

# **THE PROPOSED LEGISLATION CHILDREN PROCEEDINGS (PARENTAL RESPONSIBILITY) BILL –**

## **THE LAW REFORM COMMISSION REPORT ON CHILD CUSTODY AND ACCESS**



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**Grace Wong**

**Christine M. Koo & Ip, Solicitors & Notaries**

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**PART 1- OVERVIEW OF THE PROPOSED REFORM**

**PART 2- PARENTAL RESPONSIBILITY MODEL –**

**(Underlying Model/Principle – “the Best Interest  
Principle”**

**PART 3- MAJOR PROVISIONS OF THE PROPOSED  
LEGISLATION**



## **PART 1 - OVERVIEW OF THE PROPOSED REFORM**

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- 1. Reform and consolidate the law relating to responsibilities and rights of parents for children in relation to those proceedings involving children including repeal in the existing Guardianship of Minors Ordinance, Cap. 13 by a New Ordinance.**
- 2. The Law Reform Commission of Hong Kong (“LRC”) on 7<sup>th</sup> March 2005 released a Report on Child Custody and Access (<http://www.hkreform.gov.hk>) – focusing on the introduction a new “joint parental responsibility model”, which significantly copied from the English law.**



### **3. Overseas jurisdictions – England, Scotland and Australia**

**\*England – Children Act 1989 came into force on 14<sup>th</sup> October 1991**

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#### **Adopting model approach - “Joint parental responsibility model”**

- - Existing law refers to “parental rights and duties”.
- Parent- child relationship – “rights” and “authority”
- - New wording is to give statutory recognition in emphasis from “rights over children” to “responsibility for children”
- - Focusing on the continuing Parental Responsibility of both parents, rather than emphasizing their individual parental rights.



4. **Following the public consultation on the Report from December 2011 to April 2012 on “Child Custody and Access”, Labour and Welfare Bureau (“LWB”) made recommendations which inter alia include:-**

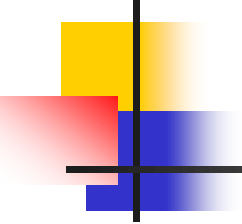
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**(i) replacing the concept of “guardianship” with concept of “parental responsibility”**

**(ii) introducing checklist lists covering :-**

**Parental responsibility**

**Major decisions concerning the child’s upbringing that require express consent of or notification to the other parent.**

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- (iii) new range of court orders to replace “Custody” and “Access” under the “child arrangements order”**
  - (iv) removal of limitation on the right of interested 3<sup>rd</sup> party to apply for Court order affecting children**
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**(v) Others:-**

- 1. increase of powers and new guidelines to the Courts to deal with custody and access which involved domestic violence;**
- 2. better mechanisms for the views of children to be taken into account in family proceedings which effect them;**
- 3. amending the legislation governing Care and (or) Protection proceedings so that the children’s rights can be better protected;**
- 4. Minimum age for marriage without parental consent be reduced from 21 to 18 years.**

# **PART 2 -**

## **PARENTAL RESPONSIBILITY MODEL (“the Model”)**

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- 1. Underlying the Model is “the Best Interests Principle”.**
  
- 2. The court must regard the best interests of a child as the paramount consideration when dealing with the following children proceedings:-**
  - a. the making of a child arrangements order**
  - b. the upbringing of a child**
  - c. the administration of any property belonging to or held in trust for a child**
  - d. the application of the income of the property referred to in c. above.**
  
- Statutory Checklist in determining a child’s best interest (Appendix -1)**

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- 3. Continuing responsibilities of both parents towards their children rather than their individual parental rights**
    - Lists of Responsibilities and Rights of a parent (Appendix – 2)**
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- 4. The child's right to enjoy a continuing relationship with both parents (if this is in child's best interest)**

- 5. Recognizing the importance of maintaining the direct involvement of both parents in the child's life as far as possible.**

- 6. Both parents continue to be actively involved in the child's life and in making major decisions affecting the child. (Appendix – 3)**

- 7. Acquisition of parental responsibility by father if the father and mother were not married to each other at the time the child's birth.**

## PART 3

### - MAJOR PROVISIONS OF THE PROPOSED LEGISLATION

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#### 1. Preliminary

1.1 Definition - “child” - under the age of 18 years.  
(s.3 of Cap. 1 – “infant” or “ minor” is defined – a person has not attained the age of 18 years).

