

Certified Trust Practitioner™ Accreditation Programme
Trust Training Certificate

**Unit 10 – Testamentary Issues & Avoiding
Testamentary Disputes**

Module 15 – Testamentary Issues - Wills

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Study Guide

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UNIT 10

**TESTAMENTARY ISSUES & AVOIDING
TESTAMENTARY DISPUTES**

MODULE 15

TESTAMENTARY ISSUES – WILLS

UNIT 10 – TESTAMENTARY ISSUES & AVOIDING TESTAMENTARY DISPUTES

MODULE 15 TESTAMENTARY ISSUES – WILLS

EXECUTIVE SUMMARY

PART 1 – THE PURPOSE AND IMPORTANCE OF MAKING A WILL

1. The testator can set out the intended disposition of his assets at his death, which may be different from how the estate will be distributed in accordance with the laws of intestacy.
2. The testator can appoint executors to administer his estate as well as guardians of his minor children.
3. A will minimizes doubt and confusion as to how the estate is to be administered and distributed.
4. Simpler and more efficient probate process.

PART 2 – INTESTACY AND HOW TO AVOID IT

1. Succession of immovable property is governed by the law of the place where the property is located, whereas succession of movable property is governed by the law of the deceased's place of domicile.
2. Different jurisdictions have different succession laws. Some jurisdictions have the concept of 'common marital property' or forced heirship rules. In Hong Kong, the order of priority relating to entitlement of the deceased's estate is set out under section 4 of the Intestates' Estates Ordinance (Cap. 73):

The deceased died leaving a spouse only	The deceased died leaving a spouse and issue	The deceased died leaving a spouse, parents/siblings
Spouse receives the residuary estate (i.e. the remaining estate after deduction of debts, taxes and expenses)	<p>Even if there are living parents or siblings –</p> <p>Spouse receives all personal chattels and HK\$500,000.</p> <p>After the deduction of HK\$500,000, the residuary estate will be divided half to the spouse and the other half equally between the issue (including illegitimate children and formally adopted children of the deceased).</p>	<p>Spouse receives all personal chattels and HK\$1,000,000.</p> <p>After the deduction of HK\$1,000,000, residuary estate will be divided half to the spouse and the other half equally between the parents.</p> <p>Siblings will only inherit the parents' share if both parents are not alive.</p> <p>Parents/siblings can only have a share if the deceased left no issue.</p>

3. In Hong Kong, the order of priority relating to who shall be entitled to a grant of administration is set out under Rule 21 of the Non-Contentious Probate Rules (Cap. 10A):
 - a. the surviving spouse;
 - b. the children of the deceased or the issue of any such child who has died during the lifetime of the deceased;
 - c. the father or mother of the deceased;
 - d. brothers and sisters of the deceased or the issue of any deceased brother or sister of the deceased who has died during the lifetime of the deceased

4. The maximum number of administrators of an estate in Hong Kong is 4 and if minority interest is involved, at least 2 individual administrators must be appointed.

5. The High Court can determine the administrator in the event of disputes between persons entitled to a grant in the same degree, or in the event the person entitled to be appointed is under 21 years old or has insufficient capacity.
6. To avoid intestacy and partial intestacy, the Will needs to have a residuary estate clause and the testator should nominate substitute executors and contingent beneficiaries.

PART 3 – KEY LEGAL ELEMENTS IN WILL DRAFTING

1. The testator must have attained the age of 18 and have testamentary capacity. Having testamentary capacity means 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.
2. The drafting of the Will must be clear, certain and unambiguous.

PART 4 – RULES ON TAKING INSTRUCTIONS AND EXECUTING WILLS

1. The client is the testator – meet with the client and obtain instructions from the client directly.
2. Determine whether the client has testamentary capacity.
3. Discuss the choice of executor(s) and substitute executor(s). There can be no more than 4 and an appointed individual must be at least 21 to act.
4. Discuss the choice of guardian(s) if the client has minor children.
5. Always consider whether the client's wishes can be practically and effectively administered after probate – a trust may be more appropriate to achieve the client's wishes.

6. If a client decides to disinherit spouse, children or other dependants, he must be asked to explain further and be advised on potential claims under the Inheritance (Provision for Family and Dependants) Ordinance (Cap. 481).
7. Obtain documentary support from the client as far as possible.
8. Make sure the client approves of and understands the Will fully prior to execution.
9. Under Hong Kong law, the testator must execute the Will in the presence of two witnesses present at the same time. The two witnesses should then sign in the presence of the testator.
10. After execution, the client should be advised not to tamper with the Will and be advised to periodically review the Will particularly if there is significant change in circumstances ie marriage, remarriage, childbirth.

PART 5 – ONE WILL OR MULTIPLE WILLS

1. The advantages and disadvantages of having one Will:

Advantages of having one will	Disadvantages of having one will
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

2. If a Will is limited to assets in a particular jurisdiction, it should not include a general revocation clause.
3. If the testator has assets or beneficiaries in multiple jurisdictions, it may be necessary to work with lawyers in those jurisdictions.

