



母親的抉擇
Mother's Choice

Changing Life Stories:
Understanding the Legal Aspects of
Working with Children and Families

Introduction to Child Rights and the Best Interests of the Child



An Introductory Manual for Child Welfare Professionals

About the Authors



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Mother's Choice

Mother's Choice is a charity serving the many children without families and pregnant teenagers in Hong Kong. We join hands with our community to give hope, and change the life stories of vulnerable girls and babies. We are a champion for children and a voice for every child to be in a safe, loving and permanent family.

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Introduction

We All Have a Role to Play

The government has a legal responsibility to protect and promote the rights and welfare of all children within Hong Kong.¹ This duty extends to all courts, administrative bodies, and other government agencies.² Protecting children is not only the responsibility of the government, but of society as a whole. Everyone can help play a role in protecting the rights of children.

It is important that every individual working with children and families is aware of the role they play in protecting children, as well as that of other professionals and caregivers. At different stages of case handling, personnel involved should collaborate with each other and share the responsibility for protection of the child and provision of assistance to the family.³

This Manual aims to help social workers and other professionals better understand some of the core legal requirements when advising and working with children and families and what role they and others can play in promoting the safety and welfare of children. References to “clients” in this Manual mean direct service recipients who receive individual, group services or program activities provided by social workers.

There are basic principles that are at the core of achieving best practices in working with children and families:

- Children should be at the center of all systems and decisions. The needs and best interests of the child should always be the paramount consideration.
- Children should have a voice. Their wishes should be listened to when making decisions about his or her life.⁴
- To ensure proper care and protection, the input of everyone who works with children — including teachers, doctors, nurses, youth workers, police, social workers, NGO workers, and others is required and significant.
- If necessary, the prescribed consent should be obtained as early as possible for personal information to be provided to relevant personnel for discussion on case handling, with a view to ensuring effective protection of children’s safety.⁵
- Professionals should regularly review the actions and processes they are using to protect and promote children’s welfare, making sure they continue to be of the highest quality and responsive to the changing needs of the children they are working with.⁶

1 See [Convention on the Rights of the Child, Art. 2\(1\); Art. 3\(2\)](#).

2 See [Convention on the Rights of the Child, Art. 3\(1\)](#).

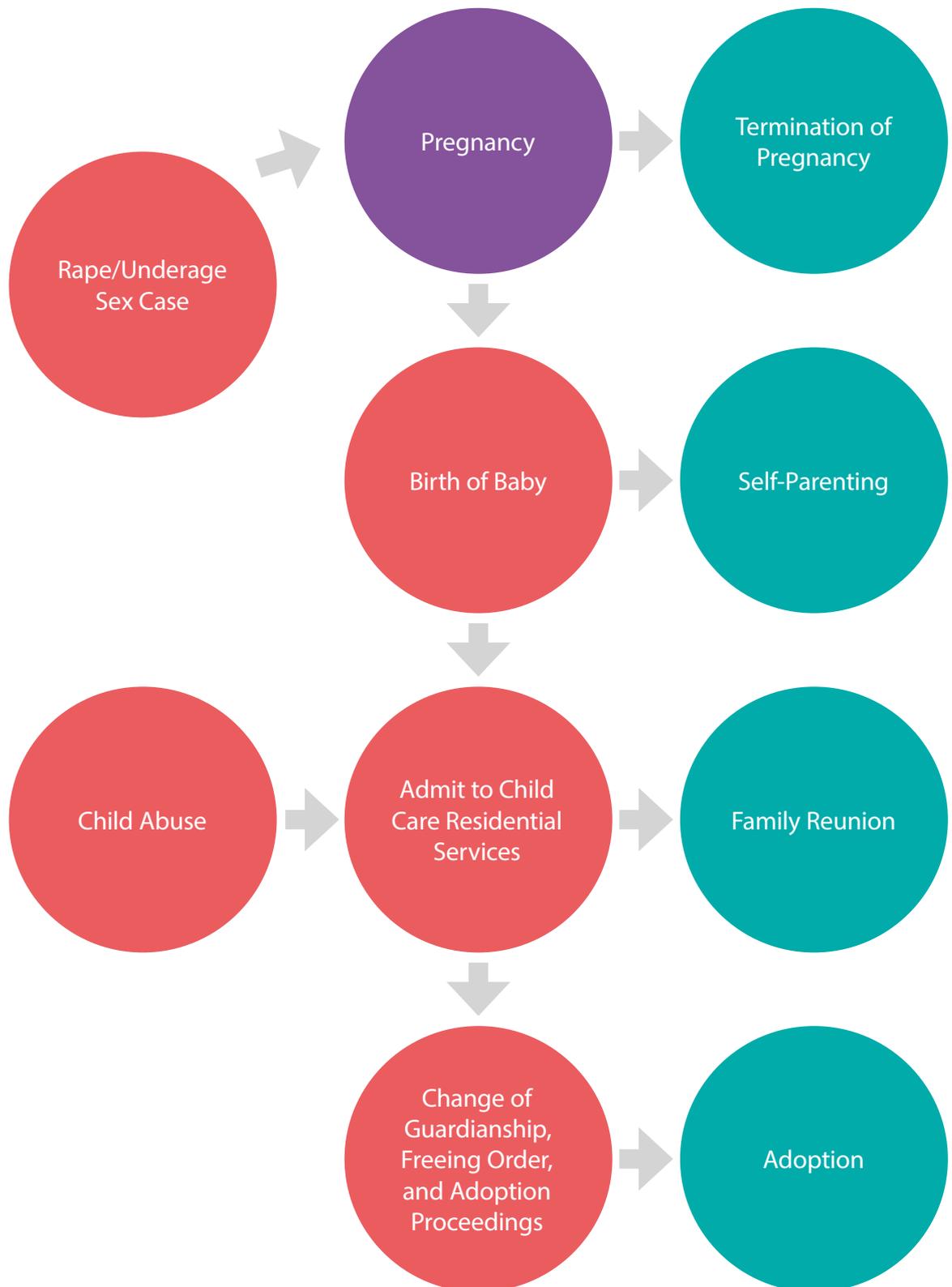
3 Social Welfare Department (2020) '[Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation](#)'

