

Law Reform Proposal

Reform of Guardianship of Infants Act

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I. Introduction

1. Cultivate SG is a non-profit organisation which wants to see families and our society thrive for generations. We call this ‘social sustainability’. This involves individual rights and responsibilities, stable marriages, strong families, a cultural climate that supports personal and family growth, and social harmony. We believe that culture – as the sum total of values, beliefs and practices of people in society – is not a battle to be fought, but a garden to be cultivated.
2. One area surrounding the welfare of children and family law that we have been studying is the topic of guardianship, which we believe is in need of reform. Thus, in this paper, we put forward two sets of recommendations for reform.

II. Need for Reform of Guardianship Law

3. Under Singapore law, guardianship of children is currently governed by Guardianship of Infants Act 1934 (“GIA”), the Supreme Court of Judicature Act 1969 (“SCJA”) and case law developed through the courts.
4. Our guardianship laws are fairly dated, and have been subject to calls for reform over the years.
5. In this section, we briefly discuss:
 - A. What is guardianship;
 - B. Current framework of guardianship laws;
 - C. Previous calls for reform.

A. What is guardianship?

6. Guardianship is a legal status under the law, giving a person the legal responsibility to care for a child below 21 years of age.
7. Unlike parenthood – which “*arises naturally*” and is acknowledged, protected and regulated by the law – guardianship responsibility is bestowed through the operation of the law.¹



¹ Report of the Family Law Review Working Group, “Recommendations for Guardianship Reform in Singapore” (23 March 2016) at para. 8.

8. The appointment of a guardian over children results in the guardian stepping into the shoes of a parent to exercise the authority that the parent naturally possesses over the child. This would include the delegation of long-term decision-making authority to that guardian, even if the parent of the child still retains responsibility and authority as a parent.²
9. A guardian has “*almost the same bundle of responsibilities*” as a parent, but the two are not exactly the same.³ Some key exceptions include:
 - (a) While a parent has primary obligation to maintain a child, a guardian does not. Nevertheless, a guardian must provide adequate food, clothing, medical aid, lodging, care or other necessities of life for the child, failing which the guardian may be criminally liable.⁴
 - (b) The role of a guardian may be limited by the legal instrument of appointment (e.g. a will or court order).⁵

B. Current framework of guardianship laws

10. The main pieces of legislation in relation to the appointment of guardians are the GIA and the SCJA.
11. There are three ways through which a guardian can be appointed:
 - (1) When one parent passes away
 - (2) By appointment of the court
 - (3) Wardship jurisdiction
12. In all cases of appointment of guardians, the welfare of the child will be the “*first and paramount consideration*”.⁶



² *VET v VEU* [2020] SGHCF 4 at para. 19. In that case, the court explained that, in the absence of any limits imposed, the delegated authority of a guardian “*includes making decisions on important matters with long-term consequences such as education (e.g., primary school registration and subsequent school choices) and whether the child should undergo major and serious medical treatment including consenting to organ donation*”.

³ Report of the Family Law Review Working Group, “Recommendations for Guardianship Reform in Singapore” (23 March 2016) at para. 27.

⁴ Section 5, Children and Young Persons Act 1993.

⁵ *VET v VEU* [2020] SGHCF 4 at para. 19.

⁶ Section 3, Guardianship of Infants Act 1934; *VET v VEU* [2020] SGHCF 4 at para. 42.

(1) When one parent passes away

13. The first way of appointing a guardian is when one parent passes away.

14. Under the GIA:

(a) **Surviving parent to be guardian.** Upon the death of one parent (father or mother), the other surviving parent (mother or father) will be the guardian of the child.⁷

(b) **By deed or will upon death (i.e. testamentary guardianship).** A parent may by deed or will appoint any person to be guardian of the child after that parent's death.⁸

(2) By appointment of the court

15. The second way is through the appointment of the court, under the GIA.

16. Section 6(3) of the GIA empowers the court to appoint a person as guardian in a situation where a child has *“no parent, no guardian of the person and no other person having parental rights with respect to him”*.

