

Legal reform for implementing parental responsibility model

Dennis C. Ho
Solicitor
8 October 2014

1

Report on Child Custody and Access 2005 (“the Report”)

“In other common law jurisdictions, there has been a shift away from this legal emphasis on the **rights and authority** of each of the parents over their children, towards a more **child-focused concept of “joint parental responsibility.”** This newer approach, which emphasizes the obligations rather than the rights of the parents, and stresses the rights

2

of the children to maintain a continuing relationship with both parents after divorce, is examined in this report as a possible model for Hong Kong's future legislation in this area.” (para. 1.3 of the Report)

3

The changes in other common law countries: -

- (1) England and Wales – the Children Act 1989
- (2) Scotland – the Children Act 1995
- (3) Australia – Family Law Reform Act 1995
- (4) New Zealand – Care of Children Act 2004
- (5) Canada BC – Family Law Act 2013

4

The Underlying Themes of the Reforms

The underlying themes of the reforms proposed by the Report might be summarized as follows: -

- (1) parents rights - parental responsibility
- (2) parental right to contact – child’s right and responsibility of the parents have for the child
- (3) encourage agreement on arrangements for their children between parents with minimal intervention from court

5

- (4) increase awareness of cases involving DV
- (5) more attention on the voice of child such as separate representation
- (6) primary responsibility for the upbringing of the children rests with their parents
- (7) centralise and codify the law relating to children

6

The Proposals

There are a total of **72** recommendations made in the Report and the major proposals are: -

- (1) the welfare or "best interests" principle guides all proceedings concerning children (Recommendations 1 & 2)
- (2) the introduction of a statutory checklist of factors to assist the judge in exercising his discretion in determining the proceedings (Recommendation 3)

7

- (3) the concept of parental responsibility should replace that of guardianship, except that the concept of guardianship should be retained in relation to a third party's responsibilities for a child after the death of a parent. (Recommendation 4)

8

(4) the adoption of a list of parental responsibilities and a list of parental rights (Recommendation 5)

(5) Scope of parental responsibility – when consent or notification is required, with the court be given express power to vary or dispense with any of the consent or notification requirements where this is considered necessary (Recommendation 13)

9

(6) 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 (Recommendation 14)

10

(7) repeal existing custody orders and replace it with a range of new orders i.e.

- residence order
- contact order
- specific issues order
- prohibited steps order
- no order

(Recommendations 21, 24, 25, 26 & 30)

11

(8) The court's powers in dealing with domestic violence on granting orders in relation to children (Recommendation 35)

(9) the Administration should review the current arrangements and facilities allowing for supervised contact in Hong Kong (Recommendation 38)

12

(10) the need to hear the view of the child and how and when view of the child's views are to be taken into account (Recommendation 42)

(15) Children not required to express views (Recommendation 45)

(16) separate representative for the child – resolve the anomalies of rules 72 and 108 of the MCR, provide criteria for the appointment and guidelines for duties of separate representative (Recommendation 47)

13

(17) third party's right to apply for care order or supervision order (Recommendation 60)

(18) as far as possible, the provisions dealing with disputes relating to children, arrangements on divorce, guardianship, disputes with third parties, or disputes between parents without accompanying divorce proceedings, should be consolidated into one existing Ordinance (Recommendation 71)

14

(19) a single policy bureau should take over responsibility for creating and implementing policy for families and children and, in particular, all the matrimonial and children's Ordinances (Recommendation 72)

15

What is “Parental Responsibilities”?

Parental responsibilities shall include the following: -

(a) to safeguard and promote the child's health, development and best interests;

(b) to provide, in a manner appropriate to the stage of development of the child:

- (i) direction;
 - (ii) guidance,
- to the child;

16

(c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and
(d) to act as the child's legal representative,
but only in so far as compliance with this section is practicable and in the interests of the child.

17

Child's Rights:

the child, or any person acting on his behalf, shall have title to sue, or to defend, in any proceedings as respects those responsibilities

18

Parental Rights

A parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right:

- (a) to have the child living with him or otherwise to regulate the child's residence;
- (b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;

19

- (c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and
- (d) to act as the child's legal representative.

20

Decisions Requiring Consent

List of major decisions where consent of the other parent is required:

- (1) consent to change the child's surname;
- (2) consent to the adoption process;
- (3) consent to removal of the child out of the jurisdiction for more than one month; and
- (4) consent to permanent removal of the child out of the jurisdiction.

