJ* 5.

270 These reform proposals are discussed in more detail in Chapter 11 of this report.

271 Children Act Sub-committee, *Report to the Lord Chancellor on the question of parental contact in cases where there is domestic violence* (Apr 2000), at Section 5.

272 *Re L (Contact: Domestic violence)*; *Re V (Contact: Domestic violence)*; *Re M (Contact: Domestic violence)*; *Re H (Contact: Domestic violence)* [2000] 2 FLR 334 (CA) (also cited as *Re L & Others* [2000] 2 FLR 334). See also the summary concerning the introduction of the guidelines in Lord Chancellor's Department, *Government response to the Report "Making contact work"* (Aug 2002).

273 Douglas, above, at 86.

274 Douglas, above, at 86. See, for example, *Re P (Contact: Discretion)* [1998] 2 FLR 696, at 703 to 704, where Wilson J differentiated between three types of cases: the first, where there is no rational ground for hostility to contact; the second, where the grounds put forward are sufficient to displace the presumption that contact is in the best interests of the child, in which case the hostility to contact is irrelevant; and third, that there are sound arguments either way, in which case the hostility to contact may become a relevant consideration.

Affairs) has commissioned research to monitor awareness of the guidelines.²⁷⁵

5.143 Further reform suggestions have also come from others researching in this area.²⁷⁶

Contact centres

5.144 Research has been commissioned by the Department for Constitutional Affairs on child contact centres, and how effective they are in promoting safe and positive contact for children that could also be consistent with the safety and well-being of women (and some men) where domestic violence is an issue.²⁷⁷ Support for such centres is also found in the recent reports of the Children Act Sub-committee²⁷⁸ and the Joseph Rowntree Foundation.²⁷⁹

Grandparents and contact

5.145 The significance of contact with grandparents in divorcing family situations has been the subject of both recent research²⁸⁰ and case law,²⁸¹ with the issue of whether grandparents should have more enhanced legal status in seeking contact with their grandchildren than is presently the case.²⁸²

Child protection generally

5.146 Serious shortcomings in how child protection cases are handled by the administrative agencies involved has been the subject of some recent reform²⁸³ and searching recent review. In particular, Lord Laming's report

275 Lord Chancellor's Advisory Board on Family Law, *Child Act Sub-committee guidelines for "Good practice on parental contact in cases where there is domestic violence": A summary report on findings from the Lord Chancellor's Department's survey to monitor awareness of the guidelines* (March 2002).

276 L Trinder, M Beek & J Connolly, *Making contact: How parents and children negotiate and experience contact after divorce* (Joseph Rowntree Foundation, 2002).

277 Dr R Aris, C Harrison & Dr C Humphreys, *Safety and child contact: an analysis of the role of child contact centres in the context of domestic violence and child welfare concerns* (LCD Research paper 10/2002).

278 Children Act Sub-committee, Report, *Making contact work* (Feb 2002), at para 8.35.

279 Trinder, Beek & Connolly, above, at 47.

280 See G Douglas & N Ferguson, "The role of grandparents in divorced families," *International Journal of Law, Policy and the Family* (2003), Vol 17(1), 41, summarising their Cardiff University research study on the subject.

281 *Re W (Contact application: Procedure)* [2000] 1 FLR 263; *Re J (Leave to issue applications for a residence order)* [2003] 1 FLR 114; *Re H (a child)* [2003] All ER 290 (CA). See also the discussion of this line of cases by Judge John Mitchell, "Grandparents and contact" (2003) *NLJ* 658.

282 See an interesting canvassing of the issues in Douglas & Ferguson, above, at 60 to 62.

283 See the recent *Protocol for judicial case management in public law Children Act cases* (18 June 2003), available on the Internet at: <http://www.courtservice.gov.uk/cms/8321.htm>.

into the tragic death of Victoria Climbié²⁸⁴ revealed an appalling string of administrative failures "on the part of every conceivable child protection agency involved"²⁸⁵ - social workers, doctors and hospitals, police officers and the National Society for the Prevention of Cruelty to children, all of whom had become involved in the case of the abused little girl at some stage, but none of whom intervened.²⁸⁶ Commenting on the findings in the report, Dame Butler-Sloss stated:²⁸⁷

"There is a reported average of 78 children killed every year by parents or minders, a figure that has not changed since Maria Colwell's death in 1973. Clearly we are still doing something very wrong indeed. ... The latest report provides us with yet another awful warning of what is and has been going wrong for sometime. Somewhere between the brilliant ideals of policy and the horrific results of failed implementation, there are some very important gaps, and we must strive much harder to fill them."

5.147 The report into the death of Victoria Climbié prompted the issue of the Government's Green Paper, *Every child matters*, in September 2003.²⁸⁸ This promises to herald "the biggest reorganisation of children's services in England for 30 years."²⁸⁹

Delay

5.148 Substantial research has also been carried out by a Government working party on delays occurring in the processing of family proceedings under the Act.²⁹⁰ The research concluded that there was no one cause of delay, but a complex interaction of factors, with problems varying from area to area.²⁹¹ Some of these problems included: limitations on the powers of judicial officers in family proceedings courts as compared to the county and High Court; the fact that magistrates courts are organised separately to the higher courts with separate IT and administrative systems; and the

284 Presented to Parliament by the Secretary of State for Health and the Secretary of State for the Home Department, *The Victoria Climbié Inquiry: Report of an inquiry by Lord Laming* (Jan 2003). On Internet at: <http://www.victoria-climbié-inquiry.org.uk/finreport/finreport.htm>.

285 B Mahendra, "And will a little child lead them to safety?" (2003) *NLJ* 161.

286 Same as above.

287 Dame Elizabeth Butler-Sloss, "Are we failing the family? Human rights, children and the meaning of family in the 21st century," The Paul Sieghart Memorial Lecture, British Institute of Human Rights (3 Apr 2003), at 3.

288 Presented to Parliament by the Chief Secretary to the Treasury, *Every Child matters* (Sep 2003, Cmnd 1560).

289 J Carvel, "Biggest shake-up for 30 years," *The Guardian* (9 Sep 2003).

290 The Lord Chancellor's Department, *Scoping study on delay in Children Act cases - findings and action taken* (Mar 2002); The Lord Chancellor's Department, *The report of the Working Party to consider delay in family proceedings courts under the Children Act 1989* (Sep 2002).

291 See the Lord Chancellor's Department, *The Government's Response to the Report of the Working Party to consider delay in family proceedings courts under the Children Act 1989* (25 Sep 2002), at 1.

requirement to give written reasons for decisions.²⁹² The Government's, *Response to the Report of the Working Party to consider delay in family proceedings courts under the Children Act 1989*, was published in September 2002.²⁹³

CAFCASS

5.149 In June 2001, the Children and Family Court Advisory and Support Services system (CAFCASS) was established as a unified court support service for families involved in relationship breakdown and family proceedings.²⁹⁴ It incorporated the services previously provided by the Family Court Welfare Service, the Guardian *ad Litem* Services and the Children's Division of the Official Solicitor.²⁹⁵ A key role of the service was to provide children's guardians to act for children in care proceedings.

5.150 Since its inauspicious beginnings, however,²⁹⁶ with a "*seriously misjudged*" foreshortened start-date,²⁹⁷ and an "*incomprehensible*" standard contract for self-employed guardians,²⁹⁸ the implementation of the service has continued to be dogged with problems. This prompted a review of the service to be carried out by the Constitutional Affairs Select Committee. A report in response was issued by the Government in October 2003 explaining how the problems identified with the system might be resolved.²⁹⁹

Family Law Protocol

5.151 On 7 March 2002, the English Law Society, working in conjunction with the Solicitors Family Law Association, the then Lord Chancellor's Department and the Legal Services Commission, launched a Family Law Protocol, which was described as, "*a major new initiative to make divorce less acrimonious and painful for those involved – especially children.*"³⁰⁰ The Protocol comprises a set of best practice guidelines for

292 Same as above.

293 Same as above.

294 *The Lord Chancellor's Advisory Board on Family Law: Third Annual Report: 1999/2000*, at 18. For an article reviewing the early operation of the service, see: R White, "Family Practice" (2001) *NLJ* 965.

295 See introductory materials on CAFCASS website at www.cafcass.gov.uk.

296 R White, "Family matters" (2001) *NLJ* 757.

297 *The Response of the Government and the Children and Family Court Advisory and Support Service to the Constitutional Affairs Select Committee's Report on the Children and Family Court Advisory and Support Service (CAFCASS)* (Oct 2003, Cm 6004), at 2.

298 See White, above.

299 *The Response of the Government* (2003), above. The report notes, at 1, that recent changes in ministerial responsibility in England have shifted the responsibility for the service from the former Lord Chancellor's Department (now the Department for Constitutional Affairs), to the new Minister for Children, Young People and Families within the Department for Education and Skills.

300 Press release issued by the Law Society, "The launch of the Family Law Protocol," 5 March 2002.

solicitors and their clients aimed at removing as far as possible the acrimony arising from the process of relationship breakdown. The relevant press release stated:

*"Family solicitors, using the Protocol, will help parties to move forward, by focusing on issues to be resolved between them, including the well-being of their children and the division of property."*³⁰¹

Impact of the Human Rights Act 1998

5.152 At the wider level, the enactment of the Human Rights Act 1998 may see still further refinements of the law in this area, as judges and family lawyers will now need to consider the implications of viewing family law *"through the prism of fundamental human rights."*³⁰² As Dame Butler-Sloss has observed:

*"A particular benefit of the human rights legislation is the opportunity it has given to judges and lawyers to revisit concepts we took for granted and to rethink the way we do things."*³⁰³

301 Same as above.

302 G Douglas, "Balancing Rights," in A Bainham (ed), *The international survey of family law: 2001 edition* (2001, Family Law), 81 to 94, at 81.

303 Dame Elizabeth Butler-Sloss, "Are we failing the family? Human rights, children and the meaning of family in the 21st century," The Paul Sieghart Memorial Lecture, British Institute of Human Rights (3 Apr 2003).

Chapter 6

Comparative Law: Scotland

Introduction

6.1 The Children (Scotland) Act 1995 was enacted several years after the equivalent English legislation.¹ It incorporates detailed consideration of the law in this area by the Scottish Law Commission, which published its *Report on Family Law*² in 1992. As the Scottish Law Commission had had some opportunity to examine which aspects of the English Act were working and which were not, the Children (Scotland) Act 1995 diverges from the precedent set by the Children Act 1989 in some significant respects. These further refinements of the Children Act model are the main subject of this chapter.

Overview of the Children (Scotland) Act 1995

6.2 The 1995 Scottish Act is in three parts. Part I deals with children in the family setting, Part II concerns child protection and state intervention and Part III governs adoption.³

6.3 Sutherland notes⁴ that the following "*over-arching principles*" run through the 1995 Act:

- that the family setting, generally, is the best place for the child, although the responsibilities and rights of the various family members involved are subject to the principle that the child's welfare is paramount;
- that the court should only intervene where such intervention would be better than not intervening, the child's welfare being paramount; and

1 The Children Act 1989 ("1989 Act"), discussed in the previous chapter.

2 Scottish Law Commission, *Report on family law* (1992, No 135). As well as considering aspects of family law related to children, the report also reviewed the law on marriage, judicial separation and divorce.

3 See analysis of the Children (Scotland) Act 1995 ("1995 Scottish Act") by E Sutherland, "How children are faring in the 'New Scotland'," in A Bainham (ed), *The international survey of family law: 2001 edition* (2001, Family Law), 363 to 382, at 367.

4 Same as above.

- that when court decisions are being made, the child has a right to express his views and have them taken into account, in the light of his age and maturity.⁵

The general principle of parental responsibility

6.4 Part I of the Children (Scotland) Act 1995, which deals with parental rights, responsibilities and guardianship, came into force in Scotland on 1 November 1996. It introduced for the first time statutory definitions of both "*parental responsibilities*" and "*parental rights*."⁶

6.5 In including such definitions, and referring specifically and separately to the concept of "*parental rights*," the Scottish legislation had taken a very different approach to the relevant English legislation.⁷

Parental responsibilities

Statutory definition

6.6 Section 1(1) of the 1995 Scottish Act provides that a parent has a responsibility to his child:

- (a) to safeguard and promote the child's health, development⁸ and welfare;
- (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

5 Sutherland adds, "*deviation from these principles is sometimes permitted where public safety requires it and such deviations occur in the context of local authority powers, court decisions on removing a child from the home and, occasionally, in the context of children's hearings.*" See same as above, at footnote 33.

6 Sutherland, above, at 368.

7 Compare the discussion of the equivalent English provisions in Chapter 5, above, at paras 5.11 to 5.14. As we saw in that discussion, the English approach was to emphasise "*parental responsibility*" only, and to deem parental rights comprised within that concept. Also, in contrast to the Scottish approach, the functional aspects of parental responsibility were not defined in the English legislation.

8 Note: article 18 of the United Nations Convention on the Rights of the Child 1989 makes reference to the parental responsibility "*for the upbringing and development of the child.*"

- (d) to act as the child's legal representative.⁹

6.7 The Scottish Law Commission observed that there was strong support from their consultees for a clear *statutory* statement of parental responsibilities, despite the fact that these parental responsibilities were already recognised to exist at common law.¹⁰ The Commission suggested¹¹ that the objectives of creating a statutory statement of parental responsibilities were:

- (a) to make explicit what was already implicit in the law;
- (b) to counteract any impression that a parent had rights but no responsibilities; and
- (c) to 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.

The parental responsibility to provide direction and guidance to the child

6.8 Sutherland observed that the 1989 United Nations Convention on the Rights of the Child *"was very much in the minds of the drafters of the 1995 [Scottish] Act."*¹² Article 5 of the Convention states:

"the responsibilities ... of parents ...[include] 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."

6.9 The Scottish Law Commission felt that as this principle to provide direction and guidance was already recognised in Scottish law, it should be incorporated into the statutory definition.¹³ The Commission elaborated on the 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."*¹⁴

9 The Scottish Law 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 Scottish Law Commission, above, at para 2.6.

10 Same as above, at para 2.2.

11 Same as above, at para 2.1.

12 Sutherland, above, at 367.

13 Scottish Law Commission, above, at para 2.4.

14 Same as above.

The parental responsibility to act as the child's legal representative

6.10 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.¹⁵

Age at which parental responsibilities cease

6.11 While considering that most of the parental responsibilities should cease when the child attained the age of 16, the Commission recommended that the parental responsibility to provide direction and guidance (which came to be comprised in section 1(1)(b)) should last until the child reached 18.¹⁶ The Commission justified providing for different ages when the parental responsibilities would cease by the following statement:

*"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... "*¹⁷

6.12 The enacted legislation on parental responsibilities largely reflected the Commission's approach, except that the "guidance" limb of the parental responsibility to provide direction and guidance to the child was the only part of the list of parental responsibilities which extended beyond the child attaining 16 years.¹⁸

Parental rights

Statutory definition

6.13 To balance out the responsibilities listed in section 1, section 2(1) provides a list of the following parental rights:

15 Scottish Law Commission, above, at para 2.11. In relation to the parental responsibility to act as the child's legal representative, the Commission noted that a young person acquires full capacity to enter into legal transactions at the age of 16, so for this reason 16 was considered to be the appropriate cut-off point for this parental responsibility.

16 Same as above, at para 2.10.

17 Same as above, at para 2.12.

18 ie, to 18 years: see section 1(2)(a) and (b), 1995 Scottish Act.

- "(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."

6.14 In confirming the existence of these rights, the legislation qualifies the position, however, by stating that these rights are conferred *"in order to enable [the parent] to fulfil his parental responsibilities in relation to his child."*¹⁹ The Commission explained this further:

*"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."*²⁰

6.15 The effect of the statutory list of rights is that the parent may sue or defend in proceedings in relation to these rights.²¹

The parental right to act as the child's legal representative

6.16 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 or consenting on his or her own behalf."*²² This was incorporated into section 15(5)(a) and (b) of the 1995 Scottish Act, but the words *"having legal effect"* were omitted from the provision.²³

19 Section 2(1), 1995 Scottish Act.

20 Scottish Law Commission, above, at para 2.14.

21 Section 2(4), 1995 Scottish Act. As with parental responsibilities, the specified parental rights supersede common law rights but not statutory rights: see section 2(5) of the Act.

22 Same as above, at para 2.27.

23 The Scottish Law Commission noted that its definition of legal representation was similar to the definition of guardianship under the Age of Legal Capacity (Scotland) Act 1991, which provided 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"*: see Scottish Law Commission, above, at para 2.15.

Age at which parental rights cease

6.17 Under the pre-existing Scottish law, the parental rights of guardianship, custody and access lasted until the child attained 16 years of age. The Scottish Law Commission recommended that the parental rights referred to in the section 2 statutory list should also last until the child reached 16, even though some of the parental responsibilities might continue beyond that date.²⁴

Acquisition of parental responsibility

Unmarried fathers

6.18 Sections 3 and 4 of the Children (Scotland) Act 1995 draw a distinction between unmarried and married fathers so that only married fathers acquire automatic parental responsibility for their children. As was the position under the English Children Act 1989 (prior to its amendment by the Adoption and Children Act 2002²⁵) an unmarried father in Scotland does not have parental responsibility for a child unless he has signed a parental responsibility agreement with the mother,²⁶ or been granted parental responsibility by court order.²⁷

6.19 The enacted Scottish legislation does not accord with the views of the Scottish Law Commission on this point, which had recommended in its report that, in the absence of a court order regulating the position, both parents of the child should automatically have parental responsibilities and rights whether or not they are, or have been, married to each other.²⁸ The Commission stated:

*"Given that about 25% of all children born in Scotland in recent years have been born out of wedlock, and that the number of couples cohabiting outside marriage is now substantial, it seems to us that the balance has now swung in favour of the view that parents are parents, whether married to each other or not. If in any particular case it is in the best interests of a child that a parent should be deprived of some or all of his or her parental responsibilities and rights, that can be achieved by means of a court order."*²⁹

24 Same as above, at para 2.34.

25 As we saw in the previous chapter, Section 111 of the 2002 Act amended section 4 of the 1989 Act to allow an unmarried father to acquire parental responsibility by, amongst other things, signing the birth register with the mother.

26 Section 4, 1995 Scottish Act.

27 Pursuant to section 11, 1995 Scottish Act.

28 Scottish Law Commission, above, at para 2.50.

29 Same as above, at para 2.48. Sutherland has commented: *"The Scottish Law Commission recommended an end to this discrimination, but Westminster chose to reject this rational approach and, instead, threw a sop to non-marital fathers in the form of parental responsibilities and rights agreements."* See Sutherland, above, at 368.

6.20 Sutherland has commented more recently on this issue:³⁰

"There is no doubt that the present discrimination is in breach of Articles 2 and 18 of the United Nations Convention on the Rights of the Child, and ... certainly arguably in breach of Articles 8 and 14 of the European Convention. The absurdity of the present position becomes all the clearer when one appreciates that the 22,319 children born to unmarried parents in 1998 represented 39% of total births for the year. The births of 82% of these children were registered by both parents and 72% of these parents were living at the same address."

6.21 Indeed, it appears that proposals are now in train to amend sections 3 and 4 of the Children (Scotland) Act 1995 to bring these provisions into line with the current position in England, where an unmarried father can acquire parental responsibility for a child by jointly registering the child's birth with the mother.³¹

The implications of parental responsibilities and rights

Cause of action

6.22 The effect of the parental responsibility provisions is that the child, or a person acting on his behalf, may sue for breach of these responsibilities by virtue of section 1(3) of the Act.³² The effect of the parental rights provisions is that *"a parent, or any person acting on his behalf, shall have title to sue, or to defend, in any proceedings as respects those rights."*³³

Delegation of parental responsibility and rights

6.23 The Commission agreed that there should be similar provisions to sections 2(9), (10) and (11) of the Children Act 1989 in relation to delegation of parental responsibility. These provisions, including a reference to parental rights, were included in section 3(5) and (6) of the Scottish 1995 Act, which state:

"(5) 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 anyone else but may arrange for some or all of them to

30 See Sutherland, above, at 369.

31 See Scottish Executive White Paper, *Parents and children: The Scottish Executive's proposals for improving Scottish family law* (2000), at paras 2.1 to 2.4.

32 Section 1(4) of the 1995 Scottish Act also provides that these statutory parental responsibilities supersede common law duties but not statutory ones. Examples of such statutory duties are those relating to financial support under the Family Law (Scotland) Act 1985 and the Child Support Act 1991, and those duties related to education under the Education (Scotland) Act 1980: see same as above, at para 2.13.

33 Section 2(4), 1995 Scottish Act.

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"*

Carers without parental responsibility

6.24 Section 3(5) of the English 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."

6.25 The Commission considered that such a provision should be included in the Scottish legislation, and gave as an example the situation of a young child being sent to stay with relatives or friends for a holiday.³⁴ 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 also be useful for step-parents and foster parents. The Commission 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.

6.26 The Commission noted the concern expressed by some consultees, however, 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.

6.27 The Commission further noted that the scope of the provision should be intended to cover persons having care or control of a child in the family or home setting, thus they did not recommend the inclusion of teachers in a school within the scope of the provision. *"A teacher should not, for example, be able to give a blanket consent to the immunisation of a whole class of school children."*³⁵

34 Scottish Law Commission, above, at para 2.59.

35 Same as above.

6.28 Accordingly, section 5 of the 1995 Scottish Act provides:

"Subject to subsection (2) below, it shall be the responsibility of a person who has attained the age of sixteen years and who has care or control of a 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,³⁶ 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."*

6.29 Subsection (2) indicates that the provisions do 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. This differs from the narrower approach adopted in England.

6.30 It should be noted that section 2(4) of the Scottish 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."

The general principle of the welfare of the child

Duty to approve arrangements

6.31 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 16.³⁷ The Scottish Law Commission criticised this provision:

36 This would cover people such as baby-sitters or child-minders.

37 See section 8 of the (Scottish) Matrimonial Proceedings (Children) Act 1958.

*"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."*³⁸

6.32 The Commission did not recommend that an independent welfare report in all cases was the solution as this would be *"an extremely expensive and wasteful use of resources,"* as there may be no dispute about parental responsibilities or rights in some cases.³⁹

6.33 The Commission agreed with the English Law Commission's view that, requiring the court to find the arrangements satisfactory may be imposing higher standards on those who divorce than on those who remain happily married.⁴⁰ Reflecting a minimum interventionist stance, the Scottish Law Commission went on to comment:

*"Indeed section 8 [of the Matrimonial Proceedings (Children) Act 1958] 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."*⁴¹

6.34 The Commission concluded that the more modest duty, contained in section 41 of the English Matrimonial Causes Act 1973, as substituted by the Children Act 1989, should be introduced.⁴² However, the Commission also 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. They stated that this was *"consistent with a child-centred approach to parental responsibilities and rights, although no doubt it would be rare for this power to be exercised."*⁴³ This recommendation was inserted into section 11(3)(b) of the Act.

The non-intervention principle

6.35 As we have seen above, the concern about unnecessary orders relating to parental rights is recognised in Scotland as in England. Indeed, prior to the 1995 Act, Scotland already had legislation providing that a court

38 Scottish Law Commission, above, at para 5.31.

39 Same as above.

40 English Law Commission, *Review of child law: Guardianship and custody* (1988, Law Com No 172), at para 3.10, cited by the Scottish Law Commission, above, at para 5.33.

41 Scottish Law Commission, above, at para 5.33.

42 Same as above, at 5.35.

43 Same as above.

*"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."*⁴⁴ The Commission felt that this should be strengthened, however, because of the *"new emphasis on orders which, so far as possible, do not deprive either parent of any parental rights."*⁴⁵ Section 11(7)(a) of the 1995 Act therefore provides that the court:

*"shall regard the welfare of the child concerned as its paramount consideration and shall not make any such order"*⁴⁶ *unless it considers that it would be better for the child that the order be made than that none should be made at all."*⁴⁷

Welfare checklist

6.36 As we saw in the preceding chapter,⁴⁸ the English Children Act 1989 provides a checklist of factors in section 1(3) and (4) to assist the court in determining what is in the child's welfare. The Scottish Law Commission noted a divergence of views amongst their consultees on the issue of providing such 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."*⁴⁹

6.37 The Commission did not favour a lengthy statutory checklist. They suggested that even if no such list appeared in primary legislation, legal advisers and social workers could use their own checklists. They considered that, in any event, the welfare principle was all encompassing.⁵⁰ Their recommendations were accepted and no checklist was included in the Children (Scotland) Act 1995.

6.38 The Commission also recommended that the child's views should be taken into account and that this should not be seen as already included in the welfare principle.⁵¹

44 See Law Reform (Parent and Child) (Scotland) Act 1986, section 3(2).

45 Scottish Law Commission, above, at para 5.17.

46 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 1995 Scottish Act. This deals with the jurisdiction of the Act.

47 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. This is implementing the recommendation of the Scottish Law Commission, above, at para 5.18.

48 Chapter 5, above, at paras 5.52 to 5.56.

49 Scottish Law Commission, above, at para 5.23.

50 Same as above.

51 Same as above.

Delay

6.39 Section 1(2) and 11 of the English Children Act 1989 contain provisions to assist in preventing delay in proceedings relating to the residence or upbringing of children. On this point, the Scottish Law Commission commented 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."*⁵²

6.40 Consequently, no statutory provision concerning delay was included in the 1995 Act.

Orders relating to children in family proceedings

Introduction

6.41 In discussing the then existing custody order regime, 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."*⁵³

6.42 Section 11 of the Children (Scotland) Act 1995 defines the types of orders which are now available. These differ slightly from those found in section 8 of the English Children Act 1989. Section 11 of the Scottish Act provides:

(1) A "residence order" is: "an order regulating the arrangements as to:

52 Same as above, at para 5.42.

53 Same as above, at para 2.28.

- (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 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)"*⁵⁴

6.43 Section 11(2)(f) refers also to an order for interdict (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."

6.44 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.⁵⁵

6.45 On the proposed introduction of these orders, the Scottish Law Commission commented 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."*⁵⁶

Relevant child

6.46 Section 12(4) of the 1995 Act provides that:

54 These include parental responsibilities, rights, guardianship and the administration of a child's property.

55 The Scottish Law Commission also recommended, at para 5.5, that it should be made clear that a court, in making 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.

56 Scottish Law Commission, above, at para 5.6

"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 them as foster parents by a local authority or voluntary organisation, who has been treated by both of them as a child of their family."*

Surname of the child

6.47 Section 13 of the English Children Act 1989 restricts any change being made to a child's surname while a residence order is in force with respect to that child. The Scottish Law 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 child's name.⁵⁷ The Commission felt that the existing practices met the situation. The Commission 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 non-intervention, or "*no order*," principle.

Removal of the child from the jurisdiction

6.48 Section 13 of the English Children Act 1989 also restricts the removal of the child from the United Kingdom when a residence order is in force with respect to that child.

6.49 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 Scottish Law 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, paragraphs 34 and 37 of the 1995 Act.

6.50 The Scottish Law 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,⁵⁸ no provision similar to section 13 of the Children Act 1989 was required.⁵⁹

57 Same as above, at para 5.41.

58 See also section 2(3) and (6) of the 1995 Scottish Act. Section 2(3) states: "*Without prejudice to any court order, no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child outwith, the United Kingdom without the consent of a person described in subsection (6) below,*" whether or not the person referred to in subsection (6) is a parent of the child, who for the time being has a right to control the child's residence, or 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 the removal or retention of the child. See also the Scottish Law Commission, above, at para 2.56.

59 Scottish Law Commission, above, at para 5.41.

Effect of orders

6.51 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."

6.52 The Scottish Law 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."*⁶⁰

6.53 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."

6.54 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."*

6.55 The following recommendation of the Commission was incorporated into section 11(11) of the 1995 Act:

*"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."*⁶¹

6.56 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

60 Same as above, at para 5.37.

61 Same as above, at para 5.39.

arbitrary, as the couple might separate again after seven months. The Commission did not make a recommendation for similar provisions.⁶²

Court order prevails

6.57 Section 2(8) of the English Children Act 1989 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.*" Also, section 3(4) of the English Act states that the fact that a person has, or does not have, parental responsibility for a child does not affect any obligation which he has towards the child. Though differently worded, section 3(4) of the Scottish Act has incorporated the tenor of these English provisions.

Persons who can apply

6.58 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.⁶³ Consequently, section 11(3) of the 1995 Act 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 under Part II of the Act⁶⁴ or by adoption.

6.59 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 property.

Other powers of the court

Participation of the child

Views of the child - to be sought by parents

6.60 The Scottish Law 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.⁶⁵ Article 12(1) of the United Nations Convention on the Rights of the Child is relevant. This provides that:

62 Same as above, at para 5.40.

63 Same as above, at para 5.7

64 This deals with applications by local authorities.

65 Scottish Law Commission, at para 2.61.

"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."

6.61 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."*⁶⁶

6.62 The Commission also preferred the term "maturity" rather than "understanding" "because it recognises that more than just cognitive ability may have to be taken into account."⁶⁷

6.63 Even though the Commission found attractive the approach of requiring a person with parental rights to consult the child, they recognised that there were practical difficulties as it would be unrealistic to require a parent to consult on all decisions, however minor, relating to the child.⁶⁸ It would also be difficult to impose any sanction for non-compliance, as "[t]he parent's position is different from that of a local authority, which is accountable to the public and subject to judicial review."⁶⁹

6.64 The Commission's consultees gave majority support for such a proposal, even though there were reservations expressed that it would be vague and unenforceable. It was seen, however, as an important declaration of principle.⁷⁰

6.65 Reflecting the change in ideology of the United Nations Convention on the Rights of the Child, section 6(1) of the Children (Scotland) Act 1995 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 such a "major decision."⁷¹ A child of 12

66 Same as above, at para 2.63.

67 Same as above.

68 Same as above.

69 Same as above, at para 2.62.

70 Same as above, at para 2.64.

71 E Sutherland, "A voice for the child" (1996) *Journal of the Law Society of Scotland*, Vol 41, No 10, at 391.

or more is presumed to be of sufficient age and maturity.⁷² 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."*

Views of the child - to be sought by the court

6.66 Article 12(2) of the United Nations Convention on the Rights of the Child goes on to provide that:

"For this purpose,⁷³ 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."

6.67 The Scottish Law Commission made recommendations in the light of article 12 which are now incorporated into section 11(7) and (10) of the Act regarding orders made by the court. The Commission noted that in section 1 of the English Children Act 1989, a court is bound in *opposed* proceedings for a section 8 order⁷⁴ to have regard to, among other things, the ascertainable wishes and feelings of the child. The Scottish Law 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."*⁷⁵

72 Section 6(1)(b), 1995 Scottish Act. The Scottish Law 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, at para 2.66, were incorporated into section 6(2) of the Act, which provides that: *"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."*

73 *"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."*

74 The relevant section comprising the orders which the court may grant under the English Children Act 1989. See Chapter 5, above.

75 Scottish Law Commission, above, at para 5.26.

6.68 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."*⁷⁶

6.69 Section 11(7) of the Children (Scotland) Act 1995 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."*

6.70 Section 11(10) further 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."

The Scottish Law Commission noted that 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."*⁷⁷

Separate representation

6.71 Section 11(9) of the Act 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."*

76 Same as above, at para 5.29.

77 Same as above, at para 5.25.

6.72 The Commission suggested that, even though the child was the "central figure," in proceedings affecting him, it would be unrealistic to recommend that separate legal representation needed 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."*⁷⁸

Developments since implementation of the 1995 Act

6.73 A few years after the enactment of the Children (Scotland) Act in 1995, the Scottish Office issued a wide-ranging consultation paper, *"Improving Scottish family law."*⁷⁹ This was followed up by the Scottish Executive's White Paper, *"Parents and children: The Scottish Executive's proposals for improving Scottish family law,"* in September 2000.

6.74 In the current context, proposals from this review which are particularly relevant include those relating to the parental responsibilities and rights of unmarried fathers and step-parents.

Parental responsibilities and rights of unmarried fathers and step-parents

6.75 As with the amendments made in England under the Adoption and Children Act 2002, the Scottish Executive has proposed reform of the law relating to parental responsibilities and rights to enable unmarried fathers to acquire parental responsibilities and rights on the joint registration of the birth of a child with the mother.⁸⁰ Consideration was given to whether this should apply retrospectively, so that once the legislation was enacted, an unmarried father who had jointly registered the birth of a child with the mother at any time, even prior to the enactment of the proposals, would acquire parental responsibilities and rights in respect of the child. The Scottish Executive

78 Same as above, at para 5.29.

79 Scottish Office, *Improving Scottish Family Law* (1999). As well as relevant child law, the consultation paper also proposed reforms to divorce law generally, the expanded use of mediation and support services in resolving family disputes and some limited changes to the treatment of matrimonial property on divorce.

As well as its Improving Scottish Family Law initiative, the Scottish Office (now replaced by the Scottish Executive) also established a continuing programme of research "to monitor the implementation of the Act and to evaluate its operation and the impact of its provisions": see The Scottish Office, *Scotland's children: Research programme on the Children (Scotland) Act 1995* (Jan 1997), at 1. Subsequently, the Scottish Executive Central Research Unit issued a paper, *Monitoring the Children Scotland Act 1995: Pilot study* (2000).

80 The Scottish Executive, *Parents and children: The Scottish Executive's proposals for improving Scottish family law* (Sep 2000), at part 2.

concluded that it was not desirable in principle to change the legal consequences of a decision which a mother took some time previously and which she now cannot undo.

6.76 Furthermore, it is proposed that married step-parents should be able to acquire parental responsibilities and rights by agreement with those who already have such rights.⁸¹

81 Same as above.

Chapter 7

Comparative Law: Australia

Introduction

7.1 The ambit of the Family Law Act 1975 in Australia includes divorce, financial matters, children and domestically-related injunctions. Section 43 of the Act contains a general statement of the principles and objectives to be applied by the courts. The section states:

"The Family Court shall, in the exercise of its jurisdiction under this Act ... have regard to:

- (a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;*
- (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;*
- (c) the need to protect the rights of children and to promote their welfare;*
- (ca) the need to ensure safety from family violence;¹*
- (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children."*

7.2 Following a succession of studies and review exercises in the area of family proceedings,² major changes to the Act were introduced in 1995 by the Family Law Reform Act, which came into force in June 1996. The Act's provisions substantially reformed the previous law and procedure governing the

1 This additional principle was added by the Family Law Reform Act 1995, which is discussed below.

2 Summarised, along with other influences on the development of the provisions in the 1995 Reform Act, in H Rhoades, R Graycar and M Harrison, *The Family Law Reform Act 1995: The First Three Years* (Dec 2000, University of Sydney and Family Court of Australia), at paras 2.1 to 2.8.

children of parents undergoing separation or divorce.³ Summarising the scope of the 1995 Act's reforms, Bailey-Harris and Dewar comment:

*"The reformed Part VII draws heavily on the language and concepts pioneered in England and Wales by the Children Act 1989 – thus the concepts of guardianship, custody, and access are replaced by those of parental responsibility, coupled with a new range of 'residence', 'contact' and 'specific issues' orders; and there is a similar emphasis on parental agreement as the primary means of settling post-divorce parenting arrangements."*⁴

Background to the 1995 reforms

The position under the former law

7.3 Rhoades, Graycar and Harrison summarise the position under Family Law Act 1975 prior to the introduction of the 1995 reforms as follows:⁵

- each of the parents of a child was a guardian of the child;
- both parents had joint custody of their children;
- custody *"involved the right to live with the person in whose favour an order was made and responsibility to make decisions concerning the daily care and control of the child"*;⁶
- guardianship, by contrast, referred to the responsibility for making decisions about the child's long-term welfare;
- the court was empowered to make orders *"altering this statutorily prescribed situation, for example, by vesting sole custody of the child in one parent, with an order for the other parent to have periodic access to the child"*;⁷
- the most common form of order made by consent of the parents (and to a lesser extent after contested proceedings) was for sole custody to be vested in the child's mother, with the father having regular access to the child; and

3 For a useful analysis of the 1995 Act, see R Bailey-Harris and J Dewar, "Variations on a theme – Child law reform in Australia" (1997) *Child and Family Law Quarterly*, Vol 9, No 2, 149 to 164, at 149. See also F Bates, "'The Glamour of childish days': Australian family law in 1999," *The International Survey of Family Law 2001 Edition* (2001, Family Law), at 15 to 33.

4 Same as above.

5 Rhoades, Graycar and Harrison (2000), above, at paras 2.17 to 2.18.

6 Same as above, at para 2.17.

7 Same as above.

- disputes about the future care of children were governed by the principle that the welfare of the child was the paramount consideration for the decision maker.

Impact of the UK Children Act 1989

7.4 In March 1994, the Family Law Council of Australia, in response to a request from the Attorney General, issued a report examining the reforms that had been brought about in England by the Children Act 1989, and considering whether similar reforms might be adopted in Australia.⁸ In its report, the Council indicated that many of the objectives of the English Children Act 1989 were consistent with the general aims of the law as proposed by the Council in their earlier report on *Patterns of Parenting after Separation*⁹ which had not been implemented. These were:

1. the ongoing priority of the "welfare" principle,¹⁰
2. the non-order approach,
3. shared parental responsibility, and
4. appointment of a guardian in specified circumstances.

"Welfare" and "best interests"

7.5 The Council recommended that the concept of "welfare" be replaced by "best interests."¹¹ It referred to Article 3 of the UN Convention on 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.*"¹²

Parental responsibility

7.6 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*

8 The Family Law Council of Australia, *The Operation of the (UK) Children Act 1989* (Mar 1994).

9 Same as above, at para 17. The Council's earlier report, *Patterns of Parenting After Separation*, was published in Apr 1992.

10 The Council subsequently recommended a change to "best interests" to be consistent with international conventions, see below.

11 Family Law Council of Australia (1994), above, at para 49 (Recommendation 4).

12 Same as above, at para 40.

*of the child will generally require continuing contact with both parents and complementary parenting skills."*¹³

Parenting orders

7.7 The 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."*¹⁴

7.8 Orders should be called "parenting orders." These orders would be made "for the purposes of settling arrangements in respect of the child's residence" and "for continuing contact" with both parents, and would contain any "special purpose" arrangements which the court considered necessary. The new orders would include in their scope matters dealt with by the "specific issue orders" and "prohibited steps orders" in the English legislation.¹⁵

7.9 The Council recommended that a *"guardianship order would be made where necessary."*¹⁶ This would cover the situation which arises after a parent's death.¹⁷

Language

7.10 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*
- (3) separating parents who are unable to cooperate to the extent where they can agree on arrangements for the ongoing care of their children."*¹⁸

7.11 The Council recognised that, *"it would be unrealistic to assume that by changing the terminology used in the Family Law Act [1975]*

13 Same as above, at para 54 (Recommendation 5).

14 Same as above, at Recommendation 3.

15 Section 8, English Children Act 1989.

16 The Family Law Council of Australia (1994), above, at para 38.

17 Same as above, at para 53. The Council's 1992 report, *Patterns of Parenting After Separation*, above, had recommended that this concept be retained.

