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Our Views towards the Consultation on the Proposed Legislation to Implement the Recommendations of the Law Reform Commission Report on Child Custody and Access

The Against Child Abuse (“ACA”) was established on 1976. We are committed to protecting children and eliminating all forms of child abuse.

ACA supports, in principle, the introduction of the concept of “parental responsibility” into Hong Kong family law. A child’s best interests should always be the Court’s paramount consideration in children proceedings. Contrary to the concept of “custody” which places emphasis on parents’ “rights and ownership” over their child, “parental responsibility” emphasizes on the continuous responsibilities of the parents on the upbringing and development of their child. The concept of “parental responsibility” reflects the true nature of “parent-child” relationship after the parents are separated or divorced. Implementing the parental responsibility model helps undo the common misconception ingrained in the society that children proceedings are about a parent “winning” over the other parent to gain custody.

ACA has the following submissions and comments in respect of the parental responsibility model as described in the consultation document and the proposed legislation annexed to the consultation document:

1. Resolving Disputes between Parents

Mediation

It is in the best interest of a child that disputes between parents are resolved amicably. Although mediation may not be appropriate for all types of disputes (e.g. in domestic violence cases parties may not be able to negotiate freely due to the undue influence that an



abuser may exert over the victim), in most cases mediation provides a means of reducing the cost, uncertainty and delay of litigation. We note that a three-year family mediation pilot scheme was introduced in the Family Court in May 2000. Information and mediation sessions were provided free of charge under the scheme and participants were given a choice of mediators. Despite the success of the scheme¹, it was discontinued on 31 July 2003. Currently, mediation services available to divorcing families are limited and the public generally have poor access to it². ACA supports the expansion of the current mediation services in line with the arrangements operating under the pilot scheme, so that any disputes can be resolved in a less complicated and less emotionally draining way.

Court Process

While court action is unavoidable in certain cases, it should always be the last resort. Disputes concerning children can run into months and years, creating uncertainty and long-term damage to the child. We suggest that mechanisms should be in place to shorten the time with which matter come to court. In emergency situations which involve urgent application for "specific issues" orders and "prohibited steps" order, parties should be allowed to make the application *ex parte*, but an *inter partes* hearing should proceed if the application is opposed.

2. Views of the Child

Article 12 of the United Nations Convention on the Rights of the Child requires state parties (including Hong Kong) to ensure that

¹ It is noted that out of 790 couples who have completed mediation, 627 reaches settlement. The Judiciary stated that the success rate is nearly 80%. See Judiciary Press Release, "Pilot Scheme on Family Mediation Extended" (30 Apr 2003).

² This is despite Practice Direction 15.10 which provides that solicitors are required to advise their clients on the availability of mediation services.

every child who is capable of forming his/her own views should have the right to freely express their views in all matters affecting them, especially in cases of judicial or administrative litigation. Under our current law, however, children are rarely given the opportunity to express their views directly in court. The focus of children's proceedings is often the custodial rights of the parents over the child and there is little to remind the parties of their responsibility towards the child.

We consider Section 60 of the proposed legislation, which expressly authorizes the court to ascertain views expressed by a child, to be a welcome change. We suggest, however, that not only should judges be provided with the discretion to consider the views of the child, they should be required to consider the views of the child. The interests of a child are very much affected in the process of their parents' divorce and his/her view should be heard by judges who handle the case. A child who is capable and willing to express his/her views should have a say in the arrangements being made after his/her parents are divorced.

We note that the consultation document and the draft bill contain little details on the mechanisms and procedures in ascertaining the views of the child. In this regard, we would suggest the followings:

- Currently, a child's view is often reflected in the Social Investigation Report only³. Judges do not have the opportunity to listen to the views of the child and direct questions to him/her. A child should be allowed to directly voice his/her views if he/she indicated a desire to do so.
- A child should be offered an opportunity to express his/her view both in formal court proceedings and in

³ See: Guidance on Separate Representation for Children in Matrimonial and Family Proceedings (20 July 2012).

alternative dispute resolution mechanism, such as mediation.

- A child may have his/her own views as to what he considers to be a “major decision” in his /her life. In granting a child arrangement order under Section 28 of the proposed legislation, the court may take into account the child’s views and request the parent responsible for the day-to-day care of the child to notify the other parent before making any such decisions.
- What a child expresses to the judge should be treated in confidence by the judge and not revealed to the parents. In particular, it should never appear that it is the child who is making the custody decision. If a child appears to be choosing between his parents, this may result in serious implications for his/her future family relationship.⁴
- The separation/ divorce of parents is unquestionably a traumatic experience for a child. A social welfare officer who is assigned to ascertain the views of a child should have adequate trainings and experience in family and child-care work to deal with sensitive situations⁵.

