

**THE LAW REFORM COMMISSION OF HONG KONG**

**REPORT**

**GUARDIANSHIP OF CHILDREN**

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**January 2002**

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# THE LAW REFORM COMMISSION OF HONG KONG

## Report

## Guardianship of Children

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# Preface

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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,<sup>1</sup> which proposed reforms to regularise the status of children, was implemented in 1993 in the Parent and Child Ordinance (Cap 429).<sup>2</sup> Two years later, the Commission's proposals for a new divorce regime<sup>3</sup> resulted in major changes to the Matrimonial Causes Ordinance (Cap 179).<sup>4</sup> 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. "Guardianship" refers to the legal status under which a person exercises parental rights and authority towards a child. When a parent dies, another person, known as a testamentary guardian, may be appointed by will to be a guardian for the child in place of the parent. A guardian may also be appointed by the court. The term "custody" usually refers to the physical custody and day to day care and control of a child after a divorce. In practice, this is usually granted to only one of the divorcing parents, while the other is granted "access" to see the child on a regular basis.

3. Traditionally, the non-custodial parent is perceived to have much less involvement with the child and much less "say" over the child's future than the custodial parent. The issue of "who gets custody of the children" is therefore one of the most fraught aspects of family proceedings. An added complication is that only parents or the Director of Social Welfare can currently apply for custody or access of a child. This means that grandparents or other relatives who may actually take care of the child are excluded from applying for custody or access and must resort to other less direct legal proceedings instead, such as having the child made a ward of the court.

4. In recent years, Hong Kong, like many other jurisdictions, has seen a dramatic rise in its rate of family breakdown and divorce.<sup>5</sup> The serious impact that the legal process itself is recognised to have on families facing these situations, particularly where arrangements for the children must be made, has led jurisdictions like the United Kingdom and Australia to

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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 *Ie*, 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. (Figures supplied by the Judiciary of the HKSAR.)

comprehensively recast their laws in this area.<sup>6</sup> Other jurisdictions also are now considering what reforms may be necessary.<sup>7</sup>

5. 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.”*

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

<b>Hon Ms Miriam Lau, JP</b> <b>Chairperson</b>	Sole Practitioner Miriam Lau & Co
<b>H H Judge de Souza</b> <b>Deputy Chairman</b>	Judge District Court
<b>Miss Rosa Choi</b>	Assistant Principal Legal Aid Counsel Legal Aid Department
<b>Ms Bebe Chu</b>	Partner Stevenson, Wong & Co, Solicitors
<b>Ms Robyn Hooworth</b> (up to 28 August 2001)	Mediator
<b>Mr Anthony Hung</b>	Partner Lau, Kwong & Hung, Solicitors
<b>Ms Jacqueline Leong, SC</b>	Barrister
<b>Dr Athena Liu</b>	Associate Professor Faculty of Law University of Hong Kong
<b>Mr Thomas Mulvey, JP</b>	Director Hong Kong Family Welfare Society

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6 In England, the Children Act 1989; in Scotland, the Children (Scotland) Act 1995; and in Australia, the Family Law Reform Act 1995. (Though see also recent 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* (Jan 2001).)

7 Ie, (New Zealand) NZ Ministry of Justice consultation paper, *Responsibilities for Children – Especially When Parents Part: The Laws About Guardianship, Custody and Access*, 15 August 2000; (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).

**Mrs Cecilia Tong**

Regional Officer (Retired)  
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**Ms June Wee**

Barrister

**Miss Wong Lai-cheung**

Counsellor

7. The first secretary to the sub-committee was Ms Paula Scully, who was appointed Chairperson of the Guardianship Board of Hong Kong in February 1999. Ms Scully was succeeded as sub-committee secretary by Ms Michelle Ainsworth, who was appointed Deputy Secretary of the Commission in April 2000.

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

9. 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.

10. This report covers the guardianship aspect of the reference and considers the legal arrangements made for children in the event of the death of one or both parents. Chapter 1 looks at the existing law on guardianship in the Hong Kong SAR. Chapter 2 highlights a number of the problems in this area. Chapter 3 considers how the law deals with the guardianship of children in other jurisdictions. Our final conclusions and recommendations for reform are set out in Chapter 4, and these are summarised in Chapter 5.



# Chapter 1

## Guardianship of children in Hong Kong

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### Introduction

#### *The meaning of “guardianship”*

*“Children’s well-being depends on their care-givers who normally are their parents”.<sup>1</sup>*

1.1 Children are born dependent, and so provision must be made for their daily care and upbringing as they move from infancy through childhood to adulthood.<sup>2</sup> In the rare<sup>3</sup> but unhappy<sup>4</sup> event that one or both of the child’s parents dies, the appointment of a “guardian” is the usual mechanism by which this is achieved; either under the will of the deceased parent (ie, a “testamentary guardian”) or by the appointment of the court. In this sense, “guardianship” refers to the legal status under which a person exercises parental rights and authority for a child following the death of one or both of the child’s parents.<sup>5</sup> As Liu states:

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1 Dr Athena Liu, *Family Law for the Hong Kong SAR* (1999, HKU Press) at 211.

2 Alberta Law Reform Institute, *Child Guardianship, Custody and Access* (1998, Rep No 18.4) at 1.

3 Hoggett, *Parents and Children: The Law of Parental Responsibility* (4th ed, 1993, Sweet & Maxwell) at 95, notes that in the UK in 1989, of all families with dependent children, just 1% were headed by widows, compared with 9% headed by separated or divorced mothers and 5% headed by single mothers. (Comparing these types of family situation, however, Hoggett goes on to comment, at 95, that: “There are almost always material disadvantages associated with growing up in a one-parent family, but the financial and housing situation of the bereaved is markedly better than that of the others ... Nor do children who have lost a parent show a significantly increased rate of delinquency ... or educational problems ... although some may be at greater risk of depressive illness in adult life.”)

4 Hoggett, above, at 95. Hoggett goes on to express the view, however, that, when compared to children whose parents are undergoing the divorce process, children in this situation suffer fewer long-term unfavourable consequences. She writes: “Bereavement is a quite different experience from other types of separation or loss. ... It is rarely accompanied by prolonged hostilities and bitterness between the parents, or by legal disputes about the children’s future. The family’s resources may be much reduced, but they do not have to be shared between two households. Their lot attracts only sympathy and compassion from society and none of the condemnation which is still sometimes attached to marital breakdown and unmarried parenthood.”

5 *Clarke Hall & Morrison on Children* (2000, Butterworths) at p 1/217, para 461.

*“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.”<sup>6</sup>*

1.2 It is the law relating to testamentary guardianship and to guardians appointed by the court which is the focus of this report.<sup>7</sup>

### **Historical context**

1.3 “Natural guardianship” is a very old legal concept that appears to have been the original legal concept of parenthood. Significantly, the concept was based more upon the protection of family landholdings than upon the protection of children.<sup>8</sup> As noted by the English Law Commission:

*“[Guardianship] developed as a means of safeguarding a family’s property and later became an instrument for maintaining the authority of the father over his legitimate minor children. Hence he was recognised as their ‘natural’ guardian. While he was alive the mother had no claims as natural guardian and was originally in no better position than a stranger. Nineteenth century legislation gave her limited rights to apply to the courts for custody and access and, in 1886, made her automatically guardian after the father’s death. The Guardianship of Infants Act 1925 provided that the father should be guardian on the mother’s death. It also gave the mother ‘like powers’ to those of the father to apply to the court in any matter affecting the child but deliberately stopped short of making her a joint guardian during his lifetime.”<sup>9</sup>*

### **The concept of guardianship today**

1.4 In modern times, this concept of natural guardianship has evolved to the point where, as we have noted above, the term “guardian” is often used synonymously with “parent.” In this sense, “guardianship” implies the bundle of rights, duties and authority of a parent towards a child. These aspects of the parent-child relationship include the right to make decisions

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6 Liu, above, at 213.

7 There also exists a form of guardianship which is used for adults suffering from a mental incapacity who cannot make decisions about their personal, medical or financial affairs. Provisions under Part IVB of the Mental Health Ordinance (Cap 136) empower the Guardianship Board to make orders appointing guardians for persons in these circumstances. This type of adult guardianship, however, is not the subject of this report. For further information on the operation of this type of guardianship, see the website of the HKSAR Guardianship Board, at <<http://www.adultguardianship.org.hk>>.

8 Liu, above, at 212.

9 English Law Commission’s report, *Family Law: Review of Child Law, Guardianship & Custody* (1988, Report No 172, HMSO) at para 2.2. See also Liu, above, at 212-213.

and to be consulted on decisions about the upbringing of a child and generally on all aspects of his welfare.

1.5 Liu observes that at common law, the list of parental rights and authority includes:<sup>10</sup>

- the right to live with the child and control the child's day-to-day upbringing
- the right to decide on the child's education and religion
- the right to inflict moderate punishment
- the right to administer the child's property
- the right to act for the child in legal proceedings
- the right to consent to medical treatment.<sup>11</sup>

1.6 The scope of parental rights and authority also includes certain statutory rights such as the right to consent to the child's marriage<sup>12</sup> or to the child's adoption.<sup>13</sup>

### ***Guardianship in practice***

1.7 It is difficult to obtain any information on the numbers of children subject to testamentary or court appointed guardianship in Hong Kong. Similar difficulties in gathering relevant facts and statistics in this area have been commented on overseas.<sup>14</sup> The English Law Commission has stated:

*"We know very little about the number of legal guardianships at present. We do not even know the numbers of children who are potentially subject to it, having lost one or both parents by death. Given the increased expectation of life generally, the risks of this have been diminishing. ... Lone motherhood is now more likely to result from divorce, marital separation or illegitimacy than from the father's death. The same appears to be true of lone fatherhood ... On any view ... the total number of children who lose one parent by death before reaching eighteen will be smaller than the number whose parents divorce or separate. It is clear that the great majority of such children remain with their surviving parents ... We suspect that most orphaned children*

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10 See generally, Liu, above, at 213.

11 *Idem.* (See Liu's detailed discussion of each of these aspects of parental rights and authority at 217-228.)