4 How much weight is given to a child’s view is dependent on the case and the child’s competence. Specific considerations in the context of Termination of Pregnancy and Birth Registration can be found in sections 4.1 and 5.1 respectively.

5 Social Welfare Department (2020) '[Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation](#)'.

6 Based on HM Government’s, [Working together to safeguard children: A guide to inter-agency working to safeguard and promote the welfare of children \(July 2018\)](#). These principles also echo the “Governing Principles of Child Protection”, put forward in the SWD’s, [Procedural Guide for Handling Child Abuse Cases \(2015 Version\)](#), at pages 1-2.

This Manual Covers the Lifejourney of a Child Along the Following Paths:





General Practices

Introduction to the United Nations Convention on the Rights of the Child

WHAT IS THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD?

The Convention on the Rights of the Child is an international treaty that sets out the basic rights of children under international law. Treaties are agreements between nations, in which governments agree to certain rules or standards regulating how they will behave. During the 20th century, a variety of human rights treaties were entered into between nations around the world. By doing this, the governments of those countries agreed to uphold minimum standards protecting the basic human rights of all individuals. Human rights are considered to be basic rights which belong to all human beings, regardless of their race, gender, nationality, religion or class.

WHAT DOES THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD DO?

The Convention on the Rights of the Child (the Convention) specifically sets out the rights of *children*. The Convention recognizes that children and young people play a special role in society and have particular needs and rights that must be protected. The Convention was adopted by the United Nations General Assembly on 20 November 1989.⁷ Currently 196 countries are party to the Convention, making it the most widely adopted international agreement. The Convention was extended to Hong Kong in 1994. By signing up to the Convention, governments agreed to respect the rights of children as described in that document. The widespread adoption of the Convention indicates that these rights for children are widely supported by nations around the world.

WHAT RIGHTS ARE PROTECTED BY THE CONVENTION?

There are more than 50 specific rights within the Convention on the Rights of the Child, incorporated within four core principles. These are:

- Non-discrimination
- Consideration of the best interests of the child
- Right to life, survival, and development
- Respect for the views of the child

WHAT DOES THE RIGHT TO “NON-DISCRIMINATION” MEAN?

The principle of *non-discrimination* (Article 2) states that the rights within the Convention apply to all children. Governments must protect the rights of all children equally, irrespective of the child’s or his or her parent’s or legal guardian’s race, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

WHAT DOES THE “BEST INTERESTS OF THE CHILD” MEAN?

The *best interests of the child* principle (Article 3) states that in “all actions concerning children... the best interests of the child shall be a primary consideration”. This

7 UNICEF (2016) ‘[What is the UNCRC](#)’

means that when parents, government officials, professionals, judges and other persons make decisions affecting children, the impact of that decision on the child, from a best interests perspective, must be considered as one of the most important factors.

