

LAW REFORM COMMISSION OF HONG KONG

REPORT

Guardianship of children



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CONTENTS

	Page
Preface	1
1. Guardianship of children in Hong Kong	4
Introduction	4
<i>The meaning of "guardianship"</i>	4
<i>Historical context</i>	5
<i>The concept of guardianship today</i>	5
<i>Guardianship in practice</i>	6
The guardianship provisions of the Guardianship of Minors Ordinance (Cap 13)	7
<i>Scope of the ordinance</i>	7
<i>Matters for the court to consider</i>	7
<i>The application of the welfare principle</i>	8
<i>Parental rights and authority</i>	10
<i>Appointment of guardians</i>	11
<i>Removal of surviving parent as guardian</i>	12
<i>Surviving parent's objections</i>	13
<i>Unmarried father</i>	13
<i>Grandparents caring for child born outside marriage</i>	14
<i>Disputes between joint guardians</i>	15
<i>Guardian of the estate</i>	16
<i>Powers of the Director of Social Welfare</i>	16

	Page
Other provisions relating to guardianship	17
<i>Proceedings concerning a minor</i>	17
<i>Guardianship and wardship</i>	18
<i>Duties of the Official Solicitor</i>	18
<i>Consent to marry</i>	19
2. Problems with the law	20
Introduction	20
Appointment of guardians	20
Disclaimer	21
Veto of the surviving parent	21
Court appointment of guardian	21
Appointment of guardian by guardian	22
Guardian of the estate	22
3. The law of guardianship in other jurisdictions	23
Introduction	23
England and Wales	23
<i>Parental appointment of guardians</i>	24
<i>When the appointment takes effect</i>	24
<i>Method of appointment</i>	26
<i>Revocation of appointment</i>	26
<i>Disclaiming the appointment</i>	27
<i>Court appointment of guardians</i>	27
<i>Removal of guardians</i>	27
<i>Termination of guardianship</i>	28
<i>Guardian of the estate of a child</i>	28
Scotland	29
<i>Appointment of guardians by parent</i>	29
<i>Appointment by existing guardian</i>	30
<i>Views of child on appointment of guardian</i>	30
<i>Revocation of appointment</i>	30
<i>When appointment should take effect</i>	31
<i>Surviving parent</i>	31
<i>Responsibilities and rights of guardians</i>	32
<i>Termination of guardianship</i>	33

	Page
4. Recommendations for reform	34
Introduction	34
Appointment of guardians	34
Disclaimer	36
Veto of surviving parent	38
Views of the child on appointment of guardian	39
When appointment of guardian takes effect	40
Court appointment	42
Appointment by guardian	43
Removal or replacement of guardian	44
Guardian of the estate	44
5. Summary of recommendations	46
Annex 1 - List of the respondents to the Consultation Paper on Guardianship and Custody	49
Annex 2 - Relevant Overseas Provisions	51

Preface

1. Recommendations made by the Law Reform Commission of Hong Kong have brought about key changes to our laws affecting the family. The Commission's 1991 report on illegitimacy,¹ which proposed reforms to regularise the status of children, was implemented in 1993 in the Parent and Child Ordinance (Cap 429).² Two years later, the Commission's proposals for a new divorce regime³ resulted in major changes to the Matrimonial Causes Ordinance (Cap 179).⁴ One area which has remained largely untouched however, despite major developments overseas, is Hong Kong's law on the guardianship and custody of children, which dates back to the late 1970s.

2. "Guardianship" refers to the legal status under which a person exercises parental rights and authority towards a child. When a parent dies, another person, known as a testamentary guardian, may be appointed by will to be a guardian for the child in place of the parent. A guardian may also be appointed by the court. The term "custody" usually refers to the physical custody and day to day care and control of a child after a divorce. In practice, this is usually granted to only one of the divorcing parents, while the other is granted "access" to see the child on a regular basis.

3. Traditionally, the non-custodial parent is perceived to have much less involvement with the child and much less "say" over the child's future than the custodial parent. The issue of "who gets custody of the children" is therefore one of the most fraught aspects of family proceedings. An added complication is that only parents or the Director of Social Welfare can currently apply for custody or access of a child. This means that grandparents or other relatives who may actually take care of the child are excluded from applying for custody or access and must resort to other less direct legal proceedings instead, such as having the child made a ward of the court.

