

**立法會**  
***Legislative Council***

LC Paper No. CB(2)739/11-12

Ref : CB2/BC/7/10

**Report of the Bills Committee on  
Guardianship of Minors (Amendment) Bill 2011**

**Purpose**

This paper reports on the deliberations of the Bills Committee on Guardianship of Minors (Amendment) Bill 2011.

**Background**

2. In April 1995, the Law Reform Commission ("LRC") was commissioned to consider the law relating to guardianship and custody of children and to recommend appropriate changes. Premised on its view that appointment of guardians will be beneficial to a child in the event that one or both of the child's parents die(s) as it can help achieve the continuation of the provision for the child's daily care and upbringing, LRC's review focused on the provisions relating to the appointment, removal and powers of the guardians for minors under the Guardianship of Minors Ordinance (Cap. 13) ("GMO").

3. Enacted in 1977, GMO is one of the ordinances which govern court proceedings relating to the custody and upbringing of children, including provision of maintenance to them. GMO provides, among others, for the appointment of guardians in the event of the death of one or both parents of the minors and also the removal and powers of guardians.

4. LRC published its Report on Guardianship of Children in January 2002 ("the Report"). In the Report, LRC identified various issues relating to the appointment, removal and powers of the guardians in the existing legislation and made nine recommendations to simplify and enhance the existing procedures under GMO so as to encourage more parents to make guardianship arrangements for their children. In arriving at its recommendations, LRC had made reference to the relevant provisions in the Children Act 1989 of England and Wales and the

Children (Scotland) Act 1995. The Administration accepted all the recommendations of the Report.

### **The Bill**

5. Introduced into the Legislative Council on 15 June 2011, the Bill seeks to implement recommendations of the Report. The Bill proposes to amend GMO to -

- (a) simplify the legal arrangements for the appointment and removal of a guardian;
- (b) provide for the revocation and disclaimer of appointment as a guardian;
- (c) provide for the assumption of guardianship;
- (d) provide for the resolution of disputes between guardians; and
- (e) provide for connected matters.

### **The Bills Committee**

6. At the House Committee meeting on 17 June 2011, Members formed a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

7. Under the chairmanship of Hon Cyd HO Sau-lan, the Bills Committee has held five meetings with the Administration. The Bills Committee has also met with representatives from the Hong Kong Bar Association ("Bar"), The Law Society of Hong Kong ("Law Society"), the Hong Kong Federation of Women Lawyers and the Family Law Association. In its scrutiny of the Bill, the Bills Committee has made reference to the provisions in the Children Act 1989 of England and Wales to which the Administration had made reference in drafting the Bill.

## **Deliberations of the Bills Committee**

### Use of the terms "welfare" and "wishes of the minor" (section 3)

8. Section 3(1)(a)(i) of GMO sets out the welfare principle that the court shall, in any proceedings concerning children, "regard the welfare of the minor as the first and paramount consideration and in having such regard shall give due consideration to the factors listed under the section". The Family Law Association has suggested that the term "welfare" should be replaced by "best interests" since the latter term is more in conformity with the language used in the United Nations Convention on the Rights of the Child ("UNCRC"). The Administration has agreed that the suggested amendment can further improve the use of the language in the Bill and will propose a Committee Stage amendment ("CSA") accordingly.

9. The Law Society has pointed out that the proposed section 6(5) adopts the term "views of the minor", which is a term used in UNCRC. However, the term "wishes of the minor" in section 3 of GMO carries more or less the same meaning. The Law Society has suggested that the term "wishes of the minor" in section 3 be replaced by "views of the minor" for consistency. The Administration has agreed to introduce CSAs to this effect.

### Rights of surviving parents as to guardianship (proposed section 5)

10. The Bills Committee notes that the proposed section 5 of GMO states as a general rule that on the death of a parent of a minor, the surviving parent is the guardian of the minor as of right. The existing section 19(4) of the Matrimonial Proceedings and Property Ordinance (Cap. 192) lays down the specific rule that the surviving parent shall not be entitled as of right to the custody or the guardianship of the child of the family upon the death of custodial parent if the court has made an order in the decree of divorce or judicial separation that he or she was unfit to have custody of the child. The Bills Committee has sought clarification on whether the rights of surviving parents as to guardianship under the proposed section 5 should be made subject to section 19(4) of Cap. 192.

