

HONG KONG TRUSTEES' ASSOCIATION WEBINAR ON

**Who really owns your family assets? Third party
interests in Family Proceedings**

The session will start at

4:30pm

The information contained herein is for general guidance only and should not be relied upon as, or treated as a substitute for, specific advice. Deacons accepts no responsibility for any loss which may arise from reliance on any of the information contained in these materials. No representation or warranty, express or implied, is given as to the accuracy, validity, timeliness or completeness of any such information. All proprietary rights in relation to the contents herein are hereby fully reserved.

Outline

1

Introduction to Third Party Interests in Family Cases

2

Financial Disclosure Obligations in Divorce Proceedings

3

Legal Rights of Third Parties in Divorce Proceedings

4

Legal Principles in Division of Family Assets in Matrimonial Proceedings

5

Practical Considerations on Ownership of Family Assets

6

Q&A

Introduction to Third Party Interests in Family Cases

Third Party Interests – Common Scenario



Legal Owner
Husband



Beneficial Owner(s)
Husband's Father or
Husband & Wife?



Husband

I am only holding the
property on trust for
my father.



Wife

H's parents
purchased the
property as a wedding
gift for us!

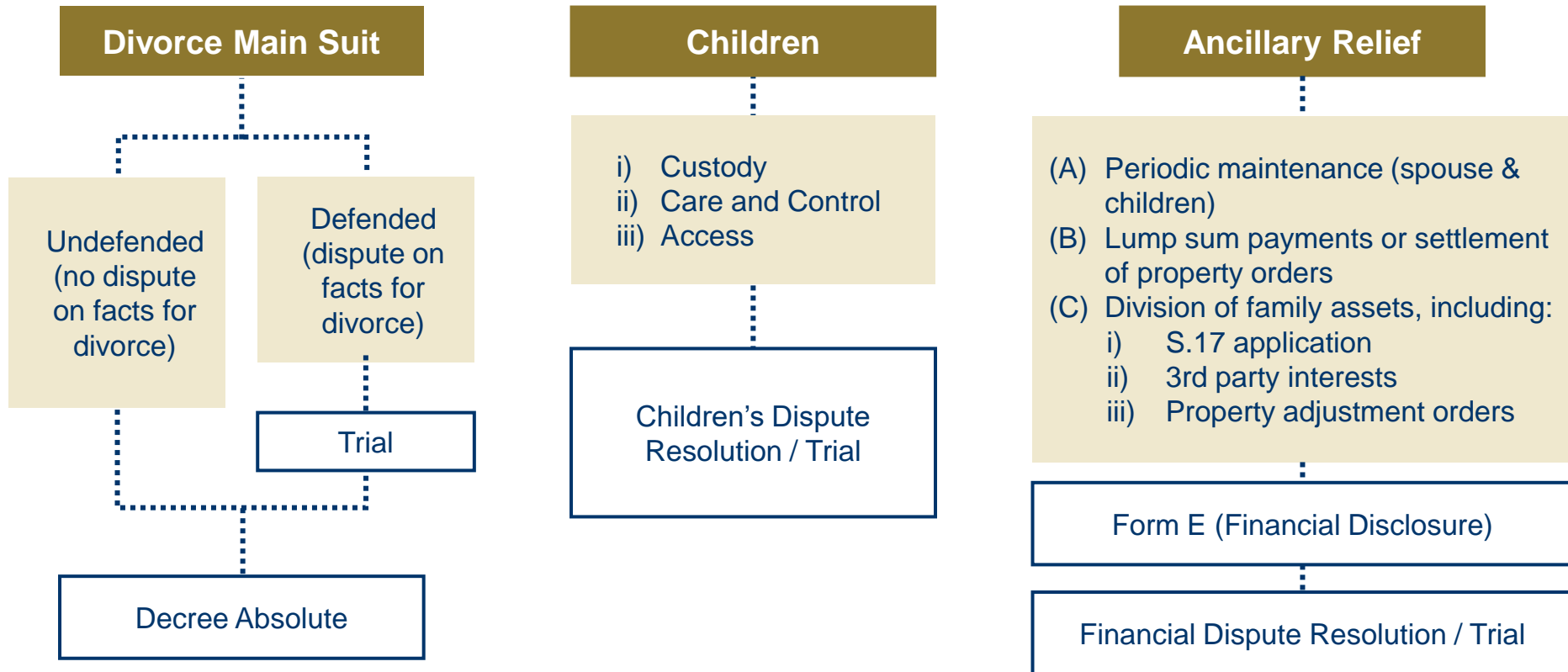


Husband's Father

I purchased this property
for retirement but
registered it in my son's
name for convenience.