18 Family Law Council of Australia (1994), above, at para 23.

separating parents who had previously been unable to co-operate would begin to do so overnight."¹⁹

7.12 The Council's report observed that although 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. It was noted that Professor Brenda Hoggett in England, though cautious about the impact of language on increasing participation by fathers, had suggested that *"the retention of parental responsibility also improves the status of the other parent while the children are with him."*²⁰

7.13 Sir Stephen Brown, President of the Family Division of the High Court had advised the Council that, *"anecdotal evidence from solicitors suggested that clients find the new terminology less adversarial which assists in resolving disputes."*²¹ Furthermore, the Law Society of England and Wales had reported that the private law provisions of the Children Act had *"attracted widespread support."*²²

Family Law Reform Act 1995

7.14 The recommendations of the Family Law Council's report on the Children Act 1989 were implemented in the provisions of the Family Law Reform Act 1995, which came into force on 11 June 1996. As noted earlier, the 1995 Act inserted a new Part VII into the Family Law Act 1975, which radically altered the previous law affecting the children of parents undergoing separation or divorce. Of the position under the former law, the Bill's Explanatory Memorandum stated that the rights of custody and access tended *"to foster notions of ownership in children."*

Objectives

7.15 Section 60B of the Family Law Act 1975,²³ as amended by the 1995 Act, contains a declaration of general principles and objectives to govern the Act's provisions relating to children.²⁴ The section states 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,

19 Same as above.

20 Same as above, at para 26.

21 Same as above, at para 27.

22 Same as above, at para 30.

23 The 1975 Act, as amended by the Family Law Reform Act 1995 ("FLA"),

24 For an interesting analysis of the Act's underlying principles and objectives, including those contained in section 43 of the Act, see Bailey-Harris and Dewar, above, at 149 to 155.

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*
 - (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

7.16 Parental responsibility is defined by section 61B of the Family Law Act 1975 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 divorce or separation.²⁵

Parenting plans

7.17 To encourage divorcing parents to take mutual responsibility for their children, the Act provides for the making of parenting plans. 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)."*

25 Section 61C, FLA.

7.18 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."*

7.19 Provisions of a parenting plan which deal with any of points (a), (b) and (d) are *"child welfare provisions."*²⁶ Provisions of a parenting plan that deal with point (c) are *"child maintenance provisions."*²⁷

7.20 Parenting plans may not be varied, but may be revoked by a later agreement.²⁸ In order to revoke the plan, the subsequent agreement must be in writing and registered with the court.²⁹ Parenting plans may themselves be registered with the court, in compliance with the procedure laid down by Rules of Court.³⁰ 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; or*
- (iii) a statement to the effect that the plan was developed after family and child mediation and that is signed by the family and child mediator involved."*³¹

Court's power to make parenting orders

7.21 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

26 Section 63C(4), FLA.

27 Section 63C(5), FLA.

28 Section 63D(1) and (2), FLA.

29 Section 63D(3), FLA.

30 Section 63E(1) and (2), FLA.

31 Section 63E(2), FLA. Subsection (2)(iii) was added by the Family Law Amendment Act 2000, schedule 3, para 43.

court will be guided by the *"best interests"* principle and the factors set out in section 68F.

7.22 An application for a parenting 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."*³² Accordingly, a parenting order may be made in favour of a person other than the child's parents.³³

7.23 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."*

7.24 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."*³⁴ 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."*³⁵

7.25 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.

Best interests and checklist of factors

7.26 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."*

7.27 In its report, the Family Law Council had recommended that the checklist already contained in section 64(1)(bb) of the Family Law Act 1975

32 Section 65C, FLA.

33 Section 64C, FLA.

34 Section 64B(3), (4) and (5), FLA.

35 Section 64B(6), FLA.

should be amended to take some extra matters into account.³⁶ Section 68F(2) therefore 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;*
- (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;*

36 Family Law Council of Australia (1994), above, at para 49 (Recommendation 4).

- (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."*

7.28 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.³⁷

Orders by consent in favour of non-parent

7.29 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."*

7.30 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."*

37 Section 68F(3), FLA.

Death of parent with whom child lives

7.31 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.

No-order principle

7.32 The Council argued that the no-order principle, as set out in section 1(5) of the English Children Act 1989, in relation to private law matters, was 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 had 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."*³⁸

7.33 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.³⁹ 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.

Breaches of orders

7.34 Where a residence order is in force, section 65M(2) provides that:

"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."*

7.35 In the case of a contact order, section 65N(2) provides that:

38 Family Law Council of Australia (1994), above, at para 47.

39 Same as above, at para 48.

"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."*

7.36 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."*

Participation of the child

7.37 The Family Law Council, in their 1995 discussion paper on involving and representing children in family law,⁴⁰ suggested that there were three aspects to involving children in family proceedings:

- "(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."*⁴¹

7.38 The 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 counsellor's 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

7.39 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:

- (a) by having regard to anything contained in a report given to the court under subsection 62G(2); or*

40 Family Law Council of Australia, *Involving and Representing Children in Family Law* (Discussion Paper, May 1995).

41 Same as above, at para 3.06.

- (b) *subject to the applicable Rules of Court, by such other means as the court thinks appropriate."*

7.40 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

7.41 The term *"separate representative"* usually describes a lawyer representing a child in family law proceedings.⁴² The Council reviewed the role of the *"separate representative"* in the light of the United Nations Convention on the Rights of the Child.

7.42 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.

7.43 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.⁴³

7.44 The Council noted that separate representatives were appointed at different stages in the proceedings and there was little uniformity on when was the appropriate time.⁴⁴ 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.⁴⁵ A comprehensive training and accreditation system should be in place.⁴⁶ A training program was developed in 1996 by the Family Law Section of the Law Council of Australia, the Family Court and the Legal Aid Commissions.

Advocacy

7.45 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."*⁴⁷ They suggest that a co-ordinator should organise the appropriate

42 This is similar to the role played by the Official Solicitor under the Matrimonial Causes Rules (Cap 179).

43 Family Law Council of Australia (1995), above, at para 4.15.

44 Same as above.

45 Same as above, at para 4.49.

46 Same as above, at paras 4.29 to 4.33.

47 Same as above, at para 5.20.

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.*"⁴⁸ The Council also recommended that more appropriate titles would be the Child's Representative, Child's Advocate, Official Solicitor, or Counsel for the Child.⁴⁹ The Family Law Reform Act 1995 amended the term "*separate representative*" to "*child's representative.*"⁵⁰

Criteria for appointment of separate representative

7.46 The case of *Re K*⁵¹ 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 to 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,

48 Same as above, at para 5.21.

49 Same as above, at para 5.27.

50 Section 68M(1), FLA.

51 [1994] FLC 773, at 775.

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

7.47 The Family Court's guidelines 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."⁵² Representatives should ensure that proceedings are not delayed by the parties and that the child is not subjected to unwarranted psychological testing.

7.48 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 is brought out. In certain cases, a child may be mature enough to be represented as a party to the proceedings. An earlier report of the Family Law Council had 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.⁵³

Court orders for separate representation

7.49 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

52 "Guidelines Promulgated by the Family Court for separate representatives of children appointed pursuant to section 65 of the Family Law Act": see Family Law Council of Australia (1995), above, at Attachment A.

53 Family Law Council of Australia, *Representation of Children in Family Law Proceedings* (Jun 1989), at para 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.

- (ii) *an organisation concerned with the welfare of children; or*
- (iii) *any other person.*⁵⁴

Examination of the child

7.50 Section 68M of the Family Law Act 1975 deals with the making of an order that a child be made available for examination where there is a *"child's representative."*⁵⁵ 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.⁵⁶ 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."*⁵⁷

Family violence

7.51 The subject of family 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 1995 amendments to the Family Law Act 1975 were significant in raising the profile of violence in family proceedings.⁵⁸ This was achieved through the addition of a reference to *"the need to ensure safety from family violence"* in section 43(ca) of the general objectives of the 1975 Act, as well as additional factors in the statutory checklist of factors that the court needs to consider in making a parenting order. The checklist now includes as relevant factors any family violence involving a member of the child's family and the existence of family violence orders.⁵⁹

54 Section 68L(3), FLA.

55 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: see Chapter 3, above, at para 3.87.

56 Section 68M(2), FLA.

57 Section 68M(3), FLA.

58 Bailey-Harris and Dewar, above, at 151.

59 See discussion of these developments in Rhoades, Graycar and Harrison (2000), above, at paras 2.11 to 2.13.

Informing court of relevant family violence orders

7.52 The interaction between a contact order and a pre-existing family violence order is dealt with in the Family Law Act 1975. 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.⁶⁰

Risk of family violence

7.53 In considering what order to make, the court is obliged by section 68K to ensure that the order does not expose a person to an unacceptable risk of family violence. Section 68K(1) requires the court to refrain from making a contact order that is inconsistent with a family violence order, unless it is in the child's best interests to do so.⁶¹

Inconsistencies between contact orders and family violence orders

7.54 Section 68Q sets out the purposes of this part of the Act as being:

- "(a) to resolve inconsistencies between ... contact orders and family violence orders; and*
- (b) to ensure that ... 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."*

7.55 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, which must be in readily understood language, should include:

- "(a) the purpose of the section 68R contact order; and*
- (b) the obligations that the order creates; and*

60 Section 68J(3), FLA.

61 See Rhoades, Graycar and Harrison (2000), above, at para 2.12.

- (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.*⁶²

7.56 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*
 - (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.*⁶³

Contact orders to prevail

7.57 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.⁶⁴

62 Section 68R(3), FLA.

63 Section 68R(4), FLA. Failure to comply with a requirement of section 68R does not, however, affect the validity of a contact order : see section 68R(5), FLA

64 Section 68S(2), FLA.

7.58 In our view, 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.⁶⁵

Subsequent review of the 1995 reforms

7.59 In 2000, the University of Sydney and the Family Court of Australia published a report entitled, *The Family Law Reform Act 1995: The first three years*,⁶⁶ which summarised the findings of a three-year research project carried out by Rhoades, Graycar and Harrison into the impact of the 1995 reforms in Australia.

7.60 The authors of the report concluded that the 1995 reforms to the previous law were not, as yet, meeting their objectives in a number of significant respects. The particular problems observed in the report are outlined below.

- The meaning of joint parental responsibility, and how joint parental responsibility should be exercised after the making of court orders, was not clearly stated in the legislation and was not well enough understood by the legal profession and the public.⁶⁷
- Similarly, the new terminology for court orders was not well understood, with separating parents continuing to think in terms of custody and access.⁶⁸
- Unlike the judicial position under the former law, interim residence orders made at interim hearings often appeared to be made now *"on the basis of ensuring that one parent [did] not obtain a tactical advantage over the other before the final hearing, rather than by an assessment of the child's best*

65 It is also noted that the child's best interests is only one criterion to be balanced by two others in section 68Q, discussed above. This seems surprising when the *"best interests"* consideration is normally treated as paramount in disputes about access or contact.

66 See Rhoades, Graycar and Harrison (2000), above.

67 Same as above, at para 1.5. The authors noted that some non-resident parents believed the new shared parenting regime provided them with *"rights"* to be consulted about day to day decisions affecting the child, or that the law required the children to live half the time with each parent. *"The parents tend to respond with anger and frustration when advised that the Act does not require this outcome"*: same as above, at para 1.5.

The authors commented that the reforms, and the way they have been applied, may have created *"greater scope for an abusive non-resident parent to harass or interfere in the life of the child's primary caregiver by challenging her decisions and choices"*: same as above, at para 1.8.

68 Same as above, at paras 1.11 to 1.13. It appeared that even some judges and legal practitioners were continuing to use *"the old language"*: same as above, at para 1.13.

*interests or by application of the 'existing arrangements' principle"*⁶⁹ (Under the latter principle, the pre-existing arrangements for the children would be maintained, as far as possible, until the full hearing of the issues in dispute could take place.)

- With regard to the making of residence orders at the final hearing stage, prior to the 1995 reforms, joint custody orders were rarely made in contested proceedings. It was considered that such orders were not appropriate unless the parties' approaches to parenting were compatible and there was a relationship of mutual trust, co-operation and communication between the parents. The findings from the research, however, indicated that since the reforms had been introduced, residence orders giving both parents equal time with the children had been ordered in circumstances where there was a high degree of conflict between the parties, and in some cases, where the arrangements had been tested at the interim stage and one parent had found them unworkable.⁷⁰
- In relation to contact, there had been a discernible shift in the focus of interim contact hearings away from asking whether interim contact was going to be in the child's best interests, and so should be ordered, to assuming that it was in the child's best interests and asking instead how to maintain contact until the final hearing.⁷¹
- This last development was particularly significant in relation to cases where family violence was alleged. The authors noted an apparent trend *"away from suspending contact at interim hearings as the way of ensuring the child's safety until trial, and towards the use of neutral hand-over arrangements as the preferred protective mechanism."*⁷²
- The research findings also indicated that there was a large increase in the numbers of applications brought by non-resident parents alleging breaches of contact orders, the majority of which were found to be *"unmeritorious."*⁷³

7.61 In relation to the issue of ensuring the safety of children in the face of family violence, we have given careful consideration to this and to the safeguards that may need to be incorporated into any similar reforms introduced here in Hong Kong. Our conclusions on this are set out later, in Chapter 11.

69 Same as above, at para 1.15.

70 Same as above, at para 1.27 to 1.28.

71 Same as above, at paras 1.16 to 1.20.

72 Same as above, at para 1.21.

73 Same as above, at paras 1.31 to 1.35.

7.62 More generally, the problems identified in Australia underscore the need to ensure that any reform measures introduced in this area are contained in clearly written legislation and accompanied by comprehensive judicial, legal practitioner and public education.

Chapter 8

Comparative Law: New Zealand

Overview of the law of child custody and access in New Zealand

Introduction

8.1 Until new legislation comes into force on 1 July 2005,¹ the primary enactment on custody and access law in New Zealand is the Guardianship Act 1968. This Act governs generally the rights and responsibilities of parents in the care, welfare and development of their children in issues where guardianship, custody and access arise.² The Act has already undergone significant revision since its enactment,³ and, as discussed later below, will be replaced in the near future by a new legislative scheme.⁴

8.2 In relation to the workings of the Family Court of New Zealand, the current structure of the court was established in 1980.⁵ The Family Court is a specialist court with specialist judges and has comprehensive jurisdiction over family matters.⁶ Divorce, custody, matrimonial property and child protection issues relating to the same family are therefore largely dealt with by the same court.⁷ It is also the case that, in most proceedings over which the Family Court has jurisdiction, *“it is possible to appoint a lawyer to represent the child and give that child a voice in the proceedings.”*⁸

8.3 Of the current New Zealand Family Court structure, it has been observed that:

1 Ie, the Care of Children Act 2004 ("COCA"), enacted on 21 November 2004.

2 See speech by Hon M Wilson, "Trends in New Zealand Family Law" (18 Aug 2000, NZ Government Executive Speech Archive).

3 Ie, the Guardianship Amendment Act 1980 (relating to the jurisdiction of the Family Court), the Guardianship Amendment Act 1991 (relating to international parental child abduction) and the Guardianship Amendment Act 1995 (concerning allegations of family violence made in custody proceedings).

4 See discussion below on the Care of Children Bill 2003 ("COCB") and the COCA.

5 By virtue of the Family Courts Act 1980, the Family Proceedings Act 1980 and the Guardianship Amendment Act 1980.

6 NZ Law Commission, *Dispute Resolution in the Family Court* ((Mar 2003, Rep 82), at para 18.

7 Same as above, at para 20.

8 Same as above, at 22.

"Custody and access disputes ... pose some of the most difficult decisions with which Judges are faced. This has been recognised by the architects of the new system introduced by the Family Courts Act 1980, the Family Proceedings Act 1980 and the Guardianship Amendment Act 1980.

*The legislation seeks in two broad ways to alleviate Judge's difficulties in this area. The first is by emphasising alternatives to judicial determination. Counselling, conciliation and mediation are all stressed in the hope that very few cases will actually proceed to a hearing. Secondly, where a hearing does eventuate the Judge may receive assistance in determining the interests of the child from several skilled sources."*⁹

8.4 Other provisions affecting children are contained in the Status of Children Act 1969. An original intention of the Act was to abolish the concept of "illegitimacy" and affirm that children are of equal status for all the purposes of the law, whether or not their parents were married.¹⁰ Modifications to the Act are now proposed to take account of the legal implications of certain assisted human reproduction procedures.

8.5 In relation to child protection, the Children, Young Persons, And Their Families Act 1989 provides the relevant rules concerning children in need of care and protection. If a court finds that a child or young person is in need of care and protection, it can make a guardianship or custody order under the Act.¹¹

Guardianship Act 1968

8.6 The main provisions of the 1968 Act which deal with child custody and access are outlined below.

Welfare of the child paramount

8.7 Under section 23 of the Guardianship Act 1968, the welfare of the child is expressed to be the first and paramount consideration for the court in any proceedings where the custody or guardianship of, or access to, a

9 These may include a lawyer representing the child, a social worker's report that may be called for, and specialist reports and expert evidence that may be introduced, "either through the child's representative or directly after being called for by the Judge": see *Butterworths Family Law in New Zealand* (2001, 10th ed, Butterworths), at 6.101. Calls for further reform of the Family Court have been made recently, however, and these are discussed further below.

10 NZ Parliamentary Library, "Care of Children Bill 2003," *NZ Parliamentary Library Bills Digest* (2003, No 978), at 6.

11 NZ Ministry of Justice, *Responsibilities for Children - Especially when parents part: The Laws about Guardianship, Custody and Access* (Aug 2000, Discussion Paper), at 8, note 1.

child, or the administration of any property or income for a child, is in question.¹²

Guardianship

8.8 "Custody" is defined in section 3 of the Act as meaning *"the right to possession and care of a child."* "Guardianship" is defined in the same section as meaning *"the custody of a child"¹³ ... and the right of control over the upbringing of a child, and includes all rights, powers, and duties in respect of the person and upbringing of a child"*¹⁴

Married father and mother both guardians of the child

8.9 Section 6 of the Act provides that the father and mother are joint guardians of a child except where the biological father was not married to the mother and was not living with the mother at the time of the child's birth.¹⁵ In such a case, the child's mother is the sole guardian of the child.

8.10 On the death of the father or the mother, the surviving parent, if he or she was then a guardian of the child, is the sole guardian of the child, unless an additional testamentary guardian of the child has been appointed by the deceased parent.¹⁶ Where the surviving father of the child was not a guardian of the child, he can apply to the court to be appointed one, either in addition to or instead of any testamentary guardian appointed by the mother.¹⁷

Additional guardians

8.11 Under section 8, new partners of parents who have taken on day-to-day care responsibilities for a child can be appointed as guardians of the child only by order of the court.

12 Section 23(1), Guardianship Act 1968 ("GA").

13 Except in the case of a testamentary guardian, and subject to any custody order made by the court: section 3, GA.

14 In relation to guardians' rights in relation to medical treatment for children, there are explicit provisions in sections 25 and 26 of the Act for dealing with the questions concerning this. They include providing that those who are the child's guardians have the power to consent to the administration of medical care for children younger than 16. If guardians refuse to consent to urgently required medical treatment, the court can assume guardianship of the child or young person for that purpose or appoint someone else to be guardian for that purpose. See commentary on the issue of medical treatment in NZ Ministry of Justice (2000), above, at 10.

15 Hon L Dalziel, "Briefing on Care of Children Bill" (NZ Parliamentary Library, 2003), at "Summary of Amendments."

16 By virtue of sections 6(4) and 7(2), GA.

17 Section 6(3), GA.

Termination of guardianship

8.12 Under section 21 of the Act, guardianship of a child terminates when the child reaches 20 years of age or marries under that age.

Custody

8.13 As noted earlier, custody is defined under the Act as the right to possession and care of a child. In practical terms, this means the day-to-day care of the child. Both parents usually have custody rights, but if they separate the Family Court (which can make “*such interim or permanent order with respect to the custody of the child as it thinks fit*”¹⁸) can grant a custody order in favour of just one of them if necessary. The court can also decide to make a joint custody order in favour of both parents.¹⁹

8.14 A parent, step-parent or testamentary guardian may apply to be granted custody of the child. Other persons need leave of the court before they can apply for custody.²⁰

Conduct of parents

8.15 A parent's conduct may be considered by the court only to the extent, if any, that it is relevant to the child's welfare and best interests.²¹

No presumption in favour of one parent over another

8.16 Related also to the issue of the welfare of the child, it should be noted that:

*“When the Family Court is deciding who should have custody of a child or young person, there is no presumption in favour of one parent over another. In fact, the Act specifically says that there is no presumption that the sex of a person who wants to have custody is relevant when deciding on what will best serve the welfare of the child. It is also important to note that there is no presumption that the children in a family should remain together when their parents separate.”*²²

Termination of custody orders

8.17 Unless there are special circumstances, custody orders no longer apply once a young person reaches 16 years of age.²³

18 Section 11(1), GA.

19 NZ Ministry of Justice (2000), above, at 9.

20 Section 11(1) (a) and (b), GA.

21 Section 23(1), GA.

22 NZ Ministry of Justice (2000), above, at 9, referring to the provision in section 23(1A), GA.

23 Section 24, GA.

Access

8.18 In the context of the Guardianship Act 1968, the term "access" is only relevant where custody has been given to one parent. Access, provided for in sections 15 and 16 of the Act, refers to the arrangements for a child or young person to spend time with their non-custodial parent.

8.19 The rights of other relatives such as grandparents or aunts and uncles to be granted access are limited to situations where one parent has died or has been refused access or is not exercising access to the child.²⁴

Family violence

8.20 The Guardianship Amendment Act 1995, in conjunction with the Domestic Violence Act 1995, introduced special provisions (in sections 16A, 16B, 16C and 15(2B) of the Guardianship Act 1968) to deal with cases involving violence. In particular, the reforms introduced a rebuttable presumption that a parent who has used violence against a child or against the other parent may not have custody of, or unsupervised access to, the child unless the court could be satisfied that the child would be safe during visitation arrangements.²⁵ The costs of any supervised access ordered are to be borne by the person granted the access.²⁶

Enforcement of access

8.21 To enforce a custody or access order, a party may apply to vary or discharge the order,²⁷ or seek a warrant to enforce it.²⁸ It is also possible for the party to seek prosecution of the other party if access has been hindered. Section 20A of the Act provides that "*hindering or preventing*" access, without reasonable excuse, is a criminal offence punishable by a maximum fine of \$1,000. This provision does not limit the court's power to punish a person for contempt of court for refusing to comply with an access order.²⁹

24 Section 16, GA. See also the commentary on custody and access in NZ Ministry of Justice (2000), above, at 9.

25 See the useful summary of family violence initiatives in New Zealand discussed in, R Busch and N Robertson, "Innovative Approaches to Child Custody and Domestic Violence in New Zealand: The Effects of Law Reform on the Discourses of Battering" in, *Children Exposed to Domestic Violence: Current Issues in Research, Intervention, Prevention, and Policy Development* (2000, The Haworth Press), at 269.

26 Section 16C, GA.

27 Section 17, GA.

28 Section 19, GA.

29 Section 20A(2), GA.

Voice of the child

Wishes of the child

8.22 Under section 23(2), the court must ascertain the wishes of the child if he is able to express them, and take these into account to the extent the court thinks fit, having regard to the child's age and maturity.³⁰

Representation

8.23 Section 30 of the Act provides that the court can appoint a lawyer to represent the child, and must do so if it is likely that the matter will proceed to a hearing.³¹

Ministry of Justice consultation exercise on custody and access

8.24 In August 2000, the New Zealand Ministry of Justice issued a discussion paper³² reviewing the existing law on guardianship, custody and access. In its Foreword, the paper noted:

*"New Zealand's law relating to guardianship, custody and access is over thirty years old. Patterns of family life, and our values regarding family relationships, have changed significantly since then. The Government has decided it is time to review this area of the law."*³³

8.25 The areas covered by the review included:³⁴

- proposing a framework for the Government's child and family policy;

30 One writer has observed 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: see 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, Oct 1994, 32, 36.

31 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: see Henaghan, above, at 36.

32 NZ Ministry of Justice (2000), above.

33 Another factor which may have contributed to the Government's decision to review the law in this area was the promotion of a private members bill the previous year by Dr M Newman, entitled the Shared Parenting Bill. The Government did not support the content of the Bill: see Hon S Maharey, "Guardianship, custody and access review," speech at launch of Ministry of Justice Discussion Paper (18 Aug 2000, NZ Government Executive Speech Archive), at 3.

34 Discussed in Hon S Maharey, same as above.

- reviewing the existing provisions of the law in the face of the diverse nature of modern New Zealand families;
- modernising the language and key concepts of the law;
- considering what measures might be necessary to promote parental responsibility; and
- considering whether changes might need to be made to the Family Court processes, particularly in relation to the enforcement of orders.³⁵

8.26 Over 350 submissions were received in response to the discussion paper, from a wide range of parties, including judges, parents, academics and community organisations.³⁶ The responses were summarised in a document issued by the Ministry of Justice in October 2001.³⁷

8.27 The overall findings are set out below.³⁸

- There was general agreement that the Guardianship Act should focus on ensuring the best interests of children and young people, including their welfare and safety, and, *"by implication, the language used in the Act and Family Court proceedings should help the family retain that focus."*³⁹
- There was substantial support for prominence being given in the legislation to the articles of the United Nations Convention on the Rights of the Child.
- There was some agreement that diverse family forms needed to be recognised in the legislation.⁴⁰
- A number of submissions dealt with the respective weights that should be given, in both the legislation and in court proceedings, to the rights of children and young people, and the rights and responsibilities of parents and members of the wider family.
- A number of submissions *"presented views on the importance and ability of both parents playing a significant role in the lives of*

35 Particularly in relation to the provision of more information and support to parties coming before the Family Court, and the better enforcement of court orders.

36 Hon L Dalziel, "Briefing on Care of Children Bill" (NZ Parliamentary Library, 2003), at 1.

37 NZ Ministry of Justice, *Summary Analysis of Submissions in Response to the Discussion Paper Responsibilities for Children: Especially when parents part. The Laws about Guardianship, Custody and Access* (Oct 2001).

38 See same as above, at 4 to 5 (Executive Summary).

39 Same as above, at 4.

40 But it was noted that there was disagreement about whether Maori aspirations and values required special attention under the law: same as above.

their children and how the legislation should or should not be changed to achieve this."⁴¹

- Some submissions discussed the usefulness of various types of resources (for parents, children and those working in the Family Court) in resolving disputes and gaining consensus on arrangements for the care of children.⁴²
- Divergent views were expressed on procedures in, and expectations of, the Family Court. In particular, *"contrasting views were presented on the appropriateness of current Family Court procedures, provision of counselling and mediation services and the respective roles of judges and legal, psychological and counselling specialists."*⁴³ It also appeared that *"views were polarised around the appropriateness of opening up court proceedings."*⁴⁴
- Some submissions commented on the need to speed up and reduce the costs of court proceedings. There was also some agreement that the court should have a means of limiting repeat applications.⁴⁵
- A number of submissions were concerned with the making and breaking of court orders. Some addressed the need to minimise trauma for children while others commented on ways of increasing the court's enforcement powers.⁴⁶

Care of Children Act 2004

Introduction

8.28 Following the Government's consultation exercise, the Care of Children Bill 2003 was introduced into Parliament on 10 June 2003. The Bill was enacted on 21 November 2004, but will not come into operation until 1 July 2005. This new legislation will replace the Guardianship Act 1968 and amend other family proceedings legislation⁴⁷ with the aim of modernising the

41 Same as above.

42 These resources included: *"guidelines for use by the Court to help resolve separation issues; parenting plans; educational resources for families about the proceedings and roles of those associated with the Family Court (eg, Counsel for the child, court specialists, etc); and do-it-yourself kits for parents"*: same as above, at 5.

43 Same as above.

44 Same as above.

45 Same as above.

46 Same as above.

47 See section 152 and schedules 2 to 4 of the COCA.

law relating to guardianship, care of children, the Family Court's procedures and parental status.⁴⁸

8.29 In commenting on the background to the legislation, the Explanatory Note to the Bill states:

*"Family and ethnic demographics in New Zealand have changed considerably since the 1968 Act was enacted. The 1968 Act is premised upon a traditional nuclear family model that does not reflect the diversity of family arrangements that now exist in New Zealand. More modern legislation must provide a framework that recognises and supports all types of family units that care for children, for example, single-parent households, extended families, reconstituted families, and de facto relationships (including those of the same sex). That challenge is magnified when the varied cultural dimensions of families are considered."*⁴⁹

8.30 The relevance of New Zealand's international human rights obligations was also considered in the formulation of the Act's provisions:

*"Over recent decades New Zealand has also become party to a growing number of international conventions relating to children's needs and interests. The United Nations Convention on the Rights of the Child ..., for example, contains a number of obligations affecting guardianship and care of children."*⁵⁰

Objectives of the Act

8.31 The main objectives of the Act are stated to include⁵¹

- *"ensuring a stronger focus on the rights of the child; and*
- *recognising the diversity of family arrangements that exist for the care of children; and*
- *improving New Zealand's compliance with international obligations."*

48 NZ Parliamentary Library, "Care of Children Bill 2003," *NZ Parliamentary Library Bills Digest* (2003, No 978), at 1.

49 Care of Children Bill, Explanatory Note, General Policy Statement, at 1.

50 Same as above, at 1 to 2.

51 Same as above, at 2.

Main reforms proposed to the existing law

General principle of the welfare of the child

8.32 As noted earlier, under the existing law, the welfare of the child is expressed to be the first and paramount consideration.⁵² In the new Act, the principle has been moved to the front of the legislation as its overriding principle.⁵³ Section 4 of the Act amends the expression of the paramountcy principle⁵⁴ so that it refers to the *"welfare and best interests of the child."* This applies to proceedings under the Act and *"in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child."*⁵⁵ The section goes on to provide that *"the welfare and best interests of the particular child in his or her particular circumstances"* must be considered,⁵⁶ and that the court must take into account any of a number of *"principles"* which may be relevant.⁵⁷ Amongst these are the principles that:

- the child's parents and guardians should have the primary responsibility for, and should be encouraged to agree to, their own arrangements, for the child's care, development and upbringing;⁵⁸
- there should be continuity in arrangements for the child's care, development and upbringing, and the child's relationships with his family or family group should be stable and ongoing; *"in particular, the child should have continuing relationships with both his or her parents"*⁵⁹; and
- the child must be protected from all forms of violence.⁶⁰

Views of the child and representation

8.33 Also moved to the front of the legislation is the provision relating to the child expressing his views. Section 6 of the Act provides that a child must be given reasonable opportunities to express his *"views"* (the current law refers to *"wishes"*) on matters affecting him, and that any views that the child expresses, either directly, or through a representative, must be taken into account. The existing reference to *"having regard to the age and maturity of the child"* in section 23(2) of the Guardianship Act 1968 has been omitted in the Act.

52 Section 23(1), GA.

53 As noted by Dalziel, above, under "Summary of Amendments."

54 Currently appearing in section 23 of the GA.

55 Section 4(1)(b), COCA.

56 Section 4(2), COCA.

57 See sections 4(5) to (6) and 5, COCA.

58 Section 5(a), COCA.

59 Section 5(b), COCA.

60 Section 5(e), COCA.

8.34 Related to the issue of the child expressing his views, the presumption that the court should appoint a lawyer to act for the child if the case is likely to proceed to a hearing has also been moved to the front of the Act.⁶¹

Guardianship

8.35 Under the existing law, guardianship is defined in terms of custody and the right of parental control over the child. In the Act, guardianship is redefined to emphasise parental responsibilities rather than rights.⁶² Section 15 states that the terms "*guardian*" and "*guardianship*" mean having, in relation to a child,

*"all duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child"*⁶³

8.36 The Act provides a list of examples of guardianship powers that may be exercised.⁶⁴ These include:

- providing day-to-day care for the child;
- contributing to the child's intellectual, emotional, physical, social, cultural, and other personal development; and
- determining for or with the child, or helping the child to determine, questions about important matters affecting the child (in each case with other guardians of the child), such as:
 - (a) the child's name (and any changes to it);
 - (b) changes to the child's residence that may affect the child's relationship with his parents and guardians;
 - (c) non-routine medical treatment for the child;
 - (d) where, and how, the child is to be educated; and
 - (e) the child's culture, language and religious denomination and practice.

8.37 The Act provides that a guardian of a child may exercise (or continue to exercise) the duties, powers, rights, and responsibilities of a guardian in relation to the child, whether or not the child lives with the

61 See section 7, COCA.

62 Dalziel, above, under "Summary of Amendments."

63 Section 15(1)(a), COCA. The section also refers to: "*every duty, power, right and responsibility that is vested in the guardian of a child by any enactment*" (section 15(1)(b) COCA).

64 See section 16, COCA.

guardian, unless a court order provides otherwise.⁶⁵ However, in exercising these duties, powers, rights, and responsibilities, a guardian of the child "*must act jointly (in particular, by consulting wherever practicable with the aim of securing agreement) with any other guardians of the child.*"⁶⁶

8.38 *Father and mother both guardians.* Under the existing law, the biological parents of a child are both guardians of the child, except where the father is not married to the mother and was not living with the mother at the time of the child's birth.⁶⁷ Under section 17 of the Act, the father and mother are joint guardians of a child, unless the child's mother is the sole guardian of the child because:

- the mother was not married to the father at any time from the conception of, until the birth of, the child; or
- the mother was not living with the father of the child as a *de facto* partner at any time during that period.

8.39 *Other circumstances for guardianship.* Under section 18 of the Act, natural guardianship is given to a child's father who is not a natural guardian by operation of law, if his particulars are, with both parents' consent, registered as part of the child's birth information.⁶⁸

8.40 The Act also provides that a father of the child who is not the mother's spouse or *de facto* partner may apply to the court to be appointed as a guardian of the child as well as, or instead of, the mother of the child or a testamentary guardian.⁶⁹

8.41 Sections 21 to 25 of the Act provide that parents of a child may, in certain circumstances, appoint a new partner as an additional guardian of the child.

8.42 *Guardians appointed by the court.*⁷⁰ Under sections 30 to 35 of the Act, an "*eligible person*" may make an application to the court for:

- an order placing under the guardianship of the court a child who is neither married nor living with a *de facto* partner; or
- an order appointing a named person to be the agent of the court either generally or for any particular purpose.

65 Section 16(3), COCA.

66 Section 16(5), COCA.

67 Dalziel, above, under "Summary of Amendments."

68 The registration may be either: at the request of the mother and father; on request of the mother and on production of a signed notice, by the father, acknowledging paternity and consenting to the recording of the information; or, on the request of the father together with confirmation by the mother that he is the child's father: see section 15, (NZ) Births, Deaths, and Marriages Registration Act 1995.

69 Section 19, COCA.

70 See summary provided in NZ Parliamentary Library (2003), above, at 4 to 5.

8.43 The term "*eligible person*" means:

- a parent or guardian of a child;
- a grandparent or an aunt or an uncle of the child;
- a sibling (including a half-sibling) of the child;
- a partner of a parent of a child;
- the child himself or herself (who may apply without any "*litigation guardian*");
- the chief executive (that is, the chief executive of the department for the time being responsible for the administration of the Children, Young Persons, And Their Families Act 1989); or
- any other person granted leave to apply by the court.

8.44 *Termination of guardianship.* Section 28 of the Act provides that the duties, powers, rights, and responsibilities of a guardian of a child end when the first of the following events occurs:

- the child turns 18 years (compared to 20 years under the current law);⁷¹
- the child marries;
- the child lives with another person as a *de facto* partner;⁷²
- the guardian is removed by an order of the court; or
- if, in the case of a guardian appointed for a particular purpose or period, the purpose is achieved or the period ends.

Care of children: making arrangements and resolving disputes

8.45 The Act provides that when two or more guardians of a child are unable to agree in relation to the guardianship, any of them may request counselling in relation to the dispute or apply to the court for its direction.⁷³ A child over the age of 16 may apply to the court for a review of a parent's or guardian's decision or refusal to give consent.⁷⁴ The court may also make orders embodying agreements between parents and guardians and parents

71 See section 8(1), GA.

72 le, the child is 16 years old or older and, with the consent of his or her parents and guardians (or, if the child is under the guardianship of the court, with the consent of the court), lives with another person, including of the same sex, in a *de facto* relationship: see Dalziel, above, under "Summary of Amendments."

73 Section 44, COCA.

74 Section 46, COCA.

and donors (in the case of a child conceived as the result of an assisted human reproduction procedure) about such matters as day-to-day care for, contact with, or the upbringing of, a child.⁷⁵

8.46 By virtue of section 48 of the Act, "*custody*" and "*access*" orders are replaced with "*parenting orders*" determining who will have –

- the role of providing day-to-day care for a child; and
- contact with a child.

8.47 The category of persons who may seek the court's leave to apply for parenting orders (covering both day-to-day care and contact) is changed so that it expressly includes near relatives and members of family groups.⁷⁶

8.48 If a parent does not have day-to-day responsibility for the care of a child, the court must consider whether and how an order can provide for contact between the parent and the child.⁷⁷

8.49 *Family violence.* As under the current legislation, the Act proposes that the court may impose conditions on contact where a parent is accused of having used violence against a child or the other parent.⁷⁸ However, section 62 of the Act now provides that the costs of formal supervised access may be paid by the Government, instead of the contact parent, up to a maximum number of sessions.⁷⁹

8.50 *Enforcement of orders.* The range of means available for "*making parenting orders work*" is expanded in sections 63 to 80 of the Act. The court is to have a specific role in preventing disputes and facilitating compliance by various means, including by:⁸⁰

- expressly spelling out the consequences of orders and contraventions;
- ordering counselling where appropriate;⁸¹
- varying or discharging the parenting order (for example, by reducing the time in which the child is in the care of, or has contact with, the party in contravention of the order);⁸²

75 Sections 40 to 42, COCA. See commentary in NZ Parliamentary Library (2003), above, at 5.

76 Section 47, COCA.

77 Section 52, COCA. See commentary in Dalziel, above, under "Summary of Amendments."

78 Sections 51 and 58 to 62, COCA.

79 See commentary in Dalziel, above, at Question and Answer (f).

80 As summarized by Dalziel, above, under "Summary of Amendments."

81 Section 69, COCA.

82 Section 68(1)(b), COCA.

- "admonishing" the party concerned.⁸³

8.51 The Act also provides that the penalty for contravening a parenting order is increased to imprisonment for a maximum term of three months and a maximum fine of \$2,500.⁸⁴

8.52 The Act contains extensive provisions on removal of the child from New Zealand,⁸⁵ international child abduction⁸⁶ and enforcing parenting orders internationally.⁸⁷

Further provisions in the Act

8.53 *Specialist reports.* The Act also provides⁸⁸ that:

- the court is empowered to order specialist reports, and to hear speakers providing testimony on a child's cultural background⁸⁹
- a wider range of persons is entitled to attend hearings under the Act.⁹⁰

8.54 *Publication of reports of proceedings.* Restrictions on publication of reports of proceedings under the Act are relaxed, permitting wider publication of those reports while still protecting the privacy of the families involved.⁹¹

8.55 *Vexatious proceedings.* The court is empowered:

- to dismiss proceedings that are frivolous or vexatious or an abuse of the procedure of the court, and proceedings that are clearly contrary to a particular child's welfare and best interests; and
- to restrict the commencement of repeat proceedings.⁹²

8.56 *Counselling.* Counselling and conciliation provisions in Part II of the Family Proceedings Act 1980 are amended so that they also apply to same-sex *de facto* partners.⁹³

83 Section 68(1)(a), COCA.

84 Section 78, COCA.

85 Section 80, COCA.

86 Sections 81 to 93, COCA.

87 Sections 94 to 124, COCA.

88 See summary in Explanatory Note to COCB, at 3.

89 See sections 128 to 136, COCA. See summary in Explanatory Note to COCB, above, at 3.

90 Sections 137 and 138, COCA. See Explanatory Note to COCB, above, at 3.

91 Section 139, COCA. See Explanatory Note to COCB, above, at 3.

92 Sections 140 and 141, COCA. See Explanatory Note to COCB, above, at 3.

93 Section 149, COCA. See Explanatory Note to COCB, above, at 3.

Law Reform Commission report on dispute resolution in the Family Court

8.57 In March 2003, the New Zealand Law Commission issued a report on dispute resolution in the Family Court.⁹⁴ The report noted that the Commission's reference was prompted by widespread criticism of the Family Court. These criticisms included that:⁹⁵

- the system was biased against men;
- without-notice applications were granted too readily;
- where orders were made without notice, it took too long for the other party to be heard;
- matters generally took too long;
- children suffered because of the delays in matters being dealt with; and
- not all Family Court professionals were properly trained and skilled.