11. The Administration has advised members that on statutory interpretation, the general rule under the proposed section 5 will be subject to the specific rule laid down in section 19(4) of Cap. 192. To put it beyond doubt, the Administration has agreed to introduce CSAs to the Bill.

Appointment of guardian (proposed section 6)

12. Under GMO, there are three types of guardianship, namely, the testamentary guardians, surviving parents as guardians and court-appointed guardians. Currently, the appointment of a testamentary guardian requires the making of a deed or a will pursuant to section 6 of GMO. There is no requirement for the appointing parents to take into account the views of the minor concerned in appointing a guardian nor any requirement that the consent of the person appointed be obtained. Also, there is no provision enabling a guardian to appoint another person to take his or her place as the minor's guardian in the event of his or her death. The proposed section 6 of GMO deals with the power of a parent or guardian to appoint guardians.

*Expression of parent's intention to appoint guardian (proposed section 6(3) and 6(4))*

13. Under the proposed section 6(3), the appointment of a guardian must be made 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 two witnesses.

The proposed section 6(4) provides that a parent or guardian may appoint a guardian by a will executed in accordance with section 5(2) of the Wills Ordinance<sup>1</sup>(Cap. 30).

14. The Bills Committee has pointed out that while setting out the formal requirements that such document must be dated, signed and attested, the proposed section 6(3) does not prescribe any formulation that would express the parent's intention of appointing a guardian. The Bills Committee has sought the Administration's view on whether it would be convenient to prescribe in the proposed section 6 the necessary wording which will be regarded as sufficient for expressing an intention of appointing a guardian. The Bar has also suggested that a provision resembling section 5(2) of the Wills Ordinance be added to the Bill so

---

<sup>1</sup> Section 5(2) of the Wills Ordinance provides that "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."

that guardian appointment may be regarded as valid as long as the intention of the appointment can be demonstrated, even if the appointing requirements in the proposed section 6(3) are not fulfilled.

15. The Administration has explained that the requirements in the proposed section 6(3) are based on the recommendation by LRC in the Report. According to the Report, this recommendation was supported by most of the respondents who commented on it during the public consultation conducted by LRC. Appointment of guardian for minors is a serious and important decision. While the Bill will much reduce the technicalities involved in the appointment process with a view to encouraging parents to appoint guardians for their children in the event of their deaths, the Administration considers that some basic requirements should be in place to avoid uncertainty in and future dispute on the validity of appointment. The Administration therefore agrees with the recommendation in the Report that the basic requirements for the appointment of guardian should be put in place and duly complied with. The Administration does not consider it necessary to include a provision in the Bill to prescribe how the intention of appointing a guardian can be demonstrated. In case there is uncertainty about the validity of the appointment, the court may exercise its general power of appointing guardian for a minor under the proposed section 8D, if it is considered in the best interests of the minor. The Bills Committee accepts the Administration's explanations.

16. To facilitate parents in making guardianship arrangements for their children, Administration will, as an administrative measure, produce a standard form for appointing guardians as recommended by LRC in the Report. The Bills Committee has considered the draft appointment form provided by the Administration. The Administration has taken on board members' suggestions to improve the design of the form to facilitate easy understanding by members of the public.

*Views of child on appointment of guardian (proposed section 6(5))*

17. The proposed section 6(5) provides that in appointing a guardian of a minor, a parent or guardian of the minor must take into account the views of the minor as far as practicable having regard to the minor's age and understanding. The Bills Committee has asked about the practicality in seeking the child's view on the appointment of guardian.

