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

Administration's Response to Views and Issues Raised by Deputations at the Meeting held on 27 July 2011

Purpose

As requested by Members of the Bills Committee on Guardianship of Minors (Amendment) Bill 2011 (the Bill) at the meeting held on 27 July 2011, this paper provides the Administration's response to views and issues raised by deputations attending the meeting.

Suggestions on the use of more modern terms and expressions

2. There were suggestions at the meeting that a few amendments concerning the use of terms should be made to the Bill –

(a) Section 3(1)(a)(i) of the Guardianship of Minors Ordinance (GMO) (Cap. 13) 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" (emphasis added). The Family Law Association suggested that the term "welfare" should be replaced by "best interests" since the latter term is more in conformity with the language of the United Nations Convention on the Rights of the Child (UNCRC);

(b) The new section 6(5) of the Bill adopts the term "views of the minor", which is the term used in UNCRC. In the existing section 3 of GMO, however, the term "wishes of the minor" is used under more or less the same meaning. For consistency sake, the Law Society of Hong Kong suggested that the existing section 3 of GMO be amended to replace the term "wishes of the minor" with "views of the minor" which is more in conformity with the language of UNCRC; and

(c) The new section 8G of the Bill uses the term "parental rights". Under the existing section 3 of the GMO, however, the term "parental rights and authority" is used under more or less the

same meaning. The Hong Kong Bar Association suggested that the term "parental rights and authority" should be used in the new section 8G for consistency sake.

3. We agree that the above suggested amendments can further improve the use and consistency of language of the Bill. Committee Stage Amendments (CSAs) will be proposed for adopting these suggestions.

Suggestion on the notification requirements when guardian disclaims appointment

4. The new section 8C of the Bill provides that a guardian may disclaim his appointment. The Hong Kong Federation of Women Lawyers suggested that if the disclaimer was made before the death of the appointing parent, the guardian should be required to notify the appointing parent. We agree with the suggestion and will propose CSAs to amend the notification requirements.

The need for complying with the formal requirements for appointing guardians in the Bill

5. The new section 6(3) of the Bill sets out the requirements for appointing guardian that the appointment 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.

6. It was raised at the meeting whether a provision resembling section 5(2) of the Wills Ordinance[1] should be introduced in the Bill so that guardian appointment may be regarded as valid as long as the

[1] 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.".

intention of the appointment can be demonstrated, even if the appointing requirements in the new sections 6(3) (i.e. those in para. 5 above) are not fulfilled.

7. The requirements in the new section 6(3) of the Bill have been introduced based on the recommendation of the Report on Guardianship of Children by the Law Reform Commission of Hong Kong (LRC's Report) (Recommendation 1). According to LRC's Report, this recommendation was supported by most of the respondents who commented on it during the public consultation conducted by LRC.

8. 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, we think that some basic requirements should be in place to avoid uncertainty in and future dispute on the validity of appointment. We therefore agree with the recommendation of LRC's Report that the basic requirements for appointment of guardian should be put in place and duly complied with. In case there is uncertainty about the validity of the guardian appointment, the court may exercise its general power of appointing guardian for a minor under the new section 8D, if it is considered in the best interests of the minor.

9. To facilitate parents in making guardianship arrangements for their children, we will, as an administrative measure, produce a standard form for appointing guardians as recommended by LRC's Report. An explanatory pamphlet will also be produced and attached to the form to explain in detail the requirements and procedures for guardian appointment.

Question about the appropriateness of seeking the child's view on the appointment of guardian

10. The requirement of seeking the child's views on the appointment of guardian in the proposed new section 6(4) of the Bill is a recommendation made in LRC's Report (Recommendation 4). It aims to set out the legal principle prominently in the law. In Scotland, the Children (Scotland) Act 1995 also has similar requirement. As recommended in the Report on Guardianship of Children and making reference to the relevant provisions of the Children (Scotland) Act 1995, the proposed new section 6(4) contains the rider that parents should have

regard to the age and understanding of the minor in seeking his views on the appointment of guardian. We consider it appropriate to put in place this requirement in the best interests of children.

11. In the standard form for appointing guardians, we will require the appointing parent/guardian to declare that he/she has taken into account the views of the minor as far as practicable having regard to the minor's age and understanding.

Suggestion that a statutory checklist of factors be included in the Bill to assist judges in proceedings concerning children

12. The Family Law Association suggested that a statutory checklist of factors for guiding the court to make decisions in proceedings concerning children should be introduced to the law as recommended by the LRC in its Report on Child Custody and Access. While noting the pros of putting in place the checklist, we are concerned that such factors may change over time. If a checklist is introduced to 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.