8.58 In considering whether these allegations were justified, the Commission observed:

*"These criticisms are not surprising, because the Family Court is a unique jurisdiction. It deals with families in crisis, and emotions run high. Its judges are faced with extremely difficult decisions, which affect litigants in a profoundly personal way. The welfare of children is often at stake. Personal rights compete with protection and security. Fairness competes with the welfare of children. Such principles cannot always be balanced or compromised – one must prevail over the other. People are hurt by these decisions, however 'right' they may be."*⁹⁶

8.59 The Commission also noted that the Family Court is only a venue for dispute resolution, and that overall, *"outcomes for New Zealand families depend on many other factors, such as health, poverty, education, and employment, all of which impact on the families who may seek assistance from the Family Court."*⁹⁷

94 NZ Law Commission, *Dispute Resolution in the Family Court* ((Mar 2003, Rep 82).

95 Same as above, at para 1.

96 Same as above, at para 2.

97 Same as above, at para 8.

8.60 The report made a number of recommendations, including new conciliation processes and court procedures to help families resolve disputes. The Commission stated that its strongest recommendation was that *"the present system be resourced to perform at its most efficient, without the delays caused by lack of court time, shortage of report writers and lack of assistance from the Department of Child, Youth and Family Services."*⁹⁸

8.61 The various recommendations made in the Commission's report are listed below.⁹⁹

- *"Avoiding delay through improved systems and resourcing, and better targeting of assistance.*
- *Addressing competence and gender bias issues by 'upskilling' Family Court staff and contracted professionals.*
- *Improving dispute resolution procedures as an alternative to judge-imposed decisions, by contracting Family Court mediators.*
- *Providing more dispute resolution processes designed by Maori, and delivered to Maori by Maori.*
- *Extending the Family Court co-ordinator role to oversee improved and more extensive conciliation services.*
- *Making available in the community more information about the Family Court and its processes.*
- *Ascertaining and incorporating children's views in conciliation processes.*
- *Improving complaint procedures related to contracted Family Court professionals, including psychologists and counsel for the child.*
- *Appointing a chief executive or general manager of the Family Court to the Department for Courts' national office.*
- *Making available appropriate conciliation services that include information, counselling, and mediation, in respect of all proceedings that may be brought in the Family Court."*

98 Same as above, at para 3. An earlier commentator had 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: see Flatley, "Family law practice; the preventative versus the reactive approach", in *Rights and Responsibilities*, papers from Symposium on Rights and Responsibilities of the Family, Wellington, Oct 1994, 161.

99 As summarised in the Introduction to the Commission's report, same as above, at para 14.

8.62 If the recommendations are implemented, it is anticipated that these reforms, together with those put forward in the Care of Children Act 2004, will have the overall impact of moving parents away from using courts to resolve their disputes, towards a greater emphasis on counselling, mediation and other processes.¹⁰⁰

¹⁰⁰ C MacLennan, "The Care of Children Bill will modernise laws but not make sweeping changes" *Law News* (21 Mar 2003, Issue 10, Auckland District Law Society) at 10.

Chapter 9

Recommendations for reform – parental responsibility and rights

Introduction

9.1 In the preceding chapters of this report we reviewed how the law of child custody and access operates, both here in Hong Kong and in a number of overseas jurisdictions. We also examined the various reform initiatives that have taken place in this area of the law in recent years. The underlying themes of these reforms might be summarised as follows:

- a move away from notions of parental rights to an emphasis on the parental responsibility of both parents for the child which continues after separation and divorce;
- a move away from seeing contact with the child as a parental right, to viewing it instead as the child's right and part of the range of responsibilities that parents have for their children;
- encouragement to parents to come to mutually agreeable arrangements for their children with minimal intervention from the courts, by, for example, the use of parenting plans;
- increased awareness of the particular sensitivity needed in dealing with custody and access cases involving domestic violence;
- more attention being paid to the voice of the child in the whole family litigation process, either directly, or through increased use of separate representation;
- recognition that the primary responsibility for the upbringing of children rests with their parents, and that the State should only intervene into family life compulsorily where the child is placed at unacceptable risk;¹ and
- an attempt by legislators to centralise and codify the law relating to children as far as possible.

¹ English Law Commission, *Review of child law: Guardianship and custody* (1988, Law Com No 172), at para 2.1.

9.2 In the remaining chapters of this report, we set out our own proposals for reform in this area of the law. In determining the content of these reforms, we have found useful guidance in the following list of objectives for the law relating to children:²

- (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 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;*³
- (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."*

9.3 The reforms we propose in the remainder of this report are, we believe, 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

2 Formulated some years ago by the English Law Commission. See English Law Commission, *Review of child law: Custody* (1986, Working Paper No 96), at para 3.7.

3 The English Commission recommended that priority should be given to principle (iii) rather than (ii) if there was a conflict: same as above, at para 3.8.

Australian Family Law Reform Act 1995. While we recognise that there are considerable lessons to be learned from comparative experiences, we nonetheless maintain that any reforms to our laws on child custody and access must be tailored to the needs of Hong Kong.

9.4 The adoption of the essential reforms we propose in this report will necessitate legislative amendment to the Guardianship of Minors Ordinance (Cap 13) and to child custody provisions in a number of other matrimonial Ordinances. Effective public education will also be needed, as the reforms represent a significant change in approach to the law and practice in this area. We consider that the substantial benefits of these reforms to the children and families undergoing the painful process of divorce will justify these efforts.

The general principle of the welfare of the child

9.5 In this chapter, we set out our recommendations for reform of the general principles underlying the law on child custody and access, namely the principle of parental responsibility and rights, and the welfare principle.

Applicable proceedings

9.6 As we saw earlier in Chapters 2 and 3, the welfare principle is to guide the courts in making decisions in cases involving children. The effect of the principle is to require the court to take into account what is in the best interests of the child over and above what may be best for any adults involved in the litigation.

9.7 Under Hong Kong's current legislation, the primary reference to this principle appears in Section 3(1) of the Guardianship of Minors Ordinance (Cap 13). This provides that:

"In relation to the 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-

(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"*

9.8 This formulation of the welfare principle is also applied in other matrimonial Ordinances. Section 48C of the Matrimonial Causes Ordinance (Cap 179) states:

"For the avoidance of doubt, section 3 of the Guardianship of Minors Ordinance (Cap 13) ... 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)."

9.9 In terms of the application of the welfare principle under the Matrimonial Proceedings and Property Ordinance (Cap 192), section 18(6) of that Ordinance provides that the child's *"welfare"* (in the context of post-divorce arrangements for the child) includes *"the custody and education of the child and financial provision for him."* Section 2 of the Ordinance provides further that *"custody"* includes access, and *"education"* includes training.

9.10 Section 5 of the Separation and Maintenance Orders Ordinance (Cap 16), although not adopting the wording of the Guardianship of Minors Ordinance, provides that the court shall *"have regard primarily to the best interests of the child"* in making orders under the Ordinance, including those related to *"legal custody"* and maintenance.

9.11 It is evident from these provisions that the welfare principle is intended to apply to a range of proceedings affecting children under the matrimonial Ordinances. However, it is possible that the differing references in the Ordinances to the types of orders covered may lead to anomalies. It may be arguable, for example, that the application of the welfare principle in section 3(1) of the Guardianship of Minors Ordinance to proceedings concerning the *"upbringing"* of a minor would not include guardianship proceedings.⁴

9.12 To avoid such anomalies arising, we proposed in our Consultation Paper⁵ that it should be made clear that the welfare principle guides all proceedings involving children, including those concerning questions of guardianship, maintenance or property.

4 As we noted in our Consultation Paper, HKLRC Sub-committee on Guardianship and Custody, *Consultation Paper: Guardianship and Custody* (Dec 1998), at para 6.7.

5 Same as above, at paras 6.7 and 15.2.

9.13 Although this broadly stated application of the welfare principle was widely supported on consultation, concerns were raised by some consultees as to the nature of the welfare principle itself and its impact in cases where the interests of the child conflicted with those of the child's mother or the family generally. For example, in the custody context, it might be considered in the child's best interests, but not necessarily his family's, for a child to maintain some form of continuing contact with a father who has behaved violently towards the mother or other members of the family.

9.14 We have taken careful account of these issues. We note that the courts will consider what is in the best interests of the child within the family context and that cases might arise where the interests of respective family members compete. For particularly difficult cases, such as those described above involving family violence, we agree that special consideration should be given to how these cases are handled by the courts, and have set out a number of specific reform proposals under this head in Chapter 11 of this report. Even in these cases, however, we do not agree that the welfare or "*best interests*" principle should be displaced. In proceedings involving the custody of children and related issues, the best interests of the child must be the paramount consideration to be applied by the court in every case.

9.15 It would be useful to clarify also that the scope of our recommendation is limited to proceedings brought under the relevant matrimonial Ordinances, as there are proceedings outside these Ordinances in which it may not be appropriate for the interests of the child to be the primary concern of the court.⁶

9.16 The welfare principle may not be applicable, for example, in proceedings brought under sections 12 and 13 of the Parent and Child Ordinance (Cap 429). These provisions deal with the granting of parental orders in favour of gamete donors and the granting of orders for the use of scientific tests in determining parentage.⁷ Similarly, it appears that the welfare principle may not apply in injunction proceedings brought under the Adoption Ordinance (Cap 290).⁸

6 For a brief discussion of the current exceptions to the welfare principle in proceedings affecting children, see A Liu, *Family Law for the Hong Kong SAR* (HKU Press 1999), above, at 247.

7 Same as above.

8 Same as above. This is also the case in relation to injunction proceedings brought under the Domestic Violence Ordinance (Cap 189) ("DVO"), where section 3(2) of the Ordinance lists various factors which the court is to take into account, including the needs of any child involved. Although these factors are all relevant, the weight to be given to each depends on the particular facts of the case: see Liu, above, at 465. See the further discussion on the DVO in Chapter 11, below, at paras 11.40 to 11.60.

It would appear also that the welfare principle does not apply to the granting of care or supervision orders under section 34(1) of the Protection of Children and Juveniles Ordinance (Cap 213) ("PCJO"), though, as we have seen above, it does apply to the granting of such orders under the matrimonial Ordinances: see Liu, above, at 247 and 455. For a further discussion of this issue, and our recommendation that the welfare principle should apply to care or supervision proceedings brought under the PCJO, see Chapter 13 below, at paras 13.19 to 13.20 (Recommendation 58).

Recommendation 1

For the removal of doubt, we recommend that it should be made clear that the welfare or "*best interests*"⁹ principle guides all proceedings concerning children under the Guardianship of Minors Ordinance (Cap 13), the Matrimonial Causes Ordinance (Cap 179), the Matrimonial Proceedings and Property Ordinance (Cap 192) and the Separation and Maintenance Orders Ordinance (Cap 16), including questions of guardianship, maintenance or property.

"First" consideration

9.17 In England, 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*." This change was made because the weight to be given to the term had caused some confusion in the courts.¹⁰

9.18 As we saw above, in Hong Kong, section 3 of the Guardianship of Minors Ordinance (Cap 13) continues to use the terminology of the 1971 Act which requires the court to regard the welfare of the child as "*the first and paramount consideration*," and that this formulation of the welfare principle is also adopted in the Matrimonial Causes Ordinance (Cap 179) and the Matrimonial Proceedings and Property Ordinance (Cap 192). We agree with the more recent English approach that the word "*first*" is unnecessary and may cause confusion.

"Best interests"

9.19 The concept of "*welfare*" is retained in the Children Act 1989 and the Children (Scotland) Act 1995. However, the Australian Family Law Council considered that using the term "*best interests*" to describe the principle was more in conformity with the language of the United Nations Convention on the Rights of the Child.¹¹ 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."*¹²

9 See Recommendation 2, below.

10 See *J v C* [1970] AC 668.

11 United Nations Convention on the Rights of the Child (1989), article 3.

12 Family Law Council, *The Operation of the (UK) Children Act 1989* (Mar 1994, Report), at para 49.

9.20 This recommendation was adopted in Australia in section 65E of the Family Law Reform Act 1995. In Hong Kong, section 5 of the Separation and Maintenance Orders Ordinance (Cap 16) was amended in 1997 to provide that, *"in making an order ... the court shall have regard primarily to the best interests of the children."*¹³

9.21 We proposed in our Consultation Paper¹⁴ that the term *"best interests"* was more appropriate for modern conditions in Hong Kong than the term *"welfare,"* and was more in compliance with our international obligations under the United Nations Convention on the Rights of the Child. As indicated above, we also considered that the word *"first"* should be omitted from the legislation. We therefore proposed that 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 ..."*, and that consequential amendments should be made to the other matrimonial Ordinances.

9.22 While the majority of our consultees supported these proposals, queries were raised as to whether the change in definition from *"welfare"* to *"best interests"* would be effective, and also whether a more specific definition should be put forward. We have considered these issues, and while we acknowledge that the effectiveness of the change in definition will remain to be seen, we feel that the *"best interests"* formulation of the principle is the best reform option at this time.

Recommendation 2

To reflect our view that the term *"best interests"* is more appropriate for modern conditions in Hong Kong than the term *"welfare,"* and is more in compliance with our international obligations under the United Nations Convention on the Rights of the Child, we recommend that 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 ..."*

We also recommend that consequential amendments should be made to the other matrimonial Ordinances.

Statutory checklist of factors

9.23 In determining what is in the child's best interests in proceedings concerning children, an important issue is whether the scope for decision-

13 Section 5(3), Separation and Maintenance Orders Ordinance (Cap 16) ("SMOO"), as inserted by the Marriage and Children (Miscellaneous Amendments) Ordinance (Ord No 69 of 1997).

14 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.8 and 15.3.

making by the judge should be unfettered, or whether there should be a checklist of factors, laid down in statute, to guide the court in making its decisions. We noted earlier in this report that the current formulation of the welfare or best interest principle does not contain such a checklist.¹⁵

9.24 The arguments in favour of a checklist are that: it would provide greater consistency and clarity; it is more systematic; all professionals could use the same checklist; and parents and children would have a greater understanding of the basis of the judge's decision.¹⁶

9.25 The arguments against the use of a statutory checklist are that it may lengthen proceedings, judges may come to take a mechanical approach to decision-making, legal advisers and social workers may use their own checklist in any event, and the best interests principle is all-encompassing.¹⁷

9.26 On balance, we consider that a statutory checklist of factors would be a useful mechanism to assist the court in making its determination in any particular case. It would also assist social welfare officers in preparing their reports for the court, as they could use the list to ensure that all aspects of the best interests of the child were covered. In cases where it arose, judges would be able to identify more clearly their reasons for departing from the recommendations in a social welfare officer's report. There would also be less concern about judges applying their own subjective judgement or cultural values.

The English checklist

9.27 As a potential model for the checklist, we saw earlier in Chapter 5 that section 1(3) of the English Children Act 1989 provides a list of factors for the court to consider when it is making a decision in contested section 8 applications (for residence, contact and other orders) and in all applications by a local authority for care and supervision orders. Section 1(3) states:

"In the circumstances mentioned in subsection (4),¹⁸ 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;*

15 See Chapter 2, above, at para 2.41, where this aspect of section 3 of the Guardianship of Minors Ordinance (Cap 13) ("GMO") is discussed.

16 See Scottish Law Commission, *Report on Family Law* (1992, No 135), at para 5.21. The Scottish report notes, at para 5.23, that those who commented on the proposals were in favour of the statutory checklist, with the exception of the legal profession.

17 Same as above, at para 5.22.

18 The circumstances are that the court is considering whether to make, vary or discharge an order made under the Act and this is opposed by any party to the proceedings.

- (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."*

The Australian checklist

9.28 As another potential model, we saw in Chapter 7 that a more detailed checklist of factors is used in Australia to assist the court in determining the child's best interests. Section 68F(2) of the Family Law Act 1975, which was amended in 1995,¹⁹ includes the following factors to be considered:

- "(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;*

¹⁹ By the Australian Family Law Reform Act 1995.

- (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."*

The draft checklist proposed in our Consultation Paper

9.29 In our Consultation Paper we proposed the introduction of a statutory checklist of factors to assist the judge in exercising his discretion in determining custody or guardianship proceedings.²⁰ We proposed the adoption of the checklist set out in section 1(3) of the English Children Act 1989, which we considered was more concise than section 68F(2) of the Australian Family Law Act 1975.²¹ In addition, we proposed that section 68F(2)(b) (in part), and 68F(2)(f) (in part), of the Australian Act should be incorporated into a composite section based on section 1(3) of the English

20 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.12 and 15.4.

21 Same as above, at paras 6.13 and 15.5.

Children Act 1989. Our proposed checklist, as set out in our Consultation Paper, was as follows:

"(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),²²*
- (b) his physical, emotional and educational needs;²³*
- (c) the likely effect on him of any change in his circumstances;²⁴*
- (d) his age, maturity, sex, social and cultural background and any characteristics of the child which the court considers relevant;²⁵*
- (e) any harm which he has suffered or is at risk of suffering;²⁶*
- (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;²⁷*
- (g) the nature of the relationship of the child with each of the child's parents and with such other persons;²⁸*
- (h) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;²⁹*
- (i) the range of powers available to the court under this Ordinance in the proceedings in question."³⁰*

22 This is based on section 1(3)(a) of the English Children Act 1989 ("1989 Act"), though we have referred to the child's ascertainable "views" instead of his "wishes and feelings," the term used under the 1989 Act.

23 Based on section 1(3)(b), 1989 Act.

24 Based on section 1(3)(c), 1989 Act.

25 Based on section 1(3)(d), 1989 Act, with elements of section 68F(2)(f) of the Australian Family Law Act 1975 ("1975 Australian Act") relating to the child's "maturity" and "social and cultural" background.

26 Based on section 1(3)(e), 1989 Act.

27 Based on section 1(3)(f), 1989 Act.

28 Based on section 68F(2)(b), 1975 Australian Act.

29 Based on section 68F(2)(h), 1975 Australian Act.

30 Based on section 1(3)(g), 1989 Act.

9.30 We also welcomed views on whether section 68F(2)(d) of the Australian Act, relating to "*the practical difficulty and expense*" of a child maintaining contact with a parent, should be adopted and incorporated into the checklist.³¹

9.31 On consultation, most respondents agreed in principle with the proposal to introduce a statutory checklist of factors. However, a number of issues were raised on particular aspects of the proposed checklist. We have considered these further. Our findings and conclusions are set out below.

All factors to be considered?

9.32 Questions were raised by consultees as to how the checklist would operate in practice, in particular, to what extent the court would be obliged to consider all of the factors noted in the statutory checklist. In answer, we envisage that it would be mandatory for the judge to go through the checklist and positively consider *all* of the factors listed, but the extent to which he then applies each factor and the weight to be given to each in the particular case before him would be a matter for the judge.

Broader English checklist versus more narrowly-defined Australian checklist

9.33 Although most consultees agreed with our proposed approach and favoured the broader English Children Act checklist, a few expressed the view that the more precise wording of some of the factors in the Australian legislation was to be preferred.³²

9.34 While it could be argued on the one hand that the narrower, more detailed Australian factors may provide better guidance to judges (particularly initially, in the context of the introduction of the new reforms that we are proposing generally for the law in this area), we are conscious of the danger that a more narrowly-defined set of factors could diminish the judge's discretion and tie his hands in any particular case. Another consideration is the possibility that the adoption of a more detailed checklist may lead to more appeals in custody cases. In contrast, a more broadly-expressed list of factors, while affording a fair degree of guidance to the judge, provides him with more discretion and flexibility to, for example, take account of changes in the parties' circumstances. We therefore conclude that, in general, our original, more broadly-stated Children Act provisions are to be preferred.

9.35 Several further refinements of our draft statutory checklist were suggested by some of our consultees and these are discussed below.

31 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.14 and 15.6. The relevant Australian provision states that account should 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.

32 In particular, those comprised in section 68F(2)(c) and (e) of the 1975 Australian Act. See the discussion below.

Ascertainable views of the child

9.36 One of the consultees proposed that the word "*understanding*" in factor (a) of the draft checklist should be replaced by the word "*maturity*." We considered this but concluded that the word "*understanding*," as used in the equivalent English provision, should remain. We noted that it may be possible for a child to be "*immature*" but still have "*understanding*" of the situation.

Likely effect on the child of any change in circumstances

9.37 One consultee preferred the Australian equivalent provision for factor (c) of the draft checklist. Our draft factor (c) is based on section 1(3)(c) of the English Children Act 1989. The relevant Australian provision, section 68F(2)(c) of the Australian Family Law Act 1975, relates similarly to the likely effects on the child of any changes in his circumstances, except that it goes further to include specific reference to the effects on the child of separation from other family members. Having considered this issue, we hold to the view that the more broadly-worded English factor (c) is to be preferred because of the wider discretion it affords to the judge.

Harm which the child has suffered or is at risk of suffering

9.38 One respondent suggested that draft factor (e), which is based on section 1(3)(e) of the Children Act 1989, and relates to any harm which the child has suffered or is at risk of suffering, was superfluous as it was already largely covered by draft checklist factor (b), concerning the child's physical, emotional and educational needs. After considering this point, we concluded that factor (e) represents quite separate criteria to (b) and therefore should remain as a separate factor to be considered by the court.

Specific reference to family violence

9.39 Also within the context of "*harm*" to the child, we considered the suggestion of another consultee who proposed the addition of a separate factor specifically referring to circumstances of family violence in the case before the court.

9.40 We note that a possible model for this factor is contained in section 68F(2)(i) of the Australian Act, by which the court is to have regard to "*any family violence involving the child or a member of the child's family*."³³

33 We note that in England there has been a recent amendment to the definition of "*harm*" to a child under section 31(9) of the 1989 Act (in the context of care and supervision orders) by section 120 of the Adoption and Children Act 2002. "*Harm*" therefore now includes "*impairment suffered from seeing or hearing the ill-treatment of another*." The explanatory note to the relevant clause of the 2002 Bill states, "*The amendment will apply to all proceedings where the court applies the 'welfare checklist' in section 1(3) of the 1989 Act. This includes proceedings for contact and residence orders*": see House of Lords (Session 2001-2002) - Adoption and Children Bill - Explanatory Notes, para 282.

9.41 The issue of family violence in the context of child custody disputes generally is discussed in detail in Chapter 11 of this report. In that chapter, we note our conclusions that custody and access cases involving domestic violence require special consideration by the courts. For the purposes of the current proposal, we note our agreement with the suggestion of the respondent, and recommend that an additional factor referring to family violence should be added into the statutory checklist of factors.

Capability of each of the parents to meet the child's needs

9.42 As with factor (c) above, one of our consultees indicated that it preferred the Australian equivalent for factor (f) of the draft checklist. The relevant Australian provision is section 68F(2)(e), which refers to the capacity of each parent or of any other person in meeting the child's needs, *"including emotional and intellectual needs."* The equivalent Children Act provision on which our own draft factor is based is section 1(3)(f), which refers simply to the child's *"needs."* Having considered the respondent's view, we continue to prefer the more broadly-worded English factor (f), again because of the greater discretion that it allows to the judge.

The attitude of each of the parents to the child and to parenthood

9.43 A consultee expressed concern that the proposed checklist factor (h), which is based on section 68F(2)(h) of the Australian Act, and which relates to the parent's attitude to the child and to the responsibilities of parenthood, may promote divisiveness and litigation between the parents. Though we note the consultee's concern, we do not agree that it will encourage an adversarial approach on the part of the parents and do not foresee any difficulty with the operation of this proposed factor.

New factor based on section 68F(2)(d) of the Australian Act

9.44 As mentioned earlier, we welcomed views in our Consultation Paper on whether the factor in section 68F(2)(d) of the Australian Act should be adopted and incorporated into a checklist for Hong Kong. This factor relates to *"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."*

9.45 This provision would be relevant to cases where one of the parents was proposing to migrate with the child, or where the parents already lived in different countries, and one could afford to travel to maintain contact with the child but the other could not. Under the proposed factor, if everything else were to be equal between the parents, the court might consider ordering that the child should reside with the parent who could not afford to travel, or that the wealthier parent may need to finance the other parent's travel costs in maintaining contact.

9.46 On consultation, a number of respondents referred to this factor, with some being in favour of inclusion and some against. Comments from those in favour included: that the wording of section 68F(2)(d) echoed Article 9 of the United Nations Convention on the Rights of the Child; that the judge's active consideration of this factor would in turn prompt active consideration by the parties of how contact could be maintained with the child even across long distances; and that it would merely point to another factor which the court may take into account in deciding custody or contact issues. Respondents not in favour were concerned that the best interests of the child might not prevail if such a factor were to be considered by the judge.

9.47 On balance, we are in favour of the inclusion of the additional provision along the lines of the section 68F(2)(d) factor. However, we feel that the wording of the factor as it stands may be too restrictive, in that it appears to imply that the court should require the child to stay in, or be brought back to, the home jurisdiction. It would be preferable if the provision were drafted as broadly as possible to stress the aspect of the child maintaining contact rather than avoiding separation *per se* with one of the parents.³⁴ We consider that the precise wording of this new factor should be left to the Law Draftsman to determine.

New "catch-all" factor based on section 68F(2)(l) of the Australian Act

9.48 We consider it significant that even the more narrowly-defined Australian list of factors is not intended to be exhaustive, as it contains, at section 68F(2)(l) the catch-all provision that the court is to consider "*any other fact or circumstance that the court thinks is relevant.*" While we note that our own draft checklist, following the English model, already states at the beginning of the provision that the court "*shall have regard in particular to*" the relevant factors (emphasis added), we recommend that, in order to make the position absolutely clear that our own checklist is not exhaustive, a catch-all provision should be added at the end of the draft checklist along the lines of section 68F(2)(l) of the Australian Family Law Act 1975.

Gender sensitive drafting

9.49 One respondent to our Consultation Paper commented that gender sensitive drafting of the legislation needed to be expressly pursued. While we agree in principle with this view, we nonetheless consider that the gender sensitivity of the proposed legislative provisions is a drafting matter to be taken up at the law drafting stage.

³⁴ We note that it will be the judge's role to balance the various factors in the checklist, and that he would have an unfettered discretion as to whether he actually applied this factor or not. We also note that judges in Hong Kong have more experience in dealing with children being taken out of the jurisdiction than perhaps anywhere else in the world. We suspect that cases where there would be disputes over these arrangements are likely to be rare in Hong Kong, as parents often prefer their children to be educated overseas.

Recommendation 3

We recommend the introduction of a statutory checklist of factors to assist the judge in exercising his discretion in determining the proceedings that will replace custody or guardianship proceedings under these reforms.³⁵ This checklist should be broadly based on that set out in section 1(3) of the Children Act 1989 in England.

We also recommend the inclusion in the checklist of the following additional factors based on section 68F(2) of the Family Law Act 1975 in Australia:

- (i) section 68F(2)(b) (in part) in relation to the child's relationship with each of his parents and other persons;**
- (ii) a broader formulation of section 68F(2)(d) of the Australian Act, in relation to the practical difficulty of maintaining contact with either parent;**
- (iii) section 68F(2)(f) (in part), in relation to any characteristics of the child that the court considers relevant;**
- (iv) section 68F(2)(h) in relation to the attitudes of each of the parents towards the child and towards the responsibilities of parenthood;**
- (v) section 68F(2)(i) in relation to any family violence involving the child or a member of the child's family; and**
- (vi) a catch-all factor along the lines of section 68F(2)(l).**

Parental responsibility and rights

Concept of parental responsibility

9.50 As we saw earlier in Chapter 5, before the Children Act 1989, parental rights and duties in England were based on the legal concept of “*guardianship*,” which tended to emphasise rights and authority over a child, rather than parental responsibility for his welfare. It was also not possible to say that the powers and responsibilities of guardians were the same as those

35 A suggested draft of the statutory checklist is set out in Annex 2, below, at para 4.

of the parents.³⁶ On the death of a parent a testamentary guardian³⁷ would act with the surviving parent.

9.51 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 of a child has in relation to the child and his property.*"³⁸

9.52 In our Consultation Paper,³⁹ we proposed that the concept of parental responsibility was 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.

9.53 While most of the respondents who commented on this proposal supported it, some were not in favour. As with the recommendations on the welfare principle, concerns were raised, in the context of family violence in particular, that the implementation of the parental responsibility proposals would exacerbate the predicament of abused wives by allowing the non-residential parent to be obstructive. In this sense, it was noted, the interests of the child would be in conflict with the interests of the wife.

9.54 As we have explained previously, the whole emphasis of the new proposals is on the responsibilities of parents for their children, not on parental rights. Accordingly, in situations where the interests of the child and other family members compete, the interests of the child must prevail. Having said this, we do recognise that the plight of family members subjected to domestic violence must be given special consideration, and have therefore made a number of specific proposals under this head in Chapter 11 in this report.

9.55 Another respondent proposed that a mechanism should be introduced to penalise parents for non-compliance with their parental responsibilities. While we note the respondent's concerns, we do not agree that there should be specific sanctions for non-compliance. We consider that the objectives of the reforms, of encouraging the greater involvement of both parents in the lives of their children after divorce, should be promoted primarily through public education.

36 See English Law Commission, *Family Law Review of Child Law: Guardianship*, (1985, Working Paper No 91), at para 2.26. See Chapter 5, above.

37 A testamentary guardian is a person appointed by a parent, by deed or by will, to look after the child in the event of the parent dying.

38 Section 3 of the 1989 Act.

39 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.18 and 15.8.

Recommendation 4

We recommend that the concept of parental responsibility should replace that of guardianship, except that the concept of guardianship should be retained in relation to a third party's responsibilities for a child after the death of a parent.

Parental rights

9.56 While we feel that the focus on the language of rights and authority in both the existing Hong Kong legislation and the common law is not appropriate, we feel that it is helpful to have a separate definition of parental rights as a guide to parents, children and the court on the parameters of the relevant rights and powers.

9.57 Unlike the English legislation, sections 1 and 2 of the Children (Scotland) Act 1995 make separate provision for parental responsibilities and parental rights respectively, and explain them in some detail.⁴⁰ We therefore proposed in our Consultation Paper⁴¹ that provisions on the lines of sections 1 and 2 of the Children (Scotland) Act 1995 should be adopted as two separate sections, one on rights and one on responsibilities.

9.58 The proposed draft section on parental responsibilities based on section 1 of the Scottish Act was set out in our Consultation Paper as follows:⁴²

- "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;*

40 See Chapter 6, above, for full text.

41 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.19 and 15.9.

42 Same as above, at Annex 1, para 5.

- (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;⁴³*
- (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."*

9.59 The proposed draft section on parental rights in our Consultation Paper, based on section 2 of the Scottish Act, stated:⁴⁴

- "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;*

⁴³ This diverges from the original Scottish provision, which specifies that the parental responsibilities cease when the child reaches the age of 16, except for the parental responsibility to provide guidance, which extends to the child attaining 18 years of age: see Chapter 6, above, at para 6.11 to 6.12, and the discussion below.

⁴⁴ HKLRC Sub-committee on Guardianship and Custody (1988), above, at Annex 1, para 6.

- (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."*

9.60 On Consultation, there was general support from the respondents for this proposal. Two concerns were raised, however. One was a general reservation about the use of language to effect the change of concept in the minds of the general public. The respondent concerned doubted that the use of new terminology and an articulated statement of parental responsibilities in the law would be sufficient to change parents' appreciation of their legal roles in relation to their children. While we acknowledge this view, it is clearly not our intention that the new language of the law alone will effect this change. We fully accept that comprehensive public education will be required to introduce these new concepts.

9.61 A second concern was that defining the various aspects of parental responsibility and parental rights in legislation might prove to be too restrictive, as these definitions would likely change over time and so the legislation would need to be amended from time to time to bring the law up to date. It was noted that defined lists of parental responsibilities and rights appearing in statute would supersede any common law definitions of these terms that had previously evolved. The suggestion was made that the more

detailed definitions of parental responsibilities and parental rights should comprise guidelines only.

9.62 We have considered these views and the alternatives of adopting either a more general provision on parental responsibilities, as under the English Act scheme, or of adopting a combination of the more general and the more detailed definitions, but conclude that our original approach, of defining parental responsibilities and rights in the legislation along the lines of the Scottish model, is to be preferred.

Recommendation 5

We recommend the adoption of a provision based on sections 1 and 2 of the Children (Scotland) Act 1995, which specifies separately a list of parental responsibilities and a list of parental rights.

Age at which parental responsibility ceases

9.63 Although our recommended draft provisions above are closely based on the equivalent Scottish provisions, we do not agree that the age limits applying to parental responsibilities and parental rights in the Children (Scotland) Act 1995 should be adopted in Hong Kong. The Scottish provisions specify that all parental rights and parental responsibilities, except the responsibility to provide guidance, shall cease when the child reaches 16 years of age. The parental responsibility in Scotland to provide guidance lasts until the child reaches 18.

9.64 In England, a child is defined under the Children Act 1989 as a person below the age of 18 years.⁴⁵ However, a court order relating to residence, contact and other matters under section 8 of the Act does not extend beyond the child reaching the age of 16 years unless it expressly provides for this.⁴⁶

9.65 In our Consultation Paper,⁴⁷ we proposed that the age of 18 should apply to all the situations referred to in sections 1 and 2 of the Children (Scotland) Act 1995. The respondents who commented on this proposal were all generally in support of it. Some reservations were expressed as to how the age limit of 18 would apply in certain circumstances, however. One of the issues raised was whether the courts would continue to be entitled to make orders for the financial provision and maintenance of children who were

45 Section 105(1), 1989 Act.

46 Section 91(10), 1989 Act. Part of the justification for this was that a child can leave school to take up employment at that age. See also section 9(6) and 91(11) of the Act, which deal with the exceptional cases where an order extends beyond the child attaining 16 years of age.

47 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.20 and 15.9.

over 18 years of age but were still in full-time education, or were mentally or physically handicapped and therefore required long-term support. As will be discussed further in Chapter 10, it is not our intention to abrogate the right of the court to grant such orders in these situations.⁴⁸

Recommendation 6

We recommend that all the parental rights and responsibilities referred to in sections 1 and 2 of the Children (Scotland) Act 1995 should apply in respect of a child until the child reaches the age of eighteen.

Father as natural guardian

9.66 At common law a father is the natural guardian of his legitimate child. Even though the mother has equal rights and authority by virtue of section 3(1)(b) of the Guardianship of Minors Ordinance (Cap 13), the common law right of the father has never been abolished in Hong Kong. It is clear that 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). In England, 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.*"

9.67 In our Consultation Paper,⁴⁹ we proposed that the common law right of the father to be the natural guardian of his legitimate child should be abolished, on the lines of section 2(4) of the English Children Act 1989, as it was no longer appropriate in Hong Kong. We also proposed the repeal of section 3(1)(b) of the Guardianship of Minors Ordinance (Cap 13).⁵⁰

9.68 On consultation, there was widespread support from respondents for this recommendation, though one respondent observed that there may need to be consequential changes made to section 7 of the Births and Deaths Registration Ordinance (Cap 174), which relates to the current duty of the father of a child to register the child's birth. The respondent also expressed concern that public education would be required to assist parents to understand the new position. We agree with this observation, and anticipate that the relevant Government departments will produce information pamphlets on the subject for distribution at, for example, Government departments and district offices.

48 Other proposals in relation to the age of the child are also discussed elsewhere in this report. See, in Chapter 13 below, discussions on the relevant age of the child for the purposes of parental consent to marriage, the duration of wardship orders and the jurisdiction of the Official Solicitor.

49 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.22 and 15.10.

50 We note that the repeal of section 3(1)(b) of the GMO will also require the minor amendment of section 3(1)(c)(i), GMO.

Recommendation 7

We recommend that the common law right of the father to be natural guardian of his legitimate child should be abolished.

We also recommend the repeal of section 3(1)(b) of the Guardianship of Minors Ordinance (Cap 13).

Married parents

9.69 In England, 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. It is not clear, however, whether this section excludes those parents who marry after the birth of a child. Under the current law in Hong Kong, such a child would be legitimated by the subsequent marriage of his parents under the Legitimacy Ordinance (Cap 184).

9.70 In our Consultation Paper,⁵¹ we recommended the adoption of a provision on the lines of section 2(1) of the Children Act 1989 in England, but that it should be amended, for the removal of doubt, to include reference to parents married subsequent to the birth of the child. On consultation, this proposal was unanimously supported by those who responded under this head.

Recommendation 8

We recommend the adoption of a provision on the lines of section 2(1) of the Children Act 1989 in England, 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

Language of the current law

9.71 As we saw earlier in this report,⁵² an unmarried father in Hong Kong does not automatically become a guardian or obtain parental responsibility for his child. He can, however, apply under section 3(1)(d) of the Guardianship of Minors Ordinance (Cap 13) for an order conferring parental rights and authority on him.

⁵¹ Same as above, at paras 6.23 and 15.11.

⁵² See Chapter 2, above, at para 2.11 and Chapter 3, above, at para 3.19.

9.72 In our Consultation Paper,⁵³ we proposed 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. The text of these provisions currently state:

"(c) where the minor is illegitimate ...

(ii) a father shall only have such rights and authority, if any, as may have been ordered by a court on an application brought by the father under paragraph (d);

(d) the Court of First Instance or a judge of the District Court may, on application, where it is satisfied that the applicant is the father of an illegitimate child, order that the applicant shall have some or all of the rights and authority that the law would allow him as father if the minor were legitimate."

9.73 On consultation, the respondents who commented on this proposal supported it, although some issues were raised in relation to other means by which the unmarried father may acquire parental responsibility. These issues are discussed later in this chapter.

Recommendation 9

We recommend that the language of section 3(1)(c)(ii) and (d) of the Guardianship of Minors Ordinance (Cap 13), which relates to the *"rights and authority"* of an unmarried father, should be changed to reflect the new language of responsibilities rather than rights.

Acquisition of parental responsibility by signing the birth register

9.74 As we saw in Chapter 5, where parents in England are unmarried at the time of the child's birth, only the mother has parental responsibility for their child as of right but the father can acquire it in the following ways.⁵⁴

⁵³ HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.25 and 15.12.

⁵⁴ See Chapter 5, above, at paras 5.17 to 5.19. See also section 2(2), 1989 Act.

- (a) by becoming registered as the child's father on the birth certificate;⁵⁵
- (b) by taking office as a guardian of the child appointed under the Children Act 1989;⁵⁶
- (c) by obtaining a parental responsibility order from the court;⁵⁷
- (d) by making a parental responsibility agreement with the mother;⁵⁸ and
- (e) by obtaining a residence order, in which case the court is bound to make a separate parental responsibility order for the father.⁵⁹

9.75 Under the current law in Hong Kong, however, as we have seen above, an unmarried father must apply for a court order to acquire parental rights and authority for his child. This is the case even if he has already taken the positive step of signing the birth register to identify himself as the father of a child.⁶⁰

9.76 If it were possible for an unmarried father to acquire parental responsibility for his child by virtue of the child's birth alone, without needing to take any further steps, then this would be termed "*automatic*" acquisition of parental responsibility and rights. With "*automatic*" responsibility and rights, the burden would be on the mother to apply to court to take away or diminish the exercise of the father's rights.