18. According to the Administration, the requirement of seeking the child's views on the appointment of guardian is a recommendation made by LRC in the Report. In Scotland, the Children (Scotland) Act 1995 also has similar

requirements. As recommended in the Report and making reference to the relevant provisions of the Children (Scotland) Act 1995, the proposed section 6(5) contains the rider that parents should have regard to the age and understanding of the minor in seeking his or her views on the appointment of guardian. The Administration considers it appropriate to put in place this requirement. In the standard form for appointing guardians, the appointing parent or guardian will be required to declare that he or she has taken into account the views of the minor as far as practicable having regard to the minor's age and understanding.

19. The Bills Committee has raised query as to whether the word "must" in the proposed section 6(5) should be used, given that a parent or a guardian is only required to take into account the views of the minor as far as practicable having regard to the minor's age and understanding on the appointment of a guardian and there will not be any legal consequence if a parent or guardian fails to do so.

20. Having considered the views of the Bills Committee, the Administration has agreed to replace the word "must" with "is required to" and add a provision to state that the validity of an appointment of a guardian is not affected by a failure to comply with the proposed section 6(5). The Administration will move CSAs to this effect.

*Implied acceptance by the appointed guardian (proposed section 6(6))*

21. Under the proposed section 6(6), an appointment made under section 6 has no effect unless the appointed person accepts the office either expressly or impliedly by conduct. The Bills Committee has sought information on the meaning and proof of implied acceptance by the appointed guardian.

22. The Administration has explained that acceptance may be express, as when it is openly declared by the party to be bound by it; or implied, as where the party acts as if he or she had accepted. An offer may be impliedly accepted by conduct. After the death of the appointing parent, if an appointed guardian shoulders the responsibility for day-to-day care and upbringing of the minor, the guardian may be regarded as accepting the office impliedly by conduct. Objective tests would be employed to determine whether there is an acceptance of office with regard to the facts and circumstances of each case. According to common law, an office could be accepted both expressly and impliedly unless it is specified that it has to be accepted expressly. To specify in the legislation that the appointed person can accept the office either expressly or impliedly by conduct is to provide more flexibility.

*Guardianship arrangements for minors under different situations*

23. At the request of the Bills Committee, the Administration has provided information<sup>2</sup> on the guardianship arrangements for minors under different situations, including arrangement when parents who have appointed guardians for children under GMO die; arrangement when parents who have not appointed guardians for their children under GMO die; arrangement for children whose parents are still alive; and arrangement for "Type II babies" (i.e. whose parents are Mainland citizens residing in the Mainland.). Members have noted the guardianship arrangements.

Automatic assumption of guardianship (proposed section 7)

24. The Bills Committee notes that currently, the appointment of testamentary guardian takes effect automatically upon the death of the appointing parents. The proposed section 7 expressly stipulates that the guardian appointment is to take effect automatically if the appointing parent or appointing guardian has obtained a custody order over, or has lived with, the minor prior to his or her death. The Bills Committee has requested the Administration to consider whether the proposed section 7(a) should be amended to clearly reflect the policy intent that the automatic assumption of guardianship will apply to cases of joint custody order so that the appointments of guardians by both parents will take effect with equal rights when both parents die.

25. The Administration has explained that when a joint custody is granted, both parents retain the right to decide on important matters affecting the upbringing of the child although the physical care and control is usually granted to only one of them. The parent who lives with the child should consult and seek agreement with the other parent on all major issues about the child. In case where a joint custody order is granted to divorced parents, the guardian appointed by either parent will automatically assume guardianship after the death of the appointing parent in accordance with the proposed section 7(a), even if the latter does not live with the child immediately before dying. In such circumstances, the surviving parent should continue to work and cooperate with the guardian who acts for the deceased parent on major issues about the minor. As such, the existing rights and responsibilities of the surviving parent over the minor will not be affected. If there is any conflict between the surviving parent and the guardian, either of them may apply to the court for direction to resolve their disputes or for removing the other guardian in accordance with the proposed section 8A(2) and 8E and the existing section 9 of GMO.