4. In recent years, Hong Kong, like many other jurisdictions, has seen a dramatic rise in its rate of family breakdown and divorce.⁵ The serious impact that the legal process itself is recognised to have on families facing these situations, particularly where arrangements for the children must be

1 HKLRC, *Illegitimacy*, Topic 28, December 1991.

2 Ordinance No 17 of 1993.

3 HKLRC, *Grounds for Divorce and Time Restrictions on Petitions for Divorce Within Three Years of Marriage*, Topic 29, November 1992.

4 ie, the Matrimonial Causes (Amendment) Ordinance (Ord No 29 of 1995).

5 In 1972, 354 divorce decrees absolute were granted in Hong Kong. By 1980, the figure had risen to 2,087. In 1990, 5,551 decrees absolute were granted, and in 2000, the figure had soared to 13,058. (Figures supplied by the Judiciary of the HKSAR.)

made, has led jurisdictions like the United Kingdom and Australia to comprehensively recast their laws in this area.⁶ Other jurisdictions also are now considering what reforms may be necessary.⁷

5. The topic of guardianship and custody of children was referred to the Law Reform Commission by the Attorney General and the Chief Justice in April 1995 in the following broad terms:

“to consider the law relating to guardianship and custody of children, and to recommend such changes as may be thought appropriate.”

6. In May 1996, the Commission appointed a sub-committee chaired by the Hon Mrs Miriam Lau to consider the terms of reference and to make proposals to the Law Reform Commission for reform. The members of the sub-committee are:

Hon Ms Miriam Lau, JP Chairperson	Sole Practitioner Miriam Lau & Co
H H Judge de Souza Deputy Chairman	Judge District Court
Miss Rosa Choi	Assistant Principal Legal Aid Counsel Legal Aid Department
Ms Bebe Chu	Partner Stevenson, Wong & Co, Solicitors
Ms Robyn Hooworth (up to 28 August 2001)	Mediator
Mr Anthony Hung	Partner Lau, Kwong & Hung, Solicitors
Ms Jacqueline Leong, SC	Barrister
Dr Athena Liu	Associate Professor Faculty of Law University of Hong Kong
Mr Thomas Mulvey, JP	Director Hong Kong Family Welfare Society

6 In England, the Children Act 1989; in Scotland, the Children (Scotland) Act 1995; and in Australia, the Family Law Reform Act 1995. (Though see also recent follow-up study on the Australian reforms by University of Sydney and Family Court of Australia, *The Family Law Reform Act 1995: The First Three Years* (Jan 2001).)

7 le, (New Zealand) NZ Ministry of Justice consultation paper, *Responsibilities for Children – Especially When Parents Part: The Laws About Guardianship, Custody and Access*, 15 August 2000; (Canada) Canadian Parliamentary Special Joint Committee on Child Custody and Access, *For the Sake of the Children* (Dec, 1998), *The Government of Canada's Response to the Report* (May 1999), Dept of Justice Canada, *Federal Provincial Territorial Consultations on Custody, Access and Child Support in Canada* (March 2001).

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Counsellor

7. The first secretary to the sub-committee was Ms Paula Scully, who was appointed Chairperson of the Guardianship Board of Hong Kong in February 1999. Ms Scully was succeeded as sub-committee secretary by Ms Michelle Ainsworth, who was appointed Deputy Secretary of the Commission in April 2000.

8. In the course of its detailed examination of the law of guardianship and custody, the sub-committee identified a number of key topics for review. These included the guardianship of children on the death of a parent, the approach of the law and the courts to custody and access arrangements for children, the use of dispute resolution procedures in family cases and parental child abduction.

9. The sub-committee published an extensive consultation paper on *Guardianship and Custody* in December 1998 addressing these topics and setting out a wide range of proposals for reform. Fifty-one submissions were received during the three-month consultation exercise. Those who responded included members of the legal profession, social workers, welfare organisations, youth groups, women's groups, counsellors, mediators, educational institutions, ~~government departments~~ and private individuals. The list of respondents is at Annex 1. We are grateful to all those who commented on the consultation paper.

