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Li 1 and Qin: Judicial Recognition of Testamentary Trusts in China

Sherlynn Chan, Lusina Ho, Hao Wang

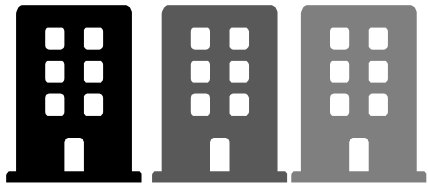
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FACULTY OF LAW
THE UNIVERSITY OF HONG KONG

The will

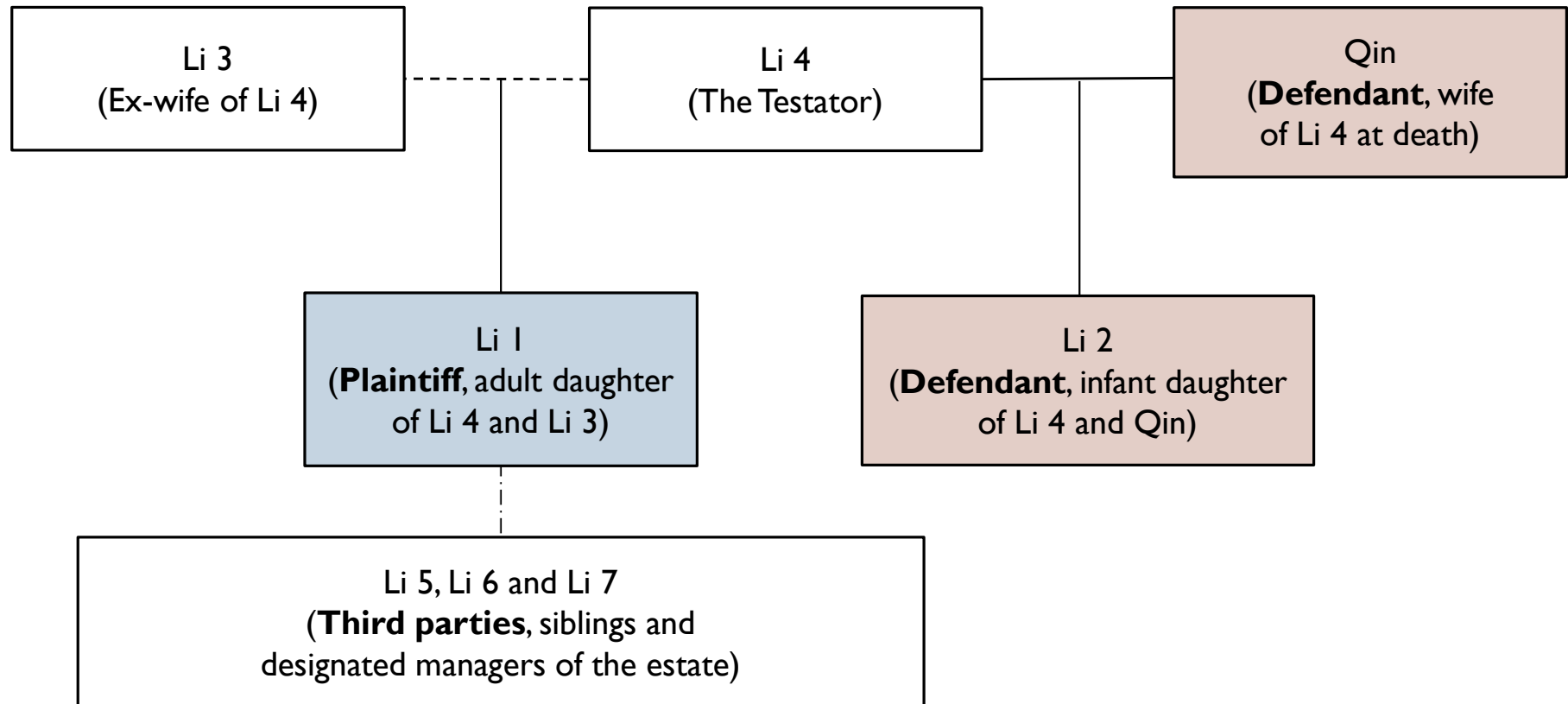
1. Properties held in the testator's name (¥14m) :