PART 6 – DOES A LIFETIME GIFT OR AN INTER VIVOS TRUST OVERRIDE THE NEED FOR MAKING A WILL

1. No, because if there are any assets not transferred at the time of the deceased's death, these will be disposed of in accordance with intestacy laws.
2. Depending on the type of asset, transfers as a gift or to a trust may carry stamp duty, capital gains or other taxes although currently there is no estate duty in Hong Kong.
3. Not all assets can be owned within an offshore structure or trust.
4. Lifetime gifts and inter vivos trusts are still important estate planning tools: immediate enjoyment by the beneficiary, not subject to the probate process, asset protection and tax planning benefits.
5. A trust is a relationship created at the direction of the settlor, in which the trustee holds the settlor's property for the benefit of the beneficiaries. There can be different types of trusts: Inter vivos, testamentary, revocable, irrevocable, discretionary, standby.
6. The settlor can retain some control by making investment decisions, but if the settlor retains too much control, the trust may be challenged and not ideal from the asset protection perspective.
7. A trust is usually accompanied by a non-binding letter of wishes, through which the settlor gives trustee guidance and recommendation for issues relating to administration and distribution of the trust assets.

8. The settlor can also appoint a trusted person to act as protector of the trust to make sure that the trustee properly administers the trust for the benefit of beneficiaries.
9. An inter vivos trust with a professional trustee should be considered in the following circumstances:
 - a. Tax planning and reporting
 - b. Complicated asset picture or holding structure
 - c. Avoid probate
 - d. Intend for assets to be held for a long time or for multiple generations
 - e. Many detailed instructions and conditions
 - f. Strong desire to preserve assets
 - g. Minor, disabled or vulnerable beneficiaries
 - h. Risk of potential disputes between beneficiaries

PART 7 – HOW TRUSTS AND WILLS INTERPLAY WITH ESTATE PLANNING INVOLVING CROSS-BORDER INTERESTS

1. Sometimes it is not effective to only have one Will – worldwide assets and beneficiaries who reside across multiple jurisdictions, conflict of laws and different tax regimes.
2. Work with legal/tax experts of other relevant jurisdictions to ensure estate plan is comprehensive and that the documents do not conflict each other.
3. Choosing the right trust structure depends on the tax considerations as well as a balance between flexibility and certainty.
4. It is common for a standby trust to be used in conjunction with the Will when the client wishes to continue managing his own assets, minimize trustee fees during his lifetime and avoid any transfer tax. The key disadvantage is that the assets to be transferred into the standby trust must first go through probate.

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Module Overview

Testamentary Issues - Wills

1. The reasons and need for making Wills and avoiding testamentary disputes
2. Can a Trust be used instead of a Will to avoid Probate?
3. The nature and use of limited Wills
4. The usual content of Wills
5. Information to be kept with Wills
6. Multiple jurisdiction Wills and probating
7. Testamentary trusts versus inter vivos trust
8. Standby trusts

Learning Outcomes

After completion of this module students will:

1. Understand the importance of making a will
2. Understand what is meant by testamentary capacity and be able to list the requirements for testamentary capacity
3. Be aware of and explain the need for care in the drafting of a will, in order to avoid disputes
4. List the information to be contained in a will
5. Understand the interplay between trusts and wills and be able to explain and compare the differences and where each is appropriate
6. Explain the issues that arise with multi jurisdiction assets and explain the need for multiple wills
7. Understand and explain the limitations of testamentary trusts/ standby trusts

1. The Purpose and Importance of Making a Will

1.1 A will or testament is the declaration, in a prescribed manner, of the intentions of the person making it (called the 'testator') with regard to matters which he/she wishes to take effect upon or after his/her death. Since a will only takes effect upon the death of the testator, it can be revoked any time during the testator's lifetime provided the testator is mentally capable of doing so.

1.2 A will sets out the disposition of the testator's assets as at his/her death. The testator's assets are known as (the 'estate' upon his/her death. The testator can specify in detail who can inherit which asset and in what proportion. Without a will, the deceased is said to have died "intestate" and the estate will be distributed in accordance with the laws of intestacy. These laws may be very different from the deceased's own wishes in terms of the manner of the distribution out of his estate. In some cases, the testator might want to benefit friends and/or charities and this intention can only be achieved if the testator leaves a will provided that his testamentary intentions do not fall within any restriction under the law where he dies domiciled eg. forced heirship or matrimonial regime rules.

1.3 A testator is able to appoint a trusted person(s) in his will to act as his executor(s) (to administer his estate) and/or to act as guardian(s) of his minor children after his death. If the testator's asset holding structure is complicated, he may not want to appoint family members and may consider

appointing professionals such as a lawyer or a trust corporation as his executors.

1.4 A well drafted will sets out clearly the testator's wishes and therefore minimizes doubt and confusion as to how the estate is to be administered and distributed. Where the size of the estate is significant and/or where the testator's family circumstances are complex, a well drafted will can reduce the risk of family disputes and claims eg in Hong Kong under the Inheritance (Provision for Family and Dependents) Ordinance (Cap. 481).