12 See the Marriage Ordinance (Cap 181) as amended by the Law Reform (Miscellaneous Provisions and Minor Amendments) Ordinance (No 80 of 1997).

13 See the Adoption Ordinance (Cap 290).

14 See the English Law Commission's working paper, *Family Law: Review of Child Law, Guardianship* (1985, Working Paper No 91, HMSO) at paras 1.29-1.32; and the Scottish Law Commission's discussion paper, *Parental Responsibilities and Rights, Guardianship and the Administration of Children's Property* (1990, Discussion Paper No 88, HMSO) at para 3.2.

*are cared for by relatives, friends or step-parents without any formal appointment of guardians.”<sup>15</sup>*

## **The guardianship provisions of the Guardianship of Minors Ordinance (Cap 13)**

### ***Scope of the ordinance***

1.8 The Guardianship of Minors Ordinance (Cap 13) (“the Ordinance”) is one of the ordinances which governs court proceedings relating to the custody and upbringing of children,<sup>16</sup> including the provision of maintenance for them. It regulates the custody rights of fathers in relation to illegitimate children<sup>17</sup> and the administration of property owned by or held in trust for children.<sup>18</sup> The Ordinance also deals with the appointment, powers and removal of guardians.<sup>19</sup> For the purposes of the Ordinance, a minor is a child who has not yet attained 18 years of age.<sup>20</sup>

### ***Matters for the court to consider***

1.9 Section 3 of the Ordinance sets out the principles that govern the conduct of court proceedings covered by the Ordinance. 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*

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15 English Law Commission (1985), above, at paras 1.29 and 1.31.

16 Other relevant ordinances include the Matrimonial Causes Ordinance (Cap 179), the Matrimonial Proceedings and Property Ordinance (Cap 192) and the Separation and Maintenance Orders Ordinance (Cap 16).

17 See Part V, GMO.

18 See Parts II and IV, GMO.

19 See Part III, GMO.

20 See section 3, Interpretation and General Clauses Ordinance (Cap 1) and section 2, Age of Majority (Related Provisions) Ordinance (Cap 410). Note: in section 2 of 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. This section of the MPPO goes on to define “child of the family” as a child of both 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.”

- 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 ....”*

### ***The application of the welfare principle***

1.10 The principle of the welfare of the child is referred to in section 3(1)(a)(i) but is not defined. The “welfare of the child” is a fundamental principle of guidance to the courts in making decisions in children’s cases and is said to lie “at the heart of all litigation regarding children.”<sup>21</sup>

1.11 The effect of the welfare principle 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. This concept is also sometimes referred to as “the paramountcy principle.”<sup>22</sup> 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.<sup>23</sup>

### ***Factors in determining the welfare of the child***

1.12 The Ordinance does not 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.<sup>24</sup> Cases on point suggest that there are certain key factors which the courts have regard to.<sup>25</sup> These key factors 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.<sup>26</sup>

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21 Philippa Hewitt (ed) and others, *Hong Kong Legal Practice Manuals: Family* (Sweet & Maxwell, 1998), at 162, para 7.17. It is also said to be an evolving concept which encapsulates the widest possible meaning: see Liu, above, at 247-248; and also Hewitt, above, at 210-211.

22 See Liu, above, at 246. Other terms with a similar meaning often used in this context include “the interest of the child” and “the best interests of the child.”

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

24 Liu, above, at 251.

25 Liu, above, at 249-264. See also Hewitt (ed) and others, above, at 210-214.

26 These factors have been encapsulated in statutory form in section 1(3) of the English Children Act 1989.

### *First and paramount consideration*

1.13 All of the factors above are taken into account by the court in determining what constitutes the welfare or best interests of the child. Section 3(1)(a)(i) also states that the welfare of the child is to be “the first and paramount consideration” of the court in hearing any proceedings under the Ordinance. Lord MacDermott, in *J v C*,<sup>27</sup> approached the term as follows:

*“[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 paramount consideration because it rules on or determines the course to be followed.”*

### *Judicial discretion*

1.14 In relation to the various factors that constitute welfare, Liu has noted that there are “no arithmetical points systems or quantitative formulae” for assessing these factors, and that “*the courts are dealing with the lives of human beings, and these cannot be regulated by any rigid prescriptions.*”<sup>28</sup>

1.15 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. As a result, commentators have variously described the welfare of the child as an inherently subjective,<sup>29</sup> “notoriously indeterminate,”<sup>30</sup> and still evolving,<sup>31</sup> concept.<sup>32</sup>

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27 [1970] AC 710, 711.

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

29 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.

30 Liu, above, at 263.

31 Liu, above, at 248.

32 We have noted earlier that the welfare principle has general application throughout proceedings relating to children. The principle is not applicable, however, in the following types of proceedings: an injunction under the Domestic Violence Ordinance (Cap 189) 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 Protection of Children and Juveniles Ordinance (Cap 213): see Liu, above, at 247.

## ***Parental rights and authority***

1.16 Section 3(1)(b) of the Ordinance makes various references to the rights and authority of the parents of the child. The scope of these parental “rights” and areas of authority have been described earlier in this chapter.<sup>33</sup> It has also been noted that the term “guardian” is often used synonymously with “parent” and so implies the bundle of rights, duties and authority of a parent towards a child.<sup>34</sup>

### ***Parental rights and authority vis-a-vis each parent***

1.17 Section 3(1)(b) of the Ordinance states that in relation to the custody or upbringing of a child, and in relation to the other matters dealt with under the ordinance, the rights and authority of the mother and father are equal and exercisable by either without the other, except where the child is born out of wedlock.

1.18 In relation to the independent exercise of the respective parent’s rights and authority,<sup>35</sup> Liu explains the implications of this as follows:

*“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, but not the other way around.”<sup>36</sup>*

1.19 Where the child is born out of wedlock, 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.

### ***Subject to the welfare principle***

1.20 As we have noted above, although broad in its scope, the principle of parental rights and authority is still subject to the principle of the welfare of the child. Liu writes:

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33 See above, paras 1.5 to 1.6.

34 See above, para 1.4.

35 Section 3(1)(b). It is significant that the concept of joint guardianship between the parents of the child in relation to custody, etc, does not appear to be contemplated within these provisions of the ordinance.

36 Liu, above, at 229. See section 4(2) of the ordinance 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.

*“[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.”*<sup>37</sup>

### *Diminishing nature of parental rights*

1.21 Strictly speaking, parental rights and authority apply until a child reaches his majority.<sup>38</sup> However, in reality, the significance of parental rights and authority diminishes as the child grows older. 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.”*<sup>39</sup>

### *Shift towards focus on parental “responsibilities”*

1.22 It is apparent from the discussion in this chapter that the traditional focus of the law in this area has been on parental rights rather than on parental responsibilities. In some jurisdictions however, there has been a major shift away from this emphasis on parental rights, to a new emphasis on parental responsibilities and the rights of the child. This is reflected in the English Children Act 1989, the Children (Scotland) Act 1995 and the Australian Family Law Reform Act 1995.

1.23 It should be noted that the implications of these developments for the legal parent-child relationship, and whether similar changes should be introduced in Hong Kong, will be considered in detail in the Commission’s forthcoming report on custody and access.

## ***Appointment of guardians***

1.24 Part III of the Ordinance deals with the appointment, removal, and power of guardians. Section 5 provides that the surviving parent shall be the child’s guardian, either alone or with the guardian appointed by the deceased parent. Where no guardian has been appointed, or the person appointed as guardian refuses to act or has died, then the court may appoint a guardian to act with the surviving parent.<sup>40</sup>

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37 Liu, above, at 216.

38 See above, para 1.8.

39 *Hewer v Bryant* [1970] 1 QB 357, at 369, cited in Liu, above, at 217.

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



1.25 Section 6 of the Ordinance allows a parent to appoint a guardian by deed or will. Section 2 of the Age of Majority (Related Provisions) Ordinance (Cap 410) provides that a reference in a deed or will, made after the Ordinance took effect, to a minor or infant shall be construed as a person under 18 years. Unless the surviving parent objects to the guardian so acting, the surviving parent and the testamentary guardian act together as joint guardians.<sup>41</sup> In those circumstances an order for payment of remuneration “for his services as guardian” can be made under section 6(6) of the Ordinance.

### ***Removal of surviving parent as guardian***

1.26 If the parent objects to the appointment of the testamentary guardian, or if the guardian considers that the surviving parent is unfit to have custody, the guardian can apply to the court under section 6(3) of the Ordinance. The court can make an order that the guardian act as sole guardian, or jointly with the surviving parent.<sup>42</sup> This seems to imply that the surviving parent’s guardianship rights can be removed and, given the significant consequences of such an order, it would seem desirable that the legislation should spell this out explicitly. Yet section 8, which provides for removing or replacing a guardian, only gives this power to the court where it is a guardian appointed or acting by virtue of the Ordinance or a testamentary guardian. The welfare principle applies.

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

1.28 In its working paper, the English Law Commission argued that the High Court had a limited right of removal in respect of a natural parental guardian.<sup>43</sup> This was because, historically, in serious cases of misconduct, unfitness or inability, the court could appoint another person to act in the place of the father and could restrain the father from interfering though his rights

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41 Section 6(2), GMO.

42 Section 6(3)(b)(i), GMO.

43 English Law Commission (1985), above, at para 2.19.

were never completely abrogated. However, the Commission noted that there were no recent cases on these grounds.<sup>44</sup>

### ***Surviving parent's objections***

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

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

### ***Unmarried father***

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

#### ***Unmarried father as surviving parent***

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

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44 English Law Commission (1985), above, at para 2.7.

*“[A]ny appointment of a guardian made by the natural father of an illegitimate child under section 6(1) shall be of no effect unless the appointer is entitled to the custody of the minor as under paragraph (a)[order of custody by an order under section 10(1)], or to enjoy any rights or authority with respect to the minor as under paragraph (b)[order under section 3(1)(d)], immediately before his death.”*

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

1.34 If the natural father is deemed to be the surviving parent and he objects to the guardian who has been appointed by deed or will by the deceased parent, then the court can order either the father or the testamentary guardian to act as sole guardian.<sup>45</sup> The court can also make orders under section 11 of the Ordinance.

