

TRUST TRAINING CERTIFICATE (“TTC”)

UNIT 10 – MODULE 15 TESTAMENTARY ISSUES & AVOIDING TESTAMENTARY DISPUTES (TESTAMENTARY ISSUES – WILLS)

28 April 2021

THE PURPOSE AND IMPORTANCE OF MAKING A WILL

- Will (para 1.1-1.5):
 - Declaration of the intentions of a testator regarding matters which he/she wishes to take effect upon or after his/her death
 - Prescribed manner
 - Can be revoked any time during the testator's lifetime provided the testator is mentally capable of doing so
 - Set out the disposition of the testator's assets as at his/her death (the "estate")
 - Family members or professionals as executors
 - Minimize doubt and confusion as to how the estate is to be administered and distributed

INTESTACY AND HOW TO AVOID IT

- Intestacy: (para 2.1)
 - Died without a will
 - Distribution in accordance with succession laws:
 - Movable property – Place of domicile of the deceased
 - Immovable property – Place where the property is located

INTESTACY AND HOW TO AVOID IT

- Order of priority in HK: Succession to estate on intestacy (para 2.2)
 - Section 4, Intestates' Estates Ordinance (Cap 73)
 - Died leaving a spouse only
 - Spouse receives the residuary estate
 - Died leaving a spouse and issue
 - Spouse receives all personal chattels & HK\$500,000
 - After deduction of HK\$500,000, ½ residuary estate to the spouse, ½ residuary estate to the issue

INTESTACY AND HOW TO AVOID IT

- Order of priority in HK: Succession to estate on intestacy (para 2.2)
- Section 4, Intestates' Estates Ordinance (Cap 73)
 - Died leaving a spouse, parents/siblings
 - Spouse receives all personal chattels and HK\$1,000,000
 - After the deduction of HK\$1,000,000, ½ residuary estate to the spouse and ½ residuary estate to the parents
 - Siblings will only inherit the parent's share if both parents are not alive.
 - Parents/siblings can only have a share if the deceased left no issue.

INTESTACY AND HOW TO AVOID IT

- Order of priority in other jurisdictions: Succession to estate on intestacy (para 2.3)
 - Different jurisdictions have different succession laws
 - E.g. Mainland China: spouse, children and parents are in the first priority and will generally share the deceased's estate in equal shares
 - Concepts of common marital property and forced heirships

INTESTACY AND HOW TO AVOID IT

- Order of priority for grant in HK in case of intestacy (para 2.4)
 - Rule 21, Non-Contentious Probate Rules (Cap. 10A)
 1. the surviving spouse
 2. the children of the deceased or the issue of any such child who has died during the lifetime of the deceased
 3. the father or mother of the deceased
 4. the brother and sister of the deceased or the issue of any brother or sister of the deceased who has died during the lifetime of the deceased

INTESTACY AND HOW TO AVOID IT

- Estate administrators (para 2.5)
 - Section 25(1), Probate and Administration Ordinance (Cap 10)
 - The maximum number is four.
 - Where there is minority interest involved: at least two individuals.
 - Application to the HK High Court to determine who to be appointed in case of dispute between person entitled to a grant in the same degree
 - HK High Court's power to appoint a person who is not in the order set out in rule 21, NCPR to administer the estate

INTESTACY AND HOW TO AVOID IT

- Avoiding intestacy (para 2.6)
 - Have a will that is clear and unambiguous, yet not too restrictively worded
 - Include a residuary estate clause in the will
 - Consider nominating substitute executors and contingent beneficiaries

KEY LEGAL ELEMENTS IN WILL DRAFTING

- Will (paras 3.1 – 3.2)
 - A written document that embodies the testator's testamentary intentions
 - The testator's wishes only take effect upon his death.
 - Section 4, Wills Ordinance (Cap. 30)
 - No will made by person who has not **attained full age** (i.e. 18 years old) shall be valid unless that person is a married person, a person in actual naval, military or air force service, or a mariner or seaman at sea.

KEY LEGAL ELEMENTS IN WILL DRAFTING

- Will (para 3.3)
 - The testator must have **testamentary capacity** to make a will.
 - *Banks v Goodfellow* (1870) LR 5 QB 549
 - The testator must understand:
 1. the nature of the act of making a will and its effects;
 2. the extent of the property of which he is disposing; and
 3. be able to comprehend any future claim following his demise by his family members, relatives or friends who are financially dependent on him during his lifetime.

