

TRUST TRAINING CERTIFICATE (“TTC”)

UNIT 10 – MODULE 16 OTHER TESTAMENTARY ISSUES 28 April 2021

MARRIAGE AND COMMON LAW SPOUSE / PARTNERSHIP RELATIONSHIPS

- Marriage in Hong Kong on or after 7 Oct 1971: (para 1.1)
- Voluntary union for life of one man with one woman to the exclusion of all others and may be contracted only in accordance with the Marriage Ordinance (Cap 181)
- Forbidden: Concubinage / “kim tiu” marriage
- Celebration of marriage:
 - At a marriage registry by a Registrar
 - At a licensed place of worship by a competent minister
 - By a civil celebrant of marriages at any hour and any place in HK (other than the office of the Registrar / a licensed place of worship)
- Status of concubinage and kim tiu marriages

MARRIAGE AND COMMON LAW SPOUSE / PARTNERSHIP RELATIONSHIPS

- Marriage in Hong Kong before 7 Oct 1971: (para 1.2)
 - Customary marriage
 - Celebrated in HK before the Appointed Day in accordance with Chinese law and custom
 - Presumption that a marriage is “deemed to accord with Chinese law and custom”
 - Modern marriage
 - Celebrated in HK before the Appointed Day by open ceremony as a modern marriage and in the presence of 2 or more witnesses

MARRIAGE AND COMMON LAW SPOUSE / PARTNERSHIP RELATIONSHIPS

- Foreign marriage: (para 1.3)
 - Celebrated outside HK
 - Valid if celebrated or contracted in accordance with the law in force at the time and in the place where the marriage was performed
- Same sex marriage: Not recognized (para 1.4)
- Common law marriage: Not recognized (para 1.5)

COMMUNITY OF PROPERTY

- Not recognized
- Separation of legal and equitable title: (para 2.1)
- Co-ownership: Joint tenancy and tenancy in common: (para 2.2)
 - “Four unities”
 - Presumption at law
 - Beneficial co-ownership
 - Severance
 - Right of survivorship
- Registration and priority: (para 2.3)
- Disposal of property: (para 2.4)

COMMUNITY OF PROPERTY

- Provision for family and dependants: (para 2.5)
- Application to the Court for an order that provisions be made out of the deceased's estate by way of periodical payments, lump sum payment, transfer of property comprised in the estate etc.
 - May be made by any person specified in s 3, Inheritance (Provision for Family and Dependants) Ordinance (Cap 481) who survives the deceased
 - On the ground that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant
 - Provided that the deceased dies: (a) domiciled in HK; or (b) having been ordinarily resident in HK at any time in the 3 years immediately preceding his death

NUPTIAL AGREEMENTS

- Post-nuptial agreements: (para 3.1)
 - Leading English case is *Edgar v Edgar* [1980] 1 WLR 1410.
 - Landmark HK case is *SPH v SA (Formerly known as SA)* [2014] HKCFA 56
 - When parties who are sui juris freely enter upon a bargain for the division of matrimonial assets then, in the absence of unfair or unconscionable circumstances surrounding the conclusion of the agreement and material and drastic unforeseen circumstances arising thereafter such as to cause manifest prejudice to one of the parties, the courts will hold the parties to their agreement.

NUPTIAL AGREEMENTS

- Pre-nuptial agreements: (para 3.2)
 - Historically, at common law, were considered as contrary to public policy and were therefore non binding
 - Leading English case *Radmacher v Granatino* [2010] UKSC 42: such long standing rule was obsolete and no longer applied
 - HK (*SPH v SA*): Main principles of the *Radmacher* case should be regarded as the law of HK / Pre-nuptial agreements and separation agreements not distinguished

MATRIMONIAL PROPERTY AND EXPRESS, RESULTING, CONSTRUCTIVE AND FAMILY TRUSTS AND DISPUTES

- Express trust: (para 4.1)
 - Declaration of trust in respect of any land or any interest in land must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will
 - Any property other than land or interest in land – declaration of trust can generally be made orally
- Resulting trust: (para 4.2)
- Constructive trust: (para 4.3)

MATRIMONIAL PROPERTY AND EXPRESS, RESULTING, CONSTRUCTIVE AND FAMILY TRUSTS AND DISPUTES

- Family trust and matrimonial property disputes: Whether a trust and its assets will be treated as a “financial resource” of a party to a marriage: (para 4.4)
- *Pun Lok To Otto v Kan Lai Kwan also known as Kan Lai Kwan Kay and Anor FACV 21/2013*
- Facts and major issues
- The Husband set up a discretionary trust and settled 84.63% of the shares in the holding company of his business in the trust.
 - The wife’s application for ancillary relief: How the trust ought to be approached and that to what extent the value of the shares settled in the trust should be treated as matrimonial assets

MATRIMONIAL PROPERTY AND EXPRESS, RESULTING, CONSTRUCTIVE AND FAMILY TRUSTS AND DISPUTES

- *Pun Lok To Otto v Kan Lai Kwan also known as Kan Lai Kwan Kay and Anor FACV 21/2013*
- The law and application
 - Section 7(1)(a), Matrimonial Proceedings and Property Ordinance (Cap 192)
 - *Charman* test: whether, if the husband were to request the trustee to advance the whole or part of the capital or income of the trust to him, the trustee would, on the balance of probabilities, be likely to do so
 - “the reality of the situation” & “past conduct as a useful guide”