
INFORMATION NOTE

Custody and access of children in Hong Kong

1. Introduction

1.1 The Law Reform Commission ("LRC") published the Report on Child Custody and Access ("the Report") in March 2005, which was the last of a series of four reports published by LRC under its reference on guardianship and custody of children¹. The Report makes 72 recommendations on arrangements relating to child custody and access, which suggest, among other things, Hong Kong should follow other jurisdictions such as England and Wales, and Australia in adopting the "joint parental responsibility model" to family law. LRC considers that the proposed new model will enable both parents to continue to play an active part in the life of their child after divorce.

1.2 The Government launched a public consultation on 28 December 2011 to gauge public views on the recommendation of LRC that the "joint parental responsibility model" should be implemented by legislative means to replace the existing custody and access arrangements under the family law. Earlier on, some Members have questioned on several occasions about the lack of progress on implementation of the LRC recommendations.

1.3 The Government will brief the Panel on Welfare Services on the public consultation at the meeting on 9 January 2012. This information note aims to provide information on the existing legislation and arrangements relating to the custody and access of children in Hong Kong, the key recommendations in the Report, and previous deliberations related to the Report at the Legislative Council.

¹ In 1995, the then Attorney General and Chief Justice requested LRC to consider the law relating to guardianship and custody of children and to recommend appropriate changes of the law. In 1998, the subcommittee set up under LRC to consider the matters published a consultation paper on guardianship and custody covering its reform proposals. Following the consultation, LRC published a series of four reports between 2002 and 2005, namely: Guardianship of Children; International Parental Child Abduction; The Family Dispute Resolution Process; and Child Custody and Access.

2. Legislative framework

2.1 In Hong Kong, the key legislation governing child custody and access includes:

- (a) *Guardianship of Minors Ordinance* (Cap. 13) – governing court proceedings relating to the custody and upbringing of children and stating that the welfare principle² applies to all proceedings relating to custody of children;
- (b) *Matrimonial Causes Ordinance* (Cap. 179) – governing the granting of divorce, and providing for the supervision or care of a child under the Director of Social Welfare in exceptional circumstances³;
- (c) *Matrimonial Causes Rules* (Cap. 179A) – providing for the application for an order relating to the custody or education of a child⁴;
- (d) *Matrimonial Proceedings and Property Ordinance* (Cap. 192) – providing for restrictions on decrees for dissolution, annulment or separation affecting children and orders for custody and education of children affected by matrimonial suits⁵;
- (e) *Separation and Maintenance Orders Ordinance* (Cap. 16) – empowering the District Court to make various orders including that the legal custody of any child of the marriage may be committed to the husband or the wife until the child reaches 18 years old upon applications that are grounded on allegations of misbehaviour on the part of one party to the marriage such as assault and desertion⁶;

² The effect of the welfare principle is to require the court to take into account what is in the best interests of the child over and above what is best for any adults involved in the litigation. See section 3, *Guardianship of Minors Ordinance*.

³ Sections 48 and 48A, *Matrimonial Causes Ordinance*.

⁴ Rule 92, *Matrimonial Causes Rules*.

⁵ Sections 18 and 19, *Matrimonial Proceedings and Property Ordinance*.

⁶ Section 5, *Separation and Maintenance Orders Ordinance*.

- (f) *Protection of Children and Juveniles Ordinance* (Cap. 213) – empowering the juvenile court to make orders relating to the guardianship, custody and control of children and juveniles in need of care or protection⁷; and
- (g) *Domestic and Cohabitation Relationships Violence Ordinance* (Cap. 189) ("*DCRVO*")⁸ – empowering the court to vary or suspend a custody or access order currently in force when making an injunction regarding the child concerned⁹.

3. Existing arrangements relating to child custody and access

Child custody

3.1 According to LRC, "custody" comprises the bundle of rights that parents have over their child, including the right to care and control and the right to make all important decisions affecting the child, such as decisions regarding his or her education, religion and medical treatment¹⁰. Section 2 of the *Matrimonial Proceedings and Property Ordinance* provides the statutory definition of custody and states that "custody, in relation to a child, includes access to the child".

3.2 Under the existing legislation, there is a general principle of equality of parental rights between the mother and the father. However, the court would need to rearrange the parental rights between the parents through custody orders when they divorce. The court may, after considering the circumstances of each individual divorce case, make a sole custody order, a joint custody order or, in rare cases, a split order.

⁷ Section 34, *Protection of Children and Juveniles Ordinance*.

⁸ *DCRVO* was amended by the *Domestic Violence (Amendment) Ordinance 2009* for the purpose of extending the scope of the *Domestic Violence Ordinance* to cover same-sex cohabitants and such former cohabitants. The *Domestic Violence Ordinance*, enacted in 1986, initially provided for civil remedies in the form of injunctions to protect spouses, people in heterosexual cohabitation relationships and their children against molestation by the other party to the relationship. The Government extended the scope of *Domestic Violence Ordinance* in 2008 to include former spouses, former heterosexual cohabitants and other immediate and extended family members.