---

2 LC Paper No. CB(2) 2447/10-11(03).

26. Nevertheless, in response to members' comments, the Administration has agreed to move a CSA to the proposed section 7(a) to clarify that the appointing parent or appointing guardian who has a custody order over the minor immediately before he or she dies assume guardianship automatically irrespective of whether anyone else has a custody order over the minor at that time.

Application to the court to remove guardians (proposed section 8A(2))

27. The proposed section 8A(2) provides that if the surviving parent and the guardian appointed under section 6 think the other is unfit to have guardianship over the minor, either of them may apply to the court to remove that guardian. There is a suggestion from the Hong Kong Federation of Women Lawyers that the threshold of the application under the proposed section 8A(2) be lowered so that each guardian may apply to the court for resolution of their dispute even if neither of them is unfit to have guardianship over the minor.

28. The Administration has explained that the proposed section 8A(2) is introduced to the Bill upon the removal of the existing section 6(2) and (3) of GMO. The existing section 6(2) provides the surviving parent with the power to veto the guardian appointed by the deceased parent taking up the appointment. Under the existing section 6(3), if the surviving parent exercises his or her veto power, or if the guardian considers that the surviving parent is unfit to have custody of the minor, the guardian may apply to the court. The court may order -

- (a) the surviving parent to maintain the sole guardian of the minor;
- (b) the surviving parent and the guardian to act jointly; or
- (c) the guardian to be the sole guardian of the minor.

LRC recommended that the surviving parent's veto right in the existing section 6(2) should be removed. The proposed section 8A(2) has been introduced specifically to provide for the surviving parent or the guardian to apply to the court to remove the other side as the guardian of the minor on an equal footing, instead of one having veto power over the other.

29. In the Administration's view, when two or more guardians acting as joint guardians of a minor are unable to agree on issues affecting the welfare of the minor, any of them may continue to apply to the court for its discretion as at

present under the existing section 9 of GMO<sup>3</sup>. In other words, the threshold of application to the court for resolution of disputes between guardians will not be raised by the Bill. In addition, the proposed section 8E provides that the court may, in its discretion, on being satisfied that it is for the best interests of the minor, remove any guardian and appoint another person to replace that guardian. Any person may apply for an order under the proposed section 8E to replace a guardian if he or she can satisfy the court that it is for the best interests of the minor. The Administration believes that the proposed sections 8A(2) and 8E and the existing section 9 have already provided different ways for joint guardians to resolve their disputes and the court is empowered to make appropriate orders so as to protect the interests of the affected minor.

#### Checklist of factors to assist judges in proceedings concerning children

30. The Bills Committee has sought the Administration's view on the Family Law Association's suggestion of including in the Bill a checklist of factors for guiding the court to make decisions in proceedings concerning children as recommended by LRC in its Report on Child Custody and Access.

31. While noting the merits of putting in place the checklist, the Administration is concerned that such factors may change over time. The Administration has explained that if a checklist is included in the primary legislation, the legislation may need to be amended from time to time to bring the law up-to-date. It may restrict the court and the relevant professionals in determining the best interests of children. It is noted from some court judgments that the checklist recommended by LRC has already been adopted and applied by some judges in Hong Kong in proceedings relating to children without legislative amendments. Judges and the relevant professionals may refer to the list of factors considered in recent court judgments as reference in determining the best interests of children. The list of factors may be flexibly adjusted and updated in view of the latest social developments without the need to initiate another legislative process. On balance, the Administration considers a non-statutory checklist more flexible and advisable.

#### Revocation of guardian appointment (proposed section 8B)

32. The proposed section 8B provides the ways an appointment made under the proposed section 6 can be revoked. The Bills Committee considers that it may be unclear in the Bill as to whether a revocation of guardian appointment is valid

---

3 Section 9 of the GMO provides that "Where two or more persons act as joint guardians of a minor and they are unable to agree on any question affecting the welfare of the minor, any of them may apply to the court for its direction, and the court may make such order regarding the matters in difference as it may think proper."

if the requirement for revocation in the proposed section 8B(4)(b) (i.e, the person who revokes the appointment must notify all other persons who jointly made the appointment) is not complied with. To address the concern, the Administration has agreed to add a provision to specify that the revocation has no effect unless the requirement in the proposed section 8B(4)(b) is complied with. The CSA will be moved by the Administration.