9.77 In this report, we use the term "*semi-automatic*" acquisition of parental responsibility and rights to mean that the unmarried father could obtain parental responsibility and rights by taking some positive step, such as signing the birth register or entering into a parental responsibility agreement, as an alternative to applying for parental responsibility to be conferred by court order.

9.78 In our Consultation Paper,⁶¹ we did not propose the automatic acquisition of parental responsibility and rights by unmarried fathers. We proposed instead that one of the means that an unmarried father could acquire parental responsibilities and rights would be by signing the birth register. We therefore proposed that the signing of the birth register should

55 Section 4(1)(a), 1989 Act.

56 Section 5(6), 1989 Act.

57 Section 4(1)(c), 1989 Act.

58 Section 4(1)(b), 1989 Act.

59 Section 12(1), 1989 Act.

60 See subsections 3(1)(c)(ii) and 3(1)(d), GMO. The current legal position was established by virtue of section 19 of the Parent and Child Ordinance (Cap 429), which was enacted in 1993 (Ord 17 of 1993).

61 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.28 and 15.13.

be included in the proposed legislation which delineates the means of acquiring parental responsibility.⁶²

9.79 While most of the respondents who commented on this proposal supported it, one respondent felt that signing the birth register should not be sufficient in itself to acquire parental responsibility and rights and that this should come with the signing of a parental responsibility agreement by both parents (discussed below). The respondent's concern was directed at endeavouring to ensure that the mother really wanted to recognise the father's responsibilities and rights, and that financial support arrangements for the child, if relevant, would be adequately protected. In our view, even without these provisions granting semi-automatic parental responsibility, if a father comes forward to sign the birth register, he is holding himself out as the father of the child even if that does not yet grant him parental responsibility and rights. Also, whether or not a parental responsibility agreement has been signed between the parties, if their relationship breaks down, the mother could still resort to the court for relief.

9.80 Another respondent raised concern about who would answer the complex queries which unmarried fathers might raise as to their rights and obligations under the new proposals (for example, the implications of signing or not signing the birth register, etc). We feel that this concern could be met by the Government producing information pamphlets explaining the position and by an effective publicity campaign.

Recommendation 10

We recommend that an unmarried father should be capable of acquiring parental responsibilities and rights by signing the birth register. The proposed legislation should include this in a list of the ways in which parental responsibility can be acquired. We do not recommend the automatic acquisition of parental responsibility or rights by unmarried fathers.

Parental responsibility agreements

9.81 A parental responsibility agreement signed by unmarried parents ensures that the father can continue to exercise parental responsibility in the event of the mother's death. He would then become the surviving parent automatically without having to be appointed as testamentary guardian by the mother.⁶³ In line with this, we proposed in our Consultation

62 For example, see the list above regarding the English position, at para 9.74.

63 See further, the discussion below, at paras 9.124 to 9.125 and Recommendation 19.

Paper⁶⁴ that unmarried parents should be encouraged to sign parental responsibility agreements to ensure the best interests of their child.

9.82 We also consider that 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. We therefore also proposed in our Consultation Paper⁶⁵ that unmarried mothers should be encouraged to appoint a testamentary guardian for their children.

9.83 On consultation, while most respondents were in favour of these proposals, there were some queries as to how these proposals would operate in practice. In particular, respondents wondered what forms the "*encouragement*" would take and which bodies would be responsible for undertaking it. In answer to this, we would expect that the Administration will take a positive role in this area, by policy promotion, Social Welfare Department initiatives, the production of pamphlets, publicity and public education. We would also hope that solicitors, social workers, doctors, and others involved in family advisory work would encourage parties to enter these types of agreements.

9.84 In terms of the parental responsibility agreement and what form it should take, we have no fixed views on whether this should be a legalistic form or an informal one, and would leave this to the Administration to determine how full implementation should be effected. We respectfully suggest that a body like the Law Society's Family Law Committee might consider developing a specimen form for parental responsibility agreements.

9.85 We also note the issue of enforceability of these agreements and consider that they should be enforced in the same way as other agreements, by resort to the courts.

Recommendation 11

We recommend that unmarried parents should be encouraged to sign parental responsibility agreements to ensure the best interests of their child.

We also recommend that unmarried mothers should be encouraged to appoint a testamentary guardian for their children.

64 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.29 and 15.14.

65 Same as above, at paras 6.30 and 15.15.

Permanency of parental responsibility

9.86 Notwithstanding separation or divorce, each parent continues to have parental responsibility under the English Children Act 1989, even if a residence order has been made in favour of one of them.⁶⁶ There is no provision for parental responsibility to be removed. As we saw earlier in Chapter 5, the concept of child custody has been abolished.⁶⁷ Instead, the court makes an order determining the child's residence and, if necessary, a specific issue order. The law in England recognises that it is in the best interests of children that their parents continue to exercise parental responsibility after divorce.

Parents acting independently

9.87 Section 2(7) of the English 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.⁶⁸

9.88 We note that 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.

9.89 In our Consultation Paper,⁶⁹ we proposed 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 exercising contact with the child.

9.90 On consultation, all but one of the respondents who commented on this proposal supported it. The respondent's objection was along similar lines to those mentioned earlier in this chapter, where concern was expressed that the implementation of the proposals in this report might promote further conflict amongst parents already in conflict, which would not be in the best interests of the child. As discussed elsewhere in this report,⁷⁰ we have taken particular note of the problem of domestic violence in the context of custody and access cases, and have made a number of specific recommendations to deal with this issue. In relation to the present proposal,

66 Section 2(6), 1989 Act.

67 See Chapter 5, above, at para 5.7.

68 Section 2(7), 1989 Act. See also section 13(1) and (3) of the Act.

69 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.33 and 15.16.

70 See earlier in this chapter, and in Chapter 11, below.

our intention is to make the situation easier for the parties by not requiring one of the parents, the wife for example, to seek out an absent father in order to make day-to-day decisions and take day-to-day action in respect of their child.

Recommendation 12

We recommend the adoption of a provision on the lines of section 2(7) of the Children Act 1989 enabling persons with parental responsibility to act independently, but restricted to the day-to-day care and best interests of the child.

Scope of parental responsibility – when consent or notification is required

9.91 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 parent acting independently. In *Re G (a minor) (Parental Responsibility: Education)*,⁷¹ 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".

9.92 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 proposed in our Consultation Paper⁷² that one parent should consult the other when it came to making major decisions for the child. We felt that it was preferable if major decisions could be made jointly by the parents, but that day-to-day decisions should not need notification to, or consent by, the other parent.

9.93 We also proposed in our Consultation Paper⁷³ that, 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.

9.94 We proposed that the legislation should include a definition of a major decision and list the classes of major decisions.⁷⁴ We proposed that

71 [1994] 2 FLR 964 (CA).

72 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.35 and 15.17.

73 Same as above, at paras 6.36 and 15.18.

74 Same as above, at paras 6.37 and 15.19.

there should be a list of major decisions requiring the express consent of the other parent and a list of major decisions requiring notification only to the other parent.

List of major decisions where consent of the other parent is required

9.95 We set out in our Consultation Paper a list of the major decisions affecting the child for which consent of the other parent⁷⁵ would be required. If consent should not be forthcoming, a court order would need to be sought. This list includes:

1. consent to change the child's surname;
2. consent to the adoption process;
3. consent to removal of the child out of the jurisdiction for more than one month; and
4. consent to permanent removal of the child out of the jurisdiction.

List of major decisions where notification only is required

9.96 A further list specifies those major decisions where we proposed that notification only to the other parent⁷⁶ would be required. We considered that this list should be as follows:

1. Notification of a major operation or long-term medical or dental treatment for the child;
2. notification of a major change in the child's schooling;
3. notification of bringing the child up in a particular religion;
4. notification of consent to the child's marriage;
5. notification of moving house with the child;
6. notification of removing the child from the jurisdiction temporarily but for less than one month;
7. notification if there are going to be changes in the child's domicile or nationality; and
8. notification of any other major or important decisions in the life of the child.

75 Or other person with parental responsibility for the child.

76 Or other person having parental responsibility.

9.97 In our view, the common law probably provides that doctors may proceed with an emergency medical operation or procedure without any parental consent. Accordingly, in the situations where notification would be needed for medical treatment, we proposed that a short period of notice to the other parent would suffice. A reasonable period of notice would be needed, however, for notification of consent for marriage.⁷⁷

9.98 On consultation, while many respondents supported these proposals, some were not in favour and others expressed reservations about the details of the proposals. The various issues raised by the respondents are outlined below.

Concern that the consent / notification requirements could increase hostility and litigation

9.99 Some consultees were concerned that the introduction of the new consent and notification requirements might be used by trouble-making or abusive spouses to obstruct and harass the other spouse. Particular concern was raised about the vulnerability of battered wives in relation to the requirements to notify the other party of changes of residential address and in the child's schooling.

9.100 We have considered these concerns related to domestic violence both here and elsewhere in this report.⁷⁸ While we would expect that the judge in such situations would be fully informed of all the circumstances of the case and should be able to award orders accordingly (such as a specific issues or prohibited steps order to avoid the need for disclosure), we agree that the judge's power to vary or dispense with items on the parental responsibility list in any particular case should be made explicit. We therefore propose that our recommendation should include express reference to the court having the power to vary or dispense with any of the consent or notification requirements contained in the lists where the court considers this necessary.⁷⁹ It may also be useful if a catch-all provision were to be added to the end of the lists of matters requiring consent or notification, to the effect of "*subject to what the court may otherwise order.*"

9.101 Concern was also raised that if these changes were introduced, they may prompt an increase in litigation in this area, especially initially, as generally speaking, the current "*rights*" of the non-custodial parent to be kept informed and to collaborate in decision-making over the child would be significantly increased. It was also noted that substantial public education

77 We considered that 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 on behalf of the child: see HKLRC Sub-committee on Guardianship and Custody (1998), above, at para 6.41.

78 See Chapter 11, below.

79 We note that the District Court does not have the same inherent jurisdiction to grant orders as the High Court, so the powers of the court would need to be stated in full in the implementing legislation.

would be required to enable the public to understand how these new provisions will operate in practice.

9.102 We accept that it will take effort on the part of the Administration, the courts and the professionals working in the field to acquaint the public with the new concepts and procedures that these reforms will introduce. We also accept that difficult cases will occasionally arise. Nonetheless, we feel that the underlying principles of these reforms, of promoting the continued involvement of both parents in the lives of their children, will operate in the long run in the best interests of children.

Concern about non-contributing spouse acquiring "rights" over the child – enforcement of maintenance orders

9.103 Another issue raised by respondents was that these proposals would enable non-contributing fathers, who were not prepared to pay maintenance towards their child's upbringing, to acquire decision-making "rights" in respect of the child that they currently did not enjoy. Allied to this, some respondents expressed concern at the adequacy of maintenance enforcement in Hong Kong. The respondents called on the Government to do more in this area.

9.104 While we have sympathy for these concerns, our basic approach, as we have noted above, is that the courts should be in a position to make orders that are in the best interests of the child in maintaining a continuing relationship with both parents. From the child's point of view, the payment of maintenance or otherwise may not be a relevant factor to be considered.

9.105 Nonetheless, we do agree and recommend that the Administration should review the existing law and procedures relating to the enforcement of maintenance orders to see how they could be made more effective.

Whether the lists should be in statutory form or expressed as non-statutory guidelines

9.106 Some respondents considered that the respective lists of parental responsibilities should not take statutory form, but should be comprised as non-statutory guidelines. Alternatively, it was suggested that the parents themselves could draw up an itemized list to be approved by the court, or that the parents could be left to decide between themselves as to what is a decision requiring consent. Their reasoning was that the content of the lists may need to change over time and that this would require statutory amendment on each occasion. In reply, we accept that legislative change will be required to reconstitute the lists, but note that we have endeavoured to build into the provisions adequate flexibility for the judge to change or vary the content of the list in any particular case. We therefore note the respondents' comments but favour our original approach that the lists should take statutory form.

Recommendation 13

We recommend that the proposed legislation should specify those decisions relating to the child where the other parent's express consent is required, and those decisions where only notification to the other parent is required.

We further recommend that the court should be given express power to vary or dispense with any of the consent or notification requirements where this is considered necessary.

Recommendation 14

We recommend that the Administration should review the existing law and procedures relating to the enforcement of maintenance orders to see how they could be made more effective.

Acting incompatibly

9.107 In England, 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."

9.108 Where, for example, a residence order has 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.

9.109 In our Consultation Paper,⁸⁰ we proposed that a provision on the lines of section 2(8) of the Children Act 1989 should be adopted. All but one of our consultees who referred to this proposal supported it. The concern raised by the respondent was whether any mechanism could be introduced to monitor parents with regard to their efforts in working for the interests of their children, and whether there would be any mechanism to penalize parents who refused to co-operate with the former spouse and bear parental responsibility.

80 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.43 and 15.20.

9.110 In reply to this, we would be reluctant to see anything in the proposed legislation purporting to define a "*difficult spouse*." We note that that if one spouse is proving to be difficult, the mechanism available to the other spouse would be to apply for a specific issue order, as discussed in the next chapter. It would then be left to the court to adjudicate on the matter.

Recommendation 15

We recommend that a provision on the lines of section 2(8) of the Children Act 1989 should be adopted.

Delegation of parental responsibility

9.111 Section 2(9) of the English Children Act 1989 provides that parents may delegate, but not transfer or surrender, parental responsibility.⁸¹ In contrast, the current Hong Kong provision, section 4 of the Guardianship of Minors Ordinance (Cap 13), refers to the "*giving up*," in whole or in 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.

9.112 In our Consultation Paper,⁸² we proposed that a provision on the lines of the section 2(9) to (11) of the Children Act 1989 be enacted.⁸³ This provides:

- "(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."*

81 Section 3(5) of the Children (Scotland) Act 1995 has a similar provision but is worded slightly differently: see Chapter 6, above, at para 6.23.

82 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.45 and 15.21.

83 Rather than section 3(5) of the Children (Scotland) Act 1995.

9.113 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 incorporate in our proposed new provision based on section 2(9) to (11) of the Children Act 1989 the general purport of the last three lines of section 4(1) which state, *"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"*.

9.114 On consultation, this proposal was supported by all of the respondents who commented on it.

Recommendation 16

We recommend the enactment of a provision based on section 2(9) to (11) of the Children Act 1989 in England, with the addition of words to the effect that no arrangement of a type referred to in that provision shall be enforced by the court if the court is of the opinion that it would not be for the benefit of the child to give effect to that arrangement.

We further recommend that section 4 of the Guardianship of Minors Ordinance (Cap 13) be repealed.

Continuing parental responsibility

9.115 Section 2(6) of the English Children Act 1989 provides that a person does not lose parental responsibility just because someone else, such as a step-parent or an unmarried father, acquires it. The provision states:

"(6) A person who has parental responsibility for a child at any time shall not cease to have that responsibility solely because some other person subsequently acquires parental responsibility for the child."

9.116 Section 11(11) of the Children (Scotland) Act 1995 is worded differently and, in our view, more realistically as it recognises that in making such an order there may be consequences for other persons with such responsibilities. Section 11(11) states:

"An order ... shall have the effect of depriving a person of a parental responsibility or parental right only in so far as the order expressly so provides and only to the extent necessary to give effect to the order; but in making any such order ... the court may revoke any [parental responsibility] agreement which, in relation to the child concerned, has effect by virtue of section 4(2) of this Act."

9.117 In our Consultation Paper,⁸⁴ we proposed the adoption of a provision on the lines of section 11(11) of the Children (Scotland) Act 1995.

9.118 Most of the respondents who referred to this proposal supported it. However, one respondent queried whether there would be an option for the court to consider permanent deprivation of parental rights and responsibility if circumstances suggested that this was necessary. In our view, specifically providing for permanent deprivation of parental rights and responsibility appears somewhat draconian. We note that the court will have a wide discretionary power under the recommendations contained in this report. Therefore, if it appeared to the court in a particular case that a degree of deprivation of parental rights and responsibilities were warranted, even for a lengthy period of time, the proposed new provisions would not rule this out.

Recommendation 17

We recommend a provision on the lines of section 11(11) of the Children (Scotland) Act 1995, in relation to the effect on the retention of parental responsibility and rights by one person when another person also acquires such rights.

Acquisition of parental responsibility by guardians

Removal of surviving parent as guardian

9.119 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.⁸⁵ This order can be included in the decree of divorce or judicial separation.

9.120 If the court appoints the testamentary guardian as sole guardian of the child under section 6(3)(b)(ii) of the Guardianship of Minors Ordinance (Cap 13), the implication for the surviving parent is that his rights cease except for access and the duty to maintain the child. Whether under the current law this removes the surviving father's rights as the natural guardian of his child is unclear, as there has yet to be a specific provision in Hong Kong abolishing the rights of a father as natural guardian of his child.⁸⁶ Where the mother is the surviving parent she is not a natural guardian.

9.121 In England, there is no provision in the Children Act 1989 allowing a parent to be deprived of his parental responsibility. A surviving

84 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.46 and 15.22.

85 Section 19(4), MPPO. The court has power under section 19(3) to declare that a parent is unfit to have custody.

86 However, see the recommendation discussed earlier in this chapter calling for its abolition.

parent therefore retains his parental responsibility even if a testamentary guardian is also acting. The court can, however, make a residence order in favour of the guardian rather than the surviving parent. The English section 8 orders, which we refer to and recommend in the next chapter, ensure that the best interests of the child are protected even if the surviving parent's responsibilities and rights are almost completely circumscribed.

9.122 In our Consultation Paper,⁸⁷ we recommended that the right to remove the surviving parent as guardian under section 6 of the Guardianship of Minors Ordinance (Cap 13) should be repealed. We considered that it would be inconsistent with the adoption of parental responsibility, and the limiting of the concept of guardianship to only third parties appointed on the death of a parent, to retain a power to remove a surviving parent as guardian of his child.

9.123 On consultation, all but one of the respondents who commented on this proposal accepted it. The respondent who rejected the change simply advocated continuation of the current position.

Recommendation 18

We recommend that the right to remove the surviving parent as guardian under section 6(3) of the Guardianship of Minors Ordinance (Cap 13) should be repealed.

Unmarried father as surviving parent

9.124 The implications of the grant of the status of parental responsibility, as discussed earlier,⁸⁸ would be that the unmarried father could be treated as the surviving parent under the Guardianship of Minors Ordinance (Cap 13) 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 proposed In our Consultation Paper⁸⁹ that a provision should be inserted that once the natural father is granted parental responsibilities and rights, whether by fulfilling the requirements for semi-automatic acquisition, or by a court order,⁹⁰ he can be deemed to be the surviving parent under the Ordinance.⁹¹

9.125 On consultation, all of the respondents who referred to this recommendation supported it.

87 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.70 and 15.32.

88 See earlier in this chapter.

89 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.71 and 15.33.

90 See section 3(1)(d) of the GMO as amended.

91 He could also be treated as a guardian if the present law is retained, though we have earlier recommended that the concept of "*guardianship*" should be reserved for third parties appointed to act on the death of one of the parents, and not to surviving parents.

Recommendation 19

We recommend that a provision be inserted in the Guardianship of Minors Ordinance (Cap 13) to the effect that once an unmarried father is granted parental rights or responsibilities, he can be treated on the death of the mother as the surviving parent for the purposes of that Ordinance.

Chapter 10

Recommendations for reform – types of court orders for children

Introduction

10.1 In this chapter we examine our proposed range of new court orders for children to replace the current orders relating to child custody and access.

English provisions

10.2 As we saw in Chapter 5, the modern English orders were designed to focus on the practical arrangements for fulfilling parental responsibilities with a view to minimising disputes between the parents. This was a different approach to that taken under the previous law in England (and the present law in Hong Kong), which tended to focus on one parent controlling the other parent while he had the child physically with him. These newer English orders include residence orders, contact orders, specific issue orders and prohibited steps orders.

Australian provisions

10.3 In Chapter 7, we noted that the Australian Family Law Reform Act 1995 amended their Family Law Act 1975 by the abolition of the concepts of custody and access and the introduction of "*parenting orders*." Largely similar to the English position, these new orders include residence orders, contact orders and "*specific issues*" orders.

Custody orders

10.4 In our view, the language of custody orders implies something akin to ownership of a child. The former common law, still accepted in Hong Kong, which gave the custodial parent virtually all rights concerning the upbringing of the child, inevitably leads to more cases being contested in the courts. To say to non-custodial parents that the only right they retain is to have access to the child, and some undefined residual rights which may only

be exercised if the non-custodial parent finds out that they are being infringed by the custodial parent,¹ is to invite continuing conflict between the child's parents.

10.5 The retention of the current regime of custody orders does not accord with our earlier proposals on parental responsibility, in which we advocated the continuing active involvement of both parents in their child's upbringing after divorce. We therefore proposed in our Consultation Paper² that the current legislative provisions relating to child custody orders should be repealed and replaced by new orders more appropriate to the parental responsibility model. These new orders are discussed later in this chapter. On consultation, most of the respondents agreed with this proposal. A significant minority, however, raised objections and indicated that they would prefer to retain the status quo.

10.6 The respondents expressed concern that under the new reforms the rights of the non-resident parent would be "*unduly*" enhanced at the expense of the residential parent who had the more direct, day-to-day responsibility for the child. This was considered particularly problematic in cases where domestic violence was a factor. These respondents feared that the new changes would expose the residential parents to a greater risk of abuse from ex-spouses than was the case for custodial parents under the current law. They also felt that the best interests of the child should not be the sole consideration in the granting of orders, but that regard should also be given to striking a balance between the rights of the parents, particularly in domestic abuse cases.

10.7 Although we do not agree with the view that the status quo in this area should be maintained, or that the best interests of the child should not be the paramount consideration of the court, we accept that the concerns of these respondents are serious and we have endeavoured to address them within the recommendations of this report. In particular, we have included in the next chapter a set of specific recommendations to cover cases involving family violence.

10.8 Another area of concern to some respondents was the proposed enhancement of the involvement of the non-residential parent in cases where the non-residential parent was not paying maintenance for the child. A view was expressed that a failure by a party to pay maintenance should deny that party access to the child.

10.9 We accept that there are often problems surrounding the enforcement of maintenance orders. In our view this is an issue, though outside the scope of this report, which should be comprehensively addressed by the Administration as soon as possible. However, while we also appreciate that a concept of "*no pay, no see*" may be deeply rooted in some

1 "[C]ustody equates to the legal parental rights and responsibilities borne by the parents of the child." See Hewitt (ed), *Hong Kong Legal Practice Manual: Family* (1998), at 160.

2 HKLRC Sub-committee on Guardianship and Custody, *Consultation Paper: Guardianship and Custody* (Dec 1998), paras 6.78 and 15.35.

sections of our community, we consider it to be fundamental that a child should not be deprived of access to one or other of his parents simply because the parents themselves are not behaving responsibly towards each other. A continuing focus on the respective *"rights"* of the parents, and which parent has been granted *"possession"* of the child to the exclusion of the other, is a mindset that the recommendations of this report are seeking to transform. In making our proposals, we accept that public education will be particularly important in overcoming the perception that access to a child should be, to any degree, *"for sale."*

Recommendation 20

We recommend the repeal of the provisions in the matrimonial Ordinances (including the Guardianship of Minors Ordinance (Cap 13) and the Matrimonial Proceedings and Property Ordinance (Cap 192)) dealing with custody orders and their replacement with provisions introducing the new range of orders outlined later in this Chapter.

Residence order

10.10 Following on from the previous recommendation, there must obviously be a provision in the proposed legislation governing the child's residence and providing for a parent to take responsibility for the child on a daily basis. The English provision, in section 8 of the Children Act 1989, states that a residence order *"means an order settling the arrangements to be made as to the person with whom a child is to live."*³ The Scottish provision, in section 11 of the Children (Scotland) Act 1995, states that 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... "*⁴

3 Section 8(1), Children Act 1989 ("1989 Act").

4 Section 11(2)(c), Children (Scotland) Act 1995 ("1995 Scottish Act").

10.11 A residence order is conceptually different from a custody order and is closer in effect to an order of care and control, where the parent has the day to day care and responsibility for the child.

10.12 In our Consultation Paper,⁵ we proposed that legislation provide for a residence order. On consultation, this proposal received a similar response to the previous one, with most respondents in favour, but a minority indicating that they preferred the existing custody orders to be maintained for the reasons noted above. In addition, two respondents commented that the variety of new orders proposed may create much confusion for lay people. They considered that, in particular, the distinction between the old and new terminologies for the orders was difficult to grasp. Another respondent was concerned at the increased level of support services that would be required to implement the legislation.

10.13 As we have noted previously, we accept that the introduction of these reforms will require an effective public education initiative to be undertaken by the Administration. We also consider that it will be important for lawyers and other professionals working in the family advisory area to explain to their clients the purpose and implications of the new proposals to ensure that their clients understand them.

Definition of a residence order

10.14 In relation to the definition of residence orders, we stated in our Consultation Paper⁶ that we preferred the more detailed language of the English and Scottish legislation⁷ on this point to that of the Australian legislation.⁸ We considered that an even more detailed definition of residence orders may be required for Hong Kong, however. We noted that the terms of the existing order in Hong Kong for care and control equate to having the day-to-day care and responsibility for the child. We saw some merit in retaining the existing language of "*care*" but not that of "*control*," which has some negative connotations. We were also attracted to the Australian section 64B(6) which uses the term "*day-to-day care, welfare and development*" in the definition of a specific issue order, but we concluded that "*development*" had more long-term implications which were not appropriate for a residence order.

10.15 In our Consultation Paper,⁹ we proposed that the definition of a residence order should incorporate a reference to the parent in whose favour

5 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.80 and 15.36.

6 Same as above, at para 6.81.

7 See, respectively, Chapter 5, above, at paras 5.65 to 5.72, and Chapter 6, above, at paras 6.41 to 6.42.

8 Which, in section 64B(2) and (3) of the Australian Family Law Act 1975 ("1975 Australian Act"), defines a residence order as an order dealing with "*the person or persons with whom a child is to live.*" See Chapter 7, above, at paras 7.23 to 7.24.

9 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.83 and 15.37.

the order is made having responsibility for *"the day-to-day care and best interests of the child."* Accordingly, we proposed that the definition should 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."

10.16 On consultation, while some respondents did not support the new residence order, all but one of the respondents who commented on the proposed definition of a residence order supported it. The objecting respondent suggested that the inclusion of the phrase *"in the best interests of the child"* within the definition of a residence order was superfluous and should be removed. We considered this suggestion but concluded that it was better to err on the side of caution and leave in the provision the reference to *"best interests."*

Recommendation 21

We recommend that there should be statutory provision for a *"residence order."*

We recommend that the definition of a residence order should 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 should be: *"a residence order is an order settling the arrangements as to the person with whom a child is to live and who has responsibility for the day-to-day care and best interests of the child."*

Change of surname

10.17 In England, 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 without the leave of the court. There is no similar requirement in legislation in Hong Kong.

10.18 In our Consultation Paper,¹⁰ we proposed the enactment of a provision on changing a child's surname along the lines of section 13(1)(a) of the Children Act 1989. This was supported by all but two of the respondents who commented on the proposal. One of these two respondents felt that the reform was unnecessary. The other was concerned that the reform may require consequential amendments to the birth registration procedure and that it had possible implications for the issuing of Hong Kong identity cards. We

¹⁰ Same as above, at paras 6.103 and 15.47.

have considered these issues, but conclude that our original proposal should stand as it is simply intended to ensure the preservation of the child's name and status.

Recommendation 22

We recommend the enactment of a provision similar to section 13(1)(a) of the Children Act 1989 in England, governing the changing of a child's surname.

Non-parents

10.19 Section 12(2) of the Children Act 1989 Act provides that if a residence order is made in favour of a person other than a parent, that person shall have parental responsibility (with all that that implies) while the residence order remains in force. We stated in our Consultation Paper¹¹ that we considered section 12(2) of the Children Act 1989 to be a useful provision and we proposed the enactment of a similar provision in Hong Kong. This proposal received unanimous support from those who commented on it during the consultation exercise.

Recommendation 23

We recommend the enactment of a provision on the lines of section 12(2) of the Children Act 1989 in England regarding the granting of parental responsibility to non-parents who are awarded residence orders.

Contact order

10.20 In relation to contact orders, section 8(1) of the English Children Act 1989 states:

"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

11 Same as above, at paras 6.84 and 15.38.

*with the person named in the order, or for that person and the child otherwise to have contact with each other... .*¹²

10.21 The equivalent Scottish provision states that 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... ."*¹³

10.22 We have considered both the English and Scottish definitions of contact orders as potential models for Hong Kong. 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 to the child by the non-residential parent. In contrast, the Scottish section uses no such terms.¹⁴

10.23 In our Consultation Paper,¹⁵ we proposed the adoption of a provision on the lines of the Scottish definition of the contact order. We also proposed that this section should provide that the contact parent would have the right to act independently with regard to the day-to-day care of the child when he was exercising contact with the child.

10.24 On consultation, almost all of the respondents who commented on this proposal supported it. As with the residence order, however, one respondent objected to this proposal on the basis that the difference between the old and new terminologies for the order was difficult to grasp. As we have acknowledged elsewhere in this report, we accept that comprehensive public education about the new orders and the reforms generally will be required in order to fully acquaint the public with the new concepts.

10.25 Another respondent, while supporting the proposal, suggested that the wording *"or will not be"* should be deleted from the end of the proposed Scottish provision, so as not to infer inappropriate finality to the court proceedings. We have considered this suggestion, but we do not think that the wording currently proposed creates the element of finality suggested by the respondent.

12 It should be noted that, *"Contact need not be physical and may, for instance, be made by letter or telephone. This may prove to be the only practical form of contact where the parties live some considerable distance apart."* See L Ayrton & M Horton, *Residence and contact: A practical guide* (1996), at 1.3.2. More modern forms of non-direct contact would include email and tele-texting.

13 Section 11(2)(d), 1995 Scottish Act.

14 This more neutral language is similar to Article 9.3 of the United Nations Convention on the Rights of the Child.

15 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.87 and 15.39.

Recommendation 24

We recommend that there should be statutory provision for a "contact order," on the lines of section 11(2)(d) of the Children (Scotland) Act 1995.

We also recommend that this section should provide that the contact parent would have the right to act independently in respect of the day-to-day care of the child while contact with the child is being exercised.

Specific issues order

10.26 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 English wording appears to give the court unrestricted discretion to make an order for the welfare of the child.

10.27 The Scottish section 11(2)(e) defines a specific issue order 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)..."*¹⁶

10.28 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:

*"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."*¹⁷

10.29 In our Consultation Paper,¹⁸ we expressed a preference for the English definition rather than the Scottish definition, as we considered that it was more concise and gave considerable flexibility to the court. Accordingly, we proposed that a provision on the lines of the English definition of the specific issue order be enacted. We also stated that we preferred the term specific "issues" order to specific "issue" order.

16 These include parental responsibilities, rights, guardianship and the administration of a child's property.

17 Section 64B(6), 1975 Australian Act, as inserted by the Australian Family Law Reform Act 1995 ("1995 Australian Act").

18 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.90 and 15.40.

10.30 On consultation, most respondents supported this proposal apart from those who expressed concern generally about how the new orders would work, particularly where the parents were hostile towards each other. In answer, we anticipate that the new range of orders should make it easier for the courts to deal with urgent cases and thus be more protective towards those in difficult circumstances. As indicated earlier, we have also suggested in Chapter 11 of this report special supplemental provisions and guidelines to deal with cases involving family violence.

Recommendation 25

We recommend that there should be statutory provision for a "specific issues order," similar to section 8(1) of the Children Act 1989 in England.

Prohibited steps order

10.31 In relation to the prohibited steps order, section 8(1) of the English Children Act 1989 states:

"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."

10.32 The equivalent Scottish provision states:

"an interdict prohibiting the taking of any step of a kind specified in the interdict in the fulfillment of parental responsibilities or the exercise of parental rights relating to a child or in the administration of a child's property."¹⁹

10.33 We considered that the most suitable definition of the prohibited steps order for Hong Kong was the English definition, as the Scottish version refers to a type of order that is not known in our law²⁰ and there is no similar provision allowing for a prohibited steps order in the Australian Family Law Act 1975.

¹⁹ Section 11(2)(f), 1995 Scottish Act.

²⁰ The interdict, which is similar to an injunction.

10.34 In our Consultation Paper,²¹ we proposed that a provision on the lines of the definition of a prohibited steps orders in section 8(1) of the Children Act 1989 be enacted. All of the respondents except one, who objected in principle to the range of new orders, supported the proposal.

Recommendation 26

We recommend that there should be statutory provision for a "prohibited steps order," similar to section 8(1) of the Children Act 1989 in England.

Supplementary requirements

10.35 Section 11(7) of the English Children Act 1989 gives power to the court, when making an order under section 8, to include directions or conditions in the order.²² This might include, for example, directions that supervised contact with the child be organised where there has been a history of violence or abuse in the family. This is a useful power to assist the court in structuring orders to meet the best interests of the child and to minimise future disputes.

10.36 We therefore proposed in our Consultation Paper²³ the adoption of a similar provision to section 11(7) of the Children Act 1989. This proposal received unanimous support from the consultees who commented on it.

Recommendation 27

We recommend the adoption of a provision similar to section 11(7) of the Children Act 1989 in England which gives the court the power to include directions or conditions in a court order.

21 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.92 and 15.41.

22 See Chapter 5, above, at para 5.78.

23 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.93 and 15.42.

Right of a third party to apply

10.37 It has been noted in Chapter 3 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 child to be brought up by the grandparents and subsequently demands the child back. It may be also in the child's best interests to maintain contact with both sets of grandparents, particularly in Hong Kong where the extended family is particularly important.

10.38 Third parties currently have to rely on either a parent or the Director of Social Welfare applying on their behalf for such orders.²⁴ Alternatively, wardship proceedings can be taken by the carer, or the Official Solicitor may intervene.

10.39 The relevant Scottish legislation²⁵ provides that any person can seek an order relating to the parental rights, parental responsibilities or the guardianship of a child, other than a person whose parental responsibilities or parental rights were removed by an order in favour of a local authority or by adoption.

10.40 Section 10 of the English Children Act 1989,²⁶ which deals with those who can apply for a section 8 order without leave and those who can apply once leave is granted, appears to be more relevant to the social realities of Hong Kong. However, the provision in section 10 of the Act limiting the right to apply without leave to any person with whom the child has lived for a total of at least three years,²⁷ seems overly restrictive for Hong Kong where the extended family plays such an important role.

10.41 In our Consultation Paper²⁸ we expressed the view that there was no justification for obstacles preventing interested third parties from applying for orders concerning children. We therefore proposed that 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. To replace it, we proposed the enactment of a provision on the lines of section 10 of the English Children Act 1989, but with the amendment of subsections (5)(b) and (10) to provide that no leave would be required if the child had lived with the applicant for a total of one year out of the previous three. We proposed that the one year period need not necessarily be a continuous period, but that it must not have ended more than three months before the application.

24 Though rules 92(1) and (3) of the Matrimonial Causes Rules (Cap 179) provide that a guardian or a person who has custody, control or supervision of a child can apply for an order in respect of the child.

25 See section 11(1) and (3), 1995 Scottish Act.

26 See Chapter 5, above, at paras 5.90 to 5.98.

27 Section 10(5)(b) and (10), 1989 Act.

28 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.97 and 15.43.

10.42 On consultation, these proposals were supported by all but three of the respondents who commented on them. Two of these three respondents considered that the pre-conditions we had set out in the proposal should not be required, as each application to the court should be decided on its own merits in relation to what would be in the best interests of the child. An example was cited of grandparents with a close relationship with the child, but who may not have had the child living with them for the requisite period. The respondent wondered whether there would be any facility for the court to consider other factors, even though the stated prerequisites had not been met. In answer to this, we note that those falling outside the "*as of right*" criteria may still apply for court orders with respect to the child with leave of the court.

10.43 Another respondent observed that the court would need to carefully scrutinise the application in each case to ensure that the applicant for a court order was not acting out of self-interest. We agree that the court would always need to be vigilant when considering these cases, to ensure that orders were made in the best interests of the child.

Recommendation 28

We recommend the removal of the limitation in section 10 of the Guardianship of Minors Ordinance (Cap 13) on the right of third parties to apply to court for orders concerning children.

We recommend the introduction of a provision on the lines of section 10 of the Children Act 1989 in England, with the amendment of subsections (5)(b) and (10) to provide that leave of the court would not be required if the child has lived with the applicant for a total of one year out of the previous three years.

We further recommend that the one year period need not necessarily be a continuous period, but must not have ended more than three months before the application.

Arrangements for the children

10.44 The current Hong Kong provision dealing with the arrangements for the children is contained in section 18 of the Matrimonial Proceedings and Property Ordinance (Cap 192).²⁹ This directs that the court shall not make absolute a decree of divorce or nullity unless the court is satisfied, and

29 This is similar to section 41 of the English Matrimonial Causes Act 1973.

declares that it is satisfied, that the arrangements made for the welfare³⁰ of each child of the family *"are satisfactory or are the best that can be devised in the circumstances."*³¹ Section 18(5) states that the section applies to the following children of the family:

- "(a) any minor of the family who at the date of the order under subsection (1) is -*
 - (i) under the age of sixteen, or*
 - (ii) receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also in gainful employment; and*
- (b) any other child of the family to whom the court by an order under that subsection directs that this section shall apply."*

10.45 In England, section 41 of the Matrimonial Causes Act 1973³² 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. In doing so, the court is 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.³³ By virtue of section 11(4) of the English Family Law Act 1996, 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."*³⁴

30 This is defined as including *"the custody and education of the child and financial provision for him"*: see section 18(6), Matrimonial Proceedings and Property Ordinance (Cap 192) ("MPPO").

31 Section 18(1)(b)(i), MPPO.

32 As amended by Schedule 12, para 31 of the 1989 Act, and section 11, English Family Law Act 1996 ("1996 Act").

33 Section 11(3), 1996 Act.

34 Section 11(4)(c), 1996 Act.

10.46 The statement of arrangements proposed by the parents for the 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 children. Section 12 of the Children (Scotland) Act 1995 is similar in effect.

10.47 In our Consultation Paper,³⁵ we noted that we preferred to retain section 18 of the Matrimonial Proceedings and Property Ordinance, but we proposed that it should be amended to include a provision that the court must have regard to the views of the child and the desirability of a child's retaining contact with both parents, as is set out in section 11(4) of the English Family Law Act 1996.

10.48 We also proposed³⁶ that parents should have to prove to the judge that arrangements for the children were the best that could be arranged. The judge should examine the future plans regarding the child's place and country of residence and his proposed contact with both parents, especially if one parent proposed to emigrate from Hong Kong. We felt that if that burden on the court were to be lessened by the English section, then we did not think it desirable from the child's point of view. We also proposed that for consistency with other provisions in matrimonial legislation, section 18(5)(a)(i) should be amended to refer to the age of 18, not 16.

10.49 On consultation, these proposals were supported by all but one of the respondents who commented on them. This respondent considered that section 18 of the Matrimonial Proceedings and Property Ordinance (Cap 192) should not be amended as proposed. Concern was expressed that by "*requiring*" the court to take account of the views of the child, there might be some risk that a child would be subjected to inappropriate questioning in order to comply with the requirement. This is certainly not our intention. We therefore agree that the apparently mandatory nature of the proposal should be softened.