1.5 In Hong Kong, regardless of whether the deceased died testate (i.e. with a will) or intestate (i.e. without a will), a Grant of Representation will have to be obtained from the Probate Registry of the High Court before any of the deceased's assets in Hong Kong can be dealt with. The Grant of Representation is evidence of a personal representative's right to deal with the deceased's estate. Where the deceased died testate, the probate process is that the executors obtain a Grant of Probate. This is simpler and more efficient as compared with the probate process of an intestate estate where the administrators, usually the deceased's next-of-kin, are required to obtain Letters of Administration. Moreover, pursuant to Rule 38 of the Non-contentious Probate Rules (Cap. 10A), in some intestate cases (for example, where there is minority interest), the Registrar would require a guarantee to be provided by two Hong Kong residents or a corporation (insurance company) as a condition of issuing Letters of Administration in order to ensure due administration of the estate by the administrators unless such

application was made on behalf of the administrators by a Hong Kong practising solicitor or a trust corporation.

2. Intestacy and how to avoid it

2.1 If a deceased died intestate, the distribution of his estate will be in accordance with succession laws. In order to determine which law applies, the deceased's place of domicile must first be determined. Succession of immovable property (eg real estate) is governed by the law of the place where the property is located, regardless of the deceased's place of domicile. On the other hand, succession of movable property is governed by the law of the deceased's place of domicile.

2.2 Order of Priority in Hong Kong : Intestate Circumstances

In Hong Kong, the order of priority under the law relating to the entitlement of the deceased's estate is set out under section 4 of the Intestates' Estates Ordinance (Cap. 73).

The deceased died leaving a spouse only	The deceased died leaving a spouse and issue	The deceased died leaving a spouse, parents/siblings
Spouse receives the residuary estate (i.e. the remaining estate after deduction of debts, taxes and expenses)	Even if there are living parents or siblings – Spouse receives all personal chattels and HK\$500,000. After the deduction of HK\$500,000, the residuary estate will be divided half to the spouse and the other half equally between the issue (including illegitimate children and formally adopted children of the deceased).	Spouse receives all personal chattels and HK\$1,000,000. After the deduction of HK\$1,000,000, residuary estate will be divided half to the spouse and the other half equally between the parents. Siblings will only inherit the parents' share if both parents are not alive. Parents/siblings can only have a share if the deceased left no issue.

2.3 Order of Priority & Issues: Other Jurisdictions

Different jurisdictions have different succession laws. For example, in Mainland China, spouse, children (including, illegitimate children, adopted children and stepchildren who supported the deceased or were supported by the deceased) and parents, are in the first priority and will generally share the deceased's estate in equal shares.

In some jurisdictions, there is the concept of 'common marital property' (such as Mainland China and the United States) or forced heirship requiring a certain proportion of the estate to be left to the deceased's surviving spouse and/or children (such as France and Japan). These create layers of complication if the deceased had cross-border interests and died intestate.

2.4 Hong Kong Order of Succession: Intestacy Circumstances

In Hong Kong, the law also provides for the order of priority for grant in case of intestacy. Rule 21 of the Non-Contentious Probate Rules (Cap. 10A) provides that where a person dies wholly intestate, the persons having beneficial interest in the estate shall be entitled to a grant of administration in the following order of priority:-

- (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) brothers and sisters of the deceased or the issue of any deceased brother or sister of the deceased who has died during the lifetime of the deceased.

2.5 Estate Administrators

The maximum number of administrators of an estate in Hong Kong is four. Where there is minority interest involved, then at least two individuals must be appointed (section 25(1) of the Probate and Administration Ordinance (Cap. 10)).

When there is a dispute between persons entitled to a grant in the same degree (i.e. they are all equally entitled to apply as administrators of the estate), an application has to be made to the High Court to determine who will be appointed. The Hong Kong High Court also has the power to appoint a person who is not in the above order to administer the estate, for example, when the next-of-kin of the deceased who would otherwise be entitled to be appointed is under 21 years old or has insufficient capacity to administer the estate.

2.6 Avoiding Intestacy

To avoid intestacy and partial intestacy, the will needs to be clear and unambiguous, yet, not too restrictively worded. The will should have a residuary estate clause so that unspecified assets, future assets and lapsed legacies can be covered. The testator should also consider nominating substitute executors and contingent beneficiaries in the event that the first priority executors/beneficiaries predecease him.

3. Key Legal Elements in Will Drafting

- 3.1 A will is a written document that embodies the testator's testamentary intentions. The testator's wishes only take effect upon his death.
- 3.2 Section 4 of the Wills Ordinance (Cap. 30) provides that no will made by a person who has not **attained full age** (in Hong Kong this is age 18) 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.
- 3.3 The testator must have **testamentary capacity** to make a will. Testamentary capacity is not the same as mental capacity. Mental illness does not necessarily mean a lack of testamentary capacity. The leading case in this regard is *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. .
- 3.3.1 If a will appears **rational and contains no irregularities**, it will be presumed that the testator had testamentary capacity. In *Sharp and Bryson v Adam* [2006] WTL 1059, the judge held that the presumption of capacity was rebutted due to the testator's brain damage and his unusual decision to leave nothing to his children. The propounders (the executors seeking probate and validity) of the will were unable to prove that the testator had the requisite testamentary capacity. **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.