*If unmarried father is not the surviving parent*

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

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

***Grandparents caring for child born outside marriage***

1.37 Section 7 of the Ordinance allows any person to apply to be appointed as guardian of a child who has no parent, guardian or other person with parental rights. This would, for instance, permit the grandparents caring for a child born outside marriage to apply to be appointed as guardians in

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<sup>45</sup> Section 6(3)(a) or (b), GMO.

appropriate circumstances. Though the legislation does not specifically so provide, the court can appoint joint guardians.<sup>46</sup>

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

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

### ***Disputes between joint guardians***

1.40 Where there is a dispute between joint guardians, section 9 of the Ordinance allows the court to “make such order regarding the matters in difference as it may think proper.” Joint guardians are either the surviving parent acting with the testamentary guardian or a court appointed guardian under section 5 or 7, or guardians appointed by both parents.<sup>47</sup> Section 9 does not indicate whether orders of custody or access or maintenance can be made against a guardian who is not a parent. However, the English Law Commission suggested that the court, in dealing with a dispute between joint guardians under the English legislative equivalent to section 9,<sup>48</sup> can make any order as is proper, and this could include access.<sup>49</sup>

1.41 Section 12 of the Ordinance deals with powers to order custody and maintenance where joint guardians disagree and where one of the guardians is a surviving parent. The court can order access by the surviving parent, and maintenance orders against the surviving parent. Arnold J in *Re N (Minors) (Parental Rights)*<sup>50</sup> said that an application under the equivalent English legislation, the Guardianship of Minors Act 1971, was of little help when both parents are dead as the court cannot settle the custody of the child where members of the family disagree about where the child should live.

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

47 Section 6(4), GMO.

48 Section 7 of the Guardianship of Minors Act 1971.

49 English Law Commission (1985), above, at para 2.28.

50 [1974] Fam Law 40, at 44, referred to in English Law Commission (1985), above, at para 2.18.

## ***Guardian of the estate***

1.42 Section 18 of the Ordinance confirms the principle that a guardian is not only the guardian of the child's person, but also of his estate. The Court of First Instance retains its power to appoint a guardian of the estate either generally or for a specific purpose.<sup>51</sup>

1.43 The powers of a guardian and parent may not be co-extensive. For example, a surviving parent can object to a testamentary guardian. A testamentary guardian cannot appoint a guardian for the child. Liability to maintain can only be ordered against a parent under section 10 or section 11 of the Ordinance. The child who is the subject of a guardianship order can then be regarded as a child of the family for the purposes of an order for maintenance when the guardian's marriage breaks up, but not otherwise.<sup>52</sup> The English Law Commission concluded that there was uncertainty as to a parent's position in relation to the property of the child, and it may be that a guardian has more powers than a parent. The English Law Commission<sup>53</sup> and the Scottish Law Commission<sup>54</sup> dealt extensively with the rights and duties of a guardian of the estate.

## ***Powers of the Director of Social Welfare***

1.44 If there are exceptional circumstances making it impracticable or undesirable to entrust the minor to the parents or any other individual, then the court may commit him to the care of the Director of Social Welfare.<sup>55</sup> The court must hear the representations of the Director, including representations on maintenance of the child, before ordering a child to be committed to the Director's care.<sup>56</sup> The scope of a supervision order is not defined.<sup>57</sup> The court can order the parent to pay maintenance to the Director.<sup>58</sup> The supervision order ceases when the child is 18 years.<sup>59</sup> It may be varied, discharged, suspended or revived on the application of either parent or, a guardian, or by any person having custody by an order under section 10 of the Ordinance, or on the application of the Director when he has a supervision order in his favour.<sup>60</sup>

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51 Section 18(2), GMO.

52 English Law Commission (1985), above, at para 2.29.

53 *Ibid.*

54 Scottish Law Commission's report, *Report on Family Law*, (1992, Report No 135, HMSO).

55 Section 13(1)(b), GMO.

56 Section 15(1).

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

58 Section 13(2).

59 Section 14(1).

60 Section 14(2).

1.45 There is no time limit specified for the expiration of a care order. However, since the Ordinance uses the term “minor” and this is defined in section 3 of the Interpretation and General Clauses Ordinance (Cap 1) as a person who has not yet attained 18 years, the care order expires at 18 years. The time limit of 16 on a supervision order has been removed by section 4 of the Marriage and Children (Miscellaneous Amendments) Ordinance.<sup>61</sup>

## Other provisions relating to guardianship

### *Proceedings concerning a minor*

1.46 A guardian of the person or testamentary guardian can be appointed as next friend to take or defend proceedings on behalf of the minor.<sup>62</sup> Order 80 of the Rules of the High Court (Cap 4, subsidiary legislation) deals with the appointment of a next friend or guardian *ad litem* to represent the interests of the child. The Order refers to a “person under disability,” which is defined in Order 80 rule 1 to be “a person who is a minor or a mentally incapacitated person”. The court must approve the settlement of any proceedings in which there is a claim of money. The court gives directions under rule 12 to control the monies recovered for the minor. Usually the money is invested by the court until the minor reaches majority. Payment out of any of the monies may be applied for by the next friend and the court will give directions on this matter under rule 12(3).

1.47 There is no definition of “next friend” but “the court generally expects a next friend to be a substantial person; and, as in the case of a guardian *ad litem*, it is desirable that he be a relation, connection, or friend of the family and not a mere volunteer.”<sup>63</sup> The Official Solicitor can also be appointed<sup>64</sup> especially if no other person is willing to act.<sup>65</sup>

1.48 The guardian *ad litem* or next friend can be removed if he is acting adversely to the interests of the infant, or if he conducts the infant’s affairs improperly.<sup>66</sup> If a conflict of interest arises, the court can make an order to appoint the Official Solicitor as guardian *ad litem* or next friend.<sup>67</sup>

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61 Ord No 69 of 1997.

62 *Harris v Lightfoot* (1862) 10 WR 31, referred to in *Supreme Court Practice*, (2001 ed) at 80/3/7.

63 *Ibid*, at 80/3/7, referring to *Nalder v Hawkins* (1833) 2 M & K 243.

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

65 *Supreme Court Practice*, above, at 80/6/8. See below for powers of the Hong Kong Official Solicitor.

66 *Ibid*, at 80/3/9.

67 *Ibid*, at 80/12/9.

## **Guardianship and wardship**

1.49 A court has no power to remove rights as a guardian while a parent is alive, even though the impact of a custody order between two parents is sometimes seen as achieving this.<sup>68</sup> This jurisdiction is different from the wardship jurisdiction. If a guardian is appointed that does not make the child a ward of court.<sup>69</sup> In wardship proceedings, the court becomes the guardian and has responsibility for all matters affecting the upbringing of the child.

1.50 Section 26 of the High Court Ordinance (Cap 4) and Order 90 of the Rules of the High Court (Cap 4, subsidiary legislation) governs the wardship jurisdiction. An order of wardship vests custody:

*“[I]n the sense of the whole bundle of parental rights, in the court which usually delegates actual care and control to an individual. Major decisions affecting the ward, eg consent to marriage, adoption proceedings, surgery and education must be taken by the court. Interference with and disobedience to the court order is a contempt of court.”<sup>70</sup>*

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

## **Duties of the Official Solicitor**

1.52 The Official Solicitor can act where so appointed by the court,<sup>71</sup> or at his discretion where he is satisfied that the interests of justice so require and where there is no other person fit and willing to act.<sup>72</sup> The Director of Legal Aid is the Official Solicitor.<sup>73</sup> The duties of the Official Solicitor include acting as guardian *ad litem* or next friend to a person under disability of age or mental capacity, or where a person is committed to prison for contempt and who is unable or unwilling to apply to the court for release.<sup>74</sup> The Official Solicitor can also be requested by the Juvenile Court to act for a party

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68      le, where “sole custody” is granted to one of the parents.

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

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

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

72      Section 4(1)(b), OSO.

73      Section 7, OSO.

74      Schedule 1, Part 1, OSO.

involved in proceedings under the Protection of Children and Juveniles Ordinance (Cap 213).<sup>75</sup> The office of Official Solicitor, who is also the Official Trustee and Judicial Trustee, was established in 1991.<sup>76</sup> He also took over the functions of the Crown Solicitor (now Law Officer (Civil Law)) under rules 105(4) and 108(1) of the Matrimonial Causes Rules (Cap 179, subsidiary legislation).<sup>77</sup>

1.53 Where the Official Solicitor is appointed in wardship proceedings, he appears as advocate for the ward and represents the interests of the ward to the court. He is also the guardian of the ward. He does not represent the parents.<sup>78</sup>

### ***Consent to marry***

1.54 Section 14 of the Marriage Ordinance (Cap 181)<sup>79</sup> provides that the written consent to the marriage of a child under 21 is required from the parent who has custody, or both parents if they have joint custody. In the case of an illegitimate child, the consent of the mother, or if she is dead, the guardian, is required when the child is under 21. This removed a doubt as to whether the consent of the father of an illegitimate child was required. A guardian is now defined by section 18A(3) as including “any person to whose custody the party is committed by order of the court, other than a parent.”<sup>80</sup> If a person whose consent is required refuses to give his consent or cannot be traced, then a District Court Judge may give his consent under section 18A.

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75 Schedule 1, Part 3, OSO.

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

77 Schedule 3, OSO.

78 *Re R(PM)* [1968] 1 WLR 385, at 387, *per* Goff J.

79 As amended by sections 28 to 36 of the Law Reform (Miscellaneous Provisions and Minor Amendments) Ordinance, Ord No 80 of 1997.

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



## Chapter 2

### Problems with the law

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#### Introduction

*"[Guardianship] is a concept linked to English feudal landownership and so is of little relevance to Hong Kong today."*<sup>1</sup>

2.1 The historical development of guardianship, and its interplay with the modern notion of parenthood, has meant that the law of guardianship *"has developed piecemeal to meet various different requirements."*<sup>2</sup>

2.2 The focus of this chapter is an examination of various shortcomings in Hong Kong's current law on the guardianship of children.

