

BUTTERWORTHS HONG KONG

**Family Law**  
HANDBOOK

Fifth Edition (Volume 1)



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HANDBOOK

Fifth Edition (Volume 2)



# **Butterworths Hong Kong**

## **Family Law Handbook**

**Fifth Edition**

**2024**

**Volume 1**

This is the Fifth Edition of the Butterworths Hong Kong Family Law Handbook, containing the legislation currently in force and annotations to the Guardianship of Minors Ordinance (Cap 13), Separation and Maintenance Orders Ordinance (Cap 16), Law Amendment and Reform (Consolidation) Ordinance (Cap 23), Marriage Reform Ordinance (Cap 178), Matrimonial Causes Ordinance (Cap 179), Marriage Ordinance (Cap 181), Married Persons Status Ordinance (Cap 182), Legitimacy Ordinance (Cap 184), Domestic and Cohabitation Relationships Violence Ordinance (Cap 189), Matrimonial Proceedings and Property Ordinance (Cap 192), Adoption Ordinance (Cap 290), Parent and Child Ordinance (Cap 429), Family Procedure Ordinance (Cap 646).

This title contained herein replaces the Fourth Edition, published in 2021.

August 2024

# Family Law Handbook

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**Butterworths Hong Kong**

**Family Law Handbook**

**(Fifth Edition)**

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**L.T. Long Title**  
To consolidate and amend the law relating to the guardianship of minors.  
[17 February 1977]  
(Format changes—E.R. 2 of 2012)

#### PART I

#### PRELIMINARY

##### 1. Short title

This Ordinance may be cited as the Guardianship of Minors Ordinance.

##### 2. Interpretation

In this Ordinance, unless the context otherwise requires—

*court* (法院) means the Court of First Instance or the District Court;

*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; (*Added 1 of 2012 s. 3*)

*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; (*Added 1 of 2012 s. 3*)

**maintenance** (贍養) includes education;

**maintenance order** (贍養令) means an order made-

(a) under ss 10(2)(b), 11(1)(b)(ii), 12(b)(ii) or 13(2)(b)(3)(a) or (4) for periodical payments; or

(b) under ss 10(2)(c), 11(1)(b)(iii) or 12(b)(iii) for secured periodical payments; or

(c) under ss 10(2)(a), 11(1)(b)(i), 12(b)(i) or 13(2)(a) for payment of a lump sum; (*Added 18 of 2003 s. 2*)

**parent** (父母) means father or mother. (*Amended 1 of 2012 s. 3*)

**will** (遺囑) includes a codicil. (*Added 1 of 2012 s. 3*)

### [2.01] Enactment history

The words within the square brackets in the definition of 'court' were substituted pursuant to s 2 of the Adaptation of Laws (Courts and Tribunals) Ordinance 1998 (25 of 1998), deemed to have commenced on 1 July 1997. The definition of 'maintenance order' was added pursuant to s 2 of the Interest and Surcharge in Arrears of Maintenance Ordinance 2003 (18 of 2003) commencing on 1 May 2003. The definitions of 'custody order', 'domestic proceedings' and 'will' were added pursuant to s 3 of the Guardianship of Minors (Amendment) Ordinance 2012 (11 of 2012), commencing on 13 April 2012.

### [2.02] Court of First Instance

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean the Court of First Instance of the High Court.

### [2.03] District Court

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean the District Court of the Hong Kong Special Administrative Region. As to the constitution of the District Court, see the District Court Ordinance (Cap 336) under Div III above.

### [2.04] Wardship, inherent jurisdiction of the Court of First Instance in relation to minors

As to the jurisdiction of the High Court in wardship, see s 26 of the High Court Ordinance (Cap 4).

### [2.05] Minor

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean a person who has not attained the age of 18 years.

### [2.06] Education

The word 'education' where it appears as part of the terms of a testamentary gift for a child, connotes an obligation as can reasonably be expected from the person who has to discharge the obligation, to supply such reasonable and proper scholastic instruction, either at school or by private tuition; and such amusements and surroundings as shall be calculated to fit the child for the station in life and fortune he or she is to occupy and enjoy; *Ross v Ross* 23 Rettie (HL) 67. The same word is to be construed in its widest possible sense in a covenant by a parent to contribute towards the expenses of educating the child, so that it includes not only tuition fees but also the house fees of a boarding school: *Scott v Scott* [1946] 175 LT 508. As to the general meaning of the word, see *Chartered Insurance Institute v London Corp* [1957] 2 All ER 638; *Chesterman v Federal Taxation Comr* (1922) 32 CLR 362. For factors to be considered in schooling decisions, see *PYJ v NKS* [2021] 5 HKLRD 1, [2021] HKFC 187.

