

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

**Administration's Response to Issues Raised by Members
at the Bills Committee Meeting held on 6 July 2011**

*Supplementary information in relation to
the guardianship arrangements for children under different situations*

Purpose

As requested by Members of the Bills Committee on Guardianship of Minors (Amendment) Bill 2011 (the Bill) at the meeting held on 6 July 2011, this paper provides supplementary information on –

- (a) the mechanisms for appointing guardians for minors or making a minor a ward of the court under the Guardianship of Minors Ordinances (the GMO) (Cap. 13), the Protection of Children and Juveniles Ordinance (PCJO) (Cap. 213) and the High Court Ordinance (HCO) (Cap. 4); and
- (b) the guardianship arrangements for minors under different situations.

The mechanisms for guardian appointment and wardship arrangement under the existing law

The GMO

2. The GMO provides for the appointment of guardians to act after one or both of the parents of a minor die(s). Anyone can be appointed as guardian for any minor under the GMO. Under the GMO, guardians can be appointed by parents of minors. The appointment of guardian by parents is a private arrangement which does not require registration with the court or any government authority. Besides, the GMO also provides for the court to appoint guardians for a minor on its own motion or on application by any person after one or both of the minor's parents die(s)

in a number of prescribed situations, including the following –

- (a) under section 5, on the death of a parent of a minor, the court may, if it thinks fit, appoint a guardian for the minor –
 - (i) where no guardian has been appointed by the deceased parent; or
 - (ii) in the event of the death or refusal to act of the guardian or guardians appointed by the deceased parent;
- (b) under section 7, where a minor has no parent, no guardian of the person, and no other person having parental rights with respect to him, the court, on the application of any person, may, if it thinks fit, appoint the applicant to be the guardian of the minor; and
- (c) under section 8, the Court of First Instance may, in its discretion, on being satisfied that it is for the welfare of the minor, remove from his office any testamentary guardian or any guardian appointed or acting by virtue of the GMO, and may also, if it deems it to be for the welfare of the minor, appoint another guardian in place of the guardian so removed.

The PCJO

3. The PCJO (section 34(1)) provides for the appointment of the Director of Social Welfare as the guardian for minors in need of care or protection¹. The appointment is made by the court on its own motion or

¹ For the purposes of the PCJO, a child or juvenile in need of care or protection means a child or juvenile –

- (a) who has been or is being assaulted, ill-treated, neglected or sexually abused; or
- (b) whose health, development or welfare has been or is being neglected or avoidably impaired; or
- (c) whose health, development or welfare appears likely to be neglected or avoidably impaired; or
- (d) who is beyond control, to the extent that harm may be caused to him or to others.

and who requires care or protection (s.34(2) of the PCJO).

upon the application of the Director of Social Welfare or any police officer. Unlike the GMO, appointment of guardian under the PCJO can take effect even if both parents of the minor are still alive. Apart from appointing the Director of Social Welfare to be the legal guardian of the minor, the court may also take the following actions in respect of a child or juvenile in need of care or protection –

- (a) commit him to the care of any person whether a relative or not, who is willing to undertake the care of him, or of any institution which is so willing; or
- (b) order his parent or guardian to enter into recognizance to exercise proper care and guardianship; or
- (c) without making such order or in addition to making an order under (a) or (b) above, make an order placing him for a specified period of not exceeding three years under the supervision of a person appointed for the purpose by the court.

The HCO

4. As set out in section 26 of the HCO and Rule 90 of the Rules of the High Court (Cap. 4A), the Court of First Instance may, on its own motion or on application of any interested party, make any minor a ward of the court. Similar to the appointment of guardian under the PCJO, the power of the court to make a minor its ward can be exercised even if both parents of the child are still alive.

5. Once warded, the minor will come under the guardianship of the court which, in theory, has an unrestricted power to do whatever is necessary for the welfare of the minor. No major decisions affecting the child, including the consent to marriage, adoption, surgery and education can be made without the consent of the judge. The court usually delegates actual care and control of the ward to another person.

6. A table summarising the existing mechanisms for guardian appointment and wardship arrangement under the GMO, PCJO and HCO is provided at **Annex A** for Members' reference.