35 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.100 and 15.44.

36 Same as above, at paras 6.101 and 15.45.

Recommendation 29

We recommend that section 18 of the Matrimonial Proceedings and Property Ordinance (Cap 192) should be amended to provide that the court should have regard to the views of the child and the desirability of a child's retaining contact with both parents, as is set out in section 11(4) of the English Family Law Act 1996.

We also recommend that parents should have to satisfy the court that arrangements for the children are the best that can be arranged. The court 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 further recommend that, for consistency with the other provisions in matrimonial legislation, section 18(5)(a)(i) should be amended to refer to the age of eighteen.

No order principle

10.50 The "*no order*" principle is contained in section 1(5) of the Children Act 1989, which specifies that 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.³⁷ The Scottish provision in section 11(7)(a) is similar.

10.51 The same approach was not adopted in Australia, however. We saw in Chapter 7 that the statutory checklist of factors that the Australian court considers in determining what is in the best interests of the child is contained in section 68F(2) of the Family Law Act 1975. One of the factors that the court is to take into account is "*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.*"³⁸ The reason why the Family Law Council of Australia did not recommend the adoption of the relevant English provision was the perceived *practical* difficulty of the "*no order*" approach, in that an order relating to the residence of the child might be required if parents applied for separate units of local authority housing.³⁹

37 For fuller arguments on the pros and cons of the principle, see Chapter 5, above, at paras 5.47 to 5.51.

38 See section 68F(2)(k), 1975 Australian Act.

39 This was based on the advice of the English Law Society. See Chapter 7, above, at paras 7.32 to 7.33, in relation to the Family Law Council report, *The Operation of the (UK) Children Act 1989*, at para 48.

10.52 We note that similar requirements may be stipulated by government departments in Hong Kong, such as the Housing Department and Housing Society. We also recognise that divorcing parents in Hong Kong usually want some form of recognition by way of an order regulating the arrangements for their children, whether these have been made by agreement or imposed by the court. Given Hong Kong's mobile population, a court order regulating residence and contact may be particularly important in providing security to the parents that the child will not be removed unlawfully by either of them.

10.53 In our Consultation Paper,⁴⁰ we noted the rationale for the no order principle but proposed that it should not be adopted in Hong Kong as we considered it unsuitable for local conditions.

10.54 The majority of the respondents who commented on the proposal during the consultation exercise supported our approach, with several noting that, in the context of domestic proceedings, government departments usually required a court order before they would take action, particularly in relation to housing matters.

10.55 There were also some respondents, however, who were in favour of the introduction of the no order principle, or at least that the option of not having a court order made should be available to those parties who preferred this approach in their particular circumstances. It was argued that, in cases where divorcing couples were prepared to co-operate between themselves to ensure suitable continuing arrangements for their children,⁴¹ *not* making an order would be in the best interests of the children, as this would enhance and support the parents' future relationship.

10.56 Having taken account of the views of all the respondents, we are now in agreement in principle with those who argue that the option of no order should be available in Hong Kong for those cases where both parties consent and where no order would be in the best interests of the child. We envisage that the proposal for no order in any particular case would not come from the judge on his own initiative, but that the parties themselves would be involved in determining this outcome. If it proved subsequently that the parties required a court order (for example, to later secure public housing), they could return to court to seek one.

10.57 We appreciate that the idea of the introduction of no order, even for the exceptional cases we describe above, would be a significant innovation in Hong Kong, and, again, may require effective public education to promote its possible benefits.

40 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.16 and 15.7.

41 For example, couples who would be inclined to opt for joint custody and joint care and control of their children under the current law.

10.58 On the issue of public housing, we have observed above that Government departments currently appear to require that court orders have been made before making public housing arrangements for divorcing couples. While we accept that this may be the established practice at the present time, we would urge the Administration to look into this issue to see whether other, less formal documentation could suffice for the relevant departments' purposes. In our view, it would be unfortunate if reform in this area of the law were constrained by what were essentially administrative considerations.

Recommendation 30

We recommend that the option of "*no order*" should be available for those cases where both parties consent to no order being made by the court and where the making of no order would be in the best interests of the child.

Family proceedings

10.59 Section 10(1) of the Children Act 1989 in England gives the court a specific power to make section 8 orders⁴² in any family proceedings. The provision states:

- "(1) In any family proceedings in which a question arises with respect to the welfare 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."*

⁴² Including orders for residence, contact, specific issue and prohibited steps described earlier in this chapter, and in Chapter 5, above, at paras 5.61 to 5.77.

10.60 We note that this would include wardship. In our view, this may reduce the need for wardship where orders under section 8 can be made *in lieu*.

10.61 In our Consultation Paper,⁴³ we proposed that a similar provision to section 10(1) of the Children Act 1989 should be adopted in Hong Kong's legislation. We proposed that it would also be useful to have a definition of family proceedings. On consultation, all of the respondents who commented on this proposal supported it.

Recommendation 31

We recommend the enactment of a provision similar to section 10(1) of the Children Act 1989 in England, which gives the court a specific power to make section 8 orders in any family proceedings.

We also recommend the introduction of a definition of "*family proceedings*."

Age at which parental responsibility ceases for the purposes of court orders⁴⁴

10.62 As we saw in Chapter 9, in England, a child is defined as a person below the age of 18 years of age.⁴⁵ However, the Children Act 1989 provides that section 8 orders (for residence, contact, specific issue or prohibited steps) do not extend beyond the age of 16 years unless the order expressly provides for this.⁴⁶ In contrast, the Scottish provisions set an age limit of 16 on most parental responsibilities and rights.⁴⁷

10.63 We proposed in our Consultation Paper⁴⁸ that, for the sake of consistency, parental responsibility for children and provisions on the lines of section 8 orders should cease when the child reaches 18 years of age. All of the respondents who commented on this proposal during the consultation

43 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.102 and 15.46.

44 Other issues relating to the age of the child are also addressed in this report. See the discussions on the age at which parental responsibility ceases (in Chapter 9, above, at paras 9.63 to 9.65); the relevant age of the child for the purposes of parental consent to marriage; the relevant age of the child for the purposes of the duration of wardship orders; and the relevant age of the child for the purposes of the jurisdiction of the Official Solicitor (all in Chapter 13, below, at paras 13.50 to 13.62).

45 Section 105 (1), 1989 Act.

46 Section 91(10), 1989 Act.

47 See the discussion on this point in Chapter 9, above, at paras 9.63 to 9.65.

48 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.154 and 15.67.

exercise were generally in support of it, although some reservations were expressed.

10.64 One respondent queried whether the recommendation would affect the current right of the courts to make financial orders for children who were over 18 years of age but were still in full-time education, or were physically or mentally handicapped and therefore required long-term support.⁴⁹ This respondent felt that there should be consistency between these proposals and the existing legislation regarding financial provision and maintenance of children. The respondent considered that the definition of "*child*" proposed in the Consultation Paper should be more open-ended and should cover all dependent children, regardless of age. It would therefore be within the court's discretion in these cases to determine how long the relevant orders should apply.

10.65 In reply to this, while it is certainly not our intention to abrogate the current right of the court to grant financial orders for children beyond the age of 18 in the circumstances set out in section 10 of the Matrimonial Proceedings and Property Ordinance (Cap 192), we do not consider it appropriate to create an open-ended definition of "*child*" for the purposes of the wider issues which are the subject of this report, namely parental responsibility, the welfare of the child and the new types of orders we propose. To do so would mean that an application could be made for a residence order, for example, even for a person over 18 years of age where that person was continuing in full-time education. In our view, only in cases of mental incapacity should some sort of custody/residence order be required for a child over 18, and this should be obtained via the adult guardianship provisions of the Mental Health Ordinance (Cap 136),⁵⁰ not through the provisions of the matrimonial legislation.

10.66 In considering this issue, however, we have observed that there may be a grey area relating to children over 18 years of age who, though not sufficiently mentally incapacitated to fall within the protective jurisdiction of the mental health legislation, may still not be able fully to take care of themselves. In these cases, although the parents may be ordered to make financial provision for the child, they would no longer have formal parental responsibility as such.

10.67 Although we do not intend to extend our proposed definition of "*child*," or our proposed age limit for section 8 orders, to bring children in this category specifically within the scope of our proposals, we wish to note our concern as to this possible lacuna in the law.

49 Pursuant to section 10(3), MPPO, where the court has the discretion to extend indefinitely in some cases the application of financial provision and maintenance orders for children.

50 I.e., see Part IVB of the Mental Health Ordinance (Cap 136), which sets out the powers and responsibilities of the Guardianship Board in respect of mentally incapacitated adults.

Recommendation 32

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.

We also observe that:

- (a) section 10 of the Matrimonial Proceedings and Property Ordinance (Cap 192) ("MPPO") should continue to apply to orders for financial provision and maintenance of children 18 years and over falling within its scope; and**
- (b) there may be a lacuna in the law with regard to children over 18 years of age who, though not sufficiently ill or incapacitated as to fall within the scope of the current mental health provisions, may nonetheless require some form of statutory protections beyond the financial provisions afforded by the MPPO.**

Chapter 11

Recommendations for reform - special consideration for cases involving family violence

Introduction

11.1 As we have seen in the previous chapters, the underlying paradigm of the reforms proposed in this report¹ is the introduction of the joint parental responsibility model into family proceedings in Hong Kong. Under this new model, even parents who are divorcing will continue to share, as far as possible, parental responsibility and decision-making power to promote the best interests of their children.² A crucial feature of this model is that a child will be deemed to have the *right* to maintain regular contact with both parents, subject to such contact being in the child's best interests.

11.2 We recognise that one area where special care will need to be taken by the courts in applying the new joint parental responsibility model is where family violence is alleged.³ In our Consultation Paper, we observed that while it is generally in the best interests of the child to have regular contact with both parents, in a small minority of cases, protecting the children and a spouse from the threat of violence is a more important consideration.⁴ We commented:

1 See also our earlier consultation paper: HKLRC Sub-committee on Guardianship and Custody, *Consultation Paper on Guardianship and Custody* (Dec 1998).

2 As we have seen in the earlier chapters of this report, the joint parental responsibility approach is significantly different from that currently applied in many family law proceedings in Hong Kong, where, on divorce, the bundle of parental rights and responsibilities for the children is essentially divided up and reassigned between the parents. One party, often the mother, may be granted sole custody of the children, and thereby acquires primary responsibility to ensure their care and welfare as well as the right to make all major decisions affecting them. The other party, usually the father, may be granted access only to the children, to see and communicate with them from time to time.

3 Statistics which are available indicate that some form of spousal abuse may be occurring in at least one in ten households in Hong Kong: see Dr Chan Ko-ling, *An Evaluative Study of Group Therapy for Male Batterers cum Intervention Strategies* (Oct 2001) HKU Dept of Social Work & Social Administration and Hong Kong Family Welfare Society, at 1. (The figure given for North America is one in six households: *idem*.)

4 HKLRC Sub-committee on Guardianship and Custody (1998), above, at para 6.147.

"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."⁵

11.3 The findings of several recent overseas studies,⁶ as well as views expressed by a number of commentators in this area,⁷ bear out this concern. In particular, it appears that in overseas jurisdictions where the Children Act regime has been in place for some years, the courts, in applying the Act, may on occasions have placed too much emphasis on maintaining parental contact even where allegations of violence in the family were substantiated, and where such violence may have posed a risk to the safety and well-being of the children.

11.4 In order to avoid similar problems developing in Hong Kong with the advent of the joint parental responsibility model here, we have given careful consideration to the family violence safeguards that may be required to be incorporated into the new system to provide protection in the small number of cases coming before the courts where family violence is at issue. These safeguards are the subject of this chapter.

5 Same as above.

6 See: Children Act Sub-committee of the Lord Chancellor's Advisory Board on Family Law ("Children Act Sub-committee"): Consultation Paper, *Contact between Children and Violent Parents* (June 1999), *Report to the Lord Chancellor on the Question of Parental Contact in Cases where there is Domestic Violence* (Apr 2000), *A Consultation Paper: Making Contact Work* (Mar 2001) and *Making Contact Work: A Report to the Lord Chancellor on the Facilitation Arrangements for Contact between Children and their Non-Residential Parents and the Enforcement of Court Orders for Contact* (Feb 2002) (see also Lord Chancellor's Department, *Government Response to the Report 'Making Contact Work'* (Aug 2002)); L Trinder, M Beek & J Connolly, *Making Contact: How Parents and Children Negotiate and Experience Contact after Divorce* (Joseph Rowntree Foundation, 2002); University of Sydney and the Family Court of Australia, *The Family Law Reform Act 1995: The First Three Years* (Dec 2000); NZ Ministry of Justice report, *The Domestic Violence Legislation and Child Access in New Zealand* (May 1999).

7 See: I Weyland, "Judicial Attitudes to Contact and Shared Residence Since the Children Act 1989" (1995) 17 *Journal of Social Welfare and Family Law* 445; C Smart & B Neale, "Arguments Against Virtue - Must Contact be Enforced?" [1997] *Family Law* 332; Judge Victor Hall, "Domestic Violence and Contact" [1997] *Family Law* 813; Dr C Humphreys, "Judicial Alienation Syndrome - Failures to Respond to Post-separation Violence" [1999] *Family Law* 313; R Bailey-Harris, J Barron and J Pearce, 'From Utility to Rights? The Presumption of Contact in Practice' (1999) 13 *International Journal of Law, Policy and the Family* 13; F Kaganas & S Day Sclater, "Contact and Domestic Violence - The Winds of Change?" [2000] *Family Law* 630; G Douglas, "Balancing Rights," in A Bainham (ed), *The international survey of family law: 2001 edition* (2001, Family Law), at 81. (The writer is indebted to Ms Helen Rhoades of the Faculty of Law, University of Melbourne, Australia, for her kind assistance in locating many of these materials.)

Overseas research findings on contact and family violence

England

Problems relating to the Children Act 1989

11.5 The English Children Act and its Australian equivalent - on which most of our recommendations in this report have been based - have been the subject of various review studies in recent years to identify areas where further reform of the model may be necessary. As noted above, one area commented on by the researchers has been the special problem of dealing with domestic violence when the courts consider the granting of orders relating to children, particularly orders for contact.

11.6 In England, a programme of review carried out by the Children Act Sub-committee ("CASC") of the Lord Chancellor's Advisory Board on Family Law⁸ revealed a strong perception in the community that, in applying the Children Act 1989, so much weight was being placed by the courts on the importance of parental contact that they were not properly addressing the issue of domestic violence when it was raised in the context of applications for contact.⁹

The Children Act Sub-committee's Report

11.7 The CASC's *Report to the Lord Chancellor on the question of parental contact in cases where there is domestic violence*, published in April 2000, noted¹⁰ that a substantial number of responses, particularly from children's charities and women's groups, emphasised the need to ensure that contact was safe and worthwhile for children who may have experienced abuse or been exposed to domestic violence. There was also significant concern that the principle of the child's right to contact with both parents did not address adequately the need to ensure the safety of the non-abusive parent. The respondents stressed that the principle of the child's right to contact with both parents needed to be sufficiently flexible to match the specific needs of the child.

11.8 The overwhelming message from the respondents was that contact should only be ordered in cases involving domestic violence if the court could be satisfied that both the child and the parent with whom the child was living would be safe before, during and after contact.¹¹ The respondents considered that the courts should first consider the nature and extent of any risk to the child and the residential parent, and if contact was in the interests

8 Children Act Sub-committee Consultation Paper (1999), above; Children Act Sub-committee Report (2000), above; Children Act Sub-committee Consultation Paper (2001), above; and Children Act Sub-committee Report (2002), above. See also Lord Chancellor's Department Report (Aug 2002), above.

9 Children Act Sub-committee Report (2000), above, at paras 3.3.3 to 3.3.5 and 4.2.

10 Same as above, at para 3.1.2.

11 Same as above, at para 3.4.1.

of the child, it should only be ordered if proper arrangements could be put in place to safeguard the child and the residential parent from risk of further physical or emotional harm.¹²

11.9 Respondents to the English study also expressed concern about the difficulty of providing conclusive evidence of domestic violence in order to show that contact in a particular case might carry a greater element of risk to the children involved.¹³

11.10 Regarding the problems identified, the CASC stated:

"The Consultation has amply demonstrated the importance of the question of domestic violence in the context of parental contact with children. It has also confirmed the perception identified in the Consultation Paper¹⁴ that the issue is not currently being fully or appropriately addressed by the courts."¹⁵

11.11 On whether anything needed to be done, the CASC stated:

"There is always a school of thought that advises that change is not required; that our perceptions of domestic violence are evolving and developing, and that these processes are being and will continue to be addressed within the Family Justice System without the need for further legislation, practice guidelines or continuous training. ... That standpoint was very much a minority view in the responses we received. The overwhelming majority view was that the issue of domestic violence in the context of contact between children and violent parents required a much better informed and more proactive approach from all the professionals engaged in the Family Justice System."¹⁶

Views on possible legislative changes

11.12 In terms of proposed solutions, the CASC noted that the call for legislative change had received substantial support on consultation.¹⁷ The changes mooted had been the introduction of a presumption against contact where domestic violence was established (as was applied in New Zealand¹⁸) and changes to the statutory checklist of factors (the welfare checklist) to specifically include reference to family violence (as was applied in Australia¹⁹).

12 Same as above.

13 Same as above, at para 3.1.4.

14 Children Act Sub-committee Consultation Paper (1999), above.

15 Children Act Sub-committee Report (2000), above, at para 1.5.

16 Same as above, at paras 1.6 to 1.7.

17 Same as above, at para 1.7.

18 Children Act Sub-committee Consultation Paper (1999), above, at Appendix 4, where the relevant New Zealand provisions are summarised.

19 Same as above, at Appendix 3, where the relevant Australian provisions are summarised.

11.13 The CASC itself, however, while agreeing that steps needed to be taken to ensure that the issue of domestic violence where it arose in contact applications was both properly addressed and seen to be properly addressed, did not consider it necessary to move to legislative change of the Children Act 1989.²⁰ The CASC stated that:

*"We remain of the view that the Children Act 1989, if properly implemented, contains within it the means to address the issue without amendment."*²¹

Proposed judicial guidelines for good practice

11.14 The CASC's principal recommendation was that there should be guidelines for the judiciary, at all levels, setting out the approach which the courts should adopt when domestic violence was put forward as a reason for denying or limiting parental contact to children.²²

11.15 These guidelines emphasised the principle that the welfare of the child was paramount and highlighted the fact that domestic violence was not simply an issue between the parents, but often impacted on the children.²³ They also emphasised the importance of the safety of the residential parent before, during and after contact, as this would affect the well-being of the child.²⁴

*"The Guidelines set out a detailed and systematic strategy to be adopted in cases where the court believes that allegations of domestic violence, if proved, may affect its making of a contact order."*²⁵

11.16 The strategy set out in the Guidelines²⁶ provided that where there were allegations of domestic violence:

20 Children Act Sub-committee Report (2000), above, at paras 1.7 to 1.8.

21 Same as above, at para 1.8.

22 Same as above, at para 1.9 and Part 5. The full text of the Guidelines appears below, at Annex 3 of this report.

23 Lord Chancellor's Advisory Board on Family Law, *Children Act Sub-committee Guidelines for 'Good Practice on Parental Contact in Cases where there is Domestic Violence': A Summary Report on Findings from the Lord Chancellor's Department's Survey to Monitor Awareness of the Guidelines* (Mar 2002), at para 1.7.

24 Same as above, at para 1.8.

25 Same as above, at para 1.9.

26 See summary in Lord Chancellor's Advisory Board on Family Law Report (Mar 2002), above, at para 1.10.

- a finding of fact should be made to establish the nature and degree of the violence and its effect on the child and the residential parent;
- there should be a presumption in favour of obtaining a welfare report;
- before making any contact order, the court should apply the 'welfare checklist' and be satisfied that the safety of the child and the resident parent may be ensured before, during and after contact;
- the court should consider whether supervision of contact may be necessary and how this may be arranged;
- the court should consider whether to make a non-molestation order;
- the court should consider whether to require the non-resident parent to attend treatment as a prerequisite to contact.

11.17 The CASC recommended that the guidelines should take the form of a Practice Direction issued by the Family Court.²⁷ They also recommended that proper mechanisms should be set in place to monitor the effectiveness of the guidelines after a given period.²⁸

11.18 In addition, the CASC advocated certain other remedial measures.²⁹

On-going training

11.19 It stated that there needed to be on-going training and a raising of awareness levels in relation to the effect of domestic violence on children and residential parents *"for all the disciplines engaged in the Family Justice System, including the legal profession and the judiciary."*³⁰

Contact centres

11.20 The CASC acknowledged that contact centres had played an important role in the context of court orders for contact.³¹ It had been noted that their primary function was to provide a temporary venue for contact in cases where the child's parents were unable to provide an alternative.³²

27 Children Act Sub-committee Report (2000), above, at para 1.10.

28 Same as above, at paras 1.12 and 4.5 to 4.6. The report of the first survey to monitor the effectiveness of the Guidelines is contained in the Lord Chancellor's Advisory Board on Family Law Report (Mar 2002), above.

29 Children Act Sub-committee Report (2000), above, at paras 1.13 to 1.25.

30 Same as above, at para 1.13.

31 Same as above, at para 3.14.1.

32 Children Act Sub-committee Report (2002), above, at para 8.6.

11.21 While endorsing the establishment of contact centres and emphasising their usefulness, the CASC expressed concern at the current limitations on contact centres: that they generally facilitated *"supported"* contact only, where both parties agreed to contact and were prepared to be co-operative; that they were generally not equipped, and their staff were not trained, to handle cases where contact was required to be supervised, as in cases where there had been domestic violence, or because there was a risk to the child of violence or other abuse during contact.³³

More information before the court

11.22 The CASC observed that a major concern of their consultees had been the lack of interaction between the civil and the criminal law where domestic violence was concerned. These respondents were strongly of the view that courts hearing contact applications should have access to parents' criminal records and should be kept fully informed of concurrent proceedings against perpetrators.³⁴

Privacy issues

11.23 On another important issue, the CASC noted that strong concern had been expressed by women's groups that *"the Family Justice System was often improperly used by abusers to locate victims and children, and that the system lent itself to such abuse."*³⁵ Reference was made, in particular, to the death of Georgina McCarthy, who had been traced by her husband to her address in Penzance and murdered in the presence of her child. The CASC commented that:

*"These are issues which the CASC will have on its agenda for the future. Discussions are going on with the Home Office to define joint areas of concern and how they can be tackled."*³⁶

Long-term research into the effects of domestic violence

11.24 The CASC commented that there was a need for a much greater understanding of the long-term effects on children of witnessing and/or being the victims of domestic violence.³⁷ It was noted that the suggestion in the CASC's Consultation Paper,³⁸ that the Lord Chancellor's Department should undertake long-term research and detailed collection and evaluation of information arising from court proceedings, was widely welcomed.³⁹

33 Children Act Sub-committee Report (2000), above, at para 3.14.3

34 Same as above, at paras 1.23 and 3.17.2.

35 Same as above, at para 1.24.

36 Same as above, at para 1.25.

37 Same as above, at para 1.22. See also paras 3.13.1 to 3.13.21.

38 Children Act Sub-committee Consultation Paper (1999), above.

39 Children Act Sub-committee Report (2000), above, at paras 1.22, 3.13 and 4.6.

More recent developments

11.25 Following the publication of the CASC's report, the proposed Good Practice Guidelines, requiring judges to be more cautious before ordering contact in cases involving domestic violence, were promulgated in April and May 2001.⁴⁰ The Guidelines have now been incorporated into judicial training by the Judicial Studies Board.⁴¹ The Lord Chancellor's Department (now the Department for Constitutional Affairs) has also commissioned research to monitor awareness of the Guidelines.⁴²

11.26 Research has also been commissioned by the Department for Constitutional Affairs on child contact centres. The research is to examine how effective they are in promoting safe and positive contact for children that could also be consistent with the safety and well-being of women (and some men) where domestic violence is an issue.⁴³

11.27 A further change in this area has been an amendment to the definition of "*harm*" to a child under the Children Act 1989, so that harm now includes the "*impairment suffered from seeing or hearing the ill-treatment of another.*"⁴⁴ This amendment will apply to all proceedings where the court

40 The substance of the guidelines had already entered into case law in June 2000, as a result of a judgment of the Court of Appeal in *Re L (Contact: Domestic violence)*; *Re V (Contact: Domestic violence)*; *Re M (Contact: Domestic violence)*; *Re H (Contact: Domestic violence)* [2000] 2 FLR 334 (CA) (also cited as *Re L & Others* [2000] 2 FLR 334). In that judgment, the Court of Appeal cited the Children Act Sub-committee's findings with approval. See also the summary concerning the introduction of the guidelines in the Lord Chancellor's Advisory Board on Family Law Report (Mar 2002), above, at paras 1.1 to 1.11.

Even prior to the introduction of the guidelines, Douglas (above, at 86) noted that more recent cases in this area indicated "*that there [was] a concerted attempt to get the message across of the need to think carefully before ordering contact where there is a history of domestic violence.*" Douglas observed that the means that the courts appeared to have adopted in determining whether contact should be refused was to distinguish between legitimate and illegitimate fears or hostility of the party resisting the contact. See, for example, *Re P (Contact: Discretion)* [1998] 2 FLR 696, at 703 to 704, where Wilson J differentiated between three types of cases: the first, where there was no rational ground for hostility to contact; the second, where the grounds put forward are sufficient to displace the presumption that contact was in the best interests of the child, in which case the hostility to contact was irrelevant; and third, that there were sound arguments either way, in which case the hostility to contact may become a relevant consideration.

41 Lord Chancellor's Advisory Board on Family Law Report (Mar 2002), above, at para 1.5.

42 Same as above, full report.

43 Dr R Aris, C Harrison & Dr C Humphreys, *Safety and child contact: an analysis of the role of child contact centres in the context of domestic violence and child welfare concerns* (LCD Research paper 10/2002). Further support for such centres is also found in the recent reports of the Children Act Sub-committee (Children Act Sub-committee Report (2002), above, at para 8.35) and the Joseph Rowntree Foundation (Trinder, Beek & Connolly, above, at 47).

44 Adoption and Children Act 2002, section 120, amending section 31, 1989 Act.

applies the welfare checklist in section 1(3) of the 1989 Act, including proceedings for contact and residence orders.⁴⁵

Australia

Problems relating to the Family Law Act 1995

11.28 It would appear that the English experience in relation to problems with contact and domestic violence has been reflected in Australia. A report by the University of Sydney and the Family Court of Australia into the implementation of the Australian Family Law Reform Act 1995⁴⁶ (legislation based closely on the English Children Act 1989) raised concerns about certain consequences of the application of the joint parental responsibility model. In particular, the report indicated that there had been a shift in judicial approach since the Australian Act came into effect, so that children's welfare was being compromised in the approach taken to interim decision-making. This applied to the making of interim residence orders and contact orders, and especially where domestic violence was alleged.

11.29 The previous principle, of maintaining the existing care-giving arrangements for the child unless there were strong or overriding indications to the contrary (eg, threat of violence in the care-giver's household), had been displaced, according to the report, by judicial concerns about parental 'equality,' and not creating a *status quo* in favour of one parent.⁴⁷ The report stated:

*"[D]ecisions are being made on the basis of the parents' interests (or more accurately, the parent who is not the existing primary care-giver), rather than on the basis of the child's welfare."*⁴⁸

11.30 The report commented that, in relation to contact, there now appeared to be a "*presumption*" (though not a legal one) in favour of contact with the non-resident parent,⁴⁹ despite the requirement to consider the best interests of the child, and despite the indications that a substantial proportion of contact cases involved allegations of domestic violence or abuse.⁵⁰ The report noted that there was increased pressure on women who feared

45 The explanatory note to the relevant clause of the 2002 Bill states, "*The amendment will apply to all proceedings where the court applies the 'welfare checklist' in section 1(3) of the 1989 Act. This includes proceedings for contact and residence orders*": see House of Lords (Session 2001-2002) - Adoption and Children Bill - Explanatory Notes, para 282. In relation to our own recommendations on the court considering family violence in the context of the welfare checklist, see the discussion in Chapter 9, above, at paras 9.38 to 9.41 (Recommendation 3), and also para 11.58, below.

46 See University of Sydney & Family Court of Australia (2000), above.

47 University of Sydney & Family Court of Australia (2000), above, at paras 1.14 to 1.15.

48 Same as above, at para 1.15.

49 Same as above, at para 1.20.

50 Particularly at the interim hearing stage, and only a small proportion of which failed to be established subsequently: see same as above, at para 1.23 and Chapter 5.

violence to provide contact. Because of the effective presumption in favour of contact adopted by the courts, the report found that it appeared that unsafe contact orders were being made by consent. The report also found that there had been a large increase in contravention applications brought by non-resident parents alleging breaches of contact orders. A large proportion of these were found to be unmeritorious.⁵¹

Proposed legislative changes

11.31 In terms of solutions to remedy these problems, the report's view differed in some respects from the English findings. The Australian study concluded that changes to the legislation to highlight the importance of family violence as a factor which must be properly considered, plus greater information being made available to the court in each case, was the appropriate route to take.⁵²

*"The need to ensure the safety of children should be included ... as a principle underlying the objectives of the Act. An understanding of the deleterious effects of domestic violence on children is an essential part of the background knowledge a decision maker must bring to bear on deciding children's 'best interests' issues. This should involve moving the caution ... that a court not make an order that exposes the child to an unacceptable risk of family violence, to a more prominent place in the Act, specifically [to the objects section]."*⁵³

More information before the court

11.32 The Australian report noted that it was essential that, in making decisions based upon the child's best interests, the court should be able to make a proper assessment of any risk to the child.⁵⁴ This would include being able to investigate allegations of domestic violence at interim hearings. For this reason, the report noted,⁵⁵ the court needed to have available to it enough information to make these assessments.

11.33 The report concluded that ideally, family (welfare) reports should be available in each case that involved an issue of a child's welfare, though it was acknowledged that this obviously would have considerable resource implications for the court.

51 Same as above, at para 1.18.

52 University of Sydney & Family Court of Australia (2000), above, at 10.

53 Same as above, at para 1.36, Recommendation 3.

54 Same as above, at Recommendation 2.

55 Same as above.

More recent developments

11.34 More recently, the Family Court of Australia has launched a Family Violence Strategy⁵⁶ to establish a comprehensive set of strategies to deal with family violence in the context of all aspects of the court's operations. It is intended that these strategies will be consistently applied and clearly communicated.⁵⁷

11.35 The Strategy covers five key areas of the Court's activities, including: Information and Communication; Safety; Training; Resolving the Dispute; and Making the Decision.⁵⁸

11.36 The Court has stated that the new Family Violence Strategy *"represents a major commitment by the Court to the management of matters involving violence and the protection from harm of its clients, their children and staff."*⁵⁹

Our recommendations for reform

Introduction

11.37 As we have seen in the preceding discussion, overseas research has highlighted the importance of developing specific provisions and procedures to accompany the joint parental responsibility model, so that the family courts may deal appropriately with those relatively rare, but serious, divorce cases which involve family violence.

11.38 In the context of the introduction of the joint parental responsibility model into Hong Kong's family law, we have given careful consideration to the family violence safeguards that may need to be incorporated into the new system. Our recommendations in this area are set out below.

11.39 Whilst the majority of these recommendations relate to provisions and procedures to supplement our family proceedings legislation, we have also given consideration to wider aspects of Hong Kong's law on domestic violence that may require reform.

56 The Family Court of Australia, *Family Violence Strategy 2004-2005* (Mar 2004).

57 Same as above, at 2.

58 The Strategy states that the Court's approach in these areas will be governed by the following Guiding Principles: Primacy of safety; Recognition of the impact of family violence; Recognition of the impact of violence on children; Recognition of the diversity of court clients; A risk assessment approach; Importance of information provision; Community partnership approach; and Importance of development programs. See: same as above, at 8.

59 Same as above, at Preface.

The Administration to review Hong Kong's general law on domestic violence

Overview of the Domestic Violence Ordinance (Cap 189)

11.40 Hong Kong's general law on domestic violence is contained in the Domestic Violence Ordinance (Cap 189). The objective of the Ordinance, which is based on the English Domestic Violence Act 1976,⁶⁰ is to give a victim of abuse in a domestic setting the right to seek a speedy injunction against the other party on a simple application to the District Court.⁶¹

11.41 Section 3(1) of the Ordinance states:

"(1) On an application by a party to a marriage the District Court, if it is satisfied that the applicant or a child living with the applicant has been molested by the other party to the marriage ... may grant an injunction containing any or all of the following provisions -

- (a) a provision restraining that other party from molesting the applicant;*
- (b) a provision restraining that other party from molesting any child living with the applicant;*
- (c) a provision excluding that other party from the matrimonial home, or from a specified part of the matrimonial home, or from a specified area whether or not the matrimonial home is included in that area;*
- (d) a provision requiring that other party to permit the applicant to enter and remain in the matrimonial home or in a specified part of the matrimonial home,*

whether or not any other relief is being sought in the proceedings."

11.42 For the purposes of the Ordinance, the applicant for the injunction must be *"a party to a marriage,"* although the term *"marriage"* is deemed to include a man and a woman in cohabitation.⁶² The applicant for the injunction must have been cohabiting with the violent party at the time the

60 The Act was repealed and replaced by the provisions of Part IV of the English Family Law Act 1996.

61 A Liu, *Family Law for the Hong Kong SAR* (Hong Kong University Press, 1999), at 460.

62 Section 2(2), Domestic Violence Ordinance (Cap 189) ("DVO").

incidents relied on occurred, but they need not be still living together at the time the application is made.⁶³

11.43 The injunction, and any power of arrest attached to it, may be granted *"for such period, not exceeding 3 months, as the court considers necessary."* Before that period expires, the court may extend the injunction or power of arrest for up to a further three months.⁶⁴

11.44 The pre-condition for the granting of the injunction is that the applicant, or a child of the applicant, has been *"molested"* by the other party, although what may constitute *"molesting"* is not defined in the Ordinance. The courts have construed the term as follows:

*"It has been held that the word molesting in section 3(1) does not imply necessarily either violence or threats of violence. It applies to any conduct which can properly be regarded as such a degree of harassment as to call for the intervention of the court. The courts [have] noted that molestation without the threat or use of violence may still be serious and inimical to mental and physical health."*⁶⁵

11.45 A non-molestation order may only be made on the basis that the harassment has carried with it an element of intent to cause harm or distress.⁶⁶ The Law Reform Commission has commented that this requirement, *"gives rise to difficulties where the other party acts out of affection or is incapable of forming intent because of mental problems."*⁶⁷

11.46 In relation to the court's power to exclude the other party from the matrimonial home, or to require the other party to permit the applicant to occupy the matrimonial home, section 3(2) of the Ordinance stipulates that the court is to have regard to, *"the conduct of the parties, both in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any child living with the applicant and to all the circumstances of the case."* Although these factors are all relevant, it appears that the weight to be given to each depends on the particular facts of the case.⁶⁸

63 Liu, above, at 461. Liu notes, however, that *"the longer time elapses between the cessation of the relationship and the incident complained of, the more difficult it is for the applicant to obtain remedy under the DVO": same as above.*

64 See sections 6 and 7, DVO.

65 HKLRC, *Report on Stalking* (Oct 2000), at para 4.34.

66 Same as above, at para 4.35.

67 Same as above.

68 See Liu, above, at 465.

11.47 It should be noted that the welfare or best interests principle therefore does not apply to injunction proceedings under the Ordinance,⁶⁹ as the factor of *"the needs of any child living with the applicant"* is not treated as the first and paramount consideration under the Ordinance, but as just one of the factors to be taken into account by the court in considering whether to grant an exclusion order against the other party.⁷⁰

Shortcomings of the Domestic Violence Ordinance (Cap 189)

11.48 As a means of providing swift relief in cases involving domestic violence, the Ordinance is recognised to have a number of significant shortcomings.⁷¹ These include:

- Injunctive relief under the Ordinance is available only to married persons and a man and a woman who are living together. Thus, the remedies are not available once the spouses are divorced and living apart, or the relationship has ended between the cohabitants.⁷²
- A child who has been molested has no standing to apply for an order under the Ordinance. The child therefore receives no protection under the Ordinance if the child's parent is unwilling to bring an action against the other party. There is also a requirement that the child must be living with the applicant. Children not living with their parents cannot benefit from the Ordinance.⁷³
- Molestation can occur in other types of domestic relationship. *"For instance, an elderly member of a family may be abused by those with whom he is living; parents may be abused by their violent child; and a gay or lesbian partner may become irrational or obsessive. The requirement of marriage or cohabitation has deprived these parties of the right to apply under the Domestic Violence Ordinance."*⁷⁴
- Breach of an injunction granted under the Ordinance is not a criminal offence. The power of the court to attach a power of arrest to an injunction is restricted to cases where the respondent has caused actual bodily harm. There is a general reluctance to invoke such power.⁷⁵

69 Liu, above, at 247.

70 Same as above, at 467. Liu notes, at 467, that the courts have held on this issue that where the merits of a case are evenly balanced between adult parties, it would be wrong to consider the interests of the child as having decisive weight, tipping the balance in favour of an exclusion order.

71 See HKLRC Report (2000), above, at paras 4.33 to 4.50, and Liu, above, at 474 to 475.

72 HKLRC Report (2000), above, at para 4.36.

73 Same as above, at para 4.38.

74 Same as above, at para 4.37.

75 Liu, above, at 474 to 475.

- In the context of child custody and access, there is no statutory provision clarifying the effect of an exclusion order (to exclude a spouse from the matrimonial home) on existing orders for custody or access.⁷⁶

Reforms to the equivalent English legislation

11.49 We note that the English Domestic Violence Act 1976, on which the Ordinance is based, was repealed and replaced in England by Part IV of the Family Law Act 1996. Amongst the reforms to the original legislation, the Family Law Act provides as follows.

- Non-molestation orders can be made in respect of "*associated*" persons or "*relevant*" children under the Act.⁷⁷
- Persons may be associated by virtue of:⁷⁸
 - marriage or former marriage;
 - cohabitation or former cohabitation;
 - an agreement to marry;
 - being related;
 - being parents or having parental responsibility for a child;
 - being connected by adoption;
 - living or having lived in the same household (other than merely as employees, tenants, lodgers or boarders); or
 - being party to the same family proceedings.
- A relevant child includes a child who is living with or might be reasonably expected to live with either party to the proceedings, a child in relation to whom an order under the Children Act 1989 or the adoption legislation is in question, and any other child whose interests the court considers relevant.⁷⁹
- Children may apply for occupation or non-molestation orders in their own right under the Act, although children under 16 require the leave of the court to apply.⁸⁰

76 We referred to this problem in our Consultation Paper: see HKLRC Sub-committee on Guardianship and Custody (1998), above, at para 6.147.

