

## GUARDIANSHIP OF MINORS ORDINANCE

### (CAP 13)

#### Introduction

The Guardianship of Minors Ordinance (Cap 13) makes provision for the guardianship of minors on the basis of the Guardianship of Minors Act 1971 [Eng] (as amended by the Guardianship Act 1973) [Eng], including the appointment, removal and powers of guardians, the making of orders of custody and maintenance of minors, the application of the provisions to illegitimate children, and jurisdictional and procedural matters. It also provides for the power of the court to order attachment of income to satisfy an order made under the Ordinance.

The common law position is that the father of a child has legal authority over it; such authority is proprietary in nature and gives rise to a right of action. In *Hewer v Bryant* [1970] 1 QB 357 at 373, [1969] 3 All ER 578 at 585E, (CA) (Eng), Sachs LJ described such legal authority as a 'bundle of powers'. Such powers include the personal power physically to control the child until the years of discretion and the right to apply to the courts to exercise the powers of the Crown as *parens patriae*, the right to the services of the child, and the power to control education, the choice of religion, the administration of property and to appoint a testamentary guardian. See Pegg, *Family Law in Hong Kong* (3rd Ed, 1994, Butterworths Asia, Hong Kong) p 243. Acts of Parliament from 1866 onwards modified the legal position in England in favour of the mother. As Sachs LJ described in the case above, 'guardianship is by nature, by nurture, by testamentary disposition, or by order of a court'. On the other hand, in spite of the statutory intervention described above (including the Guardianship of Minors Act 1971 c 3 and the Guardianship Act 1973 c 29), the English common law position presuming authority on the part of the father remained until 1991. See *F v Wirral Metropolitan Borough Council* [1991] Fam 69, (CA) (Eng).

The current English position is governed by the Children Act 1989 c 41 [Eng], which repealed in whole the Guardianship of Minors Act 1971 and the Guardianship Act 1973. The Children Act 1989 provides a complete and superseding legal regime for the determination of issues over a child's upbringing or the administration of his property. The paramount consideration for the court in determining such issues is the child's welfare. Parental responsibility (ie all rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property) is conferred on both parents if they are married to each other, and on the mother alone if not, unless the father has acquired it. Those who share parental responsibility may act independently of the other. The rule of law that

a father is the natural guardian of his legitimate child is abolished. The Children Act 1989 makes provision for the court's power to appoint a guardian in respect of a child, and also for the court's power to make orders on contact, prohibition of taking of certain steps, residence and specific questions with respect to a child in the course of family proceedings.

The principal provisions in the Guardianship of Minors Ordinance (Cap 13) are:

- Courts must have regard to the welfare of the minor as the first and paramount consideration in making decisions in proceedings before it involving the custody or upbringing of a minor, or involving the administration of any property belonging to or held in trust for a minor or the application of the income of any such property. In making such decisions, courts must also have regard to the wishes of the minor (if it is practicable to do so having regard to the age and understanding of the minor and to the circumstances of the case); and any material information, but must not take into consideration whether, from any point of view, the claim of the father over the issue to be determined is superior to that of the mother and vice versa (s 3(1)(a)).
- A mother has the same rights and authority as the law allows to a father, and the rights and authority of mother and father are equal and exercisable by either without the other, but where the child is illegitimate, the father's right and authority has to be acquired, and only to the extent provided, by court order. Any disagreement between a minor's father and mother over any question affecting the minor's welfare may be resolved by seeking a direction from a court. An agreement for a man or a woman to give up any of his or her rights and authority over his or her child is unenforceable, except where the agreement is made between husband and wife to operate only during their separation while married (though the court may decide not to enforce it if it is of the opinion that it will not be for the benefit of the child to give it effect) (ss 3(1)(b), (c), (d), 4).
- A parent of a minor may by writing signed by the person making the appointment or a person acting at the direction and in the presence of the person making the appointment and attested by two witnesses or will appoint any person to be guardian of the minor after his death. On the death of a parent of a minor, the surviving parent is to be guardian of the minor either alone or jointly with any guardian appointed by the deceased parent or the court. Provision is made for the revocation of appointments and the disclaimer of an appointment by a guardian. A person appointed by a parent or guardian as the guardian of a minor may, after the appointing parent or appointing guardian dies, apply to the court to assume guardianship over the minor. The court may authorize a guardian of a minor (who is not a parent of the minor) to be paid remuneration for the guardianship service. If a minor has

no parent, no guardian of the person and no other person having parental rights with respect to him, the court may on application, appoint the applicant to be the guardian of the minor. Guardians may be removed or replaced by the court. Disputes between joint guardians on any question affecting the welfare of the minor may be resolved by seeking direction from a court. A guardian under the Ordinance has all the rights, powers and duties of a guardian of the minor's estate, without prejudice to the power of the Court of First Instance to appoint a guardian of a minor's estate. A guardian under the Ordinance does not have such rights, powers and duties so long as there is a guardian of the minor's estate alone. The natural father of an illegitimate child is not to be treated as the father of a minor and his appointment of a guardian is to be treated as having no effect unless he is entitled to custody of the minor or he acquires rights or authority with respect to the minor by court order (ss 5-9, 18, 21).