1.2 Parental responsibility for the child would cease when he reaches 18 year.



## **2. General Principles**

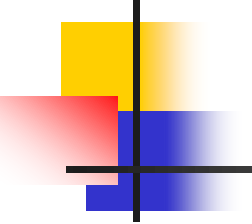
### **2.1 Statutory list in determining a child's best interest. (Appendix – 1)**

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### **2.2 Parental responsibility for children**

- 1. Replace the concept of “guardianship” under the existing law with “parental responsibility”.**
- 2. One who has “parental responsibility” is someone with all with all the “responsibilities” and “rights” for the child. That “parental right” is to facilitate the parents to fulfill their “parental responsibility”. (Appendix – 2)**

## **2.3 Acquisition of parental responsibility for an unmarried father**



**- An unmarried father can acquire parental responsibility simply by signing the birth register. (*The current law must apply for a court order*)**

## **2.4 Consent or notification required certain acts relating to children**

- 1. Major decisions of the child (being a decision of long term consequence for the child's health, development and general welfare) be made jointly by the parents. (Appendix – 3).**



**2. Day-to-day decisions do not need notification to / consent of the other parent.**

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**3. Written consent of every other person who has parental responsibility for the child or obtain leave of the court:-**

**a. causing the child to be known by a new surname;**

**b. removing the child out of Hong Kong for more than 1 month; or**

**c. removing the child permanently out of Hong Kong.**

### **3. Appointment and Powers of Guardians Taking Effect on or after the Death of Parent or Guardian**



**3.1 Concept of “guardianship” be interpreted as a 3<sup>rd</sup> party’s responsibilities for a child after the death of a parent only whereas the concept of “parental responsibility” would replace that “guardianship”.**

**3.2 Re-enacting the relevant provisions of Guardian of Minors Ordinance, Cap. 13 (“GMO”) by which the concept “guardianship” to be reinterpreted in relation to the appointment, application for, removal and powers of guardians.**

**3.3 Abolition of the common law right of the father to be natural guardian so as to tally with s.3(1)(b) of GMO.**

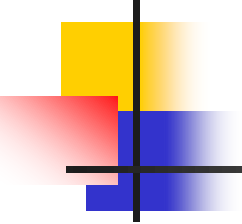
*(In England, the Children Act 1989 provided that the “rule of law that a father is the natural guardian of his legitimate child is abolished”.*

## **4. Orders with respect to Children in Children Proceedings**

**4.1 Abolition of terminologies of “custody” and “access’ which would imply a winner or a loser in disputes concerning a child and introduction of an all-in-one term “child arrangements order” which orders include:-**

- **Residence Order**
- **Contact Order**
- **Prohibited Steps Order**
- **Specific Issues Order.**
- **Option of “no order” – both parties’ consent**

## **4.2 Right of 3<sup>rd</sup> parties to apply for court orders**

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- 1. Existing law under s.10(1) of GMO, only either parent of a child or the Director of Social Welfare (“DSW”) may apply to the court for orders of “custody” or “access” to the child.**
  - 2. Removal of the limitation of 1. above so that e.g. grandparents or other carers may apply to the court for such orders.**
  - 3. For the purpose of 2. above, the child has lived with the applicant for a total of 1 year out of the previous 3 years (the 1 year period needs not be a continuous period but must not have ended more than 3 months before the application).**

## **5. Care Order and Supervision Order**

### **5.1 Power to make care orders and supervision orders**

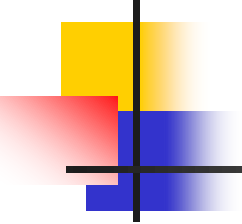
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#### **1. The Court's power to grant an order**

- a. Placing a child under DSW's supervision**
- b. Committing a child to the care of DSW**

**so as to align the grounds on which DSW would be entitled to apply for a care or supervision in children proceedings with the grounds on which DSW would be entitled to apply for a care or protection order under Protection of Children and Juveniles Ordinance, Cap. 213.**

## 5.2 Contact in respect of a child in care



**1. Existing law – there is no clear legal basis for the parents or guardians to have contact with the child in care.**

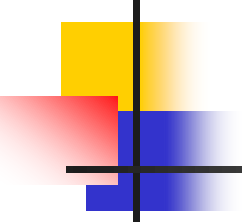
**2. To deal with the above 1. – express provisions be included in order to apply to the court to secure reasonable contact.**