KEY LEGAL ELEMENTS IN WILL DRAFTING

- Testamentary capacity (para 3.3.1)
 - If a will appears rational and contains no irregularities, it will be presumed that the testator had testamentary capacity.
 - *Sharp and Bryson v Adam* [2006] WTLP 1059
 - The presumption of capacity was rebutted due to the testator's brain damage and his unusual decision to leave nothing to his children.
 - The requisite testamentary capacity not proved.
 - If the Court holds that the testator lacked testamentary capacity, the will is invalid and the previous will, if any, revives, or failing that, intestacy rules apply.

KEY LEGAL ELEMENTS IN WILL DRAFTING

- Testamentary capacity (para 3.3.2)
 - Testamentary capacity can fluctuate at different times.
 - Possible to take instructions from a client at a later date, a different time of day and/or a different environment if a client appears to not have sufficient testamentary capacity
 - Should assess a person's decision-making ability and not the decisions he makes
 - Section 3, Wills Ordinance (Cap. 30): All property may be disposed of by will.

KEY LEGAL ELEMENTS IN WILL DRAFTING

- Certainty (para 3.4)
 - Certainty is of vital importance.
 - Each clause should truly reflect the client's wishes and that there should be no ambiguity for the executor when administering the estate.
 - Specific legacies and persons mentioned in the will must be clearly and unambiguously identified.
 - If relevant, the manner, timing and/or division of the gifts also need to be set out clearly.
 - Residuary estate clause
 - Cover contingent situations

RULES ON TAKING INSTRUCTIONS AND EXECUTING WILLS

- Taking instructions (paras 4.1 – 4.2)
 - The client is always the testator.
 - Meet with the client and obtain instructions from the client directly
 - Review any earlier will and discuss with the client the reasons for making a new will
 - Determine whether the client has testamentary capacity
 - Obtain corroborative medical evidence or diagnostic assessment by a psychiatrist in the case of an elderly or ill client

RULES ON TAKING INSTRUCTIONS AND EXECUTING WILLS

- Taking instructions (para 4.3)
- Choice of executors:
 - A person must be at least 21 to act as an executor. (Section 39, Probate and Administration Ordinance (Cap 10))
 - Can appoint more than one person but no more than four (Section 25(1), Probate and Administration Ordinance)
 - Consult the individuals to be appointed as executors to determine whether they are willing to accept such responsibility and whether they can work together
 - Appointment of substitute executors
 - Consider appointing professionals or a trust corporation

RULES ON TAKING INSTRUCTIONS AND EXECUTING WILLS

- Taking instructions (paras 4.4 – 4.5)
 - If the client has minor children, he should be advised to appoint guardians in his will.
 - Gifts to minors:
 - The executors must hold the minors' share in trust at least until they attain the age of 18.
 - May state in the will that a child should not receive the gift until a later age
 - Consider whether the client's wishes can be practically and effectively administered after probate

RULES ON TAKING INSTRUCTIONS AND EXECUTING WILLS

- Taking instructions (paras 4.6 – 4.8)
 - If the client decides to disinherit spouse or children:
 - A declaration to this effect should be included in the will.
 - Advise the client as to the risk of potential dispute or claims against the estate
 - The testator's spouse, minor children, mistresses, and adult children may make claims against the estate under sections 3 to 5 of the Inheritance (Provision for Family and Dependants) Ordinance (Cap. 481).
 - Obtain documentary support from the client if relevant
 - Alert to the risk of undue influence

RULES ON TAKING INSTRUCTIONS AND EXECUTING WILLS

- Executing wills (para 4.8)
 - Ensure that the will is executed promptly, in particular the wills of elderly or ill clients
 - *Hooper v Fynmores* (2002) Lloyds Ref. PN18
 - The delay caused by the will-drafter in failing to ensure the expeditious execution of a will generated a liability to a disappointed beneficiary.