The Court of First Instance and the District Court are empowered to make orders for the custody and maintenance (including education) of a minor. Similar orders may be made at the time when the court appoints a sole guardian of the minor to the exclusion of the parents. An order made in relation of the custody of a minor may be made requiring the minor to be under the supervision of the Director of Social Welfare in exceptional circumstances. On an application relating to custody of a minor, the court may in exceptional circumstances commit the care of the minor to the Director of Social Welfare, while directing the parent(s) to make payments to maintain the minor. Where an order is made as to maintenance of a minor requiring payment of a lump sum by instalments, or of periodical payments or secured periodical payments, such payments may begin with the date of the making of an application for the order in question or any later date but must not extend beyond the date when the child will attain the age of 18, though the court has power to extend the term for making payments beyond that date if the child is, or will be, or if such an order or provision were made would be, receiving education or training; or if there are special circumstances justifying the making of the order or provision. The court has power to make an interim order containing provision of maintenance and regarding custody of the minor or of the right of access of the parent(s) (ss 10-17).

- A person for the time being under an obligation to make payment pursuant to an order made under the Ordinance must give notice of change of address within 14 days of such change (s 19).
- The Court of First Instance and the District Court have power to order that the income of a person who is obliged under an order made under the Ordinance to make payment in maintenance of a minor to be attached as to the whole or part of the amount payable under the maintenance order and amount attached to be paid to the person named in the

maintenance order, if it is satisfied that the payer has without reasonable excuse failed to make any such payment; or there are reasonable grounds to believe that the payer will not make full and punctual payment in compliance with the order; or if there is agreement between the payer and the person named in the order to the attachment of income. An attachment order is an authority to an income source to make the payment in accordance with the order and applies, inter alia, to income that is wages or salary payable to a maintenance payer by the Government. A person entitled to enforce a maintenance order is, in the case where the person liable under it fails to make full and punctual payment in compliance to it, entitled to interest in respect of arrears of maintenance, but the person liable under it may apply to the court for an order that he is not required to pay the interest. A person entitled to enforce a maintenance order may apply to the court for an order that the person liable under it should be required to pay a surcharge on the ground the person liable under it repeatedly fails to make full and punctual payment in compliance to it without reasonable excuse. The amount of the surcharge payable must not exceed 100% of the total arrears of maintenance calculated from the date on which the arrears first accrued to the date of payment of the surcharge. A surcharge payable is recoverable as a civil debt by action in the District Court irrespective of monetary amount (ss 20, 20A, 20B).

- The District Court may hear and determine applications under the Ordinance under its civil jurisdiction and powers. It may hear and determine such applications otherwise than in open court. If it considers the matter one which could more conveniently be dealt with by the Court of First Instance, it may refuse to make an order. If an application is made in the District Court, a party to the application may apply to the Court of First Instance for an order that the application be removed to the Court of First Instance (ss 23-24).
- The jurisdiction of the Court of First Instance to appoint or remove guardians or otherwise in respect of minors is not affected by the Ordinance (s 25).
- The jurisdiction conferred on any court under the Ordinance is exercisable notwithstanding that any party to the proceedings is not domiciled in Hong Kong. (s 26).

The Interest and Surcharge on Arrears of Maintenance Ordinance 2003 (18 of 2003) amended the Ordinance to introduce the entitlement to interest on the part of the person entitled to enforce a maintenance order in the case of failure to make full and punctual payment in compliance with the maintenance order; and to empower the court to impose a surcharge on the person liable under a maintenance order in the case of repeated failure to make full and punctual payment in compliance with the maintenance order; and to provide for enforcement mechanisms. These amendments came into operation on 1 May 2005.

The Attachment of Income Order (Application to Government and Miscellaneous Amendments) Ordinance 2007 (20 of 2007) was enacted on 22 November 2007 and came into operation on 23 November 2007. This amending Ordinance amended, inter alia, the Ordinance to provide for the application of attachment of income orders to the Government as an income source; to provide that the court may make such orders in respect of wages or salary payable by the Government notwithstanding the paragraph (a) of the proviso to section 23(1) of the Crown Proceedings Ordinance (Cap 300); and to validate any such orders made in respect of wages or salary payable by the Government before its commencement.

