Custody Orders in Hong Kong: Fact and Fiction

Introduction

On the 2 March 2012 I was asked to participate in the Friday evening tea gathering held by Margaret Ng, the legal professions soon to be retired LegCo representative. The topic was the Government’s new consultation paper on child custody namely “Joint Parental Responsibility”. I was asked to attend along with Robin Egerton from the Bar Association and two representatives from the Labour and Welfare Bureau. The Labour and Welfare Bureau had been responsible for preparing the paper under discussion.

At the time I outlined some of my very real concerns about the Governments paper and the assumptions it made. However given that I had stepped in for someone else at the last minute, I had had very little time to deal with this matter substantively. In particular I was keen to research into some of the factual issues raised rather than rely on anecdotal evidence. The meeting itself was a rather spirited affair and I decided on the back of that that the most valuable contribution that I could make to the discussion was to undertake a small research project to determine inter alia the percentage of sole and joint custody orders made by myself at the pronouncement of the decree nisi. What follows is a summary of my findings.

Background

For the uninitiated among you it might be helpful if I set out some of the background to the present situation.

The law on children in Hong Kong has largely remained unchanged since the 1970’s. Court orders are routinely made inter alia for custody, joint custody, care and control and access. On occasion there are also split orders and orders can also be made for shared care. Legislative provision can be found in the Guardianship of Minors Ordinance, Cap 13, the Matrimonial Causes Ordinance, Cap 179 and the Matrimonial Proceedings and Property Ordinance, Cap 192, amongst others.
In April 1995 the topic of children was referred to the Law Reform Commission and they were asked

*To consider the law relating to guardianship and custody of children, and to recommend such changes as may be thought appropriate*

A subcommittee was established in 1996 and after an extensive consultation period four reports were produced namely the *Guardianship of Children* (January 2002), *International Child Abduction* (April 2002), *The Family Dispute Resolution Process* (March 2003) and *Child Custody and Access* (March 2005). Although reform was achieved in a number of areas there has been no substantive reform of the law relating to child custody and access. This is despite constant lobbying from the legal profession and others. The report from the Labour and Welfare Bureau was the first substantive response received from the Government to date.

*The Government’s consultation paper*

The paper is called:

*Child Custody and Access: Whether to Implement the “Joint Parental Responsibility Model” by Legislative Means*

A number of stakeholders and individuals have filed responses to this paper, highlighting a whole host of issues including the Government’s seeming confusion with respect to the terminology used when talking about children. I appreciate many of these concerns, but nonetheless I have limited this paper to the assumptions made by the government with respect to the orders actually made by the courts and how this compares to the reality.

Most, but not all of these assumptions can be found in chapter 2 entitled *The Existing Legislative Framework*.

I think it might be helpful if I were to repeat some of the worst offenders:

Under paragraph 2.8 it states

*In addition to the relevant legislation, Hong Kong’s law on child custody and access also includes the common law decisions of the court. The case law has been evolving and the views of the court*
on child custody and access arrangements have been changing. As noted earlier and further below, although the statutory provisions on child custody and access have not been amended, there has been an increasing shift by the court in recent years towards applying the principles of joint parental responsibility in child custody and access cases, and orders for joint custody are now commonly made in Hong Kong.

Under paragraph 2.10(b) it adds

Joint custody order – When a joint custody order is granted, both parents retain the right to decide on important matters affecting the upbringing of the child, although the physical care and control is usually granted to only one of them. While joint custody orders were not common at the time of LRC’s study of the subject, they are now commonly made with the evolving of the court’s views on the post-divorce custody arrangements for children as discussed in paragraph 2.14 below.

This theme continues under paragraph 2.14

While the court has not kept statistics about the number of joint custody orders granted, recent court judgments in custody proceedings suggest that it is no longer uncommon in Hong Kong.

This error is compounded at paragraph 2.15(c)

Sole custody orders, which were commonly made by the court at the time of LRC’s study, may lead to non-custodial parents drifting out of their children’s lives altogether. It should be noted, however, that since the publication of the LRC’s Report in 2005, joint custody orders have been more commonly granted under the existing legislative framework. Sole custody order may no longer be the dominating type of custody order made by the court.
In chapter 4 the report discusses the Views on Implementing the Model through Legislative Reforms. Again the assumption continues to be made that joint custody orders are now the preferred type of order when dealing with children’s issues and that they are routinely made in the courts. At paragraph 4.8(a) it states

Some stakeholders expressed reservations about the introduction of the model in Hong Kong through legislative reforms to achieve joint parenting. Their major comments included –

(a) Under the existing law, the court could already make joint custody orders for parents who can cooperate with each other for the best interests of the child. In fact, as indicated in paragraph 2.14 above, recent court judgments show that the court has, in recent years, considered that joint custody is in the best interest of children. Joint custody orders are now more commonly made than before. Some stakeholders believed that it would take time to change the mindset of parents and an overnight law reform might not be the most effective way to implement and promote the concept of joint parenting. It might be more useful to promote joint parenting through family education and law reforms were not necessary imminent.