RULES ON TAKING INSTRUCTIONS AND EXECUTING WILLS

- Executing wills (para 4.9)
 - Section 5(1), Wills Ordinance (Cap. 30)
 - The testator must sign the will in the presence of at least 2 witnesses present at the same time.
 - The 2 witnesses should then sign in the presence of the testator.
 - Best practice for the testator and the witnesses to initial at the corner of every page of the will

RULES ON TAKING INSTRUCTIONS AND EXECUTING WILLS

- Executing wills (para 4.9)
 - Beneficiaries should not act as the attesting witnesses or else, gifts to them under the will is forfeited (Section 10, Wills Ordinance (Cap. 30))
 - A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed in accordance with the requirements, be deemed to be duly executed if, upon application, the court is satisfied that there can be no reasonable doubt that the document embodies the testamentary intentions of the deceased person. (Section 5(2), Wills Ordinance)

RULES ON TAKING INSTRUCTIONS AND EXECUTING WILLS

- Executing wills (para 4.10)
 - Consult foreign expert on execution of a non-HK will
 - A will shall be treated as properly executed if its execution conformed to the internal law in force in the territory where it was executed, or in the territory where, at the time of its execution or of the testator's death, he was domiciled or had his habitual residence, or in a state of which, at either of those times, he was a national. (Section 24, Wills Ordinance (Cap 30))

RULES ON TAKING INSTRUCTIONS AND EXECUTING WILLS

- Post-execution of wills (paras 4.11 – 4.12)
 - Advise client:
 - Not to tamper with the will
 - If alterations are needed to be made: execute a new will or codicil (for minor and straight forward amendments)
 - To periodically review his will esp. after divorce
 - Divorce: the will shall take effect as if any appointment of the former spouse as an executor were omitted and any devise or bequest to the former spouse shall lapse unless there is contrary intention in the will (sections 14 and 15, Wills Ordinance (Cap. 30))

ONE WILL OR MULTIPLE WILLS?

Advantages of having one will	Disadvantages of having one will (para 5.1)
Cheaper to prepare	Concern as to formal validity (Can the will be proved in every jurisdiction where there are assets?)
No risk of unintentional revocation	The will probably has to be probated in each jurisdiction sequentially which may cause long delays in dealing with assets post death
Clarity as to what should be paid from where	Probably needs translation for each jurisdiction
Clarity as to who is responsible for doing what	Administrative clauses may be strange to foreign notaries
Easier to manage	Executors may have to take on responsibility for foreign estate

ONE WILL OR MULTIPLE WILLS?

- Ensure non revocation (paras 5.2 – 5.3)
 - Not to include a general revocation clause if the will is limited to assets in a particular jurisdiction
 - Seek multiple jurisdiction advice to ensure consistency
 - Single will: Make sure the will can validly cover the testator's worldwide interests
 - Multiple wills: Make sure all wills are consistent and do not revoke each other

DOES A LIFETIME GIFT OR A INTER VIVOS TRUST OVERRIDE THE NEED FOR MAKING A WILL

- The need for making a will not overridden (para 6.1):
 - Any assets not transferred at the time of the deceased's death will be disposed of in accordance with intestacy laws – have a will with a residuary estate clause
 - Transfers as a gift or to a trust may attract stamp duty, capital gains or other taxes (no estate duty in HK)

DOES A LIFETIME GIFT OR A INTER VIVOS TRUST OVERRIDE THE NEED FOR MAKING A WILL

- Lifetime gifts and inter vivos trusts are still important estate planning tools (para 6.2):
 - The beneficiary can enjoy the gift or benefit under the trust upon transfer.
 - Not subject to the probate process which would take 3 – 12 months or more
 - Can carry additional benefits such as asset protection, succession and tax planning
 - Using a foreign grantor trust to avoid US federal gift and estate tax for non-US settlors who wish to benefit US beneficiaries

DOES A LIFETIME GIFT OR A INTER VIVOS TRUST OVERRIDE THE NEED FOR MAKING A WILL

- Trust (paras 6.3 – 6.4)
 - A relationship created at the direction of the settlor, in which the trustee holds the settlor's property for the benefit of the beneficiaries.
 - Overview of some types of trusts
 - Inter vivos trust (living trust)
 - Testamentary trust (will trust)
 - Revocable trust & irrevocable trust
 - Discretionary trust
 - Standby trust

DOES A LIFETIME GIFT OR A INTER VIVOS TRUST OVERRIDE THE NEED FOR MAKING A WILL

- Trust (para 6.4)
 - Genuine alienation of trust assets: The settlor can be a beneficiary but not the trustee.
 - Acceptable for the settlor to retain some control, but if he retains too much control, the trust may be challenged
 - In administering a trust, a trustee may take into account the settlor's guidelines and suggestions but must still have independent thought and action when the trust deed empowers them with such discretion – must always act in the beneficiaries best interests

DOES A LIFETIME GIFT OR A INTER VIVOS TRUST OVERRIDE THE NEED FOR MAKING A WILL

- Trust (para 6.4)
- *JSC Mezhdunarodniy Promyshlemniy Bank v Pugachev* [2017] EWHC 2426 (Ch)
 - The English High Court found that the defendant retained beneficial ownership of the assets involved in 5 discretionary trusts and thus the trust assets were not beyond the reach of creditors.