In 2012, amendments were made to the Ordinance to give effect to the recommendations of the Report of the Law Reform Commission of Hong Kong on Guardianship of Children (January 2002) to simplify and enhance the existing procedures under the Ordinance so as to encourage more parents to make guardianship arrangements for their children.

## CHAPTER 13

# GUARDIANSHIP OF MINORS ORDINANCE

To consolidate and amend the law relating to the guardianship of minors.

[17 February 1977]

(Originally 12 of 1977)

(\*Format changes - ER 2 of 2012)

Note: \* The format of the whole Ordinance has been updated to the current legislative styles.

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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. 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, 12.

**[2.06] 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).

**[2.07] 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.

**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 s 2 of 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; and subsections (1)(c) and (d) were added; and subsection (2) was replaced by the words within the square brackets pursuant to the Parent and Child Ordinance (17 of 1993) s 19 and Sch, commencing on 19 March 1993. The words within the square brackets in subsection (1)(d) were substituted pursuant to s 2 of the Adaptation of Laws (Courts and Tribunals) Ordinance (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 [Eng] s 2 and the Guardianship Act 1973 [Eng] s 1(1).

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

Custody, in contrast 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, instruction and the like: *Wedd v Wedd* [1948] SASR 104. See also *R v Johnson* [1957] St R Qd 594; *Re B (A Minor) (Abduction)* [1994] 2 FLR 249; *McKiver v McKiver (O H)* 1995 SLT 790; *Pirrie v Sawacki* 1997 SLT 1160, 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 (Joint 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, (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).

### [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' 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 Isaacs and Rich JJ).

### [3.06] Held in trust for

Section 2 of the Trustees Ordinance (Cap 29) defines a trust as not including the duties incident to an estate conveyed by way of mortgage, but with this exception the expression 'trust' and 'trustee' extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative.

### [3.07] Minor

As to meaning, see [2.07] above.

### [3.08] Income

'Income' signifies 'what comes in' and can be used to denote "a person's receipts"; see *Jones v Ogle* 42 LJ Ch 336, [1861-1873] All ER Rep 919; *Re Huggins* 51 LJ Ch 938.

### [3.09] Court

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean any court of the Hong Kong Special Administrative Region of competent jurisdiction.

### [3.10] Best interests of minor as first and paramount consideration

The principles set out in the section apply when the court makes orders for custody, care or supervision of a child under the Matrimonial Causes Ordinance (Cap 179) or the Matrimonial Proceedings and Property Ordinance (Cap 192); Matrimonial Causes Ordinance (Cap 179) s 48C. The court may also be guided by the principles when it makes custody orders under the Separation and Maintenance Orders Ordinance (Cap 16). However, it has no application in proceedings for an ouster order under the Domestic Violence Ordinance (Cap 189): *Richards v Richards* [1984] AC 174, [1983] 3 WLR 173, [1983] 2 All ER 807 (HL).

This section was amended in 2012 to bring the terminology more in conformity with that used in the United Nations Convention on the Rights of the Child. While the terms 'welfare' and 'wishes' of the minor are now replaced by 'the best interests' and 'views', the change does not affect the substance of the law: *H v N* [2012] 5 HKLRD 498, (CFI). For the expressions 'welfare' and 'best interests' are synonymous: *Re B (a minor) (Wardship: Sterilisation)* [1988] AC 199, (HL) at 202 (per Lord Hailsham of St Marylebone LC); *Re A (Conjoined Twins: Medical Treatment)* [2001] 1 FLR 1, (CA) (Eng) at 34D (per Walker LJ).

Although the section provides that the best interests of the minor is to be the first and paramount consideration, it is not the only consideration: *Re Thain, Thain v Taylor* [1926] Ch 676, [1926] All ER 384, (CA) (Eng); *Re O (infants)* [1962] 2 All ER 10, [1962] 1 WLR 724, (CA) (Eng); *J v C* [1970] AC 668, [1969] 1 All ER 788 (HL). See also *M v M* 1926 SC 778, 126 SLT 550; *W v W* [1926] P 111; *Re B's Settlement, B v B* [1940] Ch 54; *Allen v Allen* [1948] 2 All ER 413, (CA) (Eng); *Chipperfield v Chipperfield* [1952] 1 All ER 1366; *McKee v McKee* [1951] AC 352, [1951] 1 All ER 942 (PC); *Re L (infants)* [1962] 3 All ER 1, [1962] 1 WLR 886, (CA) (Eng); *Re R (M) (an infant)* [1966] 3 All ER 58, [1966] 1 WLR 1527; *Re F (an infant)* [1969] 2 Ch 239, [1969] 2 All ER 766, [1969] 3 WLR 162; *Cheetham v Glasgow Corp* 1972 SC 243; *Re CB (A Minor)* [1981] 1 All ER 16, [1981] 1 WLR 379, (CA) (Eng); *W v A (Child: Surname)* [1981] Fam 14, [1981] 2 WLR 124, [1981] 1 All ER 100, (CA) (Eng); *Re B (A Minor) (Wardship: Medical Treatment)* [1981] 1 WLR 1421, [1990] 3 All ER 927, (CA) (Eng); and *McKay v Essex Area Health Authority* [1982] 2 QB 1166, [1982] 2 All ER 771, (CA) (Eng). The essential justice of the case however is not one such factor: *S (BD) v S (DJ)* [1977] 1 All ER 656, [1977] Fam 109, (CA) (Eng).