#### Disclaimer of appointment (proposed section 8C)

33. Under the proposed section 8C, a guardian may disclaim his appointment. The Hong Kong Federation of Women Lawyers has suggested that if the disclaimer is made before the death of the appointing parent, the guardian should be required to notify the appointing parent. The Administration has agreed to introduce CSAs to amend the notification requirements. Under the proposed CSAs, a guardian who wishes to disclaim the appointment is required to do so by notifying the appointing parent or appointing guardian of the disclaimer. If the appointing parent or appointing guardian has died, an appointed guardian who has not assumed guardianship under the proposed section 8 and wishes to disclaim the appointment is required to disclaim the appointment by a written, dated and signed document. A disclaimer will not take effect until the guardian has notified the person set out in the proposed section 8C(2)(a) to (c) of it.

#### Use of the term "parental rights" (proposed section 8G)

34. The proposed section 8G provides that a person appointed as the guardian of a minor has, on assuming guardianship, parental rights with respect to the minor. However, under the existing section 3 of GMO, the term "parental rights and authority" is under more or less the same meaning. For the purpose of consistency, the Bar has suggested that the term "parental rights and authority" should be used in the proposed section 8G. The Administration agrees with the Bar's suggestion and will propose the relevant CSAs.

#### Remuneration for guardian (proposed section 8H)

35. The proposed section 8H provides for the court to authorize a guardian of a minor to be paid with remuneration for the guardianship service if the guardian is not a parent of the minor; and if the minor is a ward of the court. The Bills Committee is concerned that the proposed provision has narrowed the scope of remuneration entitlement to only the guardian of minor who is a ward of the court. The Bills Committee has suggested that the provision in the existing

section 6(6)<sup>4</sup> should be maintained, as it is ultimately for the court to decide whether remuneration should be given. The Administration has agreed to propose a CSA to this effect.

Conflicts arising from dual appointments by both parents

36. The Bills Committee has noted that in the event where parents cannot reach a consensus on the appointment of guardians, each parent may appoint a guardian for the same minor ("dual appointments") under the proposed section 6. The Bills Committee is concerned whether measures are in place to deal with conflicts arising from dual appointments by both parents.

37. The Administration has advised members that the Bill contains provisions to deal with the potential conflicts between surviving parents and guardians and between joint guardians on the following -

- (a) whether and when the appointment should take effect; and
- (b) any on-going issues affecting the welfare of the minor after the appointment takes effect.

*When the appointment takes effect*

38. The Administration has explained that the proposed sections 7 and 8 set out when guardianship takes effect based on the recommendation by LRC in the Report. Section 7 provides that appointment of guardian made by any parent or guardian will take automatic effect on the death of the appointing parent or appointing guardian only in the following situations -

- (a) the appointing parent or appointing guardian has a custody order over the minor immediately before he or she dies; or
- (b) the appointing parent or appointing guardian lived with the minor immediately before death and the minor does not have any surviving parent or surviving guardian when the appointing parent or appointing guardian dies.

For any other situations, a person appointed by a parent or guardian as the guardian of a minor will need to apply to the court before he or she can assume guardianship after the death of the appointing parent or appointing guardian

---

<sup>4</sup> Section 6(6) provides that the court may authorize a guardian who is not a parent of the minor who is his ward to be paid such remuneration for his services as guardians as the court may think fit.

under the proposed section 8. The court will consider the application based on the welfare principle having regard to the best interests of the minor as the first and paramount consideration.

*Disputes on issues affecting the welfare of the minor after the appointment takes effect*

39. The Administration has further explained that the proposed sections 8A(2) and 8E and the existing section 9 together provide for different ways for joint guardians to resolve their disputes and the court is empowered to make appropriate orders having regard to the best interests of the minor as the first and paramount consideration so as to protect the affected minor.

