

# From “Child Custody” to “Joint Parental Responsibility Model”: A Better Choice?

2012

On the occasion of the 20th Anniversary  
of the Free Legal Advice Clinic



香港婦女中心協會  
Hong Kong Federation of Women's Centres

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# Foreword

The Hong Kong Federation of Women's Centres (HKFWC) was established in 1981. It provides a wide range of women-oriented services and seeks to enhance women's empowerment in order to improve the situation of women and promote the rights of women and gender equality.

The Free Legal Advice Clinic was set up in 1992, the first entity devoted to providing legal counselling services to women in Hong Kong. The Clinic's registered lawyers provide them free legal counsel on family law issues. By providing free and professional legal advice, the Clinic aims to help women who may lack the resources to hire a lawyer, or lack a general knowledge of the law, so that they can understand their legal rights and interests in divorce proceedings and be empowered legally. Our trained peer counsellors offer assistance to counselees during the process to increase the counselees' confidence and ability to handle their marital issues.

To celebrate the 20th anniversary of the Free Legal Advice Clinic, the HKFWC convened the seminar 'From "Child Custody" to "Joint Parental Responsibility Model" A Better Choice?'. The seminar explored topics on law, social policy, and the situation of divorced women from a female perspective.

The seminar was split into two sessions and chaired by the Honourable Anna Wu Hung-yuk, Non-official Member of the Executive Council and HKFWC Honorary Vice President. The first session explored the existing principles on custody and visitation rights. Speakers for the session included Her Honour, Judge Bebe Chu Pui-ying, Principal Family Court Judge and Eva Leung Yee-wah, HKFWC Jockey Club Lai Kok Centre Centre-in-charge. The second session explored the joint custody model. Speakers for the session included Dennis Ho Chi-kuen, a partner with Ho & Ip Solicitors; Agnes Ng Kwok-tung, a member of the Hong Kong Council of Social Service Working Group on Parental Responsibility and the Chief Executive of The Nurturing Education Ltd; Si-si Liu Pui-shan, HKFWC Director, and Dr Shirley Hung Suet-lin, Associate Professor at the Hong Kong Baptist University Department of Social Work.

The English version consists of summaries of the speeches given, with the exception of Shirley Hung's presentation which has been re-written as a short paper, while the Chinese version documents the speeches in full. We are also using this publication to publicize recent data about our Free Legal Advice Clinic, accumulated over the past 10 years (2003-2013) for the reference of those interested in this service.

# Chairperson's Remarks

## On a historical note

2012 is the year we proudly mark the 20th anniversary of the Free Legal Advice Clinic (LAC). Like many a good idea, it needed the commitment of a few to implement it, and in time this would take root with the support of a dedicated group. Among this dedicated group are the many lawyers who volunteered their services. I would especially like to take the opportunity to remember the formative contribution of two law educators, **Julie Macfarlane and Harriet Samuels**, who worked at the Law Department of the City University of Hong Kong. Julie was the spark who initiated this project and after she left Hong Kong, the little fire she started was stoked by Harriet Samuels, who encouraged her students and fellow lawyers to provide pro bono services to the women who attended the legal clinic at our Women's Centre in Cheung Sha Wan. The enduring partnership among lawyer volunteers, peer counselors and the support staff of the Hong Kong Federation of Women's Centres these twenty years is a cause for celebration.

Julie Macfarlane saw a need in Hong Kong and she felt keenly that promoting a pro bono culture among lawyers was important to the community. Harriet Samuels had always shown an abiding interest in promoting gender equality in Hong Kong and her support fuelled the momentum. Their accounts below

capture for us the historical beginning of LAC and its development within the wider political context in Hong Kong during the 1990s.

### ***\*From Julie Macfarlane, Faculty of Law, University of Windsor***

*In the spring of 1992, we were gearing up for the opening of Hong Kong's first Womens' Legal Advice Clinic. Despite widespread skepticism that such a service would be used by local women, I arranged for posters advertising the service to be printed up in Chinese on cheap paper and spent an afternoon walking around the housing estates in Cheung Sha Wan, pinning these up. I was heavily pregnant at the time with my second child and must have been a strange sight for the residents!*

*The first night that the clinic was to open, I waited anxiously in the Womens' Centre along with Lester Huang – a volunteer lawyer, and later President of the Hong Kong Law Society – one other ex-pat lawyer volunteer, and some of my students from the PCCL course at City University who were there to provide translation. We had no idea what to expect when the time for the clinic*

*opening rolled around. Then, a trickle of women began. The first two clients were set up in interview rooms with lawyers. I returned to the waiting area, to find that it was now filling up with many more women, sitting quietly and patiently for their turn. The Women's Legal Advice Clinic was up and running!*

***\*From Harriet Samuels, School of Law, University of Westminster***

*Free legal advice on family law delivered in an accessible and non-intimidating atmosphere: this was the aim of the Women's Centre Free Legal Advice scheme. It was the initiative of my colleague, Julie Macfarlane, at the City University of Hong Kong. She saw the need for such a service and the potential for the Women's Centre as the host venue. When we started to plan the clinic we weren't sure whether we would find a sufficient number of family lawyers willing to give up their time. Life in Hong Kong is always so hectic and work so demanding that it was uncertain whether lawyers would be prepared to make the journey out to Cheung Sha Wan to give advice. Nevertheless, we sent notices out and organised a meeting in Central not sure who would turn up, and were pleased to find a room full of Hong Kong lawyers (men and women) willing to volunteer. It was a very productive meeting and we managed to*

*compile a volunteer rota and to establish the ground rules for the clinic.*

*When Julie left Hong Kong for Canada, not long after the clinic was up and running, she asked me to take over her work co-ordinating the clinic. It was a great opportunity for me to do some volunteer work. I had always been very involved with the Hong Kong Council of Women and various law reform campaigns but this was a chance to engage in a more practical project. I saw myself as a point of contact between the legal world of the lawyers and the welfare orientation of the social workers. I often found myself explaining legal jargon to the social workers and sometimes the limits of the law to deal with the problems women were experiencing but on other occasions discussing the ethos and resources of the women's centre with the lawyers.*

*We managed to involve our students at City University School of Law in the clinic. As not all of the lawyers spoke Cantonese we used the students on the PCCL (Post Graduate Certificate in Laws) as interpreters. Later the undergraduate LLB students began to volunteer, a number of whom were studying family law. Some of them continued to work for us when they became trainee solicitors. This sparked an interest in traditional women's issues such as domestic violence and rape,*

*that continued into their legal practice and some also did campaign work.*

*One of the unique features of the clinic was that the clients not only had access to good legal advice, but they had the opportunity to discuss matters with a social worker after they had consulted a lawyer. Many of the clients were in the early stages of a marital break-up or were considering whether to end their marriages. They often wanted to know the options open to them in terms of the division of property and child custody. Consulting a lawyer could be emotionally draining, and left many practical and non legal questions unanswered. When the women had some knowledge of their legal position they often wanted to speak to the social workers who had an understanding of issues around public services and were able to offer on-going support such as counselling at the Women's Centre. Linda Wong, the Centre in Charge, and the social workers who gave advice were able to create a suitably sympathetic and professional environment. Sometimes the social workers simply provided a caring response and an opportunity for the client to collect themselves before going home to their family.*

*The legal centre at the clinic filled an important gap in the*

*provision of services for women. Harmony House, a domestic violence shelter, was well established when the clinic began, and there was already a telephone legal advice service. There was also a very vibrant and visible women's movement in Hong Kong that was taking advantage of the opening up of democratic politics before the handover to press for important changes such as the introduction of anti discrimination laws. But the clinic at the Women's Centre provided something quite different. The case law it generated illustrated the importance of focusing on women's needs as well as those of the family, the ongoing problems of domestic violence and the feminisation of poverty after divorce. It gave great opportunities for those who were more privileged such as the lawyers, volunteers and students who worked in the clinic a chance to give something back to the Hong Kong community.*

*Writing this from the United Kingdom where, in the age of austerity, law centres and free legal advice clinics are closing down and legal aid is being cut it is very encouraging to hear that the Women's Centre Free Legal Advice Clinic is still going strong after twenty years. It really is something to celebrate! I am very pleased to have played a small part in the work of the clinic and am very grateful for the chance it gave me to work with such a dedicated group of women.*

## **On the future**

There is much work to be done to sustain the services we provide for many vulnerable members of the community for the next twenty years. This forum today provides one of the opportunities to gather some committed persons together to think through some of the relevant issues facing us.

It is important, especially for those at the frontline and for those at the macro policy level to promote positive changes that will improve the lives of women and the family, and your presence today validates the work started two decades ago. It is also an invaluable opportunity to renew ties with our colleagues in the legal profession, our partners and friends. Thank you for coming and for ensuring that this morning's session will be a productive exchange.

Evelyn G H Ng  
Chairperson  
Executive Committee  
2012



## **Part One**

# **Current Practice of Granting Custody and Visitation Rights**

Existing Legal Principle and Judgment on Granting Child Custody and Access

Divorced Women's Situation under Existing System:  
The Plight of Women during Divorce

# Existing Legal Principle and Judgment on Granting Child Custody and Access (A Summary)

Her Honour Judge Bebe Chu Pui-ying

Principal Family Court Judge

- The court can order child custody using the following main ordinances:
  - (a) The Matrimonial Proceedings and Property Ordinance (Cap 192) pertaining only to children of legally married parents;
  - (b) The Guardianship of Minors Ordinance (Cap 13) relevant to all children;
  - (c) The Separation and Maintenance Orders Ordinance (Cap 16), an older ordinance relevant to traditional polygamous marriages.
- There is no proper definition of “custody”. The term refers to care and control but does not include the concept of upbringing. In the past, children were seen as possession or commodities of the father, no different than horses and dogs.
- The concept of custody has continued to develop in case law and eventually in 1989, the Children Act introduced the concept of parental responsibility to replace that of custody.
- The Chinese translation of “custody” may cause confusion. There is a term “child custody” which comes from Chinese law, and in Taiwan, the term is equivalent to “guardianship”.
- In Hong Kong, a person may have custody of a child, but may not have the right to decide for their education. Also, “custody” may not include “upbringing”, as they are separate concepts. Having sole custody does not give one the right to take a child out of Hong Kong. Consent from the other parent is needed even if it is a day trip to Macau.
- “Custody” in Chinese means both “control” and “raise”, and there is a misunderstanding of the two concepts of “custody” and “care and control”.
- In granting child custody and access, originally, there were two ordinances. The first ordinance is the Guardianship of Minors Ordinance (Cap 13) which considers the minor’s age, the ability to understand (the situation) and past conditions. Courts also need to take

into consideration any critical information, including reports written by the Social Welfare Department. This Ordinance refers to the Welfare Principle. The other legislation is the Separation and Maintenance Orders Ordinance (Cap 16). Under this ordinance, the first consideration is the best interests of the child. This is based on Article 3 of the United Nations Convention of the Rights of the Child.

- As a result of the recommendation of the Law Reform Commission of Hong Kong's 2005 Report concerning custody and access, the Welfare Principle will be changed to the "Best interests of the child" that should take effect on 13 April, 2013. At the minimum, the two ordinances would share the same concept, and the best interests for a child should also take into consideration a list of items. The list is not legislated at the moment but judges can use it to explain their decision.
- In PD v KWW, Hartmann mentioned the huge misunderstandings about sole custody and joint custody. The party granted with sole custody does not have the right to make all decisions concerning the "upbringing" or "education" of the child, no matter

big or small. For example, in health care or education, the party with sole custody has the duty to consult the other party. A lot of people do not know about this duty. They make a decision and then notify the other parent, which is not right.

- Judges can decide on joint custody as best for the child even if the parents do not have a good relationship, or the party granted with the right of "care and control" disagrees. These are not singly sufficient reasons to deny joint custody. Currently, with new technology, the two parents can now use email or text messages instead of face to face or telephone contact. Hartmann mentioned that judges can assume that parents love their children and are able to cooperate for the best interests of the child. It is also recognized that in some cases, parents are unable to agree rationally on major decisions for their children and forcing these parents to try may not be protecting the interests of the child.
- Every year there are over twenty thousand divorce cases, but not many cases actually reach the litigation and trial stage. Most parents can rationally come to an agreement, and many of them agree with joint custody.

# **Divorced Women's Situation under Existing System: The Plight of Women during Divorce (A Summary)**

**Ms Eva Leung Yee-wah**

**Centre-in-charge, Hong Kong Federation of Women's Centres**

- The Free Legal Advice Clinic of the HKFWC provides both legal and counselling service under one roof.
- In the decade between 2002 and 2012, the clinic served 2,346 women facing the trauma of divorce. Of the cases involved, 70 to 80% entailed housing rights issues, 50% alimony, 40% child custody, and 50% property division. Sadly, also among these cases, 15-20% involved domestic violence requiring an injunction.
- A scrutiny of these cases shows that in protecting women's rights in divorce, the current system has been ineffectual.
- In terms of financial arrangement, women would often be deprived of their legal rights because the current system has been ineffective in preventing spouses from defaulting on alimony payments or from concealing their real financial worth.
- During divorce, women further face implications from housing, child custody or visitation problems; for example, if they have earned custody rights, they need to struggle with child care and employment issues.
- The legal and emotional turmoil of a divorce can take a heavy toll on their mental well-being.

## **Part Two**

# **Joint Parental Responsibility Model**

Why Introduce the (Joint) Parental Responsibility Model?

Australian Model and Singaporean Experience on Joint Parental Responsibility

Survey on Users of the Free Legal Advice Clinic of Hong Kong Federation of Women's Centres towards the Joint Custody and Joint Parental Responsibility Model

Commentary on the Joint Parental Responsibility Model from a Feminist Perspective

# Why Introduce the (Joint) Parental Responsibility Model? (A Summary)

**Mr Dennis Ho Chi-kuen**

**Partner, HO & IP Solicitors**

- A paradigm shift is necessary to shift the emphasis of “custody” as referring to the rights and authority of the parents towards an understanding of their shared parental responsibilities over their children. Instead, the emphasis should rest on the rights of the child.
  - as the language associated with custody implies ownership of the child. Furthermore, social changes suggest that there is no fixed rule that the mother is the best person to care for the child and the father, as the breadwinner, should provide financial support and accept visitation rights. Such views are sexist.
- Private law provisions on “custody” should comply with the principles set out in the United Nations Convention on the Rights of the Child and the International Covenant on Civil and Political Rights.
  - There is confusion in the present law governing the reallocation of “parental rights and authority” because child custody is dealt with in a number of Ordinances with varied and overlapping jurisdictions.
- Historically, “custody” was derived from the concept of guardianship which was developed to protect family property and it later became an instrument for maintaining the authority of the father over his legitimate minor children. He was recognized as the “natural” guardian and the mother had no claims.
  - There is a call for legislative change by judges and the Hong Kong Law Reform Commission, but little appears to have been done.
- The concept of guardianship needs to be reviewed to include modern notions of child-parent relationships.
  - The Administration is urged to legislate on the specific recommendations set out in the 2005 Law Reform Commission Report and to introduce reforms on child laws holistically.