17. The purpose of this provision is to *“enable the courts to make orders for the welfare of the children without intervening unnecessarily in a parent's parental responsibility”*.⁹ A child in this situation does not have the usual adults *“at the apex”* – i.e. the parents – having parental rights with respect to and exercising parental responsibility over him or her.¹⁰

18. Section 10 of the GIA further empowers the court to remove any guardian, and appoint another guardian in that person's place. Guardianship can be terminated if there is actual or threatened misconduct of the guardian or a change of circumstances which renders it for some reason better for the child to have a new guardian.¹¹

(3) Wardship jurisdiction

19. The third way in which a guardian may be appointed is through the court's *“wardship jurisdiction”*. This jurisdiction is based on the idea that *“the sovereign [has] a duty to protect all minor children living within the sovereign's area of control.”*¹²

⁷ Section 6(1) and (2), Guardianship of Infants Act 1934.

⁸ Section 7, Guardianship of Infants Act 1934.

⁹ *VET v VEU* [2020] SGHCF 4 at para. 32.

¹⁰ *UMF v UMG* [2018] SGHCF 20 at para. 35.

¹¹ *UMF v UMG* [2018] SGHCF 20 at para. 36.

¹² *UMF v UMG* [2018] SGHCF 20 at para. 52.

20. In Singapore, wardship jurisdiction is provided under Section 17(1)(d) of the SCJA, which states that the civil jurisdiction of the court includes “*jurisdiction to appoint and control guardians of infants and generally over the persons and property of infants*”.
21. Beyond this, the scope of the court’s wardship jurisdiction not clearly spelt out in statute and has instead been developed through case law in the Singapore courts.¹³ This will be elaborated further below.

C. Previous calls for reform

22. In 2016, a Family Law Working Group – comprised of judges, academics, representatives from the Government and legal practitioners – issued a report titled “Recommendations for Guardianship Reform in Singapore”.¹⁴
23. The report noted the “*feudal*” origins of the GIA, which dates back to the time before Singapore’s Independence. The Working Group sought to modernise guardianship law by emphasising parental and guardianship responsibility (instead of the language of parental “*rights*”, as is currently contained in the GIA), and the welfare of the child.¹⁵ Among the recommendations of the Working Group were also to allow non-parents who have an interest (e.g. grandparents) to apply for specific orders which may fall short of guardianship, custody or care and control orders.¹⁶
24. In separate cases in 2018 and 2020, Justice Debbie Ong (as she then was) cited the report and echoed calls for reform of guardianship law.¹⁷ Justice Ong was previously part of the Working Group (as a Judicial Commissioner at the time of the report).

¹³ *UMF v UMG* [2018] SGHCF 20; *VET v VEU* [2020] SGHCF 4.

¹⁴ Report of the Family Law Review Working Group, “Recommendations for Guardianship Reform in Singapore” (23 March 2016).

¹⁵ Report of the Family Law Review Working Group, “Recommendations for Guardianship Reform in Singapore” (23 March 2016) at paras. 1 to 5, and 20.

¹⁶ Report of the Family Law Review Working Group, “Recommendations for Guardianship Reform in Singapore” (23 March 2016) at paras. 49 to 50.

¹⁷ *UMF v UMG* [2018] SGHCF 20 at paras. 69 to 70; *VET v VEU* [2020] SGHCF 4 at para. 58.

III. Two Sets of Recommendations

25. We agree with the 2016 Family Law Working Group on the need for reform of Singapore's guardianship laws and support its recommendations. We invite the Government to revisit the recommendations made in the report.
26. We further invite the Government to consider the following two sets of recommendations in reforming guardianship law in Singapore:
 - A. Create a clearly-defined statutory regime for non-parents to protect the welfare of children;
 - B. Allow the nomination or appointment of a guardian in the event there is no one able and willing to discharge parental or guardianship responsibilities towards the child.
27. It bears emphasising that the welfare of the child remains the paramount consideration at all times.¹⁸

A. Clearly-defined statutory regime for non-parents to protect the welfare of children

28. Currently, the grounds under the GIA are too narrow to adequately cover situations where children need protection. The courts have had to resort to their "wardship jurisdiction" under the SCJA, as illustrated by the following case:

Mother an absent parent, leaving children in care of grandaunt

A mother had left her three children born out of wedlock (K, P and W) in the care of their grandaunt (i.e. the mother's aunt) since their births. The mother was an absent parent throughout the lives of K, P and W. Subsequently, the mother married and had another three children from this marriage.

