香港法律改革委员会

研究报告书

遗嘱、未留遗嘱情况下的继承以及死者家属和受供养人士的供养问题

（论题十五）

香港法律改革委员会谨提交“遗嘱、未留遗嘱情况下的继承以及死者家属和受供养人士的供养问题”研究报告书，本委员会委员名单如下：

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目录

说明

本报告书所引用的所有法例，仅是法例的译本，旨在供读者参考。译文虽已力求准确，但如须知悉权威性及有法律效力的条文，仍须参阅英文原文。

引言

1. 1984年9月3日，首席按察司与律政司根据1980年1月15日总督会同行政局赋予的权力，以及其后在1983年6月7日所作的有关修订，提交下列问题予法律改革委员会（“委员会”）研究，并作出报告：

“遗嘱法

1. 鉴于下列情况，遗嘱法应否作出更改：

(a) 英国在1982年对司法执行法第IV部条文已予修改；及

(b) 华裔立遗嘱人对按照遗嘱条例（香港法例第30章）第5(2)条而订立遗嘱的需求。

2. 1973年10月26日，各国在华盛顿缔结‘就国际遗嘱形式制定统一法公约’，香港是否有必要或需要就国际遗嘱制定法律，以符合该公约附件规定？

无遗嘱者继承法

3. (a) 以一般情况而言，现行无遗嘱者继承法是否令人满意？是否有必要或需要更改这方面的法律？

(b) 特别是，现行法律规定，如无遗嘱者的土地属于新界条例（香港法例第97章）第II部适用的土地，则须另行分开继承，此情况是否令人满意？

死者家属和受供养人士的供养问题

4. 关于供养死者家属和受供养人士，包括提供足够赡养费及维持生计方面的法律，是否令人满意，或是否有需要更改？”

工作概述

2. 1984年10月5日，法律改革委员会委任一个小组委员会，研究上述问题，主席由委员会其中一名成员麦雅理先生（Mr. Brian McElney JP）担任，其他小组委员计有：

艾文士教授 （Professor Dafydd Evans）	香港大学法律学院
梁爱诗女士	洗秉熹律师行合伙人
彼得维吾博士	的近律师行合伙人
黄殿春医生	政府合署牙科诊所牙医

3. 1986年10月，小组委员会完成一份工作报告，交予本报告附录2名单上各人士及机构传阅，并吁请他们提供意见。小组委员会在考虑到各方意见后，已将适用的意见列入初步报告内。委员会于其第56、第58及第59次会议上审议该份初步报告，并提出意见。小组委员会根据那些意见而对该报告作出修改，委员会于第67、第68及第69次会议上重新审议经修订的报告。

4. 我们谨藉此机会对小组委员会各成员深表谢意。在过去几近5年内，他们不辞劳苦，献出宝贵时间和专长。同时，我们亦要对工作文件提出意见的人士，表示致谢。此外，期间亦有不少法律改革委员会秘书处人士，协助小组委员会工作。此包括甘明智先生（Mr. Geoffrey Grimmett）、乐以德先生（Michael Darwyne）、单格全先生（Michael Scott）、布奕堂先生（Mark Berthold）及颜倩华女士（Michelle Ainsworth），我们在此亦一一表示致谢。

第 1 章　背景

1.1　香港最近一次对继承法作出重大修订是于 1970 及 1971 年。当时制定了涉及家庭、财产及继承的法律。以继承法来说，1970 年制定了遗嘱条例（香港法例第 30 章），并于 1971 年生效。同年，亦制定了无遗嘱者遗产条例（香港法例第 73 章）及遗属生活费条例（香港法例第 129 章）。此外，亦制定了遗嘱认证及遗产管理条例（香港法例第 10 章），由于这条例祇涉及遗产管理程序，本报告不拟赘述。

1.2　平情而论，这三条例运作时，并未有引起法律执业方面重大问题，而且亦未有大量关于这些条文诉讼的报导。根据这些条例而提出的申请，多在内庭聆讯，而不是在公开法庭审讯。但多年来亦出现了一些矛盾怪异现象，显示现今对这些条例作出检讨，亦合时宜。其中某些现象是由于采纳整套英国法律引用于香港，而未有足够考虑到本地情况所致。此外，亦有由于条例本身所引起的问题。

1.3　对于影响整个社会的法律，固然应时加检讨，继承法亦是一样。社会日变，人的期望亦时刻在变，法律亦必须迎合这些改变。但另一方面，人必须依据他们所认识的法律而为他们的事务及家属作出安排，如果法律更改频仍，迭作重大变更，这种做法似亦不恰当，负责改革法律的人士必须提高警觉，经常留意法律条文或有未能迎合社会人士需求的情况出现，这原因有二，一是由于法律制定初期未有全盘考虑到在社会方面的运作，一是法律已跟不上社会方面的改变。

1.4　香港无论在种族或文化上，都是多元化的社会，要为香港制定一套一般性的法律，大致公平地适用于不同组别的人士，实有特别困难。有关家庭及财产法的困难至为明显，较其他方面的法律有更多问题。1971 年 10 月 7 日前，香港的法律制度既奉行英国法，但同时，在若干程度上亦承认某些中国习俗已在香港植根，因此，香港不单承认旧式婚姻完全有效，而且事实上，一种由这种习俗演变而成的新式婚姻——中国新式婚姻，即将农村婚礼搬移至城市举行的婚姻，亦获得全面承认。同样，虽有法律规定无遗嘱时财产分配的办法，但死于香港的中国人，亦获准根据习俗分配其遗产。此外，虽然关于遗嘱的基本法律源自 1837 年英国遗嘱法，华裔立遗嘱人虽未有遵循正式规定而立遗嘱，但其遗嘱亦获得法庭认证。1970 及 1971 年，有关法律作出基本更改，以致任何人士，不论属何种族、文化或宗教背景，都有统一的个人法律可遵奉。

1.5 自那次重大改变后，施行距今已有十九年，现在亦须对一些基本问题重新审议。

1.6 委员会亦留意到自1972年对婚姻诉讼条例（香港法例第179章）作出各种修订以来，离婚个案大增，香港不少家庭的生活模式也大受影响。当年其中一项修订规定：提出离婚的唯一理由就是婚姻已破裂至无可挽回的程度（香港法例1972年第33号第3条、香港法例第179章第11条）。

1.7 至于须审议本港继承法的近因，就是英格兰及威尔斯在1982年通过司法执行法，其中第IV部是关于遗嘱的，并对1837年遗嘱法作出若干修改，该法是香港遗嘱法所依循者。

国际人权

1.8 1976年5月20日，英国通过采纳“经济、社会与文化权利国际公约”和“公民权利和政治权利国际公约”。除作若干保留外，英国亦于同日将该两份公约条文的适用范围，扩至香港。所保障的权利之中，其中“人不应受到歧视”一条在现阶段来说最为有关。例如，根据现行法律，在继承权方面，非婚生子女较婚生子女处于不利地位，委员会建议增加国际公约所规定的权利。

