

HONG KONG BAR ASSOCIATION

COMMITTEE ON FAMILY LAW

**RESPONSE ON THE CHILDREN PROCEEDINGS
(PARENTAL RESPONSIBILITY) BILL**

1. The Hong Kong Bar Association's Committee on Family Law ("Committee") has considered the Children Proceedings (Parental Responsibility) Bill ("Bill"). We respond and submit as follows.

INTRODUCTION

2. The Committee welcomes and fully supports the objectives of the Bill, which are based on the child's best interests principle as enshrined in the United Nations Convention on the Rights of the Child (UNCRC).¹ The Bill properly addresses the recommendations of the Law Reform Commission ("LRC") relating to the reform of the law and procedure relating to Children, implementing many of the LRC's Recommendations.
3. We agree with the LRC that the existing orders for "Custody", with "Care and Control" to one parent and "Access" to the other are based on out-dated perceptions of parental proprietary rights, rather than the interests of the child. They impliedly declare a winner and a loser, and ultimately may diminish meaningful continuing contact between the "losing" parent and the child, all of which may not be in the best interests of the child.
4. The Bill correctly emphasises the importance of the greater involvement of both parents in the lives of children, even after the family unit has broken down. It correctly replaces the out-dated notions with the child-centric and inclusive concept of "Parental Responsibility". We note with approval that the Bill introduces neutrally framed Child Arrangements Orders and that for the first time, grandparents

¹ UNCRC was adopted on 20th November 1989 and extended to Hong Kong on 7th September 1994

(and persons other than the child's parents) may apply for parental responsibility and/or contact with the child where this is appropriate.

5. We refer to the other notable provisions in the Bill which include the following:
 - a. The Bill's definitions of relevant terms (Part 1);
 - b. The statutory checklist in determining a child's best interests (Part 2);
 - c. The appointment of guardians whilst repealing the Guardianship of Minors Ordinance, Cap. 13 ("GMO") (Part 3);
 - d. The reinstatement of the provisions of the GMO on child maintenance and enforcement, with some revisions (Part 4);
 - e. The consolidation of Supervision Orders and Care and Protection Orders² ("C&P Orders"), with matters ancillary thereto, permitting C&P Orders to be heard in the civil proceedings environment of the Family Court (Part 5);
 - f. Express provision for the Views of the Child to be taken into account, the need if any for a Guardian *ad litem* and Separate Representation for the Child (Part 6);
 - g. Procedure, jurisdiction, repeal, consequential amendments and transitional provisions (Parts 7 and 8).
6. Our comments below address issues arising out of the provisions of the Bill in the order in which they appear in the Bill. These are intended to be constructive, are largely incidental and therefore should not impede the passing of the legislation.
7. Further, we comment on the social programmes currently available, said to be in the pipelines or are as yet to be entertained. Although social programmes and other

² C&P Orders are currently dealt with in quasi-criminal proceedings in the Juvenile Court

facilitative measures are important to support dysfunctional family relationships, these are necessary in any event, even without the amendments the Bill introduces. The absence or inadequacy of such support should in no way be relied upon as an excuse to delay the introduction of this much-awaited and necessary reform.

TITLE

8. We consider that the title to the Bill is not wholly descriptive as it implies that the Bill only deals with the concept of “Parental Responsibility”, relating to the care of children, when in fact the legislation goes beyond that.
9. The title to the Bill would be more descriptive if it were renamed “Children Bill” or “Children Proceedings Bill” or “Children Proceedings and Parental Responsibility Bill.”
10. However, if there is a good reason for retaining the title as framed, we take no further issue on this point.

PART 1 – DEFINITIONS

Definition of “parent” (Clause 2)

11. We agree that “*child*” should be defined as a person under the age of 18 and that this definition should apply consistently in relation to all “*children proceedings*” as set out in the Bill.
12. However, we consider that the definition of “parent”³ may arguably be too narrow, given the jurisprudence on this issue and the dicta of the Court of Final Appeal in *W v Registrar of Marriages* (2013) 16 HKCFAR 112.