This section applies not only where both parents are living but also where both, or either, are dead: *Re Collins (an infant)* [1950] Ch 498, (CA) (Eng).

The Family Court in Hong Kong has referred to the 'welfare checklist' in the Children Act 1989 [Eng] s 1(3) as a list of helpful guidance and assistance in the assessment of the requirement of the child's welfare; see *W v W* Unreported, FCMC 11676/2002, 9 March 2004, (DC); *P v P (Children-Custody)* [2006] HKFLR 305, (DC); *PFH v CMS* Unreported, FCMC 9655/2005, 17 October 2007, (DC), (where Judge Chu agreed that the factors in the checklist can be helpful while emphasizing that each custody case is different and the facts in a checklist may not be exhaustive); *YLS v TL (Custody and Domestic Violence)* [2009] HKFLR 19, (DC). The Court of

Appeal endorsed the adoption of the welfare checklist in *SMM v TWM (Child: Relocation)* [2010] 4 HKLRD 37, [2010] HKFLR 308, (CA). On the other hand, in *H v N* (above), Poon J endorsed the now more or less standard practice of referring to the welfare checklist with three caveats: (1) Absent any statutory underpinning in the Ordinance, the courts in Hong Kong are under no duty to have regard to the 'welfare checklist'. In other words, it is not compulsory to do so. Whether a judge may wish to make use of it and if so how is entirely a matter for him. For example, he may cherry-pick, as it were, only those factors on the checklist which are relevant to the case before him. As long as the judge's decision, supported by reasons, is demonstrably in the best interests of the minor, he cannot be criticized for not expressly applying the checklist or not going through all the factors one by one; (2) When applying the checklist, judges are not subject to the laborious necessity of expressly relating their findings in every case to its specific provisions one by one. Otherwise the task will become too onerous unnecessarily; (3) 'the welfare checklist' is an aide-memoire designed to ensure that none of the factors potentially relevant for a court considering a child's welfare generally in the circumstances of each particular case is left out of account: *London Borough of Southwark v B* [1993] 2 FLR 559, (CA) (Eng) at 573B-C per Waite LJ. It is not meant to be exhaustive. Judges are entitled to and indeed should have regard to all other relevant factors even if they are not on the list.

The court in discharging its duty under this section is exercising a judicial discretion, subject to the overriding consideration above and the appellate court is slow to interfere with the decision of the court unless it is shown to be plainly wrong: *G v G* [1985] 2 All ER 225, [1985] 1 WLR 647 (HL), followed in *Ho Man v Ho Lee Kam Wan* [1988] HKC 266 (CA); *Liu Lau Oi Yuk Shellydy v Liu Chian Hsiong* Unreported, CACV 126/1997, 17 October 1997; *Zhen Xiao Ting v Yu San Chuen* [2000] 4 HKC 771 (CA); *H v H* Unreported, CACV 42/2002, 6 September 2002.

But if the exercise of the discretion is not dependent on the trial judge having seen and heard the witnesses, an error in the balancing exercise that the appellate court can clearly detect will vitiate the judge's decision: *NA v RA (Minors: Custody and Removal Applications)* [2004] 2 HKC 657, (CA); *L v F (Custody Application)* [2007] HKFLR 104, (DC); *Y v L (Application for Custody)* [2007] HKFLR 275, (DC). In *SMM v TWM (Relocation of Child)* (above), the Court of Appeal cautioned by reference to *Re J (Child Returned Abroad: Convention Rights)* [2006] 1 AC 80, (HL), against an appellate court interfering too readily in the exercise of such statutory discretion.

### [3.11] Views of the minor

Generally, a court would not make an order for custody against the wishes of a minor who is 16 years old or above; see *Stark v Stark* [1910] P 190. On the other hand, it was suggested in *Re Kwok Micah* Unreported, HCMP 3040/1984, 1 July 1985 that a child may not wish to offend the wishes of a parent with whom he is living. Naturally, the older the child, the more likely it is the court will take his wishes into consideration. See also *Boulter v Boulter* [1977-1979] HKC 282. A judge has a discretion whether or not to