The grandaunt had difficulties obtaining the mother's consent for matters necessary for the children's welfare. For example, she had to seek assistance from KK Hospital's medical social worker to obtain the mother's consent for P's operation for respiratory problems. There was no evidence that the mother was willing to be, or capable of, being a responsible parent to these children.

The grandaunt applied to court to be appointed as guardian (under the court's wardship jurisdiction), and the court granted her application, taking the view that the grandaunt "*should be supported in having the authority to make decisions required for their best*

¹⁸ In *BNS v BNT* [2015] SGCA 23, the Singapore Court of Appeal emphasised that the "golden thread" that runs through all proceedings directly affecting the interests of children is as follows: "*the welfare of the child is paramount and this principle ought to override any other consideration*" (at para. 19).

interests without running into unnecessary obstacles in carrying out these responsibilities". The court also ordered the mother to pay maintenance for the three children K, P and W.

(Source: The unreported decisions in HCF/OSG 2/2019 and HCF/OSG 3/2019, cited in *VET v VEU*[2020] SGHCF 4)

29. In cases decided in 2018 and 2020, Justice Debbie Ong (as she then was) called for:
- (a) *"a clearly-defined statutory regime through which non-parents may apply for the necessary orders for the welfare of children";*¹⁹
 - (b) *"specific provision for non-parents with some connection to a child to make applications for custody, care and control and access in appropriate cases. One such group of adults could be the child's grandparents for instance. To protect the parent-and-child relationship from unmeritorious interference, the law could provide that the leave of court is required for such applications, setting out clearly the classes of persons who may apply for the court's leave."*²⁰
30. Similar calls had also been made by the 2016 Family Law Working Group.²¹
31. In our view, here are some key features that should be included in the statutory regime for non-parents to apply for orders to protect children's welfare:
- (a) **List of non-parents who may apply:**
 - (i) **Relatives.** These include grandparents, siblings (above the age of 21), uncles or aunts, or cousins (above the age of 21).²²
 - (ii) **Non-parent caregivers (including former caregivers).**²³
 - (b) **Leave of court required.** To protect the parent-and-child relationship from *"unmeritorious interference"* (as per then-Justice Debbie Ong's proposal),²⁴ leave



¹⁹ *UMF v UMG* [2018] SGHCF 20 at para. 69; *VET v VEU* [2020] SGHCF 4 at para. 58.

²⁰ *UMF v UMG* [2018] SGHCF 20 at para. 70; *VET v VEU* [2020] SGHCF 4 at para. 58.

²¹ Report of the Family Law Review Working Group, "Recommendations for Guardianship Reform in Singapore" (23 March 2016) at paras. 49 to 50.

²² Compare Section 18 of the Probate and Administration Act 1934, where a spouse or next-of-kin is entitled to apply for letters of administration on intestacy.

²³ The 2016 Family Law Working Group took the view that the current or former caregivers of a child should be granted standing to apply to court for guardianship orders or orders such as custody, care and control, access, maintenance and/or other orders on specific issues relating to the care and upbringing of a child. The Working Group added that: *"This excludes any person who has had care of the child under the Child Protective Services purview. The latter may only apply with the Child Protector's sanction."* (Report of the Family Law Review Working Group, "Recommendations for Guardianship Reform in Singapore" (23 March 2016) at para. 52).

²⁴ *UMF v UMG* [2018] SGHCF 20 at paras. 69 to 70; *VET v VEU* [2020] SGHCF 4 at para. 58.

of court should be required before a non-parent can apply for the necessary orders for the welfare of children.

- (c) **Wardship jurisdiction to remain.** The statutory framework is meant to supplement rather than supplant the court's wardship jurisdiction.

B. Nomination or appointment of a guardian when there is no one able and willing to discharge parental or guardianship responsibilities

32. Under the GIA, a guardian can be appointed by deed or will upon the death of a parent (i.e. testamentary guardianship under Section 7, GIA), or if a child has *"no parent, no guardian of the person and no other person having parental rights with respect to him"* (Section 6(3), GIA). However, these provisions would not apply in the event a parent is *unable* to care for the child (e.g. loss of capacity or incarceration), and/or if the parent(s) of the child are *unwilling* to discharge their parental responsibilities.
33. Consider the following hypothetical scenarios:

Hypothetical Scenario 1: Widow who becomes incapacitated

A widow (W) with two young children receives a diagnosis of a medical condition that would cause her to become incapacitated (physically and mentally) in approximately one year.