非婚生子女：1985年10月市民意见调查

1.9 委员会在提出某些建议时，亦曾考虑到1985年的“市民对非婚生子女态度意见调查报告”（以下简称“市民意见调查报告”）所发表的结果。该报告是由政务总署社区资讯科在1985年10月编制。当时聘请一间私人调查机构“市场策略研究中心”（“研究中心”）进行调查，调查工作于1985年8月进行。根据研究中心所搜集的实地调查所得，政务总署编制了一份“市民意见调查报告”，载于附录1。

1.10 目前，根据无遗嘱者遗产条例（香港法例第73章）规定，非婚生子女及曾与死者同居的受供养人均无权根据该条例领取任何遗产。他们亦不能根据遗属生活费条例（香港法例第129章）申请从死者遗产中拨给生活费，原因为他们不属于条例内所界定的“受供养人”。研究中心为政务总署设计调查时，即针对该两条例，希望确知市民对非婚生子女及其母亲应享权利的意见。

1.11 调查结果显示，今日香港市民对这问题持有开明态度。大多数人(86%)同意，非由合法妻子所生的子女应有权从死去父亲的遗产中申领生活费。略少于以上的大多数，即83%的人士认为如果非婚生子女母亲的生活费，一向由他们父亲生前供养，则应有权从其父亲的遗产中申领生活费。至于平等继承权这一般性问题上，十居其七认为非婚生子女应与婚生子女同等享有继承其父亲遗产权利。

1.12 超过半数人士(62%)认为，给与非婚生子女权利不会导致鼓励婚外情。

1.13 有关搜集资料的方法、抽样调查的规模、反应率及个别调查结果经载于附录1市民意见调查报告内。

本报告的编排

1.14 论理上，我们须首先研究遗嘱法，继而无遗嘱继承法，最后研究遗属生活费问题，本报告第1、第2和第3部就是按这次序探讨一下我们研究范围内着令我们审议的三部分问题。至于在本报告第4部，本委员会提出应否将各条例合而为一及作出修订。第5部研究剥夺权利问题，最后，在第6部，委员会将各建议撮述，以便省览。

第 I 部　遗嘱法

第 2 章　遗嘱：引言

遗嘱研究范围

2.1　本部研究范围涉及 1982 年英国司法执行法第 IV 部，香港法例第 30 章遗嘱条例（在本部内以下简称“本条例”）第 5(2)条“华裔遗嘱”及国际遗嘱。

2.2　本报告此部分按以下顺序研究下列题目：形式及签定；遗嘱条例的修订；纠正及释义；遗嘱的登记及国际遗嘱；以及并无立遗嘱能力的精神病人所遇到的困难。

遗嘱：形式及签证

现行法律

2.3　条例第 5 条规定如下：

> 5. (1)除第(2)款另有规定外，遗嘱应按照下列规则以书面签立，否则无效——
>
> 规则 1—遗嘱应由立遗嘱人，或由立遗嘱人指定的其他人士，在他面前并遵照他的指示，在遗嘱的结尾处或末端签署。
>
> 规则 2—上述签署应由立遗嘱人在两名或两名以上证人同时在场时签立或承认，而每一证人应签名见证立遗嘱人的签署，或见证代立遗嘱人在立遗嘱人面前的代签，见证形式则不论。
>
> 规则 3—如立遗嘱人或其代签署人的签署是在遗嘱的末端，或紧随遗嘱末端之后、之下、之侧或相对地方，而从遗嘱表面上看来，明显地立遗嘱人有意藉该签署而使该份遗嘱有效，成为一份由他签立的遗嘱。

规则 4—在不妨碍规则 1 的一般性原则下，遗嘱的效力不应因下列情况而受影响——

(a) 立遗嘱人的签署不是尾随或紧接遗嘱的结尾处或末端；

(b) 遗嘱最后的文句与署名之间留有空隙；

(c) 署名——

(i) 夹杂在署名前条款或见证条款文句之间；

(ii) 尾随见证条款或在该条款之后或之下（不论中间是否有空隙）；或

(iii) 尾随其中一名证人的姓名或在证人姓名之后，之下或之侧，或

(d) 署名是在载录遗嘱各纸张中的一面、或一页或其他部分，而该面、该页或该部分并无载有其他条款、段节或处置立遗嘱人遗产的文句；或

(e) 遗嘱在署名页的前一面或前页之上或底部，或在署名页的其他部分，似乎留有足够空间供立遗嘱人签署。

规则 5—于署名之下或之后的任何有关财产处置或指示的条款均属无效，而在署名后加插的任何有关财产处置或指示的条款亦不能藉该署名而生效。

(2) 华裔立遗嘱人如全部或相当大部分用中文书写遗嘱，并在遗嘱上签署，则即使并未有按照第(1)款的规定签立，仍属有效及作为正式签立论。

2.4 我们深信必须审慎研究现行本条例第 5(1)条关于签立有效遗嘱所制定的规定所根据的基本原则。

2.5 本条例第 5(1)条的规定，是根据 1837 年英国遗嘱法而制定。该遗嘱法并未载有类似本条例第 5(2)条有关可免却遵守立遗嘱的规定。司法执行法第 17 条则将英格兰及威尔斯须遵守的 1837 年遗嘱法的规定放宽，条文如下：

17. 1837 年遗嘱法第 9 条将由下列条款取代：

9. 除非遗嘱按照下列规定签立，否则无效——

(a) 遗嘱以书面并由立遗嘱人签署，或由他人名及见证在立遗嘱人面前遵照他的指示签署；及

(b) 立遗嘱人似乎有意藉该署名而使该份遗嘱有效；及

(c) 上述署名是立遗嘱人在两名或两名以上证人同时在场时签立或承认；及

(d) 每名证人须在立遗嘱人面前（而毋须规定在另一名证人面前）——

(i) 见证及在该份遗嘱上签署；或

(ii) 承认其署名；

但见证形式则不论。

司法执行法第 17 条的效力

2.6 司法执行法第 17 条所作出的主要更改是不再强制规定立遗嘱人须在遗嘱上某一位置签署，但规定表面上看来立遗嘱人有意藉该署名而使其遗嘱有效。因此，理论上可在遗嘱上任何位置签署。这似乎是一较合情理的条文，可避免法庭在审理立遗嘱人在“不正确”位署上签署的遗嘱时所作出近乎奇异的判决。*Re Beadle* 一案 [1974] 1 All ER 493）即可作为例子。该名女立遗嘱人向两位朋友默读其拟立遗嘱的内容。在阅毕该份遗嘱后即在右上角签署。其中一位朋友亦在遗嘱上签署，然后放入信封内封密，立遗嘱人并在信封上写上“我，E.A. Beadle 的最后遗嘱，致查理和美施”。她的两位朋友同时亦在信封上签署。立遗嘱人逝世后，法庭认为虽然对于死者有意签立遗嘱一事，法庭并无怀疑，但遗嘱并未有按照正式规定签立，因此判定无效。

2.7 此外，司法执行法第 17 条亦对见证规则略为放宽。该条规定：立遗嘱人祇须在两名或所有证人同时在场时签署或承认其署名，但每一名证人可在立遗嘱人面前作出见证及在遗嘱上签署，或承认其署名而毋须规定必须在其他证人面前签署或承认其署名。

2.8 **我们建议本条例第 5(1)条由类似司法执行法第 17 条的条文所取代（详见本报告附录 8 遗嘱（修订）条例草案（以下简称“条例草案”）草稿第 2 条）。**该条与司法执行法第 17 条所载条文相同。

