# Child Custody and Support Upon the Death of a Parent

*Produced in partnership with **Alfred Ip of Hugill & Ip***

Death is an unpleasant thought and can be an uncomfortable subject to consider for many people. If you have minor children to consider and provide for, the subject becomes even more complicated. Namely, how will child custody and maintenance be affected?

Attachment theory in psychology shows that young children need to form a strong attachment to at least one primary caregiver who provides them with unconditional love and support to develop relationship skills in later years. When a parent dies – whether expectedly or not – it is suggested that children can develop emotional problems when they fail to resolve their sense of loss. It goes without saying that divorce of parents introduces massive change into a child's life, but when coupled with the death of one parent, the effects can be tenfold.

## Custody of children

The Court's primary concern when dealing with a divorce, will be the benefits afforded to the children. The Court would not allow a marriage to be dissolved unless it is satisfied that the arrangements for the welfare of every child are satisfactory (s18 of the Matrimonial Proceedings and Property Ordinance (Cap. 192) ("**MPPO**"). Custody of the children can be vested in one of the parents, but in most circumstances the parents will have joint custody, and either one of the parents would have care and control unless shared custody can be agreed upon or ordered by the Court.

When considering child maintenance, one of the parents may be ordered to continue providing financial support to the other parent for children's needs after divorce. The payment responsibility usually lasts until the children attain the age of 18 or finish full time education, whichever is later.

## Death of a parent who provides financial support to the children

Upon the death of the parent who is paying child support, the receiving parent would have concern regarding the continuation of child maintenance. It may be particularly worrisome where the payments were made periodically or by instalments for a lump sum, as they are unfinished, continuous payments.

Unfortunately, under section 10(4) of the Matrimonial Proceedings and Property Ordinance (Cap. 192) ("**MPPO**"), any order made for periodical child maintenance payments (i.e. periodical payments, secured periodical payments, lump sum payments) will cease to have effect upon the death of the payor, with the exception of any arrears due under the

order on the date of his/her death. Similarly, section 12A(4) of the Guardianship of Minors Ordinance (Cap. 13) ("**GMO**") stipulates for the same.

If instalments for a lump sum were being paid, the estate of the deceased is still liable for the unpaid instalments, but those unpaid instalments may not become immediately due and payable upon the death of the deceased.

If you are going through the process of divorce and entering into a child maintenance agreement by way of a Consent Summons, you may wonder whether it is possible for the inclusion of a clause that stipulates for maintenance to be continued in the unfortunate death of the payor. It is unlikely that the Court can enforce such a clause, as the guarding legislation does not require payment following the payor's death. If the other parent is already willing to include such a clause in the child maintenance agreement, it is possible that the children will be provided for in their Will.

It would be wise to include a provision, in the Consent Summons, with an undertaking from the payor to make a Will in favour of the children.

If the paying parent has been substantially or wholly maintaining the children, but not provided for them in his/her Will, it is possible to make an application to the Court under section 4 of the Inheritance (Provision for Family and Dependants) Ordinance (Cap. 481) for an order on the grounds that the Will has not made reasonable financial provision for the children.

## Death of the custodial parent

Upon the unfortunate death of the parent who has primary care and control, the most pressing concern will be the custody or guardianship of the children. The law in relation to guardianship can be found in the GMO.

Section 5 of the GMO stipulates for the surviving parent to be appointed as guardian of the minor either alone or jointly with an appointed guardian on the death of the custodial parent. However, this is subject to section 19(4) of the MPPO which protects children from falling under guardianship of parents who have been declared unfit to have custody. Two questions may arise out of the rights of surviving parent as to guardianship:

1. What if the parent who has primary care and control remarried prior to their death? Does the new wife/husband have [automatic] custodial rights as a step-parent?

   No. The new wife/husband will either have to make an application to Court under section 8D of the GMO, or the custodial parent will need to have appointed the new wife/husband as guardian of the minor children in a deed prior to their death.

2. But what if your children were born out of wedlock? The following question may arise: will the biological father be considered the "surviving parent"?

   Under section 21 of the GMO, the answer would be no. Such answer is exempt where the biological father makes an application to the Court for custody of the child (pursuant to section 10 or 3(1)(d)).

If you have been granted care and control of your children, a pre-emptive measure that can be taken is to appoint (pursuant to section 6 of the GMO) a guardian for your children in the event of your death. The appointment must be made in writing, dated, signed by you, and witnessed by two people; it is possible to make such appointment through a deed of appointment of guardianship. While this acts as a preventative measure to ensure your children are well cared for, in the unfortunate event that the named guardian has died or disclaims the office (either expressly or implied by conduct), the Court has power under section 8D to appoint a guardian. "Any person" that is deemed fit by the Court can also apply for guardianship of the minor child in the event of the death of the custodial parent. If the other surviving parent has not been declared unfit to have custody, it is likely that if you have named a guardian by way of deed, the named guardian for your children will have joint guardianship together with the surviving parent.

## Maintenance for the children from the custodial parent

The second cause for concern is the maintenance of the children following the unfortunate death of the custodial parent. It is of course best practice to have a Will in place that provides for your children in the event of your death, appointing an executor to act as trustee to hold on to your children until they reach an age designated by the testator while providing for their financial needs in the interim. But what happens where the custodial parent dies intestate?

