

(Submission from Hong Kong Federation of Women Lawyers)

27 July 2011

Comments on Guardianship of Minors (Amendment) Bill 2011

We are generally in support of the proposals made by the Law Reform Commission on the Guardianship of Minors Ordinance (the “Ordinance”) but have the following detailed comments on the provision of the Guardianship of Minors (Amendment) Bill 2011:

- (1) APPOINTMENTS PRIORITY: There is room for clarification with regard to the legal effect and the priority issue (if any) of an appointment made under the new Section 6 of the Ordinance and a testamentary appointment made in a will. While the proposed Sections 8B(1) and 8B(2) make it possible for an appointment under Section 6 to revoke an earlier appointment (including one made in a will) and to be revoked by a subsequent document revoking it. There appears to be no provision in the Bill to clarify the effect of a subsequent appointment made in a will on such appointment. It is preferable to have an express provision in the Bill to state whether a subsequent appointment made under a will (without an express revocation of any prior appointment) will affect the validity of an existing appointment made under Section 6.

- (2) APPOINTMENT BY BOTH PARENTS: It appears that the proposed Section 7 which provides for automatic assumption of guardianship applies to a guardian appointed by a parent or a guardian under the new Section 6.

In a situation where each of the parents makes an appointment under Section 6 without informing the other parent of such an appointment, each of them appoints different guardians and subsequently both parents die, for example, in an accident leaving the child alive (which is not uncommon, especially if the family travels together), will Section 7 apply so that all the guardians appointed by the parents assume the duties immediately automatically and act jointly?

If this is the intention, we suggest that express provisions should be made to remove any doubt.

It also appears that the new Section 8A(1) may not cover the above situation because the reference to “surviving guardian” in that section may exclude guardian appointed

by the other parent. We suggest that Section 6(4) of the existing Ordinance may be referred to.

- (3) DISCLAIMER: Regarding a guardian's ability to disclaim from the appointment, it appears that Section 8C only allows a guardian who has accepted an appointment ("consented guardian") to withdraw from the appointment before he/she assumes the appointment. Even so, we suggest that the guardian's notice of withdrawal provided in Section 8(C)(2) should be amended so that if the withdrawal is made before the death of the appointing parent, the guardian must also give written notice to the appointing parent.
- (4) WITHDRAWAL: In relation to the proposed amendment in point (3) above, we also suggest that consideration should be given to adding a provision to allow a consented guardian to withdraw/disclaim the appointment in the course of his/her guardianship even after he/she has assumed or made an application for assumption of guardianship. This will provide flexibility for a guardian to withdraw where he/she becomes sick or unable to continue performing his/her guardianship duties. Even if the proposed Section 8E is intended to cover the situation, we suggest to provide expressly that a guardian may apply to the court for withdrawal from guardianship.
- (5) WHO MAY APPLY TO COURT: We suggest to expand the situations provided in Sections 8D(1) and 8E where the court may exercise its power to appoint a guardian or to add guardians or to replace guardians, for example, where the minor requests on reasonable grounds and it is in the interest of the minor to make such appointment/replacement. In Sections 8D(1) and 8E, it may be preferable to state expressly on whose application the Court will make such an appointment. This will help clarify the procedural aspects of making the applications.
- (6) PARTIES IN DISPUTE: Section 8A(2) allows the surviving parent or surviving guardian and the guardian appointed Section 6 to apply to court for resolution of their dispute. The threshold of the application appears to focus on the fault of the party i.e. based on "unfit to have guardianship over the minor". We suggest to include other thresholds such as when the parties are in persistent and grave disagreement or quarrels notwithstanding both of them are acting with the welfare of the minor in

mind. This will enable either party to seek the remedy by the court much earlier, instead of having to do the finger pointing. This will also help avoiding any undue delay in dealing with the matters over the minor due to their disagreement. Our suggestion is made in view of Section 9 of the existing Ordinance which does not empower the court to make the orders as provided in the new Section 8A(2) in case of the parties' serious dispute.