3.3.2 Testamentary capacity can fluctuate at different times. If a client appears to not have sufficient testamentary capacity, it might still be possible to take instructions from that client at a later date, a different time of day and/or a different environment. Will-drafters should assess a person's decision-making ability and not the decisions he makes. The law recognizes individuals' freedom to dispose of their assets based on their own values and beliefs. Section 3 of the Wills Ordinance provides that a person may by will, dispose of all property to which he is beneficially entitled at the time of his death.

3.4 Certainty is of vital importance when it comes to will drafting because when the will takes effect, the client is no longer around to explain or clarify his true intentions. The will-drafter must make sure that each clause truly reflects the client's wishes and that there is no ambiguity for the executor when administering the estate. Specific legacies and persons mentioned in the will (executors, guardians, and beneficiaries) must be clearly and unambiguously identified. If relevant, the manner, timing and/or division of the gifts also need to be set out clearly. As mentioned above, there should be a residuary estate clause to cover unspecified assets, future assets and lapsed legacies. The will should also cover contingent situations when an executor or beneficiary predeceases the testator. It is common for testators to nominate charities or trusts as the ultimate beneficiary. Again, such charities should be exactly named and such trusts clearly identified (make reference to the name of the trust, the settlor, the trustee and the date of the trust deed).

4. Rules on Taking Instructions and Executing Wills

4.1 In the context of will drafting, the client is always the testator, regardless of whether it is the testator who is paying the legal fees. The will-drafter should meet with the client and obtain instructions from the client directly. If the client has an earlier will, the will-drafter should review such earlier will and discuss with the client the reasons for making a new will.

4.2 When taking instructions, it is necessary to determine whether the client has testamentary capacity. In most cases, it is fairly obvious. But sometimes, it is necessary for the will-drafter to have a few meetings with the client especially when the client's wishes are complex and/or when the client does not seem very certain. The will-drafter must ensure that the client has full and accurate understanding, for example, by asking the client to paraphrase in broad terms the explanation given by the will-drafter. In the case of an elderly or ill client, obtaining corroborative medical evidence or diagnostic assessment by a psychiatrist is strongly advisable.

4.3 In addition to the distribution of the estate, the choice of executors is also an important discussion to have with the client. Executors are responsible for administering the estate (collecting the deceased's assets and paying any expenses, debts and taxes) and distributing the remaining assets in accordance with the will. A person must be at least 21 to act as an executor (section 39 of the Probate and Administration Ordinance (Cap. 10)). The testator can appoint more than one person but no more than four (section 25(1) of the Probate and Administration Ordinance). The testator should

consult the individuals to determine whether they are willing to accept this responsibility before naming them in the will. It is also important to consider whether the appointed individuals can work together as well as the appointment of substitute executors. Alternatively, the testator can also consider appointing professionals or a trust corporation if it is anticipated that the administration of the estate will be complicated.

4.4 If the client has minor children, he should be advised to appoint guardians in his will. Such guardian will have legal custody upon the testator's death but cannot displace the rights of a surviving legal parent. In the case of gifts to minors, the executors must hold the minors' share in trust at least until they attain the age of 18. Many parents state in their wills that a child should not receive the gift until a later age, such as 25, when it is more likely that the child will be mature enough to manage a large amount of wealth.

4.5 Always consider whether the client's wishes can be practically and effectively administered after probate. Sometimes the client's wishes cannot be achieved in the manner envisioned by the client. For example, if the client wants the estate to be held for a long period of time with many detailed guidelines and conditions, the use of a trust may be more appropriate. Another example is the bequest of an operating company.

4.6 If the client decides to disinherit spouse or children, the will-drafter should ask the client to explain further. A declaration to this effect should be included in the will. The will-drafter should not pass judgment but should advise the client as to the risk of potential dispute or claims against the estate. The testator's

spouse and minor children can apply to Court for a reasonable amount out of the estate to maintain their living under sections 3 to 5 of the Inheritance (Provision for Family and Dependants) Ordinance (Cap. 481). Similarly, mistresses and adult children (whether legitimate or not) can also make claims against the estate if they can prove they were being maintained by the deceased either wholly or substantially, immediately before the deceased's death. If successful, claimants are only entitled to reasonable financial provision for their maintenance. In determining what is reasonable, the Court will take into account all circumstances of the case including the size of the estate, financial resources of the claimants and the standard of living that the deceased provided for the claimants.

- 4.7 Where relevant, the will-drafter should obtain documentary support from the client as far as possible. For example, identification documents of the executors and guardians, full addresses of properties, annual returns or certificates of incorporation of companies, and account numbers.
- 4.8 After the will is drafted, a copy of the same should be sent to the client for review. Prior to execution, the will-drafter should meet the client again to confirm that the draft will reflects the client's true wishes and that the client understands the nature and effect of the clauses. Again, the will-drafter should be alert to the risk of undue influence especially when a third-party is present. The will-drafter should then ensure that the will is executed promptly, in particular the wills of elderly or ill clients. It was held in *Hooper v Fynmores* (2002) Lloyds Ref. PN18 that the delay caused by the will-drafter in failing to

ensure the expeditious execution of a will generated a liability to a disappointed beneficiary.