Not disposed by the will

- ## 2. Holographic will to set up a family foundation managed by 3 siblings:
- to acquire and hold in perpetuity ('never to be sold') a ¥6.5m real estate in Shanghai for descendants;
 - to pay for the expenses of wife (Qin) & infant daughter

Dramatis personae



The Dispute – the adult daughter

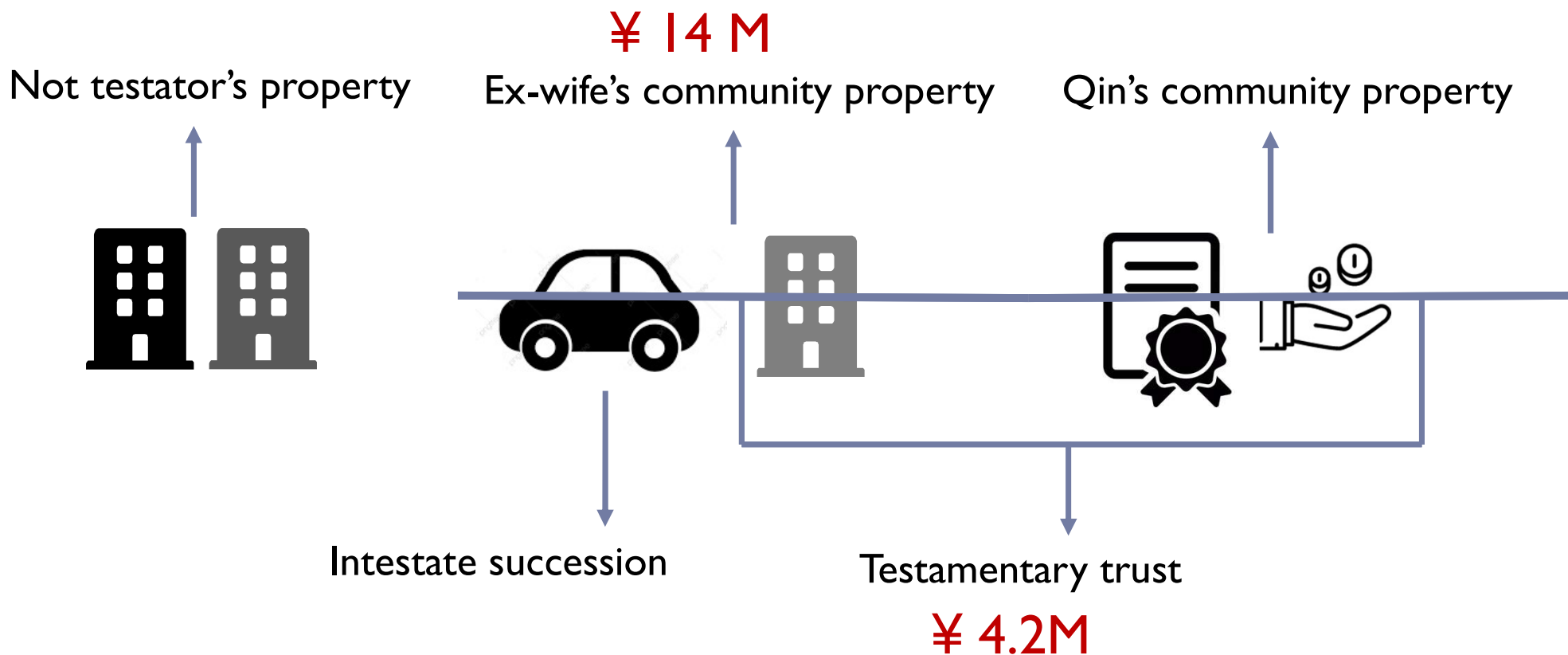
1. Community property

- Arts 17 & 19, Marriage Law: unless agreed otherwise, properties acquired during marriage are jointly owned by spouses in equal shares

2. Prenuptial agreement

- Deceased had a prenuptial agreement with Qin to exclude community of property with her

First Instance Decision – the estate



First Instance decision - creation of a trust

1. Despite the reference to a family foundation, testator intended to create a trust, because:
 - Intention to segregation ownership from beneficial enjoyment
2. Compliance with formality requirements :
 - in writing + by instruments such as will (art 8, Trust Law)
 - Holographic will: signed by testator with date of execution (art 17, Succession Law)

Appellate decision

1. Endorsed first instance decision
2. Set out the trustees' duties and liabilities, as per the Trust Law:
 - Duties: comply with terms of the trust; act in the best interest of the beneficiary, honestly, earnestly, carefully and effectively
 - Liabilities: restoration of trust property & compensation of loss

Salient points about the case

1. Arrangement characterised as a trust even though testator provided for a foundation
2. Use of judicial decision to overcome lack of guidelines in the Trust Law
 - ▶ Why?
 - ▶ Art. 13, Trust Law

Article 13, Trust Law

For the creation of a testamentary trust, the provisions in the Law of Succession concerning testamentary succession shall be observed.