DOES A LIFETIME GIFT OR A INTER VIVOS TRUST OVERRIDE THE NEED FOR MAKING A WILL

- Letters of wishes (para 6.4)
 - Set out the settlor's intentions
 - Contain detailed guidance so that the trustee can carry out the settlor's wishes
 - Not legally binding

DOES A LIFETIME GIFT OR A INTER VIVOS TRUST OVERRIDE THE NEED FOR MAKING A WILL

- Letters of wishes (para 6.4)
- Usual guidelines
 - Primary beneficiaries and excluded persons
 - Distribution timing, guidelines and conditions
 - How to manage and invest trust assets
 - How to care for minor or disabled beneficiaries
 - Circumstances for suspension of distribution
 - Termination of the trust (ultimate beneficiary)

DOES A LIFETIME GIFT OR A INTER VIVOS TRUST OVERRIDE THE NEED FOR MAKING A WILL

- Protectors (para 6.4)
 - Change/remove trustees
 - Consent or veto the exercise of certain trust discretions
 - Give directions to trustees
 - Should not have too many powers & the trustee should be able to exercise independent discretion when such discretion is conferred by the trust deed

DOES A LIFETIME GIFT OR A INTER VIVOS TRUST OVERRIDE THE NEED FOR MAKING A WILL

- Inter vivos vs. Testamentary trust (para 6.5)
 - An inter vivos trust with a professional trustee can be expensive (settlor needs to pay a set-up fee and periodic management / administration fees to the trustee; additional legal costs for professionals to review the trust deed & ensure alignment of the will).
 - A testamentary trust is usually less expensive and easier to prepare.

DOES A LIFETIME GIFT OR A INTER VIVOS TRUST OVERRIDE THE NEED FOR MAKING A WILL

- Inter vivos vs. Testamentary trust (para 6.5)
 - Consider having an inter vivos trust in the following circumstances:
 - Tax planning and reporting
 - Complicated asset picture / holding structure
 - Long probate process is anticipated & the beneficiaries will not be able to financially maintain themselves during that period
 - Assets expected to be held for a long time & possibly multiple generations

DOES A LIFETIME GIFT OR A INTER VIVOS TRUST OVERRIDE THE NEED FOR MAKING A WILL

- Inter vivos vs. Testamentary trust (para 6.5)
 - Consider having an inter vivos trust in the following circumstances (cont.):
 - Many detailed instructions and conditions as to when and how a beneficiary should take benefit
 - Risk of creditor or matrimonial claims and a strong desire to preserve assets
 - Minor, disabled or vulnerable beneficiaries involved
 - Potential disputes between the beneficiaries

HOW TRUSTS AND WILLS INTERPLAY WITH ESTATE PLANNING INVOLVING CROSS-BORDER INTERESTS

- Estate planning is more complex when cross-border issues are involved. (para 7.1)
 - Conflict of laws & different tax regimes across the jurisdictions
 - Will-drafter must ascertain:
 - relevant jurisdictions
 - ownership structures of the assets and their rough values
 - client's objectives and family circumstances
 - foreseeable changes in the nationality/domicile/habitual residence of the client and/or beneficiaries
 - Matrimonial regime issues, formal validity issues, tax issues and administrative issues

HOW TRUSTS AND WILLS INTERPLAY WITH ESTATE PLANNING INVOLVING CROSS-BORDER INTERESTS

- Having both a trust and one or multiple wills (para 7.2)
- Revocable or irrevocable trust?
 - Requirements under the relevant tax regime & balance between tax planning and asset protection
- How discretionary the trust needs to be?
 - Relevant tax regime & balance between flexibility and certainty
- Standby trust in conjunction with the will (para 7.3)
 - Client can continue managing his own assets, minimize trustee fees during his lifetime & avoid any transfer tax
 - After probate, executor to inject the residuary estate or specific legacy into the standby trust upon the client's death
 - Assets to be transferred to a standby trust must first go through probate