21

Decisions Requiring Notifications

This list should be as follows: -

- (1) notification of a major operation or long-term medical or dental treatment for the child;
- (2) notification of a major change in the child's schooling;
- (3) notification of bringing the child up in a particular religion;

22

- (4) notification of consent to the child's marriage;
- (5) notification of moving house with the child;
- (6) notification of removing the child from the jurisdiction temporarily but for less than one month;

23

- (7) notification if there are going to be changes in the child's domicile or nationality;
- and
- (8) notification of any other major or important decisions in the life of the child.

24

The court should be given express power to vary or dispense with any of the consent or notification requirements where this is considered necessary (Recommendation 13)

25

The Development of “Parental Responsibility” in Australia

In Australia, after the reform from custody to parental responsibility in 1995, further major reform was made in 2006.

This is a reform to Part VII of the Family Law Act 1975 in Australia (the "2006 Reform") was introduced by way of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (the “2006 Act”).

26

Section 61DA(1) of the 2006 Act provides that “When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child’s parents to have **equal shared parental responsibility** for the child”. As a result, this presumption must be applied unless there are reasonable grounds to believe that a parent or a person who lives with a parent has engaged in the abuse of the child or family violence.

27

In examining whether the presumption should be applied or rebutted, the Courts are required to have regard to 2 tiers of consideration under the “section 60CC(3) checklist”.

- (1) Primary considerations
- (2) Additional considerations

28

The primary considerations include:

- (1) The benefit to the child having a meaningful relationship with both of the child's parents; and
- (2) The need to protect the child from physical and psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

29

There are 14 factors in the additional considerations which cover mainly the following: -

- views of the child
- the relationship of the child with parents
- the parents spending time with the child
- the effect of any changes to the child's circumstances

30

- the practical difficulty & expenses for the child to spend time with the parent
- the capacity of the parent to provide needs of the child
- the maturity, sex, lifestyle and background of the child and the parents
- the parents' attitude to the child and the responsibility
- the issue of domestic violence

31

In the UK **Family Justice Review Interim Report** March 2011, it is of the view that, "No legislation should be introduced that creates or risks creating the perception that there is an assumed parental right to substantially shared or equal time for both parents."

32

Care should be taken to introduce any presumption of shared parenting for the following reasons: -

- (1) such legal presumption falsely conflates shared care and the child's best interest, and confuses parental responsibility with parental rights.
- (2) it limits the choices parents have when it comes to deciding what is the best arrangement for the child.
- (3) this will undermine the fundamental principle that the best interest of the child is the paramount consideration.

33

(4) whether there is adequate social support for the shared parenting such as the need to run two households. This is difficult for low or modest income families.

(5) the presumption risks applying a 'one size fits all' approach to families which does not work

34

(6) Shared Residence Order impacts heavily on the child's lifestyle.

(7) children's wishes and feelings easily become subordinated to the rights claims of parents.

35

UK Family Law Amendment 2014

In the Children and Families Act 2014, Section 1 of the Children Act 1989 (welfare of the child) is amended as follows by inserting, "(2A)A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.

36

(2B) In subsection (2A) “involvement” means involvement of some kind, either direct or indirect, but not any particular division of a child’s time.”

37

Section 8(1) of the Children Act 1989 is amended by deleting “contact order” and “residence order” and inserting

“**child arrangements order**” means an order regulating arrangements relating to any of the following—

- (a) with whom a child is to live, spend time or otherwise have contact, and
- (b) when a child is to live, spend time or otherwise have contact with any person;”.

38

Is Hong Kong ready for the reform?

(A) Changes in Case Law

- (1) Court Orders for Joint Custody
- (2) Different combinations of court orders on custody and care and control

39

HH Judge Melloy in **SKP v YITT FCMC 17772/2011** set out a whole array of different orders, which include:-

- (1) custody and care and control to one parent and reasonable access to the other
- (2) joint custody with care and control to one parent and reasonable access to the other
- (3) joint custody and joint care and control to both parents

40

- (4) sole custody to one parent and shared care
- (5) joint custody and shared care
- (6) it is also possible to make an order for joint custody and to be silent on care and control/access/shared care
- (7) In addition, as intimated above, it is also possible to make a whole array of orders with respect to access. (see para. 19)

41

What is “joint care and control”?

HH Judge Melloy in her judgment explained, “Consequently 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.

42

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.

43

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.” (para. 21)

44

What is “shared care”?

