

TRUST TRAINING CERTIFICATE (“TTC”)

UNIT 4 – OTHER ESTATE PLANNING VEHICLES

MODULE 7

OTHER ESTATE PLANNING/SUCCESSION VEHICLES

NATURE AND USE OF HOLDING COMPANIES OF TRUSTS

- Protection of Trustees by use of corporate limited liability. (para 1.1 – 1.2)
- Physical separation of the assets of one trust from those of other trusts having the same Trustee. (para 1.3)
- Prohibition of trusts as shareholders of Hong Kong companies. (para 1.5)

REASONS FOR THE USE OF INSURANCE*

- Term insurance. (para 2.2)
- Whole of life insurance. (para 2.3)
- Joint life and second death insurance. (para 2.4)

REASONS FOR AND USE OF INSURANCE*

- Estate equalization: Compensation for family members not inheriting family business. (para 2.5)
- Fund to meet future tax / prevent sale of asset. (2.6)
- Liquidity needed following death; the time it takes to obtain Probate. (para 2.7)
- Will the proceeds form part of the life insured's estate?
Should the policy be written in trust?

REASONS FOR AND USE OF INSURANCE

- Tax advice needed: Jurisdiction of insurance, tax status of those concerned and available tax exemptions. (para 2.7)
- Irrevocable Life Insurance Trusts (“ILIT”): Benefits to US Beneficiaries under US law:- (para 2.8)
 - total marital deduction for estate passing from US spouse to US spouse;
 - tax free distributions to surviving US spouse.

REASONS FOR AND USE OF INSURANCE

- ILIT (Cont'd):
 - US Estate Tax exemption on death of surviving spouse: US\$11.18m;
 - therefore, funds to meet Estate Tax and funds for Beneficiaries; and
 - legal method of avoiding Gifts Tax on premiums;

NEED FOR AND CONTENTS OF WILLS*

- Governing law is law of the domicile of the Testator on death: Exception is lex situs for immoveable property. (para 3.1)
- General reasons for making a will (para 3.2)
- Choosing who will administer your estate
- Choosing your Beneficiaries
- Avoiding forced heirship

NEED FOR AND CONTENT OF WILLS

- Should there be more than one Will?
- The benefits of a will limited to the disposal of property situated in a specified jurisdiction: (para 3.3)
 - Immoveable property
 - High value assets
 - Speedier administration

NEED FOR AND CONTENTS OF WILLS

- Consideration of tax implications before making wills:
Examples: (para 3.4)
 - Are tax exemptions available – surviving spouse exemption?
 - Are assets by their nature or situs tax exempt?
 - Are Beneficiaries tax exempt – charities?
 - Are there reasons for leaving inheritance to Beneficiaries prior to a particular age?

NEED FOR AND CONTENTS OF WILLS

- Interest of surviving spouse: (para 3.5)
 - Absolute
 - For life or until re-marriage
 - Power for Trustees to give capital where there is a life interest
 - Part absolute and part for life
 - Basic need for home and for sufficient support

NEED FOR AND CONTENT OF WILLS

- Gifts to take effect on the death of the surviving spouse:
(para 3.6 – 3.10)
 - At what age should children/issue be entitled as of right to income?
 - At what age should children/issue be entitled as of right to capital?
 - Class gifts rather than gifts to named children/issue.
 - Are all children/issue legitimate/legitimated or are any illegitimate or adopted?
 - Gifts made “per stirpes”.
 - Is perpetuity an issue?

THE NEED FOR AND CONTENTS OF WILLS

- Gifts in default: (para 3.11)
 - What happens if the immediate family go on holiday and no one comes home?
 - Will there be gifts to siblings/their issue per stirpes?
 - Will the estate be divided equally between siblings or will there be a “Husband’s Fund” and a “Wife’s Fund”?
 - Will there be gifts to others – charities?

THE NEED FOR AND CONTENT OF WILLS

(para 3.12 – 3.14)

- Administrative powers – the need and extent.
- Who needs to know the content of the wills?
- Where should original wills be kept? Who should know where they are kept?
- Letters/Memoranda to Executors/Trustees.
- Memorandum of assets to be kept with the Wills

THE NEED FOR AND CONTENT OF WILLS

- Is there a need for and value in having a discretionary Will?

