

For discussion
on 13 May 2004

**Bills Committee on
Adoption (Amendment) Bill 2003**

**Requirement of “Continuous Actual Custody”
before the Making of an Adoption Order**

Purpose

This paper provides supplementary information on the requirement of “continuous actual custody” in the Adoption (Amendment) Bill (the Amendment Bill) before an adoption order can be made.

Background

2. At the meeting on 25 March 2004, Members requested, among others :
 - (a) the exact interpretation of “continuous actual custody” in section 5(7) of the Adoption Ordinance and whether it should be replaced by “continuous actual care and control” to better reflect the legislative intent; and
 - (b) whether the three scenarios listed in the revised section 5(8) under clause 8 of the Amendment Bill, under which the actual custody shall not be regarded as broken, are exhaustive. If not, Members asked the Administration to consider if an explicit provision should be added to that section to authorize the Court to allow other scenarios to be regarded as unbroken actual custody.

Interpretation of Continuous Actual Custody

3. It is provided in section 5(7) of the Adoption Ordinance that an adoption order cannot be made unless, among others, the infant has been continuously in the actual custody of the applicant for at least 6 months (or 13

weeks if the applicant or either of the applicants is a natural parent of the child)¹. The legislative intent is to provide sufficient opportunities to observe the child with the applicant(s) together in a home environment to enable the placement to be tested and supervised, with a view to ascertaining whether the proposed adoption is in the best interests of the child before an adoption order is finalized.

4. Section 5(8) of the Adoption Ordinance specifically provides that if a child stays in a hospital or resides at a boarding school either in or outside Hong Kong, the “continuous actual custody” shall not be regarded as broken². Under clause 8 of the Amendment Bill³, we have proposed to revise section 5(8) by extending those scenarios covered to include receiving full-time education outside Hong Kong.

5. The Adoption Ordinance originally required the child to have been in the applicant’s “care and possession”, but the term “care and possession” was replaced by “actual custody” by the Adoption (Amendment) Bill 1987. The relevant LegCo Brief in 1987 made it clear that the term “actual custody” essentially meant “sharing a home with (the adoptive parent)”, and was used to distinguish it from the concept of legal custody⁴.

¹ Section 5(7) of the Adoption Ordinance provides that “An adoption order shall not be made in respect of any infant unless-

- (a) subject to paragraph (aa), the infant has been **continuously in the actual custody** of the applicant for at least 6 consecutive months immediately preceding the date of the order;
- (aa) where the applicant or either of the applicants is a natural parent of the infant, the infant has been **continuously in the actual custody** of the applicant (or both applicants, where there are joint applicants) for at least 13 weeks immediately preceding the date of the order;
- (b) the applicant has not less than-
 - (i) 6 months before the date of the order; or
 - (ii) such shorter period before that date as the Court may allow on application by the applicant, lodged with the Director notice in writing in the prescribed form of his intention to apply for an adoption order in respect of the infant;
- (b) the applicant has, within 4 months after the date of lodging such notice as is referred to in paragraph (b), applied to the Court for an adoption order in respect of the infant.”

² Section 5(8) of the Adoption Ordinance provides that “For the purposes of subsection (7), continuous actual custody shall not be regarded as broken during any period when the infant is an in-patient in a hospital or resides at a boarding school either in or outside Hong Kong.”

³ Section 5(8) is revised under clause 8 of the Adoption (Amendment) Bill 2003 to read “For the purposes of subsection (7), continuous actual custody shall not be regarded as broken during any period when the infant -

- (a) is an in-patient in a hospital;
- (b) resides at a boarding school either in or outside Hong Kong; or
- (c) receives full-time education outside Hong Kong.”

⁴ Referring to “rights and authority which a parent has in relation to a child”.

6. It appears that the term “actual custody” in the Adoption Ordinance follows the approach adopted in the UK Children Act 1975⁵. In the UK, section 3(1) of the Adoption Act 1958⁶ originally required the child to have been in the applicant’s “care and possession”, but the term “care and possession” was replaced by “actual custody” by the Children Act 1975. The term “actual custody” was equated with “actual possession” by virtue of section 87(1) of the Children Act 1975. However, section 87(3) spelt out that certain circumstances (temporary absence etc.) should be disregarded. The provisions of section 87(3) effectively removed any doubt that continuous physical propinquity was absolutely necessary.

7. The change was introduced to address the difficulties under the original form of section 3(1) of the Adoption Act 1958, as there was doubt whether the applicants could be said to have “care and possession” if they parted with the child temporarily. In a decided case in the UK in 1963, Buckley J. deliberated on the words “care and possession” and concluded that continuous physical propinquity and control of the infant’s person was not required⁷. It is suggested in Bromley’s Family Law 6th edition that the change of wording by the Children Act 1975 has confirmed the decision of this case.

8. From the foregoing, it can be seen that the term “actual custody” is capable of covering scenarios other than those expressly set out in section 5(8) of the Adoption Ordinance.

9. Members have suggested that we consider replacing the term “actual custody” by “actual care and control”. We prefer the term “actual custody”

⁵ Section 9(2) of the UK Children Act 1975 provided that “...an adoption order shall not be made unless the child is ... during the preceding twelve months had his *home* with the applicants...”

Section 87(3) of the UK Children Act 1975 provided that “**In this Act, unless the context otherwise requires, references to the person with whom a child has his *home* refer to the person who, disregarding absence of the child at a hospital or boarding school and any other temporary absence, has *actual custody* of the child**” .

Section 87(1) of the UK Children Act 1975 provided that “**a person has actual custody of a child if he has *actual possession* of his person, whether or not that possession is shared with one for more other persons**”.

⁶ Section 3(1) of the UK Adoption Act 1958 stated that “An adoption order shall not be made in respect of any infant unless he has been continuously in the **care and possession** of the applicant for at least three consecutive months immediately preceding the date of the order, not counting any time before the date which appears to the court to be the date on which the infant attained the age of six weeks.”

⁷ In *Re B. (G.A.) (an infant)* [1963] 3 A.E.R. 125, Buckley J, in considering the meaning of the words “care and possession”, remarked that “it must be conceded, and I think that it must be, that ‘possession’ here does not mean continuous propinquity with and control of the infant’s person”.

to “actual care and control”, as the former reflects more clearly the legislative intent of “sharing a home with (the adoptive parent)”.

Proposal

10. As we consider that the term “actual custody” should be able to reflect the legislative intent clearly, we do not suggest revising it again. That said, we keep an open mind as to whether section 5(8) should be further revised by extending those scenarios covered to include “any other temporary absence” as well.

Presentation

11. Members may wish to take note of the information above to facilitate their consideration of the Committee Stage Amendments for the Adoption (Amendment) Bill 2003.

Health, Welfare and Food Bureau
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