Guardianship arrangement for children under different situations

Guardianship arrangement when parents who have appointed guardians for children under the GMO die

7. Under the existing legislative framework, if the deceased parent has appointed a guardian for the minor before his death, the guardian will assume guardianship automatically on the death of the appointing parent in all cases² and will act jointly with the surviving parent of the child, if any.

8. As recommended by the Law Reform Commission of Hong Kong (LRC) in its Report on Guardianship of Children, if the Bill is enacted, the arrangements for guardianship to take effect will be different. Pursuant to the proposed new section 7 under Clause 4 of the Bill, a person appointed by a parent or guardian as the guardian of a minor will only assume guardianship over the minor automatically on the death of the appointing parent if –

- (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 his or her death and the minor does not have any surviving parent or surviving guardian when the appointing parent or appointing guardian dies.

In other cases, the guardian will need to apply to the court to assume guardianship over the child.

9. In any case, if the court considers it appropriate and/or necessary, it may, on its own motion or on application by any person, appoint a guardian for the minor in the situations prescribed in the GMO set out in paragraph 2 above. Besides, the court may also make guardianship/wardship arrangements for the minor pursuant to the PCJO

² This includes situations where it may not be preferable for a guardian appointment to take effect automatically upon the death of the appointing parent, such as when the appointing parent did not live with and take care of the minor before his/her death, and when the appointing parent is the non-custodial parent, etc..

and HCO as set out in paragraphs 3 to 6 above, even if the minor still has a surviving parent or guardian.

10. The guardianship arrangements for various situations when parents who have appointed guardians for their children under the GMO die, both under the existing legislative framework and after the commencement of the Bill (if enacted), are set out in **Annex B**.

Guardianship arrangements when parents who have not appointed guardians for their children under the GMO die

11. If a parent of a minor who has not made guardian appointment for his child under the GMO dies, the surviving parent, if any, will be the guardian of the child pursuant to section 5 of the GMO. If both parents die, the child will not have any legal guardian, unless the court appoints a guardian for him under the GMO or PCJO or makes him its ward under the HCO.

12. To ensure that these children will be in proper care, social workers will provide support and assistance as appropriate in meeting their emotional and welfare needs. For those minors placed under court orders, social workers of SWD will provide statutory supervision and maintain regular contacts with them. Through proper assistance and guidance, the general welfare of the minors, including emotional / financial / residential care needs, study / career plan, interpersonal relationship, etc. will be addressed. It should however be noted that, in practice, intervention of SWD and the court may not be necessary in all cases, provided that the concerned child are properly cared for by the surviving parent or other persons (e.g. relatives).

Guardianship arrangement for children whose parents are still alive

13. There may be cases where guardianship arrangement is necessary for minors although their parents are still alive. Examples include, among others, that the parents of the minors are missing, in jail or, for certain reasons, not able/willing to perform their responsibility for the care and control of the child. The mechanisms for guardian appointment under the GMO are not applicable since guardians appointed under the GMO can only assume guardianship after one or both of the

parents die. In such cases, the guardianship/wardship arrangement under the PCJO and HCO may be invoked.

Guardianship arrangement for “Type II babies” whose parents are Mainland citizens residing in the Mainland

14. From time to time, there have been reports that some “Type II babies” in Hong Kong are not properly cared for by their parents who are residing in the Mainland. The mechanisms for guardian appointment under the GMO are not applicable to their cases as their parents are still alive. Similar to the cases mentioned in paragraph 3 above, the PCJO and HCO may be invoked to arrange for the appointment of guardians or making them a ward of the court where the court considers it necessary to protect the minor.

15. Parents always have the primary responsibilities to take care of their children. For “Type II babies” whose parents are Mainland citizens not residing in Hong Kong, the parents should seriously consider the long-term child welfare plan including the psychological impact on the infants / children as well as the availability of suitable carers who can assist in childcare and provide parental guidance before arranging their children to stay in Hong Kong. If “Type II babies” are left to stay in Hong Kong without receiving proper care, social workers will thoroughly assess their situation and provide appropriate services based on individual circumstances, including residential care service, financial support as well as considering the application of court orders under the PCJO to safeguard their best interests.