3. Independent Representation for Child's Interest

We welcome the introduction of Section 62 of the proposed legislation, which expressly grants discretion to the judge to make an order for the independent legal representation of a child’s interest. At present, the court will only step in and appoint separate legal representatives for a child in exceptional cases (such

⁴ Law Reforms Commission Recommendation 44.

⁵ Ibid.

as in cases where there are serious allegations of child abuse)⁶. We consider the current state to be unsatisfactory. Whilst we understand that not all children want to be actively involved in legal proceedings, separate representation should still be provided to those who wants to participate.

We note the Administration proposes that parents should bear the legal costs for the appointment of legal representatives for children. This is inappropriate. Not only will there inevitably be a conflict of interest, it will also place additional burden on the parents. The Administration should allocate resources to the Official Solicitors' Office and/or the Legal Aid Department to provide separate legal representation for children in legal proceedings.

4. Power of the Court to Vary/ Dispense with any Consent or Notification Requirement in High-Conflict Cases

We note that a major concern of single parents over the parental responsibility model is that the new consent and notification requirement may allow a greater room for an abusive and/or a trouble-making parent to obstruct and harass the other parent. Uncooperative parents may intentionally delay the decision-making process or object to everything the other party proposes. The number of cases going to court may increase. It would also create a significant burden on the parent responsible for notifying / obtaining consent, and would cause disruption to their children.

In the proposed legislation, the court is given express power to vary or dispense with any of the consent or notification requirements where it is considered necessary (Section 10(4) of the proposed legislation). While we support discretion to be given

⁶ See: Guidance on Separate Representation for Children in Matrimonial and Family Proceedings (20 July 2012).

to the court, we also consider it important to include a statutory checklist of factors that the court should consider in deciding whether to vary or dispense with the consent or notification requirement. Certain factors that the court should consider include whether there is any domestic violence involving the child and/or a member of the child's family in the past, the practical difficulty and/or expense in obtaining consent from the other parent, and the potential disruption to the child in awaiting the consent from the other parent.

5. Right of Third Parties in Children Proceedings

We support granting the right to third parties (such as grand-parents or other close relatives) to apply for court orders related to the child. We also consider "living together for one year out of the previous three years" to be an appropriate threshold for a person to apply for a child arrangement order.

It is suggested that the wording of the proposed legislation may require some fine-tuning. Based on our experience, it is not uncommon for grandparents or other close relatives to take care of a child during day-time, while sending the child back to his/her parents' residence at night. The proposed legislation stated that a third party is only qualified to apply for a child arrangement order if he/she has "lived with" the child for more than one year over the previous three years. The Administration should consider re-wording the proposed legislation so that an individual who takes care of a child is also entitled to apply for child arrangement order, even if the child does not reside with him/her at night.

6. Support Services and Complementary Policies

The implementation of the parental responsibility model requires a change in cultural mindset. It is important for the



Administration to implemented support services and complementary policies alongside with the new legislation. The following support measures are fundamental to the successful implementation of the parental responsibility model.

Specialized Service Centres for Separated Families

Despite there being 65 Integrated Family Service Centres to provide family services, many of these centres are currently overloaded. In order to cope with the increasing demand of services after the introduction of the new legislation, the Administration should consider setting up specialized service centres which provides one-stop access to various services for divorced/ separated parents and their children, including co-parenting skills education, counseling, emotional management and referral to other support services.

Mandatory Co-parenting Education

The introduction of the parental responsibility model requires a shift in cultural attitude which cannot be achieved solely by the enactment of a new legislation. Proper measures need to be put in place to educate parents on their continuing responsibilities of parents after separation/ divorce. We suggest the government to introduce mandatory co-parenting courses which provide information concerning the arrangement of children and the options available to the parents. Parents should be required to attend these courses before they are allowed to file for divorce. Unless the Administration properly address the gap of knowledge, we can foresee a significant increase in the number of court cases and the overburdening of the Family Law Court after the proposed legislation is enacted.

Pilot Project on Child Contact Services

We note from the consultation document that the Administration will set up visitation centres to facilitate the arrangement of

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children contact with separated/divorced parents. While we support setting up visitation centres, it is suggested that these centres should be more than just a place for supervised access. Counselling, emotional management and other services provided by social workers and counselors should also be available in these visitation centres.

Professional Trainings

To prepare for the law reform, special trainings should be provided to judges, lawyers, mediators and social workers and other professionals on their role and jurisdiction in relation to children proceedings, and how to interview and represent children in sensitive and complex cases. Only professionals with specific trainings should handle these cases.

7. Conclusion

We welcome the initiative of the Administration to introduce the new parental responsibility model. The shifts of focus from the “custody and control” to “parental responsibility” must be the way ahead. That being said, we cannot lose sight of the importance of having support measures alongside with the introduction of the proposed legislations. Only then will the best interest of children be promoted.

Against Child Abuse
18 March 2016