10. This report covers the guardianship aspect of the reference and considers the legal arrangements made for children in the event of the death of one or both parents. Chapter 1 looks at the existing law on guardianship in the Hong Kong SAR. Chapter 2 highlights a number of the problems in this area. Chapter 3 considers how the law deals with the guardianship of children in other jurisdictions. Our final conclusions and recommendations for reform are set out in Chapter 4, and these are summarised in Chapter 5.

Chapter 1

Guardianship of children in Hong Kong

Introduction

The meaning of “guardianship”

“Children’s well-being depends on their care-givers who normally are their parents”.¹

1.1 Children are born dependent, and so provision must be made for their daily care and upbringing as they move from infancy through childhood to adulthood.² In the rare³ but unhappy⁴ event that one or both of the child’s parents dies, the appointment of a “guardian” is the usual mechanism by which this is achieved; either under the will of the deceased parent (ie, a “testamentary guardian”) or by the appointment of the court. In this sense, “guardianship” refers to the legal status under which a person exercises parental rights and authority for a child following the death of one or both of the child’s parents.⁵ As Liu states:

1 Dr Athena Liu, *Family Law for the Hong Kong SAR* (1999, HKU Press) at 211.

2 Alberta Law Reform Institute, *Child Guardianship, Custody and Access* (1998, Rep No 18.4) at 1.

3 Hoggett, *Parents and Children: The Law of Parental Responsibility* (4th ed, 1993, Sweet & Maxwell) at 95, notes that in the UK in 1989, of all families with dependent children, just 1% were headed by widows, compared with 9% headed by separated or divorced mothers and 5% headed by single mothers. (Comparing these types of family situation, however, Hoggett goes on to comment, at 95, that: “There are almost always material disadvantages associated with growing up in a one-parent family, but the financial and housing situation of the bereaved is markedly better than that of the others ... Nor do children who have lost a parent show a significantly increased rate of delinquency ..., or educational problems ... although some may be at greater risk of depressive illness in adult life.”)

4 Hoggett, above, at 95. Hoggett goes on to express the view, however, that, when compared to children whose parents are undergoing the divorce process, children in this situation suffer fewer long-term unfavourable consequences. She writes: “Bereavement is a quite different experience from other types of separation or loss. ... It is rarely accompanied by prolonged hostilities and bitterness between the parents, or by legal disputes about the children’s future. The family’s resources may be much reduced, but they do not have to be shared between two households. Their lot attracts only sympathy and compassion from society and none of the condemnation which is still sometimes attached to marital breakdown and unmarried parenthood.”

5 *Clarke Hall & Morrison on Children* (2000, Butterworths) at p 1/217, para 461.

*"The general understanding is that such a person acts as a parent substitute ... and arguably should have the same rights and authority as a parent."*⁶

1.2 It is the law relating to testamentary guardianship and to guardians appointed by the court which is the focus of this report.⁷

Historical context

1.3 "Natural guardianship" is a very old legal concept that appears to have been the original legal concept of parenthood. Significantly, the concept was based more upon the protection of family landholdings than upon the protection of children.⁸ As noted by the English Law Commission:

*"[Guardianship] developed as a means of safeguarding a family's property and later became an instrument for maintaining the authority of the father over his legitimate minor children. Hence he was recognised as their 'natural' guardian. While he was alive the mother had no claims as natural guardian and was originally in no better position than a stranger. Nineteenth century legislation gave her limited rights to apply to the courts for custody and access and, in 1886, made her automatically guardian after the father's death. The Guardianship of Infants Act 1925 provided that the father should be guardian on the mother's death. It also gave the mother 'like powers' to those of the father to apply to the court in any matter affecting the child but deliberately stopped short of making her a joint guardian during his lifetime."*⁹

The concept of guardianship today

1.4 In modern times, this concept of natural guardianship has evolved to the point where, as we have noted above, the term "guardian" is often used synonymously with "parent." In this sense, "guardianship" implies the bundle of rights, duties and authority of a parent towards a child. These aspects of the parent-child relationship include the right to make decisions

6 Liu, above, at 213.

7 There also exists a form of guardianship which is used for adults suffering from a mental incapacity who cannot make decisions about their personal, medical or financial affairs. Provisions under Part IVB of the Mental Health Ordinance (Cap 136) empower the Guardianship Board to make orders appointing guardians for persons in these circumstances. This type of adult guardianship, however, is not the subject of this report. For further information on the operation of this type of guardianship, see the website of the HKSAR Guardianship Board, at <http://www.adultguardianship.org.hk>.