#### Appointment of guardians

2.3 Section 6(1) of the Ordinance provides that a parent may appoint a guardian by deed or will. These are formal documents, the preparation, execution and operation of which may involve many technicalities. Partly as a result of this perhaps, many people do not make a will. This situation is not in the best interests of children.

2.4 For those who do make a will appointing a guardian for their child, there is currently no requirement that the consent of the person appointed as testamentary guardian be obtained, or even that they be notified of the fact of their proposed testamentary guardianship. This also is not in the best interests of children, nor for the appointee involved, who should be given the opportunity to consider the seriousness of the responsibilities he may be expected to assume in relation to the child.

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1 Dr Athena Liu, *Family Law for the Hong Kong SAR* (1999, HKU Press) at 235.

2 English Law Commission's working paper, *Family Law: Review of Child Law: Guardianship* (1985, Working Paper No 91, HMSO) at para 2.3.

## Disclaimer

2.5 Although section 5 of the Ordinance gives power to appoint a guardian where a testamentary guardian refuses to act, there is no provision for a guardian to *disclaim* an appointment, if he does not wish to take it up. For the reasons cited above, there may need to be some provision introduced to allow this.

## Veto of the surviving parent

2.6 Under section 6(2) of the Ordinance, the surviving parent has a right to veto the testamentary guardian taking up his appointment if the surviving parent objects to it. Without more, this renders the appointment by the deceased parent nugatory, unless the testamentary guardian takes the matter to court. The court can then refuse to make an order, which results in the surviving parent remaining sole guardian,<sup>3</sup> or it can order that the guardian act jointly with the surviving parent, or to the exclusion of the surviving parent.<sup>4</sup> The surviving parent, however, does not have the right to take the initiative to go to court under this section.

2.7 It does not seem satisfactory that the surviving parent can so easily nullify the testamentary appointment made by the deceased parent. Equally, it does not seem justifiable that the surviving parent should be barred from seeking a specific remedy from the court if he objects to the testamentary guardian assuming his appointment.

## Court appointment of guardian

2.8 Section 7 of the Ordinance provides for the court to appoint a guardian if the child has no parent, no guardian and no other person having parental rights with respect to him.<sup>5</sup> The power to appoint is therefore limited in its scope.<sup>6</sup> In Hong Kong, the role of the extended family in the upbringing of children is still very much apparent. It would be preferable if this section gave a more effective right to such interested persons to apply to the court to be appointed as guardian.

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3 Section 6(3)(a), GMO.

4 Section 6(3)(b), GMO.

5 This would include an unmarried father who had obtained an order under section 3 GMO granting him parental rights or authority.

6 See Liu, above, at 239.

## **Appointment of guardian by guardian**

2.9           There does not appear to be any statutory provision in Hong Kong allowing a guardian to appoint a guardian to act for him in the event of his death. If a guardian is intended to assume full parental responsibility for the child, then the power for the guardian himself to appoint a guardian should be included within the scope of that responsibility.

## **Guardian of the estate**

2.10           Section 18 of the Ordinance provides that a guardian of the person of the minor shall also be guardian of his estate except in those circumstances specified in subsection (2).<sup>7</sup> The Official Solicitor Ordinance (Cap 416) sets out the jurisdiction of the Official Solicitor with regard to property matters. We note that there appears to be no equivalent power in Hong Kong to Order 80 rule 13 of the English Rules of the Supreme Court, which provides that only the Official Solicitor can be appointed by the court as guardian of the estate of a child. It is unclear whether such an express power needs to be similarly provided in Hong Kong.<sup>8</sup>

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7           Where the court may specifically appoint a separate guardian of the estate.

8           See the comments under this head appearing later, in Chapter 4.

## Chapter 3

### The law of guardianship in other jurisdictions

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#### Introduction

3.1 This chapter examines developments in the law of guardianship which have taken place in the United Kingdom. As their guardianship regimes have in the past been very similar to our current guardianship regime in Hong Kong, the reforms they have implemented may be useful for consideration here.

#### England and Wales

3.2 The earlier law of guardianship in England was a product of the common law, equity and statute. Parents and guardians formerly had similar but not identical powers.<sup>1</sup> The law has been simplified and is now governed exclusively by the provisions of the Children Act 1989 Act (“the 1989 Act”).<sup>2</sup>

3.3 The term “guardian” is now restricted to non-parents, and guardians now have “parental responsibility.”<sup>3</sup> The rationale is that the power to control a child’s upbringing should go hand in hand with the responsibility to care for him. It was expected that guardians would take over complete responsibility for the care of a child if the parents die.

3.4 A guardian may appoint another individual to take his place as the child’s guardian in the event of his death.<sup>4</sup> The English Law Commission noted that, “[i]f appointing a guardian is an aspect of responsible parenthood, it can be no less an aspect of responsible guardianship.”<sup>5</sup>

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1 *Family Law: Review of Child Law: Guardianship* (1985, Working Paper No 91, HMSO) at para 2.26.

2 Section 5(13), the 1989 Act.

3 Section 5(6), the 1989 Act. The term “parental responsibility” is used under the English Act to describe the bundle of responsibilities owed by the parent towards the child. (The equivalent under our current Hong Kong law is “rights and authority” as referred to in the GMO, section 3. See Chapter 1, above at paras 1.16 to 1.23.)

4 Section 5(4), the 1989 Act.

5 English Law Commission’s report, *Family Law: Review of Child Law, Guardianship and Custody* (1988, Rep No 172, HMSO) at para 2.25.

## ***Parental appointment of guardians***

3.5 In the past, each parent could appoint a testamentary guardian to replace him on his death.<sup>6</sup> The appointment took effect even if the other parent was still alive. However, if the survivor objected, he could apply to the court to prevent the appointee from taking office. The guardian could also apply if he considered the survivor unfit to have custody of the child. The court could then order that the guardian or parent may act alone or both to act jointly.

3.6 Under the 1989 Act, a parent with parental responsibility<sup>7</sup> may appoint an individual to be the child's guardian in the event of his death.<sup>8</sup> Appointments can be made only in respect of children under the age of 18.<sup>9</sup> Although there is no express prohibition against making an appointment in respect of a married child, it is not clear whether the courts would make such an appointment in practice. It seems that more than one individual may be appointed.<sup>10</sup> An additional guardian may also be appointed at a later date.<sup>11</sup>

## ***When the appointment takes effect***

3.7 The appointment will take effect immediately upon the death of the appointing person if that person was the only parent with parental responsibility at the time of his death.<sup>12</sup> But if there is a surviving parent with parental responsibility, then the appointment will normally take effect upon the death of the sole surviving parent.<sup>13</sup> The exception is when the deceased parent had a residence order in his favour and the surviving parent did not. In such circumstances, the appointment will take effect immediately upon the death of the appointing person.<sup>14</sup>

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

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

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

8 Section 5(3)(4), the 1989 Act.

9 Section 105(1), the 1989 Act.

10 Interpretation Act 1978, section 6(c).

11 Section 6(1), the 1989 Act.

12 Section 5(7)(a), the 1989 Act.

13 Section 5(8), the 1989 Act.

14 Section 5(7)(b), (8)(b), (9), the 1989 Act.

parent had also appointed a guardian, there can be conflicts between the two separately appointed guardians on the subsequent death of the survivor.

3.9 As regards this exception, the English Law Commission held the view that if a parent has a residence order in his favour, he should be able (and indeed encouraged) to provide for the child's future upbringing in the event of his death by appointing a guardian.<sup>15</sup> The Act therefore provides that in such circumstances the appointment by that parent will have immediate effect even though there is a surviving parent.<sup>16</sup> The guardian will have to share parental responsibility with the latter. Any dispute as to the child's upbringing such as his residence, will have to be resolved by the court.

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

*"The thinking seems to be that the deceased parent should be able, through guardianship, to preserve the 'advantage' of the residence order after his death. It is questionable how far this can be squared with the central principle of continuing parental responsibility.*

*Apart from the residence issue, the non-residential parent is as much a parent as was the deceased residential parent. To make him share parental responsibility with a guardian may seem inappropriate where he has continued, in fact, to be actively connected with the child. It would arguably have been more consistent with the general aims of the legislation to have placed the onus on the guardian to seek immediate appointment where it could be demonstrated that this was in the child's best interests.*

*Another difficulty is that the rule appears to create uncertainty about who is entitled to take over the physical care of a child. An initial dispute over where the child is to live would, therefore, appear to require a residence order to resolve it. This could have been avoided if the survivor held sole parental responsibility unless and until challenged by the guardian."*<sup>17</sup>

3.11 The Scottish Law Commission also commented that the exception makes no provision for the position where the spouses were separated or divorced but where there was no residence order.<sup>18</sup> For example,

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15 English Law Commission (1988), above, para 2.28.

16 Section 5(7), the 1989 Act.

17 Bainham, *Children - The Modern Law* (1993) at 191-192.

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

although the father may have abandoned his family, and no residence order was obtained by the mother, he nevertheless has sole parental responsibility for the child and the onus will be on the appointee to challenge this position. The opinion of the Scottish Law Commission was that in such cases, it might be desirable for the appointment of guardian to take effect immediately on the death of the appointing person even though there is a surviving parent somewhere.

### ***Method of appointment***

3.12 The 1989 Act prescribes a simple method of appointment to encourage parents to appoint guardians.<sup>19</sup> It is no longer necessary for appointments to be made by deed or will. However, the document of appointment must be in writing and signed by the person making the appointment. The document must be signed at his direction, and in the presence of two witnesses who should each attest the signature. An appointment made by a will which is not signed by the testator must be signed at the direction of the testator and witnessed in accordance with the provisions of section 9 of the Wills Act 1837.<sup>20</sup>

### ***Revocation of appointment***

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

- (a) by making another appointment unless it is clear that the purpose is to appoint an additional guardian,<sup>21</sup>
- (b) by a written document revoking the appointment,<sup>22</sup> or
- (c) by destruction of the document with intention to revoke the appointment.<sup>23</sup>

If the appointment is made in a will, it is revoked if the will is revoked.<sup>24</sup> Section 4 of the Law Reform (Succession) Act 1995 provides that, unless a contrary intention is shown in the instrument of appointment, any appointment by the deceased testator of the former spouse as guardian is deemed to have been revoked at the date of the divorce. This also applies to nullity.<sup>25</sup>

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19 Section 5(5), the 1989 Act.