4.9 The legal requirements for executing a Hong Kong will can be found in section 5(1) of the HK Wills Ordinance.

The testator must sign the will in the presence of at least two witnesses present at the same time. The two witnesses should then sign in the presence of the testator. It is best practice for the testator and the witnesses to also initial at the corner of every page of the will. In accordance with section 10, beneficiaries under the will (and their spouses) should not act as the attesting witnesses or else, gifts to them under the will is forfeited. It may not be fatal if the legal requirements for execution are not complied with. Section 5(2) provides that 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.

4.10 Other jurisdictions may have different requirements with respect to execution so if it is not a Hong Kong will, it is important to consult the relevant expert before execution. Section 24 of the Wills Ordinance provides that a will shall be treated as properly executed if its execution conformed to the international 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.

4.11 After execution, the client should be advised not to tamper with the will in any way (for example, avoid applying paperclips and staples). Section 16 of the Wills Ordinance governs alterations in wills after execution. No obliteration, interlineation, or other alteration made in a will after execution shall be valid unless the signatures of the testator and witnesses are made in the margin or some part of the will opposite or near to such alteration or at the foot or end of or opposite to a memorandum referring to such alteration and written at the end or some other part of the will. Nevertheless, with respect to alterations to the will, the best practice is to execute a new will or codicil (if the amendments are minor and straight forward). A codicil is generally supplemental to a will previously made, being executed for the purpose of adding to, varying or revoking the provisions of that will. It needs to be executed in the same manner as a will.

b. 4.12 The client should be reminded to periodically review his will, particularly if there is significant change in family circumstances or asset holding structure, or if there is occurrence of a significant life event (such as marriage, divorce, childbirth, or immigration). Although unlike subsequent marriage, divorce does not automatically revoke a will, 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 of the Wills Ordinance). Therefore, to avoid partial intestacy and to give effect to obligations under

court orders, it is still strongly advisable for the client to review his will after divorce.

5. One Will or Multiple Wills?

5.1 Benefit of Multiple Wills

In some cases, it is beneficial for the testator to make more than one will. For example, where the testator has assets in different jurisdictions. Different jurisdictions can have very different tax, succession and probate laws. Having multiple wills covering assets in the different jurisdictions is useful because it allow simultaneous probate of the wills and allows each will to cater for any specific formalities and requirements of the jurisdiction.

The advantages and disadvantages are summarized below

Advantages of having one will	Disadvantages of having one will
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

5.2 Ensure non revocation

If a will is limited to assets in a particular jurisdiction, it should not include a general revocation clause. The limited will should clearly specify which jurisdiction it is limited to and that it only revokes previous wills limited to

the same jurisdiction. This is important when a testator updates his estate planning so that the new limited will does not revoke previous wills for assets in other jurisdictions.

5.3 Seek multi jurisdiction advise to ensure consistency

If the testator has assets in multiple jurisdictions, it is necessary to work with lawyers in those jurisdictions. In the case of a single will, lawyers from other jurisdictions should be consulted to make sure the will can validly cover the testator's worldwide interests. In the case of multiple wills, the will-drafter should work with lawyers from other jurisdictions to make sure that all wills are consistent and do not revoke each other.

6. Does a Lifetime Gift or a Inter Vivos Trust Override the Need for Making a Will

- 6.1 A lifetime gift or an inter vivos trust does not override the need for making a will because if there are any assets not transferred at the time of the deceased's death, these will be disposed of in accordance with intestacy laws. On the other hand, a residuary estate clause in a will covers all remaining assets of the deceased as at the date of death (i.e. such assets need not be specified). Moreover, depending on the type of asset, transfers as a gift or to a trust may carry stamp duty, capital gains or other taxes although currently there is no estate duty in Hong Kong. For example, a lifetime gift of Hong Kong stock is subject to a fixed duty of HK\$5 plus the full ad valorem stamp duty (0.2%) by reference to the value of shares transferred. In addition, not all

assets can be owned within an offshore structure or Trust. For example certain assets within PRC such as real estate may be prohibited from being owned directly by an offshore trust. In order to plan for succession of overseas real estate, a will may be the only solution.

6.2 Lifetime gifts and inter vivos trusts are still important estate planning tools.

- Contrary to transfers under a will, the beneficiary can enjoy the gift or benefit under the trust upon transfer.
- Lifetime gifts and inter vivos trusts are not subject to the probate process which would take 3-12 months or more.
- If properly drafted, an inter vivos trust can also carry additional benefits such as asset protection, succession and tax planning. It is particularly useful when there are young or incapacitated beneficiaries who are not able to manage their affairs or when the trust property is expected to benefit many generations (i.e. long trust period).
- Another common scenario is the use of a foreign grantor trust to avoid US federal gift and estate tax for non-US settlors who wish to benefit US beneficiaries.

6.3 A trust is a relationship created at the direction of the settlor, in which the trustee holds the settlor's property for the benefit of the beneficiaries. The trustee holds the legal title of the trust property, manages the trust, and carries out the settlor's wishes as set out in the trust deed. Trustees owe fiduciary duties towards the beneficiaries who hold the beneficial title of the trust property. This is the essential characteristic of all trusts but there are different types of trusts for different purposes.

6.4 Overview of some types of trusts

Inter vivos trust (living trust)

Created during the settlor's lifetime. Can be revocable or irrevocable. Ownership of the assets is passed when such assets are injected into the trust. The trustee can be given lots of discretion or the settlor can retain more control.