8 Liu, above, at 212.

9 English Law Commission's report, *Family Law: Review of Child Law, Guardianship & Custody* (1988, Report No 172, HMSO) at para 2.2. See also Liu, above, at 212-213.

and to be consulted on decisions about the upbringing of a child and generally on all aspects of his welfare.

1.5 Liu observes that at common law, the list of parental rights and authority includes:¹⁰

- the right to live with the child and control the child's day-to-day upbringing
- the right to decide on the child's education and religion
- the right to inflict moderate punishment
- the right to administer the child's property
- the right to act for the child in legal proceedings
- the right to consent to medical treatment.¹¹

1.6 The scope of parental rights and authority also includes certain statutory rights such as the right to consent to the child's marriage¹² or to the child's adoption.¹³

Guardianship in practice

1.7 It is difficult to obtain any information on the numbers of children subject to testamentary or court appointed guardianship in Hong Kong. Similar difficulties in gathering relevant facts and statistics in this area have been commented on overseas.¹⁴ The English Law Commission has stated:

"We know very little about the number of legal guardianships at present. We do not even know the numbers of children who are potentially subject to it, having lost one or both parents by death. Given the increased expectation of life generally, the risks of this have been diminishing. ... Lone motherhood is now more likely to result from divorce, marital separation or illegitimacy than from the father's death. The same appears to be true of lone fatherhood... On any view ... the total number of children who lose one parent by death before reaching eighteen will be smaller than the number whose parents divorce or separate. It is clear that the great majority of such children remain with their surviving parents... We suspect that most orphaned children

10 See generally, Liu, above, at 213.

11 *Idem.* (See Liu's detailed discussion of each of these aspects of parental rights and authority at 217-228.)

12 See the Marriage Ordinance (Cap 181) as amended by the Law Reform (Miscellaneous Provisions and Minor Amendments) Ordinance (No 80 of 1997).

13 See the Adoption Ordinance (Cap 290).

14 See the English Law Commission's working paper, *Family Law: Review of Child Law, Guardianship* (1985, Working Paper No 91, HMSO) at paras 1.29-1.32; and the Scottish Law Commission's discussion paper, *Parental Responsibilities and Rights, Guardianship and the Administration of Children's Property* (1990, Discussion Paper No 88, HMSO) at para 3.2.

are cared for by relatives, friends or step-parents without any formal appointment of guardians.”¹⁵

The guardianship provisions of the Guardianship of Minors Ordinance (Cap 13)

Scope of the ordinance

1.8 The Guardianship of Minors Ordinance (Cap 13) (“the Ordinance”) is one of the ordinances which governs court proceedings relating to the custody and upbringing of children,¹⁶ including the provision of maintenance for them. It regulates the custody rights of fathers in relation to illegitimate children¹⁷ and the administration of property owned by or held in trust for children.¹⁸ The Ordinance also deals with the appointment, powers and removal of guardians.¹⁹ For the purposes of the Ordinance, a minor is a child who has not yet attained 18 years of age.²⁰

Matters for the court to consider

1.9 Section 3 of the Ordinance sets out the principles that govern the conduct of court proceedings covered by the Ordinance. Section 3(1) states that:

“In relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of the income of any such property-

(a) in any proceedings before any court ... the court -

(i) shall regard the welfare of the minor as the first and paramount consideration and in having such regard shall give due consideration to -

(A) the wishes of the minor if, having regard to the age and understanding of the minor and

15 English Law Commission (1985), above, at paras 1.29 and 1.31.

16 Other relevant ordinances include the Matrimonial Causes Ordinance (Cap 179), the Matrimonial Proceedings and Property Ordinance (Cap 192) and the Separation and Maintenance Orders Ordinance (Cap 16).