20 Section 5(5)(a), the 1989 Act.

21 Section 6(1), the 1989 Act.

22 Section 6(2), the 1989 Act.

23 Section 6(3), the 1989 Act.

24 Section 6(1) to (4), the 1989 Act.

25 The 1995 Act has effect as regards an appointment made by a person dying on or after 1 January 1996. See Family Proceedings (Amendment) Rules (SI 1996, No 816) (L1) for changes to the relevant forms.

## ***Disclaiming the appointment***

3.14 The Act provides for a right to disclaim appointments made by a parent or guardian but not to those made by the court.<sup>26</sup> The disclaimer must be made by an instrument in writing, signed by the appointee and made “within a reasonable time of his first knowing that the appointment has taken effect”. It must also be recorded in compliance with any regulations that may be made by the Lord Chancellor.

## ***Court appointment of guardians***

3.15 The court may appoint an individual to be a child’s guardian if the child has no parent with parental responsibility, or a parent or guardian with a residence order in his favour died while the order was in force.<sup>27</sup> The former applies to orphans or where there is an unmarried father without parental responsibility. The latter applies where the child may have a surviving parent without a residence order.<sup>28</sup> It seems that the court may exercise its power to appoint even though the deceased had made an appointment and may do so either to add or to substitute a new guardian.<sup>29</sup>

3.16 There is no requirement that leave of the court must first be obtained before an application to be appointed a guardian can be made. In addition, the court has a power to make an appointment of its own motion.<sup>30</sup> It seems that once family proceedings have been initiated, any interested person, including the child himself, may seek the appointment of another individual to be a guardian.<sup>31</sup> A court may call for welfare reports to assist it in deciding on the appointment or discharge of a guardian.<sup>32</sup>

## ***Removal of guardians***

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

- (a) on the application of any person with parental responsibility;
- (b) on the application of the child with leave of the court; or
- (c) upon the court’s own motion in any family proceedings, if the court considers that it should be brought to an end.<sup>33</sup>

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26 Section 6(5) and 6(6), the 1989 Act.

27 Section 5(1) and (2), the 1989 Act.

28 Section 5(9), the 1989 Act.

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

30 Section 5(2), the 1989 Act.

31 White, Carr & Lowe, *A Guide to the Children Act 1989* (1990) at para 2.39.

32 Section 7, the 1989 Act.

33 Section 6(7), the 1989 Act.



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

### ***Termination of guardianship***

3.18 Guardianship automatically terminates when the child reaches the age of 18.<sup>34</sup> Whether the guardian's duties determine upon the child's marriage is a moot point. Although the Act does not contain any express limitation, the court may well decide that there is no scope for the operation of guardianship. Even if the guardianship continues, it is unlikely that a guardian would be permitted to interfere with the activities of a married child.<sup>35</sup>

### ***Guardian of the estate of a child***

3.19 Apart from guardians of the person, there are also guardians of the estate who are appointed to protect the child's property. The English Law Commission noted that guardians of the estate may be appointed specifically to administer an award made to a child by the Criminal Injuries Compensation Board in respect of injuries caused by the parents, or where a child becomes entitled to a foreign legacy or money from a pension fund or insurance policy and either his parents are dead or for some reason cannot give an adequate receipt.<sup>36</sup>

3.20 The English Law Commission stated that:

*"following the Law of Property and Settled Land Acts 1925 guardianship of the estate became less significant because a legal estate in land can no longer be held by a minor but instead is held by trustees as statutory owners ... a guardian has the right to recover rents and profits from the minor's land."*<sup>37</sup>

3.21 The Commission explained that this means that:

*"he can control the income due to the infant and any of the personal profit to which the infant is legally as well as beneficially entitled, but is not entitled to receive or exercise powers over property to which the infant has only beneficial title, except income as it becomes payable."*<sup>38</sup>

3.22 The Commission argued that trusteeship would adequately and more appropriately fill any gap.<sup>39</sup> However, the government disagreed and the

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34 Section 91(7) and (8),.

35 White, Carr & Lowe, above, at para 2.52.

36 English Law Commission (1985), above, para 2.23, footnote 95.

37 English Law Commission (1985), above, para 2.23.

38 English Law Commission (1985), above, para 2.23.

39 English Law Commission (1985), above, para 2.24.

1989 Act preserves the High Court's power to appoint guardians of the estate of any child but only in accordance with rules of court.<sup>40</sup>

3.23 Under the rules of court,<sup>41</sup> only the Official Solicitor can be appointed as the guardian of the estate of a child. The appointment can be made only when the consent of the persons with parental responsibility has been signified to the court or when such consent cannot be obtained or may be dispensed with. Furthermore, appointments may be made only in the following circumstances:

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

In practice such appointments are confined to cases where the parents are dead or where it is unsuitable for them to be involved.<sup>42</sup>

## Scotland

### ***Appointment of guardians by parent***

3.24 The Scottish Law Commission, in its discussion paper on this area,<sup>43</sup> did not find difficulty with the existing law which provided that:

*“the parent of a child may appoint any person to be guardian of the child after his death, but any such appointment shall be of no effect unless the appointment is in writing and signed by the parent; and the parent at the time of his death was guardian of the child or would have been such guardian if he had survived until after the birth of the child.”*<sup>44</sup>

3.25 Section 7(1) of the Children (Scotland) Act 1995 provides that a parent can appoint a guardian for the child in the event of the parent's death, provided the appointment is in writing.

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40 Section 5(11) and (12), the 1989 Act.

41 Rules of the Supreme Court, Order 80, rule 13.

42 As when the injuries to the child had been caused by the parents.

43 Scottish Law Commission (1990), above.

44 Section 4 of the Law Reform (Parent and Child) (Scotland) Act 1986, section 4 (as amended by the Age of Legal Capacity (Scotland) Act 1991, section 10 and Schedule 1 para 41).

### ***Appointment by existing guardian***

3.26 The Commission supported the inclusion of a provision similar to section 5(4) of the Children Act 1989. Thus, an elderly grandparent, who is sole guardian and who is anxious about the arrangements for the child after her death, could appoint a replacement.<sup>45</sup> Section 7(2) provides that:

*“A guardian of a child may appoint a person to take his place as guardian in the event of the guardian’s death, but such appointment shall be of no effect unless in writing and signed by the person making it.”*

### ***Views of child on appointment of guardian***

3.27 The Commission received submissions that, where a child was of sufficient age and maturity, his views should be taken into consideration by a guardian proposing to appoint a replacement, or by a parent appointing a guardian. Section 7(6) provides that:<sup>46</sup>

*“Without prejudice to the generality of subsection (1) of section 6 ..., a decision as to the appointment of a guardian under subsection (1)<sup>47</sup> or (2)<sup>48</sup> above shall be regarded for the purposes of that section (or of that section as applied by subsection (5) above) as a major decision which involves exercising a parental right.”*

3.28 The Commission suggested that a child who objected to the appointment of a guardian could apply to court for the termination of the appointment and, if necessary, the appointment of someone else.<sup>49</sup> However, the Act does not explicitly give the child that right.

### ***Revocation of appointment***

3.29 The Commission recommended that a power of revocation of an appointment of a nominated guardian should be provided for on similar lines to the provisions in section 6(1) to (4) of the Children Act 1989.<sup>50</sup> Section 8 implements this recommendation.

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45 Scottish Law Commission (1990), above, para 3.4.

46 Scottish Law Commission (1990), above, para 3.5.

47 By a parent.

48 By an existing guardian.

49 Scottish Law Commission (1990), above, para 3.5.

50 Scottish Law Commission (1990), above, para 3.7.

### ***When appointment should take effect***

3.30 The Commission felt that it was important, in the interests of the child as well as the guardian, that the guardianship of a child should not be imposed on anyone who was unwilling to accept it. Scottish law provides that some act needs to be done expressly by a minute or letter of acceptance addressed to the executors of the deceased parent or impliedly (from acts which are not consistent with any other intention) to accept the office of guardian.

3.31 The Children Act 1989 in England is different, as an appointment takes effect automatically but can be later disclaimed by an instrument in writing, which has to be registered in a prescribed way. The Commission did not agree with this provision as it would involve the guardian, who may not have been consulted about the appointment, in the inconvenience and expense of obtaining legal advice.<sup>51</sup>

3.32 Section 7(3) provides that: “An appointment as guardian shall not take effect until accepted, either expressly or impliedly by acts which are not consistent with any other intention.”

3.33 The Commission recommended that “the rule that where two or more persons have any parental right each of them may exercise it without the consent of the other or others, unless the deed or decree conferring the right provides otherwise” should apply where there were two or more guardians.<sup>52</sup> Section 7(4) provides that: “If two or more persons are appointed as guardians, any one or more of them shall, unless the appointment expressly provides otherwise, be entitled to accept office even if both or all do not accept office.”

### ***Surviving parent***

3.34 If a testamentary guardian has been appointed, then after the death of the appointing parent, the surviving parent continues to have full parental responsibilities and rights. The Commission suggested that:

*“in many cases it would be expected that the guardian would be content for the surviving parent to exercise parental responsibilities and rights but the guardian would be available, in reserve, just as an absent parent would be, in case of emergencies.”*

3.35 However, in some cases there might be conflict between the guardian and the parent. For example, “the mother may have been divorced from the father, and may have appointed her mother or her new husband as

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51 Scottish Law Commission (1990), above, para 3.8.