77 Section 42, English Family Law Act 1996 ("1996 Act").

78 Section 62(3), 1996 Act.

79 Section 62(2), 1996 Act.

80 Section 43, 1996 Act.

11.50 We also note that further changes to English legislation have recently been enacted.⁸¹ The Domestic Violence, Crime and Victims Act 2004, provides, amongst other reforms that:

- a breach of a non-molestation order will be a criminal offence;⁸²
- same-sex couples will be able to apply for orders under the Act;⁸³
- the list of associated persons will be expanded to include non-cohabiting couples, who are persons who *"have or have had an intimate personal relationship with each other which is or was of significant duration."*⁸⁴

Our conclusions

11.51 We consider the deficiencies in the protections afforded by the current domestic violence legislation in Hong Kong to be serious. We note that these deficiencies were drawn to the Administration's attention in 2000 in the Law Reform Commission's *Report on Stalking*. The first recommendation of that report was that *"the Administration should give consideration to reforming the law relating to domestic violence."*⁸⁵ We strongly endorse this view, particularly in light of the successive reforms that have been and are being made to the English legislation on which our Ordinance is based. We therefore take the opportunity to note our concern and to make a further recommendation calling for reform of the law in this area.

Recommendation 33

We recommend that the Administration should review the law relating to domestic violence and introduce reforms to improve its scope and effectiveness.

81 The Domestic Violence, Crime and Victims Act 2004 ("DVCVA") was enacted on 15 November 2004. These reform proposals originated from a UK Government White Paper, *Justice for All* (Jul 2002, Cm 5563) and consultation paper, *Safety and Justice: the Government's Proposals on Domestic Violence* (Jun 2003, Cm 5847).

82 Section 1 of the DVCVA (inserting a new section 42A in the 1996 Act).

83 Section 2 of the DVCVA (amending section 62(1)(a) of the 1996 Act).

84 Section 3 of the DVCVA (amending section 62(3) of the 1996 Act).

85 HKLRC (2000), above, at para 4.50.

A new definition of "domestic violence"

11.52 Acts of violence within the family may take many forms, including physical, sexual and/or psychological abuse. In some cases, such violence may cause serious harm or even death to the victims. Whether those acts constitute actionable domestic violence in a given case is a question of fact to be determined by the court on the basis of the relevant legislation and the evidence presented to it.⁸⁶

11.53 As we have noted earlier, the current pre-condition for the granting of an injunction in a family violence case is that the applicant, or a child of the applicant, has been "*molested*" by the other party.⁸⁷ The term "*molesting*" is not defined in the Ordinance. In line with our recommendation that the Administration should review the effectiveness of the domestic violence legislation in Hong Kong, we consider that priority should be given to the introduction of a broad, all-encompassing definition of domestic violence. The purpose of this new definition would be to assist the courts to more clearly identify whether domestic violence has occurred in a particular case and to assess its impact on the children and residential parent.⁸⁸

11.54 As we have noted earlier, in England, the Children Act Sub-committee of the Lord Chancellor's Advisory Board on Family Law considered the introduction of a new definition of domestic violence along the lines of section 3 of the New Zealand Domestic Violence Act 1995, which the Children Act Sub-committee saw as useful, comprehensive and gender neutral.⁸⁹ The text of this section is set out below.

"3. Meaning of "domestic violence" –

- (1) In this Act, "domestic violence", in relation to any person, means violence against that person by any other person with whom that person is, or has been, in a domestic relationship.*
- (2) In this section, "violence" means –*
 - (a) physical abuse:*
 - (b) sexual abuse:*
 - (c) psychological abuse, including, but not limited to, –*

86 Children Act Sub-committee Report (2000), above, at para 2.7.

87 Section 3, DVO.

88 Children Act Sub-committee Report (2000), above, at para 2.10.

89 Same as above, at para 2.8. For details of other aspects of the New Zealand domestic violence provisions, see Children Act Sub-committee Consultation Report (2000), above, at Appendix 4, and NZ Ministry of Justice (1999), above.

- (i) *intimidation:*
- (ii) *harassment:*
- (iii) *damage to property:*
- (iv) *threats of physical abuse, sexual abuse, or psychological abuse:*
- (v) *in relation to a child, abuse of the kind set out in subsection (3) of this section.*

(3) *Without limiting subsection (2)(c) of this section, a person psychologically abuses a child if that person –*

- (a) *causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship: or*
- (b) *puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring; -*

but the person who suffers that abuse is not regarded, for the purposes of this subsection, as having caused or allowed the child to see or hear the abuse, or, as the case may be, as having put the child, or allowed the child to be put, at risk of seeing or hearing the abuse.

(4) *Without limiting subsection (2) of this section –*

- (a) *a single act may amount to abuse for the purposes of that subsection:*
- (b) *a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.*

(5) *Behaviour may be psychological abuse for the purposes of subsection (2)(c) of this section which does not involve actual or threatened physical or sexual abuse."*

Recommendation 34

We recommend the introduction of a broad, all-encompassing definition of domestic violence along the lines of section 3 of the New Zealand Domestic Violence Act 1985.

The court's powers under the Domestic Violence Ordinance (Cap 189) in relation to custody and access orders

11.55 As noted above, we observed in our Consultation Paper⁹⁰ that there was no statutory provision⁹¹ as to the effect on existing orders for custody or access of an order for an injunction excluding a spouse from the home.⁹² We therefore advocated increasing the powers of the court to take into account circumstances of family violence where custody or access was at issue. We proposed that the court should be given a power when making an injunction under the Domestic Violence Ordinance (Cap 189) to suspend a prior access or contact order, or to vary a prior order so as to make a supervised access or contact order.⁹³

11.56 We also proposed that the court should have the power to make consequential orders determining the residence of the child or any other aspect of parental responsibility that would meet the best interests of the child.⁹⁴ We further proposed that there should be an onus on the parties to disclose prior relevant orders when applying for an injunction, to avoid orders that were inconsistent with prior custody, access, residence or contact orders.⁹⁵

11.57 On consultation, all of the respondents who commented on these proposals were in support of them, although, as noted previously, some respondents expressed strong general concerns about the impact of the new joint parental responsibility model in family violence cases.

11.58 Having carefully reviewed the terms of our original proposals, we consider that it would be useful to add certain further refinements. First, as injunctions under the Ordinance are granted for a temporary period only,⁹⁶ it should be made clear that the proposed suspension or variation of access or contact orders, and the granting of consequential residence or other orders, should be on an interim basis only.

90 Same as above.

91 In either the DVO or the Guardianship of Minors Ordinance (Cap 13) ("GMO").

92 Under the DVO.

93 HKLRC Sub-committee on Guardianship and Custody (1998), at paras 6.149 and 15.63.

94 Same as above.

95 Same as above, at paras 6.150 and 15.64.

96 For an initial period of up to three months, which can be extended for a maximum of a further three months: see sections 6 and 7, DVO.

11.59 Secondly, within the list of consequential orders that we propose the court should be empowered to make, we would include a power to the court to make interim maintenance orders.

11.60 Lastly, it should also be made clear that, although the welfare or best interests principle may not apply to the making of an injunction under the Domestic Violence Ordinance (Cap189),⁹⁷ it should guide the court in its consideration of the interim access, contact, custody, residence or other consequential order made in the situation set out in our recommendation below.

Recommendation 35

We recommend that the court should be given power, when making an injunction under the Domestic Violence Ordinance (Cap 189), to, on an interim basis, suspend a prior access or contact order or vary a prior order so as to make a supervised access or contact order. We recommend that the welfare or best interests principle should guide the court's exercise of such power.

We also recommend that the court should be given power, when making an injunction under the Domestic Violence Ordinance (Cap 189), to make interim consequential orders determining the residence of a child or any other aspect of parental responsibility that meets the best interests of the child, including the question of maintenance. We recommend that the welfare or best interests principle should guide the court's exercise of such power.

We further 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 are inconsistent with prior custody, access, residence or contact orders.

97 See the discussion, above, at paras 11.46 to 11.47.

Statutory checklist of factors in family proceedings legislation to include reference to family violence

11.61 In terms of custody and access legislation, as we saw in Chapter 9, we have already taken account of the issue of family violence in some of the earlier recommendations of this report. In particular, we have proposed, in relation to our recommended statutory checklist of factors (Recommendation 3⁹⁸), that circumstances of family violence should be incorporated into the checklist of factors that the court is to consider when determining what is in the best interests of the child.⁹⁹ In this context, we note the comment of the Children Act Sub-committee that:

*"Whether or not there has been domestic violence in a given case is a question of fact to be decided by the court on the evidence presented to it in the individual case. What matters, in our view, is that where domestic violence, whatever form it takes, is identified as a relevant feature of a case, its nature, and the effect it has had on the children in the case and the parent with whom they are living are addressed when the court is considering whether or not contact is in the interests of the children."*¹⁰⁰

Scope of parental responsibility – consent and notification requirements

11.62 We have also considered the implications of the issue of family violence for our recommended consent and notification requirements on parental responsibility matters (Recommendation 13¹⁰¹). Responding to the concerns expressed by some of our consultees, that the new consent and notification requirements might be used by abusive spouses to obstruct and harass the other spouse, or to facilitate further violence, we proposed that the court should have the power to vary or dispense with any of the consent or notification requirements in appropriate cases.

Judicial guidelines to supplement legislative reforms

11.63 In accordance with the principal recommendation in the English study,¹⁰² we advocate that there should be guidelines for the judiciary at all levels, setting out the approach which the courts should adopt when domestic violence is put forward as a reason for denying or limiting parental contact to children. We consider that the guidelines should be in the form of a Practice Direction, and should refer to the proposed English model, as set out in Annex

98 Along the lines of section 1(3) of the English Children Act 1989 ("1989 Act") with some modifications drawn from section 68F of the Australian Family Law Act 1975 ("1975 Australian Act").

99 See the discussion in Chapter 9, above, at paras 9.39 to 9.41.

100 See Children Act Sub-committee Report (2000), above, at para 2.7.

101 See the discussion in Chapter 9, above, at paras 9.99 to 9.102.

102 Children Act Sub-committee Report (2000), above, at section 5.

3 of this report. The elements to be dealt with by the guidelines are set out below.

- *Court to give early consideration to allegations of domestic violence*
- *The steps to be taken where the court forms the view that its order is likely to be affected if allegations of domestic violence are proved*
- *Specific directions to be given to the court welfare officer in cases involving domestic violence*
- *Matters to consider in relation to granting interim contact pending full hearing*
- *Matters to be considered at the final hearing*
- *Matters to be considered where findings of domestic violence are made*
- *Matters to be considered where contact is ordered in a case where findings of domestic violence have been made*
- *Information to be provided about local facilities available (court to familiarise itself with the facilities which are available to assist families subject to domestic violence)*
- *Reasons (court to explain how its findings in respect of domestic violence have influenced its decision on contact)*
- *Court to review facilities at court to ensure there are separate waiting areas for parties, and that victim support information is available.*

Recommendation 36

We recommend that there should be guidelines for the judiciary at all levels, setting out the approach which the courts should adopt when domestic violence is put forward as a reason for denying or limiting parental contact to children.

More information to be available to the court

11.64 We agree with the recommendation made in the Australian study that, in making decisions based upon the best interests of the child, it is essential that the Court should be able to make a proper assessment of any risk to a child. This includes being able to investigate allegations of domestic violence at interim hearings. For this reason, the court needs to have available to it enough information to make these assessments. Ideally, family welfare reports should be available in each case that involves an issue of a child's welfare, though we acknowledge that this may have considerable resource implications for the court.

11.65 We also note the findings of the English study, that there was strong concern at the lack of interaction between the civil and criminal law where domestic violence was concerned. We note the data privacy issues involved, but, because of the serious implications for the interests of the child, we advocate that consideration should be given to allowing the courts hearing contact applications to have access to the criminal records of parents insofar as they may be relevant to issues of domestic violence, and to be kept informed of concurrent proceedings against perpetrators of domestic violence.

Recommendation 37

We consider that, in making decisions based upon the best interests of the child, it is essential that the Court should be able to make a proper assessment of any risk to a child. This includes being able to investigate allegations of domestic violence at interim hearings.

We recommend that consideration should be given to allowing the courts hearing contact applications to have access to the criminal records of parents insofar as they may be relevant to issues of domestic violence, and to be kept informed of concurrent proceedings against perpetrators of domestic violence.

Supervised contact

11.66 We advocate a review by the Administration of the current arrangements and facilities allowing for supervised contact in Hong Kong. It is essential that, in cases where the court comes to the conclusion that contact is in the child's best interests, despite the fact that domestic violence has occurred, adequate protections are in place to ensure that the contact is safe.¹⁰³

¹⁰³ See: same as above, at Part 4, and NZ Ministry of Justice report (1999), above, especially Introduction and Sections 8 and 9.

Recommendation 38

We recommend that the Administration should review the current arrangements and facilities allowing for supervised contact in Hong Kong.

On-going training for those handling family cases

11.67 In line with the English proposals, we also believe that there needs to be ongoing training, and that awareness levels need to be raised, in relation to the effect of domestic violence on children and residential parents for all the disciplines engaged in the Family Justice System, including the legal profession and the judiciary.

Recommendation 39

In line with the English proposals, we recommend that there needs to be on-going training and raising of awareness levels in relation to the effect of domestic violence on children and residential parents for all the disciplines engaged in the Family Justice System, including the legal profession and the judiciary.

Privacy issues

11.68 We note the concerns expressed by our own consultees as well as those responding to the English study that the family justice system could be improperly used by abusers to locate victims and children, and that the system lent itself to such misuse. We believe that a review of these issues, and the susceptibility of the system, should be considered by the Administration.

11.69 We wish to state, however, that such a review should also take into account our recommendation below, advocating that long term research should be carried out into the effects of domestic violence.

Recommendation 40

We recommend that the Administration consider a review of data protection arrangements for victims of family abuse and the susceptibility of the family justice system.

Long-term research

11.70 In our view, long-term research should be undertaken on the effects on children of witnessing and/ or being the victims of domestic violence. We also advocate the detailed collection and evaluation of information arising from court proceedings in these cases. We acknowledge that such research should be undertaken having regard to the data protection issues noted above. We appreciate that a careful balance would need to be struck between the interests of data subjects in keeping their personal information as private as possible, and the goal of facilitating the important socio-legal research proposed in this recommendation.

Recommendation 41

We recommend that long-term research should be undertaken on the effects on children of witnessing and/ or being the victims of domestic violence.

We also recommend the detailed collection and evaluation of information arising from court proceedings in these cases.

Chapter 12

Recommendations for reform – the voice of the child

Introduction

12.1 In this chapter, we consider the various ways in which children can have a more direct involvement in family proceedings. In reviewing this topic, we have been mindful of the following objectives for the law in this area:

- to give children the opportunity, as far as is practical, to express their views on decisions which will directly affect them, and
- to ensure that they do not feel a sense of exclusion from those decisions.¹

The views of the child

12.2 In family proceedings, the "voice" of the child can be brought to the court's attention in a number of ways:

- 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 way of proceedings issued by the child or on his behalf.

12.3 The relevant part of section 3 of the Guardianship of Minors Ordinance (Cap 13) states:

¹ The Family Law Council of Australia, *Involving and Representing Children in Family Law* (May 1995, Discussion Paper), at para 3.06.

- (1) *In relation to the custody or upbringing of a minor ...*
- (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; ..."*

12.4 By implication, a similar stricture applies to proceedings under the Matrimonial Causes Ordinance (Cap 179) and the Matrimonial Proceedings and Property Ordinance (Cap 192). Section 48C of the Matrimonial Causes Ordinance (Cap 179) states:

"For the avoidance of doubt, section 3 of the Guardianship of Minors Ordinance (Cap 13) (which provides that the welfare of the minor 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)."

12.5 In England, section 1 of the Children Act 1989 provides that, in contested cases relating to section 8 orders (for residence, contact, etc) and in care and supervision cases,² the court is under a duty to have regard to *"the ascertainable wishes and feelings of the child (considered in the light of his age and understanding)."*³ This is one of the factors in the English welfare checklist, which was considered earlier in this report.⁴

12.6 The Scottish Law Commission preferred the term *"views"* to the English expression *"wishes and feelings"* of the child. The Scottish Law Commission commented that the term *"views"*:

"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

2 Section 1(4), Children Act 1989 ("1989 Act").

3 Section 1(3)(a) 1989 Act.

4 See Chapter 5, above, at paras 5.52 to 5.56.

considered view as to what was the right course of action in the circumstances".⁵

12.7 We note the reference to "views" in Article 12.1 of the United Nations Convention on the Rights of the Child,⁶ which 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."

12.8 In our Consultation Paper,⁷ we proposed that a provision on the views of the child should apply to all proceedings concerning children. We noted that it would be clearer if each matrimonial Ordinance⁸ specifically referred to the need to hear the views of the child. We proposed 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 should be enacted in matrimonial legislation.

12.9 While these proposals were generally supported by the respondents on consultation, one respondent objected to the proposals generally in this area, stating that children should not in any case appear to be choosing between their parents, because of the obvious repercussions that this could have for the future family relationship. Several other respondents stressed the special skill, care and training that should be required on the part of those involved in ascertaining children's views. We acknowledge these concerns and address them further in the discussion which follows.

Recommendation 42

We recommend that each of the matrimonial Ordinances should specifically refer to the need to hear the views of the child.

We also 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.

5 Scottish Law Commission, *Report on Family Law* (1992, Scot Law Com No 135), at para 2.63.

6 Adopted by the United Nations in 1989.

7 HKLRC Sub-committee on Guardianship and Custody, *Consultation Paper: Guardianship and Custody* (Dec 1998), at paras 6.110 and 15.48.

8 We are referring here to the Guardianship of Minors Ordinance (Cap 13) ("GMO"), the Matrimonial Causes Ordinance (Cap 179) ("MCO"), the Matrimonial Proceedings and Property Ordinance (Cap 192) ("MPPO"), the Separation and Maintenance Orders Ordinance (Cap 16) ("SMOO") and the Domestic Violence Ordinance (Cap 189) ("DVO").

How and when child's views taken into account

12.10 As we saw earlier, section 3(1)(a)(i)(A) of the Guardianship of Minors Ordinance (Cap 13) states 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."*

12.11 In England, section 1(1) of the Children Act 1989 refers to the child's wishes in the context of *"where a court determines any question ..."* Provisions in section 1(3) and 1(4) of the Act expressly apply the welfare checklist (of which the child's wishes are one factor to be taken into account) to *contested* cases for section 8 orders. This approach was criticised by the Scottish Law Commission⁹ as limiting the situations where the child's wishes could be taken into account by the court to only those cases where orders were being opposed by one of the parents.

12.12 By contrast, the Scottish section on the views of the child is free-standing, as there is no welfare checklist in the Scottish legislation. The Scottish provision also sets out the mechanism for expression of the child's views. Section 11(7) of the Children (Scotland) Act 1995 provides that:

"in considering whether or not to make an order under subsection (1) above¹⁰ and what order to make, 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."*

12.13 The Australian provision on the child's wishes is incorporated into the checklist of factors appearing in section 68F of the Family Law Act 1975. The child's wishes are to be considered with all the other factors in that checklist.¹¹

12.14 We proposed in our Consultation Paper¹² that, in line with our proposal that a statutory checklist of factors should be established, the child's views should be one element in the checklist of factors, rather than a free-standing section. We also proposed that the child's views should be balanced with the other factors in the checklist when the judge is making a

9 Scottish Law Commission (1992), above, at para 5.26: see Chapter 6, above.

10 This is relating to parental responsibilities or rights, or guardianship, or the administration of a child's property.

11 See Chapter 7, above, at para 7.27. See also the broader discussion of the statutory checklist of factors in Chapter 9, above, at paras 9.23 to 9.49.

12 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.113 and 15.49.

decision in the child's best interests. We further proposed that section 3(1)(a)(i)(A) of the Guardianship of Minors Ordinance (Cap 13), discussed above, should be repealed.

12.15 On consultation, these proposals received a similar response to the previous recommendation, with an emphasis on the skill and training that should be required of those involved in ascertaining the views of children. We fully accept these concerns, and have made specific reference to them in recommendations below.

Recommendation 43

In line with 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.

With the adoption of this provision, 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

12.16 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."¹³*

12.17 In our Consultation Paper,¹⁴ we proposed that a child should be given the facility to express his views if he wishes, whether directly or indirectly.¹⁵ Once he has indicated a desire to express his views, then the

13 This would deal with separate representatives.

14 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.115 to 6.116 and 15.50 to 15.51.

15 This is via a report from a social welfare officer, psychiatrist or psychologist.

court must hear his views. We suggested that it would be useful to set out the mechanisms for ascertaining and expressing the child's views. We proposed adopting a provision along the lines of the Australian section 68G(2), but adapted to insert "views" rather than "wishes." With the adoption of this provision, we proposed the repeal of section 3(1)(a)(i)(B) of the Guardianship of Minors Ordinance.

12.18 As with the previous recommendations concerning the child's views, these proposals were generally supported on consultation, but with reservations expressed by several respondents as to the level of care and expertise required by those seeking the views of children in court proceedings. It was emphasised that the child's maturity and the particular circumstances of the case must always be considered.

12.19 As noted earlier, one respondent stressed that a child should not be appearing to choose between his parents, because of the serious implications this might have for the future family relationship.

12.20 We have carefully considered these comments and believe that the views that the child expresses to the judge should be treated in confidence by the judge and not revealed to the parents. In particular, we consider that it should never appear that it is the child who is making the custody decision. We also agree that where social welfare officers are assigned to ascertain the views of the child, only those officers with adequate training and experience in this area should deal with these sensitive situations.¹⁶

12.21 In the context of this recommendation, it would be useful to clarify that although the court must hear a child's views if he chooses to express them, the particular *weight* to be given to those views will be a matter for the court to determine.

Recommendation 44

We recommend that a child should be given the facility to express his views if he wishes, whether directly or indirectly. Once the child has indicated a desire to express views, then the court must hear those views, although the weight to be given to the child's views will be a matter for the court to determine.

¹⁶ It should be noted that we have previously considered in an earlier report the issue of the training and experience that should be required of social welfare officers working in this area: see HKLRC, *The Family Dispute Resolution Process* (March 2003), at para 7.30 to 7.34 and Recommendation 30. Amongst other matters relating to the work of social welfare officers, we recommended in that report that social welfare officers preparing reports for the Family Court should have a minimum of three years' experience in family and child care work, and their training should include the preparation of court reports.

We recommend that the mechanisms for ascertaining and expressing the child's views should be set out in the legislation. We therefore recommend the adoption of a provision on the lines of the Australian section 68G(2), but adapted to insert "views" rather than "wishes."

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).

We also recommend that any views that the child expresses to the judge should be treated in confidence by the judge and not revealed to the child's parents.

We further recommend that where social welfare officers are assigned to ascertain children's views, only those officers with adequate training and experience in this area should deal with these sensitive cases.

Children not required to express views

12.22 Section 68H of the Australian Family Law Act 1975 states that:

"Nothing in this Part [of the legislation] permits the court or any person to require the child to express his or her wishes in relation to any matter."

12.23 In our Consultation Paper,¹⁷ we proposed that children should not be required to express their views, as to do so would place children under pressure by one or both parents to take sides in a dispute concerning the child's best interests. However, we stated that we did not see the need for a statutory provision to that effect along the lines of the Australian section 68H.¹⁸

12.24 On consultation, the respondents commenting on this proposal agreed that a child should not be required to express his views. However, a number also strongly indicated that they would prefer this to be expressly stated in the legislation to make the position clear. In the light of these comments, we have further considered this issue and agree with the respondents that an express provision should be included in the legislation to avoid any ambiguity.

17 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.117 and 15.52.

18 Same as above.

Recommendation 45

We recommend that children should not be required to express their views.

To make the position clear, we recommend the introduction of a statutory provision to that effect on the lines of section 68H of the Australian Family Law Act 1975.

Age of maturity for the purpose of obtaining views

12.25 Section 11(10) of the Children (Scotland) Act 1995 provides a presumption of maturity for the purpose of obtaining views for a child of 12 or above.¹⁹ In our Consultation Paper,²⁰ we proposed that there should be no similar age limit in Hong Kong and that the court should have unfettered discretion in deciding whether to hear a child's views, irrespective of his age. We stated that we considered that section 11(10) of the Children (Scotland) Act 1995 might not be suitable for local conditions, as such a presumption might be too inflexible in particular cases.

12.26 On consultation, a number of respondents expressed reservations about this proposal. One respondent felt that no child under 16 should appear to choose between his parents, as the child could not know all the factors involved, and so could not know what was in his own best interests. Another respondent said that it was unsatisfactory that no age limit was specified in the proposal. A third respondent felt that children under 10 or 11 years of age should be protected from direct involvement in court proceedings and, in particular, that judges should rarely seek children's views directly. Another respondent emphasised the level of caution that was needed in obtaining the views of the child, and noted that much depended on the child's maturity and the circumstances of the case.

12.27 We have carefully considered the views of these respondents, and while we acknowledge the need for special care, skill and training for those handling these cases, we must reiterate our view that it may be too restrictive to specify any age limit for the purpose of considering the views of the child. In line with Recommendation 44 above, where if a child indicates a desire to express his views then the court must hear those views, we believe that this should apply regardless of the child's age. However, as we noted in Recommendation 44, the particular *weight* to be given to the child's views should be left to the judge to assess in each case.

19 Section 11(10) of the Children (Scotland) Act 1995 states: "*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.*"

20 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.118 and 15.53.

Recommendation 46

We recommend that there should be no age limit and the court should be empowered to consider a child's views irrespective of his age.

Separate representation

Introduction

12.28 Hong Kong's legislation and rules allow for representation of children in family law proceedings by separate representatives and guardians *ad litem*. Their role is to represent the child's interests and to speak on the child's behalf.²¹ The term "*separate representative*" is usually used to describe a lawyer appointed to represent the child,²² while a guardian *ad litem* need not be a lawyer.²³ In Hong Kong the role of separate representative for the child is usually fulfilled by the Official Solicitor under the provisions of the Official Solicitor Ordinance (Cap 416), though he may also act as guardian *ad litem* for the child.²⁴

12.29 Some may argue that it is not necessary to appoint a separate representative or a guardian *ad litem* for the child in family proceedings, as the court already orders a report from a social welfare officer where the parents cannot agree on the best interests of a child. Their roles differ, however. As Butler-Sloss LJ stated in *Re S (A Minor) (Care Proceedings: Reports)*:

"the functions of the court welfare officer and those of the guardian ad litem are not identical although they do have many features in common: each has a duty to report to the court; each

21 See A Liu, *Family Law for the Hong Kong SAR* (Hong Kong University Press, 1999), at 325.

22 As in rule 72 of the Matrimonial Causes Rules (Cap 179) ("MCR"), while under rule 108 of the MCR, a person appointed to "*separately represent*" the child can include the Official Solicitor or a guardian *ad litem*. As will be seen below, guardians *ad litem* need not be legally qualified. (See further rule 108(1), MCR and order 80, rule 2(3) of the Rules of the District Court (Cap 336) ("RDC")).

23 However, a non-legally qualified guardian *ad litem* should act with a solicitor: see order 80, rule 2(3) of the RDC which states: "*Except where the Official Solicitor is acting as next friend or guardian ad litem, a next friend or guardian ad litem of a person under disability [of age] must act by a solicitor.*"

In England, the term "*guardian ad litem*" is used in the context of private law cases, while in public law cases, where the appointment of a representative for the child is mandatory, the term "*children's guardian*" is used. Children's guardians are appointed from the Children and Family Court Advisory and Support Services system ("CAFCASS"). For a fuller discussion of separate representation for children in England, see Chapter 5, above, at paras 5.116 to 5.120.

24 The duties of the Official Solicitor are expressed in the legislation as including, "*To act as guardian ad litem or next friend to any person under a disability of age ... in proceedings before any court.*" See Official Solicitor Ordinance (Cap 416), Schedule 1, Part 1.

*has a duty to consider the welfare or the interests of the child; each may be cross-examined on any report which they give. However, a court welfare officer is not a party in the proceedings, whereas the guardian ad litem, through his representation on behalf of the child, is. Nonetheless, 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 other parties in the proceedings. Therefore, the reports of both the court welfare officer and the guardian ad litem should be given the same consideration by the court receiving such reports. Of course the added distinction between the two is that the guardian ad litem has the added duty of representing the child in court and if necessary instructing legal representation for the child."*²⁵

Rule 108 of the Matrimonial Causes Rules (Cap 179)

12.30 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. The court 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 of the child with authority to take part in the proceedings on the child's behalf."*²⁶

12.31 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 specially trained social worker,²⁷ appointed to interview the child and represent his views and best interests to the court.

Rule 72 of the Matrimonial Causes Rules (Cap 179)

12.32 Rule 72 of the Matrimonial Causes Rules (Cap 179) is confined to ordering representation for children in relation to financial and property matters.²⁸ The separate representation ordered can be by a solicitor, or a solicitor and counsel, and can include appointing the Official Solicitor or other fit person to be guardian *ad litem* for the child.

25 [1992] 2 FCR 554, at 558 to 559.

26 Rule 108(1)(b), MCR.

27 For an example of the English position, see Chapter 5, above, at paras 5.116 to 5.120.

28 I.e., an application for a variation of a settlement order or any other application for ancillary relief.

Anomalies in relation to separate representation under the Matrimonial Causes Rules (Cap 179)

12.33 There is no power in rule 108 of the Matrimonial Causes Rules to direct separate representation by lawyers, unlike in rule 72. The Official Solicitor must consent to being appointed under rule 108, though this is not required under rule 72. Rule 108 refers to a "*proper person*" acting as guardian *ad litem* while rule 72(1) refers to a "*fit person*." Neither term is defined. It appears to us ironic that there is no provision referring to separate representation for children by a lawyer in matrimonial disputes, and yet there can be for financial and property matters.

12.34 In rule 72 of the Matrimonial Causes Rules, it is clear that the "*solicitor*" referred to acts for the child and has to file a certificate that any proposed guardian *ad litem* (other than the Official Solicitor) has no interest adverse to the child's. By comparison, the solicitor referred to in rule 108 appears to be acting more for the applicant who is seeking to be appointed guardian *ad litem* "*with authority to take part in the proceedings on the child's behalf*." The provision simply states that "*A solicitor*" has to certify that the applicant is a proper person with no adverse interest to the child's. 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.

12.35 In our Consultation Paper,²⁹ we proposed that the anomalies in rules 72 and 108 of the Matrimonial Causes Rules as to the appointment of a separate representative or guardian *ad litem* should be addressed. All of the respondents who commented on this proposal during the consultation exercise supported it, apart from one respondent, who expressed reservations generally with the proposals in this area.

Recommendation 47

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* should be addressed.

Types of proceedings where a separate representative may be appointed

12.36 As stated earlier, the court has a discretion under rule 108 of the Matrimonial Causes Rules to order that a child should be separately represented in any "*matrimonial proceedings*." This term is defined³⁰ in the rules as meaning "*any proceedings with respect to which rules may be made*

29 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.126 and 15.54.

30 See rule 2, MCR.

under section 54(1) of the [Matrimonial Causes] Ordinance." Section 54(1) of that Ordinance provides for rules to be made "*for the better carrying out of the purposes and provisions of this Ordinance ...*" 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, as the court's powers to award custody and access orders are generally³¹ found within the provisions of other matrimonial Ordinances.³² However, in our view, it is in exactly this type of proceeding that appointment of a separate representative or a guardian *ad litem* would be appropriate.

12.37 We therefore proposed in our Consultation Paper³³ that, for the removal of doubt, it should be made clear that a separate representative can be appointed in any dispute relating to the parental responsibility for, or guardianship of, a child.

12.38 On consultation, all of the respondents who commented on this recommendation supported it, apart from one respondent who was concerned that separate representation might be called for in every case, for which there would be significant cost and staffing implications for the Legal Aid Department (as the Official Solicitor is the Director of Legal Aid). We note but do not agree with this view. Our proposal is not that separate representation would be provided in each and every case, but that in all *appropriate* cases it should be possible for the court to appoint a separate representative for the child.

Recommendation 48

For the removal of doubt it should be made clear that a separate representative can be appointed in any dispute relating to the parental responsibility for, or guardianship of, a child.

Person who may be a guardian ad litem

12.39 We proposed in our Consultation Paper³⁴ 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

31 That is, apart from the power to order care and supervision orders under sections 48A and 48 of the MCO (discussed in Chapter 3, above, at paras 3.30 to 3.33).

32 Namely, section 10 of the GMO, section 19 of the MPPO and section 5 of the SMOO. See the discussion of these Ordinances in Chapter 3, above. See also Liu, above, at 275.

We also note that rule 108 of the MCR comes under that part of the MCR which is headed "*Other Applications*," rather than under that part headed "*Applications relating to Children*."

33 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.128 and 15.55.

34 Same as above, at paras 6.129 and 15.56.

that non-parents should be able to apply for orders concerning children.³⁵ Such non-parents would not be regarded as guardians *ad litem* in this context.

12.40 All of the respondents who commented on this proposal supported it, apart from one respondent who stated that the roles and responsibilities of the guardian *ad litem* should be clearly defined, rather than by making reference to such a person being a professional person with experience in children's issues.

12.41 Having carefully reviewed our original proposal, we now consider that it would be preferable for the current law to be retained. We can envisage that cases might arise where an otherwise suitable person should be eligible to be appointed as a guardian *ad litem* for the child, even though that person may not be "*a professional person with experience in children's issues.*"

Who can apply for a separate representative to be appointed

12.42 Section 68L(3) of the Australian Family Law Act 1975 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. The court may do this:

- "(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".*

12.43 We are attracted to the simplicity of section 68L(3), and the fact that it has been incorporated into primary legislation in Australia reflects the importance of ensuring separate representation for children.

12.44 In our Consultation Paper,³⁶ we proposed 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 1975 in Australia be enacted. We further proposed that the restrictions on who can make application for an order, contained in section 10 of the Children Act 1989 in England, should also apply to this provision.³⁷

35 See Chapter 10 above, at paras 10.37 to 10.43 (Recommendation 28).

36 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.133 and 15.57.

37 Section 10 of the 1989 Act deals with those who can apply for section 8 orders without leave and those who can apply once leave is granted: see the discussion in Chapter 5, above, at paras 5.89 to 5.98, Chapter 10, above, at paras 10.37 to 10.43, and later in this chapter (in respect of an application by the child concerned), at paras 12.57 to 12.60. See also the recent English practice direction: *Practice Direction (Family Proceedings: Representation of Children)* [2004] 1 WLR 1180, which sets out guidelines on when it is appropriate to make a child party to "*non-specified*" family proceedings (ie, those not related to care and other public law proceedings) and whether a guardian *ad litem* should be appointed.

12.45 On consultation, all of the respondents who commented on this proposal supported it, apart from one respondent who had general reservations about the recommendations in this area.

Recommendation 49

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 Australian Family Law Act 1975 be enacted.

We also recommend that the restrictions on who can make application for an order, contained in section 10 of the English Children Act 1989, should also apply to this provision.

Criteria for appointment of separate representative

12.46 Article 12.2 of the United Nations Convention on the Rights of the Child provides that:

"For this purpose,³⁸ 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 appropriate body, in a manner consistent with the procedural rules of national law."

12.47 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 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, appears to be inadequate.

38 This is referring back to Article 12.1 which deals with a child expressing his views. For text see above.

12.48 In our Consultation Paper,³⁹ we noted that the Australian list of criteria for the appointment of a separate representative would be useful as a checklist for guiding the court on the circumstances when it is appropriate to appoint a separate representative. The particular circumstances included in the Australian list are set out below:⁴⁰

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 by 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,
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

39 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.136 and 15.58.

40 As it appeared in the case of *Re K* [1994] FLC 92-461, at 80. The criteria is discussed in Chapter 7, above, at para 7.46.

12. in cases involving allegations of child abuse, whether physical, sexual or psychological.

12.49 Since we were undecided in our Consultation Paper whether the criteria should be included in legislation, we invited views from the public on this point. We also expressed the view that a separate representative of the child should be appointed on a more frequent basis in Hong Kong.

12.50 On consultation, all of the respondents who commented on this proposal supported the adoption of criteria for the appointment of separate representatives along the lines of the Australian model. In terms of whether these guidelines should be incorporated in legislation or not, the majority of the respondents were in favour of including the guidelines in legislation,⁴¹ although two respondents considered that it would be preferable to include the guidelines in a practice direction, to facilitate amendment.

12.51 (We should point out at this juncture that during the process of refining our proposals generally on separate representation, we have reconsidered the position of children who are the subject of care and supervision orders. As we discuss later in this report,⁴² we have concluded that children who may be the subject of these orders should have separate representation as of right. Accordingly, the criteria referred to in our recommendation below would not apply in these cases.)

Recommendation 50

Except in the case of a child who may be subject to care or supervision orders,⁴³ we recommend the adoption of a list of criteria based on those adopted in Australia to determine when it is appropriate to appoint a separate representative. We recommend that this list of criteria be incorporated in legislation.

Guidelines for duties of separate representative

12.52 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.⁴⁴ To help in this, *"the court [should] adopt a more flexible approach to the*

41 In matrimonial proceedings rules at least, if not in primary legislation.

42 In relation to Recommendation 62. See Chapter 13, below, at paras 13.30 to 13.34.

43 These cases are covered separately in Recommendation 62: see same as above.

44 Boshier, *New Zealand Family Law Report*, 1993 Executive Summary. See summary in Boshier, "New Zealand Family Law Report," *Family and Conciliation Courts Review* (Apr 1995) Vol 33, No 2, at 182 to 193.

appointment of counsel, by considering at each phase of a case whether an appointment is necessary and for what purpose."⁴⁵ At the outset of the case the tasks which are expected of counsel need to be specified with clarity.⁴⁶

12.53 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."⁴⁷ 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 separate representative may take a different view from that of the court counsellor and is not bound by his report.

12.54 In England, the Solicitors Family Law Association (SFLA) also has 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.⁴⁸

12.55 In our Consultation Paper,⁴⁹ 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*. This would be useful in clarifying the exact nature of their roles.

12.56 On consultation, all of the respondents who commented on this recommendation supported the adoption of guidelines setting out the duties of the separate representative along the lines of the Australian model. It was also noted however, that unlike the criteria for the *appointment* of a separate representative for the child, these guidelines on the duties of the separate representative should not appear in statute, but in booklet form.

45 Same as above, at para 10.11.9.

46 Same as above, at para 10.11.8.

47 "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).

48 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).

49 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.140 and 15.59.

Recommendation 51

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. We recommend that this appear not in statute, but in booklet form.

Child as a party

12.57 Section 10(1) of the Guardianship of Minors Ordinance (Cap 13) provides that those who may apply for a custody or access order include *"either of the parents of a minor (who may apply without next friend) or the Director of Social Welfare."*

12.58 In England, section 10(8) of the Children Act 1989 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."* Rule 9(2A) of the English Family Proceedings Rules 1991 allows a child to participate without a next friend or guardian *ad litem* on certain conditions. Although, there may be some problems with the capacity of the child to give instructions, 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.⁵⁰

12.59 In our Consultation Paper,⁵¹ we proposed 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 a solicitor and counsel to represent him. We proposed the introduction of a provision on the lines of section 10(8) of the Children Act 1989 and rule 9(2A) of the Family Proceedings Rules 1991.

12.60 On consultation, all of the respondents who commented on this proposal supported it. One respondent cautioned that joining the child as a party to the proceedings should only be allowed where it was absolutely necessary, and that each case where it is proposed should be carefully examined. We consider that our proposal is already so qualified.

50 See also the discussion on separate representation of children under the 1989 Act appearing earlier in this report at Chapter 5, paras 5.116 to 5.120. A recent practice direction in England has set out guidelines on when it is appropriate to make a child party to *"non-specified"* family proceedings (ie, those not related to care and other public law proceedings) and whether a guardian *ad litem* should be appointed: see *Practice Direction (Family Proceedings: Representation of Children)* [2004] 1 WLR 1180.

51 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.142 and 15.60.