WHAT DOES THE “INHERENT RIGHT TO LIFE” MEAN?

Under the Convention (Article 6), “every child has the *inherent right to life*” and countries “shall ensure to the maximum extent possible the *survival and development* of the child”. This principle means that children must be given the best chance at both a healthy life as well as developing to their full potential. This principle not only encompasses the physical health of a child, but also their social development and education.

WHAT DOES “RESPECT FOR THE VIEWS OF THE CHILD” MEAN?

The final principle requires that there be *respect for the views of the child* (Article 12). This means that children have a right to have their opinions heard and respected in matters concerning them, taking into account their age and maturity. Respecting the views of a child can be seen to include two parts. First, it is important to hear and take into account the child’s views and opinions. Second, the child should be an active participant in the decision-making process of matters concerning him or her. The weight of the child’s views must be balanced with what is deemed to be in their best interests.

HOW ARE CHILDREN’S RIGHTS BALANCED AGAINST THE RIGHTS AND INTERESTS OF THE FAMILY?

The Convention also recognizes the vital role that the family plays in the lives of children. The Convention supports loving and harmonious environments for children to develop in and specifically requires that governments should provide support to families and allow parents to fulfil their parental duties to children. Although the Convention recognizes the rights of parents, it also addresses the responsibilities parents have to their children. It is important to recognize that parental rights are not absolute and must be balanced against a child’s rights, especially the child’s right to be heard and to have his or her “best interests” considered.

HOW ARE CHILDREN’S RIGHTS PROTECTED?

The *rights of children* described in the Convention are considered to be absolute. By agreeing to be bound by the Convention, countries agree that they should take concrete steps to respect and protect the rights described in it. However, the Convention only lays down the general standards: it is understood that each country must find its own way of implementing these standards. One way that countries do this is to incorporate the rights or certain principles described in the Convention into their own domestic laws. This could then facilitate the enforcement of laws that protect children’s rights locally and perhaps most importantly, promote changes in the attitudes and behavior of society to best protect these rights. In Hong Kong, some of the Convention’s principles have been adopted in the Hong Kong Bill of Rights (Cap. 383) and the Guardianship of Minors’ Ordinance (Cap. 13), and Hong Kong court decisions supporting the Convention’s standards and principles form part of Hong Kong common law. Further, English court decisions confirming the Convention’s principles are either binding on Hong Kong courts or have persuasive effect.

Introduction to the “Best Interests of the Child” Standard

ARTICLE 3(1)

United Nations Convention on the Rights of the Child

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

WHAT DOES THE “BEST INTERESTS OF THE CHILD” STANDARD MEAN?

While the “best interest of the child” standard is required by the Convention to be ‘a’ primary consideration, in most countries it is now a legal requirement to consider what is best for the child as ‘the’ paramount consideration in decisions affecting their care or wellbeing.⁸ For example, in cases of child abuse, the child’s rights and interests must be considered above other factors, including what is best for the parents, family, or others involved with the case.⁹

In Hong Kong, the best interest standard is legally required by both international law obligations,¹⁰ and Hong Kong’s domestic law.¹¹ The standard in Hong Kong is that the best interests of the child must be the “paramount consideration.”¹²