52 Scottish Law Commission (1990), above, para 3.15.

guardian. On the mother's death the father's wish to have the child living with him may be resisted by the grandmother or stepfather.”<sup>53</sup>

3.36 The Commission felt that whether this type of case resulted in litigation depended more on the relationships between the parties, “rather than on whether the law has a rule precluding a guardian from accepting office during the life of the surviving parent.”<sup>54</sup>

3.37 However, the Commission noted that section 5(8) of the English Children Act 1989 provides that an appointment of a guardian by one parent does not take effect until the other parent dies or ceases to have parental responsibility for the child. If the appointing parent before his death had a residence order in force then the appointment does take effect. The Scottish Law Commission were concerned that there would be situations where the parents of a child are separated and yet have no residence order in force. “The father, for example, may simply have abandoned his family.”<sup>55</sup>

3.38 This is also inconsistent with the policy that no order should be made unless this is necessary in the interests of the child. Section 3(2) of the Law Reform (Parent and Child) (Scotland) Act 1986 provides that a court should not make any order relating to parental rights “unless it is satisfied that to do so will be in the interests of the child”. There is a similar provision in section 1(5) of the Children Act 1989.

3.39 A parent who is on good terms with the other parent can provide that an appointment of a guardian is not to take effect until after the other parent's death. The Commission recommended a more flexible solution which allows a guardian to accept office even if there is a surviving parent in existence, unless the appointing parent has made specific provision otherwise.<sup>56</sup> The legislation also provides that the other parent's responsibilities and rights subsist.<sup>57</sup>

### ***Responsibilities and rights of guardians***

3.40 The Commission noted that under the existing law the parent's right of guardianship differed from the rights conferred on non-parental guardians. “The parent's guardianship did not need to include rights in relation to the child's person and day to day upbringing, which the parent had anyway as parent.” The Commission suggested that a non-parental guardian might need to have such rights.<sup>58</sup> The Commission agreed with the provision in the Children Act 1989 that a guardian should be given the normal parental

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53 Scottish Law Commission (1990), above, para 3.10.

54 Scottish Law Commission (1990), above, para 3.10.

55 Scottish Law Commission (1990), above, para 3.11.

56 Scottish Law Commission (1990), above, at para 3.12.

57 Section 7(1)(b).

58 This was in agreement within section 3(5) of the English Children Act 1989.

responsibilities and rights to enable him or her to fulfil these responsibilities.<sup>59</sup> They accepted the view of the English Law Commission that:

*“[P]arenthood should become the primary concept. Any necessary distinctions between parents and guardians who act in loco parentis could then clearly be drawn ....”*<sup>60</sup>

3.41 Section 7(5) provides that a guardian will have parental rights and responsibilities<sup>61</sup> subject to an order under section 11<sup>62</sup> or section 86.<sup>63</sup>

### ***Termination of guardianship***

3.42 The Commission suggested that:

*“although a person should be free to accept or refuse the guardianship of a child, the interests of the child require that, once the guardian has unequivocally accepted office, he or she should not be able to surrender or transfer his or her responsibilities, other than by means of an appropriate court order or orders.”*<sup>64</sup>

3.43 Section 8(5) provides that:

*“Once an appointment of a guardian has taken effect, under section 7 of this Act, then, unless the terms of the appointment provide for earlier termination, it shall terminate only by virtue of:*

- (a) the child concerned attaining the age of 18 years;*
- (b) the death of the child or the guardian; or*
- (c) the termination of an appointment by a court order under section 11 ....”*

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59 Scottish Law Commission (1990), above, para 3.13.

60 English Law Commission (1988), above, para 2.3.

61 Section 7(5).

62 An order of the court which can deprive or modify the rights and responsibilities.

63 This provides for parental responsibilities and rights to be transferred to a local authority, the equivalent of the Social Welfare Department in Hong Kong.

64 Scottish Law Commission (1990), above, para 3.16.

## Chapter 4

### Recommendations for reform

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#### Introduction

4.1 In Chapter 1, we examined the provisions of Hong Kong's law on the guardianship of children. In Chapter 2, we identified various limitations in the law which should be addressed. Changes which have been introduced in the United Kingdom were examined in Chapter 3. In this chapter, we review the relevant findings of our consultation exercise and set out our conclusions and recommendations for reform in this area.

#### Appointment of guardians

##### *Introduction of a simplified process*

4.2 Section 6(1) of the Guardianship of Minors Ordinance (Cap 13) provides that a parent may appoint a guardian by deed or will. In contrast, section 5(5) of the Children Act 1989<sup>1</sup> in England provides that parents who have parental responsibility<sup>2</sup> may appoint guardians by a document in writing, with their signature attested by two witnesses, without the need to make a formal will or deed. This avoids technicalities and facilitates appointment, as many people do not make a will. We consider that a guardian should be able to be appointed by a simple process which is not legalistic. We therefore recommended in the consultation paper the adoption of a similar provision to section 5(5) of the Children Act 1989.

##### *Standard form for appointment of guardian*

4.3 Concern was expressed by some members of the Subcommittee that a parent may appoint a person as testamentary guardian without having first informed that person or obtained his consent, and that this was not in the best interests of the child. We agree that there must be a

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1 See Annex 2, below, for the text of the provision.

2 Thus an unmarried father would not be able to appoint a guardian unless he had been granted parental responsibility by agreement or court order.

recognised system to enable a third party to determine that a person has acknowledged his appointment as a guardian. A requirement of formal consent would bring home to the guardian the seriousness of the parental responsibility that he was taking on for the child.

4.4 We recommended in the consultation paper the introduction of a standard form for the appointment of a guardian, which should explain briefly a guardian's responsibilities and be signed by the proposed guardian. These forms could be made available at the Legal Aid Department and the District Offices where the Free Legal Advice Scheme of the Duty Lawyer Service operate. They could also be made available on the Internet.

### *Appointee's acknowledgement of consent*

4.5 We also recommended in the consultation paper that the guardian should have to accept office as guardian expressly or impliedly if he has not formally consented to act as guardian. This could also be achieved by the completion of a form.

### *Feedback from consultation*

4.6 *Overview.* In general, all of the recommendations relating to guardianship proposed by the Sub-committee were welcomed by the consultees. It was agreed by many that encouraging parents to make well-considered arrangements for their children in the unfortunate event of the parents dying, would certainly be in children's best interests.

4.7 Of the concerns that were raised, the focus appeared to be on the balance that would need to be struck in some circumstances<sup>3</sup> between the rights and authority of the surviving parent and those of the appointed guardian representing the wishes of the deceased parent. A few respondents cautioned that some of the proposals<sup>4</sup> might create an inherently adversarial situation in practice between the surviving parent and the guardian, resulting in more painful litigation for the surviving parent and the child.

4.8 *Appointment of guardian.* In relation to the specific proposals under this head, most of the respondents who commented on the proposals supported them. **The Legal Aid Department** went on to mention that it would be helpful if the guardianship forms available publicly had an explanatory pamphlet attached, and that they were made available also at district offices and through the Law Society and the Social Welfare Department. We agree with the Department and trust that the proposals of making the forms standard,

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3 For example, where the parents were divorced and the deceased parent had had custody of the child prior to that parent's death.

4 In particular, the recommendations below regarding: the surviving parent's veto, when the appointment of the guardian takes effect and the appointment of guardians by guardians.



simple, easily understood and widely available will be taken up by the Administration in the future.

### **Recommendation 1**

#### **We recommend:**

- (a) the adoption of a provision similar to section 5(5) of the English Children Act 1989<sup>5</sup> that parents who have parental rights and authority may appoint guardians by a document in writing, with their signature attested by two witnesses, without the need to make a formal will or deed;**
- (b) the introduction of a standard form for the appointment of a guardian, which should explain briefly a guardian's responsibilities and be signed by the proposed guardian. (These forms could be made available, for example, at the Legal Aid Department and the District Offices where the Free Legal Advice Scheme of the Duty Lawyer Service operates, and on the Internet);**
- (c) that the guardian should have to accept office as guardian expressly or impliedly if he has not formally consented to act as guardian. This could also be achieved by the completion of a form.**

## **Disclaimer**

### *Formal notice by guardian to withdraw from acting*

4.9 Section 5 of the Guardianship of Minors Ordinance (Cap 13) gives power to appoint a guardian where a testamentary guardian refuses to act. There is no provision for a guardian to disclaim. In England, a guardian who does not want to act as such may disclaim by an instrument in writing under section 6(5) of the Children Act 1989.<sup>6</sup> The Scottish Act provides that an appointment cannot take effect unless accepted expressly or impliedly by acts which are not consistent with any other intention.<sup>7</sup>

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5 See Annex 2, below, for the text of the provision.

6 See Annex 2, below, for the text of the provision.

7 Children (Scotland) Act 1995, section 7(3).

4.10 We recommended in the consultation paper that there should be a system for withdrawing from acting as a guardian similar to the system for appointing a guardian. If the proposed guardian had already consented to act, by signing the appropriate form, then he would have to formally disclaim the appointment if he did not want to act at a later time. The disclaimer should be formal, in writing, and notified to the executor or administrator of the estate. The Director of Social Welfare should be notified of the disclaimer if there is no executor, administrator or surviving parent, so that steps could be taken to protect the best interests of the child.

### *Feedback from consultation*

4.11 Most of the respondents who commented on this recommendation expressed unequivocal support for it. **Resource The Counselling Centre** noted, however, that accepting an appointment as a child's guardian should be treated as a very serious commitment by the individual appointed. The Centre was concerned at the emotional effect that a disclaimer might have on the child, particularly if the guardian disclaimed after having already taken up the role.

4.12 We have considered these comments and, while agreeing that the effects of a disclaimer in the situation described above may be very unfortunate, feel that there can be no restrictions on the making of a disclaimer. We are of the view that the appointed guardian cannot be forced, either into assuming the appointment, or into not resiling from it once he has embarked upon the appointment. We do agree, however, that it would be useful if public information pamphlets on the obligations of guardians were produced, in an effort to educate the public as to the serious nature of the obligations that the guardian agrees to take on.