The Initial Research

Prior to attending Margaret Ng’s tea gathering I began to collect some data from my court. My initial findings did not support the assumption being made by Government.

1 In the two weeks prior to Margaret Ng’s tea gathering I began to keep some figures on a fairly impromptu basis. These showed that of the 119 decree nisi’s pronounced by me in 45 cases there were children under the age of 18 years. Of those 45 cases 34 orders were made for sole custody, 6 orders were made for joint custody and five cases were adjourned. Of the 34 orders made for sole custody, 25 orders were made in favour of the mother and 9 orders were made in favour of the father.
Consequently I decided to undertake a more indepth study in an attempt to ascertain what is in fact happening in our courts. In doing so I accept unequivocally that what follows is a snap shot of my court only. I am one of only 8 courts. I am also the only monolingual judge – although I do routinely undertake Chinese work. In each court decree nisi’s of divorce are pronounced three times per week. On average each court is currently dealing with approximately 60 decree nisi’s per week in batches of 20. At the beginning of the project the figures were a little lower at c 45 decree nisi’s per week. This is all done on paper and the pronouncements are then made in open court usually at the beginning of the court day.

Setting the scene

In 2011 there were 18,374 matrimonial causes issued (i.e. petitions) and 4,169 joint applications for divorce i.e. a total of 22,543.

This compared to 20,849 in 2010.

In the first six months of this year there have been 9,430 matrimonial causes issued and a further 1,972 joint applications totaling 11,402 applications for divorce in all. If we continue at the same rate the figures are likely to be up slightly on last year.

In so far as applications concerning children are concerned, in 2011 there were 3,423 applications/summonses listed concerning children including inter alia applications for custody, access, removal and schooling.

This compared to 3,053 applications in 2010.

In the first six months of this year there have been 1,791 applications.

Generally speaking arrangements for children are endorsed in court orders at the following points in the process:

a) By consent summons prior to the pronouncement of the decree nisi

b) At the First Appointment hearing by agreement prior to a Social Investigation report (SIR) being obtained
c) At an adjourned First Appointment hearing usually after a SIR has been obtained

d) At the pronouncement of the decree nisi

e) Prior to trial by agreement

f) Post trial by court order

This research only relates to d) i.e. what happens at the pronouncement of the decree nisi. Anecdotally we know that this is when the vast majority of orders are made by consent with respect to children.

The research project

I kept figures for a total of 20 weeks commencing on the 5 March and ending on the 10 August i.e. a period of about 5 months. At annex 1 I have attached a copy of the sheet used to keep a tally of the information extracted from the files. As can be seen in each batch I kept a note of how many cases involved a) children under the age of 18, b) children over the age of 18 and c) cases were no children were involved.

Of the children under the age of 18 I asked in how many instances orders were made for a) sole custody, b) joint custody and c) in how many cases there was disagreement or further clarification was necessary.

Of the sole custody orders I kept note of whether the sole custody order was made in favour of the mother or the father. Likewise where there was a joint custody order I kept a note of whether care and control vested in the mother or the father. Further a record was also kept of any other arrangements such as shared care or joint care and control.

In all cases I also asked how many families relied on third party care givers. This information was normally obtained either from the Statement of Arrangements for the Children or from letters when queries on child care was raised by the registry. I accept that the information obtained is probably no more than an indication of the practical arrangements entered into by many families in Hong Kong.
What the research shows us

The petitions

I pronounced decree nisi’s in 1,067 cases over that period. Of those approximately 50% did not have children and a further 17% had children over the age of 18 years. Approximately 33% had children under the age of 18. It is this group that we are concerned with here.  

2. Of the petitions filed in 529 cases there were no children, in 186 cases the children were over the age of 18 and in 352 cases the children were under the age of 18 years
Orders made for children under the age of 18 years

Sole custody v joint custody

The following orders were made for children under the age of 18 years:

<table>
<thead>
<tr>
<th>Order Type</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Orders for Children under 18 Sole custody</td>
<td>75%</td>
</tr>
<tr>
<td>Orders for Children under 18 Joint custody</td>
<td>10%</td>
</tr>
<tr>
<td>Orders for Children under 18 Clarification / Disagreement</td>
<td>15%</td>
</tr>
</tbody>
</table>

These figures were startling. They showed that:

a) 265 orders were made for sole custody

b) 33 orders were made for joint custody and in

c) 54 cases either further clarification was needed before an order could be made or the arrangements for the children were in dispute.
Mothers v Fathers

In my initial research I did not ascertain whether or not sole custody orders were generally made in favour of the Mother or the Father. I rectified this in the subsequent research. The figures were equally stark. They showed that just under 75% of sole custody orders were made in favour of Mothers and 25% were made in favour of Fathers.³

a) Sole orders for custody

³ 199 orders were made in favour of Mothers; 66 orders were made in favour of Fathers. In 2 cases split orders were made with sole custody of one or more children vesting in one parent and sole custody of one or more vesting in the other parent.
b) *Joint custody orders*