HH Judge Melloy continued to explain, “The concept of shared care as an alternative to joint care and control has developed over time. ... for a variety of different reasons it was felt appropriate for the ultimate decision making power to vest in only one parent. Thus orders were made for sole custody.

45

However the court was anxious to ensure that the child/ren 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.

46

Again in social science terms this is perhaps more reflective of a parallel parenting regime i.e. where there is a very high level of conflict between the parents which makes cooperative co parenting virtually impossible, but where it is in the child/rens best interests to spend significant periods of time with both parents.

47

It would be normal in a situation like that to set out very clearly how the child/ren’s time is to be split between both parents. There is no order for access per se.” (para. 22)

48

(B) Changes in Practice and Procedure in Family Law

- (1) Introduction of Children's Dispute Resolution Pilot Scheme under PD 15.13
- (2) Guidance on Meeting Children PDSL 5
- (3) Guidance on Separate Representation for Children in Matrimonial and Family Proceedings PDSL 6

49

(1) Children's Dispute Resolution (CDR)

Practice Direction 15.13

PD 15.13 issued on 23 July 2012 by the Chief Justice introduced the pilot scheme on CDR for three years which has commenced on **3 October 2012**.

CDR applies to the Family Court but NOT any case in the High Court

It is a mandatory process unless otherwise directed by the court,

- (1) on the court's own motion; or
- (2) on the application by any one party or both.

50

The objective of the CDR

To assist parents on separation or divorce to obtain a lasting agreements concerning children quickly and in a less adversarial atmosphere.

Focus

Best interests of children as well as the duties and responsibility of their parents.

51

Two stages of CDR :-

- (1) Children's Appointments – Form J (Children Form)
- (2) The Children's Dispute Resolution Hearings

52

CDR Hearing

At the hearing, the judge act as a conciliator. The judge will talk to the parties directly and not only through the lawyers.

53

Affidavits/Affirmations from the parties are not encouraged

This is because CDR is meant to be a reconciliatory process engaging both parents to come to an agreement for the future arrangement of the child.

54

Arguments against each other is not to be encouraged, therefore, the information provided in Form J should be factual and not argumentative.

Any attempt to include arguments in reply to the supporting affidavit in the Form J may be rejected by the judge.

55

Children's Form (Form J) – there are 6 parts: -

- (1) to provide for all facts concerning the child/children such as, present arrangement, school, health and finances
- (2) to propose future parenting arrangements which include future access for the other parent and any other specific arrangements.
- (3) to provide for another circumstances in paragraph 7

56

The parties to the CDR should adopt a different mindset in the whole process

This process involves the judge participating as a conciliator to assist the parents come to an agreement for future arrangements of the child/children. (see para. 13 of PD 15.13)

57

Parties attending the CDR hearing shall use their best endeavours to reach an agreement on all relevant matters pertaining to the children. (para. 16 of PD 15.13)

58

(2) Judges Interview With Children

There is no statutory obligation to provide for any interview with the child.

But, both the GMO and the UNCRC recognize that, if a child is capable of forming his or her own views, that child shall have the right freely to express those views: directly or indirectly, whether in person or through a representative. (See S. 3(1) of the GMO and Article 12 of the UNCRC)

59

The Guidance on Meeting Children (PDSL 5) is a note issued by the Chief Justice on 28 March 2012 to all judges (w.e.f., 2 May 2012). It intends to provide guidance to judges in their consideration on,

- (1) the appropriateness to interview children;
- (2) in what circumstances to do so; and
- (3) in accordance with what safeguards.

60

Objective of the Guidance in Hong Kong:

The objective is limited to offering guidance in the hope that it will in a sufficiently large number of cases ensure the best interests of children

61

(3) Separate Representation for Children

Separate representation for children in matrimonial and family proceedings is provided for in the Matrimonial Causes Rules under Rules 72 and 108.

The High Court has inherent jurisdiction in wardship proceedings to provide for separate representation for the ward(s) involved.

62

Rules 72 of the MCR provides, “Where an application is made to the Court of First Instance or the District Court for a variation of settlement order, the court shall, ... direct that the children be separately represented on the application, either by a solicitor or by a solicitor and counsel, and may appoint the Official Solicitor or other fit person to be guardian ad litem of the children for the purpose of the application.”

63

Rule 108 provides, “(1) Without prejudice to rule 72, if in any matrimonial proceedings it appears to the court that any child ought to be separately represented, the court may-

(a) of its own motion, appoint the Official Solicitor if he consents, or

(b) on the application of any other **proper person**, appoint that person, to be guardian ad litem of the child with authority to take part in the proceedings on the child's behalf.