- These changes recommended refer to the following:
  - (a) enforcing maintenance orders;
  - (b) giving a third party (e.g. the grandparent) the right to apply for parental responsibility;
  - (c) reviewing the matter of supervised contact;
  - (d) adopting the language of the United Nations Convention on the Rights of the Child regarding “views” rather than “wishes”;
  - (e) addressing the anomalies regarding the appointment of a separate representative;
  - (f) consolidating the provisions dealing with disputes relating to children into one existing Ordinance; and
  - (g) assigning one policy bureau to be responsible for creating and implementing policies for families and children.
- The experience in Singapore is not appropriate for family law practice and procedure in Hong Kong.
- The implications behind the proposals suggested by the 2005 Law Commission Report is to stop parents from fighting about their “rights” and instead direct them to talk about joint responsibilities towards the child so that there is little interference from the court; to pay more attention to cases involving domestic violence; and to centralize and codify the law relating to children.
- Supporting services should not wait until the law is changed as there is an urgent need for an array of services ranging from counseling, provision of visitation centres, mediation for families, support for domestic violence cases and courses on co-parenting.
- Australia and England can provide lessons for Hong Kong when implementing the joint parental responsibility reforms.

# **Australian Model and Singaporean Experience on Joint Parental Responsibility (A Summary)**

**Ms Agnes Ng Kwok-tung**

**Member, Working Group on Parental Responsibility, Hong Kong Council of Social Service; Chief Executive, The Nurturing Education Ltd**

- Joint parental responsibility is a better model to pursue than joint custody and Australia has been introducing a series of changes in the family law system since 2006. This was the result of lobbying by vocal men groups who demanded that they had the right to care for and to have access to their children after divorce.
- The establishment of 65 Family Relationship Centres (FRCs) and a national advice line are some examples of such supportive services.
- Another service rendered to separating parents was the mediation session called 'Family Dispute Resolution' (FDR).
- These fathers claimed that their ex-spouses abused the then legal system and prevented non-residential fathers from maintaining a meaningful relationship with their children.
- In 2008 this process was made a legal requirement before a court application could be filed, except when the case involved family violence and child abuse. Separating couples were required to sort out disputes regarding children and issues relating to money and property first before applying to the court for a Parenting Order.
- Their claims were supported by some research findings which stressed the significance of the 'father role' in the development of children after divorce.
- In some cases where a FDR did not work out for a number of reasons, a certificate would still be required specifying the reason/reasons why.
- The aims of the reforms were basically for the well-being of the children and sought to move the issues and problems of parental separation away from the courts and towards cooperative parenting with the help of a number of supportive services.



- Another change was the emphasis on the 50-50 principle which presumed equal shared parental responsibility although it was sometimes interpreted rigidly to mean equal time with both parents. The spirit of the principle was to make parents be responsible equally.
- One other family support service was the 'Roundtable Dispute Management' (RDM) which helped separating parents to work out a co-operative parenting plan or a court order for the care of children.
- An evaluation of the changes conducted in 2006 concluded that there were positive impact in some areas and less impact in others. Overall, there was better use of relationship services, a decline in filings to the court and a significant number of separated parents who were able to work out parenting arrangements.
- The evaluation also found that families that were the predominant users of the social and legal services offered were those who were affected by family violence, mental health problems and substance abuse. The resolution of their disputes continued to pose ongoing challenges.
- The legislative changes also gave rise to some negative outcomes:
  - (a) The equal shared parental responsibility led to disputes among separating parents because the new caring model had financial implications over maintenance and property allocation.
  - (b) In cases where there were violence, mental health problems and child abuse, some children's well-being was compromised.
  - (c) The amendments focusing on the best interest of the child and equal parental responsibility increased the flexibility and also the complexity of applying the legislation.
  - (d) The reforms were seen by many legal professionals to favor the interest of the father over the mother, and the interest of the parents over the children.
- Any attempt at law reforms has to include the following considerations:
  - (a) Inject adequate resources into the judicial and family service systems;

- (b) Build a multi-sectoral consensus among the public and relevant legal, social welfare and judicial professionals regarding this trend towards parental responsibility;
- (c) Provide effective screening and assessment, and efficient intervention on child protection safeguards;
- (d) Provide regular independent research to evaluate the reforms so that ongoing modifications and improvements can be implemented;
- (e) Promote and facilitate the use of family mediation to solve child care arrangements, financial and property disputes;
- (f) Encourage the court system to adopt less adversarial legal proceedings, for example, by using 'family consultants' in pre-trial assessments and in the court proceedings.

# Survey on Users of Free Legal Advice Clinic of Hong Kong Federation of Women's Centres on Joint Custody and Joint Parental Responsibility Model (A Summary)

Ms Si-si Liu Pui-shan

Director, Hong Kong Federation of Women's Centres

- A telephone survey involving over 400 women was conducted from February to April 2012. They were service users of the Free Legal Advice Clinic and were facing marital difficulties in the previous two years.
- 156 women finally agreed to complete the questionnaire over the phone and four of them agreed to be interviewed in a more in-depth, free flowing discussion with some standard questions.
- Among these 156 respondents, 106 were divorced and 66.7% of the divorcees were in custody disputes while dealing with divorce proceedings.
- 35.5% of all respondents surveyed, and 40.4% of the divorce cases reported incidents of domestic violence.
- Among a subset of 13 respondents who were currently committed to joint custody, five of them were anxious about the Joint Parental Responsibility Model.
- In this group only two of them reported incidents of domestic violence which appeared to be a lower figure than the overall percentage (40.4%) among divorce cases.
- If the joint parental responsibility model were to be implemented legally, all the four respondents of the in-depth interview felt that it would be very impractical and very difficult to implement.
- They were worried that with joint responsibilities there would always be occasions when former spouses refuse to cooperate and conflicts between parents would arise. Such on-going disagreements would ultimately affect the children adversely.
- In addition, with reference to the proposed supporting measures for estranged families, it was hoped that they would not be left by themselves to deal with the situation but that more social resources would be given to assist them to cope.
- In conclusion, the survey showed that over half of all respondents were basically worried about the legal implementation of the Joint Parental Responsibility Model.

# Commentary on the Joint Parental Responsibility Model from a Feminist Perspective

Dr Shirley Hung Suet-lin

Associate Professor, Department of Social Work,  
Hong Kong Baptist University

## Gender and divorce

Marriage and family has long been a significant area of concern among feminists. Not only are there inequalities in gender power relationship in marriage and family, divorce is also not considered a gender-neutral experience but affects men and women differently. As there exist “his” and “her” marriages (Bernard, 1982), “his” and “her” divorces also exist (Conway-Turner & Cherrin, 1998; Hetherington & Tryen, 1989). The notion that marriage and family are at the centre of society and the idea that family life is the centre of all loving relationships have been criticized by both radical and postmodern feminists, who argue that social relationships have been constructed in a way that monogamy and heterosexuality are accepted as the exclusive model of marriage (Delphy, 1984; Delphy & Leonard, 1992: 258; Nes & Iadicola, 1989). To women, marriage has always carried with it strong cultural, social, economic and emotional meanings that are difficult to resist; while the social construction of the negative meanings of divorce have at the same time been embedded in the dominant ideology of marriage and the family.

Poststructuralist / postmodern feminists have conducted analyses of the concepts of single parenthood and the morality of divorce which have shed light on the social construction that divorced families and people are somehow deficient. Reekie (1996), adopting the Foucauldian framework, conducted a discourse analysis of the social “problem” of single parents. Drawing on the analyses of a number of social scientific texts in Australia, single parenthood can be defined as: 1) a problem of father’s absence, 2) a social and economic cost to society to be shared by other “normal” people, causing injustice and inequity to two-parent families, 3) the erosion of integrity and responsibility, and 4) a result of excessive state regulation of the labour market which has made single mothers “brides of the state” due to the lack of job opportunities. The multiplicity of problems inherent in this dominant discourse of single parenthood is characterized by its conservative and anti-feminist ideology.

Available feminist studies have also centred on the economic impact of divorce on women and their children, as an outgrowth of the concern about the

feminization of poverty (Arendell, 1986; Maclean, 1991; Weitzman, 1985). Often, their material condition suffers a great loss after divorce, including a drop in income, downward class mobility and in most countries, a significant portion of the custodial parents - usually the mothers - become welfare dependents. In addition, findings from feminist analyses suggest that women had to undergo significant changes in their self-identity after a divorce; whereas this is less the case for men. The disadvantaged positions that single mothers suffer have also been widely documented both in the West and in Hong Kong.

### **Dominant gendered discourses that inform the 'Joint Parental Responsibility' model**

Proposals on joint parental responsibility (JPR) have been informed by at least two different perspectives: children's best interest and men's rights. Dominant discourses about the best interests of children are characterized by high significance accorded to the continued involvement of both parents in the upbringing of children and their face-to-face contact with both parents. The beliefs upheld include the notion that most children of separated parents would like an ongoing relationship with both their parents, and even when fathers have been abusive, children most often value the relationship with them and want it to be 'fixed' rather than eliminated. There are also dominant discourses about parents of different gender being involved with the

family and childcare. The voice about bringing fathers back, not only within marriage but after divorce, has been strong among men's rights groups and organizations both in the West and in Hong Kong. A major argument is that abusive husbands can be good fathers, that is, marital and parental roles can be differentiated theoretically and practically. There is a great suspicion towards the mother / custodial parent as responsible for manipulating their children. For example, an alienated child who is strongly allied with the custodial parent, usually the mother, is believed to have been manipulated. The presumption that competent and loving parents possess sufficient objectivity to be able to make rational decisions in the interests of the child and will be able to cooperate with each other has been widely upheld.

Research studies on parenting after divorce, however, have revealed that relationships between parents and children are complex and nuanced. First, parenting patterns after divorce resembles much like those before divorce. In many cases, parents are marginally involved in the child's life before divorce. Divorce is unrelated to changes in parenting behaviour, suggesting that there are more similarities than differences in parenting among divorced and continuously married parents (Strohschein, 2007). Second, research findings regarding the effect of a father's visitation on a child's adjustment have been inconclusive though those conducted in the 1970s and 1980s found visitation by non-custodial fathers

significant. Third, research studies confirmed that high conflicts of parents after divorce affect children greatly. According to McIntosh and Chisholm (2008), the two variables that independently predicted poor mental health outcomes for children were high levels of ongoing inter-parental conflicts and low levels of education by fathers. Where children were caught in the middle of radiating parental conflict, shared care was found to compound the risks of poor outcomes for children. McIntosh and colleagues (McIntosh, et al., 2008; McIntosh & Chisholm, 2008) identified five variables which best predicted poor mental health outcomes of children among which a high level of inter-parental conflict was one. Fourth, there are problems of enforcement and sustainability after giving court orders. Post-separation parenting arrangements are an on-going process. Most parental plans are not age specific, necessarily involving negotiation and decision making an ever evolving process. Shared care often seems to reduce gradually over time. Sixth, the class factor makes a difference in parenting after divorce. Shared parenting has been mainly practiced by the well-educated dual income parents with primary school age children. Co-parent mothers tended to be relatively financially secure. Co-parent fathers tended to be single. Both parents lived near to each other and appeared to have flexible work arrangements, and had established shared parenting without any involvement from the legal system (Smyth, et al., 2004).

In short, parenting arrangements and responsibilities of both parents are unlikely to exhibit great differences before and after parental separation, and continuous inter-parental conflicts are highly detrimental to child's growth. Co-parenting after divorce remains a desirable pattern only for some but not all parents.

In many places, including Australia, US and UK, legislations on JPR have made exceptions for domestic violence (DV) cases, but many other studies showed otherwise. For example, a study in California revealed that domestic violence was determined through documentation in the file or through detection by the mediator. However, the court's screening form failed to signify DV in 14.7% of cases while mediators failed to account for DV in 56.9% of cases. The mediators recommended primary physical custody for the father significantly more often in DV cases than in non-DV cases; as likely to recommend joint custody in DV as in non-DV cases and recommended supervised visitation in 18.6% of cases (Johnson, et al., 2005). The insufficient sensitivity in identifying domestic violence when implementing the model of JPR has put women, who are victims of violence in the greatest majority of cases, in vulnerable situations. The model of JPR, in its design and implementation, has to fully address these issues and it may do more harm than good to children and both parents should the arrangements bring heightened inter-parental conflicts and violence on women and children.

## **Gender and shared parental responsibilities**

It is obvious that the rhetoric of shared parental responsibilities has merged with the “new father” discourses: men do not share childcare because they are prevented from doing so either by structural obstacles such as employment, residence / custody or because women are reluctant to share. It has been constructed as an issue of male exclusion based on the assumption that men would share more equally if they could. Since there is an imbalance in the rights between fathers and mothers in the regime of custody and access, the solution is the redistribution of rights provided by legislation to allow men’s participation in children’s lives.

The experiences of shared parental responsibilities after parental separation, however, are also gendered. A study in Australia on the relationship between attitudes to parental responsibility and sharing practices revealed that the sexual division of childcare labour persists and shared parental responsibility after divorce remains highly gendered. Inequalities are obscured in and through the practices and rhetoric of sharing and there is a tendency for mothers to provide the vast majority of care for children and for fathers to discontinue contact and / or support their children after separation. Mothers do not experience themselves as free from responsibility at any time but doing “in case” work, and therefore has to be always “flexible”, and “being there”. The “rest with” principle, that is, the

mother taking on an extended responsibility for meeting any needs of the children when they were not with the father, has been at work. The discourse of equality appears not to be relevant, however, because women do not complain against the unequal division of work due to the persistence of the ‘breadwinner’ theme and women abiding a sense of justified self-sacrifice (selflessness) for the wellbeing of children (Lacroix, 2006).

Gender is and remains a significant variable in determining how parental responsibility is experienced and shared after separation. The practice of the model of JPR brings new normative expectations on motherhood: both responsible for childcare and for ensuring involvement of the father. Mothers are more burdened by the consequences of the new norms than fathers do. The legitimacy of women’s needs for psychological and physical safety is challenged when the “best interest” of children is defined by maximum contact with the father. Women seek to engage fathers and shoulder the greatest burden in managing child’s contacts with the non-residing parents. It has become a taboo to emphasize women’s needs when the interests of children are being addressed in the face of expectations that mothers should be selfless in relation to children. This is an issue of women’s autonomy, and more, safety. Women are very often endangered by visitation / contact arrangements but violence after divorce is not recognized as a public but a private matter.

In view of the dominant gendered pattern of division of work between parents within marriage, the norm of shared parenting after separation may be simply irrelevant for those who did not share that role prior to separation. It is only when a father experiences that responsibility as obligation rather than as desire, and on the same terms as the mother, will equal sharing become practice. That parents can cooperate and communicate, that is, the quality of relationships between parents is critical. The legislation may probably under-emphasize the importance of the impact of adult conflict on children and over-emphasize the importance of time and responsibility. The normative power is even greater when there is a presumption and / or preference for shared parental responsibility in the legal system. It is important that abstract notions of child welfare should not form the basis of decisions but focus on the principle of actuality and the principle of care (Smart and Neale, 1999). The central relevancy of women's autonomy and safety has to be fully acknowledged and addressed in childcare arrangements after divorce.