Recommendation 52

We recommend that, in principle, provided the leave of the court has been sought, the child should be allowed to become a party to proceedings which concern him and where he has sufficient understanding to instruct a solicitor and counsel to represent him. We recommend the introduction of a provision on the lines of section 10(8) of the English Children Act 1989 and rule 9(2A) of the English Family Proceedings Rules 1991.

Costs

12.61 Section 6(1) of the Official Solicitor Ordinance (Cap 416) states:

"The Official Solicitor may charge for his services and for services provided on his behalf, and may recover such costs and disbursements as are ordered to him by a court, magistrate or tribunal or otherwise agreed."

12.62 Although in general the Official Solicitor will ask for an indemnity for costs before he consents to act, we understand that he does not usually seek such an indemnity where there are minors involved in the proceedings.

12.63 If the Official Solicitor is not involved, the applicant representing the child could apply for legal aid on behalf of the child.

12.64 In our Consultation Paper,⁵² we proposed that, for those cases where the person representing the child was not the Official Solicitor, the court should be given power to order the parties to bear the costs of the separate representative or guardian *ad litem*.

12.65 On consultation, a number of respondents expressed concerns about this proposal. Several respondents proposed that legal aid should be available as of right for any child who was in need of separate representation, otherwise there was a danger that the child might be blamed by the parents for causing additional expense. Another respondent agreed that legal aid could be available for eligible cases, and suggested that the court could have the power to waive costs where parents refused to pay.

12.66 We have carefully considered these comments but still adhere to the terms of our original proposal which is intended to clarify that means should be available, in cases where the Official Solicitor is not representing the child, to meet the costs of those who are representing the child.

52 Same as above, at paras 6.143 and 15.61.

Recommendation 53

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*.

Chapter 13

Recommendations for reform – related matters

Introduction

13.1 This chapter brings together a number of proposals for reform on issues collateral to the general law of child custody and access. Although not central to our review of the law in this area, we feel that these are matters of importance which should be considered by the Administration.

Separation and Maintenance Orders Ordinance (Cap 16)

13.2 We saw earlier in this report that the Separation and Maintenance Orders Ordinance (Cap 16), though rarely resorted to these days, is still used in situations involving customary marriages or a union of concubinage where the applicants cannot apply for a divorce or a decree of judicial separation under the Matrimonial Causes Ordinance (Cap 179)¹ The most common applications under the Separation and Maintenance Orders Ordinance appear to be made by wives seeking maintenance, but who do not wish to divorce or pursue judicial separation.²

13.3 While amendments made to the Ordinance in 1997³ have redressed many of its defects, we noted earlier in this report that an applicant under the Ordinance has to establish fault-based grounds before an order for maintenance, separation or custody can be made.⁴ We also observed that the Ordinance appears to deal inadequately with the arrangements for children of the parties.⁵

13.4 Rather than embark on detailed recommendations for further reform of the Ordinance, the approach taken in our Consultation Paper⁶ was

1 See Chapter 3, above, at paras 3.68 to 3.77, especially para 3.69.

2 Hewitt (ed), *Hong Kong Legal Practice Manual: Family* (1998), at 23.

3 See Marriage and Children (Miscellaneous Amendments) Ordinance (Ord No 69 of 1997), referred to in Chapter 3, above, at para 3.74.

4 See Chapter 3, above, at para 3.74.

5 As above, at para 3.75.

6 HKLRC Sub-committee on Guardianship and Custody, *Consultation Paper: Guardianship and Custody* (Dec 1998), at paras 6.146 and 15.62.

to welcome submissions on whether the Ordinance remained of any practical use.

13.5 The results from the consultation exercise reinforced the view that, although not often used, the Ordinance remained appropriate for cases involving particular religious beliefs, customary marriages and concubinage relationships. We therefore accept that the Ordinance should be retained on this basis.

13.6 It was also suggested by one respondent that the inclusion of the pejorative term "*wilful neglect*" in section 6(1) of the Ordinance should be reviewed.⁷ While we note this suggestion, we consider that the use of the term is in line with the fault-based approach adopted generally in the Ordinance and should therefore be retained until such time as the Ordinance is fully reviewed or repealed.

13.7 As a drafting matter, one member of the Sub-committee suggested that the relevant, still operative provisions of the Ordinance should be transferred into the Matrimonial Proceedings and Property Ordinance (Cap 192). We raise this suggestion as a matter for the Law Draftsman to consider.

Recommendation 54

We recommend the retention of the provisions of the Separation and Maintenance Orders Ordinance (Cap 16) to cover exceptional cases, such as those involving customary marriages or concubinage, which are not covered by other matrimonial proceedings legislation.

Powers of the Director of Social Welfare

13.8 Since our terms of reference are confined to private law, we have not undertaken a review of the Protection of Children and Juveniles Ordinance (Cap 213) except in so far as it is relevant to the intervention of the Director of Social Welfare in custody or access disputes.⁸

13.9 We started our review of the powers of the Director of Social Welfare in this context from the principle of equality of treatment between children who are separated from a parent as a result of divorce and those

7 This term also appears in section 8(4)(a) of the Matrimonial Proceedings and Property Ordinance (Cap 192) ("MPPO").

8 For a discussion of the relevant provisions of the Protection of Children and Juveniles Ordinance (Cap 213) ("PCJO"), see Chapter 3, above, at paras 3.78 to 3.98.

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.⁹ 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."

13.10 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. Accordingly, in our view, 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.¹⁰

Power to order care and supervision orders

13.11 As we saw earlier in Chapter 3,¹¹ if there are exceptional circumstances making it impracticable or undesirable to entrust a child to his parents or any other individual, then the court may, under provisions in the Guardianship of Minors Ordinance (Cap 13) and the Matrimonial Causes Ordinance (Cap 179),¹² commit the child to the care of the Director of Social Welfare. The court can also order the supervision of a child in exceptional circumstances.¹³

13.12 We proposed in our Consultation Paper that the power to order care and supervision orders in guardianship disputes and any disputes concerning the best interests of a child should be retained.¹⁴

13.13 We also proposed that the anomalies between the Director of Social Welfare's powers in relation to care and supervision orders under both

9 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."*

10 See, for example, our comments at paras 13.46 to 13.49 below, in relation to our recommendation for a right to apply for contact under the PCJO.

11 Chapter 3, above, at paras 3.10 to 3.11.

12 Section 13(1)(b) of the Guardianship of Minors Ordinance (Cap 13) ("GMO") and section 48A of the Matrimonial Causes Ordinance (Cap 179) ("MCO").

13 Section 13(1)(a), GMO and section 48, MCO. See also Chapter 3, above, at paras 3.12 to 3.13.

14 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.158 and 15.68.

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.¹⁵ These anomalies are discussed further below.

13.14 On consultation, there was unanimous support for these proposals.

Recommendation 55

We 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.

We also recommend that the anomalies between the Director of Social Welfare'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.

Definitions of care and supervision orders

13.15 We have observed that there is no definition of either a care order or a supervision order in the matrimonial legislation.¹⁶ We proposed in our Consultation Paper¹⁷ that these terms should be defined in the matrimonial legislation rather than requiring resort to the relevant provisions of the Protection of Children and Juveniles Ordinance (Cap 213).¹⁸ This recommendation was supported by all of the respondents who commented on it during the consultation exercise.

Recommendation 56

We recommend that there should be a definition of a care order and a supervision order in each of the matrimonial Ordinances.

15 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.161 and 15.71.

16 See Chapter 3, above, at paras 3.12, 3.30 and 3.32.

17 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.158 and 15.68.

18 See: section 34 of the PCJO which sets out the powers of the juvenile courts in relation to guardianship, custody and control of children and juveniles in need of "care or protection"; and section 2 of the Ordinance, where a definition of "supervision order" appears.

Grounds

13.16 Applying the equality of treatment principle, we proposed in our Consultation Paper¹⁹ that, the Director of Social Welfare 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), where these orders are made in the context of "*care or protection*" proceedings.²⁰

13.17 It was noted earlier in Chapter 3 of this report that in private law proceedings, a care order may be made where it appears to the court that there are exceptional circumstances "*making it impracticable or undesirable*" for the child to be entrusted to either of the parents or to any other individual.²¹ In contrast, the various grounds for the making of a care order under the Protection of Children and Juveniles Ordinance (Cap 213) are specific and serious, including, for example, that the child has been "*assaulted, ill-treated, neglected or sexually abused*" and requires care or protection.²²

13.18 On consultation, this proposal was supported by all of the respondents who commented on it.

Recommendation 57

We recommend that the Director of Social Welfare 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).

Application of the welfare or best interests principle

13.19 With regard to care and supervision orders, we saw earlier in Chapter 9 that the welfare or "*best interests*" principle, which is to guide the courts in making decisions in cases involving children, applies expressly to these orders if they are made under the matrimonial Ordinances.²³ The welfare principle does not appear to apply, however, to the granting of care or supervision orders under section 34(1) of the Protection of Children and Juveniles Ordinance (Cap 213).²⁴

19 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.161 and 15.71.

20 For further details on these orders, see Chapter 3, above, at paras 3.10 to 3.13, 3.30 to 3.33 and 3.81 to 3.83. See also A Liu, *Family Law for the Hong Kong SAR* (Hong Kong University Press, 1999), at 454 to 455.

21 See section 13(1)(b) GMO and section 48A(1) MCO.

22 For a full statement of the grounds under the PCJO, see Chapter 3, above, at para 3.83.

23 Care orders and supervision orders may be made under, respectively, sections 13(1)(b) and 13(1)(a) of the GMO and under, respectively, sections 48A(1) and 48(1) of the MCO.

24 See Liu, above, at 247.

13.20 In our view, this is a further example where the equality of treatment principle should apply. As one writer has observed:

*"the welfare principle has now become the cornerstone in child law and should be the guiding principle in the PCJO as well."*²⁵

Recommendation 58

We recommend that the welfare or best interests principle should guide all proceedings under the Protection of Children and Juveniles Ordinance (Cap 213).

Ex parte applications by the Director of Social Welfare

13.21 As we saw earlier in Chapter 3 of this report,²⁶ 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 a case of urgency or where the application is unlikely to be opposed, be made by letter addressed to the court. The provision goes on to state that *"the Director shall, if practicable, notify any interested party of the intention to make the application."* There is a similar provision in order 90, rule 4 of the Rules of the District Court (Cap 336) for cases under the Guardianship of Minors Ordinance (Cap 13).

13.22 In our view, these provisions may not adequately protect the rights of interested parties to be heard in relation to an application by the Director of Social Welfare. 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.

13.23 In our Consultation Paper,²⁷ we proposed that rule 93 of the Matrimonial Causes Rules (Cap 179) and (now) order 90, rule 4 of the Rules of the District Court (Cap 336) should be amended to allow for an *ex parte* application in case of emergency, but that an *inter partes* hearing should proceed if the Director's application was opposed. On consultation, all of the respondents who commented on this recommendation were in support of it.

25 Same as above, at 455.

26 Chapter 3, above, at paras 3.44 and 3.50.

27 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.166 and 15.74.

Recommendation 59

We recommend that rule 93 of the Matrimonial Causes Rules (Cap 179) and order 90, rule 4 of the Rules of the District Court (Cap 336) should be amended to allow for an *ex parte* application in case of emergency, but that an *inter partes* hearing should proceed if the Director's application was opposed.

Third parties

13.24 Section 34 of the Protection of Children and Juveniles Ordinance (Cap 213) provides that the court can make a care or supervision order on its own motion, or on application of the Director of Social Welfare or a person authorised by the Director.²⁸

13.25 This provision, as we have noted earlier,²⁹ may be criticised for restricting applications for orders under the Ordinance by interested persons, such as family members or neighbours, of a child in need of care or protection. These persons cannot apply unless they are authorised to do so by the Director of Social Welfare. Seeking the Director's authorisation would take time and defeats what is presumably a principal purpose of the section: to protect children in emergency situations.

13.26 It is consistent with our previous recommendations on the rights of third parties concerned with the welfare of a child³⁰ to allow them also to apply for orders under the Protection of Children and Juveniles Ordinance (Cap 213).

13.27 In our Consultation Paper,³¹ we proposed that section 34 of the Protection of Children and Juveniles Ordinance (Cap 213) should be amended to allow an application for a care order or supervision order to be made by third parties. In our view, the same criteria for applications by third parties already adopted for private law proceedings should be adopted for such public law proceedings. On consultation, there was unanimous support for these proposals from all of the respondents who commented on it.

28 The word "*person*" includes any public body and any body of persons, corporate or unincorporate: see section 3 of the Interpretation and General Clauses Ordinance (Cap 1).

29 See Chapter 3, above, at para 3.88.

30 See Chapter 10, above, especially paras 10.37 to 10.43.

31 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.164 and 15.73.

Recommendation 60

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 order or supervision order to be made by third parties.

We also recommend that the same criteria for applications by third parties, already adopted for private law proceedings, should be adopted for such public law proceedings.

The court environment for the hearing of care and protection proceedings

13.28 In the context of commenting on the issue of representation for children in care and protection proceedings, which is discussed below, one respondent suggested that it was time to consider changing the current system, so that all care and protection proceedings relating to children could be dealt with not in the quasi-criminal setting of the juvenile court, but in the more friendly environment of the civil Family Court.³²

13.29 We agree that the proposal has merit, but appreciate that such a change in approach would have significant implications for the judges of the Family Court, magistrates of the juvenile court and court administration generally. We therefore consider that further research should be conducted into this issue before a view is taken. We note, for example, that another possible option might be to transfer the physical location of the juvenile court to the premises of the Family Court. This would have the advantage of retaining the existing jurisdiction of magistrates to hear care and protection cases, while providing an enhanced physical environment for the children appearing in these proceedings.

Recommendation 61

We recommend that research should be conducted into how the court environment could be improved for children appearing in care and protection proceedings.

32 We note that this is more in line with the approach taken in New Zealand where the Family Court has comprehensive jurisdiction in family matters, including child protection: see Chapter 8, above, at paras 8.2 and 8.5.

Separate representation for public law proceedings

Criteria for appointment

13.30 As we saw earlier in Chapter 3,³³ there is provision in the matrimonial Ordinances for separate representation of children in private law proceedings,³⁴ but there is no similar provision in the Protection of Children and Juveniles Ordinance (Cap 213). Instead, the juvenile court may, under provisions in the Official Solicitor Ordinance (Cap 416), *request* the Official Solicitor to step in to act for any party involved in proceedings under the Protection of Children and Juveniles Ordinance "*relating to the care and protection of a child or juvenile*."³⁵

13.31 In our Consultation Paper, we took the view that this provision for representation in the Official Solicitor Ordinance (Cap 416) was inadequate.³⁶ We proposed³⁷ that the criteria we had recommended for appointing a separate representative in private law proceedings³⁸ should be accepted as the criteria for appointment of a separate representative in care or supervision proceedings. (These criteria are discussed earlier in this report in relation to Recommendation 50.³⁹) We also proposed that, as a matter of principle, separate representation should be available for children subject to care and protection proceedings, and that it should be at the discretion of the juvenile court whether it was appropriate in a particular case.⁴⁰

13.32 On consultation, the respondents who commented on these proposals were generally in support of them. One respondent, however, disagreed that the current provisions in the Official Solicitor's Ordinance were inadequate. We note, but do not accept, that respondent's view.

13.33 Another respondent considered that representation for children in these cases should not be at the discretion of the juvenile court, as we had proposed, but should be as of right. We acknowledge the underlying concern that under the current arrangements, it is possible for a child or juvenile who is subject to care and protection proceedings to be deprived of his liberty (by being placed in a children's home, for example) without the benefit of legal representation. In contrast, if the same child were to commit a criminal offence, he would receive immediate legal representation through The Duty Lawyer Scheme.

33 Chapter 3, above, at paras 3.47 to 3.49, 3.51 to 3.52 and 3.95.

34 Pursuant to rules 72 and 108 of the Matrimonial Causes Rules (Cap 179). See discussion in Chapter 12, above, at paras 12.28 to 12.66.

35 See Schedule 1, Part 3 of the Official Solicitor Ordinance (Cap 416).

36 HKLRC Sub-committee on Guardianship and Custody (1998), above, at para 6.167.

37 Same as above, at paras 6.168 and 15.75.

38 Same as above, at paras 6.168 and 15.75.

39 See Chapter 12, above, at paras 12.46 to 12.51.

40 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.168 and 15.75.

13.34 In light of this, we have come to the view that a child subject to care and protection proceedings should receive legal representation by the Official Solicitor *as of right*, and not, as we formerly proposed, at the discretion of the court. We also consider that such representation should be available to the child whether the care or supervision orders are brought under the Protection of Children and Juveniles Ordinance (Cap 213) or under the matrimonial Ordinances.

Recommendation 62

We recommend that separate representation by the Official Solicitor should be available for children as of right in care or supervision proceedings, whether brought under Protection of Children and Juveniles Ordinance (Cap 213) or the matrimonial Ordinances.

Representation and legal aid for parents

13.35 In our Consultation Paper,⁴¹ we observed that if parents can be granted 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 themselves and the Director of Social Welfare where the Director is applying for care or supervision orders under the matrimonial Ordinances. We considered that a means and merits test should apply. The merits would be that legal representation would be warranted where it is likely that a child would be removed from residing with his parents under a care or supervision order.⁴²

13.36 Applying the principle of equality of treatment, we considered that parents should be entitled to legal representation also if care and protection orders or supervision orders were applied for by the Director of Social Welfare in the juvenile court.⁴³ We suggested that The Duty Lawyer Service would be the appropriate body to provide this service in this situation, as the Legal Aid Department does not provide representation in the magistrate's court.⁴⁴ We therefore envisaged that there may be cases where the child would be represented by the Official Solicitor and the parents by The Duty Lawyer Service or the Legal Aid Department.

13.37 We therefore proposed in our Consultation Paper⁴⁵ that if parents fulfilled the eligibility requirements, they should be granted legal representation by The Duty Lawyer Service in the juvenile court, or by the

41 Same as above, at para 6.169.

42 Same as above.

43 Same as above, at para 6.170.

44 Same as above.

45 Same as above, at paras 6.171 and 15.76.

Legal Aid Department in the Family Court or the Court of First Instance, where care or supervision orders were applied for by the Director of Social Welfare. This would be the case whether the orders were applied for under the matrimonial Ordinances or the Protection of Children and Juveniles Ordinance (Cap 213).

13.38 We also proposed that there should be legal representation for children and parents in wardship proceedings, provided by the Legal Aid Department, where the applicant is the Director of Social Welfare or other public agency, as the effect of the wardship order is to take away the parental responsibility of the parents.⁴⁶

13.39 On consultation, most of the respondents who commented on this recommendation were in support of it. However, two respondents expressed the view that the provision of legal aid for legal representation was a matter for the Administration, as it had cost and resource implications. We note these views but still hold to our original approach on this issue.

Recommendation 63

We recommend that, where care or supervision orders are applied for, whether under the matrimonial Ordinances or the Protection of Children and Juveniles Ordinance (Cap 213), parents should be granted legal representation (by The Duty Lawyer Service if in the juvenile court, or by the Legal Aid Department if in the Family Court or the Court of First Instance) if they fulfil the eligibility requirements.

We also recommend that there should be legal representation provided by the Legal Aid Department for children and parents in wardship proceedings where the applicant is the Director of Social Welfare 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

13.40 Earlier in this report, we recommended the adoption of the Australian guidelines as to the duties of the Official Solicitor or separate representative or other person acting as a guardian *ad litem* for children.⁴⁷ In our Consultation Paper,⁴⁸ we had also proposed the adoption of the Australian guidelines in relation to the duties of lawyers representing children and parents in the juvenile court for care and protection and supervision

46 Same as above, at paras 6.172 and 15.77.

47 See Chapter 12 above, at paras 12.52 to 12.56 (Recommendation 51).

48 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.173 and 15.78.

orders. We proposed that special training on how to interview and represent children and parents should be provided to lawyers, and that only lawyers with this special training should handle these sensitive and complex cases.⁴⁹ It was also our intention that these proposals should apply to care and supervision orders being made under the matrimonial Ordinances in the Family Court.⁵⁰

13.41 On consultation, all of the respondents who commented on these proposals supported them.

Recommendation 64

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 on how to interview and represent children and parents should be provided to lawyers for these sensitive and complex cases, and only lawyers with this special training should handle these cases.

We further recommend that these arrangements should apply to cases involving care and supervision orders being made under the matrimonial Ordinances in the Family Court.

Assessment

13.42 Under section 45A of the Protection of Children and Juveniles Ordinance (Cap 213), the Director of Social Welfare or the court has the power, where a child is thought to be in need of care and protection, to order assessment of the child by a doctor, clinical psychologist or social worker.⁵¹ No similar power is available when an application for a care order is being made under the matrimonial Ordinances.⁵²

49 Same as above.

50 Same as above.

51 See also the discussion at Chapter 3, above, at para 3.87.

52 In matrimonial proceedings, the court can, of course, refer the case for social welfare investigation and report pursuant to rule 95 of the Matrimonial Cause Rules (Cap 179) and order 90, rule 6 of the Rules of the District Court (Cap 336). (See the discussion on this point in Chapter 3, above, at para 3.45.) Both rules are confined to any matter concerning the welfare of the child. As a related issue, we considered whether it was necessary that these rules should specify that they apply to guardianship and wardship proceedings (though it could be argued that the court has an inherent power to request such a report in wardship proceedings in any event). We concluded that the existing powers were sufficient.

13.43 We therefore proposed in our Consultation Paper⁵³ that a power along the lines of section 45A of the Protection of Children and Juveniles Ordinance (Cap 213) should be provided in the matrimonial Ordinances to allow a District Judge to order that a child be assessed before making a care order. We also proposed that the Director of Social Welfare should have the power to order assessment in these proceedings in line with section 45A. On consultation, these proposals were supported by all of the respondents who commented in this area.

Recommendation 65

We recommend that, before making a care order, a District Judge should have the power under the matrimonial Ordinances to order that a child be assessed by a medical practitioner, clinical psychologist or an approved social worker, as is provided in section 45A of the Protection of Children and Juveniles Ordinance (Cap 213).

We also recommend that the Director of Social Welfare should have the power to order assessment in these proceedings in line with section 45A.

Child's views

13.44 There is no provision in the Protection of Children and Juveniles Ordinance (Cap 213) for taking account of the views of the child, although the parent or guardian's wishes can be taken into account in relation to supervision orders.⁵⁴

13.45 We proposed in our Consultation Paper that the views of the child should be taken into account in proceedings under the Ordinance.⁵⁵ On consultation, all of the respondents who commented on this proposal were in support of it.

53 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.160 and 15.70.

54 Under section 34A, PCJO. See Chapter 3, above, at para 3.94.

55 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.163 and 15.72.

Recommendation 66

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).

Contact in respect of a child in care

13.46 When a care order is being made, there is no provision under the Protection of Children and Juveniles Ordinance (Cap 213) allowing the court to make access orders in respect of the child.⁵⁶ An access order may be made only on an application to vary or discharge the care order pursuant to Section 34C(6).⁵⁷

13.47 In relation to the matrimonial Ordinances, there appears to be no clear provision allowing a child who is the subject of a care order to have access to his parents apart from the court's more general power under section 10 of the Guardianship of Minors Ordinance (Cap 13) to make an access order on an application of the parents or the Director of Social Welfare.⁵⁸

13.48 Although the Director of Social Welfare may informally grant access to a child under his care, in our view there remains a need to clarify the legal position by allowing parents or guardians or a relevant third party to take proceedings for access to children in the care of the Director. This is particularly so under the matrimonial Ordinances, where the only ground for removing the child from parental custody and placing him in the care of the Director is that there are exceptional circumstances making it "*impracticable or undesirable*" for the child to be entrusted to either of the parents or to any other individual.⁵⁹ As we have commented above, this is a lesser standard than the grounds for taking a child into care under the Protection of Children and Juveniles Ordinance (Cap 213), where section 34(2) sets out specific and serious grounds for removal, including assault or sexual abuse.

13.49 In our Consultation Paper,⁶⁰ we proposed that parents whose children were made the subject of care orders under the matrimonial Ordinances should be entitled to apply to have orders made to secure regular contact between them and their children. We also proposed that section 34C(6) of the Protection of Children and Juveniles Ordinance (Cap 213) should be amended to allow the court to make an order for contact when a care order is being made. On consultation, these proposals were unanimously supported by the respondents who commented on them.

56 See Chapter 3, above, at para 3.84 to 3.86 and 3.90 to 92.

57 Same as above, at para 3.91 to 3.92.

58 Same as above, at para 3.34 to 3.35.

59 Section 48A(1), MCO.

60 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.159 and 15.69.

Recommendation 67

We recommend that parents whose children are made the subject of care orders under the matrimonial Ordinances should be entitled to apply 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) should be amended to allow the court to make an order for contact when a care order is being made.

Provisions relating to age

13.50 In the earlier chapters of this report, we have made a number of recommendations that relate to the age of the child. In Chapter 9, we considered the age at which parental responsibility should cease,⁶¹ and looked again at this issue in Chapter 10, for the purpose of recommending the duration of the new court orders for residence, contact, specific issues and prohibited steps.⁶² In Chapter 10, we also considered the relevant age limits regarding arrangements for children.⁶³ In Chapter 12, we discussed the age of maturity for the purposes of obtaining the child's views in family proceedings.⁶⁴

13.51 In this chapter, we discuss certain further areas relating to the age of the child which we consider may require reform, including clarification of the age at which wardship orders and the jurisdiction of the Official Solicitor cease, and reducing the current minimum age for marriage without parental consent.

61 See Chapter 9, above, at paras 9.63 to 9.65 (Recommendation 6).

62 See Chapter 10, above, at paras 10.62 to 10.67 (Recommendation 32).

63 Same as above, at paras 10.44 to 10.49 (Recommendation 29).

64 See Chapter 12 above, at paras 12.25 to 12.27 (Recommendation 46).

Age at which wardship orders cease

13.52 We noted in our Consultation Paper⁶⁵ that, by implication, a wardship order in respect of a child ceases when the child reaches 18, but that this was not clearly stated in the relevant legislation.⁶⁶ We also observed that the Law Reform Commission, in its report on *Young Persons – Effects of Age in Civil Law*,⁶⁷ had proposed that wardship orders should cease at the age of 18 years.

13.53 We therefore proposed in our Consultation Paper that a provision should be enacted clearly specifying that the duration of wardship orders ceases at 18 years.⁶⁸

13.54 We also considered that it would be useful to make clear that the jurisdiction of the Official Solicitor ceased when a child reached the age of 18 years, except for persons suffering a disability beyond that age.

13.55 These proposals received general support during the consultation exercise, however one respondent felt that there should be no express provision limiting the jurisdiction of the Official Solicitor in wardship cases. We note the view of the respondent but do not agree with that approach.

Recommendation 68

We recommend that a provision be enacted clearly specifying that the duration of wardship orders ceases at 18 years.

We also recommend that it be made clear that the jurisdiction of the Official Solicitor ceases at the age of 18 years, except for persons suffering a disability beyond that age.

65 HKLRC Sub-committee on Guardianship and Custody (1998), above, at para 6.152.

66 This is because the relevant Rules of the High Court (Cap 4) (see Order 90) refer to a minor, which is defined in the Interpretation and General Clauses Ordinance (Cap 1) as a person under 18. However, the relevant provision (section 26) of the High Court Ordinance (Cap 4) does not specifically state that a wardship order ceases at 18.

67 Topic 11, 1986.

68 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.153 and 15.66.

Minimum age for marriage without parental consent

13.56 The minimum age of marriage in Hong Kong is 16.⁶⁹ Although the age of majority is 18,⁷⁰ the Marriage Ordinance (Cap 181) requires the consent of the parent or guardian when a party to a marriage is under 21 years of age.⁷¹ This has been criticised on the basis that a person of 18 years of age should be considered mature enough to make major decisions such as whether to enter into marriage.⁷² It has been argued that it is illogical to allow an 18 year old person to vote but not to marry.⁷³

13.57 In 1986, the Hong Kong Law Reform Commission recommended, in its report on *Young Persons - Effects of Age in Civil Law Legal Effects of Age*⁷⁴ that the age at which a child could marry without parental consent should be lowered from 21 to 18 years.⁷⁵ The Administration, however, chose an alternative approach and instead amended section 18A of the Marriage Ordinance (Cap 181) to provide that where a person whose consent is required under section 14 of the Ordinance refuses to give his consent, a District Judge may consent to the marriage, and this consent shall have the same effect as if it had been given by the person who refused the consent.⁷⁶

13.58 We revisited this issue in our Consultation Paper and proposed that the age for marriage without parental consent should be reduced from 21 to 18 years of age.⁷⁷ We observed that it was indefensible to maintain 21 as the minimum age for marriage without parental consent when young people in Hong Kong now matured at a much earlier age.

13.59 On consultation, most of the respondents who commented on this proposal were in support of it, although one respondent expressed reservations and queried whether it was appropriate to consider lowering the age of marriage without parental consent from 21 to 18. We note but do not agree with the respondent's concern. We believe that Hong Kong society

69 See sections 13 and 14 of the Marriage Ordinance (Cap 181).

70 Age of Majority (Related Provisions) Ordinance (Cap 410), section 2(1).

71 Section 14 and the Third Schedule, Part 1 of the Marriage Ordinance (Cap 181) (as amended by sections 28 to 36 of the Law Reform (Miscellaneous Provisions and Minor Amendments) Ordinance (Ord No 80 of 1997)) provide that the written consent to the marriage of a child under 21 is required: from either parent if their marriage is subsisting; from the parent who has custody if they are divorced or separated (or both parents if they have joint custody); or from the child's guardian if the parents are dead or cannot be traced. 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. A guardian is 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 ...". See also A Liu, *Family Law for the Hong Kong SAR* (Hong Kong University Press, 1999), at 151 to 152.

72 Ng Man Kin, "Parental Consent," *Hong Kong Lawyer*, (18 Dec 1995), at 18.

73 Same as above.

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

75 Same as above, at paras 6.3.3. and 16.4.2.

76 Or as if the forbidding of the issue of the relevant certificate had been withdrawn: see section 18A(1), Marriage Ordinance (Cap 181).

77 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.151 and 15.65.

has now progressed to the stage where it should be acceptable to allow a person who has reached the age of majority to marry without parental consent.

Recommendation 69

We recommend the retention of 16 as the minimum age of marriage with parental consent.

We also recommend the reduction of the minimum age of marriage without parental consent from 21 to 18 years.

Age and consent for medical treatment

13.60 One respondent, while agreeing to our proposal in relation to parental consent for marriage, expressed the view that reform may also be necessary in the area of parental consent for medical treatment. The respondent pointed to instances under Hong Kong law where a child of 16, not 18, was permitted to make significant autonomous decisions.⁷⁸

13.61 We did consider this issue briefly in our Consultation Paper,⁷⁹ and observed that the Law Reform Commission's report on effects of age in civil law had recommended that a statutory provision be introduced to provide a presumption that an 18 year old has the ability to give a valid consent to medical treatment.⁸⁰ This proposal reflected developments in England, where section 8 of the English Family Law Reform Act 1969 stated that a young person over the age of 16 years⁸¹ can consent to medical treatment as if he or she was an adult. The proposal has not been implemented.

13.62 In our Consultation Paper, we concluded that the common law rules governing medical consent and the guidelines adopted by the medical

78 For example, consent to marriage with parental consent (see the Marriage Ordinance (Cap 181) as noted above) and consent to heterosexual intercourse (see the Crimes Ordinance (Cap 200), sections 122, 124 and 146).

79 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 2.143 to 2.150.

80 HKLRC (1986), above, at paras 5.5.1 to 5.5.4. (Under the law, 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. Failure to obtain the consent of a parent or guardian before medical treatment is carried out theoretically amounts to an assault on the child. There could also be a claim for the tort of trespass to the person. See HKLRC Sub-committee on Guardianship and Custody (1998), above, at para 2.145. See also the useful discussion on consent for medical treatment of children in Liu, above, at 222.)

81 Following the landmark decision in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112, in which the House of Lords 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. Their Lordships 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 (at 188 to 189) stated 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."

profession appeared to be working well, so there was no need for legislation.⁸² We remain of that view. Although the legal position on medical consent may appear anomalous when compared to some other areas of the law, this is a relatively new and developing area. We therefore consider that, for the time being at least, the law should continue to reflect the current common law position augmented by the existing medical guidelines used by doctors and others in Hong Kong.

Enforcement of orders

13.63 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.

13.64 Articles 267 and 268 of the Civil Procedure Law of the People's Republic of China adopted in 1991 allow for the recognition and enforcement of foreign judgments on the basis of either a treaty or reciprocity.

13.65 Sections 55 to 62 of the Matrimonial Causes Ordinance (Cap 179) provide for recognition of divorces in any country outside Hong Kong, but does not cover findings of fault or orders of custody ancillary to the divorce proceedings.⁸³

13.66 The Hague Convention on the Civil Aspects of International Child Abduction (25 October 1980) aims at securing the prompt and safe return of children who have been wrongfully removed from one Convention country to another, and to ensure that rights of custody and access under the law of one contracting state are effectively respected in the other contracting states.⁸⁴ The Convention applies in Hong Kong by virtue of the Child Abduction and Custody Ordinance (Cap 512), but the Convention does not apply to the Mainland.⁸⁵

13.67 The Judgments (Facilities for Enforcement) Ordinance (Cap 9) and the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) deal with the enforcement of civil judgments from the United Kingdom and

82 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 2.143 to 2.150. We also noted that, whilst there is no general statutory power or duty dealing with medical treatment for children, 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. Disputes might involve the parents or the parents and the medical or social work professions. They may arise where a child is mentally or physically handicapped, or the parents belong to a minority religious sect with particular views on medical treatment: same as above, at para 2.145.

83 Section 61(3), MCO. See also section 56(3) of the Ordinance.

84 HKLRC, *International Parental Child Abduction* (Apr 2002), at para 1.5.

85 Same as above, at para 4.3.

jurisdictions listed in the schedules of subsidiary legislation respectively.⁸⁶ These include both Commonwealth and non-Commonwealth countries. Mainland China is not one of the jurisdictions included.

13.68 In our Consultation Paper,⁸⁷ we proposed that a mechanism for mutual legal assistance for the enforcement of orders for custody and access, residence and contact, and orders for the return of a child removed unlawfully from Hong Kong, should be arranged with the Mainland. On consultation, all of the respondents who commented on this recommendation were in support of it.

Recommendation 70

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, and vice versa, be arranged with the Mainland.

Consolidation of legislation

13.69 As we saw in Chapter 3, the provisions dealing with disputes relating to children, arrangements on divorce, guardianship, disputes with third parties and care and supervision arrangements are currently scattered throughout several Ordinances. This affects the accessibility of the law in this area, particularly to the general public. In our Consultation Paper, we proposed that, as far as possible, all of the provisions dealing with the various issues affecting children should be consolidated into one existing Ordinance.⁸⁸

13.70 We uphold the view that Hong Kong's private law provisions on child custody should comply with the principles set out in the United Nations Convention on the Rights of the Child, the Basic Law and the International Covenant on Civil and Political Rights. In addition to making the law more accessible, another advantage of consolidation is that it would give the Administration an opportunity to ensure that all legislation governing children is in compliance with these instruments.

86 It should be noted in this context that the Judgments (Facilities for Enforcement) Ordinance (Cap 9) only deals with money judgments (see section 2(1) of the Ordinance). Section 2(2) of the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) expressly excludes from the definition of "*an action in personam*" (ie, one of the categories of judgments covered by the Ordinance) "*any matrimonial cause*" or "*any proceedings in connection with ... matrimonial matters [or] guardianship of infants.*"

87 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.177 and 15.79.

88 Same as above, at paras 6.180 and 15.80.

13.71 Strictly speaking, consolidation is the exercise of bringing together within a single piece of legislation all provisions dealing with a particular subject, and does not include reform of the existing law. In practice, however, consolidation and reform often go hand in hand.

13.72 An issue related to such a consolidation exercise in the present case would be to determine which Ordinance is the most suitable for the insertion of the new principles proposed in this, and our other recent reports in this area.⁸⁹ We accept that formulating detailed proposals on how the amendment of existing legislation is to be implemented is essentially a matter for the Law Draftsman. Nor do we make recommendations on whether the public law provisions relating to children should be consolidated with the private law provisions.

13.73 In our Consultation Paper we stated that we thought it 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.⁹⁰ We proposed 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.

13.74 On consultation, all but two of the respondents who commented on this recommendation were in support of it. One of these two respondents expressed reservations about the practicality of consolidating all private law provisions affecting children into one Ordinance. The other felt that consolidation was not necessary, and that the Administration's efforts would be better directed towards giving more legal assistance and social protection to individual children who had such need, and in improving professional practices. We note these comments but still hold to our original views on this point.

89 HKLRC, *Guardianship of Children* (Jan 2002); HKLRC, *International Parental Child Abduction* (Apr 2002); and HKLRC, *The Family Dispute Resolution Process* (Mar 2003).

90 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.180 and 15.80.

Recommendation 71

We recommend 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.

Accordingly, we recommend that any legislative provisions resulting from our recommendations in this area, as well as the existing substantive provisions on guardianship and custody, should be incorporated into one consolidated Ordinance.

We also recommend that there should be one definition of "*child*" and of "*child of the family*" applying to all Ordinances.

Policy co-ordination

13.75 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 or more bureaux. The Health, Welfare and Food 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).

13.76 In our Consultation Paper,⁹¹ we proposed 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. We observed that it was a matter for the Administration to decide whether it should be the Health and Welfare Bureau (now Health, Welfare and Food Bureau) or the Home Affairs Bureau to assume this responsibility.

91 HKLRC Sub-committee on Guardianship and Custody (1998), above, at paras 6.182 and 15.81.

13.77 On consultation, all but three respondents were in favour of our proposed approach. One of these expressed the view that the coverage of Ordinances proposed in the recommendation went too far. Another indicated that such centralisation of policy responsibility was not necessary. The third considered that it was entirely a matter for the Administration to consider which policy bureau should be assigned the relevant responsibilities in this area. While we have taken note of these comments, we remain of the view that it is unsatisfactory that responsibility for handling issues affecting children should be dispersed amongst a variety of departments, boards and working groups.

Recommendation 72

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 the Health, Welfare and Food Bureau or the Home Affairs Bureau should assume this responsibility.

Chapter 14

Summary of recommendations

(The recommendations below are to be found in Chapter 9 of this report, on *Parental responsibility and rights*.)

Recommendation 1

(Applicable proceedings)

For the removal of doubt, we recommend¹ that it should be made clear that the welfare or "*best interests*" principle guides all proceedings concerning children under the Guardianship of Minors Ordinance (Cap 13), the Matrimonial Causes Ordinance (Cap 179), the Matrimonial Proceedings and Property Ordinance (Cap 192) and the Separation and Maintenance Orders Ordinance (Cap 16), including questions of guardianship, maintenance or property.

Recommendation 2

(Best interests)

To reflect our view that the term "*best interests*" is more appropriate for modern conditions in Hong Kong than the term "*welfare*," and is more in compliance with our international obligations under the United Nations Convention on the Rights of the Child, we recommend² that 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 ...*."

We also recommend that consequential amendments should be made to the other matrimonial Ordinances.

1 See discussion in Chapter 9, above, at paras 9.6 to 9.16.

2 See discussion in Chapter 9, above, at paras 9.17 to 9.22.

Recommendation 3

(Statutory checklist of factors)

We recommend³ the introduction of a statutory checklist of factors to assist the judge in exercising his discretion in determining the proceedings that will replace custody or guardianship proceedings under these reforms. This checklist should be broadly based on that set out in section 1(3) of the Children Act 1989 in England.

