

A BILL

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.

Enacted by the Legislative Council.

1. Short title and commencement

- (1) This Ordinance may be cited as the Guardianship of Minors (Amendment) Ordinance 2011.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.

2. Guardianship of Minors Ordinance amended

The Guardianship of Minors Ordinance (Cap. 13) is amended as set out in sections 3 to 8.

3. Section 2 amended (Interpretation)

- (1) Section 2, English text, definition of *parent*—
Repeal the full stop

Clause 3

Substitute a semicolon.

(2) Section 2—

Add in alphabetical order

“*custody order* (管養令) means an order made—

- (a) under section 10(1), 11(1)(a), 12(a) or 13(1)(b);
- (b) under section 5(1)(b) of the Separation and Maintenance Orders Ordinance (Cap. 16);
- (c) under section 19 or 20 of the Matrimonial Proceedings and Property Ordinance (Cap. 192);
or
- (d) by the Court of First Instance in the exercise of its jurisdiction relating to wardship so far as it gives the care and control of a minor to any person;

domestic proceedings (家事法律程序) means any proceedings under the—

- (a) Separation and Maintenance Orders Ordinance (Cap. 16);
- (b) Matrimonial Causes Ordinance (Cap. 179);
- (c) Domestic and Cohabitation Relationships Violence Ordinance (Cap. 189);
- (d) Matrimonial Proceedings and Property Ordinance (Cap. 192);
- (e) Adoption Ordinance (Cap. 290);
- (f) Parent and Child Ordinance (Cap. 429); and
- (g) inherent jurisdiction of the Court of First Instance in relation to minors;

will (遺囑) includes a codicil.”.

Clause 4

4. Sections 5 to 8 substituted

Sections 5 to 8—

Repeal the sections

Substitute

“5. Rights of surviving parent as to guardianship

On the death of a parent of a minor, the surviving parent (if any) is the guardian of the minor either alone or jointly with any guardian appointed under this Part.

6. Power of parent and guardian to appoint guardian

- (1) A parent of a minor may appoint any person to be a guardian of the minor after that parent dies.
- (2) A guardian of a minor may appoint any person to be a guardian of the minor after that guardian dies.
- (3) An appointment made under this section must be 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 2 witnesses.
- (4) Despite subsection (3), a parent or guardian may appoint a guardian by a will executed in accordance with section 5 of the Wills Ordinance (Cap. 30).
- (5) In appointing a guardian of a minor, a parent or guardian of the minor must take into account the views of the minor as far as practicable having regard to the minor's age and understanding.

Clause 4

- (6) An appointment made under this section has no effect unless the appointed person accepts the office either expressly or impliedly by conduct.
- (7) An appointment under this section may be made by 2 or more persons acting jointly.

7. When guardianship takes effect automatically

A person appointed by a parent or guardian as the guardian of a minor under section 6 automatically assumes guardianship over the minor on the death of the appointing parent or appointing guardian (as the case may be) 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 dying and the minor does not have any surviving parent or surviving guardian when the appointing parent or appointing guardian dies.

8. Assumption of guardianship by application

Subject to section 7, a person appointed by a parent or guardian as the guardian of a minor under section 6 may, after the appointing parent or appointing guardian dies, apply to the court to assume guardianship over the minor and the court may order the person—

- (a) to act jointly with the surviving parent or surviving guardian;
- (b) to act as the guardian of the minor after the minor no longer has any parent or guardian;
- (c) to act as the guardian of the minor at a time, or after the occurrence of an event, specified by the court;

Clause 4

- (d) to be removed as a guardian; or
- (e) to act as the guardian of the minor to the exclusion of the surviving parent or surviving guardian.

8A. Guardian appointed under section 6 to act jointly with surviving parent or surviving guardian

- (1) Subject to section 8, any guardian appointed under section 6 must act jointly with the surviving parent or surviving guardian (if any) of a minor on assuming guardianship over the minor.
- (2) If the surviving parent or surviving guardian 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 and the court may order—
 - (a) the surviving parent or surviving guardian and the guardian appointed under section 6 to continue to act jointly;
 - (b) the surviving parent or surviving guardian to act as the guardian of the minor to the exclusion of the guardian appointed under section 6; or
 - (c) the guardian appointed under section 6 to act as the guardian of the minor to the exclusion of the surviving parent or surviving guardian.