³ Clause 2 of the Bill defines parent to mean “*father or mother*” or the natural father who is named in a child arrangement order or has acquired parental responsibility.

13. In *W v Registrar of Marriages*, the Court of Final Appeal referred to the impact of a gender reassignment on the duties and (parental) responsibilities of the person who has had such change and suggested that appropriate legislation be introduced. The joint Judgment of Ma CJ and Ribeiro PJ stated at p.169:

“141. As the GRA 2004 indicates, several other areas exist where legislative regulation would be particularly valuable. One prominent issue involves the impact of a legally recognized gender change on an existing marriage. For example, a male-to-female transsexual may be married to a woman before undergoing sex reassignment treatment qualifying her for legal recognition in her acquired gender as a woman. What impact would that have on the marriage and on the existing wife’s rights (and, if there are children, on the children’s rights)? Does the transsexual woman retain the rights and duties of a husband and father? If the couple wish to end the marriage, does the gender change provide a ground for doing so? No doubt the courts could work out the answers to such questions as they arise by applying existing legal provisions, but it would obviously be far preferable to have a legislative solution worked out in advance.” (Emphasis added)

14. In *re G (Children) (Residence Same sex Partner)* [2006] 1 W.L.R. 2305 (HL) at paragraphs 33 – 35, the House of Lords held that there are at least three ways in which a person may be or become a natural parent of a child: genetic parenthood, gestational parenthood, and social and psychological parenthood.
15. In the light of the abovementioned cases and the continued development of the concept of who is a “parent”, we highlight the current definition of “parent” under clause 2 of the Bill, and note that it may become controversial and generate dispute in the future.

PART 2 - GENERAL PRINCIPLES

“Welfare Checklist” (Clause 3)

16. We support the introduction of a Welfare Checklist and note that the Family Judges

have been having recourse to the same as set out by the LRC, in anticipation of the legislative change that the Bill will introduce.

17. In *SMM v TWM (Child Relocation)* [2010] 4 HKLRD 37 (CA), Cheung JA stated at p.47:

“27. Hong Kong has continued to use the terms of “custody” and “access” under s.10 of the Guardianship of Minors Ordinance (Cap.13) (GMO) and the term “custody” in s.19 of the Matrimonial Proceedings and Property Ordinance (Cap.192) (MPPPO). It is clear, however, that the family courts in Hong Kong have in line with the modern approach granted joint custodial orders which emphasised the continuation of parental responsibilities and judges in Hong Kong have also adopted the welfare checklist in s.1(3) of the Children’s Act: see, for example, Judge Bruno Chan in P v P (Children: Custody) [2006] 2 HKFLR 305.” (Emphasis added)

18. However, some family practitioners have highlighted the issue of delay and stressed its importance when determining questions as to a child’s best interests.
19. We refer to the English legislation and in particular section 1(2) of the Children Act 1989, which provides:

“In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.” (Emphasis added)

20. In *re G (A Minor) (Interim Care Order Residential Assessment)* [2006] 1 A.C. 576 (HL), Baroness Hale referred to the uncertainties in the formulation of a care plan and the uncertain outcome of parental treatment identified by Lord Nicholls. She went on to state at p.597:

“58. To my mind, the link between the uncertainty referred to by Lord Nicholls and the problem of “delay” in care proceedings is clear. It is no surprise to find that

care proceedings now take far longer than was envisaged when the 1989 Act was passed...” (Emphasis added)

21. According to paragraphs 5.58 to 5.60 of the LRC Report issued in March 2005, the LRC discussed the position in England & Wales including the procedure for drawing up a timetable, which specifies the periods within which various steps must be taken, and the applicable rules of the court.
22. We consider that prolonged litigation about their future is deeply damaging to children, because of the uncertainty it brings to them in the meantime. We recommend that the consideration of delay should be incorporated either as part of the welfare checklist or as a free-standing sub-section, comparable to s.1 (2) of the Children Act 1989.