Only 33 orders were made for joint custody out of a total of 352 orders made in all. Of those in approximately 46% of cases, care and control was granted to the Mother and in 36% of cases care and control was granted to the Father. In the remaining 18% of cases there was some other arrangement put in place by agreement e.g. shared care, joint care and control, or the order was silent on the day to day care arrangements.\(^4\)

\(^4\) 15 orders for care and control were made in favour of the Mother and 12 orders for care and control were made in favour of the Father. In 6 cases some other alternative was put in place including one reference to boarding school.
Third party care givers

I also tried to keep figures for third party care givers – although these are unlikely to be exact as there is no absolute requirement for parties to provide this information. In general, as I have said, it was gleaned from the Statement of Arrangements for the Children or from correspondence with the Family Court Registry regarding the day to day care of children. In addition I would sometimes tick more than one category – if for example grandparents and a domestic helper were all involved in child care. However, according to the data, it seems that where others are assisting with child care, in the vast majority of cases these third parties are likely to be the children’s Grandparents.  

In 152 cases third party care givers were referenced. Of those in 99 cases those third parties were Grandparents; in a further 26 cases other family members were involved. In another 26 cases domestic helpers were also referred to. In 3 cases there were other child minders and in a further 7 cases other arrangements were cited including boarding schools.
Conclusions based on the research

1) The assumptions made by the Labour and Welfare Department are not correct.

2) In the vast majority of cases orders continue to be made by consent for sole custody as opposed to joint custody. Joint custody orders are clearly NOT commonly made. They are NOT the dominating type of order. Further there is no evidence to suggest that joint custody orders are now more likely to be made than at the time of the Law Reform Commissions Report in March 2005.

3) The majority of custodial parents are Mothers

4) Where there are orders for joint custody, the figures for care and control are more evenly matched with either the mother or the father being granted care and control. However the sample of numbers is very small at that level.

5) Many families appear to rely on Grandparents for support with child care.

Orders post decree nisi

As can be seen from the figures it is clear that most child related matters settle. Generally this is either before or at the decree nisi hearing. In the event that there is any disagreement the court will ask for a Social Investigation Report. At the time of writing this paper I was awaiting clarification from the Social Welfare Department with respect to figures. However, according to the representatives from the Labour and Welfare Bureau at Margaret Ng’s tea gathering, last year 400 reports were requested. The Government representative added that in 147 cases an order for joint custody was recommended. Presumably then sole custody was recommended in the majority of the remainder? This is still less than in 50% of cases where there is an initial dispute. The other point to note is that the court is not necessarily bound by these recommendations
How many cases go to full trial?

The following statistics have been kept by the Family Court for trials lasting for more than one day:

<table>
<thead>
<tr>
<th>Year</th>
<th>Total no. of cases heard</th>
<th>Sole custody</th>
<th>Joint custody</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>81</td>
<td>58</td>
<td>23</td>
</tr>
<tr>
<td>%</td>
<td></td>
<td>72%</td>
<td>28%</td>
</tr>
<tr>
<td>2009</td>
<td>73</td>
<td>45</td>
<td>28</td>
</tr>
<tr>
<td>%</td>
<td></td>
<td>62%</td>
<td>38%</td>
</tr>
<tr>
<td>2010</td>
<td>65</td>
<td>41</td>
<td>24</td>
</tr>
<tr>
<td>%</td>
<td></td>
<td>63%</td>
<td>37%</td>
</tr>
<tr>
<td>2011</td>
<td>40</td>
<td>22</td>
<td>18</td>
</tr>
<tr>
<td>%</td>
<td></td>
<td>55%</td>
<td>45%</td>
</tr>
</tbody>
</table>

The figures to date for 2012 show that in the 20 cases heard up until the 31 July 2012, in 9 cases orders were made for sole custody and in 11 cases orders were made for joint custody.

Again these figures do not support the assumptions made in the Government report.
Conclusion

In conclusion then I would like to put forward a motion that before the Government proceeds any further with its policy initiative that it undertake some further research to ascertain what orders are currently being made in the Family Court for children across all courts. Further that such empirical evidence be considered prior to any new policy initiative being formulated or new legislation proposed. Lastly that in all matters pertaining to family matters that empirical evidence be sought and relied upon in preference to anecdotal evidence as appears to be the case at present.  

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6 This problem appears to exist in other jurisdictions also. See July 2012 edition of Family Law, Vol 42 p.786 reference the report entitled “Operation of the Family Court” published by the Justice Select Committee.

“Throughout its inquiry the Committee found it difficult to form a clear picture of trends and changes in the family justice system because of flaws in the compilation of data. It recommended the creation of a robust evidence base for the formation and scrutiny of policy.”