17 See Part V, GMO.

18 See Parts II and IV, GMO.

19 See Part III, GMO.

20 See section 3, Interpretation and General Clauses Ordinance (Cap 1) and section 2, Age of Majority (Related Provisions) Ordinance (Cap 410). Note: in section 2 of the Matrimonial Proceedings and Property Ordinance (Cap 192), the term “child” is used and is defined as including an illegitimate or adopted child of one or both parties to a marriage. This section of the MPPO goes on to define “child of the family” as a child of both the parties to a marriage as well as “any other child who has been treated by both those parties as a child of their family.”

- to the circumstances of the case, it is practicable to do so; and*
- (B) *any material information including any report of the Director of Social Welfare available to the court at the hearing*"

The application of the welfare principle

1.10 The principle of the welfare of the child is referred to in section 3(1)(a)(i) but is not defined. The "welfare of the child" is a fundamental principle of guidance to the courts in making decisions in children's cases and is said to lie "at the heart of all litigation regarding children."²¹

1.11 The effect of the welfare principle is to require the court to take into account what is in the best interests of the child over and above what is best for any adults involved in the litigation. This concept is also sometimes referred to as "the paramountcy principle."²² It is not confined to considerations of money and physical comfort for the child, but includes consideration of his social, intellectual, moral and religious welfare, as well as his ties of affection.²³

Factors in determining the welfare of the child

1.12 The Ordinance does not provide any comprehensive list of the factors or considerations which the court should take into account in determining what constitutes the welfare or best interests of the child. This does not mean that cases are decided in a vacuum, however.²⁴ Cases on point suggest that there are certain key factors which the courts have regard to.²⁵ These key factors include: the wishes and rights of the child (considered in relation to his age and level of understanding); the child's physical, emotional and educational needs; the desirability of maintaining continuity of care for the child and the likely effect on him of any change in circumstances; the child's age, sex, background and particular personal characteristics; any harm that he has suffered or is at risk of suffering; and the capacity of each parent, or relevant third party, to care for the child and to meet his needs.²⁶

21 Philippa Hewitt (ed) and others, *Hong Kong Legal Practice Manuals: Family* (Sweet & Maxwell, 1998), at 162, para 7.17. It is also said to be an evolving concept which encapsulates the widest possible meaning: see Liu, above, at 247-248; and also Hewitt, above, at 210-211.

22 See Liu, above, at 246. Other terms with a similar meaning often used in this context include "the interest of the child" and "the best interests of the child."

23 *Re McGrath (infants)* [1893] 1 Ch 143, at 148, per Lindley LJ, also cited in Liu, above, at 248.

24 Liu, above, at 251.

25 Liu, above, at 249-264. See also Hewitt (ed) and others, above, at 210-214.

26 These factors have been encapsulated in statutory form in section 1(3) of the English Children Act 1989.

First and paramount consideration

1.13 All of the factors above are taken into account by the court in determining what constitutes the welfare or best interests of the child. Section 3(1)(a)(i) also states that the welfare of the child is to be “the first and paramount consideration” of the court in hearing any proceedings under the Ordinance. Lord MacDermott, in *J v C*,²⁷ approached the term as follows:

“[R]eading these words in their ordinary significance ... it seems to me that they must mean more than that the child’s welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child’s welfare ... that is the first consideration because it is of first importance and the paramount consideration because it rules on or determines the course to be followed.”

Judicial discretion

1.14 In relation to the various factors that constitute welfare, Liu has noted that there are “no arithmetical points systems or quantitative formulae” for assessing these factors, and that “*the courts are dealing with the lives of human beings, and these cannot be regulated by any rigid prescriptions.*”²⁸

1.15 As each case turns upon its own unique facts, judicial precedent can play only a minor role in decision-making in this area. The courts therefore have very wide discretion in determining what is in the best interests of the child. As a result, commentators have variously described the welfare of the child as an inherently subjective,²⁹ “notoriously indeterminate,”³⁰ and still evolving,³¹ concept.³²

27 [1970] AC 710, 711.

28 Liu, above, at 251, citing the case *Re F (an infant)* [1969] 2 Ch 238.

29 Mnookin, “Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy,” (1975) 39 Law & Contemporary Problems 226, at 260, cited in Liu, above, at 263.