### [2.07] Father or mother

Section 5 of the Parent and Child Ordinance (Cap 429) establishes two presumptions of paternity. A man is presumed to be the father of a child if he was married to the mother of the child at any time and if there arises by virtue of that marriage a presumption of law that the child is the legitimate child of that man. If no man is presumed to be the father under the first presumption, then the man who has been registered as the father of the child by an entry made after 19 June 1993 in any register of births kept by the Registrar of Births and Deaths would be presumed to be the father. As to the determination of parentage where the birth or pregnancy of the child has resulted from medical treatment, see the Parent and Child Ordinance ss 9, 10 and 12.

## PART II

## GENERAL PRINCIPLES

## 3. General principles

- (1) In relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of the income of any such property—
- (a) in any proceedings before any court (whether or not a court as defined in section 2) the court—
- (i) shall regard the best interests of the minor as the first and paramount consideration and in having such regard shall give due consideration to— (Amended 1 of 2012 s. 4)
- (A) the views of the minor if, having regard to the age and understanding of the minor and to the circumstances of the case, it is practicable to do so; and (Amended 1 of 2012 s. 4)
- (B) any material information including any report of the Director of Social Welfare available to the court at the hearing; and
- (ii) shall not take into consideration whether, from any other point of view, the claim of the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father; (Replaced 69 of 1982 s. 2)
- (b) except where paragraph (c) applies, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal and be exercisable by either without the other; (Amended 17 of 1993 s. 19)
- (c) where the minor is illegitimate—
- (i) a mother shall have the same rights and authority as she would have by virtue of paragraph (b) if the minor were legitimate;
- (ii) a father shall only have such rights and authority, if any, as may have been ordered

- by a court on an application brought by the father under paragraph (d); (Added 17 of 1993 s. 19)
- (d) the Court of First Instance or a judge of the District Court may, on application, where it is satisfied that the applicant is the father of an illegitimate child, order that the applicant shall have some or all of the rights and authority that the law would allow him as father if the minor were legitimate. (Added 17 of 1993 s. 19. Amended 25 of 1998 s. 2)
- (2) Subsection (1)(a) shall have effect as regards any application under subsection (1)(d). (Replaced 17 of 1993 s. 19)
- [cf. 1971 c. 3 s 1 U.K.; 1973 c. 29 s 1(1) U.K.]

## [3.01] Enactment history

Subsection (1)(a) was replaced by the words within the square brackets pursuant to the Guardianship of Minors (Amendment) Ordinance 1982 (69 of 1982), commencing on 12 November 1982. Subsection (1)(b) was amended by inserting the words in square brackets; sub-ss (1)(c) and (d) were added; and sub-s (2) was replaced by the words within the square brackets pursuant to the Parent and Child Ordinance 1993 (17 of 1993), s 19 and Sch, commencing on 19 March 1993. The words within the square brackets in sub-s (1)(d) were substituted pursuant to s 2 of the Adaptation of Laws (Courts and Tribunals) Ordinance 1998 (25 of 1998), deemed to have commenced on 1 July 1997. Subsection 3(1)(a)(i) was amended pursuant to s 4 of the Guardianship of Minors (Amendment) Ordinance 2012 (1 of 2012), commencing on 13 April 2012.

## [3.02] English counterpart

The wording of this section is similar to those in the Guardianship of Minors Act 1971 (UK), s 1 and the Guardianship Act 1973 (UK), s 1(1).

## [3.03] Subsection (1): Custody or upbringing

Custody, in contradistinction with guardianship, is essentially concerned with control, and the preservation and care of the child's person, physically, mentally and morally; responsibility for a child in regard to his needs, food, clothing, education and the like: *Wedd v Wedd* [1948] SASR 104. See also *R v Johnson* (1957) 111 All ER 594; *Re B (A Minor) (Abduction)* [1994] 2 FLR 249; *McKiver v McKiver (O H)* (1995) SLT 790; *Pirrie v Sawacki* (1997) SCLR 59; *S v H* (Abduction: Access Rights) [1998] Fam 49. The Court of Appeal discussed the concept of custody in contradistinction from that of care and control in *PD v KWW* (Local Custody, Care and Control) [2010] 5 HKC 543, [2010] 4 HKLRD 191, [2010] HKFLR 184 (CA), (which was followed in *SMM v TWM (Child: Relocation)* [2010] 4 HKLRD 37, [2010] HKFLR 308, [2010] HKCU 1263 (CA)),