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## Our History

In the late 1970s the Hong Kong Council of Women (HKCW) (now disbanded) conducted a successful campaign to highlight the handling of rape victims by the media. This 'War on Rape Campaign' was followed by the formation of the Women's Centre sub-committee which opened a telephone line on May 5, 1981 to handle public enquiries. The telephone service was manned by volunteers in a back room of the office occupied by the former Urban Councilor, Ms Elsie Tu. In 1985, the Women's Centre acquired its own premises in Lai Kok Estate, Sham Shui Po, and in August 1989, it was accepted as a member of The Community Chest of Hong Kong. While still affiliated to HKCW, the Centre continued to develop and had its own dedicated Executive Committee. In September 1992, the Women's Centre was subsequently renamed the "Hong Kong Federation of Women's Centres" (HKFWC) in order to chart a new direction for itself. In 1996, the HKFWC established its second centre in Tai Wo Estate, Tai Po, thereby expanding its services in the New Territories. In September 2014, the HKFWC founded its third centre in Fanling, laying a concrete cornerstone in serving women in the Northern District, and named it "WISE (Women In Self Enhancement)". The HKFWC is a member agency of The Hong Kong Council of Social Service, and in 2002 acquired Special Consultative Status with the Economic and Social Council of the United Nations.

## Our Mission

1. To promote the rights and status of women.
2. To help women develop their individual potential.
3. To collaborate and co-ordinate with agencies and groups concerned with women's issues.
4. To advise decision-making bodies on the needs of women and the resources required to meet these needs effectively.
5. To pioneer the development of resources and services that are in the interest of women.

## Our Services

### ***Supportive Services:***

**Women's Helpline:** Women volunteer counsellors offer information and support in the areas of legal, medical, marital and emotional matters. Referrals to professional workers for follow up will be made when necessary.

**Free Legal Advice Clinic:** Practicing lawyers provide free legal advice to women on matters of divorce, custodial rights, alimony, and allocation of property and domestic violence. Peer counsellors assist women service users on these matters.

**Case Counselling Service and Self-help Groups:** Professional workers offer counselling on an individual and group basis to women facing marital distress and/or other emotional problems, single parents, and victims of sexual or domestic violence.

### ***Developmental Services:***

**Employment-related Retraining:** We provide retraining courses and job-matching services to assist women re-enter the job market.

**Economic Empowerment:** We encourage women to explore alternative economic participation models, establish cooperatives or mutual help groups to enhance women's participation in economic activities.

**Health Empowerment:** We promote messages of holistic health among women.

**Continuing Education:** We provide a variety of courses, including language, legal rights, psychology, stress management, IT, and family education. We also encourage women's self-development and advocate equality in educational opportunities.

**IT Education and Promotion:** We promote information access, IT skills and knowledge among women through peer IT project by women IT Ambassadors.

**Social Participation:** We encourage and support women to actively take part in social life to realize and promote gender equality.

**Community Networking and Inclusion:** We link up with various community groups and social networks in order to enhance community resources and strength and build up a mutually beneficial and supportive community for the accumulation of social capital.

**Volunteer Development:** We provide skills training for volunteers, and encourage women to participate in community work and contribute to the society.

**Resource Corner (AV resource and books loan-out service):** Our centres are equipped with a large quantity of books on women-related themes, research reports, novels, AV resources and newspapers for the public.



**Information Technology Corner:** Our centres are also equipped with computers with internet access for women to use.

**Drop-in Service:** Our centres are opened for drop-ins by women and others in the community for participation and use of our services and community resources.

### ***Advocacy Work***

**Community Education on Women's Rights:** We organize seminars, large-scale community education and promotional events, information booths, courses, and group activities to promote women's health, legal rights, and civic rights.

**Self-help Group Development:** We encourage women to develop self-help groups so as to promote women's social participation, rights, and mutual support.

**Gender Awareness Training:** We raise public concern on women's needs and promote gender equality across different sectors of the community including the social services, health, IT, business, education and political sectors.

**Research and Publication:** Based on our experience in direct services, we conduct studies on the needs of women to highlight their issues.

**Advocacy:** We voice out our views and opinions to the government and public on women's issues.

# 附錄 Appendices

## 免費律師面見諮詢服務 2003-2013 求助個案數字統計 Statistics of HKFWC Free Legal Advice Clinic for 2003-2013

表一：個案年齡分佈

Chart 1: Age Distribution

	2003-2004		2004-2005		2005-2006		2006-2007		2007-2008		2008-2009		2009-2010		2010-2011		2011-2012		2012-2013		Total	%
	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%		
20 歲以下 Under 20 yrs	0	0	1	0.3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0.04
20-29 歲 20-29 yrs	21	7.2	31	10.4	17	6.8	12	5.2	11	4.7	16	6.7	25	10.5	17	7.9	23	9.4	36	13.6	209	8.33
30-34 歲 30-34 yrs	45	15.5	43	14.5	32	12.7	35	15.2	33	14.1	46	19.2	33	13.9	39	18	33	13.5	42	15.9	381	15.19
35-39 歲 35-39 yrs	54	18.6	47	15.8	54	21.5	49	21.2	44	18.8	37	15.5	51	21.4	43	19.8	48	19.6	43	16.2	470	18.74
40-44 歲 40-44 yrs	67	23	70	23.6	56	22.3	52	22.5	53	22.6	44	18.4	40	16.8	35	16.1	54	22	58	21.8	529	21.09
45-49 歲 45-49 yrs	50	17.2	60	20.2	39	15.5	41	17.7	46	19.7	36	15.1	37	15.6	35	16.1	32	13.1	31	11.7	407	16.23
50 歲以上 Over 50 yrs	54	18.6	45	15.2	53	21.1	42	18.2	47	20.1	60	25.1	52	21.8	48	22.1	55	22.4	55	20.8	511	20.37
個案總數 Total	291		297		251		231		234		239		238		217		245		265		2,508	

表二：個案婚姻狀況分佈

Chart 2: Marital Status

	2003-2004		2004-2005		2005-2006		2006-2007		2007-2008		2008-2009		2009-2010		2010-2011		2011-2012		2012-2013		Total	%
	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%		
單身 Single	6	2.1	5	1.7	5	2	5	2.2	3	1.3	5	2.1	7	2.9	3	1.4	1	0.4	5	1.9	45	1.8
已婚 Married	146	50.2	149	50.2	105	41.8	101	43.7	114	48.7	101	42.3	107	45	108	49.8	107	43.7	102	38.5	1,140	45.5
分居 Separated	3	1	7	2.4	7	2.8	4	1.7	3	1.3	3	1.3	2	0.8	4	1.8	5	2	7	2.6	45	1.8
離婚 Divorced	88	30.2	93	31.3	99	39.4	83	35.9	78	33.2	89	37.2	91	38.2	72	33.2	99	40.4	112	42.3	904	36
同居 Cohabiting	42	14.4	36	12.1	32	12.7	31	13.4	28	12	34	14.2	25	10.5	25	11.5	25	10.2	38	14.3	316	12.6
喪偶 Widowed	5	1.7	3	1	0	0	4	1.7	2	0.9	2	0.8	0	0	0	0	2	0.8	0	0	18	0.7
再婚 Remarried	1	0.3	4	1.3	3	1.2	3	1.3	6	2.6	5	2.1	6	2.5	5	2.3	6	2.4	1	0.4	40	1.6
總數 Total	291		297		251		231		234		239		238		217		245		265		2,508	

表三：個案求助問題類別

Chart 3: Topic of Enquiries

3.1 分居問題 Separation Issues

	2003-2004		2004-2005		2005-2006		2006-2007		2007-2008		2008-2009		2009-2010		2010-2011		2011-2012		2012-2013	
	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%
同室分居 Living under the same roof	48	16.5	59	19.8	45	17.9	42	18.1	43	18.4	48	20.08	59	24.8	45	20.7	42	17.1	43	16.2
申請分居 How to apply for separation order	31	10.6	31	10.4	34	13.5	20	8.6	29	12.4	31	13	31	13	34	15.6	20	8.16	29	10.9
其他 Others	33	11.3	115	38.7	49	19.5	64	27.7	67	28.6	33	13.8	115	48.3	49	22.6	64	26.1	67	25.2

3.2 離婚問題 Divorce Reasons (可選多項 Multiple Selections)

	2003-2004		2004-2005		2005-2006		2006-2007		2007-2008		2008-2009		2009-2010		2010-2011		2011-2012		2012-2013	
	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%
配偶大陸婚外情 Spouse had extra-marital affairs / kept a mistress in China	75	25.7	67	22.5	44	17.5	44	19	55	23.5	51	21.3	47	19.7	40	18.4	44	17.9	50	18.8
配偶香港婚外情 Spouse had extra-marital affairs / kept a mistress in Hong Kong	52	17.8	55	18.5	49	19.5	48	20.7	41	17.5	39	16.3	56	23.5	43	19.8	44	17.9	53	20
曾被虐待或子女被虐待(精神、身體、性) Abuse / abuse of children (mental, physical, sexual)	44	15.1	54	18.1	54	21.5	59	25.5	56	23.9	53	22.1	51	21.4	50	23	48	19.5	76	28.6
配偶欠付家用 Spouse did not pay maintenance for family	77	26.4	98	32.9	73	29.0	64	27.7	71	30.3	67	28	58	24.3	56	25.8	78	31.8	82	31
配偶欠債 Spouse was in debt	34	11.6	47	15.8	36	14.3	28	12.	30	12.8	27	11.3	27	11.3	27	12.4	31	12.6	40	15
配偶有不良嗜好 Spouse had unreasonable habit	27	9.2	45	15.1	30	11.9	29	12.5	27	11.5	35	14.6	32	13.4	29	13.3	36	14.6	44	16.6
配偶提出離婚 Spouse raised divorce	66	22.7	53	17.8	50	19.9	58	25.1	50	21.4	75	31.3	52	21.8	45	20.7	54	22.0	63	23.7
被配偶遺棄 Abandoned by Spouse	33	11.3	24	8.0	27	10.7	21	9.0	25	10.7	23	9.6	28	11.76	19	8.7	40	16.3	38	14.3
配偶通姦 Adultery of Spouse	32	10.9	25	8.4	24	9.5	14	6.0	26	11.1	22	9.2	31	13	13	6.0	17	6.9	25	9.43
不清楚法律程序 Do not know about legal procedures	79	27.1	69	23.2	70	27.8	68	29.4	59	25.2	75	31.3	56	23.5	48	22.1	82	33.4	67	25.2
法律費用 Legal fees	60	20.6	54	18.2	45	17.9	48	20.7	50	21.4	59	24.6	38	15.9	41	18.9	52	21.2	51	19.2
婚內強姦 Marital rape	0	0	6	2.0	3	1.2	1	.43	5	2.1	7	2.9	19	7.9	8	3.68	34	13.8	18	6.79

### 3.3 贍養費 Alimony

	2003-2004		2004-2005		2005-2006		2006-2007		2007-2008		2008-2009		2009-2010		2010-2011		2011-2012		2012-2013	
	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%
要求贍養費 Request for maintenance	166	57	178	60	160	63.7	172	74.4	180	76.9	190	79.49	168	70.5	177	81.5	173	70.6	182	68.6
配偶要求贍養費 Spouse requests maintenance	13	4.4	9	3.0	10	4.0	14	6.0	11	4.7	12	5.0	9	3.7	8	3.7	11	4.5	6	2.26
前夫欠贍養費 Ex-husband default maintenance	159	54.6	178	60	145	57.7	118	51	123	52.6	130	54.3	141	59.2	127	58.5	140	57.1	153	57.7
扣押入息令 Attachment of Income Order	19	6.5	12	4.0	9	3.6	19	8.2	13	5.6	11	4.6	4	1.6	6	2.8	10	4	4	1.5

### 3.4 子女撫養權 Child Custody

	2003-2004		2004-2005		2005-2006		2006-2007		2007-2008		2008-2009		2009-2010		2010-2011		2011-2012		2012-2013	
	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%
要求子女撫養權 Request for child custody	150	51.5	153	51.5	162	64.5	143	61.9	162	69.2	175	73.2	148	62.1	159	73.2	173	70.6	146	55
配偶要求子女撫養權 Spouse requests for child custody	16	5.5	13	4.3	14	5.6	16	6.9	22	9.4	19	7.9	18	7.5	18	8.3	16	6.5	19	7.1
上訴/重審子女撫養權 Appeal / Re-trial on child custody	10	3.4	12	4	8	3.18	12	5.2	7	3	20	8.3	26	10.9	9	4.1	18	7.3	10	3.7

### 3.5 住屋問題 Housing Issues

	2003-2004		2004-2005		2005-2006		2006-2007		2007-2008		2008-2009		2009-2010		2010-2011		2011-2012		2012-2013	
	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%
因離婚而有住屋問題 Housing problems after divorce	204	70.1	211	71	188	74.9	156	67.5	140	59.8	151	63.1	183	76.8	198	91.2	167	68.1	200	75.4
公屋 Rights concerning Public Housing	64	21.9	70	23.5	67	26.6	67	29	52	22.2	52	21.7	87	36.5	96	44.2	61	24.8	84	31.6
居屋 Division of property / Home Ownership Scheme Flats	45	15.4	47	15.8	39	15.5	28	12.1	27	11.5	26	10.8	28	11.7	30	13.8	24	9.8	33	12.4
私人物業 Division of property / Private Housing	95	32.6	94	31.6	82	32.6	61	26.4	61	26	73	30.5	68	28.5	72	33.1	82	33.4	83	31.3

表四：案主精神狀態

Chart 4: Mental Health of users

	2003-2004		2004-2005		2005-2006		2006-2007		2007-2008		2008-2009		2009-2010		2010-2011		2011-2012	
	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%	人數 No.	%
疲倦 Fatigue	130	44.6	207	69.6	149	59.3	146	63.2	148	63.2	151	63.1	133	55.8	141	64.9	153	62.4
精神緊張 Nervous	132	45.3	195	65.6	142	56.5	140	60.6	137	58.5	154	64.4	131	55	124	57.1	138	56.3
經過一天後感到 疲累不堪 Easily exhausted	107	36.7	170	57.2	114	45.4	121	52.3	102	43.6	118	49.3	112	47	98	45.1	124	50.6
失眠 Sleeping problems	145	49.8	193	64.9	151	60.1	142	61.4	142	60.7	156	65.2	144	60.5	125	57.6	146	59.59
不能集中精神 Difficulty in concentrating	122	41.9	182	61.2	134	53.3	133	57.5	132	56.4	143	59.8	122	51.2	117	53.9	138	56.3

案主精神狀態 (問卷於 2012 年更新)

Mental Health of users (Form Used after 2012)

	2012-2013	
	人數 No.	%
頭痛 Headache	130	49
精神緊張 Nervous	166	63
胸口弱悶 Feeling weak	80	30.1
失眠 Sleeping problems	109	41.1
難以集中精神 Difficulty in concentrating	104	39.2
覺得自己一無是處 Feeling helpless or inadequate	170	64.1
心情煩躁 Irritable	143	54
腦海常想著不愉快的事情 Focusing on unpleasant thoughts	167	63