30 Liu, above, at 263.

31 Liu, above, at 248.

32 We have noted earlier that the welfare principle has general application throughout proceedings relating to children. The principle is not applicable, however, in the following types of proceedings: an injunction under the Domestic Violence Ordinance (Cap 189) or the Adoption Ordinance (Cap 290); some wardship proceedings; proceedings related to sections 12 or 13 of the Parent and Child Ordinance (Cap 429) or section 34(1) of the Protection of Children and Juveniles Ordinance (Cap 213): see Liu, above, at 247.

Parental rights and authority

1.16 Section 3(1)(b) of the Ordinance makes various references to the rights and authority of the parents of the child. The scope of these parental “rights” and areas of authority have been described earlier in this chapter.³³ It has also been noted that the term “guardian” is often used synonymously with “parent” and so implies the bundle of rights, duties and authority of a parent towards a child.³⁴

Parental rights and authority vis-a-vis each parent

1.17 Section 3(1)(b) of the Ordinance states that in relation to the custody or upbringing of a child, and in relation to the other matters dealt with under the ordinance, the rights and authority of the mother and father are equal and exercisable by either without the other, except where the child is born out of wedlock.

1.18 In relation to the independent exercise of the respective parent’s rights and authority,³⁵ Liu explains the implications of this as follows:

“In other words, one parent can, for example, decide which school and Sunday church a child should attend, or which doctor to consult, without consulting the other. This rule is designed to allow each parent, particularly the one who has day-to-day care and upbringing of the child, to exercise responsibility and make decisions without having to consult the other, and the onus is on the objecting parent to raise such an objection in court, but not the other way around.”³⁶

1.19 Where the child is born out of wedlock, the rights of the father are limited unless he applies for a court order under section 3(1)(d) of the Ordinance for some or all of the rights and authority that a father of a legitimate child would have.

Subject to the welfare principle

1.20 As we have noted above, although broad in its scope, the principle of parental rights and authority is still subject to the principle of the welfare of the child. Liu writes:

33 See above, paras 1.5 to 1.6.

34 See above, para 1.4.

35 Section 3(1)(b). It is significant that the concept of joint guardianship between the parents of the child in relation to custody, etc, does not appear to be contemplated within these provisions of the ordinance.

36 Liu, above, at 229. See section 4(2) of the ordinance which outlines how disagreements between parents on issues affecting the child’s welfare are to be dealt with. Either party may apply to the court for directions, and the court may make such order as it thinks proper.

*"[P]arental 'rights' reflects a misconception of the nature of the parent-child relationship. To the extent that the law enables parents to decide how to bring up their children without interference from others, it does so primarily because this is a necessary part of the parents' responsibility for that upbringing and in order thus to promote the welfare of their children."*³⁷

Diminishing nature of parental rights

1.21 Strictly speaking, parental rights and authority apply until a child reaches his majority.³⁸ However, in reality, the significance of parental rights and authority diminishes as the child grows older. Lord Denning has described parental rights as:

*"[A] dwindling right which the court will hesitate to enforce against the wishes of the child, the older he is. It starts with the right of control and ends with little more than advice."*³⁹

Shift towards focus on parental "responsibilities"

1.22 It is apparent from the discussion in this chapter that the traditional focus of the law in this area has been on parental rights rather than on parental responsibilities. In some jurisdictions however, there has been a major shift away from this emphasis on parental rights, to a new emphasis on parental responsibilities and the rights of the child. This is reflected in the English Children Act 1989, the Children (Scotland) Act 1995 and the Australian Family Law Reform Act 1995.

1.23 It should be noted that the implications of these developments for the legal parent-child relationship, and whether similar changes should be introduced in Hong Kong, will be considered in detail in the Commission's forthcoming report on custody and access.

Appointment of guardians

1.24 Part III of the Ordinance deals with the appointment, removal, and power of guardians. Section 5 provides that the surviving parent shall be the child's guardian, either alone or with the guardian appointed by the deceased parent. Where no guardian has been appointed, or the person appointed as guardian refuses to act or has died, then the court may appoint a guardian to act with the surviving parent.⁴⁰

37 Liu, above, at 216.

38 See above, para 1.8.

39 *Hewer v Bryant* [1970] 1 QB 357, at 369, cited in Liu, above, at 217.

40 Section 5(a) and (b), GMO.