⁹ Section 7A, *DCRVO*.

¹⁰ The Law Reform Commission of Hong Kong (2005b).

3.3 Sole custody order is a common type of order being granted with the effect to transfer most parental rights to the custodial parent exclusively. The non-custodial parent would generally only retain the access right in respect of the child, and would be excluded from the making of important decisions affecting the upbringing of the child. A joint custody order grants the right to decide on important matters affecting the upbringing of the child to both parents, while the physical care and control of the child is usually granted to only one of them. Under a split custody order, the daily care and control of the child is granted to one parent while custody in the sense of wider decision-making right is granted to the other parent.

Child access

3.4 "Access" is the right to have contact with the child, such as through letters, emails, telephone calls, visiting the child, taking the child out, or having him or her to stay from time to time¹¹. The types of access order that the court may make include¹²:

- (a) reasonable access – where the parties agree that the parent without care and control can see the child whenever it is reasonable and agreeable by both parties;
- (b) defined access – where the time, and sometimes the place, of access is specified in the order; and
- (c) supervised access – where access by the non-custodial parent is supervised by the custodial parent, a relative or some other third party such as a social welfare officer.

¹¹ Access is a generic term and is not defined in the relevant Ordinances. Most of the law in relation to access is found in case precedent. See The Law Reform Commission of Hong Kong (2005b).

¹² Frances & Warren (1995) and The Law Reform Commission of Hong Kong (2005b).

The "welfare principle"

3.5 In any court proceedings relating to the custody and upbringing of a child, the court is bound by the "welfare principle", which is set out in section 3 of the *Guardianship of Minors Ordinance*, in making any order. The effect of the principle is to require the court to take into account what is in the best interests of the child over and above what is best for any adults involved in the litigation. The factors that the court may consider in determining the welfare of the child include¹³:

- (a) the wishes and rights of the child considered in relation to his or her age and level of understanding;
- (b) the child's physical, emotional and educational needs;
- (c) the desirability of maintaining continuity of care for the child and the likely effect on him or her with any change in circumstances;
- (d) the child's age, sex, background and personal characteristics;
- (e) any harm that he or she has suffered or is at risk of suffering; and
- (f) the capacity of each parent or relevant third party to care for the child and meet his or her needs.

Recent development

3.6 According to the Government, the views of the court on custody and access arrangements have been changing with its increased use of joint custody orders than before. In cases where a sole custody order is made, the court also thinks that the non-custodial parent should still be consulted on all important decisions affecting the child's welfare, though the custodial parent retains the right to veto the opinion of the non-custodial parent and make the final decision. If the non-custodial parent disagrees, he or she can take the matter to court for final determination¹⁴.

¹³ The Law Reform Commission of Hong Kong (2005b).

¹⁴ Labour and Welfare Bureau (2011).

4. Law Reform Commission's Report on Child Custody and Access

4.1 LRC has made reference to the following objectives, as proposed by the Law Commission¹⁵ in the United Kingdom in its review on child law in the mid-1980s, in formulating the law reform proposals in the Report¹⁶:

- (a) separating the issues relating to the children from those relating to any remedies sought between the parents or other adults involved, and to give priority to the former;
- (b) recognizing and maintaining the beneficial relationships already established between the child and his parents or other adults who have been important to him or her and encouraging the continuation of these relationships to the maximum extent possible in the light of changed family circumstances;
- (c) promoting a secure and certain environment for the child while he or she is growing up;
- (d) protecting the child from the risk of harm to his or her health and development;
- (e) recognizing, to the greatest possible extent, the child's own point of view;
- (f) ensuring that, where parental responsibility is divided or shared, the people concerned understand what legal responsibilities and powers they can and should exercise in relation to the child; and
- (g) securing that the legal allocation of powers and responsibilities reflects a state of affairs which is workable and sensible in everyday life.

¹⁵ The Law Commission is an independent statutory body established to review the law and recommend reform where it is needed.

¹⁶ The Law Reform Commission of Hong Kong (2005b).

4.2 The main thrust of LRC's 72 recommendations in the Report relates to the introduction of a new "joint parental responsibility model" into the family law of Hong Kong. This new model emphasizes (a) the continuing responsibilities of both parents towards their children rather than the individual rights of parents after they divorce, and (b) the children's right to enjoy continuing relationship with both parents if this is in the children's best interests. LRC considers that the proposed new model is more child-focused, is consistent with the international trend in family law which has shifted towards focusing on the child, and is consistent with the requirements of the United Nations Convention on the Rights of the Child¹⁷.

