

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 couched 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]

[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 1360; *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).