Overview of Divorce Proceedings in Hong Kong



Financial Disclosure Obligations in Divorce Proceedings

Financial Disclosure Obligations in Divorce Proceedings (Form E)

Filed by Petitioner or Respondent (delete as appropriate)

FORM E FINANCIAL STATEMENT

In the District Court / High Court*

Case No
Always quote this

Petitioner / 1st Applicant / Respondent / 2nd Applicant*

Petitioner / 1st Applicant

Respondent / 2nd Applicant

Solicitor's ref.

Solicitor's ref.

Full and frank disclosure

Required disclosures:

1. General Information
2. Assets & Liabilities
3. Income
4. Current Monthly Expenses
5. Other Information
6. Orders Sought

Sworn/ affirmed statement

Please fill in this form fully and accurately. Where any box is not applicable write "N/A". You have a duty to the court to give a full, frank and clear disclosure of all your financial and other relevant circumstances.

A failure to give full and accurate disclosure may result in any order the court makes being set aside and an order for costs being made against you.

If you are found to have been deliberately untruthful, criminal proceedings for perjury may be taken against you.

If there is not enough room on the form for any particular piece of information, you may continue on an attached sheet or paper.

Attach documents to the form where they are specifically sought and you may attach other documents where it is necessary to explain or clarify any of the information that you give.

This statement must be sworn or affirmed before a solicitor or a Commissioner for Oaths before it is filed with the Court or sent to the other party.

Important: You are recommended to obtain independent legal advice before completing this form.

Financial Disclosure Obligations (Form E) (cont')

Part 2 – Matrimonial Property and Family Assets

- 2.1 Matrimonial Home
- 2.2 Other Landed Properties
- 2.3 Bank Accounts
- 2.4 Shareholding in Private Companies
- 2.5 Directorships in the last 24 months
- 2.6 Other Businesses
- 2.7 Stocks/ Bonds/ Other Investments
- 2.8 Life Insurance and Endowment Policies
- 2.9 Moneys Owed to You
- 2.10 Valuable Personal Items
(e.g. cars/ boats/ jewellery)
- 2.11 Other assets
(e.g. Share Options, Trust Interests)
- 2.12 Pension/MPF
- 2.13 Liabilities (including credit cards)

Part 3 – Income

- 3.1 Earned Income
- 3.2 Additional Income/ Benefits
- 3.3 Income from Part-Time Employment
- 3.4 Self-Employed/ Partnership Income
- 3.5 Government Allowances
- 3.6 Other income (e.g. rent, dividend, interests)

Financial Disclosure Obligations (Form E) (cont')

Part 4 – Current Monthly Expenses

- 4.1 General Expenses
- 4.2 Personal Expenses
- 4.3 Children Expenses
- 4.4 Anticipated Future Expenses

Part 5 – Other information

- 5.1 Significant Change in Assets During the Last 36 Months
- 5.2 Conduct of Either Party
- 5.3 Details of Living Standard
- 5.4 Details of Children's Living Standard
- 5.5 Other Relevant Circumstances
- 5.6 Brief Details of Income and Assets of New Partner if You Have Remarried (or Intend To) or are Cohabiting with Him/ Her

Types of Family Assets – Form E – Matrimonial Home - 2.1



Legal Owner
Husband



Beneficial Owners
Husband's Father or
Husband & Wife?



Part 2 Assets

2.1 Give details of your interest in the matrimonial home

Address	House ABC
---------	------------------

The property is registered solely * ☒ jointly ☐
In the name of a company in which you have shareholding or beneficial interest ☐

If joint, the names of registered co-owners are:-

My share of ownership or beneficial interest is:

0%

Particulars of purchase

Date of purchase	D/M/Y		
Downpayment	HK\$	Paid by	My Parents
Mortgage/legal charge	HK\$	Name of lender	
Other loans	HK\$	Name of lender	
Other expenses	HK\$	Paid by	
Total	HK\$		

My estimate of its present market value is:-	HK\$
My estimate is / is not based on a valuation report.	
The amount presently outstanding on mortgage or charge is:-	HK\$
The amount presently outstanding on other loans is:-	HK\$
Estimated net value	

Attach a copy of documentary evidence of mortgage / other loans

NET value of your capital interest in the matrimonial home (A)

HK\$ **0**

Types of Family Assets – Form E – Bank Accounts - 2.3



**Legal Owner of
Bank Account**
W + W's Mother

Remove
W's name



**Legal Owner of
Bank Account**
W's Mother



Beneficial Owner
W + W's Mother?