**資訊科技閣：**中心提供電腦及網頁資訊予婦女瀏覽。

**偶到服務：**開放屬下兩間中心予婦女和社區人士使用，鼓勵她/他們參與和運用本會和社區資源。

## **倡議項目**

**推廣婦女權利社區教育：**舉辦講座、大型社區教育推廣日、課程、諮詢站及小組工作，內容包括：婦女健康、法律權益、公民意識等。

**自助組織發展：**鼓勵婦女發展自助組織，從而推動婦女參與社會事務、爭取權益及促進互助。

**性別意識訓練：**向各界別人士，如社會服務界、醫護界、資訊科技界、商界、教育界、政界等傳播關注婦女需要的訊息和倡導性別平等。

**研究和出版：**研究婦女的需要和整理婦女服務的經驗，以推廣婦女所關注的議題。

**倡議：**就婦女關注的議題向政府及公眾反映意見。

**免費律師面見諮詢服務：**由註冊律師接見有需要的婦女，就有關離婚、撫養權、贍養費、財產分配及家庭暴力等問題提供免費法律諮詢服務。朋輩輔導員會協助婦女使用服務。

**個案輔導服務及自強小組：**特別為面臨婚姻或其他情緒困擾的婦女、單親婦女及性暴力和家庭暴力受害人，提供個別輔導及小組支援服務。

## **發展項目**

**就業再培訓：**舉辦再培訓就業課程及轉介職位服務，協助婦女獲職及重新投入社會工作。

**經濟充權：**鼓勵婦女嘗試另類經濟參與模式，成立合作社或互助社來促進婦女參與經濟活動。

**健康充權：**向婦女推廣整全健康訊息。

**持續教育：**提供多元化的持續教育課程，以鼓勵婦女提升自我，從而推廣平等教育機會的理念。

**資訊科技教育及推廣：**透過婦女 IT 大使朋輩教學計劃，讓婦女可以掌握電腦知識和技術。

**社會參與：**鼓勵和支持婦女積極參與社會生活，以體現和推動性別平等。

**社區網絡及共融：**與社區團體合作，結連不同社群及人際網絡，提升社區的資源和能力，從而建立互助互利之社區，加強社會資本的積累。

**義工發展：**提供義務工作技能訓練，鼓勵婦女參與社區活動和事務，貢獻社會。

**資源閣(視聽資源及書籍借閱服務)：**備有大量有關婦女議題的書籍、研究報告、小說、影視資源及報紙予公眾借閱。

## 我們的歷史

在二十世紀七十年代末，香港婦女協會(現已解散)的「反強姦運動」成功引起了公眾對當時傳媒處理性暴力受害者新聞的關注。及後，組成了婦女中心小組委員會；並於一九八一年五月五日開設一條處理公眾查詢的熱線，專線設在前市政局委員杜葉錫恩女士的辦公室內，由一群熱心義工負責接聽。一九八五年，婦女中心建址深水埗麗閣邨；一九八九年八月成為香港公益金成員機構。雖然仍隸屬於香港婦女協會，但婦女中心持續發展，並有獨立的執行委員會。一九九二年九月，婦女中心宣佈獨立並易名為「香港婦女中心協會」以邁向新的方向。一九九六年，香港婦女中心協會在大埔太和邨成立太和中心，擴展新界區的服務，及後於二零一四年九月，在粉嶺成立第三所服務中心——慧思薈，奠定服務北區婦女的基石。香港婦女中心協會現時是香港社會服務聯會的會員機構，並於二零零二年取得聯合國經濟及社會理事會特別諮商成員地位。

## 我們的使命

1. 提高婦女的權益和地位。
2. 協助婦女發展個人潛能。
3. 與其他關注婦女問題的組織及團體互相配合。
4. 就婦女的需要及所需要的資源分配向決策機構提出建議，使服務臻於完美。
5. 發展有利婦女之資源及服務。

## 我們的服務

### 支援服務

**婦女求助熱線**：由女性義務輔導員向求助者就法律、醫療、婚姻及情緒問題提供資料及支援服務。有需要時，會轉介予專業人士跟進。



鄧昔芬

謝玉玲

鄧紫欣

鍾偉貞

鄧貴英

關笑霞

鄭翠英

蘇惠嫦

鄭燕萍

釋珮瑜

黎慧儀

顧媚媚

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梁慧珍

梅瑞怡

符鍵

莫如馨

莫惠萍

莫瑞儀

許濱濱

陳玉萍

陳好定

陳汝珍

陳佩芳

陳美如

陳美鳳

陳詩敏

陳潔冰

陳靜霞

陳麗鈺

陳獻紅

彭寶珠

馮玉玲

馮佩欣

馮淑芬

馮惠怡

馮惠珠

黃玉華

黃愷蓉

黃慧純

黃麗賢

黃馨漩

董雅麗

雷惠而

趙美玲

劉佩霞

劉柔芬

劉婉月

劉雪茵

劉媚

劉詠寶

劉潔明

劉蕙芊

劉麗芬

蔡英莎

謝仁君

顏少倫

羅沛隆

羅婉清

羅彩蓮

羅碧嫻

譚英傑

譚修英

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RARN, Tina

## 中國法律

盧耕宇

## 朋輩輔導員

王議平

石玉蘭

朱格梨

何珍

吳耀梧

呂歡卿

扶兆華

李天姬

李月媚

李桂鳳

李淑娟

李瑞梨

李潔明

李麗虹

冼秀玲

徐佩玲

馬惠玲

崔潔貞

康詠賢

張碧娟

陸永雄

陸家熹

程慧英

舒志傑

馮啟念

馮惠蓮

黃光文

黃成德

黃婉靖

黃涓琛

黃瑞華

黃嘉純

黃慧玲

黃慧雯

黃麗顏

楊俊豪

楊美麗

楊潤康

葉建民

葉詠娜

葉祺智

雷佩華

廖學思

劉家良

劉桂華

劉劍鵬

劉穎賢

蔣錦華

鄧妙鳳

鄧明輝

鄧國全

鄧國樑

鄭依明

鄭宗漢

鄭煥新

黎國光

黎潤儀

盧瑪莉

盧懿行

鮑富

李灝霖

林志剛

林新賢

林滿馨

林慧儀

姚逸華

洪珀姿

范碧枝

凌慧璇

容海恩

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袁正邦

馬兆華

馬慧霖

區少芬

張世偉

張惠儀

張經瑜

張達成

張鈺健

梁永豪

梁永鏗

梁偉廉

梁錫濂

畢慧貞

莊佩珊

郭匡義

郭美馨

郭婉珊

郭婉琳

陳少娟

陳佩玉

陳忠兒

陳芷寧

陳美蓮

陳倩敏

陳偉芬

陳偉雯

陳淑霞

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## 免費律師面見諮詢服務創辦人

麥法連 (Julie MACFARLANE)

沈妙思 (Harriet SAMUELS)

## 義務律師

### 當值律師服務

支韻思

王吉顯

王學今

丘栢瀚

白虹

朱希鎮

朱麗娥

何紹德

何嘉雯

何穎恩

何麗顏

吳國樑

吳靄星

李昱穎

李詠恒

李詠嫻

李黃慧玲

李嘉雯

的沒有達到性別平等，背後好像說到大家分擔，可以平等一些，但實際其實是沒有平等。舉例如媽媽依然在擔任大後備、最彈性的照顧者，經常留意爸爸若無辦法照顧的時候，就幫爸爸做保姆；又例如那個時間本來分配給爸爸，但爸爸說沒有時間，於是媽媽就會去做保姆。這些研究亦發現過往在家庭中的性別分工，不會因為離婚後而改變。媽媽仍要統籌、管理所有事，包括管理爸爸的參與、小朋友可以怎樣見到爸爸、甚至小朋友和爸爸見面時的相處，管理所有事情。所以，研究發現無達到性別平等，相反，性別繼續產生作用，媽媽仍然負起最大的責任。

太多，這個模式是相類似，不會突然間因為離婚後而在養育子女的模式上有很大的改動。爸爸的參與和探視是否真的幫到小朋友？其實，結論並不一致。在七、八十年代較早期的研究中，發現小朋友得到爸爸探視很重要。但後期的研究則顯示，有些情況可以，有些情況不可以，不過更重要的是甚麼因素最影響小朋友的利益？就是如果父母間繼續有很大的衝突和矛盾。有些研究提到，掙扎在父母之間的矛盾讓小朋友的精神健康變得很差。亦有些研究發現離婚之後的親職安排是一個延續，我們稱為進行中，事件不是一次便完，很長遠。離婚時在法庭上即使定了很多親職計劃，但這些計劃都不是按小朋友的年紀，可能是按小朋友當時的年紀，但隨著小朋友長大，親職計劃便需要作出改動，要配合小朋友，過程中需要商討。還有，就算判了共同管養，如過往的例子，能否持續下去，配合得到？香港完全沒有關於判了共同管養的在實踐時不同階段的情況的資料。有關實際上的執行情況，很多時發現，持續不到的原因是，爸爸消失了。法律管不到這部分，就是如果拒絕接觸，即給予爸爸權利，但他消失了，很多個案都是這些情況，也沒有辦法。爸爸要探視時一定要讓他探視，但如果他不出現也沒法子。而且，亦有階層的分別，研究發現，

通常離婚後比較能合作到的父母都是某些階層或教育水平，有很多這類型研究。在很多我們服務的對象中、低下階層都未必有這些條件。舉例如雙方的經濟基礎穩固，不用你計算著我，我計算著你；或者大家都有安穩的居所，又或者大家的教育程度都相當，又或者爸爸沒有再婚。要在很多因素配合下才可令共同管養延續下去。很多研究都指出，法例亦已經提過，甚或這次建議都提出如出現家暴，就不要處理或作例外。很多研究都發現錯過很多個案，特別是那些不屬於嚴重虐待，或已經報案、有了紀錄、去過社署的個案，很容易錯過。

在整個概念中，父母照顧責任裡面，與我們現在所講的「新父親」的一些論述吻合。「新父親」論述是指過往男人不願分擔照顧責任是因為他們一些結構性因素不做，那些結構性因素包括他們需要工作所以不做、不是跟小朋友同住，特別是離婚後不是同住所以甚麼都做不到，還有一項最重要的是女人不願意分享。這都是一些論述，所以，整件事令人覺得是排拒了男士，現在給予他們機會重返；另一個論述就是爸爸的參與對小朋友很有幫助。我我覺得有些概念是需要轉的，父母共同管養是重要，不過千萬不要去提那些「五十/五十」。澳洲有很多研究表示，發覺真



有兩個比較隱藏的主題，一個是性別平等的主題。性別平等在共同父母管養責任中，其實是一個隱藏了的含義，因為過往不共同，可能絕大部分由婦女去承擔。今天我們覺得不同了，爸爸都需要去分擔，但有沒有一個性別平等的好處在裡面？或者一個這樣的訊息在裡面？理論上有。離婚後不要把孩子的所有責任給媽媽，爸爸也有責任。另一個主題是男權，其實很多地方都有改動，源起與男權運動。就是有爸爸走出來，說到為甚麼我沒有管養權、為甚麼我不可以繼續去做爸爸？但在香港，我們的討論中，大多數談及小朋友的利益。當然我們的社會對小朋友的最佳利益都有一些主導的想法。包括小朋友應該繼續享有與父母接觸的機會。這個接觸甚至最好是面對面，能夠做到便最好。

另外，我們都發現小朋友是繼續想與爸爸媽媽有連繫，甚至我們都認為，即使爸爸曾有家暴，虐待的行為也好，小朋友仍會很珍惜和爸爸的關係。有時，我們對小朋友的利益會有這樣的看法。但其實我們面對不同性別的父母都有一些看法。父母共同管養及責任，背後考慮到男權的問題，就是想把爸爸帶回來，過往或者爸爸消失了、失蹤了，或者從來沒有出現，沒有扮演他的角色。今天，我們

想爸爸回來，不單止在婚姻上回來，同時亦希望離婚後，他都能夠回來，做回爸爸的角色。還有，我們都覺得就算丈夫是一個施虐的丈夫，他都可以做一個好爸爸。他是爸爸和他是丈夫，這個實際上和理論上是可以分開的。在這個想法下，如果孩子不想見爸爸，應該是有人在背後操縱。那麼，這個人會是誰？大多數都會猜是媽媽在背後下了功夫，令小朋友不想見爸爸，因為理論上小朋友想見爸爸。因為這是我們一直相信的想法。而且，我們亦相信爸爸和媽媽能夠與小朋友建立關係，就算婚姻鬧到甚麼程度也好，離婚後大家都可以理性一些，能做個理性的爸爸；我們覺得理論上一對有能力的父母，應該有足夠的理智和理性去為小朋友的利益合作。這個我們傾向相信，這些想法我們都覺得是好的。

我們比較關心的，可能真的是實際情況上是否真的能夠做到。是否真的幫到整件事，無論是小朋友還是父母。我找了一些關於離婚後養育子女的情況的研究。當然是很複雜，爸爸、媽媽和小朋友的關係，特別在父母分開之後；而且，有很多研究都發現，親職的方式，其實離婚後很大程度上是婚姻裡的一個延續。換句話說，就是過往爸爸很少參與，很大機會在離婚後，爸爸的參與依然是不會

# 從婦女角度看「共同父母責任模式」

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同一件事，實在有很多不同角度去看。女性主義其實看到離婚經驗。婚姻的經驗或者離婚的經驗也好，都不是性別中立的。男和女的經驗肯定不同。當中提到性別權力的不平等或者性別不平等。在家庭中、婚姻中甚至整個社會中都會有這些情況。那麼，女性主義的分析很簡單，譬如說社會上對於一些婚姻的論述或對於婦女的論述，如何為她們帶來一些壓力。包括社會上對離婚的看法，覺得離婚是不正常的，離婚不是好事。不好的包括失去了爸爸，因為會令小朋友失去了爸爸。還有，甚至乎過去特別是很多媽媽帶著小朋友成為單親媽媽後去申領福利，在領取福利後，社會上有人會覺得：「要我們幫妳養育小朋友？你的家庭有問題，你的丈夫走了，就要我們其他納稅人去幫妳養育小朋友。」覺得她們是社會的負擔。甚或覺得婦女本身在道德上是否都需要負上一些責任？好像不是很負責任，給予她們太多福利。

他們的分析最主要看到幾個部分，包括經濟；另外，離婚對於女性

的自我形象、自我身份認同，是一個很大的轉變。很多研究發現，這對女性的影響大於男性。還有離婚後的適應。女性主義比較強調，女人不是受害人，她們自己都會想辦法去處理她們的狀況。但在現時社會上，一些文化、制度、福利等各方面，從很多研究中可以看到單親媽媽很多時處於不利的情況。特別是香港在八、九十年代有很多研究，但在二千年後，便沒有太多單親研究。那時，看到很多問題包括養育子女的壓力、經濟、心理健康等，很多沮喪的情況，欠缺社會支持、特別是房屋問題上的歧視，在香港房屋是特別相關的。

「他」和「她」的離婚，是兩個很不同的經驗。最開始的是「他」和「她」的婚姻，但後來發現不單止是「他」和「她」的婚姻，也有「他」和「她」的離婚，這是不同的經驗。在父母責任裡面，我看到有三個主題，有三個項目在裡面糾纏著。一個是小朋友的最佳利益，這是最明顯的；我們很多時討論都會用這個架構去規劃究竟怎樣做。但其實我覺得還

總括而言，有超過一半受訪者對立法推行父母共同責任模式有某程度的擔心。以現時已判實行共同管養所存有的憂慮最少，只有百分之四十一點七。當然，最高的可以想像是曾遭受家暴的婦女，在成功接受訪問的一百五十六位婦女中，有五十位曾經遭受家暴，比例上她們最擔心實行父母共同責任模式是可以理解的。這亦同樣反映在所有曾接受訪問的個案中，她們對實行父母共同責任模式都有保留。