8B. Revocation of guardian appointment

- (1) An appointment under section 6 revokes an earlier such appointment (including one made in a will) made by the same person in respect of the same minor, unless it is clear that the purpose of the later appointment is to appoint an additional guardian.

Clause 4

- (2) An appointment under section 6 (including one made in a will) is revoked if the person who made the appointment revokes it by a written and dated document that is—
 - (a) signed either by the person who made the appointment or by another person, at the direction, and in the presence, of the person who made the appointment; and
 - (b) attested by 2 witnesses.
- (3) An appointment under section 6 (other than one made in a will) is revoked if, with the intention of revoking the appointment, the person who made it—
 - (a) destroys the document by which it was made; or
 - (b) instructs any other person to destroy the document in the person's presence.
- (4) If an appointment under section 6 is made by 2 or more persons acting jointly—
 - (a) the appointment may be revoked by any of them in accordance with subsection (2) or (3); and
 - (b) the person who revokes the appointment must notify all other persons who jointly made the appointment of the revocation.
- (5) To avoid doubt, an appointment made under section 6 in a will is revoked if the will is revoked.

8C. Guardian may disclaim appointment

- (1) Any guardian who is appointed under section 6 and has accepted the office may at any time before assuming guardianship under section 7 or 8 disclaim the appointment by a written, dated and signed document.

Clause 4

- (2) The guardian must notify the following persons before the disclaimer is to take effect—
 - (a) the executor or administrator of the appointing parent's or appointing guardian's estate under the Probate and Administration Ordinance (Cap. 10);
 - (b) the surviving parent;
 - (c) other guardians.
- (3) If there is no such person as mentioned in subsection (2)(a), (b) and (c) or if they cannot be located, the guardian must notify the Director of Social Welfare of the disclaimer.

8D. Power of court to appoint guardian of minor

- (1) After a parent or guardian of a minor dies, the court may, if it thinks fit, appoint a person to be a guardian of the minor if—
 - (a) no guardian has been appointed by the deceased parent or deceased guardian under section 6;
 - (b) the guardian appointed by the deceased parent or deceased guardian under section 6 or by the court under this section or section 8E dies; or
 - (c) the guardian appointed by the deceased parent or deceased guardian under section 6 has disclaimed the appointment.
- (2) On application by any person, the court may, if it thinks fit, appoint the person to be the guardian of a minor if—
 - (a) the parent or guardian who has a custody order over the minor dies; or
 - (b) the minor does not have any parent, guardian or other person having parental rights with respect to the minor.

Clause 4

- (3) The power to make an appointment under subsection (2) may also be exercised in any domestic proceedings if the court thinks that the appointment should be made even though no application has been made for it.

8E. Removal of guardian

On being satisfied that it is for the welfare of the minor, the court may, in its discretion—

- (a) remove any guardian; and
- (b) appoint another person to replace that guardian.

8F. Guardian appointed by court to act jointly with surviving parent or surviving guardian

- (1) A guardian appointed by the court under section 8D or 8E must act jointly with the surviving parent or surviving guardian (if any) of the minor and must continue to act after the surviving parent or surviving guardian dies.
- (2) If the surviving parent or surviving guardian of a minor has appointed a guardian under section 6, the guardian appointed by the court under section 8D or 8E must act jointly with the guardian appointed by the surviving parent or surviving guardian.

8G. Guardian to have parental rights

A person appointed as the guardian of a minor under this Part has, on assuming guardianship, parental rights with respect to the minor.

Clause 5

8H. Remuneration for guardian

The court may authorize a guardian of a minor to be paid any remuneration for the guardianship service that it thinks fit if—

- (a) the guardian is not a parent of the minor; and
- (b) the minor is a ward of the court.”.

5. Section 9A added

Part III, after section 9—

Add**“9A. Transitional and savings**

(1) In this section—

commencement date (生效日期) means the day on which the Guardianship of Minors (Amendment) Ordinance 2011 (of 2011) comes into operation;

pre-amended Ordinance (《未修訂條例》) means this Ordinance as in force immediately before the commencement date.

(2) The Guardianship of Minors (Amendment) Ordinance 2011 (of 2011) does not affect any proceedings under the pre-amended Ordinance that are pending immediately before the commencement date.