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- 8 See [Guardianship of Minors Ordinance \(Cap 13\), s. 3\(1\)](#); [H v N \[2012\] 5 HKLRD 498](#); [J v C 113 Sol Jo 164, \[1969\] 1 All ER 788, \[1969\] 2 WLR 540, \[1970\] AC 668, 710H](#), “Welfare of the infant” should be regarded as “the first and paramount consideration” in custody matters as opposed to only being “a primary consideration” as envisaged by the Convention.
 - 9 See [PD v KWW \[2010\] 4 HKLRD 191](#); [H v N \[2012\] 5 HKLRD 498](#); [JD v East Berkshire Community Health NHS Trust \[2005\] UKHL 23](#). [Convention on the Rights of the Child, Art. 3\(1\)](#); International Covenant on Civil and Political Rights, Art. 24 (the Best Interests Standard is an implied obligation under article 24 of the ICCPR); [Guardianship of Minors Ordinance \(Cap 13\), s. 3\(1\) \(HK\)](#); [Children Act 1989 \(UK\), s. 1\(1\)](#); [Adoption and Children Act 2002 \(UK\), s. 1\(2\)](#); [Family Law Act 1975 \(Australia\), s. 60CA](#); and [Determining the Best Interests of the Child, Child Welfare Information Gateway \(Nov. 2012\)](#), Washington, DC: U.S. Department of Health and Human Services, Children’s Bureau
 - 10 See [Convention on the Rights of the Child, Art. 3\(1\)](#); International Covenant on Civil and Political Rights, Art. 24 (the Best Interests Standard is an implied obligation under article 24 of the ICCPR). See [Office of the High Commissioner for Human Rights, General Comment No. 17: Rights of the Child, \(Art 24\) \(HRI/GEN/1/Rev 1\)](#) at para 6.
 - 11 See [Hong Kong Bill of Rights, Art. 20](#); [Guardianship of Minors Ordinance \(Cap 13\), s.3\(1\)\(a\)](#); [K v W \(Children – Removal from Jurisdiction\) \[2006\] 2 HKFLR 292](#); [PD v KWW \[2010\] 4 HKLRD 191](#)
 - 12 See [K v W \(Children – Removal from Jurisdiction\) \[2006\] 2 HKFLR 292](#), para 23 states that “[T]he welfare of the child is always paramount”, citing [Dame Butler-Sloss in Payne v Payne \[2001\] 1 FLR 1052](#); [Guardianship of Minors Ordinance \(Cap. 13\) s. 3\(1\)\(a\)](#), which states that “[I]n relation to the custody or upbringing of a minor ... in any proceedings before any court ... the court shall regard the best interests of the minor as the first and paramount consideration...” as opposed to only being “a primary consideration” as envisaged by the Convention on the Rights of the Child.

WHAT ROLE CAN I PLAY?

Social workers often play a key role in providing recommendations to others on what is in the *best interests of the child* and how a child's interests can be protected, in particular to lawyers, judges, and other decision makers. It is therefore critically important that social workers develop strong skills in both assessing and advocating children's best interests. Social workers can become especially skilled at understanding how to communicate with children across a range of ages and stages of development and how to work with them together with their families.

HOW DO YOU KNOW WHAT IS IN THE "BEST INTERESTS OF THE CHILD?"

Although it is clear that decision makers must consider the *best interests of the child*, figuring out what that means in practice can be difficult. It often requires many factors to be balanced against each other. Those factors, and the relative weight of each of them, may be different in every case.

Both the UK and Australia have addressed this by creating a statutory checklist of factors that should be considered when evaluating whether a decision is in the best interests of a child.¹³

13 See [Children Act 1989 \(UK\), s. 1\(3\)](#); [Family Law Act 1975 \(Australia\), s. 60CC](#).



Best Interests Checklist

Under the UK checklist, which was adopted by the Hong Kong Courts in 2006¹⁴ and has been used by them since, the courts would consider:

- a. the ascertainable wishes and feelings of the child concerned (considered in the light of his/her age and understanding);
- b. his/her physical, emotional and educational needs;
- c. the nature of the relationship of the child with each of his/her parents, siblings and with other persons;
- d. the likely effect on him/her of any change in his/her circumstances;
- e. his/her age, maturity, sex, religious faith, social and cultural background and any other characteristics which the court considers relevant;
- f. any harm which he/she has suffered or is at risk of suffering;
- g. his/her relationships and emotional ties to a parent, sibling, relative, or other member of his/her extended family or member of his/her community;
- h. any family violence involving the child or a member of the child's family;
- i. how capable each of his/her parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; and
- j. the practical difficulty and expense of the child having contact with a parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with his or her parents on a regular basis;
- k. the rights of the child;
- l. the range of powers available to the court under the Children Act 1989 (UK) in the proceedings in question and any other fact or circumstances that the court considers relevant.¹⁵

These factors should all be weighed and assessed holistically. In practice, this is often a very discretionary practice, and the ultimate decision will typically lie with the court.

14 See *P v P (Children: Custody)* [2006] 2 HKFLR 305, paras 52-53 which states that "[A]lthough we do not have the equivalence of section 1(3) or 8 in our statute, I agree that most of the matters referred in the checklist...would be of helpful guidance and assistance to the Court in the assessment of the requirement of the children's welfare"; *SMM v TWM (Relocation of Child)* [2010] HKFLR 308, para 27 states that "[I]t is clear, however,...Judges in Hong Kong have also adopted the welfare checklist in section 1(3) of the Children's Act...". See also [LWY v YCT \[2015\]](#) HKEC 2198 English Judgment at 16.

15 See *Children Act 1989 (UK)*, s. 1(3). But note the powers referred to in Hong Kong should be those available to the Hong Kong Court, e.g. under the Guardianship of Minors Ordinance.