64

Separate representation provided by Rule 108 of the MCR is confusing and unhelpful.

The **LRC Report** on Custody and Access recommended for the repeal of Rule 108 and put in place a more clear provision on separate representation for children. (see Recommendation 49 on page 279)

65

The LRC Report also recommends the introduction of Guidelines on the duty of the Separate Representative and suggested that “The Australian Family Court has guidelines which specify that the duty of the separate representative is, *inter alia*, “to ensure that all matters and witnesses relevant to the child's welfare are before the court and to assist the court to reach a decision that is in the child's best interests.” (Para. 12.50 of the LRC Report)

66

A guidance on separate representation was issued on 23 July 2012 by the Chief Justice which has taken effect on **3 October 2012**.

This Guidance (**PDSL 6**) will apply to the following proceedings : -

- (1) Matrimonial Proceedings
- (2) Family Proceedings
- (3) Hague Convention Cases
- (4) Wardship

67

In Hong Kong, we do not have any criteria for the appointment of separate representation for children. The LRC's Report suggests a list of criteria should be introduced to Hong Kong by adopting the list set out in the Australian case of **Re K [1994] FLC 92-461, at 80**.

68

(C) Family Mediation

Mediators have been encouraging parents to learn to co-parenting.

Mediated Settlement Agreements reached by the parties mostly provide with details of access arrangements and thereby encouraging parents to work together.

It helps to change the mind set of the parents to work together.

69

(D) Parenting Courses

There are more courses available for separating and divorcing parents provided by the NGOs for co-parenting and this has been helping to change the mindset

70

(1) Hong Kong Family Welfare Society

They are running a pilot project between Oct 2013 to Sept 2016

A Beam of Hope - Pilot Project on " Child-focused" Parenting Coordination & Co-parenting Services for Divorced Families

71

(2) Hong Kong Catholic Marriage Advisory Council

Co-parenting Project for Separated and Divorce Parents

Counseling services

(a) To help both parents come up with a co-parenting plan in the best interests of children;

72

- (b) To help both parents do their best ensuring that their children maintain a close and loving relationship with both of them;
- (c) To assist separating and divorcing couples to resolve on their disputes regarding child care by mutual accepted agreement;
- (d) To offer counseling or support to parents who get emotional disturbance due to the divorce process or the relationship with the ex-spouse.

73

(3) St. John's Counselling Service

Co-Parenting Through Separation & Divorce Program

“Our program embraces the principle that when children are properly guided and nurtured with effective co-parenting during these unpleasant changes divorce may bring, they have a greater opportunity in maintaining and further developing positive relationships with both sets of parents and others. “

74

(4) Parenting Course for Divorced Parents – Forever Parents 4 kids

Aims of the Parenting Course,

- “- Understand that divorce will bring changes to the family but it is not the end of the family. The parents are no longer spouses but they remain parents, ...
- Children need to be free to love and relate with each parent and be free from parental conflict,...
- Improve the quality of parental relationship by reducing conflict and redirect energy to reconnect with the children.”

75

(E) Public Education – Social Welfare Department

According to a paper from the SWD to the Law Society in September 2014, it has formed “a task group in 2012 to work out a proposal to meet the needs of divorcing/divorced parents at different conflict levels and to promote the “parental responsibility model” proposed by the Law Reform Commission.”

76

SWD said they have 2 programmes:

(1) Psycho-Educational programme to divorcing or divorced couples about the importance of continuing parental responsibilities; the impact of their separation on themselves and their children and to facilitate them to cooperate with each other in parenting after divorce.

77

(2) General Publicity - leaflets, posters & video

(a) Publication of Leaflets

The Social Welfare Department has published a leaflet called **“Parents of a Lifetime Children Need the Love of Both Parents”**

78

Another leaflet was issued by the Social Welfare Department in early 2014 under the title **“Parenthood Goes On”**.

In this pamphlet, it explains “The possible reactions of the parents in face of divorce/separation – For the one living with the children and for the one not living with the children.”

79

It goes on to explain “what is ‘Shared Parenting’?” and it says, this “refers to the continued communication and cooperation between the separated parents to maintain “partnership” in parenting the children in order to facilitate their development.”