by reference to the Law Reform Commission report on Child Custody and Access (2005). Hartmann JA considered that the decisions to be made by a custodial parent are those of real consequence in safeguarding and promoting the child's health, development and general welfare. They include decisions as to whether or not the child should undergo a medical operation, what religion the child should adhere to, what school the child should attend, what extracurricular activities the child should pursue, be it learning a musical instrument or being coached in a sport. A parent vested with custody has the responsibility of acting as the child's legal representative. By contrast, the decisions to be made by a parent who (at any time) has care and control of the child are of a more mundane, day-to-day nature, decisions of only passing consequence in themselves but cumulatively of importance in moulding the character of the child. They include a host of decisions that arise out of the fact that the parent has physical control of the child and the responsibility of attending to the child's immediate care. They include decisions as to what the child will wear that day, what the child may watch on television, when the child will settle down to homework and when the child will go to bed. They also include the authority to impose appropriate discipline. See also the earlier cases of *SEB v ZX (Custody)* [2007] HKFLR 165 (DC) and *FHY v GJS* (unreported, FCJA 973/2004, 30 April 2008) (DC). For the list of the common law parental rights, see *CLP v CSN & Anor* [2016] 6 HKC 234, [2016] 5 HKLRD 530 (CA).

In *SKP v Y & Anor* (unreported, FCMC 17772/2011, 12 November 2012) (DC), Judge Melloy explained the legal terminology used in the context of describing a child's arrangements in a court order, particularly the terms care and control, access and shared care, given that it has become increasingly important as the practical arrangements set out in the Children's Dispute Resolution Pilot Scheme develop for the court and legal practitioners to be able to adequately define those arrangements in a court order. Joint care and control denotes a situation where the parties are sharing the day to day practicalities of raising a child. It will normally mean that the child is spending significant periods of time with both parents in each of their homes, but not necessarily on a 50:50 basis. However the time shared is likely to be more significant than in a standard custody/access type order and will probably mean that the child is spending at least 35% of his time based with each of his parents. One would expect that both parents are involved in the schooling and extracurricular activity schedule and it normally denotes a high level of co-operation between the parents. Consequently one would normally expect an order for joint custody and joint care and control to be made by consent. However court intervention to that effect is not precluded. Shared care has developed in cases where the court has considered it appropriate for the ultimate decision making power to vest in only one parent and made order for sole custody but has been anxious to ensure that the child involved should continue to spend significant amounts of time with both parents in a way that was more reminiscent of a joint care and control order. In order to recognise this and the fact that the non-custodial parent continues to have a great deal of practical control in the child's day to day life, the phrase shared care was coined. It would be normal in a situation like that to set out very clearly how the child's time is to be split between both parents. There is no order for access per se. In *LCL v QCR* [2017] HKCU 433 (unreported, FCMC 3953/2015, 26 January 2017) (DC), Deputy District Judge Phoebe Man rejected the suggestion that 'shared care' be adopted instead of 'care and control' in the light not only of the agreement already reached in court in terms of terminology but also of the need to avoid misunderstanding or confusion that when the parent who is not granted care and control has access with the children, she