40. In the Administration's view, the proposed provisions referred to in paragraphs 38 and 39 above provide ways for surviving parents and guardians to apply to the court in case there are disputes on whether and when the appointment should take effect, as well as any ongoing issues affecting the welfare of the minor. The court will consider each case having regard to the best interests of the minor as the first and paramount consideration, as stated in the existing section 3 of GMO. With these provisions in place, conflicts arising from dual appointments by both parents could be properly and adequately dealt with.

Addition of reference to section 9 to the existing section 11 of GMO (clause 6)

41. The Bills Committee notes that consequential upon the proposed amendments under clause 4, clause 6 amends the existing section 11 of GMO by substituting the reference "section 6(3)(b)(ii)" with the reference "section 8(e), 8A(2)(c) or section 9". The existing section 11 provides for the types of custody and maintenance orders the court may make when it appoints a sole guardian to the exclusion of the surviving parent. While the proposed section 8(e) and 8A(2)(c) are provisions under which the court may order a guardian to act to the exclusion of the surviving parent, the existing section 9 deals with the court's power in resolving differences between joint guardians on matters affecting the welfare of the minor. The Bills Committee has enquired about the reasons for adding the reference "section 9" to the existing section 11.

42. The Administration has explained that since the court could make any order as it may think proper to resolve the matters in difference between the joint guardians under the existing section 9 of GMO, there is a need to link it with the existing section 11 so that in case the court orders the guardian to act to the exclusion of the surviving parent, the court could make the ancillary orders under the existing section 11. There may be a situation that the surviving parent and the

guardian appointed by the deceased parent are appointed by the court to be the joint guardians of a minor. If there is any dispute between them, they could resort to the court under the existing section 9 of GMO.

Application by a third party for custody and maintenance orders in respect of a minor under section 10 of GMO

43. The Bills Committee notes a call from the Law Society to amend the existing section 10 of GMO to remove the limitation on the right of third party to apply to the court for custody and maintenance orders in respect of a minor. According to the Administration, the suggested amendment stems from the recommendations made in the Report on Child Custody and Access published by LRC in 2005 ("2005 Report"). The Administration will soon launch a public consultation exercise to gauge public views on the recommendations in the 2005 Report in relation to the "joint parental responsibility model". The concerned recommendation on the removal of limitation on the right of third parties to apply for custody and maintenance orders will be included in the consultation exercise.

Implementation of and publicity on the Bill

44. The Bills Committee and the depositions have urged for early implementation of the Bill, given that the Report was published about 10 years ago. According to the Administration, the Bill, if enacted, will come into operation on a date to be appointed by the Secretary for Labour and Welfare. The Administration will seek to implement the Bill expeditiously.

45. Regarding the publicity on the Bill and the form for appointment of guardian, the Administration has advised members that it will step up publicity on the Bill, if enacted. An explanation pamphlet will also be produced and attached to the form to explain in more detail the mechanism for guardian appointment and the roles and responsibilities of guardians. The appointment forms will be available at district offices of the Home Affairs Department where free legal advice is provided.

**Committee Stage amendments**

46. Apart from the CSAs discussed in the above paragraphs, the Administration will move other minor amendments to the Bill for the purpose of consistency.

### **Consultation with the House Committee**

47. The Bills Committee consulted the House Committee on 16 December 2011 and obtained its support for the Second Reading debate on the Bill to be resumed at the Council meeting of 11 January 2012.

Council Business Division 2  
Legislative Council Secretariat  
4 January 2012

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

**Membership list**

**Chairman** Hon Cyd HO Sau-lan

**Members** Dr Hon Margaret NG (up to 6 July 2011)  
Hon Miriam LAU Kin-ye, GBS, JP (since 27 July 2011)  
Hon TAM Yiu-chung, GBS, JP  
Hon Audrey EU Yuet-mee, SC, JP  
Hon CHEUNG Kwok-che  
Hon WONG Sing-chi

(Total : 6 Members)

**Clerk** Mrs Sharon TONG

**Legal Adviser** Ms Clara TAM

**Date** 27 July 2011