- 2.3 Give details of all bank accounts in Hong Kong or elsewhere, which you hold or in which you have an interest including those closed within the last 12 months. For joint accounts, state your interest and the names of the account holders. Attach copies of your bank statements covering the last 12 months for each account. For fixed or term deposits, attach copies of latest statements.

Name of bank	Type of account (e.g. current)	Account number	Name of other account holder (if applicable)	Balance at the date of this form	Total current value of your interest
?					
TOTAL value of your interest in all accounts (C)					HK\$

Types of Family Assets – Form E – Valuable Personal Items - 2.10




Legal Owner
Husband's Girlfriend



Beneficial Owner
Husband?



2.10 Give details of valuable personal items including but not limited to cars, boats and jewellery.

Item	Purchase value	Estimated current value
		
TOTAL value of your valuable personal items (I)		HK\$



Wife
H's Girlfriend is
driving his sports
car!



Husband
I sold my sports car to
a friend.

Legal Rights of Third Parties in Divorce Proceedings

Legal Rights of Third Parties in Divorce Proceedings

Bona fide purchaser for value with notice



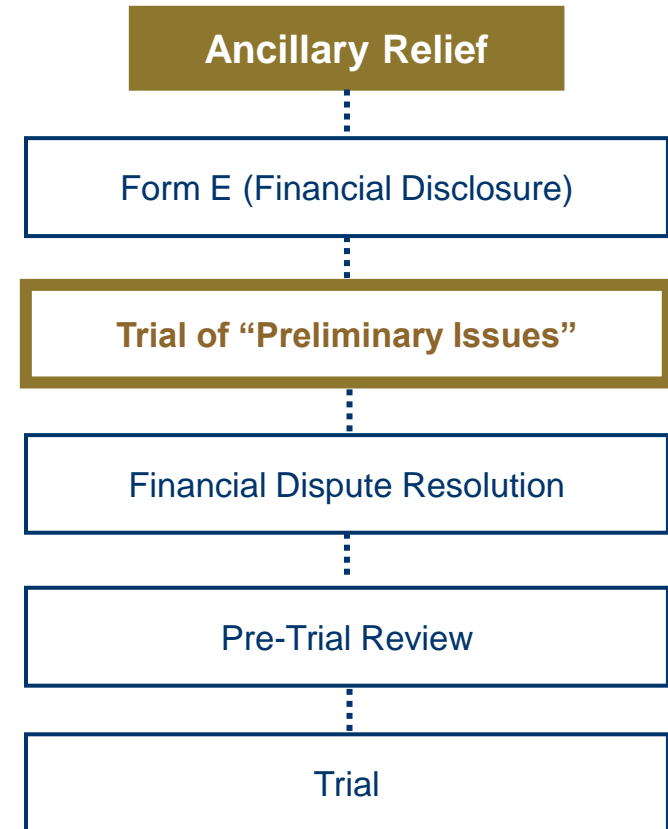
Transfers not made with good consideration



Trial of “Preliminary Issues”

Parties (Husband/ Wife) can apply to the Court to have third-party disputes first adjudicated as a **“preliminary issue”** before proceeding with their underlying claim for financial relief.

The relevant third party may **intervene** or **be joined** as a party to the proceedings.



Landmark English case of *TL v ML (Claims Against Assets of Extended Family)*



Legal Owner
Family Companies



Legal Owners
H's Brother



Beneficial Owner
Husband?



Essential to note the following:

1. The Third Party should be **joined** to the proceedings **at the earliest opportunity**;
2. Directions should be given for the issue to be **fully pleaded** by points of claim and points of defence;
3. **Separate witness statements** should be directed in relation to the dispute; &
4. The dispute should be directed to be heard separately as a **preliminary issue**, before the FDR/Trial

Landmark case: *LLC v LWMA* [2019] HKCA 347



- Sorrento Property + Carpark
- Worth around HK\$20 million
 - Purchased 2 years prior to the marriage



Legal Owners
H+ H's Father



Legal Owner
H's Father



W
Moneys paid by H's Father were his gifts to H, and H owns 100% beneficial interest of Flat and Carpark



H + H's Father
The beneficial interest of the Properties belong to the legal owners

Held:


- H and H's Father were the beneficial owners of the Sorrento Property.
- H's Father was the sole beneficial owner of the Carpark