will have care and control of them. Further, in a case where the parents are in a high conflict situation, it would be counter-productive for the court to give an order which essentially requires a high degree of communication and co-operation between them. In *N v W* [2017] HKCU 1432 (unreported, FCMC 5026/2015, 28 April 2017) (DC), Judge Melloy agreed that it is in fact 'quite rare' in Hong Kong for there to be an order for a 50:50 shared care regime and for that to be imposed by court following a trial. Nevertheless, this does happen on occasion and it is also possible for the court to make other orders, such as an order for sole custody and shared care, where the circumstances demand it. In *JDYS v EYCK* (unreported, FCMC 12871/2009, 9 March 2016) (DC), Deputy District Judge Grace Chan indicated that in light of the usual distress arising out of the breakdown of the relationship of the separated parties, there would be some kind of communication and/or trust problems of varying degrees. As such, the sole and mere allegation of difficulty in communication is not by itself sufficient to persuade the court in not granting a shared care arrangement if it is in the best interest of the children. Rather, it is clear that any order about children should be 'aspirational' and 'look to the future', with the court entitled to assume that loving parents are capable of acting rationally in making decisions for the best interests of their children. In *CS v WCT* (unreported, FCJA 973/2004, 30 April 2008) (DC), Deputy District Judge Egerton ordered joint custody and shared care and control on an equal basis upon considering that in the context of the case, giving either parent sole custody would create an imbalance in the dynamics of the parents' inter-relationship and it would be a benefit to the children if the parents stood as 'equals' in the context of custody and that the arrangements reflecting parallel parenting within the interim order should continue. In *TKM also known as WTKM v WYG* [2023] HKCU 1317, [2023] HKFC 41 (24 February 2023), Judge Elaine Lam, when not ordering shared care, noted that the parties and the child had not yet reached the stage suitable for 50:50 care arrangements and that in the case where the parties cannot establish an effective communication, a longer term arrangement without flexibility is unlikely to match the child's developmental and psychological needs.

### [3.04] Property

'Property' is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to include:

- (a) money, goods, choses in action and land; and
- (b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in para (a) of this definition.

### [3.05] Belonging to

The words 'belonging to' are to be understood in their ordinary signification. What 'belongs to' to a man is his property. That does not include land or funds held in trust for him; see *Heritable Reversionary Co v Millar* [1892] AC 598, at 621 (per Lord Macnaghten). See also *Myerson v Collard & the Commonwealth* (1918) 25 CLR 154 (per Issacs and Rich JJ).

**[8D.07] Definitions**

As to the definition of 'court', 'custody order', 'domestic proceedings' and 'parent', see s 2 above.

**8E. Removal of guardian**

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

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

(Added 1 of 2012 s. 5)

**[8E.01] Enactment history**

This section was replaced pursuant to s 5 of the Guardianship of Minors (Amendment) Ordinance 2012 (1 of 2012), commencing on 13 April 2012.

**[8E.02] English counterpart**

The wording of this section is similar to those in the Children Act 1989 (UK) s 6(7).

**[8E.03] Best interests of the minor**

As to the principles and considerations for making decisions on custody, upbringing and property of a child, see s 3 above. As to the meaning of 'minor', see [2.05] above.

**[8E.04] In its discretion**

The guardian that the court may remove pursuant to this section in the context of Part III of this Ordinance is only the guardian appointed under s 6 or s 8D; this does not include the father or mother of the minor: *So v Ng* (unreported, FCMP 70/2014, 20 May 2015) (DC).

As to the exercise of such a discretion in the context of removal of a guardian of a minor, see [8.04] above.

**[8E.05] Definition**

As to the definition of 'court', see s 2 above.

**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.

(Added 1 of 2012 s. 5)

**[8F.01] Enactment history**

This section was replaced pursuant to s 5 of the Guardianship of Minors (Amendment) Ordinance 2012 (1 of 2012), commencing on 13 April 2012.

**[8F.02] Minor**

As to meaning, see [2.05] above.

**[8F.03] Subsection (1): Dies**

As to the recognition of the state of death, see [5.03] above.

**[8F.04] Definition**

As to the definition of 'court', see s 2 above.

**8G. Guardian to have parental rights and authority**

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

(Added 1 of 2012 s. 5)

**[8G.01] Enactment history**

This section was replaced pursuant to s 5 of the Guardianship of Minors (Amendment) Ordinance 2012 (1 of 2012), commencing on 13 April 2012.

**[8G.02] Minor**

As to meaning, see [2.05] above.

**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 the guardian is not a parent of the minor.

(Added 1 of 2012 s. 5)

**[8H.01] Enactment history**

This section was replaced pursuant to s 5 of the Guardianship of Minors (Amendment) Ordinance 2012 (1 of 2012), commencing on 13 April 2012.

**[8H.02] Minor**

As to meaning, see [2.05] above.

**[8H.03] Authorize a guardian or a minor to be paid any remuneration for the guardianship service**

There is a similar provision in the Trustees Ordinance (Cap 29), s 43 to cater for the appointment of a corporation as trustee.

**[8H.04] Definitions**

As to the definition of 'court' and 'parent', see s 2 above.

**9. Disputes between joint guardians**

Where 2 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.

[cf 1971 c. 3 s 7 U.K.]

**[9.01] English counterpart**

The wording of this section is similar to those in the Guardianship of Minors Act 1971 (UK), s 7.