Where the person designated in a testament refuses or is unable to act as a trustee, the beneficiary shall appoint another person as the trustee; where the beneficiary is a person who has no civil capacity or limited capacity for civil conduct, his guardian shall appoint the trustee on his behalf. If there are other provisions in the testamentary instrument for governing the appointment of a trustee such provisions shall prevail.

Salient points about the case

3. Courts readily accepted a trust of land in perpetuity for living descendants from time to time
 - ▶ In Hong Kong, would have been a tso
 - ▶ How to create a life interest with remainderman in Chinese trust law?



PRC Legal Key Points

Senior Partner Hao Wang
RayYin & Partners PRC Lawyers



1

Community Property Regime

- ① Attitude in new Civil Code
- ② Nuptial agreements are binding
- ③ Offshore trust companies ignore the rule

2

Holographic Will Formality

- ① Written by the testator
- ② Formal expression of property disposition
- ③ Signed by the testator
- ④ Exact date



3

Trust of Real Property

- ① Practical hindrance: tax
- ② Not too much worry about land use rights
- ③ Perpetuity and Accumulation not a concern yet

4

Cross border Estate Plan

- ① Case about an Italian lady

➤ **Forthcoming article**

L Ho & H Wang, 'Judicial Recognition of Testamentary Trusts in China', Sept 2020, STEP Journal.

Email: wh@rayyinlawyer.com

Implications of the Decision of Li 1 and Qin to Hong Kong Practitioners

Sherlynn Chan, Partner, Stevenson, Wong & Co.



Socio-economic linkage

In the past two decades, there has been a significant increase in socio-economic linkage between Hong Kong and the Mainland:

- ▶ **720,000** daily average number of cross boundary passenger trips made in 2017. **30%** increase compared to 2007.¹
- ▶ **Over** 155,000 Hong Kongers aged 18 and over had taken up residence in the Mainland in 2009. **40%** increase from 2006.²

¹Cross-boundary Travel Survey 2017 by the Planning Department

²Thematic Household Survey Report No.38 by the Census and Statistics Department April 2009

Socio-economic linkage

In 2000, about 43% of Hong Kong residents intended to buy properties in Shenzhen.¹

Over 56% of persons aged 55-65 and over 60% of persons aged 65 or above were interested in staying in GBA Mainland cities.²

In December 2017, Mainland Chinese buyers contributed 25% of the values of the total transactions in the Hong Kong private properties market.³

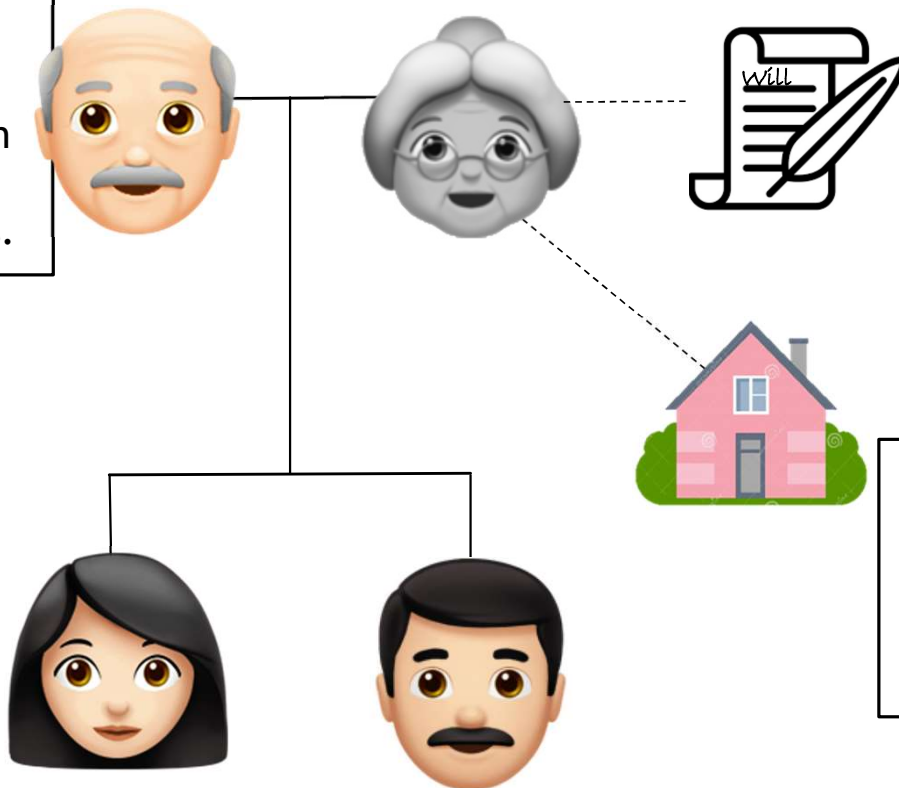
¹ Working Paper No.8 published by the Planning Department in September 2001Thematic