Testamentary trust (will trust)

Formed under the terms of the will. The settlor is the testator and the trustee is usually the executor (after the estate assets are collected and any debts/expenses paid). Ownership of the assets remains with the settlor testator until his death and the probate process must be completed before the trustee can benefit beneficiaries.

Revocable trust

This can be changed/revoked by the settlor at any time. Although this gives the settlor more flexibility and room to change his mind, it is less useful in terms of asset protection (for example, if the settlor is being sued, the trust assets may still be

Irrevocable trust

This cannot be changed/revoked after the trust deed has been signed. The beneficiaries' interests are more secured. Since the settlor gives up control, asset protection is more effective.

Discretionary trust

Under this arrangement, the trustee is given many powers and flexibility to deal with changes in circumstances such as death or divorce of a beneficiary, changes in tax regimes and legislations. Typically, there would be powers to add/remove beneficiaries. Distributions can be in different amounts, in different stages or contingent upon certain conditions.

Standby trust

The trust becomes operational when a defined triggering circumstance occurs. Before the trust operates, the settlor retains control of the assets. A standby trust is typically used in conjunction with a pour-over will and will operate upon the settlor's death, i.e. a testamentary trust.

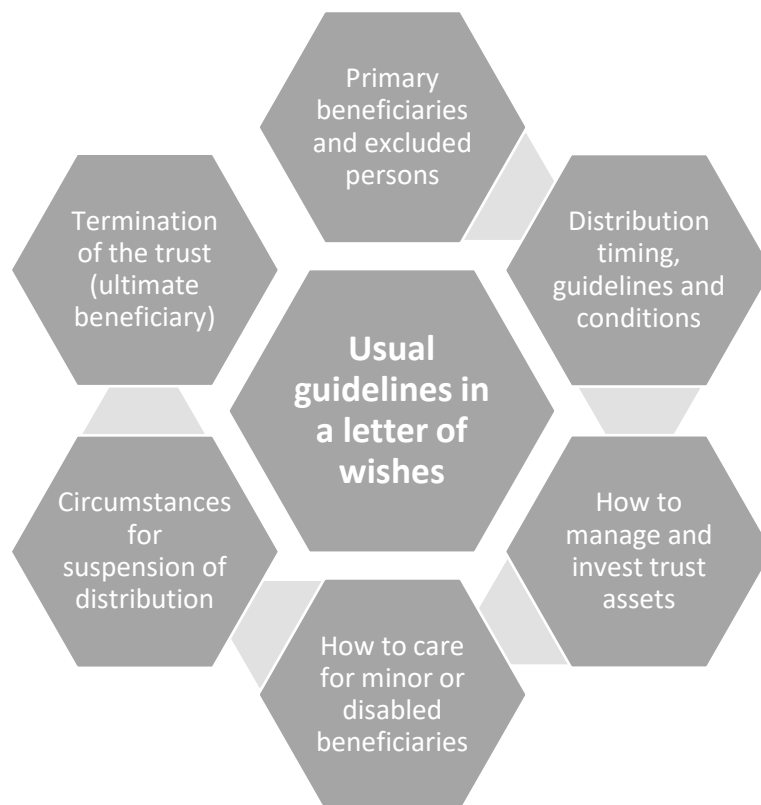
- c. The settlor can be a beneficiary under a trust but he must not be the trustee. In order for a trust to be valid, there must be a genuine alienation (separation from the settlor) of the trust assets. It is acceptable for the settlor to retain some control, such as investment decisions, but if the settlor retains

too much control, the trust may be challenged. In administering the trust, the trustee can take into account the settlor's guidelines and suggestions but they must still have independent thought and action when the trust deed empowers them with such discretion. The trustees must always act in the beneficiaries' best interests.

d. In *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 five discretionary trusts and thus the trust assets were not beyond the reach of creditors. The defendant was the settlor, protector and one of the discretionary beneficiaries. As protector, the defendant was able to veto all major decisions of the trustee, distribute income or capital of the trust funds, rewrite the terms of the trust deeds, appoint new discretionary beneficiaries, and to remove the trustee without cause. A key fact was that the defendant was able to direct all trust assets to himself and thus the terms of the trusts do not divest the defendant of the beneficial ownership of the trust assets. The judge found that at all material times, the defendant regarded all trust assets as belonging to him and intended to retain ultimate control and that the real purpose of the creation of the trusts was to hide such control. This was so even though the defendant claimed the ultimate purpose was to benefit his family and that his family members were also discretionary beneficiaries. Moreover, the defendant had a nominee on the board of three of the four trust companies. The nominees took the defendant's instructions at all times. The judge concluded that the defendant was the directing mind and will of each of the trust companies for all major decisions but he did not in fact exercise an independent intention.