**[9.02] Person**

As to meaning, see [6.04] above.

**[9.03] Minor**

As to meaning, see [2.05] above.

**[9.04] May make such order**

See further, where one of the joint guardians is the mother or father of the minor, the Ordinance s 12 below.

**[9.05] Definition**

As to the definition of 'court', see s 2 above.

**AA. Transitional and savings****(1) In this section—**

**\*commencement date** (生效日期) means the day on which the Guardianship of Minors (Amendment) Ordinance 2012 (1 of 2012) 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 2012 (1 of 2012) 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.

(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

**[11.05] Make such order, etc**

As to the principles applicable, see [10.07] above.

**[11.06] Custody**

As to meaning, see [3.03] above.

**[11.07] Access**

As to the considerations involved in making an order on right to access, see [10.06] above.

**[11.08] Periodical sum**

As to the ordering of a periodical sum, see [10.11] above.

**[11.09] Secure**

As to the meaning of 'secure', see [10.12] above.

**[11.10] Transfer**

As to meaning, see [10.13] above.

**[11.11] Property**

As to meaning, see [3.04] above.

**[11.12] Possession or reversion**

As to meaning, see [27125] above.

**[11.13] Settlement**

As to meaning, see [27126] above.

**[11.14] Subsection (2): Vary, discharge or suspend**

As to exercise of such power, see [10.19] above.

**[11.15] Definitions**

As to the definition of 'court', 'maintenance' and 'parent', see s 2 above.

**12. Orders for custody and maintenance where joint guardians disagree**

The powers of the court under section 8(a) or (c), 8A(2)(a) or 9 shall, where one of the joint guardians is the surviving parent of the minor, include power—

- (a) to make such order regarding—
  - (i) the custody of the minor; and
  - (ii) the right of access to the minor of his or her surviving parent, as the court thinks fit having regard to the best interests of the minor;
- (b) to make one or more of the following orders, that is to say—
 

*(Amended 17 of 1993 s. 19)*

  - (i) an order requiring the surviving parent to pay such lump sum (whether in one amount or by instalments) for the immediate and non-recurring needs of the minor, or for the purpose of enabling any liabilities or expenses reasonably incurred in maintaining the minor before the making of the order to be met, or for both, as the court thinks reasonable having regard to the means of the surviving parent;
  - (ii) an order requiring the surviving parent to pay such periodical sum towards the maintenance of the minor as the court thinks reasonable having regard to the means of the surviving parent; (Replaced 65 of 1986 s. 5)
  - (iii) an order requiring the securing by the surviving parent, to the satisfaction of the court, of such periodical sum towards the maintenance of the minor as the court thinks reasonable having regard to the means of the surviving parent; (Added 17 of 1993 s. 19)
  - (iv) an order requiring the transfer for the benefit of the minor, or to the minor, by the surviving parent, of such property, being property to which the surviving parent is entitled (either in possession or reversion), as the court thinks reasonable having regard to the means of the surviving parent; (Added 17 of 1993 s. 19)
  - (v) an order requiring the settlement for the benefit of the minor, to the satisfaction of the court, of such property, being property to which the surviving parent is so entitled, as the court thinks reasonable

- the wife, and upon cause being shown on fresh evidence, at any time alter, vary, discharge, suspend or revive after being so suspended any order (other than an order for a lump sum payment in one amount or for a lump sum to be paid in instalments where all such instalments have been paid) made under this Ordinance, and may from time to time increase or diminish the amount of any unpaid instalment of a lump sum payment or periodical payments or both ordered to be paid under section 5.
- (2) The jurisdiction conferred by subsection (1) shall be exercisable notwithstanding that the proceedings for the revocation, variation, discharge or suspension of the order or the revival of an order which has been suspended are brought by or against a person residing outside Hong Kong.
- (3) Subject to subsection (4), if any married person who has applied for an order and with respect to whom an order has been made under this Ordinance voluntarily resumes cohabitation with the other party to the marriage, or commits an act of adultery, such order shall upon proof of such matter be discharged.
- (4) The District Court may, if it thinks fit—
- (a) refuse to discharge an order under this Ordinance as provided in subsection (3) if in its opinion the act of adultery was conducted to by the failure of the other party to the marriage to make such payments as in the opinion of the court he or she was able to make under the order; and
- (b) in the event of an order being discharged as provided in subsection (3), make a new order ordering that the legal custody of the children of the marriage shall continue to be committed to the married person mentioned in subsection (3) until such children attain the age of 18 years, and that the other party to the marriage shall pay to that married person, or to the Registrar of the District Court or any third person on the married person's behalf, either or both of the following—
- (i) such lump sum (whether in one amount or by instalments) for—
- (A) the immediate and non-recurring needs of the child; or
- (B) the purpose of enabling any liabilities or expenses reasonably incurred in