“... it can be **disastrously expensive**... and **unduly prolong** resolution of the ultimate issue, which is the fair distribution of matrimonial assets”

Landmark case: *LLC v LWMA* [2019] HKCA 347

If the third party is a LEGAL OWNER



 The third party should be JOINED to the divorce proceedings

The Court may make an Order:-

- requiring the owner to transfer the property or
- subject the property to encumbrance

If the spouse is the LEGAL OWNER but claims that the third party has beneficial interests



- The third party should be NOTIFIED of the claim
- If the third party decides to contest the ownership issue, he/she should APPLY TO BE JOINED
- Otherwise, he/she would be bound by the judgment

Not necessary for all third parties to be joined!

Legal Principles in Division of Family Assets in Matrimonial Proceedings

S.7 of Matrimonial Proceedings and Property Ordinance (MPPO)(Cap.192)

Matters to which the Court will consider when making orders of financial provision and settlement of property:-

The income, earning capacity, property and other financial resources of the parties

The financial needs, obligations and responsibilities of the parties

The standard of living enjoyed by the family prior to breakdown

The age of the parties and the duration of the marriage

Any physical or mental disability of either of the parties

Monetary and non-monetary contributions made by the parties.

The value of any benefit (e.g. pension) which a party will lose the chance of acquiring because of the dissolution of marriage

Landmark case: *LKW v DD (2010) 13 HKCFAR*

H and W married in 1996 with no children. H is a businessman. They separated in 2002.

It was a short marriage.



W appealed to the Court of Appeal.

W was awarded $\frac{1}{2}$ of the parties' joint assets based on the “**equal sharing**” principle.



In 2004, the District Court ordered H to give $\frac{1}{3}$ of his assets to W adopting “**reasonable requirements**” approach.



The Court of Final Appeal upheld the CA's decision, and laid down the **4 Principles** and **5 Steps** in exercising discretion under s.7 MPPO.



Landmark case: *LKW v DD* – The 4 Principles

Objective of fairness

Rejection of
discrimination

Yardstick of equal
division – should only be
departed for good,
articulated reasons

Rejection of minute
retrospective
investigations

Landmark case: *LKW v DD* – The 5 Steps

1

Identify
assets in the
**matrimonial
pot**

2

Assess
parties'
financial
needs

3

If financial
resources
larger than
needs, adopt
**equal sharing
principle**

4

Consider
whether there
were good
reasons for
**departing from
equal division**

5

Decide on the
outcome

* Normally the process can be completed after Step 2.

s.17 of MPPO – Avoidance of Dispositions



Legal Owner
Husband



**Sold to H's Girlfriend
6 months before
W filed for divorce**



Legal Owner
H's Girlfriend



Beneficial Owner
Husband?



Wife
H's Girlfriend is driving
his sports car!



Husband
I sold my sports car to a friend.

s.17 of MPPO – Avoidance of Dispositions

***Rebuttable presumption**
where disposition was made less than
3 years before the date of application

Where one party has the intention to defeat his/ her spouse's claim for financial provision*:

INJUNCTION

IS ABOUT TO
make a disposition or transfer
out of the jurisdiction or deal
with any property