The judge further considered that if he was wrong to hold that the defendant retained beneficial ownership of the trust assets, then the sham doctrine would apply.

e. A trust is usually accompanied by a document from the settlor to the trustee ('letter of wishes'). The letter of wishes sets out the settlor's intentions and should contain detailed guidance so that the trustee can carry out the settlor's wishes. Although letters of wishes are not legally binding, in practice, most trustees, especially professional ones, will follow the guidance contained therein. In this sense, the settlor indirectly retains some control.



f. It is also common for trust deeds to have provisions for protectors. The settlor can appoint a trusted person to act as protector of the trust to make sure the

trustee properly administers the trust for the benefit of beneficiaries. Typically, the protector is able to change/remove the trustee, consent or veto the exercise of certain trustee discretions (or at least get notified), and give directions to trustees. In many cases the settlor appoints himself as the protector and a trusted person as successor protector. This can ensure that there is always someone to monitor the trustees and look after the beneficiaries' interest even after the settlor passes away or becomes mentally incapacitated. As explained in the case above, the protector should not have too many powers and the trustee should be able to exercise independent discretion when such discretion is conferred by the trust deed.

6.5 Inter vivos versus Testamentary trust

An inter vivos trust with a professional trustee can be expensive as the settlor needs to pay a set-up fee and periodic management/administration fees to the trustee. There can also be additional legal costs for the professionals eg. lawyer or trustee to review the trust deed and ensure alignment of the will. A testamentary trust is less expensive and easier to prepare, however, an inter vivos trust with professional trustees should be considered in one or more of the following circumstances:

- Tax planning and reporting, in particular when multiple or complex tax jurisdictions are involved.
- Complicated asset picture/holding structure that is difficult for lay executors to manage.
- It is anticipated that the probate process will take a long time (for example, probating in multiple jurisdictions where there are assets) and there is concern

that the beneficiaries will not be able to financially maintain themselves during that period.

- It is expected that the assets will be held for a long time and possibly multiple generations. The trust can bypass the risk of the executors dying or becoming mentally incapacitated.
- There are many detailed instructions and conditions as to when and how a beneficiary should take benefit, which may be too burdensome for lay executors to manage.
- There is risk of creditor or matrimonial claims and a strong desire to preserve assets.
- There are minor, disabled or vulnerable beneficiaries who need to be maintained in specific ways in different stages of their lives.
- There is risk of potential disputes between the beneficiaries, which non professional executors may not be able to handle.

7. How Trusts and Wills Interplay With Estate Planning Involving Cross-Border Interests

7.1 Estate planning is more complex when cross-border issues are involved. There is an increasing trend of clients with worldwide assets and/or intending to benefit beneficiaries who reside across multiple jurisdictions. There are also cases when clients are motivated to devise or revise their estate planning pending immigration. In such cases, the conflict of laws and different tax regimes across the jurisdictions render it ineffective to only have one will. When interviewing the client, the will-drafter must ascertain what are the relevant jurisdictions, what are the ownership structures of the assets and their rough values, what are the client's objectives and family circumstances

and what are the foreseeable changes in the nationality/domicile/habitual residence of the client and/or beneficiaries. In each country where the client has assets, the will-drafter must additionally check (and consult relevant experts) whether there are matrimonial regime issues, formal validity issues, tax issues and administrative issues. It is necessary to work with advisers and lawyers in different jurisdictions to make sure the estate plan is comprehensive and that the documents do not conflict each other.

- 7.2 Often, clients with cross border assets would need both a trust and one or multiple wills depending on the jurisdictions involved. Whether the trust should be revocable or irrevocable depends on the requirements under the relevant tax regime as well as the balance between tax planning and asset protection. In terms of how discretionary the trust needs to be, again, it depends on the relevant tax regime as well as the balance between flexibility and certainty.
- 7.3 It is common for a standby trust to be used in conjunction with the will when the client wishes to continue managing his own assets, minimize trustee fees during his lifetime and avoid any transfer tax. Under such an arrangement, after probate, the executor will inject the residuary estate or specific legacy into the standby trust upon the client's death. During the client's lifetime, he only needs to pay the set-up fee of the standby trust and is free to manage, invest, and dispose of his assets in any way. After the client's death and the executor's transfer of the residuary estate/specific legacy to the trustees, the residuary estate/specific legacy will form part of the trust fund and the trustees will commence managing/administering the trust fund for the benefit of the beneficiaries in accordance with the trust deed and the letter of wishes.

Although there are cost and control advantages of a standby trust over an inter vivos trust, the key disadvantage is that the assets to be transferred to the standby trust must first go through probate.

-END-

REVIEW QUESTIONS

1. Under which circumstances is a will revoked?
 - i. The testator destroys the will
 - ii. The testator makes a new will
 - iii. The testator gets divorced
 - iv. The testator gets married
 - v. Birth of the testator's child
 - vi. Death of a beneficiary under the will
2. The deceased's place of domicile was Hong Kong. He died intestate. The succession laws of which jurisdiction applies with respect to the deceased's following assets?
 - i. Bank accounts in Mainland China
 - ii. Shares in a British Virgin Islands company
 - iii. A flat in London
 - iv. Antique collection in Hong Kong
 - v. Land in the United States
3. Mr. and Mrs. Chan were injured in a car crash. Mrs. Chan died on the way to the hospital and despite the doctors' best efforts, Mr. Chan died in the Emergency Room. Mr. Chan died intestate leaving a sister. Mr. Chan also had a mistress and they had two children together. Is Mr. Chan's sister entitled to Mr. Chan's estate under intestacy? How about Mr. Chan's mistress? Would the answers be different if Mr. Chan and his mistress did not have children?
4. How can the following drafting be improved?
 - I. I give 1,000,000 to each of my close friends.
 - II. I give my home to my wife's trust for the benefit of our children.
 - III. I appoint my husband and my sister to be the executors of this my will.
 - IV. My executors shall hold my residuary estate for my children absolutely

- V. provided that if all of my children shall predecease me, then for
- VI. charities dedicated to the welfare of elephants.