Labour and Welfare Bureau
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Summary of the mechanisms for guardian appointment and wardship under the existing laws

	The Guardianship of Minors Ordinance (Cap. 13)	The Protection of Children and Juveniles Ordinance (Cap. 213)	The High Court Ordinance(Cap. 4)
Who can appoint the guardian / make the child a ward of the court	<ul style="list-style-type: none"> • Parents of minors; and • The court, on its own motion or upon the application of any person under the prescribed condition. 	<ul style="list-style-type: none"> • The court, on its own motion or upon the application of the Director of Social Welfare or any police officer. 	<ul style="list-style-type: none"> • The court
Guardianship/ wardship arrangement made for whom	<ul style="list-style-type: none"> • Any minor 	<ul style="list-style-type: none"> • Children or juveniles in need of care or protection³ 	<ul style="list-style-type: none"> • Any minor

³ For the purposes of the PCJO, a child or juvenile in need of care or protection means a child or juvenile –

- (a) who has been or is being assaulted, ill-treated, neglected or sexually abused; or
- (b) whose health, development or welfare has been or is being neglected or avoidably impaired; or
- (c) whose health, development or welfare appears likely to be neglected or avoidably impaired; or
- (d) who is beyond control, to the extent that harm may be caused to him or to others, and who requires care or protection

	The Guardianship of Minors Ordinance (Cap. 13)	The Protection of Children and Juveniles Ordinance (Cap. 213)	The High Court Ordinance(Cap. 4)
Who can be the guardian	<ul style="list-style-type: none"> • Any persons 	<ul style="list-style-type: none"> • The Director of Social Welfare 	<ul style="list-style-type: none"> • The court
Remarks	<ul style="list-style-type: none"> • Guardians appointed can only assume guardianship after one or both of the parents of a minor die(s). • The appointment of guardian by parents is a private arrangement which does not require registration with the court or any government authority. 	<ul style="list-style-type: none"> • The Director of Social Welfare can be appointed as guardian for “child or juvenile in need of care or protection” even if both parents of the minor are still alive. 	<ul style="list-style-type: none"> • The power of the court to make a minor its ward can be exercised when the court considers it necessary to protect the minor, regardless of whether the parents are dead or are still alive.

**Guardianship arrangements for various situations under which parents
who had appointed guardians for their children under the Guardianship of Minors Ordinance die**

A. Non-divorce cases and both parents live together with the minor

Situations	Arrangements under the existing legislative framework	Arrangements after the commencement of the Bill
A1. Both parents die at the same time	<ul style="list-style-type: none"> • The guardian appointed by the deceased parents (who may not be aware of the appointment) will assume office automatically. If both parents have appointed guardians, the guardians will act together as joint guardians. • Given that the minor no longer has a parent, a guardian, or any other person having parental rights with respect to him, any person can apply to the court to be the guardian of the minor under section 7 of the GMO. 	<ul style="list-style-type: none"> • Same as existing arrangements under the new section 7(b), except that the guardian should have to accept office before the appointment can take effect under the new section 6(6). • Same as existing arrangement under the new section 8D.

Situations	Arrangements under the existing legislative framework	Arrangements after the commencement of the Bill
A2. One of the parent dies	<ul style="list-style-type: none"> The guardian appointed by the deceased parents (who may not be aware of the appointment) will assume office automatically and will act jointly with the surviving parent as joint guardians. 	<ul style="list-style-type: none"> According to the new section 8, the guardian may apply to the court to assume guardianship over the minor. He may also choose not to apply to the court to assume guardianship if he believes that it would be in the best interests of the minor if the surviving parent acts as the minor's sole guardian.

B. Divorce cases and one of the parents having the custody of the child

Situations	Arrangements under the existing legislative framework	Arrangements after the commencement of the Bill
B1. Both parents die at the same time	<ul style="list-style-type: none"> • The guardian appointed by both deceased parents (who may not be aware of the appointment) will assume office automatically. If both parents have appointed guardians, the guardians will act together as joint guardians. • Given that the minor no longer has a parent, a guardian, or any other person having parental rights with respect to him, any person can apply to the court to be the guardian of the minor under section 7 of the GMO. 	<ul style="list-style-type: none"> • Same as existing arrangements under the new section 7(a), except that the guardian should have to accept office before the appointment can take effect under the new section 6(6). • Same as existing arrangement under the new section 8D.
B2. Only the custodial parent dies	<ul style="list-style-type: none"> • The guardian appointed by the custodial parent (who may not be aware of the appointment) will assume office automatically. He will act with the non-custodial parent as joint guardians. 	<ul style="list-style-type: none"> • Same as existing arrangements under the new section 7(a), except that the guardian should have to accept office before the appointment can take effect under the new section 6(6).