- maintaining and educating the child before the making of the order to be met, or for both, as the court considers reasonable, having regard to the means of both the husband and the wife and to any payment previously made under any order for a lump sum payment;
- (ii) such periodical payments as the court considers reasonable having regard to the means of both the husband and the wife for the maintenance and education of the child until that child attains the age of 18 years.
- (5) In making an order under subsection (4)(b) the court shall have regard primarily to the best interests of the children.  
(Replaced 69 of 1997 s. 12)

#### [7.01] Enactment history

This section was replaced with the present wording pursuant to the Marriage and Children (Miscellaneous Amendments) Ordinance 1997 (69 of 1997), s 12, commencing 4 July 1997.

#### [7.02] English counterpart

This section has wording similar to the Summary Jurisdiction (Married Women) Act 1895 (UK), s 7 (as amended by the Summary Jurisdiction (Separation and Maintenance) Act 1925 (UK), s 2).

#### [7.03] District Court

As to meaning, see [3.03] above.

#### [7.04] Alter, vary, discharge, suspend or revive after being so suspended

To 'alter' is not to replace or substitute one thing for another; see *R v Parkway Chrysler Plymouth Ltd* (1976) 32 CCC (2d) 116, at 117 (per Wilson JA). Damage to a message does not amount to an alteration unless the damage alters the material particulars of that message in some way; see *R v Cheung Man* [1983] 2 HKC 453 (CFI).

To 'vary' means 'to cause to change to alter; to introduce changes or alterations into'; see *R v Tonkin ex p Federated Ship Painters' Union* [1954] ALR 777; and *R v Industrial Court, ex p Mount Gunson Mines Pty Ltd* (1982) 30 SASR 504, at 512 (per Mitchell J).

**[20C.02] Subsection (1)**

'Loss of ... society' is for cases where the injured person suffers such serious injury that the person is unable to participate in a meaningful family life: see *Ng Tai Kuen v Tam Che Fu & Ors* [2019] 4 HKC 533, [2019] HKCFI 1191; *Lam Wing Yee v City Super Ltd* [2019] HKCU 4172, [2019] HKCFI 2507; *Lai Chi Wai v Tong Hing Kwok & Anor* [2020] 6 HKC 1, [2020] HKCFI 628. This does not include loss of services, which is not recoverable by virtue of s 20B: *Leung Sing Kiu & Anor (Administrators of the estate of Chan Lai Wah, deceased) v Wong Shek Keung & Anor* [1989] 1 HKC 206 (CFI); *Chan Ki & Anor v Travel Trade Communications Network and Marketing Services Ltd & Anor* [1998] 2 HKC 57 (CFI), cf. [20C.06] below.

**[20C.03] 'The deceased' and 'injured person'**

The change of terminology from 'injured person' to 'the deceased' as from para (c) onwards has been observed to be illogical: *Leung Sing Kiu & Anor (Administrators of the estate of Chan Lai Wah, deceased) v Wong Shek Keung & Anor* [1989] 1 HKC 206 (CFI), at 212, per Master Jerome Chan. On a similar ground, 'the deceased' in sub-s (1)(e) has been held to mean 'injured person' by Seagroatt J in *Lam Yin Fong v Tsang Kam Cheong* [2003] 3 HKLRD 501, [2003] HKCU 968 (CFI), at 512–513 and [51]. Statutory amendment was made under s 153 of the Statute Law (Miscellaneous Provisions) Ordinance 2014 (18 of 2014), commencing on 5 December 2014, to rectify the terminology to 'injured person'.

**[20C.04] Subsection (2)**

The total sum under to be awarded under sub-s (1) shall not exceed the sum specified in s 4(3) of the Fatal Accidents Ordinance (Cap 22) which was amended to HK\$ 242,500 (LN 79 of 2023). The applicable maximum shall be that prevailing at the date of trial: *Chan Yuk by his next friend madam Chu Yin Chun v Dragages et Travaux Publics (HK) Ltd, Tactcon Construction Co Ltd and Chan Wai Hong* [2000] 3 HKLRD 1, [2000] HKCU 442 (CA).