We also recommend the inclusion in the checklist of the following additional factors based on section 68F(2) of the Family Law Act 1975 in Australia:

- (i) section 68F(2)(b) (in part) in relation to the child's relationship with each of his parents and other persons;
- (ii) a broader formulation of section 68F(2)(d) of the Australian Act, in relation to the practical difficulty of maintaining contact with either parent;
- (iii) section 68F(2)(f) (in part), in relation to any characteristics of the child that the court considers relevant;
- (iv) section 68F(2)(h) in relation to the attitudes of each of the parents towards the child and towards the responsibilities of parenthood;
- (v) section 68F(2)(i) in relation to any family violence involving the child or a member of the child's family; and
- (vi) a catch-all factor along the lines of Section 68F(2)(l).

Recommendation 4

(Concept of parental responsibility)

We recommend⁴ that the concept of parental responsibility should replace that of guardianship, except that the concept of guardianship should be retained in relation to a third party's responsibilities for a child after the death of a parent.

3 See discussion in Chapter 9, above, at paras 9.23 to 9.49.

4 See discussion in Chapter 9, above, at paras 9.50 to 9.55.

Recommendation 5

(Parental rights)

We recommend⁵ the adoption of a provision based on sections 1 and 2 of the Children (Scotland) Act 1995, which specifies separately a list of parental responsibilities and a list of parental rights.

Recommendation 6

(Age at which parental responsibility ceases)

We recommend⁶ that all the parental rights and responsibilities referred to in sections 1 and 2 of the Children (Scotland) Act 1995 should apply in respect of a child until the child reaches the age of eighteen.

Recommendation 7

(Father as natural guardian)

We recommend⁷ that the common law right of the father to be natural guardian of his legitimate child should be abolished

We also recommend the repeal of section 3(1)(b) of the Guardianship of Minors Ordinance (Cap 13).

Recommendation 8

(Married parents)

We recommend⁸ the adoption of a provision on the lines of section 2(1) of the Children Act 1989 in England, but amended, for the removal of doubt, to include reference to parents married subsequent to the birth of the child.

5 See discussion in Chapter 9, above, at paras 9.56 to 9.62.

6 See discussion in Chapter 9, above, at paras 9.63 to 9.65.

7 See discussion in Chapter 9, above, at paras 9.66 to 9.68.

8 See discussion in Chapter 9, above, at paras 9.69 to 9.70.

Recommendation 9

(Acquisition of parental responsibility by unmarried fathers - language of the current law)

We recommend⁹ that the language of section 3(1)(c)(ii) and (d) of the Guardianship of Minors Ordinance (Cap 13), which relates to the "*rights and authority*" of an unmarried father, should be changed to reflect the new language of responsibilities rather than rights.

Recommendation 10

(Acquisition of parental responsibility by signing the birth register)

We recommend¹⁰ that an unmarried father should be capable of acquiring parental responsibilities and rights by signing the birth register. The proposed legislation should include this in a list of the ways in which parental responsibility can be acquired. We do not recommend the automatic acquisition of parental responsibility or rights by unmarried fathers.

Recommendation 11

(Parental responsibility agreements)

We recommend¹¹ that unmarried parents should be encouraged to sign parental responsibility agreements to ensure the best interests of their child.

We also recommend that unmarried mothers should be encouraged to appoint a testamentary guardian for their children.

Recommendation 12

(Parents acting independently)

We recommend¹² the adoption of a provision on the lines of section 2(7) of the Children Act 1989 enabling persons with parental responsibility to act independently, but restricted to the day-to-day care and best interests of the child.

9 See discussion in Chapter 9, above, at paras 9.71 to 9.73.

10 See discussion in Chapter 9, above, at paras 9.74 to 9.80.

11 See discussion in Chapter 9, above, at paras 9.81 to 9.85.

12 See discussion in Chapter 9, above, at paras 9.87 to 9.90.

Recommendation 13

(Scope of parental responsibility – when consent or notification is required)

We recommend¹³ that the proposed legislation should specify those decisions relating to the child where the other parent's express consent is required, and those decisions where only notification to the other parent is required.

We further recommend that the court should be given express power to vary or dispense with any of the consent or notification requirements where this is considered necessary.

Recommendation 14

(Enforcement of maintenance orders)

We recommend¹⁴ that the Administration should review the existing law and procedures relating to the enforcement of maintenance orders to see how they could be made more effective.

Recommendation 15

(Acting incompatibly)

We recommend¹⁵ that a provision on the lines of section 2(8) of the Children Act 1989 should be adopted.

Recommendation 16

(Delegation of parental responsibility)

We recommend¹⁶ the enactment of a provision based on section 2(9) to (11) of the Children Act 1989 in England, with the addition of words to the effect that no arrangement of a type referred to in that provision shall be enforced by the court if the court is of the opinion that it would not be for the benefit of the child to give effect to that arrangement.

We further recommend that section 4 of the Guardianship of Minors Ordinance (Cap 13) be repealed.

13 See discussion in Chapter 9, above, at paras 9.91 to 9.106.

14 See discussion in Chapter 9, above, at paras 9.103 to 9.105.

15 See discussion in Chapter 9, above, at paras 9.107 to 9.110.

16 See discussion in Chapter 9, above, at paras 9.111 to 9.114.

Recommendation 17

(Continuing parental responsibility)

We recommend¹⁷ a provision on the lines of section 11(11) of the Children (Scotland) Act 1995, in relation to the effect on the retention of parental responsibility and rights by one person when another person also acquires such rights.

Recommendation 18

(Removal of surviving parent as guardian)

We recommend¹⁸ that the right to remove the surviving parent as guardian under section 6(3) of the Guardianship of Minors Ordinance (Cap 13) should be repealed.

Recommendation 19

(Unmarried father as surviving parent)

We recommend¹⁹ that a provision be inserted in the Guardianship of Minors Ordinance (Cap 13) to the effect that once an unmarried father is granted parental rights or responsibilities, he can be treated on the death of the mother as the surviving parent for the purposes of that Ordinance.

17 See discussion in Chapter 9, above, at paras 9.115 to 9.118.

18 See discussion in Chapter 9, above, at paras 9.119 to 9.123.

19 See discussion in Chapter 9, above, at paras 9.124 to 9.125.

(The recommendations below are to be found in Chapter 10 of this report, on *Types of court orders for children*.)

Recommendation 20

(Custody orders)

We recommend²⁰ the repeal of the provisions in the matrimonial Ordinances (including the Guardianship of Minors Ordinance (Cap 13) and the Matrimonial Proceedings and Property Ordinance (Cap 192)) dealing with custody orders and their replacement with provisions introducing the new range of orders outlined later in this Chapter.

Recommendation 21

(Definition of a residence order)

We recommend²¹ that there should be statutory provision for a *"residence order."*

We recommend that the definition of a residence order should 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 should be: *"a residence order is an order settling the arrangements as to the person with whom a child is to live and who has responsibility for the day-to-day care and best interests of the child."*

Recommendation 22

(Change of surname)

We recommend²² the enactment of a provision similar to section 13(1)(a) of the Children Act 1989 in England, governing the changing of a child's surname.

20 See discussion in Chapter 10, above, at paras 10.4 to 10.9.

21 See discussion in Chapter 10, above, at paras 10.10 to 10.16.

22 See discussion in Chapter 10, above, at paras 10.17 to 10.18.

Recommendation 23

(Non-parents)

We recommend²³ the enactment of a provision on the lines of section 12(2) of the Children Act 1989 in England regarding the granting of parental responsibility to non-parents who are awarded residence orders.

Recommendation 24

(Contact order)

We recommend²⁴ that there should be statutory provision for a "*contact order*," on the lines of section 11(2)(d) of the Children (Scotland) Act 1995.

We also recommend that this section should provide that the contact parent would have the right to act independently in respect of the day-to-day care of the child while contact with the child is being exercised.

Recommendation 25

(Specific issues order)

We recommend²⁵ that there should be statutory provision for a "*specific issues order*," similar to section 8(1) of the Children Act 1989 in England.

Recommendation 26

(Prohibited steps order)

We recommend²⁶ that there should be statutory provision for a "*prohibited steps order*," similar to section 8(1) of the Children Act 1989 in England.

23 See discussion in Chapter 10, above, at para 10.19.

24 See discussion in Chapter 10, above, at paras 10.20 to 10.25.

25 See discussion in Chapter 10, above, at paras 10.26 to 10.30.

26 See discussion in Chapter 10, above, at paras 10.31 to 10.34.

Recommendation 27

(Supplementary requirements)

We recommend²⁷ the adoption of a provision similar to section 11(7) of the Children Act 1989 in England which gives the court the power to include directions or conditions in a court order.

Recommendation 28

(Right of a third party to apply)

We recommend²⁸ the removal of the limitation in section 10 of the Guardianship of Minors Ordinance (Cap 13) on the right of third parties to apply to court for orders concerning children.

We recommend the introduction of a provision on the lines of section 10 of the Children Act 1989 in England, with the amendment of subsections (5)(b) and (10) to provide that leave of the court would not be required if the child has lived with the applicant for a total of one year out of the previous three years.

We further recommend that the one year period need not necessarily be a continuous period, but must not have ended more than three months before the application.

Recommendation 29

(Arrangements for the children)

We recommend²⁹ that section 18 of the Matrimonial Proceedings and Property Ordinance (Cap 192) should be amended to provide that the court should have regard to the views of the child and the desirability of a child's retaining contact with both parents, as is set out in section 11(4) of the English Family Law Act 1996.

We also recommend that parents should have to satisfy the court that arrangements for the children are the best that can be arranged. The court 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.

27 See discussion in Chapter 10, above, at paras 10.35 to 10.36.

28 See discussion in Chapter 10, above, at paras 10.37 to 10.43.

29 See discussion in Chapter 10, above, at paras 10.44 to 10.49.

We further recommend that, for consistency with the other provisions in matrimonial legislation, section 18(5)(a)(i) should be amended to refer to the age of eighteen.

Recommendation 30

(No order principle)

We recommend³⁰ that the option of "*no order*" should be available for those cases where both parties consent to no order being made by the court and where the making of no order would be in the best interests of the child.

Recommendation 31

(Family proceedings)

We recommend³¹ the enactment of a provision similar to section 10(1) of the Children Act 1989 in England, which gives the court a specific power to make section 8 orders in any family proceedings.

We also recommend the introduction of a definition of "*family proceedings*."

Recommendation 32

(Age at which parental responsibility ceases for the purposes of court orders)

For the sake of consistency, we recommend³² 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.

We also observe that:

- (a) section 10 of the Matrimonial Proceedings and Property Ordinance (Cap 192) ("MPPO") should continue to apply to orders for financial provision and maintenance of children 18 years and over falling within its scope; and

30 See discussion in Chapter 10, above, at paras 10.50 to 10.58.

31 See discussion in Chapter 10, above, at paras 10.59 to 10.61.

32 See discussion in Chapter 10, above, at paras 10.62 to 10.67.

- (b) there may be a lacuna in the law with regard to children over 18 years of age who, though not sufficiently ill or incapacitated as to fall within the scope of the current mental health provisions, may nonetheless require some form of statutory protections beyond the financial provisions afforded by the MPPO.**

(The recommendations below are to be found in Chapter 11 of this report, on *Special consideration for cases involving family violence*.)

Recommendation 33

(The Administration to review Hong Kong's general law on domestic violence)

We recommend³³ that the Administration should review the law relating to domestic violence and introduce reforms to improve its scope and effectiveness.

Recommendation 34

(A new definition of "domestic violence")

We recommend³⁴ the introduction of a broad, all-encompassing definition of domestic violence along the lines of section 3 of the New Zealand Domestic Violence Act 1985.

Recommendation 35

(The court's powers under the Domestic Violence Ordinance (Cap 189) in relation to custody and access orders)

We recommend³⁵ that the court should be given power, when making an injunction under the Domestic Violence Ordinance (Cap 189), to, on an interim basis, suspend a prior access or contact order or vary a prior order so as to make a supervised access or contact order.

We recommend that the welfare or best interests principle should guide the court's exercise of such power.

We also recommend that the court should be given power, when making an injunction under the Domestic Violence Ordinance (Cap 189), to make interim consequential orders determining the residence of a child or any other aspect of parental responsibility that meets the best interests of the child, including the question of maintenance.

We recommend that the welfare or best interests principle should guide the court's exercise of such power.

33 See discussion in Chapter 11, above, at paras 11.40 and 11.51.

34 See discussion in Chapter 11, above, at paras 11.52 and 11.54.

35 See discussion in Chapter 11, above, at paras 11.55 and 11.60.

We further 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 are inconsistent with prior custody, access, residence or contact orders.

Recommendation 36

(Judicial guidelines to supplement legislative reforms)

We recommend³⁶ that there should be guidelines for the judiciary at all levels, setting out the approach which the courts should adopt when domestic violence is put forward as a reason for denying or limiting parental contact to children.

Recommendation 37

(More information to be available to the court)

We consider that, in making decisions based upon the best interests of the child, it is essential that the Court should be able to make a proper assessment of any risk to a child. This includes being able to investigate allegations of domestic violence at interim hearings.

We recommend³⁷ that consideration should be given to allowing the courts hearing contact applications to have access to the criminal records of parents insofar as they may be relevant to issues of domestic violence, and to be kept informed of concurrent proceedings against perpetrators of domestic violence.

Recommendation 38

(Supervised contact)

We recommend³⁸ that the Administration should review the current arrangements and facilities allowing for supervised contact in Hong Kong.

36 See discussion in Chapter 11, above, at para 11.63.

37 See discussion in Chapter 11, above, at paras 11.64 to 11.65.

38 See discussion in Chapter 11, above, at para 11.66.

Recommendation 39

(On-going training for those handling family cases)

In line with the English proposals, we recommend³⁹ that there needs to be on-going training and raising of awareness levels in relation to the effect of domestic violence on children and residential parents for all the disciplines engaged in the Family Justice System, including the legal profession and the judiciary.

Recommendation 40

(Privacy issues)

We recommend⁴⁰ that the Administration consider a review of data protection arrangements for victims of family abuse and the susceptibility of the family justice system.

Recommendation 41

(Long-term Research)

We recommend⁴¹ that long-term research should be undertaken on the effects on children of witnessing and/ or being the victims of domestic violence.

We also recommend that the detailed collection and evaluation of information arising from court proceedings in these cases.

39 See discussion in Chapter 11, above, at para 11.67.

40 See discussion in Chapter 11, above, at para 11.68 to 11.69.

41 See discussion in Chapter 11, above, at para 11.70.

(The recommendations below are to be found in Chapter 12 of this report, on *The voice of the child*.)

Recommendation 42

(The views of the child)

We recommend⁴² that each of the matrimonial Ordinances should specifically refer to the need to hear the views of the child.

We also 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.

Recommendation 43

(How and when child's views taken into account)

In line with our earlier recommendation that a statutory checklist of factors should be established, we recommend⁴³ 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.

With the adoption of this provision, we recommend the repeal of section 3(1)(a)(i)(A) of the Guardianship of Minors Ordinance (Cap 13).

Recommendation 44

(How the views of a child are expressed)

We recommend⁴⁴ that a child should be given the facility to express his views if he wishes, whether directly or indirectly. Once the child has indicated a desire to express views, then the court must hear those views, although the weight to be given to the child's views will be a matter for the court to determine.

We recommend that the mechanisms for ascertaining and expressing the child's views should be set out in the legislation. We therefore recommend the adoption of a provision on the lines of the Australian section 68G(2), but adapted to insert "*views*" rather than "*wishes*."

42 See discussion in Chapter 12, above, at paras 12.2 to 12.9.

43 See discussion in Chapter 12, above, at paras 12.10 to 12.15.

44 See discussion in Chapter 12, above, at para 12.16 to 12.21.

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).

We also recommend that any views that the child expresses to the judge should be treated in confidence by the judge and not revealed to the child's parents.

We further recommend that where social welfare officers are assigned to ascertain children's views, only those officers with adequate training and experience in this area should deal with these sensitive cases.

Recommendation 45

(Children not required to express views)

We recommend⁴⁵ that children should not be required to express their views.

To make the position clear, we recommend the introduction of a statutory provision to that effect on the lines of section 68H of the Australian Family Law Act 1975.

Recommendation 46

(Age of maturity for the purpose of obtaining views)

We recommend⁴⁶ that there should be no age limit and the court should be empowered to consider a child's views irrespective of his age.

Recommendation 47

(Anomalies in relation to separate representation under the Matrimonial Causes Rules (Cap 179))

We recommend⁴⁷ 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* should be addressed.

45 See discussion in Chapter 12, above, at paras 12.22 to 12.24.

46 See discussion in Chapter 12, above, at paras 12.25 to 12.27.

47 See discussion in Chapter 12, above, at paras 12.33 to 12.35.

Recommendation 48

(Types of proceedings where a separate representative may be appointed)

For the removal of doubt it should be made clear that a separate representative can be appointed in any dispute relating to the parental responsibility for, or guardianship of, a child.⁴⁸

Recommendation 49

(Who can apply for a separate representative to be appointed)

We recommend⁴⁹ 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 Australian Family Law Act 1975 be enacted.

We also recommend that the restrictions on who can make application for an order, contained in section 10 of the English Children Act 1989, should also apply to this provision.

Recommendation 50

(Criteria for appointment of separate representative)

Except in the case of a child who may be subject to care or supervision orders, we recommend⁵⁰ the adoption of a list of criteria based on those adopted in Australia to determine when it is appropriate to appoint a separate representative.

We recommend that this list of criteria be incorporated in legislation.

Recommendation 51

(Guidelines for duties of separate representative)

We recommend⁵¹ 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.

We recommend that this appear not in statute, but in booklet form.

48 See discussion in Chapter 12, above, at paras 12.36 to 12.38.

49 See discussion in Chapter 12, above, at paras 12.42 to 12.45.

50 See discussion in Chapter 12, above, at paras 12.46 to 12.51.

51 See discussion in Chapter 12, above, at paras 12.52 to 12.56.

Recommendation 52

(Child as a party)

We recommend⁵² that, in principle, provided the leave of the court has been sought, the child should be allowed to become a party to proceedings which concern him and where he has sufficient understanding to instruct a solicitor and counsel to represent him.

We recommend the introduction of a provision on the lines of section 10(8) of the English Children Act 1989 and rule 9(2A) of the English Family Proceedings Rules 1991.

Recommendation 53

(Costs)

For those cases where the person representing the child is not the Official Solicitor, we recommend⁵³ that the court be given power to order the parties to bear the costs of the separate representative or guardian *ad litem*.

52 See discussion in Chapter 12, above, at paras 12.57 to 12.60.

53 See discussion in Chapter 12, above, at paras 12.61 to 12.66.

(The recommendations below are to be found in Chapter 13 of this report, on *Related matters*.)

Recommendation 54

(Separation and Maintenance Orders Ordinance (Cap 16))

We recommend⁵⁴ the retention of the provisions of the Separation and Maintenance Orders Ordinance (Cap 16) to cover exceptional cases, such as those involving customary marriages or concubinage, which are not covered by other matrimonial proceedings legislation.

Recommendation 55

(Power to order care and supervision orders)

We recommend⁵⁵ the retention of the power to order care and supervision orders in guardianship disputes and any disputes concerning the best interests of a child.

We also recommend that the anomalies between the Director of Social Welfare'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.

Recommendation 56

(Definitions of care and supervision orders)

We recommend⁵⁶ that there should be a definition of a care order and a supervision order in each of the matrimonial Ordinances.

Recommendation 57

(Grounds)

We recommend⁵⁷ that the Director of Social Welfare should only be entitled to apply for a care order or supervision order in private law

54 See discussion in Chapter 13, above, at paras 13.2 to 13.7.

55 See discussion in Chapter 13, above, at paras 13.11 to 13.14.

56 See discussion in Chapter 13, above, at para 13.15.

57 See discussion in Chapter 13, above, at paras 13.16 to 13.18.

proceedings on the same grounds as those in section 34(2) of the Protection of Children and Juveniles Ordinance (Cap 213).

Recommendation 58

(Application of the welfare or best interests principle)

We recommend⁵⁸ that the welfare or best interests principle should guide all proceedings under the Protection of Children and Juveniles Ordinance (Cap 213).

Recommendation 59

(Ex parte applications by the Director of Social Welfare)

We recommend⁵⁹ that rule 93 of the Matrimonial Causes Rules (Cap 179) and order 90, rule 4 of the Rules of the District Court (Cap 336) should be amended to allow for an *ex parte* application in case of emergency, but that an *inter partes* hearing should proceed if the Director's application was opposed.

Recommendation 60

(Third parties)

We recommend⁶⁰ that section 34 of the Protection of Children and Juveniles Ordinance (Cap 213) should be amended to allow an application for a care order or supervision order to be made by third parties.

We also recommend that the same criteria for applications by third parties, already adopted for private law proceedings, should be adopted for such public law proceedings.

58 See discussion in Chapter 13, above, at paras 13.19 to 13.20.

59 See discussion in Chapter 13, above, at paras 13.21 to 13.23.

60 See discussion in Chapter 13, above, at paras 13.24 to 13.27.

Recommendation 61

(The court environment for the hearing of care and protection proceedings)

We recommend⁶¹ that research should be conducted into how the court environment could be improved for children appearing in care and protection proceedings.

Recommendation 62

(Separate representation for public law proceedings – criteria for appointment)

We recommend⁶² that separate representation by the Official Solicitor should be available for children as of right in care or supervision proceedings, whether brought under Protection of Children and Juveniles Ordinance (Cap 213) or the matrimonial Ordinances.

Recommendation 63

(Representation and legal aid for parents)

We recommend⁶³ that, where care or supervision orders are applied for, whether under the matrimonial Ordinances or the Protection of Children and Juveniles Ordinance (Cap 213), parents should be granted legal representation (by The Duty Lawyer Service if in the juvenile court, or by the Legal Aid Department if in the Family Court or the Court of First Instance) if they fulfil the eligibility requirements.

We also recommend that there should be legal representation provided by the Legal Aid Department for children and parents in wardship proceedings where the applicant is the Director of Social Welfare or other public agency, as the effect of the order is to take away the responsibility of the parents.

Recommendation 64

(Guidelines for duties of separate representatives)

We recommend⁶⁴ 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.

61 See discussion in Chapter 13, above, at paras 13.28 to 13.29.

62 See discussion in Chapter 13, above, at paras 13.30 to 13.34.

63 See discussion in Chapter 13, above, at paras 13.35 to 13.39.

64 See discussion in Chapter 13, above, at paras 13.40 to 13.41.

We also recommend that special training on how to interview and represent children and parents should be provided to lawyers for these sensitive and complex cases, and only lawyers with this special training should handle these cases.

We further recommend that these arrangements should apply to cases involving care and supervision orders being made under the matrimonial Ordinances in the Family Court.

Recommendation 65

(Assessment)

We recommend⁶⁵ that, before making a care order, a District Judge should have the power under the matrimonial Ordinances to order that a child be assessed by a medical practitioner, clinical psychologist or an approved social worker, as is provided in section 45A of the Protection of Children and Juveniles Ordinance (Cap 213).

We also recommend that the Director of Social Welfare should have the power to order assessment in these proceedings in line with section 45A.

Recommendation 66

(Child's views)

We recommend⁶⁶ that the views of a child should be taken into account in proceedings under the Protection of Children and Juveniles Ordinance (Cap 213).

Recommendation 67

(Contact in respect of a child in care)

We recommend⁶⁷ that parents whose children are made the subject of care orders under the matrimonial Ordinances should be entitled to apply to have orders made to secure regular contact between them and their children.

65 See discussion in Chapter 13, above, at paras 13.42 to 13.43.

66 See discussion in Chapter 13, above, at paras 13.44 to 13.45.

67 See discussion in Chapter 13, above, at paras 13.46 to 13.49.

We also recommend that section 34C(6) of the Protection of Children and Juveniles Ordinance (Cap 213) should be amended to allow the court to make an order for contact when a care order is being made.

Recommendation 68

(Age at which wardship orders cease)

We recommend⁶⁸ that a provision be enacted clearly specifying that the duration of wardship orders ceases at 18 years.

We also recommend that it be made clear that the jurisdiction of the Official Solicitor ceases at the age of 18 years, except for persons suffering a disability beyond that age.

Recommendation 69

(Minimum age for marriage without parental consent)

We recommend⁶⁹ the retention of 16 as the minimum age of marriage with parental consent.

We also recommend the reduction of the minimum age of marriage without parental consent from 21 to 18 years.

Recommendation 70

(Enforcement of orders)

We recommend⁷⁰ 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, and vice versa, be arranged with the Mainland.

Recommendation 71

(Consolidation of legislation)

We recommend⁷¹ 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

68 See discussion in Chapter 13, above, at paras 13.52 to 13.55.

69 See discussion in Chapter 13, above, at paras 13.56 to 13.59.

70 See discussion in Chapter 13, above, at paras 13.63 to 13.68.

71 See discussion in Chapter 13, above, at paras 13.69 to 13.74.

accompanying divorce proceedings, should be consolidated into one existing Ordinance.

Accordingly, we recommend that any legislative provisions resulting from our recommendations in this area, as well as the existing substantive provisions on guardianship and custody, should be incorporated into one consolidated Ordinance.

We also recommend that there should be one definition of "*child*" and of "*child of the family*" applying to all Ordinances.

Recommendation 72

(Policy co-ordination)

We recommend⁷² 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 the Health, Welfare and Food Bureau or the Home Affairs Bureau should assume this responsibility.

72 See discussion in Chapter 13, above, at paras 13.75 to 13.77.

**List of the Respondents to the Consultation Paper
on Guardianship and Custody**

1. Against Child Abuse
2. Association for the Advancement of Feminism
3. Mr J J A Bosch and Ms SFM Wortmann
4. The Boys' & Girls' Clubs Association of Hong Kong
5. Caritas – Hong Kong (Social Work Services)
6. Caritas – Hong Kong Family Service
7. Caritas Family Service Project on Extramarital Affairs
8. Dr N Y Chau
9. Ms CHENG Mui-hung
10. Chinese YMCA of Hong Kong
11. Ms CHUNG Yuen-yee
12. City University of Hong Kong, Department of Public and Social Administration
13. Ms Heather Douglas, Assistant Professor
City University of Hong Kong, School of Law
14. Ms Andrea Gutwirth
15. Harmony House
16. Haven of Hope Christian Service
17. Director of Health
18. Director of Home Affairs
19. Secretary for Home Affairs
20. Hong Kong Association for the Survivors of Women Abuse
21. Hong Kong Bar Association
22. The Hong Kong Catholic Marriage Advisory Council
23. The Hong Kong Committee on Children's Rights
24. The Hong Kong Council of Social Service

25. The Hong Kong Family Law Association
26. Hong Kong Family Welfare Society
27. Ms CHAN Tsz-ying, Hong Kong Family Welfare Society
28. Miss LO Lau-oi, Hong Kong Family Welfare Society
29. Hong Kong Federation of Women
30. Hong Kong Federation of Women Lawyers
31. The Hong Kong Mediation Council
32. The Hong Kong Psychological Society
33. Hong Kong Student Aid Society
34. Hong Kong Women Development Association
35. Hong Kong Young Legal Professionals Association Limited
36. Hong Kong Young Women's Christian Association
37. Secretary for Housing
38. Director of Immigration
39. Judiciary Administrator
40. Department of Justice, Civil Division
41. Department of Justice, Prosecutions Division
42. Ms Helen Kong, Hastings & Co
43. The Law Society of Hong Kong
44. Director of Legal Aid
45. Official Solicitor
46. ReSource The Counselling Centre
47. Director of Social Welfare
48. St John's Cathedral Counselling Service
49. Ms TSANG Wan-wai
50. The University of Hong Kong, Faculty of Law
51. The University of Hong Kong, Department of Social Work and Social Administration

Relevant overseas legislation and 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 also set out.

Statutory checklist of factors

2. Section 1(3) of the English 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 Australian Family Law Act 1975, as amended by the Family Law Reform Act 1995, provides:

"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).

(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,¹ based on section 1(3) of the English Children Act 1989 and section 68F(2) of the Australian Family Law Act 1975,² should 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) the child's physical, emotional and educational needs;*
- (c) the nature of the relationship of the child with each of the child's parents and with other persons;*
- (d) the likely effect on the child of any changes in the child's circumstances;*
- (e) the child's age, maturity, sex, social and cultural background and any other characteristics of the child which the court considers relevant;*
- (f) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;*
- (g) any harm which the child has suffered or is at risk of suffering;*
- (h) any family violence involving the child or a member of the child's family;*
- (i) how capable each of the child's parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;*
- (j) [a broader formulation along the lines of] the practical difficulty and expense of a child having*

1 See the discussion in Chapter 9, above, at paras 9.23 to 9.49 (re Recommendation 3).

2 Factor (a) of the recommended statutory checklist is based on section 1(3)(a) of the English Children Act 1989 ("1989 Act"); factor (b) is based on section 1(3)(b) of the 1989 Act; factor (c) is based on section 68F(2)(b) of the Australian Family Law Act 1975 ("FLA"); factor (d) is based on section 1(3)(c) of the 1989 Act; factor (e) is based on a combination of section 1(3)(d) of the 1989 Act and section 68F(2)(f) of the FLA; factor (f) is based on section 68F(2)(h) of the FLA; factor (g) is based on section 1(3)(e) of the 1989 Act; factor (h) is based on section 68F(2)(i) of the FLA; factor (i) is based on section 1(3)(f) of the 1989 Act; factor (j) is based on section 68F(2)(d) of the FLA; factor (k) is based on section 1(3)(g) of the 1989 Act; and factor (l) is based on section 68F(2)(l) of the FLA.

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;

- (k) the range of powers available to the court under this Ordinance in the proceedings in question;*
- (l) any other fact or circumstance that the court thinks is relevant."*

Parental responsibilities

5. The recommended draft section on parental responsibilities³ based on section 1 of the Children (Scotland) Act 1995 should 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 See the discussion in Chapter 9, above, at paras 9.56 to 9.62 (re Recommendation 5).

- (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 rights⁴ based on section 2 of the Children (Scotland) Act 1995 should 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 Same as above.

- (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 responsibilities⁵ based on section 2(9) to 2(11) of the English Children Act 1989 should 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."*

with the addition of a provision along the lines of:

"But no such agreement between husband and wife shall be enforced by any court if the court is of the opinion that it will not be for the benefit of the child to give effect to it."

⁵ See the discussion in Chapter 9, above, at paras 9.111 to 9.114 (re Recommendation 16).

Definition of residence order

8. The recommended draft section on the definition of a residence order⁶ based on section 8(1) of the English Children Act 1989 should 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 responsibility for the day-to-day care and best interests of the child."

Definition of contact order

9. The recommended draft section on the definition of a contact order⁷ based on section 11(2)(d) of the Children (Scotland) Act 1995 should 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

10. The recommended draft section on the definition of a specific issues order⁸ based on section 8(1) of the English Children Act 1989 should 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

11. The recommended draft section on the definition of a prohibited steps order⁹ based on section 8(1) of the English Children Act 1989 should provide:

6 See the discussion in Chapter 10, above, at paras 10.14 to 10.16 (re Recommendation 21).

7 See the discussion in Chapter 10, above, at paras 10.20 to 10.25 (re Recommendation 24).

8 See the discussion in Chapter 10, above, at paras 10.26 to 10.30 (re Recommendation 25).

9 See the discussion in Chapter 10, above, at paras 10.31 to 10.34 (re Recommendation 26).

"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

12. The recommended draft section on the parental responsibility of non-parents¹⁰ based on section 12(2) of the English Children Act 1989 should 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

13. The recommended draft section dealing with family proceedings¹¹ based on section 10(1) of the English Children Act 1989 should 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."*

10 See the discussion in Chapter 10, above, at para 10.19 (re Recommendation 23).

11 See the discussion in Chapter 10, above, at paras 10.59 to 10.61 (re Recommendation 31).

Right of third party to apply

14. The recommended draft section dealing with the right of a third party to apply,¹² based on section 10(5)(b) and (10) of the English Children Act 1989, should 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

15. The recommended draft section dealing with how the views of the child are expressed,¹³ based on section 68G(2) of the Australian Family Law Act 1975, should 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".

12 See the discussion in Chapter 10, above, at paras 10.37 to 10.43 (re Recommendation 28).

13 See the discussion in Chapter 12, above, at paras 12.16 to 12.21 (re Recommendation 44).

Guidelines for Good Practice on Parental Contact in cases where there is Domestic Violence¹

*(prepared by the Children Act Sub-committee of the
Lord Chancellor's Advisory Board on Family Law)*

Court to give early consideration to allegations of domestic violence

1.1 In every case in which domestic violence is put forward as a reason for refusing or limiting contact the court should at the earliest opportunity consider the allegations made (and any answer to them) and decide whether the nature and effect of the violence alleged by the complainant (or admitted by the respondent) is such as to make it likely that the order of the court for contact will be affected if the allegations are proved.

Steps to be taken where the court forms the view that its order is likely to be affected if allegations of domestic violence are proved

1.2 Where the allegations are disputed and the court forms the view that the nature and effect of the violence alleged is such as to make it likely that the order of the court will be affected if the allegations are proved the court should:-

- a. consider what evidence will be required to enable the court to make findings of fact in relation to the allegations;
- b. ensure that appropriate directions under section 11(1) of the Children Act 1989 are given at an early stage in the application to enable the matters in issue to be heard as speedily as possible; including consideration of whether or not it would be appropriate for there to be an initial hearing for the purpose of enabling findings of fact to be made;
- c. consider whether an order for interim contact pending the final hearing is in the interests of the child; and in particular that the safety of the child and the residential parent can be secured before during and after any such contact;

¹ See the Lord Chancellor's Advisory Board on Family Law Children Act Sub-committee, *Report to the Lord Chancellor on the Question of Parental Contact in Cases where there is Domestic Violence* (Apr 2000), at Section 5.

- d. direct a report from a court welfare officer on the question of contact unless satisfied that it is not necessary to do so in order to safeguard the child's interests;
- e. subject to the seriousness of the allegations made and the difficulty of the case consider whether or not the children in question need to be separately represented in the proceedings; and, if the case is proceeding in the Family Proceedings Court whether or not it should be transferred to the County Court; if in the County Court whether or not it should be transferred to the High Court for hearing.

Directions to the Court Welfare Officer in cases involving domestic violence

- 1.3
- a. Where the court orders a welfare officer's report under section 7 of the Children Act 1989 in a disputed application for contact in which it considers domestic violence to be a relevant issue, the order of the court should contain specific directions to the court welfare officer to address the issue of domestic violence; to make an assessment of the harm which the children have suffered or which they are at risk of suffering if contact is ordered; to assess whether the safety of the child and the residential parent can be secured before, during and after contact; and to make particular efforts to ascertain the wishes and feelings of the children concerned in the light of the allegations of violence made.
 - b. Where the court has made findings of fact prior to the court welfare officer conducting his or her investigation, the court should ensure that either a note of the court's judgment or of the findings of fact made by the court is made available to the court welfare officer as soon after the findings have been made as is practicable.
 - c. Where in a case involving allegations of domestic violence the whereabouts of the child and the residential parent are known to the court but not known to the parent seeking contact; and where the court takes the view that it is in the best interests of the child or children concerned for that position to be maintained for the time being, the court should give directions designed to ensure that any welfare officer's report on the circumstances of the residential parent and the child does not reveal their whereabouts, whether directly or indirectly.

Interim Contact pending a full hearing

1.4 In deciding any question of interim contact pending a full hearing the court should:-

- a. specifically take into account the matters set out in section 1(3) of the Children Act 1989 ("the welfare check-list");
- b. give particular consideration to the likely risk of harm to the child, whether physical and/or emotional, if contact is either granted or refused;
- c. consider, if it decides such contact is in the interests of the child, what directions are required about how it is to be carried into effect; and, in particular, whether it should be supervised, and if so, by whom; and generally, in so far as it can, ensure that any risk of harm to the child is minimised and the safety of the child and residential parent before during and after any such contact is secured;
- d. consider whether it should exercise its powers under section 42(2)(b) of the Family Law Act 1996 to make a non-molestation order;
- e. consider whether the parent seeking contact should seek advice and/or treatment as a precondition to contact being ordered or as a means of assisting the court in ascertaining the likely risk of harm to the child from that person at the final hearing.

Matters to be considered at the final hearing

1.5 At the final hearing of a contact application in which there are disputed allegations of domestic violence:-

- a. the court should, wherever practicable, make findings of fact as to the nature and degree of the violence which is established on the balance of probabilities and its effect on the child and the parent with whom the child is living;
- b. in deciding the issue of contact the court should, in the light of the findings of fact which it has made, apply the individual items in the welfare checklist with reference to those findings; in particular, where relevant findings of domestic violence have been made, the court should in every case consider the harm which the child has suffered as a consequence of that violence and the harm which the child is at risk of suffering if an order for contact is made and only make an order for contact if it can be satisfied that the safety of the residential parent and the child can be secured before during and after contact.

Matters to be considered where findings of domestic violence are made

1.6 In each case where a finding of domestic violence is made, the court should consider the conduct of both parents towards each other and towards the children; in particular, the court should consider:-

- a. the effect of the domestic violence which has been established on the child and on the parent with whom the child is living;
- b. whether or not the motivation of the parent seeking contact is a desire to promote the best interests of the child or as a means of continuing a process of violence against or intimidation or harassment of the other parent;
- c. the likely behaviour of the parent seeking contact during contact and its effect on the child or children concerned;
- d. the capacity of the parent seeking contact to appreciate the effect of past and future violence on the other parent and the children concerned;
- e. the attitude of the parent seeking contact to past violent conduct by that parent; and in particular whether that parent has the capacity to change and/or to behave appropriately.

Matters to be considered where contact is ordered in a case where findings of domestic violence have been made

1.7 Where the court has made findings of domestic violence but, having applied the welfare checklist, nonetheless considers that direct contact is in the best interests of the child or children concerned, the court should consider (in addition to the matters set out in paragraphs 5 and 6 above) what directions are required to enable the order to be carried into effect under section 11(7) of the Children Act 1989 and in particular should consider:-

- a. whether or not contact should be supervised, and if so, by whom;
- b. what conditions (for example by way of seeking advice or treatment) should be complied with by the party in whose favour the order for contact has been made;
- c. whether the court should exercise its powers under section 42(2)(b) of the Family Law Act 1996 to make a non-molestation order;
- d. whether such contact should be for a specified period or should contain provisions which are to have effect for a specified period;

- e. setting a date for the order to be reviewed and giving directions to ensure that the court at the review has full information about the operation of the order.

Information about local facilities

1.8 The court should also take steps to inform itself (alternatively direct the court welfare officer or the parties to inform it) of the facilities available locally to the court to assist parents who have been violent to their partners and/or their children, and, where appropriate, should impose as a condition of future contact that violent parents avail themselves of those facilities.

Reasons

1.9 In its judgment or reasons the court should always explain how its findings on the issue of domestic violence have influenced its decision on the issue of contact; and in particular where the court has found domestic violence proved but nonetheless makes an order for contact, the court should always explain, whether by way of reference to the welfare check-list or otherwise, why it takes the view that contact is in the best interests of the child.

Note

1.10 Although not part of our formal guidelines, we think that all courts hearing applications where domestic violence is alleged should review their facilities at court and should do their best to ensure that there are separate waiting areas for the parties in such cases and that information about the services of Victim Support and other supporting agencies is readily available.