Comments of the Hong Kong Bar Association

on Guardianship of Minors (Amendment) Bill 2011

Formal Requirements of an Appointment

1. The proposed new section 6(3) provides,

> "(3) An appointment made under this section must be in writing, dated and –
> (a) signed either by the person making the appointment or by another person at the direction, and in the presence, of the person making the appointment; and
> (b) attested by 2 witnesses."

2. A draft standard form has recently been suggested by the Administration. The contents of the draft standard form appear to be acceptable.

3. However, the proposed new section 6 does not propose to make the use of the standard form mandatory. In the premises, an appointing parent or guardian may still validly appoint guardian in writing other than using the standard form insofar as the formal requirements under the proposed new section 6(3) are complied with.

4. The proposed new section 6(4) further provides,

> "Despite subsection (3), a parent or guardian may appoint a guardian by a will executed in accordance with section 5 of the Wills Ordinance (Cap.30)" (emphasis added)

5. It appears from the LRC Report (paras.2.3 and 2.4) that the intention of enacting the proposed new section 6(3) is to avoid technicalities and unnecessary formalities, so as to facilitate the appointment of guardian.

6. However, the proposed new section 6 appears to have failed to address the question of whether the appointment should still be given effect if the formal requirements under the proposed new section 6(3) are not complied with, e.g. the appointment is only attested by one witness only. This question is related to the matters raised hereinbelow.

7. In respect of the proposed new section 6(4), it should be noted that section 5 of the Wills Ordinance (Cap.30) ("**WO**") consists of subsections (1) and (2). Section 5(1) WO sets out the formal requirements for a valid will. On the other hand, section 5(2) WO provides,

> "A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed in accordance with the requirements under subsection (1), be deemed to be duly executed if, upon application, the court is satisfied that there can be no reasonable doubt that the document embodies the testamentary intentions of the deceased person." (emphasis added)
>
> "任何看來是體現立遺囑人遺願的文件，即使未有按照第(1)款所述規定訂立，但只要有人提出申請，而法庭在無合理疑問的情況下信納該文件是體現立遺囑人的遺願的，則該文件須當作已妥為簽立。"(Chinese version) (emphasis added)

8. Section 5(2) WO was added by section 3 of the Wills (Amendment) Ordinance (56 of 1995). The provision is unique to Hong Kong and it does not have an English equivalence. Nor is there any case authority on the application of this provision.

9. The term "testamentary intentions" is not defined under WO. Nor is it defined elsewhere in the legislation of Hong Kong.

10. It is arguable that the intention of an appointment parent to appoint guardian under a will is part of his/her testamentary intentions. It is further arguable that if an appointment of guardian is made under a document which is accepted by the court as one embodying the testamentary intentions of the appointing parent under section 5(2) WO, then the appointment will still be given effect notwithstanding that the formal requirements under section 5(1) WO are not complied with.

11. In comparison, an appointment of guardian which is not made by a will and is made other than using the standard form will not enjoy the like benefit of section 5(2) WO. In theory, if the proposed new section 6(3) is not complied with, the appointment will be invalid even if a parent's or guardian's intention of appointing guardian is clear.

12. In the circumstances, would the Administration consider proposing a provision resembling section 5(2) WO for the confirmation of an appointment of guardian? Or is it the Administration's intention to leave such situation to an application under the proposed new section 8D for the exercise of the Court's general power of appointing guardian?

<u>Taking into Account of the Minor's Views under the Proposed New Section 6(5) – the Practical Difficulties in Proving the Same</u>

13. The proposed new section 6(5) provides,

> "In appointing a guardian of a minor, a parent or guardian of the minor <u>must</u> take into account the views of the minor as far as practicable having regard to the minor's age and understanding" (emphasis added)

14. The proposed new provision has made it mandatory that the views of the minor be taken into account when making the appointment. However, the proposed amendments does not appear to have provided how the fact that the views of the minor concerned under an appointment have been taken into account should be or may be proved.

15. In the meantime, nor has any specific avenue been provided under the proposed amendments for challenging the validity/appropriateness of an appointment of guardian on the ground that the minor's views have not been taken into account.

<u>The Potential Lacuna in the Assumption of Guardianship under the Proposed New Sections 7 and 8</u>

16. Section 7 does not appear to cover the situation in which the appointing parent (in the event he/she was the only surviving parent of the minor prior to his/her death and the pre-deceased parent had not appointed any guardian) has the custody right *ex lege* (which means not covered by section 7(a)) AND for some reasons, the appointing parent did not live with the minor immediately before dying (nor is it covered by s.7(b) then).

17. It should be noted that under the proposed amendments, "custody order" does not cover the rights of custody arising out of the operation of law (*ex lege*), namely, under section 3(1)(b) of the Ordinance. It should, however, be noted that there are often situations in which the parents have rights of custody without any domestic proceedings or custody order.

18. In such circumstances, it is recommended that the proposed new section 7(a) be amended to read,

> "the appointing parent or appointing guardian has *rights of custody arising out of the operation of law or* a custody order over the minor immediately before he or she dies;"

Parental Rights under the Proposed New Section 8G

19. Regarding section 8G, "parental rights" is not defined in the current GMO. Nor has a definition of this term been suggested in the Amendment Bill.

20. Under the current section 3, "rights and authority" is employed (see section 3(b) to (d)). In fact, "parental rights and authority" is a abstract concept not clearly defined (see Liu, "Family Law for the Hong Kong SAR" HKU Press at p.213)

21. In any event, to maintain the consistency, it is recommended to amend the proposed new section 8G to read,

> "A person appointed as the guardian of a minor under this Part has, on assuming guardianship, *rights and authority with respect to the minor as a parent has under section 3 of the Ordinance.*"

Hong Kong Bar Association

25th July 2011