13. In fact, 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 to be considered may be flexibly adjusted and updated in view of the latest social developments without the need to intiate another legislative process. On balance, we consider a non-statutory checklist more flexible and advisable.

Suggestion that the threshold of application to the court to remove guardians in the proposed new section 8A(2) be lowered

14. Though not a statutory requirement under the existing GMO or the Bill, it would be in the best interests of a minor if his parents can communicate and agree with each other on the appointment of guardian for the minor. We believe that the majority of parents would do so (some may even choose to make joint appointment) to ensure the

certainty and enforceability of the guardianship arrangements for their children. Having said that, we understand that there may also be cases where parents cannot reach consensus on the appointment of guardians. To deal with the potential conflicts under such scenarios, we have put in place provisions in the Bill for surviving parents and guardians to apply to the court for direction to resolve their disputes or for removing the other guardian.

15. The new 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 was suggestion that the threshold of the application under the new section 8A(2) may 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".

16. The new section 8A(2) is introduced to the Bill upon the removal of the existing sections 6(2) and 6(3) of GMO. The existing section 6(2) of GMO 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 the custody of the minor, the guardian may apply to the court. The court may order–

(a) the surviving parent to remain 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.

17. LRC recommended that the surviving parent's veto right in the existing section 6(2) of GMO should be removed (Recommendation 3). The new section 8A(2) of the Bill has been proposed 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).

18. When two or more guardians acting as joint guardians of a minor are unable to agree on questions affecting the welfare of the minor, any of them may continue to apply to the court for its direction as at

present under the existing section 9 of GMO[2] which will not be repealed or amended by the current Bill. In order words, the threshold of application to the court for resolution of disputes between guardians will **not** be raised by the Bill.

19. In addition, the new 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 can apply under the new section 8E to remove a guardian if he or she can satisfy the court that it is for the best interests of the minor.

20. We believe that the new sections 8A(2), 8E and the existing section 9 have already accorded different ways for joint guardians to resolve their disputes and the court is empowered to make appropriate orders so as to protect the affected minor.

Suggestion that a third party be allowed to apply for custody and maintenance orders in respect of a minor under section 10 of GMO

21. The long title of the Bill is –

> *"To amend the Guardianship of Minors Ordinance to simplify the legal arrangements for the appointment and removal of a guardian, to provide for the revocation and disclaimer of appointment as a guardian, the assumption of guardianship and the resolution of disputes between guardians; and to provide for connected matters."*

22. As stated in the Legislative Council brief submitted to this Bills Committee on 31 May 2011 (File Ref.: LWB CR 1/4841/02) and the explanatory memorandum of the Bill, the object of the Bill is to amend GMO to implement the recommendations of LRC's Report on Guardianship of Children, which are solely about the guardianship arrangements of children.

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[2] 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.".

23. The suggestion to amend the existing section 10 of GMO to remove the limitation on the right of third parties to apply to the court for custody and maintenance in respect of a minor is derived from Recommendation 28 of the Report on Child Custody and Access published by the LRC in 2005. The Report on Child Custody and Access, its Recommendation 28 in particular, deals with issues relating to the custody and access of children, which are different from guardianship in both legal concept and court procedure.

24. Since the object and purpose of the Bill is on guardianship arrangement while the suggested amendment is related to custody matters, the Administration's view is that the suggested amendment is outside the scope of the Bill.

25. That said, we note the need to consider the recommendation in detail in a separate context. As mentioned in the Bills Committee meeting, the Administration will soon launch a public consultation exercise to gauge public views on the recommendations made in the Report on Child Custody and Access 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 (Recommendation 28) will be included in the consultation exercise.

Measures to deal with conflicts arising from dual appointments by both parents under different scenarios

26. As noted in paragraph 14 above, parents are encouraged to communicate and agree on the appointment of guardians for their children. They may also choose to make joint appointments. In the event where parents cannot reach a consensus on the appointment of guardians, each parent may appoint a guardian for the same minor under the new section 6 of the Bill (thereafter referred to as 'dual appointments').

27. The current Bill contains provisions which 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.

Whether and when the appointment should take effect

28. The new sections 7 and 8 of the Bill set out when guardianship takes effect based on the recommendation of LRC's Report (Recommendation 5). 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/she can assume guardianship after the death of the appointing parent or appointing guardian under 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 on-going issues affecting the welfare of the minor after the appointment takes effect

29. As stated in paragraph 15 – 20 above, the new sections 8A(2), 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. The welfare principle applies.

30. The new provisions of the Bill mentioned in paragraphs 28 and 29 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 the Ordinance. With these provisions in

place, we believe that conflicts arising from dual appointments by both parents could be properly and adequately dealt with.

Labour and Welfare Bureau
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