時，回答不知道的比例佔比較少，只有百分之十四；而表示知道但不選擇的，其實佔最多。

我們嘗試比較對於父母共同責任的考慮或憂心時，得出的結果是無論受訪者是否已經離婚，同是五十多個百分比。我們亦嘗試參考已離婚的個案中有沒有家暴情況。其實，在所有個案裡面，有百分之三十五點五受訪者曾經受過家暴的對待。而在已經離婚的個案中，則有百分之四十點四。可以推測曾否受到家暴對待，是婦女決定會否離婚的其中一項重要原因。另一方面，訪問中獲判共同撫養的十三位受訪者中，有五位表示對於父母共同責任模式存有擔心或憂慮。曾遭受家暴而獲判共同撫養的共有兩位婦女，相比起整體個案受訪者中曾遭受家暴的百分之三十五點五少，而已經離婚的個案中亦有百分之四十點四曾遭受家暴；故此，可以看到獲判共同撫養的婦女中，她們受家暴的情況相對比較少。

經深入訪談後，其中兩位受訪婦女表示作出(共同撫養)選擇，是因法官建議，雙方討論後覺得可以便選擇了。有一位婦女則表示，本來雙方都想爭取(撫養權)，但她的律師明確地說她沒有法援，這樣爭拗下去、打官

司所花的法律開支會很貴，不如算了。這是一個從金錢角度出發。最後那位婦女表示其實都要爭，不過法官判了。雖然不是自己所想，但也沒辦法，因為法官已經判了。當我們問及直至現時共同管養的安排裡面有沒有問題時，有兩位回答沒有問題；這主要是因為爸爸很少參與，甚或基本上是不參與，又或者可能已經再婚，另組家庭。當沒有人跟你討論時，自然沒有問題出現。另外一位就表示自己忍了便算，因為監護權給予了祖父母，爸爸、媽媽則共同管養，很多所謂的探視，在老爺、奶奶面前有很多制肘，故此，忍了便算。她不想讓女兒不開心而影響到她日後成長。最後一位則說到非常差，因為女兒的爸爸很不合作，很多方面都諸多刁難。

我們同時亦詢問四位婦女如果政府再立法推行父母共同責任模式覺得會怎樣。她們在感受上覺得很不切實際，很難去推行，因為總會有不合作的家長，擔心家長之間的矛盾會影響小朋友。另外，當提到一些配套措施，她們很希望不是推出(父母共同責任)之後，由雙方家長自行處理，而是有多些人或社會資源可以幫忙。而訪問過程中亦有位受訪者表示不太想再講，因為她不願再回想或重提離婚的事情。

# 香港婦女中心協會的服務使用者對共同管養 及共同父母責任模式的意見

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我們由二零一二年二月起至研討會舉行前，完成了一項很小型的意見調查，為電話訪問及深入訪談，對象為過去最近兩年曾使用免費律師見面諮詢服務的使用者，即是她們都是面對著婚姻困難的婦女。每年使用免費律師見面諮詢服務的婦女約二百人，因此，我們共打出超過四百個電話。當中，有一百五十六位是成功可以在電話中傾談得到。我們會在通話中，詢問她們是否願意再詳細傾談，答允可以的我們會再由同事通過問卷與她們了解，但為數並不多，只有四個。以下是一些使用者的意見，可作參考。

在一百五十六名受訪者中，最終辦理離婚的有一百零六位，佔百分之六十八點八，有部分最後沒有離婚。而在所有個案中，有百分之五十三點七受訪者對父母共同責任的模式表示有一些憂慮。但可以想像在電話訪問中，要詳細解釋父母共同責任模式，是一件非常困難的事。而且，有

很多服務使用者過往未聽過，甚或不知道(何謂父母共同責任模式)，我們會嘗試用一些例子去解釋，如提到一些重大的決定時，例如長時間離開香港，要取得另一方的同意；又或者有些事情需要事先通知對方。嘗試以這種方式作解釋，然後得出有關數字。餘下的都表示無意見或不太擔心。而家暴則佔整體受訪者中的百分之三十五點五，她們在傾談中提及曾經受過家暴的對待。

由於父母共同責任，只適用於離婚人士，以及我們希望盡量抽取一些獲法官判共同撫養的個案深入訪談，所以，只列出已離婚的受訪數字。從中可以看到受訪者中有一百零六位婦女已經離婚。我們會詢問在辦理離婚過程中，有否就著撫養權出現過爭拗，當中有七十位表示有，佔百分之六十六點七。而她們現在是否共同撫養？答案非常少。當中只有十三個獲判共同撫養。另外，當我們詢問這些離婚婦女為何不選擇共同撫養

等等。但最主要的是很多人願意用家庭糾紛調解服務，這能夠幫助很多人解決問題。另外，報告亦帶出很多家庭有家暴和安全問題，因為當中涉及一些爭拗。當翻閱一些調查時，我看見(澳洲)政府很有決心，投放了很多資源，但不能解決問題。因為沒有人才，律師不清楚，亦沒有足夠的工作員，出現很多困難。再加上彼此的演繹不同，儘管很有決心。這值得去思考，政府有好的決定，設立了一些配套如家庭糾紛調解、圓桌會議糾紛管理等服務，均值得香港借鏡。

另外，我們看到八成個案都由女性主導負責照顧，究竟如何能催促男士參與照顧，這值得深思。不要因為實際上的爭執，而不從孩子的角度去想。另外，不應該再倡導「五十 / 五十」的原則，而是父母共同責任，由零至一百的責任。另外，我們應提倡平均分擔，以孩子為重點，不要因此而令小朋友在當中受苦，因為孩子被拉來拉去亦很可憐。另外，協調工作也很重要。我們從澳洲的例子中，發現很混亂，因為彼此都不知道對方在做甚麼。唯有由政府法庭委派律師到家庭關係中心駐守，解決問題。由於法例未有清楚述明共同父母責任的涵義，所以澳洲的協調工作很有問題。另外，當提到孩子最佳利益時，平等分擔其實都會引來指責，被利用

作指控。有時亦要仔細研究指控內容，因為有時會偏袒爸爸或媽媽。這樣更引起很多婦女表示不甘心，因為已經被虐待，又對她不公平，還要提升爸爸的權益。在澳洲特別是女律師團體常忙於為女性組織爭取權益。因為她們覺得(法例)對她們不公平。自我責任已經成為大趨勢，不能抗拒，政府成功與否，一方面要靠決心；而保護孩子其實要有一個正確的想法，不應用成人的利益和障礙去想。當然，我希望將來會有一個好的研究，參照英國、紐西蘭等地方，汲取經驗，進行持續研究。其實，我們的傳統價值觀，不應該再繼續去堅持撫養權這個概念，應該從孩子的最佳利益去入手，現在恰巧是時候和機會重新思考，以專注在孩子的利益為原則，繼續執行和推動。

系統其實很好，從資源上和決心上均很標準。在各個地方都有相同法例去處理(問題)，有程序和完整的配套，指引齊備，並教導律師如何處理等等。澳洲是不錯的地方，每件離婚案例都獲不錯的福利，一件案件可以享受政府免費聘請律師六小時去解決問題；最初是六小時，後來因資源不足，改為三小時。澳洲可以這樣做，我們的政府若要這樣做亦未嘗不可，政府有足夠的錢。又例如熱線，因為澳洲跟香港很不一樣。澳洲地方很大，如果沒有車，要去其他地方很麻煩，所以他們要設立一條熱線供人查詢這些問題，亦有男士的熱線，專為男士服務。他們更設有一個孩子顧問和一個家庭顧問，專責接見孩子，重點是了解孩子需要甚麼和願望。讓孩子知道有人會聆聽他們，而顧問只負責記錄，亦不會完全順應孩子的期望只是盡可能反映。

另外，還有一個父母強制計劃，這是一個有很多課堂的課程。整個課程會以表列方式列出內容，父母要在指定時間上課。若不參與這些課程，便不能完成子女撫養權的安排。除此之外，亦有很多教育計劃，單張等。在二零零八年七月一日起，父母若要取得撫養權，必需得到家庭糾紛調解(family dispute resolution)的證書。但亦有例外，例如危急情況、大家只是去申請同意令，而不會做成爭

拗；又或者一方失蹤，無法參與。即使雙方不能達成協議，家庭糾紛調解仍可以幫助雙方更好地溝通。而家庭糾紛調解證書亦會指出，雙方有否缺席會議或盡最大努力達成協議，並由認可人員評審和分析雙方是否合適進行家庭糾紛調解。如領取不到家庭糾紛調解證書，法庭便不能處理(撫養權申請)。後來，澳洲政府還推出一項名為「圓桌會議糾紛管理」(round table dispute management)，由於包括法庭、律師和當事人，統稱三人圓桌會議，探討如何處理個案中的各個程序。而這三人圓桌會議將決定，如何支援小朋友的需要、怎樣開展家庭計劃去照顧小朋友，以及解決經濟問題，直至小朋友十八歲。雖然在澳洲一般年滿十六歲的小朋友已很獨立。但規定仍然是十八歲，以協助雙方與孩子溝通。個案經理會評估三人圓桌會議是否適合當事人。如果他們被邀請使用該服務，會先委任一名個案經理為會議作好準備。會議通常由有經驗的主持人協助，以幫助當事人理清自己的家庭糾紛，而當中或有可能需要進行第二次會議。經過這三人圓桌會議後，個案經理亦會跟進提供支援予當事人。孩子不會參與這個三人圓桌會議。因為是由法庭、律師、和父母去決定。但孩子可以發聲，所以稱為圓桌會議。後來，澳洲聘請專人進行檢討。當然顯示出的數字很好，暴力少了、很多人使用服務

享受父愛。這個故事有很大影響力。政府在很短時間，基本上在完全沒有準備的情況下，在澳洲成立六十五間家庭關係中心(Family Relationship Centre [FRC])。使用關係(relationship)是希望通過促進家庭關係去給予孩子多一些關顧；同時，亦開始有範式轉移(paradigm shift)，不要時常提權力和爭奪，應該是協力養育(co-parenting)照顧子女。並且有幾個目標，第一是就算父母離婚，亦應該為子女去建立一個健康關係的模式及模樣。第二，就算對方不撫養孩子，亦不應阻止對方與孩子接觸。根據研究假若完全不讓孩子接觸另一半，會衍生很多問題包括資源不足，因為只有一半，如果容許孩子享受祖父母、叔叔等的關愛，會激勵孩子，所以應該鼓勵父母去幫助他們。另外，亦要幫助離婚後的父母減少爭拗。最後，由於家庭對小朋友來說很重要，故此鼓勵離婚後的父母使用這些社區服務。

我們經常提到他們重視人權(human rights)，但現在又要立法，和原意有不同。他們解釋人權重要，但有時有些事如果不立法是推行不到的，因為沒有基礎。每個人都說有人權，但如何解決家暴問題，如果出

現這些問題便要有法例去處理。而且更規定，如不牽涉子女，父母可以離婚。但若牽涉到子女就要去家庭關係中心上課。課程內容是教父母怎樣為孩子安排福利計劃，父母同時要去上課，讓孩子不用那麼可憐。其實，我寫了一本書分享孩子在父母間受苦和他們的心理負擔。孩子會很悲慘、憂愁、抑鬱，他們懂得做戲，在這個面前說媽媽不好，在那個面前說爸爸不好，回家後又不知怎樣。他們其實都是在求存，所以，更要強調父母間必須合作。當時澳洲政府所講的「五十 / 五十」原則，跟律師、服務、社會街坊也好，所指的不是時間，不是說每人五十小時；每人百分之五十，而是分擔，一起做的意思。只是推行太急，有部分人自己演繹，導致有人以「五十 / 五十」原則作爭拗，四十九點五小時都不接受，要足夠五十。於是不斷爭論下去，重回爭拗的局面，讓孩子受苦。因為彼此都在爭，誤差一個小時又會互相指罵。在澳洲訪問期間，發現很多家庭慘案都是因為這樣而發生暴力、打鬥等流血事件，甚或有些孩子在事件中死亡，大家同歸於盡。如果持續爭拗下去，最初善意是為了孩子，但最終卻為孩子帶來另一種痛苦。全澳洲六十五間家庭關係中心都使用這個符號<sup>1</sup>。這個

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# 共同父母責任模式——澳洲與新加坡的經驗

吳國棟女士

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我自一九八四年開始研究離婚家庭，亦親身去美國拜訪很多從事這方面研究的大師。直至今今天我已經退下火線，仍然討論這個議題。由於香港在八十年代沒有這個課題，當我處理離婚個案的時候，我完全參照美國的模式。驚訝的是，美國當時已經贊成共同撫養。這些轉變和文化很有關係。英國、美國、澳洲等國家很重視人權，即個人權益，所以當時美國贊成共同(撫養)，因為彼此覺得大家對家庭都有責任。但當處理下去，出現太多家暴，故此漸漸不再建議共同(撫養)，反而多了看案例，後來更趨向單獨撫養權。而現在又重提共同撫養。故此，我想分享為何澳洲會成為大家討論的主題。在一九九五年，全世界都在討論要重新檢討孩子撫養的福利問題，澳洲身為先進國家亦不例外，但澳洲修改法例是在瞬間發生，並沒有經過周詳考慮。為何法例突然改變，改變後澳洲又發展出甚麼配套作支援？後來作出的檢討，又有甚麼地方值得借鏡？

澳洲的男士曾經進行大型遊行去爭取自己的權利。雖然他們已經離婚，但為何法例可以剝奪他們做爸爸

的責任。因為這個原故，一些男士組織壓迫政府要求重新檢討、取回孩子(撫養權)由他們自己照顧。他們要照顧自己的子女，要盡自己做父親的責任。當時有很多團體表示，已取得撫養權的人對沒有撫養權的另一半很不公道，不讓彼此見面，藉此要脅很多東西如贍養費等。他們覺得這個做法不對。另一方面，外國亦曾進行很多有關孩子的成長，父與母的角色是否重要的研究。按我三十多年來的工作經驗所得，這種關係無人可以取代。我曾經寫過，單親家庭有五種生活模式。其中一種就是可否由另一人代替父親或母親？我進行家庭生活教育時，都會教導他們，如果真的沒有了這一半，便要找回。男士的角色，不是媽媽完全可以表達到，要找叔叔、兄弟、一些男性朋友去擔任。

究竟法例怎樣轉變。因為當時澳洲有很多壓力團體，再加上臨近選舉，為要取得選票，故此(候選人)都表示贊成，要維護這些人的權益。當時亦曾出現一些很感人的故事：《Every Picture Tells a Story》這書出版後，人人都覺得孩子應該要有父愛，提出要平等，讓小朋友可以

法例是需要改的，因為共同管養權是永遠有關管養權，重申父母的權利。這裡提的是父母的擁有權。而父母共同責任提的是責任，兩者很不同。在管養權的法例下，父母間會繼續去法庭爭取他們的權利，但父母共同責任就沒有這個問題，沒有(權利)讓你去爭取。