WHAT IF THERE IS MORE THAN ONE CHILD?

Sometimes, the issues may affect more than one child, for example a teenage mother and baby, conjoined twins, or other siblings. The issue of whose interests should take priority in these circumstances has been considered by the courts. It has been held that the court should give priority to the interests of the child who is the subject of the application.¹⁶ However, if that is not possible without detriment to others, then it has been suggested that the courts should balance the children's interests and make a decision which causes the least detriment to all the children involved.¹⁷

16 Birmingham City Council v. H (A Minor) [1994] 2AC 212

17 Re T and E (Proceedings: Conflicting Interests) [1995] 1FLR 581; A (Children) (conjoined twins: surgical operation) [2001] 1FLR 1

NOTE

The Importance of Reducing Delay

“Delay”, or in other words the impact of time passing, is an important factor to consider when dealing with children. One year in a child’s life is very different from one year in the life of an adult. Child development is time sensitive and children are deeply affected by even short periods of instability and insecurity.¹⁸ In many places, including the UK, the impact that delay may have on a child is a *compulsory consideration* in all children’s matters.¹⁹

The Science Behind Reducing Delay

Studies have shown there are critical windows of time during a child’s early years when brain development occurs that will impact the rest of the child’s life.²⁰ Having interactions and experiences at the right time is crucial for how a child’s brain develops.²¹

In particular, early consistent interactions between a baby and his/her primary care giver are necessary for the building of healthy neural connections and for future healthy cognitive and social development.²²

When babies and young children experience stress, it can have particularly devastating effects on their developing brains.²³ When children experience prolonged exposure to stress, and they do not have adequate buffering relationships, such as a healthy relationship with a caregiver, the result can be *toxic stress*. This can lead to damaged systems and brain development, with lifelong repercussions.²⁴ It is therefore critical that instabilities or stressors in a child’s life, particularly for a very young child, are dealt with as quickly as possible.

18 See e.g., WARD ET AL., SAFEGUARDING BABIES AND VERY YOUNG CHILDREN FROM ABUSE AND NEGLECT (2012)

19 See [Children Act 1989 \(UK\)](#), s. 1(2) and Adoption and [Children Act 2002 \(UK\)](#), s. 1(3).

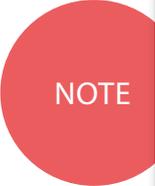
20 See Eric I. Knudsen, [Sensitive Periods in the Development of the Brain and Behaviour](#), JOURNAL OF COGNITIVE NEUROSCIENCE 16:8, pp. 1412–1425.

21 See e.g., NATIONAL SCIENTIFIC COUNCIL ON THE DEVELOPING CHILD, [The Timing and Quality of Early Experiences Combine to Shape Brain Architecture: Working Paper No. 5, \(2007\)](#).

22 See HARRIET WARD AND REBECCA BROWN, [SAFEGUARDING CHILDREN IN THE EARLY YEARS \(2014\)](#), 2.

23 See [Harvard University \(2020\) Center on the Developing Child](#).

24 See NATIONAL SCIENTIFIC COUNCIL ON THE DEVELOPING CHILD, [Excessive Stress Disrupts the Architecture of the Developing Brain: Working Paper No. 3 \(2014\)](#).



NOTE

The Importance of Permanency

As explained above, the bonds that a child forms with his/her primary care givers play a vital role in that child's development, both in terms of the physical development of the brain, as well as the psychological development of stable relationships and social skills.²⁵ Children are also negatively affected by stress and instability. It is critically important for children to have a perma-nent and stable home as quickly as possible.

"Permanency planning", meaning planning aimed at placing a child into a safe permanent placement as soon as reasonably possible, is at the core of best practice child welfare planning from around the world and is critical to acting in the *best interests* of the child.²⁶ Because of this evidence, in many places around the world, it is a legal requirement to consider *permanency* when planning for the best interests of a child.²⁷ Permanency planning aims to secure stability and continuity of nurturing relationships for the child.²⁸

25 See footnotes 19-25

26 See [Government of Western Australia, Department for Child Protection, Policy on Permanency Planning](#); [Government of Western Australia, Department for Child Protection and FAMILY Support, Casework Practice Manual, 3.4.16](#); [Northamptonshire Safeguarding Children Board, Northamptonshire Children's Services Procedure Manual, 5.1.4](#); [Permanence Planning Guidance \(2016\)](#); [Department of Children and Families, New Jersey, United States, Path to Permanency: An Overview \(2012\)](#).