条例第 5(2)条：一般豁免能力

2.9 现在我们要研究另一种情况，就是即使并未有遵守第 5(1)条的规定，遗嘱仍视为有效。根据第 5(2)条规定：华裔立遗嘱人如全部或相当大部分用中文书写遗嘱，并加签署，则即使不按照第 5(1)条的规定签立，亦应生效及作正式签立论。本港 98%人口有资格可按照条例第 5(2)条的规定而签立有效的遗嘱，可获豁免遵守第 5(1)条的规定，显而易见，根据第 5(2)条立中文遗嘱这一问题不容轻视，最高法院经历司指出法庭经常准许这类遗嘱获得认证。以香港法例来说，第 5(2)条十分重要，虽然该条祇作为保留条款，但大部分人士有机会利用这条款签立非正式遗嘱，而且其真确性毋须受到查核。

2.10 有些人曾提议删除这怪异的第 5(2)条。1970 年，当年的律政司曾反对列入这条文，但最后终作出让步，认为确需要为华裔立遗嘱人列入这条文。原来的草稿并不祇限于华裔人士，祇涉及以中文书写遗嘱，后来经立法局辩论后才予以修改。

2.11 在研究第 5(2)条时，我们首先考虑到须为签立遗嘱制定正式规定的基本理由。英国法律改革委员会（“该委员会”）在第 22 号报告（“遗嘱的订立及撤销”1980；Cmnd 7902）中条陈基本原则如下：

> “制定（关于正式规定的）法律原则为：首先：须确保真正代表立遗嘱人意愿的文件有效；其次：须防止那些伪造的遗嘱或由于任何其他原因，并不代表立遗嘱人真正意愿的遗嘱获得法庭认证。”（第 2.2 段）

我们非常赞同这原则（该委员会形容这原则是“无可指摘的”），但对于该委员会下述的意见，即须保留正式规定及不予改变（虽然司法执行法第 17 条已予放宽），以便立遗嘱人了解到其立遗嘱这一行为的严重性，从而避免作出一些“轻率或未经深思熟虑的财产处理”，这一点我们则并不表示赞同。这意见与上文所述“无可指摘的原则”并无关连，并且与“人应具有立遗嘱自由”的基本原则有所冲突。严格规定所造成的结果就是那些签立遗嘱的人认为他们所立的遗嘱有效，但事实上，由于未有遵守规定以致出现缺点，死后成为无立遗嘱者。

2.12　那些未有遵守规定而订立的遗嘱，通常是立遗嘱人在未有专业人士协助下而出现问题，虽然并非所有失效的遗嘱都是这样。（该委员会发觉有极少数由专业人士草拟的遗嘱亦曾出现未符合规定的缺点，但并未有列出签立遗嘱所出现缺点的详情）。以现行法律而言。即使显示一位遗嘱完全真确（例如：*Re Beadle* 一案），但仍可失效，这点我们深感惋惜。但现在经 *Ross 诉 Caunters* 一案 [1979 3 ALL ER 580] 后，一份遗嘱可能由于获判赔偿而获得其当初拟达到的结果。在该案中，一名律师按照立遗嘱人的指示而草拟遗嘱，其中包括将某些动产及剩余遗产其中一份额赠与原告。但由于原告的配偶在遗嘱上签署为证人，以致不能享受遗赠。法庭认为律师对一份遗嘱上指名的受益人应负上慎重办事的责任。律师被判疏忽，未有采取合理的慎重态度，使遗嘱能够恰当地签立，因而须赔偿予原告，原告因而能够藉追讨赔偿而领回本应可从遗嘱上取得的利益。其后 *Watts 诉 Public Trustee of Western Australia* [1980 WAR 97] 一案亦依循这一判例。在 *Gartside 诉 Sheffield, Young & Eillis* [1983] 1 NZLR 37 一案中，法庭宣判将慎重处事的责任扩大，以包括拟立遗嘱人发出指示所提到的受益人，律师理当有责任迅速拟备遗嘱，供立遗嘱人签立。因此，现可能祇要藉发出草拟遗嘱指示，即可毋须遵守签立遗嘱的正式规定，而获得赔偿，达到立遗嘱的效果。

海外法例及有关豁免正式规定的意见

2.13　1975 年南澳洲省遗嘱法修订法（第 2 号）第 9 条规定，在原有 1936－1975 年南澳洲省遗嘱法内新增第 12 条，该条条文如下：

> “如果有申请人向法庭申请认证一份死者最后遗嘱的文件，最高法院认为死者确有意将该份文件作为其遗嘱一事，已无任何合理置疑之处，则即使该份拟记载死者立遗嘱意愿的文件，并未有遵照本遗嘱法制定的规定签立，亦将被视为该名死者的遗嘱。”

2.14　西澳洲省法律改革委员会在其遗嘱报告（1985 年 11 月）中总结谓：南澳洲省的条文可予采纳，作为西澳洲省法例的蓝本，并建议修订西澳洲省遗嘱法，以列入 1936-1980 年南澳洲省遗嘱法第 12(2) 条条文。

2.15　至于澳洲北部省，则根据澳洲北部省法律改革委员会提出报告后，亦通过 1984 年澳洲北部省遗嘱（修订）法，将南澳洲省遗嘱法内相同条款列入该法内。

2.16 新南威尔斯法律改革委员会在其 1986 年“遗嘱——签定及撤销”报告中建议法庭应有一般豁免权，以便法庭在发觉某些签立或撤销遗嘱的行为虽然并未遵守法例的规定，但确已代表立遗嘱人的真正意愿时，即有权宣布该签立或撤销遗嘱的行为有效。

2.17 曼尼托巴省 1983 年遗嘱法第 23 条亦以南澳洲省法例为蓝本，制定规定如下：

> “如果有人提出申请，法庭认为一份文件或任何在文件上的书面文字，已载录：
>
> (a) 死者立遗嘱的意愿；或
>
> (b) 死者拟撤销、更改遗嘱或使前立遗嘱重新生效的意愿；或死者拟撤销、更改其并非载于一份正式遗嘱而祇在一份文件上的遗嘱意图，或使该份文件重新生效，
>
> 则即使该文件或书面文字并未全部遵守由法例制定的正式规定而签立，法庭可宣令该份文件或书面文字全面有效，一如该份文件或书面文字签立时，已按照遗嘱法的正式规定，成为死者的遗嘱，或作为撤销、更改遗嘱或使前立遗嘱重新生效，或可作为撤销，更改其另一份载有死者立遗嘱意愿的文件，或使该份文件重新生效。”

2.18 塔斯曼尼亚法律改革委员会亦已发表了一份工作文件，论及愈来愈多人要求改革这方面的法律。该份文件提出祇有极少数遗嘱因形式上的缺点而失效，但数目虽少，如果祇要对规则作出适当修改而可挽回这些遗嘱，则既然理由是这样充分，为什么不修订这方面的法律呢？该委员会亦留意到，实在无法计算有多少人因为未有时间、机会或有意立一份正式遗嘱而致死后成为无遗嘱者。

2.19 1982 年英属哥伦比亚法律改革委员会建议制定豁免权，以便法庭认为立遗嘱人知道及认可一份遗嘱的内容，并有意使其具有立遗嘱效力，则可接纳该份文件作为有效的遗嘱。