Acquisition of parental responsibility by father (Clause 6)

23. We support the provision that a father who is the natural father may acquire parental responsibility inter alia if he becomes registered as the father of the child under section 12 of the Births and Deaths Registration Ord. (Cap 174) and/or by agreement with the mother.

Parental Responsibility (Clauses 7, 8, 9, 10)

24. We refer to the discussion at the commencement of this Response and re-state our firm support for the provisions of clauses 7 to 10 (inclusive) relating to the concept of parental responsibility and the orders and ancillary procedure relating thereto.
25. In *PD v KWW (Child: Joint Custody)* [2010] 4 HKLRD 191 (CA), Hartmann JA stated at p.202:

“47. It is widely recognised today that the long-term best interests of a child are invariably best protected if, despite the breakdown of the marital union, both parents are able to continue to play an equal role in making important decisions that will determine the child’s upbringing.”

...

51. The Hong Kong Law Reform Commission Report on Child Custody and Access (7 March 2005) recommended changes in line with the Children Act 1989 but regrettably, to date at least, little appears to have been done to give the Commission's recommendations legislative form.” (Emphasis added)

26. As practitioners, we are aware of the divisive nature of the present terminology and welcome the change, which we regard to be in the best interests of the child.
27. However, we note that some lay persons have expressed concern as regards clause 10, which requires consent for certain acts or notification as to “major decisions” relating to children⁴ and the perceived difficulties that may arise if the other parent cannot be found and/or is not cooperative.
28. We consider this concern to be wholly misplaced, being based on a misconception of the effect of the existing law as to sole or joint custody. In this regard, we refer to the Judgment of the Court of Appeal delivered by Hartmann JA in *PD v KWW (Child: Joint Custody)*, which refers to such misconception and makes it clear that as the law presently stands, consultation and notification is necessary even where sole custody has been granted:

28. “As our law has developed and now presently stands, when a marriage breaks down and the court must ensure the best interests of any child of the union, it will invariably do so by bringing into play the dual concepts of ‘custody’ – whether it be sole or joint custody – and ‘care and control’. Neither concept, however, is defined in our statute books.

29. Regrettably, empirical evidence suggests that there is a large measure of misunderstanding as to the nature and extent of the two concepts, certainly among lay persons.

30. At a practical level, a convenient way of understanding the two concepts is to compare the nature of the decision-making that is required to put them into practice.

⁴ “Major decisions” in relation to a child are set out in s.10(5)

31. *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.*

32. *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.*

33. *We have spoken of the misunderstanding that exists as to the nature and extent of the two concepts. This is most often manifested in the misperception that, if sole custody is given to one parent, that parent thereby 'wins' the right to determine all matters big and small in the upbringing of that child while the parent who is not given custody 'loses' the right to have any say in the child's upbringing. The present case is a prime example.*

.....

36. *It is to be emphasised in the strongest terms that if one parent only is given custody, that parent is not thereby given an absolute and independent authority to act without further reference to the non-custodial parent. Any such potential misunderstanding was quashed in *Dipper v Dipper* [1980] 3 WLR 626 in which Ormrod LJ said:*

"It used to be considered that the parent having custody had the right to control their children's education, and in the past their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing or any other matter in their lives, that disagreement

has to be decided by the court.”

37. *In the same case, Cumming-Bruce LJ, another experienced family judge, said:*

“... it (is) a fallacy which continues to raise its ugly head that, on making a custody order, the custodial parent has a right to take all the decisions about the education of the children in spite of the disagreements of the other parent. That is quite wrong. The parent is always entitled, whatever his custodial status, to know and be consulted about the future education of the children and any other major matters. If he disagrees with the course proposed by the custodial parent he has the right to come to the court in order that the difference may be determined by the court.”