THE USE OF AND LIMITATIONS OF PRE-NUPTIAL AGREEMENTS*

- Nature: Agreement entered into by couple before marriage.
(para4.2)
- Examples of contents:
 - Division of immovable or physical property and financial assets and interests
 - Treatment of future earnings
 - Spousal support in the event of divorce or dissolution of marriage
 - Payment for children

THE USE OF AND LIMITATIONS OF PRE-NUPTIAL AGREEMENTS

- Uses of the agreement: (para 4.3 - 4.7)
 - Avoidance of community or separation of property rules.
 - Clarification of rights and responsibilities during marriage.
 - To protect the interest of children of a previous marriage.

THE USE OF AND LIMITATIONS OF PRE-NUPTIAL AGREEMENTS

- Protection of family business interests or heirlooms for the bloodline.
- Protection of older and wealthier intending spouse from younger and less wealthy intending spouse.
- Protection of an intending spouse who gives up a career and relies financially of the other intending spouse.

THE USE OF AND LIMITATIONS OF PRE-NUPTIAL AGREEMENTS*

- Examples of enforceability and non-enforceability: (para 4.8 – 4.9)
 - There are considerable differences between jurisdictions.
 - Not enforceable in Hong Kong but may be used in evidence. **SPH v SA [2014] HKCFA 56**
 - Enforceable in China – Art. 19 of the Marriage Law 2001.

THE USE AND LIMITATIONS OF PRE-NUPTIAL AGREEMENTS

- Matters to be considered re. enforceability when drafting agreements: (para 4.10)
 - Jurisdiction of the current residences of each intending spouse.
 - Jurisdiction of the domicile of each intending spouse.
 - State of nationality of each intending spouse.
 - Jurisdictions to which the intending spouses may relocate.
 - Jurisdiction to which one of the spouses may relocate .
 - Choice of competing jurisdictions.

THE NATURE, USE AND CONSEQUENCES OF A GIFT

- Timing of a gift: (para 5.1)
 - During lifetime
 - Anyone who directly or indirectly benefits a trust is a Settlor.
 - On death either
 - by valid will, or
 - by rules of intestacy.

THE NATURE, USE AND CONSEQUENCES OF A GIFT

- Donor and donee – capacity of donor - ownership by donor of assets to be given .
- Gift to be made voluntarily and not under duress.
- Proper evidence - depends on type of assets → shares, chattels : by share transfer documents or delivery of property evidenced by Deeds of gift
- Gift must not be invalid by its nature or purpose.
- The 3 legal requirements: Intention, sufficient delivery and acceptance.

THE NATURE, USE AND CONSEQUENCES OF A GIFT*

- Revocable – no asset protection – tax consequences. (para 5.5)
- Because donee's acceptance is required, disclaimer is possible.
- Trustees should always have power to accept or reject additions to the Trust Fund.
- Donor must be clear as to objectives, benefits, risks and tax consequences. (para 5.6)

THE NATURE, USE AND CONSEQUENCES OF A GIFT

- The tax consequences of a gift: (para 5.8)
 - Consider tax status of donor (sometimes of donee) and nature and situs of property to be given.
 - Gifts Taxes (examples: UK and USA – not in China yet).
 - Capital Gains Tax (examples: Australia, Canada, UK and USA).
 - Stamp Duty/Stamp Duty Land Tax (Australia, Canada, Hong Kong, Singapore, UK, USA).
 - Available reliefs - Available exemptions – nature of the donee, nature of the asset and situs of asset.
 - Estate Taxes/Inheritance Taxes/Death duties (examples – UK and USA).

THE NATURE, USE AND CONSEQUENCES OF A GIFT

- Tax consequences of a gift:
 - Timing (examples – UK : Potentially exempt transfer – USA: Gift to a Foreign Grantor Trust).
 - Retention of benefit.
 - Associated operations.

THE REASONS FOR AND USE OF LOANS

(para 6.1 – 6.2)

- Gift inappropriate for practical or tax purposes.
- Loan more efficient for tax purposes.
- Liquidity needed to provide cash.
- Liquidity needed for investment by leverage on assets.

THE REASONS FOR AND USE OF LOANS

(para 6.3 – 6.6)

- Is the loan at interest? Can that interest be set off against income before tax?
- Can the loan be set off against the value of the assets secured before tax?
- A debt is an asset of the creditor; what is the situs of that asset?
- Shareholder's loan is an asset of the shareholder.