27 See e.g., [Children, Youth and Families Act 2005 \(Victoria, Australia\), s. 10\(f\)](#) ("the desirability of continuity and permanency in the child's care"); the following pieces of U.S. state legislation: [Colo. Rev Stat. Ann. § 19-1-102\(1\),\(1.5\)](#); [D.C. Code Ann. § 16-2353](#); [Idaho Code § 16-1601](#); [705 Ill. Comp. Stat. Ann. 405/1-3\(4.05\)](#); [Iowa Code Ann. § 232.104\(1\)\(c\)](#); [Kan. Stat. Ann. § 38-2201\(b\)](#); [Mich. Comp. Laws Ann. § 722.23.amended](#); [Mo. Ann. Stat. § 211.443](#); [Mont. Code Ann. § 41-3-101](#); [Neb. Rev. Stat. Ann. § 43-533](#); [N.J. Stat. Ann. § 30:4C-1 1\(a\), \(b\), \(f\)](#); [N.Y. Soc. Serv. Law § 384-B\(1\)](#); [Ohio Rev. Code Ann. § 2151.414\(D\)\(1\)](#); [Okla. Stat. Ann. Tit. 10A, § 1-1-102](#); [R.I. Gen. Laws § 42-72-2\(1\)-\(2\)](#); [Wash. Rev. Code Ann. § 13.34.020](#); [Wis. Stat. Ann. § 48.426\(2\)-\(3\)](#); [Wyo. Stat. Ann. § 14-3-201](#). See also the [best practices and model law as described by The Protection Project](#), THE JOHNS HOPKINS SCHOOL OF ADVANCED INTERNATIONAL STUDIES and International Centre for Missing AND Exploited Children, ("Permanency shall be a key goal, choosing the least intrusive intervention in the life of the child to assure stability of the child's personal relationships and social environment and to guarantee the continuity of the child's education, training, or employment"), Child Protection Model Law – Best Practices: Protection of Children from Neglect, Abuse, Maltreatment and Exploitation (January 2013), Art.4(2)(c), p. 21.

28 [Appendix 1 to Chapter 8 Long-term Care Plan for Children Receiving Residential Child Care Services](#)

NOTE

Considering the Wishes and Feelings of the Child

Under both international law and Hong Kong law, if a child is capable of forming his or her own views, he/she has a legal right to express those views and to have his/her voice heard regarding proceedings affecting his/her interests.²⁹

Respecting the views of the child is a two-step process. First, it is important to hear and take into account the child's views and opinions. Second, the child should be an active participant in any process involving or concerning him/her.

How far the wishes and feelings of the child should be followed depends on the circumstances of the individual case. In particular, the wishes of the child must always be considered in light of their age and understanding.³⁰

As a child becomes older, more knowledgeable and more competent to make decisions, his/her right to make decisions regarding his/her own life increases.³¹ This includes a legal right to make medical decisions.³²

In this sense, the weight of a child's opinion increases over time. This means that although parents have a legal right to make decisions regarding the child, this right is not absolute. The right slowly diminishes over time as the child grows and develops.³³



A child's wishes are not the only determining factor. A court will consider all the other relevant factors when making a decision.³⁴ A court can override the wishes of a child, even when that child is considered mature enough to make competent decisions, if the court believes that the child's stated wishes are against his/her best interests.³⁵

29 See [Guardianship of Minors Ordinance \(Cap. 13\) s.3\(1\)](#), [Convention on the Rights of the Child, Art. 12](#). See also the [Judiciary's Practice Direction PDSL 5, Guidance on Meeting Children. Protecting Children from Maltreatment Procedural Guide for Multi-disciplinary Co-operation Para. 1.3](#).

30 See [Convention on the Rights of the Child, Art. 12](#).

31 See *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112, [1985] 3 All ER 402 (HL), approved in *PD v KWW (Child: Joint Custody)* [2010] 4 HKLRD 191, [2010] HKFLR 184 (CA), [para 44](#). See also *Re S (Transfer of Residence)* [2011] 1 FLR 1789, [2010] All ER (D) 88 (Aug), [para 58](#); *Re Roddy (A Child) (Identification: Restriction on Publication)* [2003] EWHC 2927 (Fam) [paras 50-52](#), [2004] EMLR 127, [2004] 2 FLR 949, [2004] 1 FCR 481, [2004] Fam Law 793; *Re S (a minor)(change of surname)* [1999] 1 FCR 304, [1999] 1 FLR 672 (CA).