Situations	Arrangements under the existing legislative framework	Arrangements after the commencement of the Bill
	<ul style="list-style-type: none"> A person who is not the parent of the minor has no standing to apply to the court to be the guardian of the minor under section 7, since the minor still has a surviving parent (the non-custodial parent). 	<ul style="list-style-type: none"> Any person can apply to the court to be the guardian of the minor under the new section 8D.
B3. Only the non-custodial parent dies	<ul style="list-style-type: none"> The guardian appointed by the non-custodial parent (who may not be aware of the appointment) will assume office automatically. He will act with the custodial parent as joint guardians. 	<ul style="list-style-type: none"> According to the new section 8, the guardian appointed by the non-custodial parent may apply to the court to assume guardianship over the minor. If he chooses not to do so, or if the court dismisses his application, the custodial parent will act as the sole guardian and continue to have the right to “care and control” and to make all important decisions affecting the minor alone.

C. Non-divorce case but one of the parents does not live with the minor

Situations	Arrangements under the existing legislative framework	Arrangements after the commencement of the Bill
<p>C1. Both parents die at the same time</p>	<ul style="list-style-type: none"> • The guardian appointed by the deceased parents (who may not be aware of the appointment) will assume office automatically. If both parents have appointed guardians, the guardians will act together as joint guardians. • Given that the minor no longer has a parent, a guardian, or any other person having parental rights with respect to him, any person can apply to the court to be the guardian of the minor under section 7 of the GMO. 	<ul style="list-style-type: none"> • According to the new section 7(b), the guardian appointed by the parent who lived with the minor immediately before his death will assume office automatically. The guardian appointed by the non-custodial parent may apply to the court to assume guardianship over the minor in accordance with the new section 8. • Same as the existing arrangement under the new section 8D.

Situations	Arrangements under the existing legislative framework	Arrangements after the commencement of the Bill
C2. Only the parent who lives with the child dies	<ul style="list-style-type: none"> The guardian appointed by the deceased parent (who may not be aware of the appointment) will assume office automatically. He will act with the surviving parent as joint guardians. 	<ul style="list-style-type: none"> According to the new section 8, the guardian may apply to the court to assume guardianship over the minor. The court will decide whether or not, and if so, when, to let the guardian assume guardianship taking into consideration the circumstances of each individual cases.
C3. Only the parent who does not live with the child dies	<ul style="list-style-type: none"> Ditto. 	<ul style="list-style-type: none"> Ditto.

D. Non-divorced cases and neither parent lives with the child (e.g. both are missing, or are residing outside Hong Kong)

Situations	Arrangements under the existing legislative framework	Arrangements after the commencement of the Bill
Both parents die at the same time	<ul style="list-style-type: none"> • The guardian (who may not be aware of the appointment) will assume office automatically. If both parents have appointed guardians, the guardians will act together as joint guardians. • Given that the minor no longer has a parent, a guardian, or any other person having parental rights with respect to him, any person can apply to the court to be the guardian of the minor under section 7 of the GMO. 	<ul style="list-style-type: none"> • The guardian will not assume office automatically. Under the new section 8, the guardian may apply to the court to assume guardianship over the minor. • Given that the minor no longer has a parent, a guardian, or any other person having parental rights with respect to him, any person can apply to the court to be the guardian of the minor under section 8D.
Only one of the parent dies, the other survives	<ul style="list-style-type: none"> • The guardian appointed by the deceased parents (who may not be aware of the appointment) will assume office automatically and will act jointly with the surviving parent as joint guardians. 	<ul style="list-style-type: none"> • The guardian will not assume office automatically. Under the new section 8, the guardian may apply to the court to assume guardianship over the minor.