² Household Survey Report No.71 by the Census and Statistics Department in June 2020

³ CEIC Data reported by Centaline Property Agency (Mar 2007 to Dec 2017)

Hong Kong residents with Mainland properties - probate and succession perspective

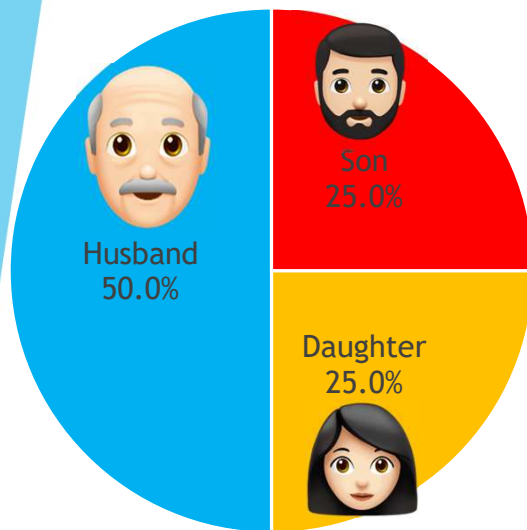
The Deceased and her husband are both HK residents. They married in the 1960s and have 2 children born in the 1970s.



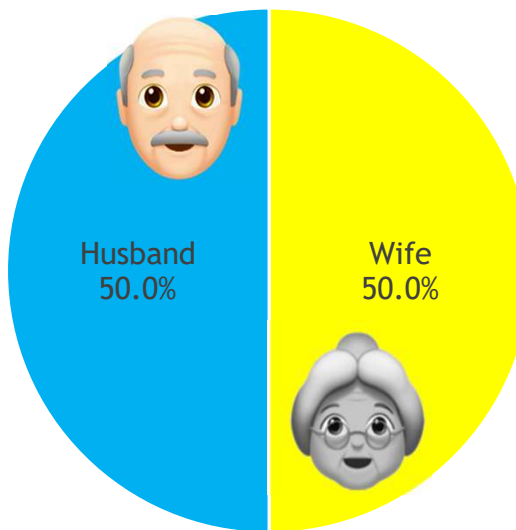
The Deceased made a Hong Kong Will in 1990 dealing with her properties and assets “wheresoever and whatsoever situated” leaving 50% of her estate to her husband and the remaining 50% to her 2 children in equal shares.

Subsequently, the Deceased bought two properties in her sole name in Shanghai and Beijing in 2003. She passed away in Hong Kong in 2010.

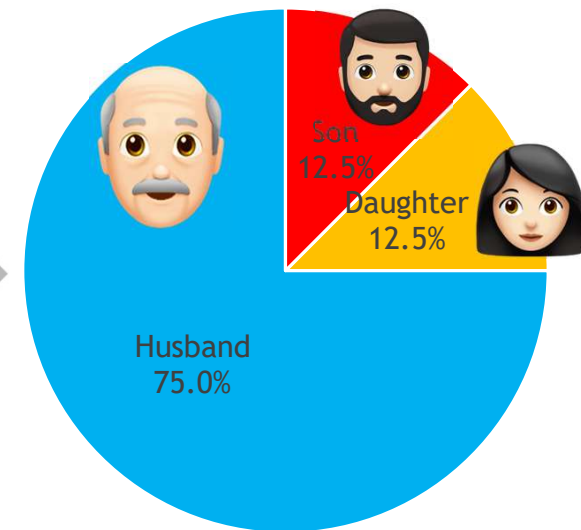
HK Will



Doctrine of Communal Property in Mainland



Outcome of PRC Property Ownership



PRC Court recognised the Deceased's HK will and the relevant inheritance law, after applying the doctrine of "communal property".