### **Recommendation 2**

**We recommend that there should be a system for withdrawing from acting as a guardian similar to the system for appointing a guardian. If the proposed guardian had already consented to act, by signing the appropriate form, then he would have to formally disclaim if he did not want to act at a later time. The disclaimer should be formal, in writing, and notified to the executor or administrator of the estate. The Director of Social Welfare should be notified of the disclaimer if there is no executor, administrator or surviving parent, so that steps can be taken to protect the best interests of the child.**

## Veto of surviving parent

### *Effect of the surviving parent's objections to the appointment*

4.13 We consider that there is a need for change to the right of the surviving parent to veto the testamentary guardian under section 6(2) of the Guardianship of Minors Ordinance (Cap 13).<sup>8</sup> It seems that the appointment of a testamentary guardian has no effect if the surviving parent objects. The result of this veto is that the testamentary guardian is forced to bring the matter to the court. The court may refuse to make an order which results in the surviving parent remaining sole guardian.<sup>9</sup> Alternatively, the court can order that the guardian act jointly with the surviving parent or to the exclusion of the surviving parent.<sup>10</sup>

### *Surviving parent should have right to apply to court*

4.14 The surviving parent does not have the right to take the initiative to go to court under this section. We cannot find any circumstances to justify barring the surviving parent from seeking a remedy from the court if he objects to the testamentary guardian acting. In those circumstances, the court will decide the matter, by applying the welfare principle.

4.15 We recommended in the consultation paper that the right to veto of the surviving parent in section 6(2) of the Guardianship of Minors Ordinance (Cap 13) should be removed. Then, either the surviving parent or guardian could apply to a court under section 6(3) if there is a dispute between them on the best interests of the child.

### *Feedback from consultation*

4.16 There was general support for this recommendation. However, a few respondents were not in favour and queried whether it was appropriate for the deceased parent's wishes in relation to the child to in effect prevail over those of the surviving parent, particularly in cases where the parents had separated or divorced.

4.17 **The Hong Kong Family Welfare Society** did not object to the recommendation, but felt that parents should be encouraged to agree amongst themselves as to who should be appointed as their respective testamentary guardians, through mediation if necessary, to avoid future conflicts arising on this issue.

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8 See Chapter 1, above.

9 See section 6(3)(a), GMO.

10 Section 6(3)(b), GMO.

### **Recommendation 3**

**We recommend that the right to veto of the surviving parent in section 6(2) of the Guardianship of Minors Ordinance (Cap 13) should be removed. Then, either the surviving parent or the guardian could apply to a court under section 6(3) if there is a dispute between them on the best interests of the child.**

## **Views of child on appointment of guardian**

4.18 Section 7(6) of the Children (Scotland) Act 1995<sup>11</sup> provides that a decision on appointment of a guardian is treated as a major decision which involves exercising a parental right under section 6 of the Scottish Act. Section 6 provides that the views of the child should, so far as practicable, be taken into account in making a major decision. This is more relevant to an older child and is a reasonable provision considering that, if the parents are divorced, the guardian will be caring for the child. We recommended in the consultation paper that a similar provision to section 7(6) of the Children (Scotland) Act 1995<sup>12</sup> be introduced so that the views of the child on the appointment of the guardian might be taken into account.

### *Feedback from consultation*

4.19 This recommendation was unanimously supported by those consultees who commented on it.

### **Recommendation 4**

**We recommend that a similar provision to section 7(6) of the Children (Scotland) Act 1995<sup>13</sup> be introduced so that the views of the child on the appointment of the guardian may, so far as practicable, be taken into account.**

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11 See Annex 2, below, for the text of the provision.

12 See Annex 2, below, for the text of the provision.

13 See Annex 2, below, for the text of the provision.

## When appointment of guardian takes effect

4.20 In England, guardians appointed by the parent or the court have parental responsibility under the Children Act 1989.<sup>14</sup> The Children (Scotland) Act 1995 has a similar provision.<sup>15</sup> Section 5(8) of the Children Act 1989<sup>16</sup> provides that the testamentary guardian only has parental responsibility after the death of the surviving parent,<sup>17</sup> unless the deceased parent had a residence (custody) order in his favour, or was the only parent with parental responsibility.<sup>18</sup>

4.21 We identified some difficulty with this provision, as the testamentary guardian could not act if the deceased parent, before his death, had had the child living with him exclusively but had not applied to court for a custody order. (The parties may have had an informal agreement, or signed a mediation agreement which was not converted into a consent order.) Limiting the care of a child to the surviving parent may not be in the best interests of the child as the surviving parent may have been irresponsible towards the child.

4.22 We noted the disadvantages of the English provision for these practical reasons.<sup>19</sup> The purpose of appointing a guardian was for the guardian to take office after the death of the parent making the appointment. It was thought futile for a parent to appoint a testamentary guardian if that guardian could only take office after the death of the surviving parent. The Scottish Law Commission felt that the appointed guardian should be allowed to act after the death of the appointing parent, even if the other parent was still alive.<sup>20</sup> Any dispute between the testamentary guardian and the surviving parent could be resolved by the court.

4.23 In Hong Kong, the role of the extended family in the upbringing of children is still apparent. It may be more appropriate that a guardian should be allowed to act even if there is a surviving parent, as already provided for in sections 5 and 6 of the Guardianship of Minors Ordinance (Cap 13). We are of the view that it is in the best interests of the child that the testamentary guardian should not have to wait until after the death of the surviving parent to take steps to act as guardian of the child.

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14 Children Act 1989, section 5(6).

15 Children (Scotland) Act 1995, section 7(5).

16 See Annex 2, below, for the text of the provision.

17 See discussion on this provision in Chapter 3, above.

18 Children Act 1989, section 5(7)(b). The situation of one parent having parental responsibility would arise where an unmarried mother had not signed a parental responsibility agreement with the father, or the court had not ordered the father to have parental responsibility. A dispute between the surviving parent and the guardian can be resolved by an application under section 8 of the Children Act 1989.

19 The Scottish Law Commission also took this view. See Chapter 3, above.

20 See section 6(2), GMO.

4.24 We recommended in the consultation paper that if a parent had obtained a custody order prior to his death, then a testamentary guardian appointed by that parent should be able to act automatically as testamentary guardian on that parent's death. If the access parent were to be unhappy with this situation he could apply to court to determine the custody of the child.

4.25 In order to cover cases where there was no custody order, we also recommended in the consultation paper that a testamentary guardian should be able to act on the death of the parent who appointed the testamentary guardian if the child was residing with that parent prior to his death. In this situation, the appointment of the testamentary guardian would not take immediate effect on the death of the parent but the testamentary guardian would need to take the pro-active step of obtaining the court's permission. This option is more practical and avoids the rigidity of section 5(8) of the English Children Act 1989<sup>21</sup> of depriving the testamentary guardian of his responsibilities until after the death of the surviving parent.

### *Feedback from consultation*

4.26 This recommendation proved to be controversial with respondents. **The Hong Kong Council of Social Service** was concerned that the assumptions on which this proposal was based (ie, the prevalence of extended-family care arrangements in Hong Kong, and the need to protect the child from possibly irresponsible access parents) were valid in only a limited number of cases, while the recommendations would have general application. **The Hong Kong Young Women's Christian Association** stated that the views of the child and the interests of the surviving parent in having the custody order, should take priority over that of the third-party testamentary guardian. Other respondents reiterated the concerns expressed earlier that the proposals might be setting up an adversarial situation between the surviving parent and the guardian.

4.27 Having considered these views, we are still in support of the recommendation as we feel that it would be the best way to ensure continuity of residence for the child.

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21 See Annex 2, below, for the text of the provision.

## **Recommendation 5**

**We recommend that:**

- (a) a testamentary guardian should be able to act on the death of the parent who appointed the testamentary guardian if the child was residing with that parent prior to his death. The appointment of the testamentary guardian would not take immediate effect on the death of the parent, but a pro-active step of obtaining the court's permission would have to be taken by the guardian;**
- (b) if a parent had obtained a custody order prior to his death, then a testamentary guardian appointed by that parent should be able to act automatically as testamentary guardian on that parent's death.**

## **Court appointment**

*Person can apply to the court to be appointed where there is no one else with parental responsibility for the child*

4.28 Section 7 of the Guardianship of Minors Ordinance provides for the court to appoint a guardian if the child has no parent, no guardian and no other person having parental rights with respect to him.<sup>22</sup> In England, section 5(1) of the Children Act 1989<sup>23</sup> provides that any individual who wishes to be a guardian may apply to the court to be appointed if the child has no parent with parental responsibility for him or a residence order had been made in favour of the parent who has now died.<sup>24</sup>

4.29 We recommended in the consultation paper that section 7 of the Guardianship of Minors Ordinance be repealed and a similar provision to section 5(1) of the Children Act 1989, with regard to the appointment of a guardian, be enacted.

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22 This would be a reference to an unmarried father who had obtained an order under section 3, GMO, granting him parental rights or authority.

23 See Annex 2, below, for the text of the provision.

24 For full text see Annex 2, below.

### *Feedback from consultation*

4.30 This proposal was unanimously supported by those who responded under this head.

#### **Recommendation 6**

**We recommend that section 7 of the Guardianship of Minors Ordinance be repealed and a similar provision to section 5(1) of the English Children Act 1989,<sup>25</sup> with regard to the appointment of a guardian, be enacted.**

## **Appointment by guardian**

### *Power for guardian to appoint guardian*

4.31 It does not seem that there is any statutory provision in Hong Kong allowing a guardian to appoint a guardian to act for him in the event of his death. In England, however, section 5(4) of the Children Act 1989<sup>26</sup> provides that a guardian may appoint a guardian to take his place as the child's guardian in the event of his death. We recommended in the consultation paper the adoption of a provision along the lines of section 5(4) of the Children Act 1989.

### *Feedback from consultation*

4.32 Though generally supported as being likely to provide the best continuity of care for the child, there was some opposition to this proposal from respondents who commented on it. **Dr N Y Chau** felt that in the event of the custodial parent's death, *"priority should be given to the surviving parent, unless he/she is proven to have problems which contravene what is required of a decent parent, or to [have] voluntarily forfeited his/her custodial right."*

4.33 We have duly considered these arguments, but conclude that our original proposal will, on balance, best serve the interests of the child.

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25 See Annex 2, below, for the text of the provision.

