

The Proposal for Reform to Parental Responsibility

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In April 1995, the then Attorney General and the Chief Justice referred to the Law Reform Commission,

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

In May 1996, the Commission appointed a sub-committee to make proposals to the Law Reform Commission for reform.

The sub-committee published an extensive consultation paper on *Guardianship and Custody* in December 1998 addressing the approach of the law and the courts to custody and access arrangements for children, the use of dispute resolution procedures in family cases, parental child abduction and guardianship of children on the death of a parent and setting out a wide range of proposals for reform.

There is a series of four reports from their study: -

1. Guardianship of Children – January 2002;
2. International Parental Child Abduction – April 2002;
3. The Family Dispute Resolution Process – March 2003; and
4. Child Custody and Access – May 2005

Report on Child Custody and Access (“the Report”)

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

The changes in other common law countries: -

- (1) England and Wales – the Children Act 1989
- (2) Scotland – the Children Act 1995
- (3) Australia – Family Law Reform Act 1995
- (4) New Zealand – Care of Children Act 2004

A Paradigm Shift

Custody Law on Parental Rights and Authority
v.
Parental Responsibility and Rights of the Child

“The original legal concept of parenthood appears to have been that of *“guardianship,”* a very old concept based more upon the protection of family landholdings than upon the protection of children.” (para. 2.7 of the Report)

“Parent” and “Guardian” were later synonymously used.

As guardianship has become less referred to, the concept of “custody” becomes more important in the parent-child relationship.

“*“Custody”* comprises the bundle of rights that parents have over their children. This includes the right to *“care and control”* and the right to make all important decisions affecting the child, such as decisions regarding his education, religion and medical treatment.” (para. 2.16 of the Report)

Existing legal concepts used in family cases: -

- (1) **Custody Rights:** Sole Custody, Split Orders and Joint Custody
- (2) **Care and Control**
- (3) **Access:** reasonable access, defined access, supervised access and staying access

Hong Kong's private law provisions on child custody should not only be modernized to handle with change of social family structure but also to comply with the principles set out in the United Nations Convention on the Rights of the Child, the Basic Law and the International Covenant on Civil and Political Rights.

Hong Kong Bill of Rights Ordinance (Cap 383)

Article 20 of the Hong Kong Bills of Rights, which is equivalent to article 24 of the International Covenant on Civil and Political Rights, ensures that every child *"shall have ... the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."*

United Nations Convention on the Rights of the Child 1989

Article 9(3) provides that, "State parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

Article 12(2) provides:

"for this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

The Underlying Themes of the Reforms

The underlying themes of the reforms might be summarised as follows: -

- (1) parents rights - parental responsibility
- (2) parental right to contact – child's right and responsibility of the parents have for the child
- (3) encourage agreement on arrangements for their children between parents with minimal intervention from court

- (4) increase awareness of cases involving DV
- (5) more attention on the voice of child such as separate representation
- (6) primary responsibility for the upbringing of the children rests with their parents
- (7) centralise and codify the law relating to children

The Proposals

There are a total of 72 recommendations made in the Report and the major proposals are: -

- (1) the welfare or "*best interests*" principle guides all proceedings concerning children
- (2) the introduction of a statutory checklist of factors to assist the judge in exercising his discretion in determining the proceedings

- (3) the concept of parental responsibility should replace that of guardianship, except that the concept of guardianship should be retained in relation to a third party's responsibilities for a child after the death of a parent.

- (4) the adoption of a list of parental responsibilities and a list of parental rights
- (5) Scope of parental responsibility – when consent or notification is required, with the court be given express power to vary or dispense with any of the consent or notification requirements where this is considered necessary

- (6) the Administration should review the existing law and procedures relating to the enforcement of maintenance orders to see how they could be made more effective

(7) repeal existing custody orders and replace it with a range of new orders i.e.

- residence order
- contact order
- specific issues order
- prohibited steps order
- no order

(8) The court's powers in dealing with domestic violence on granting orders in relation to children

(9) there should be guidelines for the judiciary at all levels, setting out the approach which the courts should adopt when domestic violence is put forward as a reason for denying or limiting parental contact to children

(10) on hearing of contact applications the Court should be able to make a proper assessment of any risk to a child, this includes

- being able to investigate allegations of domestic violence at interim hearing
- to have access to the criminal records of parents insofar as they may be relevant to issues of domestic violence
- to be kept informed of concurrent proceedings against perpetrators of domestic violence

(11) the Administration should review the current arrangements and facilities allowing for supervised contact in Hong Kong

(12) the needs to have on-going training and raising of awareness levels in relation to the effect of domestic violence on children and residential parents for all the disciplines engaged in the Family Justice System, including the legal profession and the judiciary

(13) long-term research should be undertaken on the effects on children of witnessing and/or being the victims of domestic violence and there should be detailed collection and evaluation of information arising from court proceedings in these cases

(14) the need to hear the view of the child and how and when view of the child's views are to be taken into account

(15) Children not required to express views

(16) separate representative for the child – resolve the anomalies of rules 72 and 108 of the MCR, provide criteria for the appointment and guidelines for duties of separate representative

(17) third party's right to apply for care order or supervision order

(18) as far as possible, the provisions dealing with disputes relating to children, arrangements on divorce, guardianship, disputes with third parties, or disputes between parents without accompanying divorce proceedings, should be consolidated into one existing Ordinance

(19) a single policy bureau should take over responsibility for creating and implementing policy for families and children and, in particular, all the matrimonial and children's Ordinances

What are the Parental Responsibilities?

The parental responsibilities shall include the following: -

- (a) to safeguard and promote the child's health, development and best interests;
- (b) to provide, in a manner appropriate to the stage of development of the child:
 - (i) direction;
 - (ii) guidance, to the child;

- (c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and
- (d) to act as the child's legal representative, but only in so far as compliance with this section is practicable and in the interests of the child.

Child's Rights:

the child, or any person acting on his behalf, shall have title to sue, or to defend, in any proceedings as respects those responsibilities

Parental Rights

A parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right:

- (a) to have the child living with him or otherwise to regulate the child's residence;
- (b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;

- (c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and
- (d) to act as the child's legal representative.

Decisions Requiring Consent

List of major decisions where consent of the other parent is required:

- (1) consent to change the child's surname;
- (2) consent to the adoption process;
- (3) consent to removal of the child out of the jurisdiction for more than one month; and
- (4) consent to permanent removal of the child out of the jurisdiction.

Decisions Requiring Notifications

This list should be as follows: -

- (1) notification of a major operation or long-term medical or dental treatment for the child;
- (2) notification of a major change in the child's schooling;
- (3) notification of bringing the child up in a particular religion;

- (4) notification of consent to the child's marriage;
- (5) notification of moving house with the child;
- (6) notification of removing the child from the jurisdiction temporarily but for less than one month;

- (7) notification if there are going to be changes in the child's domicile or nationality; and
- (8) notification of any other major or important decisions in the life of the child.

The court should be given express power to vary or dispense with any of the consent or notification requirements where this is considered necessary (Recommendation 13)

Conclusion: -

- (1) PD v KWW CACV 188/2009 – 9 June 2010
- (2) SMM v TWM CACV 209/2009 – 9 June 2010