W would like to appoint a guardian to care for her children in the event she becomes incapacitated.

Hypothetical Scenario 2: Imminent incarceration of a single parent

A divorcee (D) has sole care and control of his only child, a son. The former spouse is unwilling to be involved in the life of the son. D is about to be incarcerated for various offences.

D would like to appoint his parents (i.e. the boy's paternal grandparents) as the guardians of his son.

34. In each of the hypothetical scenarios above, the court's wardship jurisdiction would have to be invoked for a person to be appointed as a guardian, under current law. As noted earlier, this jurisdiction is not clearly spelt out in statute.
35. In our view, the existing grounds under the GIA can be expanded to allow the nomination or appointment of a guardian in the event there is no one *able* (and, where applicable, *willing*) to discharge parental or guardianship responsibilities towards the child (as opposed to a situation of death or *"no... person having parental rights"*):

Current Law	Proposal
Under Section 7(1) and (2), GIA: A parent of a child may by deed or will appoint any person to be guardian of the child after the parent's death.	Expanded grounds: A parent of a child may appoint any person to be guardian of the child: (a) after the parent's death; or (b) if the parent loses capacity, whether physical or mental. The instrument of appointment for (a) may be by deed or will, whereas the instrument of appointment for (b) is by deed only.²⁵ Loss of capacity may be temporary or permanent. Any appointment made is revocable.
Under Section 6(3), GIA: The court may appoint the applicant to be the guardian of the child where the child <i>"has no parent, no guardian of the person and no other person having parental rights with respect to him"</i>.	Expanded grounds: The court may appoint a person as guardian of the child where the child has no one <i>able and willing</i> to discharge parental or guardianship responsibilities with respect to the child. Either the parent of the child or the intending guardian may apply. Leave of court is required if the intending guardian is the applicant. In the appointment of a guardian, priority should be given to the child's relatives,²⁶ especially those who had provided or are providing care for the child.



²⁵ A majority of the 2016 Family Law Working Group did not favour a more simplified mode of appointing testamentary guardians ("TGs"), considering that appointment by deed or will provided "better safeguards". The report added: *"This is because the lawyers drafting up the deeds or wills would have the opportunity to advise the appointing parent(s) on the importance of the decision of appointing a TG, as well as the responsibilities which would be owed by a TG. The lawyer would also have the opportunity to advise the appointing parent(s) to obtain the consent of the proposed TG to prevent a situation where a TG is appointed but is unable and/or unwilling to be a guardian for the child."* The minority thought that TGs should be appointed only after the death of both parents. (Report of the Family Law Review Working Group, "Recommendations for Guardianship Reform in Singapore" (23 March 2016) at para. 52).

²⁶ Compare Section 18 of the Probate and Administration Act 1934, where a spouse or next-of-kin is entitled to apply for letters of administration on intestacy.

36. With regard to the above, comparison may be made to the Mental Capacity Act (“MCA”), to protect persons in the event of loss of mental capacity (whether temporary or permanent). Under the MCA, a person (i.e. the donor) may confer decision-making powers to a donee in respect of the donor’s personal welfare or property and affairs by way of a Lasting Power of Attorney (“LPA”).²⁷ The court additionally has powers to appoint deputies in respect of persons who lack capacity.²⁸
37. As alluded to above, the proposed scheme is relevant to persons who are incarcerated or about to be incarcerated. We would recommend that such persons should be notified (e.g. through talks or brochures) of the option of appointing guardians in respect of their children for the duration of their incarceration, to better safeguard the welfare of children.