Where the deceased custodial parent did not make a Will that provides for their children, his/her child is eligible under the Intestates Estates Ordinance (Cap. 73) ("**IEO**") to inherit the residuary estate of the custodial parent upon attaining 18 years of age. If the custodial parent has a surviving spouse at the time of death, the residuary estate is divided between the surviving spouse, and the children get one-half of the residuary estate less personal chattels, pursuant to section 4 of the IEO. The residuary estate is held on statutory trust (pursuant to section 5 of the IEO) until the child reaches 18 years of age, and the surviving spouse has priority to administer the estate. However, where minor interest is involved, the estate must be administered by (no less than) two individuals, pursuant to section 25 of the Probate and Administration Ordinance (Cap. 10) ("**PAO**"). This also applies in the event that the non-custodial parent dies.

In most cases, if one of the custodial parents dies and the surviving spouse is also the parent of the children, and there is little concern over whether the children would be provided for. However, if the surviving spouse is the step-parent of the children, there could be concern over whether the children would be looked after when the surviving spouse takes control of their shares of inheritance as administrator of the estate.

To mitigate such risk, it is important to have a Will to appoint a person trust-worthy to be the executor of the Estate. That person can be a relative, a friend or a professional.

In the unfortunate event that the step-parent becomes the administrator of the custodial parent's estate, and he or she failed to provide financial support to the children, the guardian of the children (be it the surviving natural parent, or another) may apply to Court for the step-parent to be passed over as the administrator of the deceased custodial parent's estate, pursuant to section 33 or 36 of PAO. The applicant will need to nominate two different people – usually a third party such as solicitors – to administer the estate.

To illustrate the abovementioned situation:

> Abby and Bruce married in 2005, and had two children, Charlie and Daisy. The couple divorced in 2017, with Bruce gaining care and control of Charlie and Daisy.
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> Shortly after the divorce, Bruce remarried, to Emma.
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> Unfortunately, in January 2020, Bruce dies in an unforeseen car accident, without having made a Will. At the time of Bruce's death, Charlie and Daisy were both minors, aged 10 and 8 respectively. What will happen to Charlie and Daisy?
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> In this situation, the Court would likely grant guardianship of Charlie and Daisy to Abby – their surviving parent – pursuant to section 5 of the GMO.
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> As Bruce died intestate, his residuary estate (less personal chattels) will be divided as follows: 50% to Emma, and 50% to Charlie and Daisy (25% each). Emma, as his surviving spouse will have priority to administer Bruce's estate. As Charlie and Daisy are minors, their combined 50% of Bruce's estate will be held on trust by Emma and another co-administrator (as required by section 25 of the PAO) until they turn 18 years old.
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> If Emma is not fond of her stepchildren, and refuses to provide for Charlie and Daisy as administrator of Bruce's estate, Abby may apply to the Court to pass over Emma from administering the estate pursuant to section 36 of PAO. If granted, the Court will appoint professionals to administer Bruce's estate instead of Emma.

Illegitimate Children of the Deceased are also entitled to maintenance pursuant to s3(1)(v) of Inheritance (Provision for Family and Dependants) Ordinance from the Deceased's estate.

## Conclusion

As heart-breaking as it may be to imagine your own unexpected death as a parent and leaving your child, you should endeavour to make arrangements that will enable your minor children to be cared for. As a custodial parent, it is in the best interests of your child to have executed a deed that appoints a trusted individual to be the guardian for your children. Having a Will in place can also remove the obstacle of applying for Court orders for the financial provision for your children where you die intestate.

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## AUTHOR


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A qualified solicitor in Hong Kong since 2000, Alfred's speciality is dispute resolution, an area in which he is ranked by Chambers & Partners Asia Pacific as a 'Leading Individual'. Until recently he was partner in the Dispute Resolutions team and head of Private Client at a leading Hong Kong law firm.

Alfred is skilled in helping individuals and their families manage personal and wealth-related matters, including trust and probate (both contentious and non-contentious), family office, and mental capacity issues.

He is vastly experienced in all areas of probate and can help clients with estate planning, ranging from the proper drafting of a will to constructing complicated trusts, airtight from any potential perils.

Alfred is appointed by court as an administrator in estate disputes, and advises professional administrators on legal aspects of estate administration, both in Hong Kong and internationally.

In contentious cases, he acts for clients in probate actions, ranging from propounding the Will to having an executor removed. For clients requiring help in estate administration problems such as declaratory relief or disclosure of account, Alfred will apply to Court for the necessary directions and orders.

Alfred's professional skills are enhanced by his membership of the Society of Trust and Estate Practitioners ("TEP"), and of the Chartered Institute of Arbitrators. He is a CEDR accredited Mediator and a Notary Public.

In 2012, he won the Law Society of Hong Kong's Gold Award for services to the community for his pro bono initiative, "FreeWill", and he has received several pro bono service awards since.

In addition to his Private Client practice, Alfred has 20 years of experience in commercial litigation and dispute resolution. Moreover, he helps clients with issues regarding family law.

In March 2017, Alfred was appointed to sit as a Deputy District Judge.

Alfred is Director of Pink Alliance.

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