THE LAW REFORM COMMISSION OF HONG KONG

Report
Guardianship of Children

Executive Summary

Background

1. 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."*

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

3. 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.

4. 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.

Introduction to the report

5. 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.

6. 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. In the rare but unhappy 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. It is the law relating to testamentary guardianship and to guardians appointed by the court which is the subject of this report.

7. The Commission's focus in reviewing the law of guardianship of children was on recommending ways to simplify the law and procedures in this area, so that more parents will be encouraged to take the positive step of making guardianship arrangements for their children.

Format of the report

8. In Chapter 1 of the report, 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 Chapter 4, we review the relevant findings of our consultation exercise and set out our conclusions and recommendations for reform in this area. Our recommendations are summarised in Chapter 5.

Problems identified with the current law

9. As noted above, Chapter 2 of the report provides an examination of various shortcomings in Hong Kong's current law on the guardianship of children.

Appointment of guardians

10. 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. *[para 2.3]*

11. 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. *[para 2.4]*

Disclaimer

12. 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. *[para 2.5]*

Veto of the surviving parent

13. 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, or it can order that the guardian act jointly with the surviving parent, or to the exclusion of the surviving parent. The surviving parent, however, does not have the right to take the initiative to go to court under this section. *[para 2.6]*

14. 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. *[para 2.7]*

Court appointment of guardian

15. 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. The power to appoint is therefore limited in its scope. 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. *[para 2.8]*

Appointment of guardian by guardian

16. 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. *[para 2.9]*

Guardian of the estate

17. 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). 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. *[para 2.10]*

The Recommendations of the report

18. In general, all of the recommendations relating to guardianship proposed by the Sub-committee in its consultation paper 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. [4.6]

19. Of the concerns that were raised, the focus appeared to be on the balance that would need to be struck in some circumstances 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 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. [4.7]

Appointment of guardians

Introduction of a simplified process

20. 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 in England provides that parents who have parental responsibility may appoint guardians by a document in writing, with their signature attested by two witnesses, without the need to make a formal will or deed. 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. [para 4.2]

Standard form for appointment of guardian

21. Concern was expressed by some members of the Sub-committee 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 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. [para 4.3]

22. 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. [para 4.4]

Appointee's acknowledgement of consent

23. 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. [para 4.5]

Feedback from consultation

24. 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, simple, easily understood and widely available will be taken up by the Administration in the future. [para 4.8]

Recommendation 1

We recommend:

(a) the adoption of a provision similar to section 5(5) of the English Children Act 1989 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

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

26. 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. [4.10]

Feedback from consultation

27. 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. [4.11]

28. 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. [4.12]

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

29. 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). 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. Alternatively, the court can order that the guardian act jointly with the surviving parent or to the exclusion of the surviving parent. [4.13]

Surviving parent should have right to apply to court

30. 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. [4.14]

31. 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. [4.15]

Feedback from consultation

32. 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. [4.16]

33. **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. [4.17]

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

34. Section 7(6) of the Children (Scotland) Act 1995 provides that a decision on appointment of a guardian is treated as a major decision which involves exercising a parental right under section 6 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 be introduced so that the views of the child on the appointment of the guardian might be taken into account. [4.18]

Feedback from consultation

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

Recommendation 4

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

When appointment of guardian takes effect

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

37. 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. [4.21]

38. We noted the disadvantages of the English provision for these practical reasons. 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. Any dispute between the testamentary guardian and the surviving parent could be resolved by the court. [4.22]

39. 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. [4.23]

40. 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. [4.24]

41. 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 of depriving the testamentary guardian of his responsibilities until after the death of the surviving parent. [4.25]

Feedback from consultation

42. 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. [4.26]

43. 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. [4.27]

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

44. 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. In England, section 5(1) of the Children Act 1989 provides that any individual who wishes to be a guardian may apply to the court to be appointed if the child has no parent with parental responsibility for him or a residence order had been made in favour of the parent who has now died. [4.28]

45. 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. [4.29]

Feedback from consultation

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

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, with regard to the appointment of a guardian, be enacted.

Appointment by guardian

Power for guardian to appoint guardian

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

consultation paper the adoption of a provision along the lines of section 5(4) of the Children Act 1989. [4.31]

Feedback from consultation

48. 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."* [4.32]

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

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.

Removal or replacement of guardian

50. 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. [4.34]

Feedback from consultation

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

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

52. 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). The English Law Commission recommended that trusteeship should fill any gaps in the provisions for guardian of the estate. 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. [4.36]

53. 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. [4.37]

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

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.