80

It also teaches the parents on how to “work out a shared parenting agreement jointly with [the other parent] and carry out accordingly”. Such as,

- (1) Set up the caring and daily life schedule of the children
- (2) Arrange time together with the children for both parents
- (3) Facilitate both parents’ better understanding of the children
- (4) How to share the expenses on the children

81

(b) Poster at Public Transportation

A poster titled “Marriage may end but parenthood goes on” which has been posted up at public transportation network in February 2013 and then from mid October 2013 to early January 2014.

82

(c) DVD

A DVD with two sets of information sheets to social workers and parents respectively which covers,

- (i) How divorce affects the parents and their children
- (ii) Practical tips on managing the negative emotion induced by divorce/separation
- (iii) How to communicate with the ex-partner
- (iv) How to work out a shared parenting agreement jointly with the ex-partner and carry out accordingly.

83

Training for Staff

In the paper from the SWD, it said “The Staff Development and Training Section (SDTS) of SWD regularly organises training programmes to front-line social workers to enhance their knowledge and skills in working with divorced/separated parents, particularly on the skills in facilitating the divorced/separated parents in shared parenting.”

84

What has the Government done to prepare for the reform?

(1) December 2011 – Public Consultation

The consultation was conducted by the Labour and Welfare Bureau which lasted for 4 months.

According to the LC Paper No. CB(2)1483/12-13(02) for the Legislative Council Panel on Welfare Services, the LWB reported there were some 230 written submissions.

85

Their analysis of the submissions concluded that, “Most respondents agree that the concept [i.e., parental responsibility] would be conducive to the well-being of children. Some of them are mostly concerned about the practical issues when the Model is put into implementation. We note that concerns have been addressed by the LRC (paragraph 6 above).” (para. 19)

86

Regarding the concerns over the possible increase in litigation and prolonged disputes between divorce parents, they referred to the fact that both the UK and Australia made further amendments to their family laws to strengthen the enforcement of court orders, introduce the use of ADR methods and enhance support measures. They said, “Later research has recorded a decline in court filings in cases involving children and a shift away from automatic recourse to legal solutions in response to post-separation relationship difficulties. (para. 21)

87

In response to concerns over the enhancement of existing support services for divorced families, they said “we have all along attached importance to the welfare of families and are committed to providing services to meet their needs.” (para. 22)

88

In conclusion, the LWB agreed to,

- (1) conduct research on the latest development in overseas jurisdictions.
- (2) prepare legislative proposals & implementation of arrangements.
- (3) consider how to take forward some of the recommendations through administrative means, e.g., issue of guidance, training and review and research on relevant arrangements.

89

(2) Meeting with the Hong Kong Law Society on 5 July 2013

The Labour and Welfare Bureau informed the Law Society that they had conducted additional research on the latest position in other jurisdictions and noted the differences between Singapore and Hong Kong. They would enter into discussion with the Judiciary. They expected to circulate a draft bill in 2015.

90

(3) Motion moved by the Administration of Justice and Legal Services (“AJLS”)

On 22 April 2014, the AJLS moved a motion and “urges the Administration to immediately follow up on the recommendations made by the Law Reform Commission in its 2005 Report on Custody and Access”.

91

(4) Another meeting between the LWB and the Hong Kong Law Society

On 26 September 2014, the Law Society together with the Bar Association and the Family Law Association met the LWB representatives.

It confirmed that a bill is now in the course of drafting.

LWB advised that they target to release the draft Bill for public consultation in late first half of 2015 or about July 2015.

92

LWB is aware of the abolition of resident and contact orders in the UK and the introduction of the Child Arrangement Orders.

LWB also agreed to look into the possibility of running pilot scheme in providing contact centre and accreditation for contact centre providers in order to address the concerns raised in Recommendation 38 of the LRC Report.

93

Is the need for support services would delay the reform?

Support Services include: -

- (1) support services for divorcing families;
- (2) counseling services for divorcing couples and children;
- (3) hotline services for divorcing couples and children;
- (4) visitation centers for contacts/access;
- (5) family mediation;

94

- (6) Parenting coordinator to assist parents to care for children after divorce;
- (7) support services for victims of domestic violence;
- (8) mediation for divorcing parents; and
- (9) courses for co-parenting.

95

**We need all these supportive services
irrespective of whether there is a change of
the law.**

96

A Hong Kong Model

The recent reforms in England and Australia to the model on “parental responsibility”

The experience of these two jurisdictions can serve as a reference for our government.

There are reports and studies from both jurisdictions which had reviewed their models and proposed ways to deal with their existing problems.

Hong Kong can benefit from their experiences and set up a model which is suitable and best for our society.

Thank You!