26 See Annex 2, below, for the text of the provision.



### **Recommendation 7**

**We recommend the adoption of a provision along the lines of section 5(4) of the English Children Act 1989 allowing a guardian to appoint a guardian for the child in the event of the guardian's death.<sup>27</sup>**

## **Removal or replacement of guardian**

4.34 Section 8 of the Guardianship of Minors Ordinance (Cap 13) provides that the High Court may remove or replace a testamentary guardian or any guardian appointed or acting under the Ordinance if it is satisfied that it is for the welfare of the child. Section 6(7) of the Children Act 1989 provides that the child, or any person with parental responsibility, or the court itself, may apply to terminate the appointment of a guardian. We recommended in the consultation paper that section 8 of the Guardianship of Minors Ordinance should be retained, but that it should be amended to give similar powers to the District Court.

### *Feedback from consultation*

4.35 This proposal was unanimously supported by those who commented on it.

### **Recommendation 8**

**We recommend that section 8 of the Guardianship of Minors Ordinance should be retained, but that it should be amended to give similar powers to the District Court.**

## **Guardian of the estate**

4.36 Section 18 of the Guardianship of Minors Ordinance (Cap 13) provides that a guardian of the person of the minor shall also be guardian of his estate except in those circumstances specified in subsection (2).<sup>28</sup> The English Law Commission recommended that trusteeship should fill any gaps

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<sup>27</sup> See Annex 2, below, for the text of the provision.

<sup>28</sup> Where the court may specifically appoint a separate guardian of the estate.

in the provisions for guardian of the estate.<sup>29</sup> Section 5(11) of the Children Act 1989 preserved the power to appoint a guardian of the estate. Rules of court gave the right to exercise the power to the Official Solicitor. The Scottish Law Commission and the Children (Scotland) Act 1995 made detailed provisions as to the administration of a child's estate which do not seem relevant to Hong Kong.

4.37 The Official Solicitor Ordinance (Cap 416) sets out the jurisdiction of the Official Solicitor with regard to property matters. We note the power in Order 80 rule 13 of the English Rules of the Supreme Court, which provides that only the Official Solicitor can be appointed as guardian of the estate of a child. Although there is no equivalent power in Hong Kong, this does not appear to have hampered the Official Solicitor in the exercise of his duty. In the consultation paper, we welcomed views as to whether the Official Solicitor has sufficient powers to act as guardian of the estate and whether any reform was necessary.

4.38 We received no adverse comments from those who responded under this head.

#### **Recommendation 9**

**We recommend the retention of the status quo in relation to the powers of the Official Solicitor to act as guardian of the estate.**

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<sup>29</sup> English Law Commission's report, *Family Law: Review of Child Law; Guardianship and Custody* (1988, Report No 172, HMSO) para 2.24.

## Chapter 5

### Summary of recommendations

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(All this report's recommendations are to be found in Chapter 4.)

#### **Recommendation 1**

*(Appointment of guardians)*

**We recommend:**

- (a) the adoption of a provision similar to section 5(5) of the English Children Act 1989<sup>1</sup> that parents who have parental rights and authority may appoint guardians by a document in writing, with their signature attested by two witnesses, without the need to make a formal will or deed;
- (b) the introduction of a standard form for the appointment of a guardian, which should explain briefly a guardian's responsibilities and be signed by the proposed guardian. (These forms could be made available, for example, at the Legal Aid Department and the District Offices where the Free Legal Advice Scheme of the Duty Lawyer Service operates, and on the Internet);
- (c) that the guardian should have to accept office as guardian expressly or impliedly if he has not formally consented to act as guardian. This could also be achieved by the completion of a form.

#### **Recommendation 2**

*(Disclaimer)*

**We recommend that there should be a system for withdrawing from acting as a guardian similar to the system for appointing a guardian. If the proposed guardian had already consented to act,**

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<sup>1</sup> See Annex 2, below, for the text of the provision.

by signing the appropriate form, then he would have to formally disclaim if he did not want to act at a later time. The disclaimer should be formal, in writing, and notified to the executor or administrator of the estate. The Director of Social Welfare should be notified of the disclaimer if there is no executor, administrator or surviving parent, so that steps can be taken to protect the best interests of the child.

### **Recommendation 3**

*(Veto of surviving parent)*

We recommend that the right to veto of the surviving parent in section 6(2) of the Guardianship of Minors Ordinance (Cap 13) should be removed. Then, either the surviving parent or the guardian could apply to a court under section 6(3) if there is a dispute between them on the best interests of the child.

### **Recommendation 4**

*(Views of child on appointment of guardian)*

We recommend that a similar provision to section 7(6) of the Children (Scotland) Act 1995<sup>2</sup> be introduced so that the views of the child on the appointment of the guardian may, so far as practicable, be taken into account.

### **Recommendation 5**

*(When appointment of guardian takes effect)*

**We recommend that:**

- (a) a testamentary guardian should be able to act on the death of the parent who appointed the testamentary guardian if the child was residing with that parent prior to his death. The appointment of the testamentary guardian would not take immediate effect on the death of the parent but a pro-active step of obtaining the court's permission would have to be taken by the guardian;

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<sup>2</sup> See Annex 2, below, for the text of the provision.

- b) if a parent had obtained a custody order prior to his death, then a testamentary guardian appointed by that parent should be able to act automatically as testamentary guardian on that parent's death.

### **Recommendation 6**

*(Court appointment of guardian)*

We recommend that section 7 of the Guardianship of Minors Ordinance (Cap 13) be repealed and a similar provision to section 5(1) of the English Children Act 1989,<sup>3</sup> with regard to the appointment of a guardian, be enacted.

### **Recommendation 7**

*(Appointment by guardian)*

We recommend the adoption of a provision along the lines of section 5(4) of the English Children Act 1989 allowing a guardian to appoint a guardian for the child in the event of the guardian's death.<sup>4</sup>

### **Recommendation 8**

*(Removal or replacement of guardian)*

We recommend that section 8 of the Guardianship of Minors Ordinance should be retained, but that it should be amended to give similar powers to the District Court.

### **Recommendation 9**

*(Guardian of the estate)*

We recommend the retention of the status quo in relation to the powers of the Official Solicitor to act as guardian of the estate.

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3 See Annex 2, below, for the text of the provision.

4 See Annex 2, below, for the text of the provision.

**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. Caritas Family Service Project on Extramarital Affairs
5. Caritas – Hong Kong (Social Work Services)
6. Caritas – Hong Kong Family Service
7. Ms CHAN Tsz-ying, Hong Kong Family Welfare Society
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. Department of Justice, Civil Division
14. Department of Justice, Prosecutions Division
15. Director of Legal Aid
16. Director of Health
17. Director of Home Affairs
18. Director of Immigration
19. Director of Social Welfare
20. Ms Heather Douglas, Assistant Professor  
City University of Hong Kong, School of Law
21. Ms Andrea Gutwirth
22. Harmony House
23. Haven of Hope Christian Service
24. Hong Kong Association for the Survivors of Women Abuse
25. Hong Kong Bar Association
26. Hong Kong Family Welfare Society
27. Hong Kong Federation of Women
28. Hong Kong Federation of Women Lawyers

29. Hong Kong Student Aid Society
30. Hong Kong Women Development Association
31. Hong Kong Young Legal Professionals Association Limited
32. Hong Kong Young Women's Christian Association
33. Judiciary Administrator
34. Ms Helen Kong, Hastings & Co
35. Miss LO Lau-oi, Hong Kong Family Welfare Society
36. Official Solicitor
37. ReSource The Counselling Centre
38. Secretary for Home Affairs
39. Secretary for Housing
40. St John's Cathedral Counselling Service
41. The Boys' & Girls' Clubs Association of Hong Kong
42. The Hong Kong Catholic Marriage Advisory Council
43. The Hong Kong Committee on Children's Rights
44. The Hong Kong Council of Social Service
45. The Hong Kong Family Law Association
46. The Hong Kong Mediation Council
47. The Hong Kong Psychological Society
48. The Law Society of Hong Kong
49. The University of Hong Kong, Department of Social Work and Social Administration
50. The University of Hong Kong, Faculty of Law
51. Ms TSANG Wan-wai

## **Relevant overseas provisions**

This Annex sets out the relevant sections from the comparative statutes, the English Children Act 1989 and the Children (Scotland) Act 1995 which are referred to in the recommendations of this report contained in Chapters 4 and 5.

### **Recommendation 1 – Appointment of guardian**

Children Act 1989, section 5(5):

- "(5) An appointment under subsection (3) or (4) shall not have effect unless it is made in writing, is dated and is signed by the person making the appointment or –*
- (a) in the case of an appointment made by a will which is not signed by the testator, is signed at the direction of the testator in accordance with the requirements of section 9 of the Wills Act 1837; or*
  - (b) in any other case, is signed at the direction of the person making the appointment, in his presence and in the presence of two witnesses who each attest the signature."*

### **Recommendation 4 – Views of child on appointment of guardian**

Children (Scotland) Act 1995, section 7(6):

- "(6) Without prejudice to the generality of subsection (1) of section 6 of this Act, a decision as to the appointment of a guardian under subsection (1) or (2) above shall be regarded for the purposes of that section (or of that section as applied by subsection (5) above) as a major decision which involves exercising a parental right."*

*(see also, for reference only, section 6(1):*

- (1) A person shall, in reaching any major decision which involves –*



- (a) *his fulfilling a parental responsibility or the responsibility mentioned in section 5(1) of this Act; or*
- (b) *his exercising a parental right or giving consent by virtue of that section,*

*have regard so far as practicable to the views (if he wishes to express them) of the child concerned, taking account of the child's age and maturity, and to those of any other person who has parental responsibilities or parental rights in relation to the child (and wishes to express those views); and without prejudice to the generality of this subsection a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view.)*

## **Recommendation 6 – Court appointment of guardian**

Children Act 1989, section 5(1):

- "(1) Where an application with respect to a child is made to the court by any individual, the court may by order appoint that individual to be the child's guardian if –*
- (a) the child has no parent with parental responsibility for him; or*
  - (b) a residence order has been made with respect to the child in favour of a parent or guardian of his who has died while the order was in force."*

## **Recommendation 7 – Appointment of guardian by guardian**

Children Act 1989, section 5(4):

- "(4) A guardian of a child may appoint another individual to take his place as the child's guardian in the event of his death."*