2.20 在昆士兰、根据 1981 年昆士兰继承法第 9(a)条规定，祇要“相当大部分符合”正式规定，则法庭可行使豁免权，该条规定：

> “如果法庭认为一份文件已表达立遗嘱人的意愿，而该份已签立作为立遗嘱的文件其中相当大部分已符合本

条的规定，则法庭可接纳该份文件获得认证……”

2.21 我们经研究“相当大部分符合”规定这一检定标准及一般豁免遵守规定权两者优劣之后，认为后者较佳。“相当大部分”已符合规定这概念本身比较含糊。虽然南澳洲省条文的字眼并不是绝对不会遇到困难，但我们同意其补救权这一原则，以便在未符合正式规定时有解救办法。另一方面，我们留意到“豁免权”这一概念，暗示法庭具有酌情处理权，对于一份未全然符合正式规定的遗嘱，仍可酌情决定其已符合认证一份遗嘱的规定论。我们现在所提出的条文，亦有不同，并未有包含“豁免权”这一概念。我们提示的条文，大意是如果法庭认为一份文件，是立遗嘱人有意藉该份文件而使其具有遗嘱效力，则不论该份文件有否遵守正式规定签立，法庭亦会使该份文件具有遗嘱效力。因此，我们建议本港制定一套全新的真确性原则。这样就可不受形式的束缚，而这一点仍是英国在施行司法执行法后仍保留的特色。但这原则会较现行第 5(2)条严谨，该条无法确保中文遗嘱是否有立遗嘱的效力或是否伪造。新条文将会符合本委员会所指出的“基本原则”，但豁免遵守正式规定，此点与以前的条文不同，而且不论种族，对所有立遗嘱人都适用。

赞同所作的改变

2.22 **我们除赞同条例第 5(1)条由司法执行法第 17 条的条文取代外，同时亦建议制定条文，规定凡遗嘱并未有按照新订第 5 条规定有效地签立者，则祇要是书面文字，由立遗嘱人签署或代其签署，而立遗嘱人有意使该文件具有遗嘱效力者，则应获接纳认证**（请参阅附录 6 条例草案第 2 条）。

2.23 现行条例第 5 条全部将予以撤销及取代，而第 5(2)条特有保留条款亦会被删去，一份遗嘱祇要符合新订第 5 条的正式规定，即作为已有效地签立遗嘱论。倘未有符合正式规定，新条文亦有规定如下：即使一份遗嘱未有符合正式规定，但已表达立遗嘱人的最后意愿，则该份遗嘱仍作有效地签立论。有关立遗嘱人必须有意使该份遗嘱具有立遗嘱效力的规定，目的在排除那些尚未想得通彻的念头和那些已丢弃的草稿。至于新条文规定倘一份遗嘱符合规定，即作为已有效地签立论，而不是“有效”，原因为一份遗嘱可由于其他理由，例如：无行为能力而失效。

2.24 根据拟议中新订第5条，一份遗嘱，不论中、英文书写，祇要立遗嘱人签具和有意使该份遗嘱具有立遗嘱效力，则会获接纳认证。无争论性遗嘱认证规则（香港法例第10章）亦因而须作出修订。

2.25 我们知道，中国人传统文化对于在遗嘱上签署一事，颇为敏感。为此，我们建议一方面本港不会接纳口头遗嘱，但另一方面仍可继续使用印鉴或印章（请参阅下文第2.29段）。我们认为，倘一份遗嘱是用书面写成，由立遗嘱人签署或盖印，即足以查核一份遗嘱的真确姓。我们深信，新订第5条但书规定是必需的，足以确保法律既符合简单而又肯定的程度。如果对于遗嘱的真确性并无规定，则相信法律并不是那般肯定，诉讼案件料会增加。本委员会亦相信市民对于一份遗嘱必须以书面写成及签署一事，已续有认识。

2.26 我们想补充一点，是关于海外签立遗嘱的，倘该份海外遗嘱是根据该地的法律签立，则即使并未有符合本港对遗嘱所制定的规定，在本港亦属有效。条例第24条规定如下：

有关正式有效的一般规则

“24. 遗嘱如遵照签立地，或签立时或立遗嘱人死时所定居或通常居住地区，或所在国家（而立遗嘱人又为该国公民）实施的国内法签立者，即作为正式签立。”

2.27 新订第5条条文亦规定，如果一份亲笔书写的遗嘱（即全部亲手书写的遗嘱）由立遗嘱人签署后，亦获法庭接纳。这条文是特为避免 *Re Kanani* (1978) 122 Solicitors' Journal 611）一案的判决所造成不幸的后果。在该案中，英国法庭在采用1963年遗嘱（正式有效）法（即香港现行遗嘱条例第III部条文）时，拒绝判定死者的遗嘱根据瑞士法律是一份有效的亲笔遗嘱，因为瑞士法律规定遗嘱全文必须亲笔书写，但有关遗嘱是在瑞士使用具有酒店笺头的纸张而签立的！

签署

2.28 我们亦考虑到立遗嘱人在签署遗嘱时可能出现的形式。释义及通则条例（香港法例第1章）界定“签署”一词包括“如果某人不能书写，则意指盖上印鉴、符号、指模或印章”。

2.29 根据我们的经验，现今香港在签署文件及法律文件时，亦接纳使用印章。但有关使用问题，则并无直接具权威性的判断（但可参考：Norton - Kyshe, History of the Laws and Courts of Hong Kong Vol II at P.526）一文。但英国长期以来均有权威性的判决而香港实际对这点亦从来未有质

疑（举例来说：李法官在 *Cheung v Chartered Bank Hong Kong Trustee Co.* [1978] HKLR 264）对于印章的使用并无置评。为顺应本地习俗，**我们建议继续容许使用印章，但如果新订第 5 条条文获得采纳的话，则一份遗嘱必须证明立遗嘱人亲自使用该印鉴或印章，才可获接纳认证。**

第 3 章　遗嘱条例的各项修订

引言

3.1　　香港的遗嘱条例（香港法例第 30 章），是直接由 1837 年英国遗嘱法引伸而来，但 1970 年制定这条例时，采用了较为简单和现代化的字眼。因此，英格兰和威尔斯对 1837 年法例所作的任何改动，均值得我们仔细考虑。本章稍后提出的修订，一般来说，并非向 1837 年法例的基本原则提出质询，但在研究这些修订时，应同时参考第 2 章所提的意见。1982 年司法执行法第 IV 部对 1837 年法例作出若干修订，当讨论到有关的香港条文时，这些修订会在考虑之列。我们将在本章内对遗嘱条例作详细的讨论。

讨论的条款

3.2　　条例的第 3 条规定——

> “3.　任何人均可根据本条例的规定订立遗嘱，处理其死亡时所享有权益的一切财产而该等财产于其死亡后转移与其遗产代理人。”
>
> 为了把第 3 条的英文法改得更好，英文“to”字应加在“property”而非“entitled”之后。（见附录 6 条例草案第 2 条）。

3.3　　条例的第 4 条规定——

> “4.　除第 6 条另有规定外，任何人倘未届合法年龄，其所立遗嘱均告无效。”