Court may make orders to
RESTRAIN or protect the claim



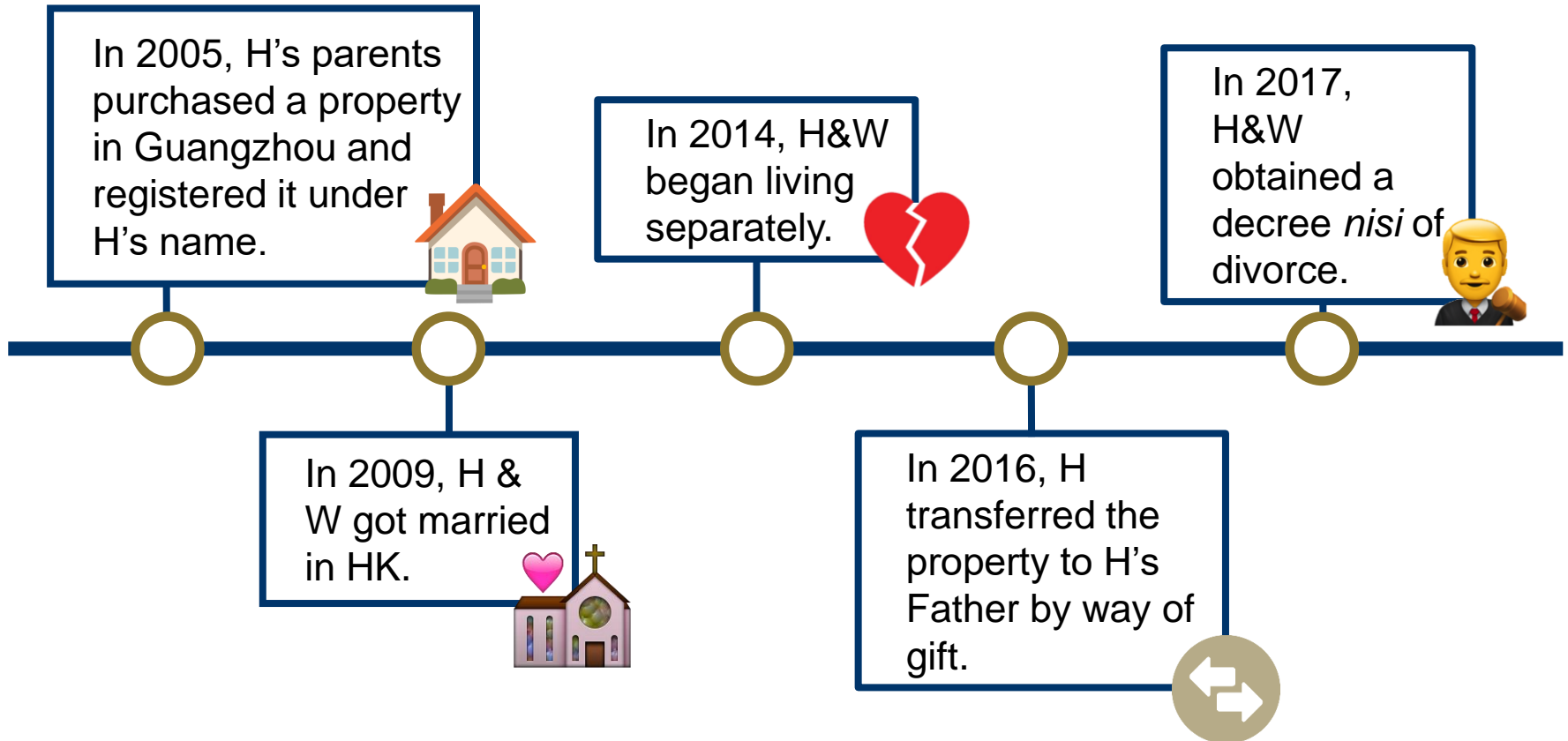
HAS MADE a disposition



Court may make an order
SETTING ASIDE the disposition and
giving consequential directions
(including requiring the making of any
payment or the disposal of any property)

But 3 years is **NOT** a magic number!

Common Intention Constructive Trust – case example



Common Intention Constructive Trust – case example

Wife

- H had beneficial interest in the property due to the presumption of advancement
- Property was a wedding gift for H&W
- Resided in the property before moving to HK

Husband

- Held the property on trust for H's Father
- H's Father had always been the beneficial owner
- Not a wedding gift

H's Father

- Bought the property to set-off a loan owed by a relative and for retirement.
- registered under H's name for convenience
- Not a gift to H or a wedding gift

Transfer to H's Father should be set aside under s.17 MPPO

+

Property should be included in H&W's matrimonial pot

Court held :

- W's application was **dismissed**
- H and H's Father's evidence prevailed and consistent with the parties' historical behaviour
- The presumption of advancement was rebutted by the common intention for H to hold the property on trust for H's Father
- Since the property was not beneficially owned by H, **s.17 MPPO was inapplicable** and the property should **not** be included in H&W's matrimonial pot

Practical Considerations on Ownership of Family Assets

Trends in Home Ownership in Hong Kong Families



Hong Kong parents are inclined to financially support their children to buy flats

- **22%** of property buyers had parental support in paying down payment in 2017.
- **70%** of HK parents are willing to assist their children to buy a home.
- **50%** of these parents are prepared to mortgage their own home for the purpose.

Source: "Socioeconomic implications of home ownership for Hong Kong", Research Brief Issue No.2 2020 – 2021, Research Office, Legislative Council Secretariat

Key Considerations when holding family assets



1

Sole Ownership, Joint Tenancy or Tenants in Common?

2

Natural Person, Corporate Vehicle, Trust?

3

Nature of Funding: Gift or Loan?

Thank you for your participation

Any questions?