IV. Conclusion

38. In any reform to guardianship law or any other part of family law, the following reminder from the 2016 Family Law Working Group is apt:

“[The] practical realities of family life in Singapore need to be taken into consideration. While the courts tend to deal with problematic families and families in crises, the vast majority of children in Singapore are cared for and brought up in far more functioning families. The law must take a measured approach. It should support a parent who is trying his/her best, while stepping in only when a parent is not performing his/her duties and needs to be reminded what the law expects of him/her or where there is a breakdown in the relationship of the parents such that the law has to intervene to regulate the living arrangements of the child. The detailed rules only come into play when a parent or guardian breaches the core principle of parental responsibility. This is when a matter may come to the attention of the courts or public care officials.”²⁹

39. We would invite the Government to revisit the recommendations of the 2016 Family Law Working Group for reform of guardianship law, and to additionally consider the recommendations made above.

²⁷ Section 11, Mental Capacity Act 2008.

²⁸ Sections 20 and 21, Mental Capacity Act 2008.

²⁹ Report of the Family Law Review Working Group, “Recommendations for Guardianship Reform in Singapore” (23 March 2016) at para. 14.

Overview of Custody, Care and Control, and Access

In an “*ideal state*”, a child would be “*in an intact family where he or she lives with and is lovingly cared for jointly by both parents*”. However, when marriage breaks down, this is no longer fully achievable. Thus, the family justice system aspires to achieve this ideal state of affairs for the child, or “*the closest to it possible*”.³⁰

To do so, courts make orders to allocate responsibilities to the parents, according to three legal “packages”:

1. “**Custody**”, which concerns long-term decision-making for the welfare of the child;
2. “**Care and control**”, involving day-to-day decision-making;
3. “**Access**”, through which a child spends regular periods of time with the other parent.

In making orders for custody, care and control, and access, the court’s focus is on the child’s welfare, which is the paramount consideration in all proceedings directly affecting the interests of a child.³¹

(1) Custody

“Custody” pertains to decision-making over the major aspects of a child’s life, such as the child’s education and major healthcare issues.

Our courts normally grant “joint custody” or “no custody” orders, in order to emphasise the joint responsibility of parents for their children. Both parents must consult each other and co-operate to make the major decisions for the child. Such orders ensure that the child continues, even after the parent’s divorce, to have the guidance of both parents in his or her life.³²

Sole custody orders will only be made in exceptional circumstances, including where one parent had physically, sexually or emotionally abused the child, or where the relationship of the parties is such that co-operation is impossible even after the avenues of mediation and counselling have been explored, and the lack of co-operation is harmful to the child.³³

³⁰ *TAU v TAT* [2018] SGHCF 11 at para. 12.

³¹ *TAU v TAT* [2018] SGHCF 11 at para. 10.

³² *CX v CY (minor: custody and access)* [2005] 3 SLR(R) 690 at para. 38; *TAU v TAT* [2018] SGHCF 11 at para. 8.

³³ *CX v CY (minor: custody and access)* [2005] 3 SLR(R) 690 at para. 38; *TAU v TAT* [2018] SGHCF 11 at para. 8.

(2) Care and control

“Care and control” relates to which parent the child should live with primarily, with that parent as the daily caregiver. Consequently, that parent is generally responsible for making day-to-day decisions for the child, such as how the child is to dress or what the child is to eat.³⁴

It is common that a parent is granted sole care and control of a child while the other parent has access to the child. In appropriate cases, the court may grant both parents shared care and control if this is feasible and determined to best serve the child’s welfare. In such cases, the child may spend about three days of the week with a parent and the remaining four days with the other parent. Each parent will be responsible for day-to-day decision-making for the child when the child is living with him or her. The child will effectively have two homes and two primary caregivers in this arrangement.³⁵

(3) Access

“Access” is the arrangement through which a child will spend regular periods of time with the other parent.

Access can take many forms. Where the child is not yet completely comfortable spending time alone with that parent, access may be supervised by professionals such as counsellors who will also assist in strengthening the parent-child relationship. Access may also be overnight, where for example, the child stays at the residence of that parent for one or some nights a week.³⁶

When the parent with access is with the child, he or she can make some of the day-to-day decisions for the child, as it would be otherwise impractical for the parent with care and control to be consulted on every decision, such as what the child should eat during periods of access.³⁷



³⁴ *TAU v TAT*[2018] SGHCF 11 at para. 9.

³⁵ *TAU v TAT*[2018] SGHCF 11 at para. 11.

³⁶ *TAU v TAT*[2018] SGHCF 11 at para. 9.

³⁷ *TAU v TAT*[2018] SGHCF 11 at para. 9.