3.4　　在释义及通则条例（香港法例第 1 章）内，“合法年龄”为 18 岁。1989 年法律改革（年龄的法律效力）条例草案将可以订立有效遗嘱人士的年龄，自 21 岁降至 18 岁。这条例草案是跟随本委员会在“年青人年龄在民事法中的法律效力问题”研究报告书中提出的建议。我们认为现在无须再作更改。

3.5 1981 年昆士兰继承法第 8(2)条规定如下——

> “已婚人士，不论年龄，均可订立有效遗嘱，而无论再订立新的遗嘱与否，亦可将已立的遗嘱撤销。”

关于上述条款所据的论点，我们理解如下：人在婚后要承担新的责任，故应可在遗嘱这类文件中，表明这些责任，而不是祇限于按照无遗嘱继承条例的条款办理。**因此，我们建议制定类似昆士兰条款的条文**（见附录 6 条例草案第 2 条）。

3.6 条例第 5 条已在第 2 章予以讨论。

3.7 条例第 6 条规定——

> “6.(1) 任何实际服务于海军、陆军或空军的英国三军人员，以及任何正出海的海员或水手，可毋须遵照第 5(1)条所列的任何规则，而——
>
> (a) 处理其任何财产；
>
> (b) 适用任何指定权；或
>
> (c) 以遗嘱指定某人为其未成年子女的监护人。
>
> (2) 为避免引起疑问起见，现声明凡本条提及的人，虽未届合法年龄，亦得以遗嘱方式处理其财产。”

首先，我们建议第 6(1)条开始时所用的“英国三军人员”字眼，由“人士”一词代替，而英文原文第 3 行“ being”这一已过时的字眼则可删去。我们亦建议废除第 6(2)条，由另一条款代替，简单地说明所提及的各类人士“即使未届合法年龄，亦可订立有效遗嘱，同时亦可有效地将遗嘱撤销”（见条例草案第 2 条）。

3.8 本条是由 1837 年遗嘱法第 11 条引申而来，该条是一项保留条款，而本条则是一项授权条款。倘第 5 条一如第 2 章所建议般制定，我们发觉剩下来唯一适用于第 6 条的地方，也许与口述遗嘱有关，因为没有理由说军人并未有遵照规定而立的遗嘱不认证。不过，如果认为须保留现行第 6 条该容许条款，则仍有一个问题尚待解决：第 15 条规定“撤销遗嘱的方式”。但按照现时第 15 条的规定，军人根据第 6 条订立遗嘱后，不可能以同样方法另立遗嘱，以撤销及代替原来的遗嘱。第 15(6)条容许“按照第 5 条的规定签立另一遗嘱”，以撤销原来的遗嘱，但却无类似条款，容许其后按照第 6 条的规定另立遗嘱，

以把原来的遗嘱撤销。要改正这点绝不困难，我们建议将该段改为——

> “(b) 另立一有效遗嘱；或”（见附录 6 条例草案第 4 条）。

一般认为，第 15 条不会适用于根据第 6 条规定而立的遗嘱，但由于第 6 条是一项授权而非保留条款，因此这问题在香港是有争议的地方。建议采用的字眼可澄清这点。除以上提出的事项外，我们认为第 6 条应予保留。

3.9 第 7 条：我们并无意见。

3.10 条例第 8 条规定——

> “8. 凡按照第 5 条规定签立的遗嘱，毋须作任何其他公布，即可生效”。

由于再无必要保留这条，我们建议将之废除。这条文原来目的，是订明见证人毋须知道自己是见证遗嘱的签署，但这点其实已是现今一般法律的一部分，就是见证人祇须知道有关文件是属于需要他人见证签署的一类文件，已属足够。

3.11 第 9 条：我们并无意见。

3.12 条例第 10 条规定——

> “10.(1) 任何人如见证遗嘱的签立，而该遗嘱中有分配任何财产或作出有关任何财产的分配（抵押及偿债指示除外）予该见证人或其配偶，凡祇涉及该见证人或其配偶的财产分配，或任何人根据该见证人或其配偶的权利提出的任何要求，均属无效。
>
> (2) 纵使遗嘱有上述的分配，该见证人仍可准予作证，以证明遗嘱的签立，或证明该遗嘱是否有效。
>
> (3) 以本条第(1)款而言，遗嘱中虽有任何上述财产的分配或作出分配予该款所述的见证人或其配偶，但如该遗嘱并无该见证人及任何其他这类人士见证，亦属正式签立者，则该项见证应不予理会。”

3.13 本条含义所引致的问题，与 *Ross v Caunters* (1979) 3 ALL ER 580 所指出的不无关系。在该案例中，有清楚和绝不含糊的证据，证明立遗嘱人对所立遗嘱的条文绝对满意，而遗嘱中的余产承受人，正是立遗嘱人的妯娌，但由于她的丈夫是遗嘱的见证人，这点瑕疵使她无法承受遗产，结果，她应得的遗产却由其他受益人摊分（她最后祇能向疏忽的律师索取赔偿，作为取回其应得的“遗产”）。

3.14 第 10(3)条保留将财产分配予见证人及其配偶，条件是如果遗嘱无该项见证亦属正式签立者。我们已建议祇要能证明立遗嘱人希望其遗嘱具有遗嘱效力，新订第 5 条的附文可规定遗嘱无需见证人见证而签立。新订第 5 条和现有第 10(3)条加起来的结果，就是祇要符合新订第 5 条附文所列的条件，见证人所获的财产分配在任何情况下都是有效的，因为套用第 10(3)条的字句，“遗嘱无该见证人的见证亦属正式签立者”。虽然这个结果可以接受，但我们认为另一个方法，不但较为简单，而且更符合实证更重于形式这项原则。方法就是干脆将整条第 10 条废除，让新订第 5 条的附文规定，祇要能证明立遗嘱人希望其遗嘱具有遗嘱效力，该遗嘱便毋需见证人见证签立。至于遗嘱受到不当影响签立的问题，我们认为如有这样的问题出现，现时的普通法规则已足以应付。**因此，我们建议将第 10 条废除**（见附录 6 条例草案第 3 条）。

3.15 如第 10 条一如建议般废除，在现行法律下可能产生的另一难题，也可迎刃而解。这关乎本可根据第 6 条规定而生效，但实际上却符合第 5 条的规定而签立的遗嘱（出海船员等的遗嘱）的见证人。在这情况下，第 10(1)条是否适用于这类遗嘱？倘该见证人亦是遗嘱的受益人，则可否引用第 10(3)条，以争辩说该遗嘱无该项见证也应属有效？倘第 10 条按上述建议废除，这些可能出现的难题将祇会成为学术性问题

3.16 第 11 条本条是以前遗留下来的情况，过往很多人即使能提供有关证据，但如信誉受到怀疑，也不获准作证。今天，任何人不论其信誉如何，均可作为证人，虽然这明显会影响到其证供的重要性。**因此，我们建议将第 11 条废除**（见条例草案第 3 条）。

3.17 第 12 条本条规定遗嘱执行人，亦可获接纳为见证人，与第 11 条理由一样属多余累赘。**因此，我们建议将第 12 条废除**（见附录 6 条例草案第 3 条）。