共同管養權不是實際平分照顧，也沒有實際平分對孩子的照顧。然而，父母共同責任則是告訴父母，他們雙方也有責任。照顧和管束，他們看到的是威脅性的阻礙，拿著照顧、管束權的一方總會覺得另一方會拿著這個權力去干預。但父母共同責任是讓父母知道他們的目標和使命不是這樣。對共同管養權的理解，不同的父母看到不同的方式，很多時引申出爭拗。但父母共同責任沒有不同的闡釋。這是整個主題，在報告中強調父母共同責任是父母聯繫孩子的權利，鼓勵父母之間的互動。我們提的是促進父母之間的協議；若出現家庭暴力個案，在父母共同責任計劃中的處理方式亦不一樣。在改例後，孩子的聲音會較多一點。父母有責任去照顧孩子，並將所有法律編纂。這樣便能解決我們現時的問題。或許，大家會擔心還未是時候改例。因為有很多配套未準備好，我們是否應該要齊

備所有配套才去改例，擔心改例後全部都太新而不知道如何接受。有些人很多時亦不清楚、不懂得怎樣去解決問題。這些配套包括：怎樣去支援離婚後的家庭、為離婚夫婦提供輔導服務、或者熱線，又或是我們所提過的探視的地方都很重要。調解、統籌員或者養育子女課程等各方面的配套。怎樣去提供支援家庭暴力的受害者、離婚夫婦的調解、輔導以及教授共同養育子女課程，這些全部都要做。不過，是否真的需要有配套後才去改例？其實，這些配套基本上以現時的环境無論改例與否都需要。現在根本非常需要這些配套，所以政府應該雙管齊下去改法例並同時增加有需要的配套。我們無需為了擔心配套未準備好就不改例，而是改例的同時，同步地做好配套，要政府面對這個問題。

澳洲和英國實行父母共同責任已經十多二十年。他們有很多經驗給我們借鏡，我們應該借助他們的優點，去建立香港自己的模式。

條文放在一起。現時我們香港的法例由兩個不同的部門來處理，政府應該納入一個部門去處理所有有關家庭事務的法例。

## 新加坡的經驗

以下是新加坡的經驗，二零零五年他們做了一份報告書，說他們有可能不需要改例。他們還未出報告書之前，上訴庭案例 *CX v CY* 就提到，他們一直沿用促進共同父母責任。在新加坡他們覺得無需要改例，便可以做到父母共同責任。這是因為他們有婦女憲章的第四十六(一)條法例，在這條例已經提共同父母責任。在他們的報告書中，基本不需要改例，因為他們覺得父母共同責任可以在管養令中強調。一般案件可以用共同管養權來處理，而獨有管養令是專門留給有家庭暴力問題的處境，是例外的命令，而其他的都是共同管養。在新加坡的 *CX v CY* 個案裡面提到，共同父母責任一直在他們的家事法中植根。這已經足夠處理。這僅是一個合理的前景，雙方需要共同協助，通常能夠合作才會給予。我覺得新加坡的方式對香港來說是不適合，她們的處理不適合香港。因為，第一我們沒有新加坡婦女憲章第四十六(一)條法例，接著 *CX v CY* 的處理，香港仍然原則上在判決上提及共同管養權是

要有合作原則才會。再者，我們不可以期望由香港法庭去獨自修改法例。我們是三權分立。立法、執行和司法機關三個都個別獨立的。另一方面，我們的家事法程序和新加坡有所不同。在新加坡社會福利報告只會給予法官，當事人父母是不可能取得一份，他們甚至在法庭上無權盤問社會福利官。所以整體上來說，新加坡在處理父母共同責任這個問題的方式是與香港有所不同之處。

## (六) 共同管養權與父母責任

若要比較共同管養權和父母共同責任，第一項是共同管養權是否能給予兒童權益足夠的保障。第二是否真的有這麼多共同管養令？

夏正民法官亦提過在無辦法之下會用共同管養，但他不是說不要改法例。他建議應該要改，但在未改的情形下，就多用共同管養。換句話說，他在告訴大家應該要改例。在二零一二年三月二日的吳靄儀議員茶會上，當時麥莎朗法官提過，她自己籠統地做了統計，這是她自己記錄下來的。在她處理的四十五宗個案中有三十宗是獨有管養權、六宗是共同管養權，而其他的需要多些調查。她覺得共同管養權不可以代替父母共同責任。

中，提到其他國家已經改例。香港(法改會)的報告書，2005年已經出版，那我們就應該根據建議書去改。夏正民法官已經提過，而林文瀚大法官亦都同樣提出，甚至明言「我想藉此機會敦促政府在這些方向上取得一些進展。」法官意見一直提倡要改，並不是因為新加坡那方面的法官認為不需要修改了便可。另外一個個案，張澤祐大法官亦都提到二零零五年(法改會)的報告書已經出版，我們應該要去改例。他亦提到「目前還沒有落實的建議。我認為，當局應盡快通過立法去落實建議。」這些都是二零零九年的案例。轉眼之間已經過了三年，但仍然無行動。最近有一個比較接近的個案，有一父親認為現在可以用共同管養令處理問題。麥莎朗法官提到錯與否共同管養權只是一個解決方式。公平地說二零零五年(法改會)的報告書內的建議仍有待採取行動。她不同意共同管養可以處理這個問題。

#### (五) 其他建議的修改

為何最近整份諮詢文件好像沒有提過其他事項，報告書內提到有很多其他法例需要修改，而其他法例真的很重要，所以今次的諮詢文件相比起之前的，是很單方面的做法。當時我亦曾詢問政府，我們之前有幾個研

討會都是討論同一個議題。而政府方面的回應是已經收到我們的訊息，他們亦會看其他建議。其中一個問題是很多人說給你見孩子，但又不給錢(贍養費)，對嗎？這個問題基本上二零零五年(法改會)的報告書亦有處理。我們的著重點應該是孩子的問題。很多研究提出，當孩子有多些機會多見爸爸的話——因為多數是爸爸沒機會取得管養權——這對孩子的成长會比較健康。其實，很多外國研究都有這個發現。至於贍養費方面，其實我們應該盡快處理執行贍養費的問題，這是政府應該處理的另外的議題。另外，有關第三者需要申請有關子女的管養權。很多時父母不見了，由祖父母、外祖父母、叔叔、姨姨等人照顧，其實他們都應該有權去申請，但現時卻沒有。監護探視亦有很多問題。因為根本上沒有中心可以幫手去進行監護探視的話；那些家庭暴力，便會影響到一方不願意讓孩子見爸爸。還有不同的代表。這是兩個問題，如我剛才提及的意見，報告書全部有涵括，給政府一個很完整的建議，將香港處理家庭的法例作大修改，以及為孩子的權利去改。所以，所有更改全部人都應該去做。再加上，我們將現時所有零碎的條例放在一起更是應該要做(香港在子女管養權方面的法例，是收載於多條條例之中)，所以更應該將這些零碎的法律

眼於孩子的需要時，上訴庭已經提醒大家，我們有需要為社會上的改變而作出改變。

## (二) 國際公約的要求

以上所提的是第一個更改理由。第二個理由是國際公約的要求；香港是很多公約的成員之一。由於公約的要求，我們有需要去改。因為以下兩個公約——《兒童權利公約》及《公民權利和政治權利國際公約》，都指出孩子的權利非常重要。我們應該就著孩子的權利去改例。在我們的人權法案條例中提及他們可以享受社會和國家的保護。政府應該在這方面著手去做事。雙方配偶有相同的權利和責任去照顧和保護兒童。另外，在《兒童權利公約》第二十條<sup>2</sup>，提到每一個孩子都有受到保護的權利，獲得照顧和保護。第三條第(三)點，提到一個個人關係要維繫，需要與父母有定期的直接聯繫。換句話說，就算離婚後，政府都要保護這方面的權利。第十八條第(一)點提到要有共同責任，剛才提到在新加坡有婦女公約，但香港是否都需要有，而且可以同樣利用？我想不可以這麼簡單就這樣去利用，是否有了共同責任，就不需要改例？不是，我們應該

就著(保護孩子)這個原則去改例才是。第十二條第(二)點提到有自由表達意見的權利。孩子是有表達意見的權利。現行的法例在這方面並不足夠亦不清楚。所以我們要建立渠道讓孩子表達他們的意見。現時，我們大多數是靠社會福利署的報告書，很少在法例上有清楚讓兒童表達他們意見的渠道。

## (三) 現時法例的混淆

至於第三個理由我覺得要改例是現時的法例有混淆之處。在管養權方面現時有不同的法例提到在不同的情況下應該引用那條法例。其實，這會影響有關程序上的進行，有時候我們進入法庭引用某條法例，法官就會根據相關的法例去作出管養權的決定。所以現時的法例需要統一。廖博士亦提過現時的法例出現混淆，是由於根據不同條例，當中有重疊和涉及不同的裁判權。以不同的方式去處理，引伸出很多不足之處，所以改例是有需要的，以改變現時的境況。

## (四) 法官對改例的看法

第四個理由是法官的意見。上訴法庭夏正民法官在 *PD v KWW* 案件

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<sup>2</sup> 聯合國《兒童權利公約》<http://www.un.org/chinese/children/issue/crc.shtml>

我們很詳細和清楚地解釋管養權的來源和基礎。因為社會上的轉變、父母與子女之間關係的改變，所以我們的基礎應該都要改。如果不作出修改，現有的法例便不可以進一步為現代社會起有必要的的作用。要緊記我們不是單談論現在的父母，而是要為將來做父母和他們的子女設想。他們對子女的概念不應該是管養而是責任。管養是一個陳舊的概念，基本上這是很多世紀之前一些地主的概念。再者，香港大學的教授亦提及過很多時這是一個很混亂的概念。剛才朱法官提到又管養又教養又教育，所有條款都相當混亂。

## 法例需要更改

### (一) 社會價值觀的改變

現時根本沒有一個清楚處理孩子的問題的概念。這是來自英國方面的報告書，當中提到要維繫一個父親的權力，當時是正統合法的。但如果不是婚生所生的孩子的話，媽媽就有權，在以前的法例，媽媽在於子女甚至是一個陌生人。因為孩子屬於爸爸。而管養這個概念是來自監護的其中一個概念。這是一個由古時直至中世紀時代的概念。根本上現在父母和監護人很多時已經很混淆。提起這些

字眼時，很多時都會共同使用。管養權提及的是全部的權力，各方面包括照顧和管束、關於教育、信仰及醫療方面，大家對這方面應該都有認識。所以這個舊概念提及的就是以上三個概念。我們需要改變，因為整個社會的價值不同了。我們需要現代化，現在跟中世紀時代的概念已經不同，所以需要更改。我們再看報告書中提及，以前的命令是講擁有權，令大家要為這個權去爭取，在不同的情況下他們需要在法庭上爭取。即使完結了，父母仍然會可以繼續打官司。大家可以看到這個原來的法例的不好之處。

以下是一個一九八六年的個案，是英國在一九八九年改例前，一個很重要的個案。當中指出父母之間的權利開始以孩子的利益為主，所以要帶出這個重要的個案。我們要求改例，並不是單單一夜之間覺得父母共同責任這個概念很好，所以我們要改。其實，本身在很多已有的法例上的基礎已告訴大家是時候要改。剛才提及到的 *PD v KWW*，裡面都有提及過不同的時期已經有不同的事件發生；最初爸爸有絕對權力，到後來爸爸、媽媽他們可以有權去照顧孩子，接著到最後便不同了。社會開始有需要改變。這是重要的和持久的，普通法可以並應該跟上這種改變。當提到要著

# 「(共同)父母責任模式」是更好的選擇嗎？

何志權律師

何葉律師行合夥人

今次討論的題目是《「共同父母責任模式」，是更好的選擇嗎？》；現時見到坊間在談到這個課題都加入了其他字例如「共同」、「平分」或者「均等平分」在這個「父母共同責任」的措詞。但要緊記“joint”的意思是共同，共同的意思是「五十／五十」，很多父母都弄錯了。我們所講的共同父母責任不是指「五十／五十」，而是零至一百的責任，是指付出多少責任，不是分數。所以不應該用共同這個字，應該是父母責任。我們大家要看一看，父母責任是一個給父母的使命，是一個使命宣言。給將來做父母的人看到這是一個目標、一個使命，協助孩子處理孩子的問題。這些全部都不是二零零五年(法改會)出版的報告書內提出的內容。二零零五年(法改會)的報告書內只提及「父母責任<sup>1</sup>」。現在有些國家加入「共同」、「平分」、「均等平分」等字後便出現了很多問題，特別是澳洲。澳洲最近在均等平分責任上出現了很多問題，引申出很多訴訟。因為他

們列出了十五個因素，若是一些比較多爭議的父母，他們會利用這十五個因素在法庭上爭拗。因此我們要緊記二零零五年(法改會)的報告書內只提及「父母責任」。報告書中，內容最初介紹共同父母責任是專注在孩子這個概念，提及的是共同父母責任而不是建議。但其他司法程序已經非常關注到受了「共同」兩個字的影響，例如英國。最主要是講彼此將來的關係，父母離婚後與子女的關係。

大家可能已經知道，基本上有四個國家已經修例，由管養權轉為父母責任。而個別國家分別有不少經驗能夠給我們借鏡。最主要是現時我們所提倡二零零五年(法改會)的報告書是整個概念式的改變。原本由管養權，即父母之間的權利，改為父母的責任，強調孩子的權利。大家要知道每一個法例都有其法律理據、法律上的基礎。我們整體上所有法例都要有基礎，不是隨你喜歡修改便修改。管養權本身都有基礎，剛才朱法官已為

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<sup>1</sup> 香港法律改革委員會《子女管養權及探視權報告書》第9章《改革建議——父母的責任與權利》第9.50至9.55段的討論

擁有撫養權一方的諸多攔阻，令到她們在接觸孩子上遇到困難甚或未能聯繫子女。

婦女亦會失去原有婚姻居所，如孩子已經長大，法庭更不會就撫養權判令。若原有婚姻居所是公共房屋，戶主是丈夫，丈夫能夠繼續居住，婦女因為沒有法庭的判令只能遷出，失去居所。如子女不想與媽媽分離，便要一同遷出。縱然原有婚姻居所是私人樓宇或居屋，在離婚時都會變賣，婦女最後亦只能租住其他樓宇或劏房。但很多時因為前配偶負債，導致債權人「釘契」。我們曾遇過兩宗這類型個案，「釘契」的原因並不是加按，而是單方的私人借貸，因為加按時銀行必須得到業權擁有人雙方簽署。當需要變賣物業或被迫變賣物業時便無從選擇，影響婦女的利益。在整個過程上，女方作為業權的持有人竟是毫不知情。亦有些婦女在等候公屋時曾居住劏房。她們就算遇到很嚴重的性暴力問題都不想離婚，因為不想再租住在劏房那些居住環境太差而且品流複雜的地方，覺得很驚恐。而財產分配上，雖然現時法律原則是男女雙方各一半，但很多時女方根本不知道男方有多少資產或資產的所在處，故此，當大家填寫向法庭呈交的經濟陳述書時，如男方刻意隱瞞，女方亦無辦法，這無疑影響婦女的權益。

另一個比較上亦相當嚴重的問題，是拖欠贍養費。雖然現時已有很多由法庭判出的命令，可是實際效用卻不顯著。當男方面臨被控告的時候，作出很多解釋或者付一小部分甚或暫交一期贍養費。每次女方都給予機會，但接著又拖欠。曾經有個案，男方長期拖欠贍養費，女方因為等不及而自己先以信用卡簽賬應付開支，以致簽賬超出限額，債台高築。在我們的服務對象中，她們的前配偶部分無穩定職業，即使法庭發出扣押入息令，對那些無穩定職業或僱主的前配偶沒有作用，因為不能執行。亦有婦女在追討贍養費的過程中感到心力透支，她們如有能力，最後都會放棄贍養費，寧願多找一份工作。