**[20C.05] Subsection (3)**

Where a right of claim for damages for bereavement arises under s 4 of the Fatal Accidents Ordinance (Cap 22), no claim for loss of society under sub-s (1) is recoverable: *Chan King Wan & Anor v Honest Scaffold General Contractor Co Ltd & Anor* [2001] 1 HKC 415 (CA), at 425.

**[20C.06] Subsection (4)**

Loss of services is recoverable under this subsection provided that such loss is sustained by a dependant of the plaintiff: see *Yan Chui Sim v Paul Y ITC General Contractors Ltd and Ors* [2004] HKCU 1053 (unreported, HCPI 244/2003, 1 September 2004) (CFI). This could include a claim by dependant children for their mother's services, notwithstanding that the husband may not make such a claim by reason of s 20B(a) above: *Leung Sing Kiu & Anor (Administrators of the estate of Chan Lai Wah, deceased) v Wong Shek Keung & Anor* [1989] 1 HKC 206 (CFI).

On the other hand, it was considered that the legislation could not be intended to compensate for the loss of minor chores performed by a juvenile too young to take up employment for his parent: *Tse Hung Kuen v Quon Hing Mainwell Concrete Ltd & Anor* (unreported, HCA 11359/1993, 20 December 1994) (CFI).

As recoverability for loss of housekeeping capacity is not affected by s 20B (see [20C.03] above), it appears that damages under this subsection overlaps with loss of housekeeping capacity at common law: see *Daly v General Steam Navigation Co Ltd* [1980] 3 All ER 696, [1981] 1 WLR 120 (CA, Eng); *Lowe v Guise* [2002] 3 All ER 454, [2002] 3 WLR 562 (CA, Eng). Note that whilst claims under this subsection are restricted to dependants as defined, their common law counterparts are not so restricted. See *Chan King Wan & Ors v Honest Scaffold General Contractor Co Ltd & Anor* [1998] 2 HKC 358, [1998] 1 HKLRD 962 (CFI) (which was not reversed on appeal: *Chan King Wan & Anor v Honest Scaffold General Contractor Co Ltd & Anor* [2001] 1 HKC 415 (CA)).

**21. Apportionment of liability in case of contributory negligence**

(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: (*Amended L.N. 337 of 1989*)

Provided that—

- (a) this subsection shall not operate to defeat any defence arising under a contract;
  - (b) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.
- (2) Where damages are recoverable by any person by virtue of subsection (1) subject to such reduction as is therein mentioned, the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.
- (3) The Civil Liability (Contribution) Ordinance (Cap. 377) shall apply in any case where 2 or more persons are liable or would, if they had all been sued, be liable by virtue of subsection (1) in respect of the damage suffered by any person. (*Amended 77 of 1984 s. 10*)

**[9.08] Subsection (4): Consent**

One cannot consent to a thing unless he has knowledge of it; see *Re Caughey's Will* (1876) 1 Ch D 521, at 528 (per Jessel MR). 'Consent' often involves some affirmative acceptance, not merely standing by and absence of objection. In this connection, it is the antithesis to 'acquiescence'; see *Bell v Alfred Franks & Birtles Co Ltd* [1980] 1 All ER 356, at 362 (per Megaw LJ). See also *Sidaway v British Royal Hospital Governors* [1984] QB 493. It is thought, however, that actual knowledge is not necessary; cf, *Knox v Boyd* [1941] JC 82, at 86; *Taylor's Central Garages (Exeter) Ltd v Roper* (1951) 115 JP 445, at 449 (per Devlin J) [1951] WN 383; *James & Son Ltd v Smee* [1955] 1 QB 78, [1954] 3 All ER 273 at 274 (per Parker J); and *Mallon v Allon* [1964] 1 QB 385, [1963] 3 All ER 843, at 847.

**[9.09] In writing**

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to include writing, printing, lithography, photography, typewriting and any other mode of representing words in a visual form.

**[9.10] Prescribed manner**

As to the prescribed form, see the Marriage Reform (Forms) Regulations (Cap 178C) below. As to the prescribed fee, see the Marriage Reform (Fees) Regulations (Cap 178B) at below.

**[9.11] Subsection (5): Certificate of marriage in the prescribed form**

A certificate, *ex vi termini*, imports that the party certifying knows the fact that he certifies: *Farmer v Legg* (1797) 7 TR 191. As to the prescribed form, see the Marriage Reform (Forms) Regulations (Cap 178C) at below.

