

**Legislative Council
Bills Committee on Guardianship of Minors (Amendment) Bill 2011**

**Administration's Response to Issues Raised by Members
at the Bills Committee Meeting held on 6 July 2011**

*Supplementary information in relation to guardianship,
custody and wardship*

Purpose

As requested by Members of the Bills Committee on Guardianship of Minors (Amendment) Bill 2011 (the Bill) at the meeting held on 6 July 2011, this paper provides supplementary information on –

- (a) the meaning of “guardianship” and “custody” and their differences;
- (b) the rights, authority and responsibility of parents and guardians; and
- (c) the wardship arrangement and its relation and interaction with guardian appointment.

Guardianship and custody

The concept of “guardianship”

2. The concept of “guardianship” of children is not explicitly defined in our statute books. According to the Report on Guardianship of Children published by the Law Reform Commission of Hong Kong (LRC), it often 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”¹. As such, while the term “guardian” is sometimes used synonymously with “parent”, it is more commonly used to refer to a person (rather than a parent of the child) who is appointed by the parent or the court as the “parent substitute” to exercise parental rights

¹ Source of information: Paragraphs 1.1 – 1.4 of the LRC Report on Guardianship of Children and paragraphs 2.7 – 2.9 of the LRC Report on Child Custody and Access.

and authority towards a child when one or both of his parent dies.

The concept of “custody”

3. Similarly, there is no general definition of the concept of “custody” in our statute books. There is a definition in section 2 of the Matrimonial Proceedings and Property Ordinance (Cap. 192) which defines “custody” as “custody in relation to a child, includes access to the child”. According to the LRC Report on Child Custody and Access, “custody” comprises “the bundle of rights that parents have over their children”, including “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.”²

4. The court has the power to make such orders as it thinks fit for the custody and education of any children of the family in divorce proceedings under section 19(1) of the Matrimonial Proceedings and Property Ordinance (Cap. 192). Under section 5(1) of the Separation and Maintenance Orders Ordinance (Cap. 16), the court may award custody to either husband or wife on proof of a matrimonial offence under either section 3(1) or section 4 of the Ordinance. Order for “custody” may also be made by the court on the application of either parent of a minor or the Director of Social Welfare under section 10 of the Guardianship of Minors Ordinance (the GMO) (Cap. 13) where no divorce proceedings are involved.

“Guardianship” and “custody”

5. As noted in paragraphs 2 to 4 above, both “guardianship” and “custody” refer to the bundle of parental rights and authority towards a child. Yet, they are used under different contexts. “Guardianship” is often used to refer to the legal relationship with a child which entitles the guardian to exercise parental rights and authority (after the parent dies). “Custody”, on the other hand, is often used to refer to a selected bundle of the parental rights and authority conferred on the parents by the court in matrimonial and other relevant proceedings.

² Source of information: Paragraphs 2.16 – 2.19 of the LRC Report on Child Custody and Access.

Rights and authority of parents and guardians

6. As noted in paragraph 2 above, the term “guardianship” often 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. Broadly speaking, a guardian should have the same rights and authority as a parent.

7. According to the LRC’s Report on Guardianship of Children, and the Report on Child Custody and Access, while not defined in our statute books, the list of parental rights and authority can be found at the common law, which includes –

- (a) the right to live with the child and control the child’s day-to-day upbringing;
- (b) the right to decide on the child’s education and religion;
- (c) the right to inflict moderate punishment;
- (d) the right to administer the child’s property;
- (e) the right to act for the child in legal proceedings; and
- (f) the right to consent to medical treatment.

The scope of parental rights and authority also includes certain statutory rights such as the right to consent to the child’s adoption and, subject to the condition set out in the law, the child’s marriage³.

8. Having said the above, it should be noted that a guardian is not in the same legal position as a parent in certain areas. For example –

- (a) child has no succession rights on the intestate death of his guardian, and vice versa⁴; and

³ Source of information: Paragraphs 1.3 – 1.5 of the LRC Report on Guardianship of Children and paragraphs 2.9 – 2.10 of the LRC Report on Child Custody and Access.

⁴ Only natural and adopted children of a deceased person have the right of succession to the intestate estate of the deceased person and vice versa, pursuant to section 2(2)(3) of the Intestate Estates Ordinance (Cap. 73) and section 15(1) of the Adoption Ordinance (Cap. 290). This however does not apply to the relationship between a minor and his guardian appointed under the GMO.

- (b) no citizenship rights pass through a guardian⁵.