MODULE 8

TRUST PROTECTION ISSUES

GENERAL RULES AND BENEFITS OF ASSET PROTECTION

(para 1)

- Different jurisdictions have different rules.
- Different rules require different periods of time between transfer to a trust and a cause of action arising.
- Commerciality and common sense is needed

TRUST PROTECTION ON BREAKDOWN OF MARRIAGE*

(para 2)

- No protection if the Trust is either
 - Invalid – by reason of local legislation / fraudulent disposition;
or
 - a sham – (para 2.4 & Annexure 3)
Snook v London and West Riding Investments Limited
Rahman v Chase Bank (CI) Limited and Others
Re. Esteem Settlement
ND v SD & Others; or
 - a nominee arrangement; or (para 2.4.2 & Annexure 4)
 - matrimonial property regime prevents transfer into trust (para 2.4.3)

TRUST PROTECTION ON BREAKDOWN OF MARRIAGE*

- No protection if
 - The trust is construed as a “nuptial settlement”; or
 - The trust’s assets are a “financial resource”
- Legislation providing non-enforcement of foreign judgments will provide protection (para 2.2) - Firewall Legislation

B Trust, RBS Coutts (Cayman) Ltd. v W and Others

TRUST PROTECTION ON BREAKDOWN OF MARRIAGE

- Is the trust a “nuptial settlement” – evolving meaning through case law:- (para 2.5 – 2.8)
 - ***Brooks v Brooks***
 - ***Prest v Petrodel Resources Limited & Others***
 - ***DR v GR and Others***
 - ***Chai v Peng and Others***
- Is there sufficient connection between the trust and the marriage? Can the trust be varied to be in favour of the plaintiff spouse?
- Piercing the veil of a family company or treating it as the alter ego of a party to the marriage.

TRUST PROTECTION ON THE BREAKDOWN OF MARRIAGE

- Most important to take timely and proper advice for a pre-nuptial agreement to protect shares in a family company.
- How far does the trust have a family connection? Consider Settlor, Beneficiaries, the time the trust was made and the intention of Letters of Wishes.
- Drafting of trust (may run contrary to family objectives) to counter a nuptial settlement:-
 - wide class of Beneficiaries to prevent connection with a particular marriage;
 - class not to include spouse or prospective spouse of Beneficiary; and
 - care with Letter of Wishes.

TRUST PROTECTION ON THE BREAKDOWN OF MARRIAGE *

- Are trust assets a “financial resource” available to the plaintiff spouse? Result of successful claim (para 2.9)
 - avoids variation of trust;
 - may circumvent the protection of firewall legislation; and
 - if order against Beneficiary spouse, then harder for Trustees to benefit that spouse.

TRUST PROTECTION ON THE BREAKDOWN OF MARRIAGE*

- The “likelihood test” for trust’s assets being treated as a “financial resource”: (para 2.10)
 - If the [husband] were to request [the Trustees] to advance the whole (or part) of the capital in the trust to him, the trustee would be likely to do so
- Is there evidence of intention from a Letter of Wishes?
- Is there evidence of intention by reason of distributions made?

TRUST PROTECTION ON THE BREAKDOWN OF MARRIAGE

- Defenses to claim that the assets of a trust are a “financial resource”:- (para 2.11)
 - content of trust and Letters of Wishes to show trust is dynastic;
 - evidence of distributions and exercise of Trustees’ discretions is without Beneficiary’s influence; and
 - proper forward planning of a fund to provide for a spouse, without recourse to the remainder of the Trust Fund.

TRUST PROTECTION ON THE BREAKDOWN OF MARRIAGE

- What is needed are the following by family, Trustees and advisers:- (para 2.12)
 - ongoing co-operation;
 - ongoing planning; and
 - ongoing review.

PROTECTION FOR ACCRUED BENEFITS

(para 3.1 – 3.3)

- The nature, role and assets of Employee Benefit Trusts (“EBT”).
- EBT provides benefit of trust asset protection rules from claims by creditors of Settlor.
- Non-vested interests are not assets of a Beneficiary and are not available to the Beneficiary’s creditors.

PROTECTION FOR ACCRUED BENEFITS

(para 3.4)

- The nature of a Hong Kong Mandatory Provident Fund Scheme (“MPF”).
- MPF contributions and earnings are held by qualified and regulated Custodians; they are separate from the funds of the employer and of the Trustees.
- Capital adequacy requirements for financial soundness of MPF Trustees.

PROTECTION FOR ACCRUED BENEFITS

- Requirement for MPF Trustees to have adequate professional indemnity cover (“PI”) for misfeasance by them and their delegates.
- Compensation Fund set up under MPF Ordinance to compensate scheme members for losses due to misfeasance of Trustees or their delegates not covered by PI.