**[9.12] Sign**

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to include in the case of a person unable to write the affixing or making of a seal, mark, thumbprint or chop.

**[9.13] Cannot reasonably be made available**

As to what is reasonable, see [9.07] above.

**[9.14] Definition**

As to the meaning of 'appointed day', 'customary marriage', 'parties to a customary marriage', 'Registrar' and 'validated marriage', see s 2 above.

**Power of Registrar**

10. Upon receipt of an application under section 9 for the registration of a customary marriage or a validated marriage, the Registrar may—

- (a) summon before him any applicant, any alleged party to the marriage and any person alleged to have been present at the marriage, and may require any person so summoned to answer such questions as the Registrar may ask for the purpose of determining the application before him;
- (b) require any applicant to furnish such further information either by statutory declaration or otherwise as he may reasonably require.

(2) Any person who, without lawful excuse, fails to comply with a summons or requirement issued or made under subsection (1) shall be guilty of an offence and shall be liable to a fine at level 1 and to imprisonment for 6 months. (*Amended L.N. 25 of 1996*)

**[10.01] Enactment history**

The words within the square brackets were substituted pursuant to the Resolution of the Legislative Council under s 100A of the Interpretation and General Clauses Ordinance (Cap 1), para (7) on 10 January 1996 (LN 25/1996).

**[10.02] Subsection (1): Answer**

Whenever a reference is made to an answer to a question, the Legislature meant a true answer, an honest bona fide answer; see *R v Hulme* (1870) LR 5 QB 377, at 388 (per Lush J).

**[10.03] Furnish**

'Furnish' means 'provide for use'; see *Kime v Hamilton Radial Electric Pty Co* (1921) 50 OLR 113, at 116 (per Riddell J).

**[10.04] Statutory declaration**

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean, if made in Hong Kong, a declaration under the repealed Statutory Declaration Ordinance or the Oaths and Declarations Ordinance (Cap 11); if made in any other common law jurisdiction, a declaration made before a justice of the peace, notary public, or other person having authority therein under any legal provision for the time being in force in the jurisdiction to take or receive a

## PART IIA

## COMMENCEMENT OF PROCEEDINGS

**10A. Commencement and transfer of proceedings**

- (1) Subject to subsection (2), a matrimonial cause and any other proceedings under this Ordinance shall be commenced in the District Court: Provided that rules may make provision—
- for the transfer to the High Court of any cause or proceedings upon the application of any party or at the instance of the District Court; and
  - for the transfer or retransfer from the High Court of any cause or proceedings to the District Court.
- (2) An application under section 39 shall be made to the court that made the order to which the application relates:

Provided that rules of court may make provision for the transfer of applications from one court to the other.

- (3) The District Court may exercise jurisdiction under this Ordinance although the amount claimed in the proceedings would, but for this subsection, be beyond the jurisdiction of that court.

(Replaced 79 of 1981 s. 2)

**[10A.01] Enactment history**

This section was replaced with the present wording pursuant to the Administration of Justice (Miscellaneous Amendments) Ordinance 198 of 1981 s 5, commencing on 1 March 1983. The words within the square brackets in Subsection (1) were substituted pursuant to the Adaptation of Laws (Courts and Tribunals) Ordinance (25 of 1998) s 2, deemed to have commenced on 1 July 1997.

**[10A.02] District Court**

As to meaning, see [2.05] above.

**[10A.03] Subsection (1): Rules**

The relevant rules that have been made are the Matrimonial Causes Rules (Cap 179A) rules 32, 91, 120.

**[10A.04] High Court**

As to meaning, see [2.04] above.

**[10A.05] Party**

'Party' is defined in the District Court Ordinance (Cap 336) s 2 to include every person served with notice of or attending any proceedings, although not named in the record.

**[10A.06] Subsection (2): Rules of court**

The expression is defined in the Interpretation and General Clauses Ordinance (Cap 1) s 3 to mean, when used in relation to any court, rules made by the authority having for the time being, power to make rules and orders regulating the practice and procedure by such court.

**[10A.07] Subsection (3): Amount claimed ... be beyond jurisdiction of District Court**

As to the monetary jurisdiction of the District Court, see the District Court Ordinance (Cap 336) ss 32-37.

**[10A.08] Definition**

As to meaning of 'court' and 'matrimonial cause', see s 2 above.