38. *A non-custodial parent therefore has the right to be consulted in respect of all matters of consequence that relate to the child’s upbringing. While the right to be consulted does not include a power of veto, it is nevertheless a substantial right. It is not merely a right to be informed, it is a right to be able to confer on the matter in issue, to give advice and to have that advice considered.*

39. *While therefore a parent who is given sole custody is given the authority, in the event of disagreement with the non-custodial parent, to make the final decision, it should only be made after due consultation and, if the final decision that is made is considered by the non-custodial parent to be inimical to the child’s best interests, the court may be called upon to determine the matter.*

40. *Invariably, therefore, the giving of sole custody to one parent does no more than recognise that, in the circumstances of the breakdown of the marriage, the best interests of the child are secured by giving to that parent the authority, if necessary, to make a final decision concerning matters of consequence in the upbringing of the child but only after the other parent’s views have been given full and rational consideration. In summary, an order of sole custody does no more than add a qualification to the otherwise joint endeavour of both parents in raising their child, that qualification being that the final decision will rest with one parent.*

41. *For this reason it is often said that there is a thin line between sole custody and joint custody.*

42. *In the present case, therefore, even if the mother is given sole custody of L,*

she will not be able to determine such matters as L's education, religious upbringing and choice of extracurricular studies free of any involvement by the father. She will remain obliged to discuss such matters with the father and to weigh in the balance all rational advice that he gives." (emphasis supplied)

29. Given the said misconception as outlined, we submit that the express provision for notification and consent in the Bill should *not* be used as an excuse to delay or impede the passing of this important Bill.

PART 3 – GUARDIANS

30. We have no comment on this section dealing with “guardianship” of the child, which is only to apply after the death of a parent.

PART 4 – CHILDREN ORDERS

Child Arrangements Orders (Clauses 28 to 32)

31. We fully support the provisions for Child Arrangements Orders setting out the person(s) with whom the child is to live, spend time or otherwise have contact with and the provisions ancillary thereto, including a prohibited steps order and specific issues orders. We endorse the alternative that “no order” is made, where this is in the child’s best interests and with the consent of the parties.
32. We welcome the enlargement of the scope of persons who are entitled to apply with or without leave for a Child Arrangements Order, including the child himself. We endorse the provision in clause 29(4)(b) granting the entitlement to apply without leave to persons with whom the child has lived for a period of at least 365 days and the provisions for contact.
33. We comment further on support measures and enforcement, noting that at present, to ensure support for the family, Judges rely on extracting undertakings from the parents that they will cooperate in the best interests of their children. However, such undertakings may not be forthcoming and/or be honoured in the breach. In the event of a breach, enforcement depends on cumbersome and draconian committal

proceedings. Imprisonment should be a remedy of last resort.

34. We consider that it would be helpful if express provision were included in the legislation that enabled a Judge to order parents to undergo social programmes such as parenting counselling or co-parenting coordination. We propose that there should be other measures to facilitate or encourage compliance with a court order relating to child care arrangements, including a bond or an order for unpaid work, the latter being a viable option where a financial penalty is unrealistic.
35. Given the need to act in the best interests of the child irrespective of the change in legislation, and the inadequacies of existing facilities, we urge the Administration to set up appropriate measures to support children who are caught in the conflict of a dysfunctional family. Such measures should include:
 - a. Sufficient and properly staffed child contact centres where handovers in high conflict cases can be effected and/or supervised access take place. In this regard we refer to the UK's National Association of Child Contact Centres, the website of which can be accessed at <http://www.naccc.org.uk>;
 - b. Sufficient and properly trained personnel who can counsel parents on co-parenting and/or intervene as parenting co-ordinators;
 - c. Sufficient and properly trained personnel, who will support and counsel children, including by play therapy.
36. We refer to the Administration's proposal to set up only one such child contact centre as a pilot scheme and consider this to be wholly inadequate to cope with the anticipated intake.
37. We are of the opinion that such support measures are necessary in the best interests of the child, whether or not the reform is introduced. Conversely, whilst necessary, the absence or inadequacies of such facilities should *not* be advanced as an excuse or justification to delay or impede the introduction of the reform.