3.18 条例第 13 条规定——

“13. (1) 如立遗嘱人在订立遗嘱之后结婚，则除非其在遗嘱内言明这预期婚姻，否则其遗嘱应作为撤销论。

(2) 如果属于指定权的遗嘱，倘指定的财产，若无该项指定则不能传与立遗嘱人的遗产代理人，则本条的规定不适用。”

从草拟条例草案方面来说，我们认为英文“personal representative”一词应改为众数（例如在司法执行法第 20 条内），因为通常遗产代理人会多过一名。

3.19 英格兰与威尔斯已采用司法执行法第 18 条的下述条款，取代以往根据 1837年遗嘱法第 18 条而实施的条款——

“18. – (1) 除下述第(2)至(4)款另有规定外，立遗嘱人如结婚，其所立遗嘱应告撤销。

(2) 纵使立遗嘱人其后结婚，由遗嘱中附予运用指定权而指定的财产分配仍然有效，除非由此指定的财产，若无该项指定，则会传与其遗产代理人。

(3) 倘遗嘱显示，立遗嘱人在签立遗嘱时，已期望会与某人结婚，并意图其遗嘱不会因其婚姻而告撤销，则纵使他与该人结婚，其遗嘱亦不应视作撤销。

(4) 倘遗嘱显示，立遗嘱人在签立遗嘱时已期望会与某人结婚，并希望遗嘱中的财产分配，不会因其婚姻而告撤销，——

(a) 则纵使立遗嘱人与该人结婚，该项财产分配仍然有效；及

(b) 遗嘱中的其他任何财产分配，亦应有效，除非遗嘱显示，立遗嘱人希望该项财产分配因其婚姻而告撤销。

18A. – (1) 立遗嘱人订立遗嘱后，倘法庭宣判解除或废除其婚姻关系，或宣布其婚姻无效，——

(a) 立遗嘱人所立遗嘱仍然有效，而有关指定其前配偶作为遗嘱执行人之一，或作为遗嘱的执行人及受托人的条文，则可视作删除；及

(b) 任何对前配偶的动产或不动产的遗赠均告失效，

除非遗嘱显示相反的意愿，则当别论。

(2) 上述第(1)(b)条的规定，无损立遗嘱人的前配偶根据1975年继承（供养家属及受供养人）法的条款，申请要求赡养费的权利。

(3) 倘——

(a) 根据遗嘱的规定，剩余权益[1]受制于终身权益；及

(b) 终身权益因上述第(1)(b)条的规定而失效。

则剩余权益应视为不受制于终身权益；如剩余权益要视乎终身权益终止而定，则应将之视为不须视乎终身权益终止而定。”

3.20 遗嘱法新订第18条是觅求改正遗嘱常因立遗嘱人，于订立遗嘱时，已预期会结婚而及后结婚，但其遗嘱却未能达到最后出现在*Re Coleman* [1975] 1 ALL ER 675一案中，Megarry J判词所指的严厉规定而遭撤销。在该案例中，Megarry J裁定，虽然给予一名被称为“我的未婚妻”的人的馈赠，是属于预期有婚姻的馈赠，但遗嘱以整体来说（相对于祇属于遗嘱内的某些馈赠），并无预期有该段婚姻，因此，由于立遗嘱人其后结婚，其遗嘱被裁定撤销，而给予未婚妻的馈赠亦告无效。如遗嘱以整体来说，并不意图这些分配会因立遗嘱人结婚而遭撤销，则这些分配不会因此而遭撤销，新的条款更保障了这些财产分配。新订第18A条是全新的条款，考虑到立遗嘱人订立遗嘱后离婚，或其婚姻被宣布无效，则——

(a) 立遗嘱人所立遗嘱依然有效，而有关指定其前配偶作为遗嘱执行人的条文，则视作自遗嘱中删除，及

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[1] 剩餘權益——一份遺囑可就同一物業設定超過一種權益。通常受到限制的權益可首先取得物業，但當其權益終止時，“剩餘權益人”將可繼承該物業。例如：立遺囑人T君在其遺囑內將其房產遺給妻子X君，作爲其“終身權益”。同時，亦將該房產的“剩餘權益”留給他第一次婚姻所生的兒子Y君。在X君有生之年，該房產屬於X君，但她不能在她的遺囑內將房產給與他人，因爲她一旦去世，該房產即歸Y君所有。反之，當Y君繼承該房產時，即全歸他所有而他可隨他的意願處理該房產。

(b) 任何对前配偶的动产或不动产的遗赠，均告失效（除非遗嘱显示相反的意愿，则当别论）。

这言之成理，因为可公平地假设在解除婚姻关系时，双方已达成适当的协议。有关运用遗嘱法第 18A 条的案例，可参看 *Re Sinclair* [1985] 1 ALL ER 1066，在该案例中，法庭对第 18A 条有关“失效”一词作出解释。

3.21 **我们建议本条例的第 13 条应由新的条款取代，条文应与遗嘱法新订第 18 及 18A 条所列出的条款相似。由于可以预见在外国法律下，婚姻关系可毋须经“法庭判决”而告解除（例如根据伊斯兰法，双方可协议离婚），我们建议将第 18(A)(1)条内的这类字句删除，而改用“有效”解除等字眼。第 18(A)(2)条亦须更改，以确保配合有关的香港法例，此处即指婚姻诉讼条例，（见附录 6 条例草案第 4 条，除上述两项修改外，这条与司法执行法第 18 及 18A 条的条款完全相同）。**

3.22 第 14 条：我们认为这应该是第 13 条其中一款，除此别无意见（见条例草案第 4 条）。

3.23 条例的第 15 条规定——

> “15. 除遇下列情况外，遗嘱的全部或任何部分，均不得撤销——
>
> (a) 立遗嘱人结婚（第 13 条规定）；或
>
> (b) 按照第 5 条的规定签立另一遗嘱；或
>
> (c) 依签立遗嘱的方式以书面将遗嘱撤销；或
>
> (d) 由立遗嘱人，或由其他人在立遗嘱人面前，并依立遗嘱人指示，将遗嘱烧毁、撕掉或以其他方法毁灭，而用意是将遗嘱撤销。”

我们对这条所采用的否定形式加以斟酌，所得结论是，这形式是可取的，因这样便可强调遗嘱祇有立遗嘱人采用特别明确的行动，遗嘱才得撤销。**鉴于我们提议对第 5 条作出修改，现建议将第 15(1)(b)条的字句改为“签立另一有效遗嘱；或”。此外，我们亦建议将第 15(1)(c)的“依签立遗嘱的方式”的字眼，改为“依立遗嘱人可以有效签立遗嘱的方式”**（见附录 6 条例草案第 4 条）。

3.24 条例第 16 条规定——

> “16. (1) 遗嘱签立后，任何涂改，在字里行间插入文字，或其他更改，除非依签立该遗嘱的同一方式为之，否则不发生任何效力，但如遗嘱内的字句或意义不经该项更改实难以明白，则属例外。
>
> (2) 遗嘱更改后，经立遗嘱人及每一见证人（如需见证者）按以下规定签名，该遗嘱连同修改部分，即视为正式签立——
>
> (a) 于遗嘱上相对或接近更改处的栏外或其他部分签署；或
>
> (b) 于遗嘱结尾处或其他部分所载有关该等更改的备忘录下端，或结尾或相对处签署。”