32 See *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112 (HL).

33 See *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112 (HL), [pp 129, 160, 162, 172, and 186](#).

34 See *Re L (Medical Treatment: Gillick Competence)* [1998] 2 FLR 810, [1999] 2 FCR 524, [1999] 51 BMLR 137, [1998] Fam Law 591.

35 See *Re W (a minor) (medical treatment: court's jurisdiction)* [1992] 2 FCR 785, [1992] 4 All ER 627, [1992] 3 WLR 758.

Children's Wishes

Case 1

Eve's parents were divorced. Eve lived with her father, but was supposed to have regular contact with her mother. Eve began to refuse to have contact with her mother. To make things more complicated, her father was transferred to a job overseas in Singapore and wanted to relocate Eve to Singapore. Eve's mother applied for Eve to be in her and Eve's father's joint custody.

The judge interviewed Eve without her parents being present to understand her feelings and wishes.³⁶ He determined that Eve felt a grievance against her mother, was happy living with her father, and wished to go with him to Singapore. The judge determined that "[i]n matters like this, the interest and welfare of the child are paramount to the feelings of the parents... I can only consider what is best for the child... In this instance the welfare of the child is, so far, that she has stayed happily with her father and stepmother and she has expressed the desire to go with her father to Singapore." The judge explained that if Eve later wanted a different relationship with her mother, this would still be an option, but at this point in her life it was in her best interests to continue living with her father.³⁷

Case 2

When Clare was 5 years old, her parents separated. After her parents' divorce, Clare lived with her mother until she was 7 years old when she moved in to live with her father for 2 years at her mother's request. This was occasioned by the mother's enrollment into a part-time Masters course whilst working full-time for six or seven days a week.

Near the end of the two years, Clare's father made plans to re-marry and to move back to Singapore and to bring Clare with him. The court dismissed his application to relocate Clare to Singapore. In making this decision, the judge determined that "the only legal principle remains that the welfare of the child is the first and paramount consideration."

To assist the court to determine what was in Clare's best interests, the judge relied on the social welfare reports made available to the court. The judge was of the view that the social welfare reports provided material information, since the social welfare officer had personally met Clare and spoken and interacted with Clare and formed a view as to her wishes and feelings. The social welfare officer had determined that Clare clearly showed her wish to stay with her mother and to remain in Hong Kong.³⁸

36 The Judge has discretion as to whether to do this: *D v D* (1980) 10 Fam Law 53.

37 See *Boulter v. Boulter* [1977-1979] HKC 282.

38 See *LSWY v SKYM* [2015] HKEC 2776

EXAMPLE CASES

Case 3

Adam is six years old and has been living in out-of-home care ever since leaving the hospital after his birth. Adam's birth parents visited him every few months for the first year of his life, but they have not visited since Adam was 18 months old. His parents continue to strongly indicate to their social worker that they want to parent Adam, however they have not shown any action steps toward family reunion for more than four years. The Social Welfare Department applies to the High Court for a freeing order for Adam to terminate his parents rights so that Adam can be adopted.

To assist the court to determine what was in Adam's best interests, the Social Welfare Department submitted social welfare reports to the court. The social welfare reports were among the material evidence considered by the court, since the welfare officer had personally met Adam and spoken and interacted with Adam and formed a view as to his wishes and feelings. The social welfare officer had determined that Adam clearly showed his wish to be adopted so that he could grow up in a family.

QUESTIONS TO CONSIDER

Q: *How can you balance the wishes of a child against the wishes of a parent?*

A: As set out above, the primary legal question is what is in the best interest of the child, not what either the child or his/her parent wants.³⁹ The court makes its decision having regard to, but is not restricted by, the wishes of the child and his/her parent.⁴⁰

Q: *How can you best understand the wishes of a child?*

A: In some cases, the court can decide that the child should be separately represented. This means that the child can either (1) have his/her own lawyer appointed⁴¹; and/or (2) have someone appointed to represent the child's interests (known as a guardian ad litem)⁴². They may assist with the understanding of what the child's wishes are. However, they are appointed to represent the child's interests which may differ from his/her wishes.⁴³

Q: *When a child is very young, are there still ways to communicate with the child and understand his/her wishes and needs?*

A: Yes. As the Practice Direction for Judges on whether to meet children in family cases (PDSL5) makes clear, "some younger children may have a clear understanding of their circumstances which they wish to express".⁴⁴