總括來說，離婚婦女面對的困境包括在取得法律保障下的權益遇到多方面的障礙，如贍養費和財產分配問題；經濟及房屋問題；探視子女時遇上困難；需要獨力撫養子女的困難和壓力以及引起的情緒困擾等。



劃的創立人在開始服務時，已經預期離婚後的婦女往往會因離婚以致處於貧困的境況。可悲地說，二十年後的今天，我觀察到這個情況未有改變，仍然一樣。居住在公共房屋的家庭，如果婦女是照顧者，她可以繼續保持居所；但如果不是居住在公共房屋的家庭，婦女可能處於更加弱勢的狀況。首先面對的是財產分配是否公平，其次是贍養費的安排和收取的問題。有時法庭已經判令男方要給予多少贍養費，但我們發現很多拖欠的情況。興訟與否，婦女都遇到很大的困難，心力交瘁，再加上面對婚姻衝擊時的精神壓力和情緒問題。

過去十年我們跟進了二千三百四十六宗個案。當中有三分一服務使用者的情況是配偶有婚外情。我們發現婦女很多時都不想離婚，盡量想辦法努力去維繫家庭，但當發生婚外情時，已經無奈地不可以再維持或者男方要求離婚。(在全部個案中)有百分之十五至二十牽涉到家庭暴力相關的強制令，亦有超過一半是贍養費問題，亦有百分之七十至八十是遇到房屋問題，如物業或財產分配。雖然，女方晚上回家後要負擔全部照顧工作，但在訴訟上、在爭取上都有困難，所以女方不一定能取得撫養權。

我們發現很貧困的婦女，在離婚訴訟上反而有優勢，因為法律援助處會給予頗大的支援。但假若有資產，如在國內擁有物業或人壽保險，未能通過法律援助署的資產審查<sup>1</sup>，便得不到法律援助。即使她們有幾十萬資產，仍要面對自己單親的人生，還要撫養小朋友，她們都不捨得花錢，唯有自己上法庭訴訟或自辯。

至於人身安全問題，如果牽涉嚴重的家庭暴力，警方會介入和處理訴訟，因為屬於刑事案件。但當遇著不算十分嚴重的情況時，婦女可以運用《家庭及同居關係暴力條例》去申請強制令。然而，我們接觸的大部分婦女，都急於離開危險的處境、離開配偶，她們會選擇入住庇護中心，繼而申請離婚，最好能夠躲藏以後不再見。她們更希望能在有監督的情況下進行探視，但事實上未必有那麼多資源，以致日後探視都可能有危險。而且，很少婦女申請禁制令。其實，法庭發出相關連的禁制令時，有權判強制輔導，可是這方面的使用率非常低。部分婦女並不是受到前配偶的暴力威脅，而是前配偶牽涉欠債問題，債權人不斷滋擾她們。另外，由於很多在職婦女，她們要工作，未必得到撫養權，即使得到探視權，又會受到

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<sup>1</sup> 法律援助署網頁，<http://www.lad.gov.hk/chi/las/fe.html>

# 現有制度下離婚婦女的困境

梁綺華女士

香港婦女中心協會賽馬會麗閣中心主任

香港婦女中心協會的免費律師面見諮詢服務的重點是將法律、程序和婦女的處境及人情和感情結連在一起，提供一站式、有承托的支援給面對婚姻困擾的婦女。從一個概括的角度去看，其實婚姻解體，家庭的轉型，帶給都市人，特別是婦女很大衝擊。

面對離婚問題的婦女，主要分為以下幾類：牽涉有家庭暴力的情況，很多時女性會受到男性的暴力迫害，然而，現在的趨勢是雙方都有使用暴力。我們觀察到有部分是男方對女方先使用暴力，因為婚姻關係雙方可能都給予彼此很大壓力。當男性使用暴力的時候，女性會作出反擊或閃避，造成雙方都使用暴力。這導致我們在提供服務或理解問題上複雜化。而雙方使用暴力或單方使用暴力，制度上提供的支援亦很不同。警方的支援甚或一些非政府機構提供的服務和處理手法都有所不同。有一點很值得我們關注，就是雙方一起使用暴力，但那一方的力度較大。我們要考慮到婦女當時的處境，明白在提供服務上有一定難度。

另外，亦有可能出現跟子女分離的狀況，因爭取不到子女的撫養權或者照顧及管束權。大家印象上，普遍覺得女性較多得到撫養權，因為女性較適合管養小朋友，實際上，這亦是較多出現的狀況。由於家庭的性別分工或者照顧的分工，在男和女的參與上，女性佔的比例很多，所以很多時由媽媽照顧的，管養權都會判給媽媽。但事實上我們遇到不一定的情況。因為法庭從一個公平的角度出發，接觸得較多的一方，不是因為性別。我們有時遇到一些在職婦女，她們要靠男方的親戚照顧孩子，甚或一些中港婚姻，男方年紀較大，又或是男方領取綜援，女方全職工作，那男方接觸孩子的時間自然較多。婦女亦需要面對一半一半的情況，她不一定可以取得撫養權，這是相對的。如由家姑照顧，婦女真的未必能取到撫養權。雖然，女方晚上回家後，仍要負擔全部照顧工作，但有時在訴訟上，在爭取上都有困難，所以女方不一定能取得撫養權。

婦女亦要面對另一個問題，失去原有的婚姻居所，引致住屋問題。計

1

Y v P	14.08.09	[2009]HKE C 1322, CACV 140 / 2009	Daughter born in 1998, W works as a part-time lecturer, H taught English	Trial Judge ordered joint custody, with c+ c to W, with defined staying access on alternate weeks to H	CA : sole custody , c + c to W , with defined staying access on alternate weeks to H:  Deep -rooted communication problem
PD v KWW	09.06.10	CACV 188 of 2009	Daughter born in 2000, W a flight attendant, H a sales manager of an engineering company	Trial Judge ordered joint custody, with c + c to W and defined access to H  W appealed against joint custody order, as she viewed H's continued involvement as a source of further conflict	CA upheld the joint custody order
R v Y	22.10.10	CACV 193 of 2010	2 children, daughter about 8, and autistic son about 6  W and H both heavy drinkers and exhibited tendency to vent their emotions in a physical way, and police had been called	Trial Judge ordered sole custody , c + c to H	CA ordered joint custody, with c+ c to W Rogers VP said in his view, the best course as regards the children is that the major decisions should be taken by the parties together

2

	須審訊的案件	單獨管養命令	共同管養命令
<b>2008</b>	81	58	23
百分比		72%	28%
<b>2009</b>	73	45	28
百分比		62%	38%
<b>2010</b>	65	41	24
百分比		63%	37%
<b>2011</b>	40	22	18
百分比		55%	45%
<b>2012 (29.03.12)</b>	10	4	6
百分比		40%	60%

題，如心境的問題，她 / 他們不會考慮或根本想不到還要和對方溝通或者商討。但現在社會變遷，溝通亦有很多種形式，以前溝通當然需要打電話，要面對面。現在大家已經可以用電郵或者發短訊，有很多溝通的形式未必需要父母面對面去商討一件事。所以，法庭需要考慮不是離婚時有沒有合作機會，不單止考慮這一方面，而是要觀察長一點，還要觀察爸爸或媽媽對小朋友一直過往照顧的情況。如果一位爸爸或媽媽，因為離婚時才特別地有很多事爭拗，這不代表將來離婚後，大家心境平復後、平靜後，雙方有新生活之後，不可以為該小朋友作出對她 / 他最佳利益的決定。夏正民法官在相同的案件中，亦都提到，在作出決定時，法官可以假設有能力、有愛心和有足夠客觀態度的父母，應該可以在子女教養的事情上共同合作。當然，夏正民法官亦指出在某些情況下，有些父母是極不能理智地為子女重大事項達成協議，勉強她 / 他們去嘗試，可能未必保護到子女的利益。他亦提及有一宗案件。

在此，列出三件上訴庭的案件<sup>1</sup>，因為在家事法庭有很多案件，無辦法全部列出。案件 *Y v P*，事實上這是在夏正民法官 *PD v KWW* 之前的案件。這宗案件家事法庭的法官

本來判共同管養權，最後被上訴庭的羅傑志法官所推翻，判獨有管養命令給媽媽。這宗案件有一個特別的情況，就是爸爸和媽媽分開之後的三、四年間，他們之間無任何暴力，但彼此往來的電郵可以多達七個文件箱，這些電郵全部都關於子女一些生活上的事項。雙方為了子女一直打官司。所以最後認為單獨管養權是比較合理。而 *PD v KWW* 案件，家事法庭法官是判共同管養令，但媽媽一方作出上訴，她覺得爸爸沒辦法和她溝通及合作，最後夏正民法官認為共同管養權合理。而這件案件最後成為上訴法庭的案件。家事法庭法官判單獨(管養令)，但羅傑志法官則說到，在這件案中他認為雙方應該合作，雖然她 / 他們當時不能夠合作，但她 / 他們應該合作，縱使有一些暴力和很多其他因素，他最後改為共同管養令。

以下有一些數據<sup>2</sup>，可以看到，每年有二萬件離婚案件，真正要打官司以致審訊的案件事實上並不是很多。而其實大部分父母都可以理智地達成一個協議，當中很多亦同意共同管養。由此可見，現在趨向越來越多共同管養的命令。

者其他事情，她／他也有責任諮詢對方。這方面很少人知道，很多人以為自己取得獨有管養權，她／他就可以不問對方，甚至知會對方都沒有，就自己作出決定。從案例和 *PD v KWW* 案件中，夏正民法官亦提及，她／他仍然有責任，需要向對方作出諮詢。夏正民法官亦提及過獨有管養令和共同管養令的分別，可以描述為一條很幼的分界線。擁有獨有管養權的一方，如果她／他想為子女作出各項重大決定而對方不同意，不同意的一方可以向法庭作出申請，防止有獨有管養權的一方作出該決定。所以擁有獨有管養權的一方不是說她／他有自由權，可以漠視對方的意見，去為子女輕易作出一項重大管養決定。現時很多人以為自己可以，先斬後奏，作出決定後才告訴對方，這個不是正確態度。她／他有責任先諮詢對方才作出命令。若先斬後奏，先作出命令，而對方反對，她／他隨時可以向法庭申請阻止作出命令的一方去實行決定。如要推翻已作出的決定，未必是對小朋友的最佳利益。如雙方共同有管養權，雙方需要共同作出決定，但若雙方不能夠達成協議，其中一方仍然可以向法庭作出申請。所以無論是擁有獨有管養權，或共同管養權，如果對方反對，都要向法庭作出申請。假若遇上很麻煩的一方，她／他甚麼都不同意的話，無論有獨有管養權，或是共同管養權，事

實上沒有分別。因為她／他怎樣都可以向法庭申請，最後都要有法庭作出決定。

過去在很多案件中，要等雙方有機會合作，法庭才會作出共同管養令。但在一九八四年，英國案件 *Caffell v Caffell* 已經指出，雖然在很多案件中，如果雙方有合理的期望可以合作，法庭才會作出共同管養命令，但共同管養命令在某種其他情況下應該都適宜。舉例，如反映一位沒有照顧權的一方對子女的責任感和關心態度，或者減低雙方不滿的情緒。所以，從這件案開始，事實上即使在英國未修改法例前，都不是一定要雙方父母有機會合作才作出共同管養命令。當然，夏正民法官亦在 *PD v KWW* 案件中指出，隨著社會觀念的轉變，現在，在香港作出一項共同管養命令，已經並非不尋常。即使父母關係並不良好，但不足為否定共同管養命令的單一理由。即使獲判照顧或者管束權的一方不同意，這亦不足以成為單一的理由。法庭需要考慮可否合理地期望，他們將來會否就一些重大的教養事項上能夠共同作出決定。大家都了解，在離婚的時候，爭拗得火紅火熱，根本無可能和對方溝通。如果一方是因為這種原因而不批准共同管養權的話，事實上可以看到很少案件能夠批出共同管養權，因為在離婚時，大家可能會有許多問

其過往的情況，法庭亦需要考慮任何關鍵性的資料，包括社會福利署的報告。這條法例本來稱為福利原則。另外一條法例是第十六章《分居令和贍養令條例》，這條例是以兒童最佳利益為首要考慮因素。這是依照聯合國《兒童權利公約》第三條，根據該條法例中提及兒童的最佳利益。在二零零五年法律改革委員會，有關管養權和探視令的報告中，已經作出建議，將福利原則改為最佳利益這個按照聯合國《兒童權利公約》的原則。我們終於在七年後看到這條法例會改。於一月引進新法例《未成年人監護條例》。據了解，這條例應該於四月十三日正式生效。但因為未刊憲，故此未知道是否已經生效，可是，相信在不久亦會生效。而最低限度在這個原則方面會一致，因為過往多年來，一直有兩條條例提及兩項不同的原則。一般人可能覺得都是關乎小朋友，甚麼是對小朋友最好，但對學者而言，這兩個原則有很大分別。在法律改革委員會二零零五年的報告中，亦有提及法庭在考慮一位子女的最佳利益的時候，應該考慮一系列的事項和有一個清單，可是，這個建議一直未被立法；雖然，在一些案件中，引用過這個清單。但現時並沒有一條清晰的法律容許我們這樣做，家事法庭亦有部分法官使用，部分不用；上訴法庭更從來沒有提及究竟有權用或有權不用；所以，在這情況下很不

清晰。當然亦有人問，為何要有這一類的清單來幫助法庭去考慮最佳利益，或過往所講的福利？這主要基於透明度。簡單來說，就最佳利益而言，特別是沒有律師代表的當事人會說「我認為這是最佳利益，但法官你突然毫無理由地認為最佳利益是跟媽媽，而我(爸爸)認為的最佳利益是跟我，那法官是以甚麼原則，突然之間去說最佳利益是應該跟媽媽呢？」。若有清單，便可以讓當事人明白法庭正在考慮甚麼事項。這會增加法律上的透明度。因為現時只可以在案件中看到，但回答不到是那一件案件，需要再翻查。可是，立例後最低限度人家知道那一條例會列出這些事項，所以在這方面立例應該有好處。

### 三、單獨或共同管養？

最近因為 *PD v KWW* 這案件，似乎多了很多共同管養令。單獨和共同管養令的判決的命令有甚麼分別？夏正民法官在 *PD v KWW* 一案中提及到，對獨有管養令“sole custody”和共同管養令“joint custody”，有很大誤解。因為主要是單獨獲得管養令的一方，她/他並不是贏得所有為該子女在教養或教育方面的大小決定，即使她/他擁有獨有管養權。例如一些案例，她/他在大事情方面，如醫療和教育方面或