(3) Any appointment of a person as guardian of a minor that was made under the pre-amended Ordinance, or under the Court of First Instance’s inherent jurisdiction with respect to the minor, and is effective immediately before the commencement date is, on and after that date, taken to be an appointment made and having effect under this Ordinance.

Clause 6

- (4) Any appointment of a person as guardian of a minor that was made under the pre-amended Ordinance and has not taken effect immediately before the commencement date is, on and after that date, to be governed by this Ordinance.
- (5) To avoid doubt, any guardian appointed under the pre-amended Ordinance has the same rights and duties as a guardian appointed under this Ordinance.”.

6. Section 11 amended (Orders for custody and maintenance where person is guardian to exclusion of surviving parent)

- (1) Section 11(1)—

Repeal

“section 6(3)(b)(ii) that a person shall be the sole guardian of a minor to the exclusion of his surviving parent”

Substitute

“section 8(e), 8A(2)(c) or 9 that a person is to act as the guardian of a minor to the exclusion of the minor’s surviving parent”.

- (2) Section 11(1)(a)(ii), English text—

Repeal

“his”

Substitute

“his or her”.

7. Section 12 amended (Orders for custody and maintenance where joint guardians disagree)

- (1) Section 12—

Repeal

“section 9”

Clause 8

Substitute

“section 8(a) or (c), 8A(2)(a) or 9”.

(2) Section 12(a)(ii), English text—

Repeal

“his”

Substitute

“his or her”.

8. Section 21 amended (Application to illegitimate children)

Section 21, after “7”—

Add

“, 8D”.

Explanatory Memorandum

The object of this Bill is to amend the Guardianship of Minors Ordinance (Cap. 13) (*principal Ordinance*) to implement certain recommendations of the Report on Guardianship of Children published by the Law Reform Commission of Hong Kong.

2. Clause 1 provides for the short title and commencement. Clause 3 adds 3 new definitions to section 2 of the principal Ordinance.
3. Clause 4 substitutes sections 5 to 8 of the principal Ordinance with the new sections 5 to 8H.
 - (a) The new section 5 states that on the death of a parent of a minor, the surviving parent is the guardian of the minor as of right.
 - (b) The new section 6 provides for the parent or guardian of a minor to appoint a guardian.
 - (c) The new section 7 sets out when guardianship is to take effect automatically.
 - (d) The new section 8 provides that a guardian may apply to the court to assume guardianship over a minor after the appointing parent or appointing guardian dies.
 - (e) The new section 8A provides that the guardian appointed under the new section 6 has to act jointly with the surviving parent or surviving guardian. It also provides that the surviving parent or surviving guardian and the guardian appointed under the new section 6 may apply to the court if they think the other is unfit to have guardianship over the minor.
 - (f) The new section 8B sets out how an appointment made under the new section 6 can be revoked.

Explanatory Memorandum

Paragraph 4

- (g) The new section 8C provides that a guardian may at any time before assuming guardianship over a minor, disclaim the appointment by a written, dated and signed document.
 - (h) The new section 8D specifies the circumstances where the court may appoint a guardian of a minor.
 - (i) The new section 8E provides that the court may remove any guardian and appoint another guardian in his or her place if it is satisfied that it is for the minor's welfare.
 - (j) The new section 8F provides that the guardian appointed by the court under the new section 8D or 8E has to act jointly with the surviving parent or surviving guardian.
 - (k) The new section 8G stipulates that a guardian is to have parental rights with respect to the minor.
 - (l) The new section 8H specifies the circumstances where a guardian may be authorized by the court to be remunerated.
4. Clause 5 adds the new section 9A of the principal Ordinance to provide for transitional and savings provisions.
 5. Clause 6 amends section 11 of the principal Ordinance to provide for the supplementary powers of the court when it makes an order under the new section 8(e), 8A(2)(c) or 9 that a person is to act as the guardian of a minor to the exclusion of the surviving parent.
 6. Clause 7 amends section 12 of the principal Ordinance to provide for the supplementary powers of the court when it makes an order under the new section 8(a) or (c), 8A(2)(a) or 9 that the surviving parent is to act jointly with the guardian appointed under the new section 6 or appointed by the court.

Explanatory Memorandum

Paragraph 7

7. Clause 8 amends section 21 of the principal Ordinance so that it is applicable to the new section 8D.