如条例第 5 条按第 2 章所建议加以修改，则第 16 条有关遗嘱签立后作出更改，亦需随之修订，**我们建议将第 16(1)条中“依签立该遗嘱的同一方式”字句废除，改为“由立遗嘱人以其可以有效签立遗嘱的方式”。此外，我们亦建议加上新的第(1A)款，以便可以利用现有的新科技，确定原来字句，即是说，“为执行第(1)款的规定起见，遗嘱的字句或意义如能以任何方法发现，即当明显论。”**（见条例草案第 5 条）。提出修订的目的，是将限制使用现代科学方法以证实书写内容（例如使用紫外线摄影）的规定消除，先前反对的理由是，倘准许使用这些方法，即表示允许认证不属于立遗嘱人签立的文件。倘文件必须经过严格的检证，则以往反对的理由，今天便难以站得住脚。使用这些方法检定以有效方式签立的遗嘱的原来内容，更能确保该遗嘱不会因不以有效方式所作的更改而变成无效。

3.25 我们认为如立遗嘱人将遗嘱的一部分除去，这等于以毁灭方式作部分撤销，建议的修订不拟对此作出任何补救。

3.26 第 18 条：我们并无意见。

3.27 第 19 至 22 条：这些条款述及遗嘱各方面的法律释义。根据普通法中法律释义的严格规定，显示家属关系的字眼，在若干情况下，会被假设为仅指婚生的合法关系，除非有意愿清楚指明非婚生子女亦能受惠，则属例外。我们先前提到 1985 年进行的本港民意调查，从该项调查所显示的较开明的社会态度来看，这项法律释义的严格规定，相信未必代表一般立遗嘱人的意愿。这种见解已成为适用于英格

兰和威尔斯两地 1969 年修订家庭法的第 15 条，而 1987 年修订家庭法第 1 及 19 条，更使非婚生子女或那些透过非婚生关系而提出要求的人进一步受惠。1987 年修订家庭法第 1(1)条规定——

> “1.- (1) 在本法例中，以及在本条款生效后制定的法令及文件中，有关述及两人关系的字句（不论如何表达），除非看到相反意愿，否则在解释时，应毋须理会其中任何一方的父母，是否已在某时候结婚。”

法例第 19(1)及(2)条规定——

> “19.- (1) 作出下列分配时，即——
>
> (a) 在本条款生效当日或之后作出的人与人之间的分配；及
>
> (b) 按在当日或之后签立的遗嘱或遗嘱修改附录[2] 而作出的分配，
>
> 有关述及两人任何关系的字句（不论明示或暗喻），应按上述第(1)条的规定解释。
>
> (2) 现声明为执行上述第(1)款引用的第(1)条的规定起见，仅使用‘继承人’或‘众继承人’或任何字眼，以图限定动产或不动产的继承权，并非显示一种相反意愿。”

我们建议条例加入具同样效力的条款（见附录 **6** 条例草案第 **8** 条）。

3.28 现时条例第 23 条规定——

> “23. 立遗嘱人的子女或其他子孙，如获给予任何遗产或权益，而两者皆为该受益人死前或死时不可终止者，倘该受益人先于立遗嘱人去世而留有子孙，而其任何子孙于立遗嘱人死亡时仍在世，则除遗嘱显示相反意愿外，该项遗赠不应失效，应当作为该受益人于立遗嘱人死亡后立即去世而发生效力。”

3.29 英国法例中相等于香港条例第 23 条的，是 1837 年遗嘱法中的第 33 条，而司法执行法第 19 条，则以下列条款取代该条——

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[2] 遺囑修改附錄——載述立遺囑人希望加添或更改的遺囑內容，這須按簽立遺囑的同一方式訂立，並與遺囑一起闡釋。

“33.–(1) 倘

(a) 遗嘱包含给予立遗嘱人的子女或后代一项动产或不动产遗赠；及

(b) 指定受益人先于立遗嘱人去世而遗下子孙；及

(c) 指定受益人的子孙于立遗嘱人死亡时仍在世，则除非遗嘱显示相反意愿，否则该项动产或不动产遗赠应生效，作为给予于立遗嘱人死亡时仍在世的子孙的一项动产或不动产遗赠。

(2) 倘——

(a) 遗嘱包括给予一组人一项动产或不动产的遗赠，而该组人之中，有立遗嘱人的子女或后代；及

(b) 该组人的其中一名成员，先于立遗嘱人去世而留有子孙；及

(c) 该成员的子孙于立遗嘱人死亡时仍在世，则除非遗嘱显示相反意愿，否则该项动产或不动产遗赠应生效，而该组受益人，应视作包括已去世成员于立遗嘱人死亡时仍在世的子孙在内。

(3) 根据本条的规定，子孙可经所有亲系，按其家系，获取其父母原可获得的任何遗赠或分配，如子孙超过一人，则可将遗赠平均分配；但如子孙的父母于立遗嘱人死亡时仍在世，有能力可以亲自收取遗赠，则其子孙不能获取这些馈赠。

(4) 为执行本条的规定起见——

(a) 任何人的非婚生问题，均毋须理会；及

(b) 在立遗嘱人死前成胎及随后活着出生的人，应视作在立遗嘱人死亡时已在世。”

3.30 原先条款的规则是，先去世的子女，概括来说，祇是假装将生命延长，以免其遗赠变成无效，而取代条款则将这项规则废除。现时，该项遗赠实质上已成为先去世子女的绝对财产，故属其遗产的一

部分。根据司法执行法新条款的规定，该项遗赠是按家系[3]而对该名子女在立遗嘱人去世时仍在生的子孙发生效力，而非作为先去世子女遗产内的一项遗赠。再者，旧的规则混淆不清，显然会导致反常的结果，故取代条款看来合理。**因此，我们建议采用司法执行法第 19 条所列的条款（惟须受下述规限），以取代条例第 23 条**（见附录 6 条例草案第 9 条，条款与英国的完全相同）。

3.31 我们注意到在英格兰和威尔斯，“子女或其他子孙”的不同定义：现时，1837 年遗嘱法第 33 条生效时有以下假设：(a)凡述及立遗嘱人的子女或其他子孙，其意思包括立遗嘱人的非婚生子女，以及任何可列为其子孙的人，并视该子女或其子孙出生时是婚生子女；及(b)凡述及指定受益人的子孙，或其他指定受益人后裔的人，均视作出生时是婚生子女（司法执行法第 19(4)条）。符合无遗嘱者遗产条例（香港法例第 73 章）及遗属生活费条例（香港法例第 129 章）的规定起见，我们建议将“子女”的定义扩大，遗嘱条例（香港法例第 30 章）第 23 条亦须反映这新的观念。**因此，我们建议将第 23 条修订，以便经由司法执行法第 19 条取代的 1837 年英国遗嘱法第 33(1)、(2)及(3)条转载于香港的遗嘱条例**（见条例草案第 9 条）。

3.32 第 24 至 29 条：本委员会研究这些条款后，决定毋须作出修订。

3.33 条例第 30 条规定——

> “30.(1) 立遗嘱人如于本条例开始实施前死亡，本条例的规定不得适用于其遗嘱；如立遗嘱人于条例开始实施之后死亡，则不论其遗嘱于实施之前或之后签立，本条例规定亦属适用，但祇在于使条例实施前签立的遗嘱，原应有效者，不致因本条例的规定而失效。
>
> (2) 根据已废除的遗嘱条例第 3 条规定生效的遗嘱，不应因第 III 部的任何规定而受影响，但如遗嘱随