5. Mrs. Wong recently suffered from a stroke and can no longer speak. Mrs. Wong is being cared for by her daughter, Molly. Molly told you that Mrs. Wong's in poor health and that she can communicate Mrs. Wong's wishes to you on her behalf.

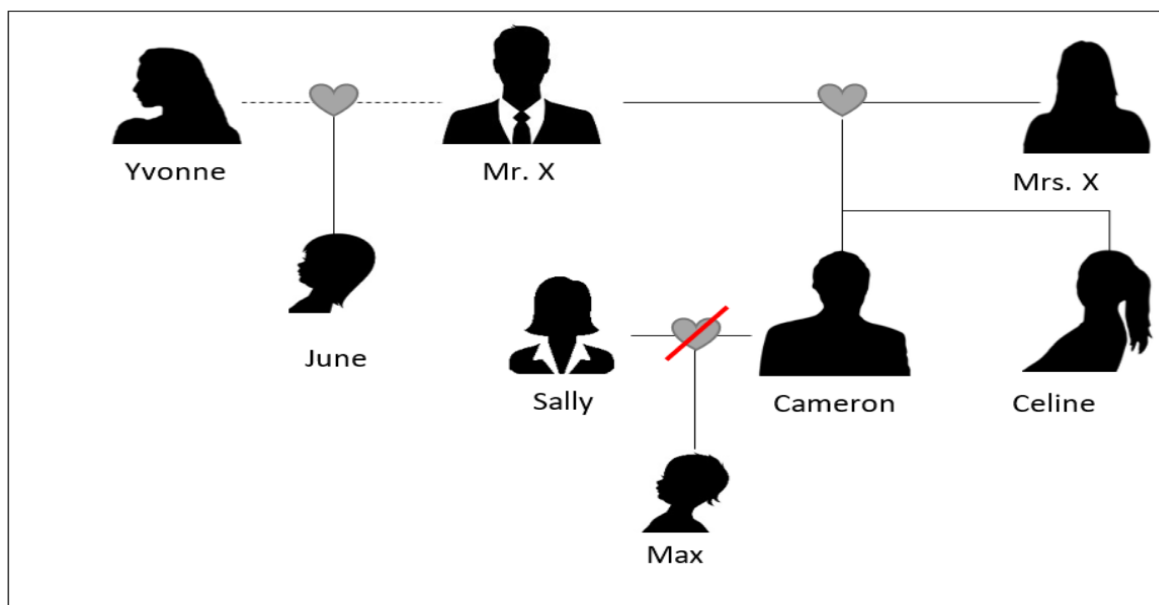
- i. Can Mrs. Wong make a will?
- ii. If so, how would you help Mrs. Wong to communicate her intentions and minimize the risk of the will being challenged?

6. Fill in the blanks (refer to section 6)

The _____ ascertains and collects the testator's estate. The estate, after payment of debts, expenses and/or taxes and after disposal of specific legacies under the will is called the _____, which can also be called the _____. While the executor holds the _____ for the beneficiaries in accordance with the will, he is referred to as the _____. Such trusts created under the will are called _____.

7.

Case Study – What are your suggestions for Mr. X?



Mr. X is a Hong Kong tycoon. He has assets all over the world, including accounts in multiple jurisdictions and landed properties in Hong Kong, the United Kingdom, the United States and France. Mr. X had been married to Mrs. X for 30 years. Together, they have a daughter, Celine, and a son, Cameron.

Celine studied in the United States, found employment there and became a United States citizen. Celine is a big spender and has a tendency to fall for “bad boys”. Mr. X wants to benefit Celine but he is worried that she is not financially responsible enough to inherit a large amount of wealth. He is also concerned that Celine would marry someone untrustworthy.

Mr. X had been training Cameron to be the successor to his businesses and he envisions leaving the majority of his assets to Cameron. Cameron is married to Sally and they have a 5-year-old son, Max. Mr. X is very fond of Max because he is a highly intelligent child.

A year ago, Mr. X had an affair with Yvonne. Yvonne is Sally’s sister whom Mr. X met at Sally’s birthday party. Yvonne gave birth to a daughter, June, who unfortunately has down syndrome. Yvonne pleaded Mr. X to divorce Mrs. X and marry her instead but Mr. X refused. Yvonne then became diagnosed with depression and is suicidal. Sally was furious and extended her anger towards Cameron. After many arguments, Sally decided to divorce Cameron. This in turn angered Mr. X who wants to make sure that Sally cannot touch Cameron’s inheritance. However, Mr. X still wants to benefit Max and ensure that he receives the best education.

Mr. X wants to take care of June and accommodate her special needs. Mrs. X reluctantly agreed but threatened to divorce Mr. X if he does not sort out his estate planning. Mr. X is to ensure that the legitimate children are the primary beneficiaries to his estate and that Yvonne would not be able to receive anything.