

政府總部  
勞工及福利局  
香港金鐘添美道  
政府總部



**LABOUR AND WELFARE BUREAU  
GOVERNMENT SECRETARIAT**

Central Government Offices  
Tim Mei Avenue  
Admiralty, Hong Kong

本函檔號 Our Ref.: LWB CR 1/4841/02

電話號碼 Tel No.: (852) 2810 3931

來函檔號 Your Ref.:

傳真號碼 Fax No.: (852) 2524 7635

**(Urgent by Fax: 2877 5029)**

9 November 2011

Ms Clara TAM  
Assistant Legal Adviser  
Legal Service Division  
Legislative Council Secretariat  
Legislative Council Complex  
1 Legislative Council Road  
Central  
Hong Kong

Dear Ms Tam,

### **Guardianship of Minors (Amendment) Bill 2011**

Thank you for your letter of 13 July 2011 regarding the Guardianship of Minors (Amendment) Bill 2011 (the Bill). Our clarifications on and response to the various issues raised in your letter are provided below –

#### **Clause 4**

*Proposed section 5 – the rights of surviving parents as to guardianship subject to section 19(4) of the Matrimonial Proceedings and Property Ordinance (Cap. 192)*

- (a) The proposed section 5 states a general rule that on the death of a parent of a minor, the surviving parent is the guardian of the minor as of right. The existing section 19(4) of the Matrimonial Proceedings and Property Ordinance lays down the specific rule that the surviving parent shall not

be entitled as of right to the custody or the guardianship of the child of the family upon the death of custodial parent if the court has made an order in the decree of divorce or judicial separation that he/she was unfit to have custody of the child.

On statutory interpretation, the general rule under the proposed section 5 will be subject to the specific rule laid down in section 19(4) of the Matrimonial Proceedings and Property Ordinance. For clarification sake, we will propose amendments to put it beyond doubt in the Bill.

*Proposed section 6 – prescription of wording sufficient for expressing the intention of appointing a guardian*

- (b) The proposed section 6(3) of the Bill has already set out clearly the requirements for appointing guardian that the appointment must be made in writing, dated and
  - (i) 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
  - (ii) attested by two witnesses.

The intention of a parent/guardian to appoint a guardian for a minor can be demonstrated by his/her compliance with the requirement in the proposed section 6(3) of the Bill.

As explained in the Administration's paper (LC Paper No. CB(2)178/11-12(01)) which provides the Administration's response to the issues raised by deputations at the Bills Committee meeting held on 27 July 2011, the requirements for appointing guardian in the proposed section 6(3) of the Bill were introduced based on the recommendation of the Law Reform Commission of Hong Kong (LRC) in its Report on Guardianship of Children (LRC's Report). 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. 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.

In view of the above, we do **not** intend to include a provision resembling section 5(2) of the Wills Ordinance in the Bill to the effect that a guardian appointment may be regarded as valid as long as the intention of the appointment can be demonstrated, even if the appointing requirements in the proposed section 6(3) are not fulfilled. Parents/guardians who wish to appoint guardians for their children should comply with the requirements in the proposed section 6(3) as recommended by the LRC's Report.

Based on the above reasons, we do not consider it necessary to include a provision in the Bill to prescribe how the intention of appointing a guardian can be demonstrated. In case there is any 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.

*Proposed section 6 – the use of the term “views of the minor”*

- (c) The term “views of the minor”, which is adopted in the English text of the proposed section 6(5), is more in conformity with the United Nations Convention on the Rights of the Child than the term “wishes of the minor”. It is also the term recommended to be adopted by the Law Society of Hong Kong which attended the Bills Committee meeting on 27 July 2011. We intend to retain the term “views of the minor” in the proposed section 6(5).

As explained in the Administration's paper (LC Paper No. CB(2)178/11-12(01)), in the existing section 3 of Guardianship of Minors Ordinance (GMO), the term “wishes of the minor” is used under more or less the same meaning. For consistency sake, we will propose amendments to replace the term with “views of the minor” in the existing section 3 of GMO.

*Proposed section 7 – Automatic assumption of guardianship in cases where the appointing parent had a joint custody over the child*

- (d) When a joint custody order is granted, both parents retain the right to decide on important matters affecting the upbringing of the child although the physical care and control is usually granted to only one of them. The parent who lives with the child should consult and seek agreement with the other parent on all major issues about the child.

In cases where a joint custody order is granted to divorced parents, the guardian appointed by either parent will automatically take effect after the death of the appointing parent in accordance with section 7(a), even if the latter does not live with the child immediately before dying. In such scenarios, the surviving parent should continue to work and cooperate with the guardian who acts for the deceased parent on major issues about the minor. In other words, the existing rights and responsibilities of the surviving parent over the minor will not be affected.

If there is any conflict between the surviving parent and the guardian, either of them may apply to the court for direction to resolve their disputes or for removing the other guardian in accordance with the new sections 8A(2), 8E and the existing section 9.

## **Clause 6 and 7**

### *Addition of the reference to “section 9” to the existing section 11 of the GMO*

- (e) There may be a situation that the surviving parent and the guardian appointed by the deceased parent are appointed by the court to be joint guardians of a minor. If there is any dispute between them, they could resort to court under the existing section 9 of the GMO.


The existing section 11 of the GMO provides for the types of custody and maintenance orders that the court may make when it orders a person to be the sole guardian of a minor to the exclusion of the surviving parent. Since the court could make any order as it may think proper to resolve the matters in difference between the joint guardians under the existing section 9, there is a need to link it with the existing section 11 so that in case the court order the guardian to act to the exclusion of the surviving parent, the court could make the ancillary orders under the existing section 11.

### *Amendments to inclusive masculine expressions*

- (f) Clause 6(2) and 7(2) of the Bill respectively propose to substitute “his” with “his or her” in the English text of the existing section 11(1)(a)(ii) and 12(a)(ii) of the GMO. The word “his” is, however, still in use to include feminine gender in other sections of the GMO. To avoid doubt, we will amend the other inclusive masculine expressions by way of a revision order prepared by the Department of Justice pursuant to section

17(i)<sup>(1)</sup> of the Legislation Publication Ordinance (Ordinance number 13 of 2011).

Yours sincerely,



(Ms Wendy LEUNG)  
for Secretary for Labour and Welfare

c.c.

DoJ

(Attn: Ms Karmen KWOK)

(Fax: 2869 1302)

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<sup>(1)</sup> Section 17(i) of the Legislation Publication Ordinance (13 of 2011) states that: “The Secretary for Justice may, by order in the Gazette, replace a word or expression in an Ordinance indicating gender or that could be taken to indicate gender by a gender-neutral word or expression.”