### **6. Views of Child and Separate Representation for Child**

**6.1 Child not required to express views – avoiding pressure from one or both parents.**



## **6.2 How views of child are expressed**

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- 1. If a child indicates directly or indirectly his / her desire to express views – then up court to determine the weight be given**
  - 2. Mechanism for ascertaining and expressing the child's views be provided.**

## **6.3 Court Order for independent representation for child's interest**

- 1. Court may make an order for the independent representation of a child's interest by a solicitor, or by a solicitor and counsel in any dispute in relation to parental responsibility for, or guardianship of a child.**



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## **2. Applicants entitled to apply above 1:-**

- (a) the child;**
- (b) a parent or guardian of the child;**
- (c) a person who is named with whom the child is to live;**
- (d) persons entitled to apply for a child arrangements order.**



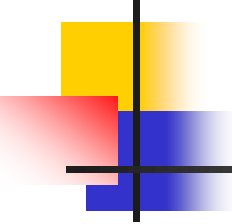
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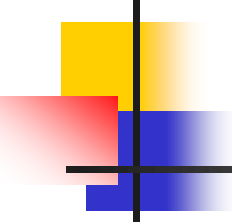
**Reference materials:-**

- 1. The Law Reform Commission of Hong Kong –  
Report on Child Custody and Access, March 2005**
- 2. Public Consultation papers by Labour and Welfare Bureau,  
November 2015**
- 3. Proposed Legislation: Children Proceedings (Parental  
Responsibility) Bill annexed to 2. above.**

## APPENDIX - 1

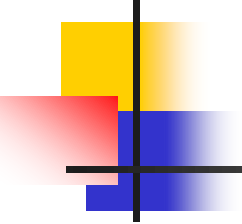
### **Statutory Checklist in determining a child's best interest:-**

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- a. the ascertainable views of the child concerned (considered in the light of the child's age and understanding);**
  - b. the child's physical, emotional and educational needs;**
  - c. the nature of the relationship of the child with each of the child's parents and with other persons.**
  - d. the likely effect on the child of any change in the child's circumstances;**

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- e. **the child's age, maturity, sex, social and cultural background and any other characteristics of the child that the court considers relevant;**

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  - f. **any harm that the child has suffered or is at risk of suffering;**
  - g. **any family violence involving the child or a member of the child's family;**
  - h. **how capable each of the child's parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting the child's needs;**
  - i. **the practical difficulty and expenses of the child having contact with a parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;**

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- 
- j. the range of powers available to the court under this Ordinance in the proceedings in question; and**
  
  - k. any other fact or circumstances that the court considers relevant.**

## APPENDIX – 2

**The Responsibilities are the responsibilities of a parent:-**

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- a. to safeguard and promote the child's health, development and best interest;**
- b. to provide direction and guidance to the child in manner appropriate to the stage of development of the child;**
- c. if the child is not living with the parent, to maintain person relations and direct contact with the child on regular basis and**
- d. to act as the child's legal representative**



## **The Rights are the rights of a parent:-**

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- a. to have the child living with the parent or otherwise regulate the child's residence;**
- b. to control, direct or guide the child's upbringing in a manner appropriate to the stage of development of the child;**
- c. if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis and**
- d. to act as the child's legal representative.**



## APPENDIX – 3



**Major Decision – long term consequence for the child’s health, development and general welfare and the decisions include on:-**

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- 1. a major operation or long term medical or dental treatment for the child;**
- 2. a major change in the child’s schooling;**
- 3. bringing the child up in a particular religion;**
- 4. giving consent to the child’s marriage;**



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**5. a change in the child's place of residence;**

**6. removing the child out of Hong Kong for not more than 1 month;  
or**

**7. a change in the child's domicile or nationality**

## **PLEASE NOTE**

The law and procedure on this subject are very specialised. This article is a general explanation for your reference only and should not be relied on as legal advice for any specific case. If legal advice is needed, please contact our solicitors.

### **請注意**

本題目之法律及程序十分專門。此文章只屬一般性之解釋，供你參考，而不應被依賴為關於任何特定事件之法律意見。如需法律意見，請與我所律師聯絡。

**Christine M. Koo & Ip, Solicitors & Notaries LLP**  
顧張文菊、葉成慶律師事務所 有限法律責任合夥