4.3 Against the above background, LRC recommends the replacement of existing orders for the custody and access with a new range of court orders such as residence order and contact order to better govern the arrangements for the child when the parents divorce. The parent granted the residence order would be entitled to reside with the child concerned and make decisions relating to the day-to-day care of the child. For major decisions affecting the child, the parent residing with the child will have to notify or obtain the prior consent of the other parent. The proposed contact order will determine the arrangements for maintaining contact between the child and a person with whom the child will not be living. LRC also recommends introducing specific issues order and prohibited steps order which enable the court to give direction to address the disagreements between parents on issues relating to their child¹⁸.

¹⁷ The Convention sets out the basic human rights of children, including the right to survival; to develop to the fullest; to protection from harmful influences, abuse and exploitation; and to participate fully in family, cultural and social life. The four core principles of the Convention are non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and respect for the views of the child.

¹⁸ The specific issues order enables the court to give directions on a particular question that may arise in relation to any aspect of parental responsibility for the child (e.g. which school the child is to attend), whereas the prohibited steps order is an injunction to prevent the taking of particular steps by a parent in the exercise of his or her parental responsibility (e.g. taking the child away from a particular school) without first obtaining the consent of the court.

4.4 LRC also sets out other key recommendations in the Report, which include:

- (a) removing current limitation on the right of interested third parties, such as close relatives, to apply for court orders affecting children;
- (b) providing increased powers and new guidelines to the courts to deal with custody and access cases which involve domestic violence;
- (c) providing better mechanisms for the views of children to be taken into account in family proceedings which affect them; and
- (d) amending the legislation governing care and protection proceedings so that children's rights can be better protected.

5. Deliberations at the Legislative Council

5.1 Some Members have raised questions on several occasions during the Council meetings between 2007 and 2009 to inquire the Government about how it would take forward LRC's recommendations in the Report, the reasons for the slow progress made and the timetable for implementing the recommendations.

5.2 In the reply to the question raised at the Council meeting on 13 May 2009 on whether and when it would implement LRC's recommendations in the Report, the Government stated that LRC's recommendations would fundamentally change the existing concept of "custody" under the family law and would have far-reaching implications on children and family on various fronts. In deciding whether and how to adopt the recommendations of the Report, the Government stated that it would need to examine carefully each of the recommendations and consider them in a holistic manner. The Government would also consult stakeholders as and when necessary during the process.

5.3 In the same reply, the Government pointed out that among the stakeholders in the social welfare sector and women's groups that they had consulted, most of them agreed with the concept underlying the "joint parental responsibility model". However, some stakeholders considered that it might not be advisable to adopt the model in local family law. There were others who worried that parents whose relationships broke up after divorce might abuse the relevant legislation and obstruct the making of major decisions relating to the child, which in the end would hinder the development of the child and work against his or her interest. The Government also stated that studies in Australia indicated that there had been an increase in the number of court disputes in Australia subsequent to the introduction of the "joint parental responsibility model", suggesting that the new model might be abused by trouble-making parents.

5.4 The Government further advised that it had adopted the relevant parts of the Report, including Recommendations 33 and 35 in the Report, in reviewing the then *Domestic Violence Ordinance*¹⁹. The Government had introduced provisions empowering the court to vary or suspend a custody or access order currently in force when making an injunction under the *Domestic Violence Ordinance* regarding the child concerned. The amendment bill was passed by the Legislative Council in June 2008 and has taken effect since August 2008.

5.5 At the meeting of the Panel on Welfare Services on 8 February 2010, the Government reiterated that it would take a cautious approach on the matter relating to the implementation of the LRC recommendations and carefully consider the views of relevant stakeholders before deciding whether and how to adopt the recommendations.

¹⁹ According to Recommendation 33, LRC recommends that the Government should review the law relating to domestic violence and introduce reforms to improve its scope and effectiveness. Meanwhile, Recommendation 35 suggests that the court should be given power to, on an interim basis, suspend or vary a prior access or contact order when making an injunction under the *Domestic Violence Ordinance*.

5.6 In the reply to members' request for further information on the stakeholders that had been consulted so far and their comments on the LRC recommendations, the Government advised that it had consulted the Law Society of Hong Kong, some social workers and women's groups on the proposed "joint parental responsibility model". The Law Society of Hong Kong considered that the proposed model would be beneficial to children as both parents would still have the responsibilities for their children after divorce.

5.7 The Government also stated that the social workers and most of the women's groups that it had consulted agreed with the underlying concept of the proposed model. However, they have expressed concerns on areas such as:

- (a) there might be an increase in the number of court cases between divorced parents on issues about their children;
- (b) some parents might abuse the right to participate in their children's lives and deliberately obstruct or delay the making of major decisions relating to their children;
- (c) the requirement for parents (including victims of domestic violence) to notify or obtain the prior consent of their ex-spouses before making major decisions for their children might cause unnecessary worries and disruptions to them; and
- (d) enhancing education to change the mindset of parents on custody issues might be more effective than law reform.

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