B Maintenance

38. We support the provision for duration of maintenance orders even after the child has attained 18 in the circumstances provided in clause 37 of the Bill:

“(3) An order may extend beyond the date when the child will attain the age of 18 years if it appears to the court that—

(a) the child is, or will be, or if an order were made would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not the child is also, or will also be, in gainful employment; or

(b) there are special circumstances that justify the making of the order.”
(Emphasis added)

39. However, we note that clause 37 of the Bill is unclear as to whether an application for such extended duration can be made in respect of a child who has already attained 18. Particularly, clause 37 appears to be akin to section 12A of the Guardianship and Minors Ordinance (Cap.13), which makes no such provision:

“(3) The court may include in an order referred to in subsection (1) in relation to a child who has not attained the age of 18 a provision extending beyond the date when the child will attain that age the term for which by virtue of the order any payments are to be made or secured to or for the benefit of that child, if it appears to the court that-

(a) that child is, or will be, or if such an order or provision were made would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not that child is also, or will also be, in gainful employment; or

(b) there are special circumstances which justify the making of the order or provisions.” (Emphasis added)

40. We consider that there should be no distinction between an application made under the Bill and that made under section 10 of the Matrimonial Proceedings and Property Ordinance (Cap.192), the latter expressly providing that such an application can be made even where the child has already attained the age of 18. Section 10, MPPO expressly provides this in the following terms:

“(3) The court may make such an order as is mentioned in subsection (1)(a) in favour of a child who has attained the age of 18 and may include in an order made under section 5 or 8 in relation to a child who has not attained that age a provision extending beyond the date when the child will attain that age the term for which by virtue of the order any payments are to be made or secured to or for the benefit of that child, if it appears to the court that

(a) that child is, or will be, or if such an order or provision were made would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or

(b) there are special circumstances which justify the making of the order or provisions.” (Emphasis added)

41. We therefore recommend that the wording of section 10 MPPO be substituted for that in clause 37 as currently drafted.

Enforcement of Maintenance Order (Part 4 – Division 2)

42. Paragraphs 9.103 of the LRC Report noted the concern that non-contributing fathers, i.e. those who were not prepared to pay maintenance towards their child’s upbringing, would acquire decision-making “rights” in respect of the child that they currently did not enjoy.
43. Paragraph 10.9 of the Report stated that the problems surrounding the enforcement of maintenance orders is an issue that is outside the scope of the Report although the

LRC recommended that the Administration should review the existing law and procedures relating to the enforcement of maintenance orders to see how they could be made more effective.

44. We agree with the LRC: the question of alternative modes to enforce maintenance orders *is* outside the scope of the LRC report on orders relating to child care arrangements, which is the main objective of the Bill. Therefore, we submit that the proponents for such alternative systems should *not* be permitted to hold up the Bill pending the consideration of alternative modes of such enforcement.

Care Order and Supervision Order (Part 5)

45. We support the consolidation of Care Orders and Supervision Orders, both to be considered in the civil proceedings environment of the Family Court, as distinct from the quasi-criminal surroundings of the Juvenile Court where currently Care and Protection Orders are made.
46. We understand that there are currently more than 200 Care and Protection Orders made each year in the Juvenile Court. We note that there may be resource-implications on the Family Court and trust that this will be monitored.

Views of Child and Separate Representation (Part 6)

47. We support the express provision for the views of the child to be taken into account and the consolidation of the circumstances in which the child may be separately represented where appropriate, setting out the circumstances when he does not need a next friend or guardian ad litem.
48. We note that in due course appropriate mechanism should be put in place to facilitate the child expressing his views and/or so that the child may have easy access to advice and legal representation.

CONCLUSION

49. Having considered the Children Proceedings (Parental Responsibility) Bill and all the circumstances, we have no hesitation in fully endorsing the Bill and urging its expeditious passage into legislation.

Dated this 26th day of April 2016

**The Hong Kong Bar Association's
Committee on Family Law**