39 Guardianship of Minors Ordinance (Cap. 13), s3(1)(a)(i).

40 H v N [2012] 5 HKLRD 498, para 27-32.

41 Rule 72 of the Matrimonial Causes Rules (Cap. 179A).

42 Rule 108 of the Matrimonial Causes Rules (Cap. 179A).

43 Practice Direction PDSL6, para 5.

44 Practice Direction PDSL5, para 4.

If the Judge decides to meet with the child, then in advance of the meeting the Judge will tell the parties to the litigation (such as the child's parents):

- The purpose of the meeting;
- When and where the meeting will take place
- Who will attend the meeting (a Judge should never see a child alone)
- How the meeting is to be recorded; and
- Who is to prepare the child for the meeting
 - » At the beginning of the meeting, the Judge should explain that the meeting will be recorded and the contents of the meeting conveyed to the child's parents. The Judge should tell the child that the Judge cannot keep secrets. The child should be assured that the outcome is never the child's responsibility.



What are the Rights of the Child?

We have a responsibility to uphold children's rights. How does understanding the rights of children help us to be the voice for vulnerable children and families?

- 1 Everyone under 18 has these rights
- 2 All children have rights, and I should be treated fairly and equally no matter who I am, what I look like, where I live, what language I speak, what my religion is, whether I am a boy or a girl and whether I have a disability.
- 3 Adults must do what is best for me.
- 4 The government has a responsibility to make sure my rights are protected and respected.
- 5 My family has the responsibility to help me learn to exercise and protect my rights.
- 6 I should be supported to live and grow.
- 7 I have the right to a name, and to belong to a country.
- 8 I have the right to an identity which no one can take away.
- 9 I have the right to live with a family who cares for me.
- 10 I have the right to be together with my family if we live in different countries.
- 11 I have the right to be protected from kidnapping.
- 12 I have the right to be listened to, and to be taken seriously.
- 13 I have the right to find out and share information, unless it harms or puts someone in danger.
- 14 I have the right to have my own beliefs and choose my own religion, with my parents' guidance.
- 15 I have the right to meet with friends and join groups, unless it harms or puts someone in danger.
- 16 I have the right to my privacy.
- 17 I have the right to get information in lots of ways, and adults have a responsibility to make sure it is not harmful.
- 18 I have the right to be raised by both parents if possible.
- 19 I have the right to be protected from abuse – from being hurt or badly treated in body and mind.
- 20 & 21 I have the right to special protection, care and support if I cannot live with my parents. I have the right to have care and protection if I am adopted or living in foster care.
- 22 If I am a refugee (if have been forced to leave my home country), I have the same rights as children in my new country.
- 23 If I have a disability, I have the right to special care and education.
- 24 I have the right to good quality healthcare, to clean water, and good food.
- 25 If I am waiting for my safe, loving, and permanent family, I have the right for my care to be reviewed regularly to make sure it is good for me.
- 26 I have the right to receive help from the government if my family doesn't have enough money.
- 27 I have the right to a safe place to live, food, and clothing to help me reach my potential.
- 28 I have the right to an education, and I should be encouraged to go to school to the highest level I can.
- 29 I have the right to an education which allows me to thrive, live peacefully, protect the environment, and respect others.
- 30 I have the right to speak my own language, and follow my family's religion and culture if I choose.
- 31 I have the right to play and rest.
- 32 If I work, I should be paid fairly, and I should not be made to do work that is dangerous or hinders my education and development.
- 33 I should be protected from dangerous drugs.
- 34 I have the right to be free from sexual abuse. No one should touch me in ways that make me feel uncomfortable, unsafe, or sad.
- 35 I should not be kidnapped, or sold.
- 36 I have the right to protection from being taken advantage of.
- 37 I have the right not to be punished in a cruel or hurtful way.
- 38 I have the right to not be enlisted in the army until I am 15 (18 years old in HK).
- 39 I have the right to help if I have been hurt, neglected, or badly treated.
- 40 I have the right to legal help and to be treated fairly if I have been accused of breaking the law.
- 41 If my country has laws that treat me better than the UNCRC, then those laws apply.
- 42 I have the right to know my rights! And everyone around me should learn about my rights.
- 43 - 54 These articles are about how governments and international organizations will work together to give children our rights.

Hong Kong agreed to the **United National Convention on the Rights of the Child (UNCRC)** in 1994.

I am a child, and I have all of these rights.

As I grow older, I have more responsibility to make choices and exercise my rights.

These rights will help me thrive and reach my full potential.