Therefore, Husband owned 75% of the deceased wife's property whilst each child received 12.5% share.

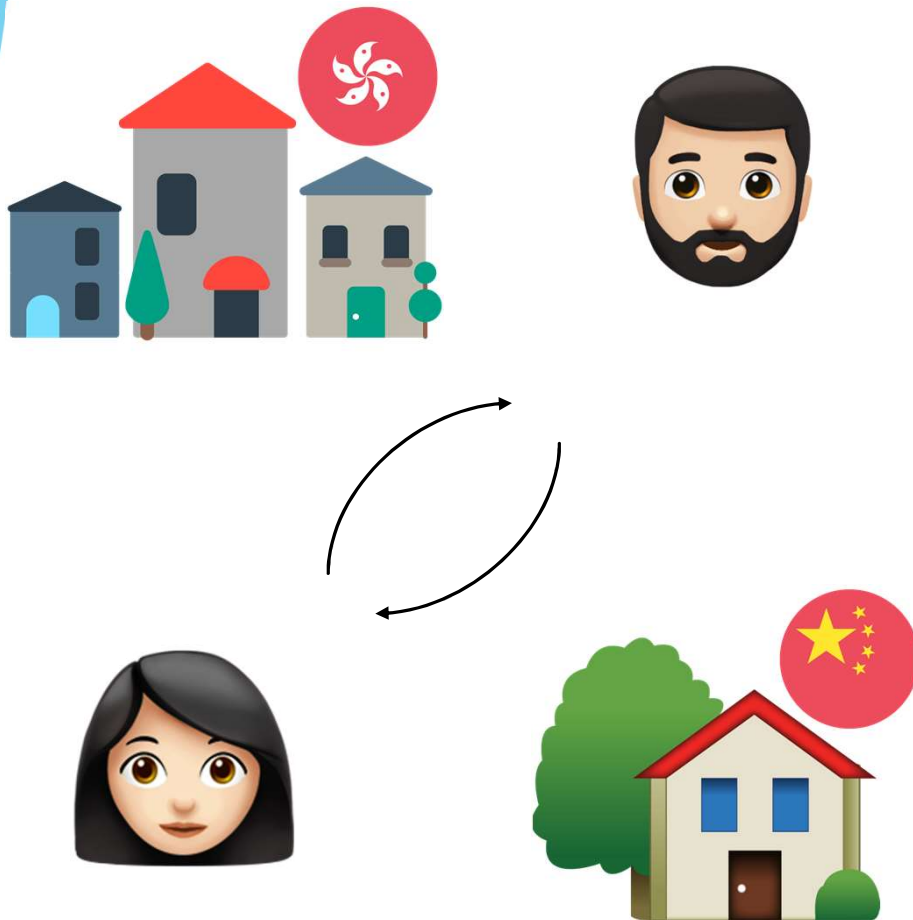
Hong Kong residents with Mainland properties - matrimonial division of property



Husband and Wife were married in Hong Kong in the 1970s. They jointly owned cross-border businesses and over 25 properties in both HK and the PRC after marriage.

In 2015, their relationship broke down and divorce proceedings were initiated in Hong Kong.

Parties reached a complex settlement involving division of the businesses and properties in Hong Kong and the PRC.



Execution of the Settlement Order involves:

- Share transfer in Hong Kong and the PRC.
 - Property transfer in Hong Kong and the PRC.
-
- Whilst Ancillary Relief Orders made in Hong Kong's Family Court are not binding on PRC Court, they are binding on Hong Kong residents.
 - Wife had to seek further directions from the Family Court in Hong Kong to enforce the Ancillary Relief Order.
 - Husband was ordered to execute China-attested powers of attorney in favour of Wife to handle the transfer procedure in the PRC.

Thank
you



Sherlynn G. Chan
Sherlynnchan.office@sw-hk.com

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