Criminal liability arising from ill-treatment or neglect by those in charge of child or young person

9. Under section 26 of the Offences against the Person Ordinance (Cap. 212), any person who unlawfully abandons or exposes any child being under the age of two years, whereby the life of such child is endangered, or the health of such child is or is likely to be permanently injured, shall be guilty of an offence. Under section 27 of Cap 212, any person over the age of 16 years who wilfully assaults, ill-treats, neglects, abandons or exposes any child or young person under the age of 16 years in his custody, charge or care in a manner likely to cause such child or young person unnecessary suffering or injury to his health, shall also be guilty of an offence. On conviction on indictment, such person shall be liable to imprisonment for 10 years. The provisions apply not only to parents of minors but also their carers. Subject to proof of the ingredients of the criminal conduct, e.g. wilful assault etc. of the child, a guardian who has custody, charge or care of the child for whom he is appointed may also incur criminal liability under Cap 212.

Guardianship and wardship

Appointment of guardian by the court under the GMO

10. Under the GMO, the court has the power to appoint a guardian for a minor under the following circumstances –

- (a) according to section 5, on the death of a parent of a minor –
- (i) where no guardian has been appointed by the deceased parent; or
 - (ii) in the event of the death or refusal to act of the guardian or guardians appointed by the deceased parent,

the court (i.e. the Court of First Instance and the District Court)

⁵ A child can acquire Hong Kong permanent resident status through his parent but not guardian in accordance with paragraph 2(c) of Schedule 1 to Immigration Ordinance (Cap. 115).

may, if it thinks fit, appoint a guardian to act jointly with the surviving parent;

- (b) according to section 7, where a minor has no parent, no guardian of the person, and no other person having parental rights with respect to him, the court (i.e. the Court of First Instance and the District Court), on the application of any person, may, if it thinks fit, appoint the applicant to be the guardian of the minor⁶; and
- (c) according to section 8, the Court of First Instance may, in its discretion, on being satisfied that it is for the welfare of the minor, remove from his office any testamentary guardian or any guardian appointed or acting by virtue of this Ordinance, and may also appoint another guardian in place of the guardian so removed.

11. Besides, according to section 18 of the GMO, the Court of First Instance has the power to appoint a person to be, or to act as, the guardian of a minor's estate (but not the guardian of the person of the minor) either generally or for a particular purpose.

Wardship proceedings

12. The wardship jurisdiction of the Court of First Instance is derived from the duties of the Government to protect its subjects and is used to protect the interests of children. The procedure for commencing wardship proceedings is contained in section 26 of the High Court Ordinance (Cap. 4) and Order 90 of the Rules of the High Court (Cap. 4A). Once the originating summons for wardship has been issued , the child is immediately "a ward of court". Once warded, the minor will come under the guardianship of the court which, in theory, has an unrestricted power to do whatever is necessary for the welfare of the minor. The court usually delegates actual care and control of the ward to another person. No major decisions affecting the child, including the consent to marriage, adoption, surgery and education can be made

⁶ The Bill will extend the scope of the court's power to appoint guardian on application by relaxing the restriction on application to be the guardian of the minor. In addition to the condition in the original section 7 (where a minor has no parent, no guardian of the person, and no other person having parental rights with respect to him), a person other than the minor's parent may also apply to the court to be the guardian of the child if the parent or guardian who has a custody order over the minor dies.

without the consent of the judge.

13. The wardship jurisdiction of the Court of First Instance has been invoked in the following circumstances –

- (a) to resolve disputes regarding custody of a minor, including where the applicant has no standing to seek custody under statutes (e.g. a relative of a minor);
- (b) to prevent a minor from being abducted, or to secure the return of a minor already abducted;
- (c) to allow a minor to be adopted overseas as there was no procedure permitting a child to leave the jurisdiction to be adopted overseas; and
- (d) to order an operation to be performed for a minor when the parents of the minor refused to give consent.

Differences between guardianship and wardship

14. Guardianship and wardship are two different concepts. Apart from the differences in their origins and concepts, the applicability and use of the guardianship and wardship arrangements are also different. Some examples of their differences are as follows –

- (a) under the GMO, the court has the power to appoint guardian for a child when one or both of his parents dies in the circumstances set out in the relevant provisions are met. For the wardship arrangement, on the other hand, the Court of First Instance can make any minor its ward, even if both of the child's parents are still alive; and
- (b) under the GMO, the court may appoint any person to be the guardian of the minor, whereas under the wardship arrangement, the child will be brought under the guardianship of the Court of First Instance itself, though his care and control may be delegated to another person.