法區域也要得到對方同意，即使擁有獨有管養權。當然，這不包括贍養。因為這個詞有「養」字，「管養」亦有「養」字。中文翻譯「養」字引起很多問題。因為很多沒有律師代表的人來到法庭，他們提到法官將管養權判了給媽媽，當然由媽媽來養。為何要爸爸來養，不是很清楚「管」是媽媽；「養」亦是媽媽，單獨的，這與爸爸無關，因爸爸已經同意。而有些媽媽亦同意，媽媽一方表示法庭判給我管養，我自己養，所以構成很多類似問題。當然，亦有一個不算新而且不為人熟悉的名詞，照顧及管束“care and control”。照顧及管束是指日常的照顧權。因現時法例中實在有很多上述不同的名詞，情況比較混亂。

法例中很少提及照顧及管束權，更沒有任何定義。嘗試在法例上去找，看到在第一百七十九章第九十二條有提及照顧和管束。近年有一宗比較標誌性的案件 *PD v KWW*，有很重要的決定。在這案中夏正民法官已經提及在經驗中獲得的證據顯示，很多不懂法律的人士，甚至乎一些初出茅廬的律師對管養“custody”和照顧及管束“care and control”這兩項概念有很大誤解。夏正民法官就這兩個概念嘗試作出解釋。大家有興趣，可以去參閱他的判詞。簡單來說，獲得管養權的一

方，即管養令的一方，有權為子女作出一些大的決定。何謂大的決定？主要是教育，例如入讀那一間學校；信仰，例如信不信天主教或不信教、要不要領洗；又例如患病需要進行手術，做那一類手術，這一類都屬於大決定。擁有管養權的一方可以為這些大的決定或大的事項作出決定。而獲得照顧及管束令的一方，通常是指子女的日常照顧，以及有權為子女作出一些日常決定。以下例子將解釋何謂日常決定。簡單如今晚回家看電視，想看那一個電視節目。若媽媽是照顧者，便由媽媽去決定。又或是孩子想參加遊戲班或游泳班，這類一般、日常照顧上的不同事項。這一類決定就屬於擁有照顧及管束權的爸爸或媽媽來作出。

## 二、考慮管養或探視命令的法律原則

法庭作出一個子女管養令和探視令，需要考慮甚麼原則？也許昨天法律可能已經修改，但現時還未查到，因為基於兩條條例。第一條是第十三章《未成年人監護條例》，這條例最為人熟悉，對一位未成年人的管養或教養，意思上好像將管養和教養分成為兩件事，管養及教養以未成年人的福利作為首要考慮事項。簡單來說，稱之為福利原則。現時，亦需要根據未成年人的意願，當然，要考慮該位未成年人的年齡及理解能力或

馬和狗一樣全部屬於爸爸。直至一八三九年，有一個嬰幼兒管養法案“Custody of Infants Act”才令英國法庭首次有權可以將七歲以下的子女的管養權判予媽媽。一直以來管養權“custody”在英國由案例中一直發展。最終，英國在一九八九年的兒童法案“Children Act”引進父母共同責任“parental responsibility”這個概念來代替管養權“custody”。

中文翻譯“custody”為管養是否適當，很多學者已經或會進行研究。但很明顯地管養“custody”在我們以中文為母語或中國人的社會有不同的翻譯，這亦是比較混亂的地方。很多人將“custody”翻譯為撫養權，如研討會的題目「撫養權」。國內亦稱撫養權，但當然不是“custody”的翻譯，因國內有中文法律，這與監護權很混淆。在台灣，用監護權。因此，有人譯作管養權，亦有譯作撫養權，又有譯作監護權。對我來說，在法律方面比較混淆。現時，香港有很多人(上法庭)沒有律師代表，來到法庭才提問「管養權是甚麼？有甚麼分別？」需要法官作解釋，他們根本不明白。就像探視“access”，為何翻譯為探視，很值得研究。單純地看，“access”完全沒有探視的意思，這只是代表一個接近的機會或享用權。舉例如擁有圖

書證，便可以去使用圖書館，這是使用權。“access”翻譯為探視，可能因過去不知如何翻譯。外國人都不明白。若是美國人，他們稱為探視權“visitation right”。“visitation”簡單解作探視，而“access”代表甚麼？今天的社會對探視權“visitation right”或已經感到過時。因為現時的接觸可以很多元化，如電腦、電話、電郵、雲端。所以探視的命令已經很多元化；而且，這亦是一個比較古舊的名詞。有很多沒有律師代表的人來到提問，探視是否只可以望一眼小朋友，因「望」即「視」，「視」等同「看」，代表我看到了。究竟社會上，還是否需要再考慮這些名詞。這有待研究。在香港法例中，除了上述情況，因為中文翻譯所引起的問題亦比較混亂。因為第一百九十二章，法例指管養及教育。這是否表示管養不包括教育？因為兩者分開。管養對一般人來說應該包括教育，但是(條例)分開兩個名詞。而第十三章的第三條，亦分開教養“upbringing”。第一條提及教育“education”，而第二條即第十三章中包括教養“upbringing”。若進行研究，「管養」可以不包括「教育」。即有權「管養」不代表有權為孩子作出「教育」上的決定。這看似不包括教養，因為分開管養和教養。即使有管養令，亦不包括可以將子女帶離開香港。舉例如去澳門旅行，要帶孩子離開香港司



# 現時管養權和探視權的法律原則

朱佩瑩法官

家事法庭主任法官

## 一、管養、照顧及管束及探視的定義

現時香港法律容許法庭在下列幾類情況下作出管養令。分別是根據三條法例，第一條是一百九十二章《婚姻法律程序與財產條例》；第二條是第十三章《未成年人的監護條例》；第三條是第十六章《分居令及贍養令條例》。第一條條例是離婚或婚姻無效或裁判分居的法律程序，這條例第十九條賦予法庭有權可以為家庭中一位未滿十八歲的子女作出管養及教育的命令。而第十三章的第十條，列出父母其中一方或社會福利署可以向法庭申請，要求法庭作出一項管養權的命令。最後，是分居令和贍養令，法庭亦可以根據該條例申請一個管養令。而這三條條例的分別在於第一條條例，適用於一段一夫一妻制的婚姻關係的家庭的子女。而第二條條例，適用於所有子女，而大部分的申請都涉及一位非婚生子女。因為第一條條例一定要建基於一段一夫一妻的婚姻關係中，法庭才可以作出一個命令；所以，第二條條例，適用於所有子女，故包括非婚生子女。而第三條條例，是一條比較古舊的法

例，適用於一段非一夫一妻的婚姻關係中。舉例如一些舊式婚姻，或是在外國一些非一夫一妻的婚姻中的子女，亦可以根據這條例作申請。亦因為未成年人監護條例，適用於所有子女，故此，這與另外兩條條例部分重疊。

事實上在所有法例中，沒有就管養作定義或解釋。何謂管養？管養，是香港法例中，“custody”的中文正式翻譯。我們的法律源自英國和普通法。管養“custody”這個概念，是源自英國二百多年前的法例。當時，若有一對夫婦分開，他們的子女會被視為屬於父親一方的財產，由父親單方擁有及保管。這是一個很古舊的概念。由於香港是英國的殖民地，法律源自英國，所以“custody”的意思，只是保管或監管，並沒有「養」的意思，亦沒有提及「教養」。舉例，如果一個犯人被警方拘捕，他是“in police custody”在警察的監管下，同樣用管養“custody”，但這完全跟管養無關。這是一個非常古舊的思想和概念。當時，視小朋友如財物，因他們有馬、有狗，小朋友就像

法律無關的問題都得不到答案。當婦女了解她們的法律權益後，往往希望與社工傾訴，因她們對公共服務和社區資源有一定認識，而且亦可在婦女中心提供持續的跟進和輔導服務。當時，中心主任王秀容女士與社工同事們成功建立一個體諒和專業的服務環境。其實，婦女有時最需要的可能只是一個關心的回應，一些精神上的支持，好讓她們整理心情踏上回家之路。

免費律師面見諮詢服務彌補了社會上婦女服務的不足。其實那時提供家庭暴力庇護的和諧之家已經成立，亦有為婦女提供電話法律諮詢的服務。當時正臨近政權回歸前夕，社會瀰漫一片期待政治開放的訴求，婦女運動亦相當活躍，反歧視條例亦是在那年代立法的。然而，婦女中心的免費律師面見諮詢服務有明顯不同的取向。從我們服務的個案的判例中可以見到關注婦女以致於她們的家庭的需要，持續的家庭暴力，以及離婚後貧窮女性化的問題，是何等重要。而婦女中心的免費律師面見諮詢服務，也正好為律師、義工和法律學生提供一個回饋香港社會的機會。

執筆之際身處英倫，在這緊縮開支的年代，眼見義務法律諮詢中心相繼停辦，法律援助亦被削減，令人鼓舞的是廿年過去，婦女中心的免費律師面見諮詢服務仍然屹立，真的值得慶賀。我很榮幸能夠為免費律師面見諮詢服務出一分力，並感謝有此機會與各位志同道合的婦女同工！

## 展望將來

展望未來二十年，我們還有很多工作需要去完成，為社會上弱勢的一群持續提供服務。今天的研討會匯聚了不少有承擔的朋友，共同為相關的議題集思廣益。特別是前線同工和在宏觀層面積極推動政策，以改善婦女的處境和家庭生活的每一位，你們的蒞臨，肯定了我們過往廿年的工作成果。這亦是一個非常寶貴的機會，讓我們與法律界的合作夥伴和朋友重新結連。最後，感謝各位光臨，相信今天早上的交流將非常豐富。

執行委員會主席

黃玉雲

二零一二年

## 沈妙思女士——寄自英國西敏 大學法學院

在一個安全免受威嚇的氣氛下，為婦女提供免費家事法律諮詢服務，是我們成立免費律師面見諮詢服務的願景。這是麥女士的建議。那時我們在香港城市大學法學系共事，她覺察到香港社會有這需要，而婦女中心恰巧是最合適的合作單位。起初，我們都擔心能否找到足夠的義務家事法律師願意付出他們的時間。香港的生活節奏急促、工作又繁重，實在不能確保律師會否願意舟車勞頓來到長沙灣提供服務。雖然如此，但也得一試，我們廣發邀請，在中環舉辦籌組會，很高興地有很多律師前來，坐滿了房間，當中有男有女。籌組會非常成功，當晚我們訂立了諮詢服務的運作規則，又議定了當值律師名單。

免費律師面見諮詢服務成立後不久，麥女士離港遠赴加拿大。她託付我接過諮詢服務的協調工作，我欣然接受。畢竟，雖然我有多年參與香港婦女協會的經驗，亦曾參與推動多項法律改革運動，但這是一個讓我挽起

袖子，落實參與的好機會。我的角色為連繫義務律師和社工的橋樑：一方面向社工解釋一些較難掌握的法律術語，並在法律層面處理婦女面對問題的限制；但另一方面，我又需要與律師探討婦女中心的特性和資源。

我們設法讓香港城市大學的法律系學生參與免費律師面見諮詢服務。由於不是所有義務律師能說粵語，故此，我們招募了多名城大法學專業證書的學生作傳譯。後來，城大的法律學士學生也加入成為義工，他們有些是專修家事法的，有部分在見習期間仍繼續為我們提供服務。這亦提起了他們研究傳統婦女問題的興趣：如家庭暴力、強姦等，部份更進而熱心參與有關的倡議運動。

本會免費律師面見諮詢服務的獨特之處，在於案主不但得到優質的法律意見，亦可在面見律師後與社工作討論。尋求我們援助的婦女通常正瀕婚姻危機，甚至處於離婚的困境，她們需要了解財產分配及子女撫育權等問題，過程可能令人精疲力竭，而且往往有很多實際以及與

# 主席感言

## 回顧過去

二零一二年本會的免費律師面見諮詢服務傲然踏入二十週年。一如許多好的念頭，先由幾位有心人開始，隨著時日透過一班志同道合支持者的推動，使之得以紮根成長。這些忠心的支持者中不乏多年來義務提供法律諮詢服務的律師。在此，我特別感謝兩位曾在香港城市大學任教法務學系的法律教育者：麥法蓮女士 (Julie Macfarlane) 及沈妙思女士 (Harriet Samuels)。麥女士是發起計劃的創始人，隨著她離港，由沈女士承傳接續，繼續鼓勵同業和後進，為本會位於長沙灣的婦女中心提供義務的免費法律諮詢服務。二十年來義務律師、朋輩輔導員以及本會同工並肩作戰，鍥而不捨的精神值得慶賀。

麥女士察覺到香港法律界需要在社會建立公益服務文化，而沈女士又將推動性別平等視為己任，兩人的熱誠終於擦出火花。讓我們透過以下的分享回顧免費律師面見諮詢服務的開始，並九十年代香港的政治實況。

## 麥法蓮女士——寄自加拿大溫莎大學法學院

在一九九二年春天，我們正準備開辦全港首項專為婦女提供義務法律諮詢的服務。雖然許多人對本地婦女會否使用這項服務存疑，我仍印製了一些中文宣傳海報，並花了整個下午在長沙灣各屋邨到處張貼！那時我正腹大便便，準備迎接第二個孩子的來臨，想起來，在街坊眼中那樣子真有點奇怪。

服務開始那一晚，我在婦女中心如坐針氈。和我一起等著的還有黃嘉純律師（後來榮任香港律師會會長）和另一位外籍義務律師，還有幾位我在香港城市大學的法學專業證書學生，他們將會提供翻譯服務。有人會來嗎？我們實在不知道。時間到了，婦女陸續進門，我安頓好首兩位婦女面見律師後，回到接待處，發現那裡坐滿了一堂默默地等候的婦女。免費律師面見諮詢服務就此開展！

# 前言

香港婦女中心協會成立於一九八一年，一直致力通過提供多元化婦女為本服務，推動婦女充權，倡議改善婦女處境、關注婦女權益和促進性別平等。

本會自一九九二年開展全港首項專為婦女而設的「免費律師面見諮詢服務」，由註冊律師為有需要的婦女就「家事法」問題提供免費法律諮詢服務，讓缺乏法律知識和資源聘請律師的婦女掌握離婚過程中的法律權益，實踐婦女法律充權；並由經培訓的朋輩輔導員協助求助婦女，以加強她們處理婚姻問題的信心和能力。

為慶祝服務踏入二十週年，本會於二零一二年四月十四日舉辦《從「撫養權」到「共同父母責任模式」——更好的選擇嗎？》研討會，從法律、社會政策、離婚婦女的處境和意見及女性角度探討有關議題。

研討會由行政會議非官守議員及本會名譽副會長胡紅玉女士主持，共分兩個部分。第一部分為探討現時處理撫養權及探視權的原則，講者包括家事法庭主任法官朱佩瑩女士及本會賽馬會麗閣中心主任梁綺華女士；第二部分主要探討「共同父母責任模式」。講者包括何葉律師行合夥人何志權律師、香港社會服務聯會父母責任工作小組成員及梓苗有限公司總監吳國棟女士、本會總幹事廖珮珊女士及香港浸會大學社會工作系副教授洪雪蓮博士。

此特刊的中文版集結了研討會嘉賓的演詞，英文版只刊載各嘉賓演講內容的撮要，惟洪雪蓮博士一文，乃講者據當日演講重新撰寫的短文。除此以外，我們亦藉此特刊發佈「免費律師面見諮詢服務」過去十年(二零零三至二零一三年)累積的統計數字，供關心有關議題的公眾人士參考。

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# 從「撫養權」到「共同父母責任模式」 —— 更好的選擇？

2012

免費律師面見諮詢服務  
二十週年特刊



香港婦女中心協會  
Hong Kong Federation of Women's Centres