[3] 按家系——“按家系這而非按人數”分配財產，意思是將財產平均分配予數組人，而不理會每組的人數。舉例來說，受益人可能有四組，即使一組可能有五人，另一組可能祇有一人，每組都祇能得到財產的四份之一。故此，立遺囑人可給予 A 君一項終生遺贈，剩餘遺贈則“按家系而非按人數”分配予 A 君去世時尚在生的子女，以及先其去世子女但在他去世時仍在生的孫。A 君有子女六名，其中五名在 A 君生時去世，每名子女均留下子孫，而這些子孫在 A 君去世時仍在生，此外，A 君去世時有一名子女尚存：財產按家系分爲六份，一份給予 A 君那名在生的子女，其餘五份，則分別給予五名已去世子女的孫，而每名去世子女的孫不論人數多少，均祇能合分一份財產。

后为根据本条例所订的有效遗嘱所撤销或更改，则属例外。

(3) 在不妨碍释义及通则条例第 23 条一般适用的原则下，以下各条例应继续适用于本条例开始实施前死亡者的遗嘱，一如本条例未有通过——

(a) 已废除的遗嘱条例、

(b) 已废除的遗嘱（有效形式）条例，及

(c) 英国法律适用范围条例附表已删去的第 66 项。”

3.34 有关来自修订本条例的法例，其制定后的条款所适用的范围问题，**我们建议，处理这个问题的方法，是在第 30 条加入一项条款，规定立遗嘱人如实施我们建议的修订法例开始实施前死亡，该修订法例则不得对其遗嘱适用；如立遗嘱人于法例开始实施之后死亡，则不论其遗嘱于实施之前或之后签立，祇要其遗嘱不致因而失效，该修订法例亦属适用。立遗嘱人在修订法例开始实施前所立遗嘱因其结婚所受的影响，应如修订法例未有通过般去决定。**建议的条款可用以确保受我们建议所影响的遗嘱不致失效。

第 4 章　遗嘱：纠正、释义及证据

引言

4.1　一份遗嘱有时会遇到一项困难，就是未能表达立遗嘱人的真正意愿，原因为笔误或未能充分了解立遗嘱人的意愿。在 *Re Reynette – James* [1975] 3All ER 1037 一案，遗嘱最后草稿经由女立遗嘱人认可，但打字员在缮打正本时，不小心漏打了某些字句，而这错处并未有在遗嘱签立前发现，结果该份遗嘱获法庭认证，唯已漏掉某些字句。自 Megarry VC 在 *Ross v Caunters* 一案所作的判决后，这种疏忽行为可能引致一名受影响的受益人诉诸法律行动（如果起诉在期限未届满之前），但如果有人能够提出明显的证据，则法庭可纠正该份遗嘱的话，这种做法似乎会较为明智。

英格兰及威尔斯所作出的更改

4.2　司法执行法第 20 条规定——

> “20. (1) 如果法庭认为一份遗嘱由于以下情况：
>
> (a) 笔误；或
>
> (b) 未能了解立遗嘱人的指示，
>
> 以致所表达的意思不能使立遗嘱人的意愿得以实行，则法庭可下令将该份遗嘱纠正，以使其意愿得以实行。
>
> (2) 除获法庭批准外，任何人士不得在第一次领取有关死者遗产的遗嘱认证及管理书六个月后申请根据这条文发出的命令。
>
> (3) 如有死者的遗产代理人在第一次领取死者的遗嘱认证及管理书六个月后，分配了死者任何遗产，而有人提出遗产代理人应考虑到法庭可能在期限届满后仍会准许本条的申请，并作出命令，则本条的规定，不得作为可令致遗产代理人为已分配的遗产负上责任，但由于法庭已颁布本条的命令，本条款的规定亦不会妨碍任何人士讨回已分配遗产的权力。

(4) 以本条而言，在考虑何时为第一次领取有关死者遗产的遗嘱认证及管理书时，一份祇限于发给‘限制授与土地’或‘受托物业’的遗嘱认证或管理书不在考虑之列；而一份祇限于发给不动产或动产的遗嘱认证或管理书亦不在考虑之列，除非一份限于剩余遗产的遗嘱认证或管理书前已发出或同时发出。”

4.3 **本港虽然并无司法执行法第 20 条第(4)款所提到的“限制授与土地”或“不动产”，但我们建议本港的遗嘱条例应加插类似司法执行法第 20 条条文，而第(4)款祇需重新草拟，以显示本港与英国所适用的法律有所不同。**（请参阅附录 6 条例草案第 10 条，除所提到的修改外，该条与英国条文相同）。

外在证据

4.4 司法执行法第 21 条规定：

“21. (1) 本条款适用于下述遗嘱——

(a) 如一份遗嘱有任何部分全无意义；

(b) 如一份遗嘱所使用的部分文句表面上含糊不清；

(c) 除根据立遗嘱人意愿的证据外，有任何证据显示鉴于周围的情况，遗嘱内部分所使用的文句含糊不清；

(2) 倘本条规定适用于上文所述的遗嘱时，外在证据，包括立遗嘱人意愿的证据，可获法庭接纳为证据，以便有助于解释该份遗嘱。”

4.5 司法执行法第 21 条规定，倘遇到遗嘱有部分全无意义、表面上含糊不清、或鉴于周围情况而属含糊不清，为有助于解释该份遗嘱，法庭容许外在证据，包括有关立遗嘱人意愿的证据，获得接纳为证据。此条规定使法官长久以来须就遗嘱所使用的文句作出解释，而即使具有清楚明确的外在证据可迅速解答某一含糊之处，亦不获接纳的奇怪现象得以消除。**我们建议香港采纳类似的条文**（详见条例草案第 10 条）。有关条文与英国的条文相同。*Re Williams* [1985] 1 All ER 964 一案则可作为引用第 21 条时的案例。在该案中，外在证据不获法庭接纳，原因为有关证据无法对解释有关遗嘱有任何帮助。

4.6 此外，我们亦希望清楚述明外在证据在下述情况——即关于遗嘱的签立、撤销或更改的方式——亦可获接纳为证据。在 *Re Colling* [1972] 3 All ER 729 一案中，Ungoed-Thomas J. 指出：1837 年遗嘱条例第 9 条（香港条例现行第 5 条所根据者）内已含有须提出口头证据的规定。**我们建议接纳他的意见，并且更进一步提议立遗嘱人本人所作的口头（或其他）证供，应获接纳为证据。因此，我们建议在原有第 17 条之后加添第 17A 条，规定“关于一份遗嘱如何签立、撤销或更改的外在证据，包括立遗嘱人在任何时候所作声明的证据，均可获接纳为证据”**（详见附录 6 条例草案第 6 条）。

给予配偶但含糊不清的馈赠

4.7 司法执行法第 22 条规定如下：

> “22. 除能提出相反意图外，如果一名立遗嘱人将其财产遗赠或遗留其配偶，从文句上的意义是将财产的绝对权益给予其配偶的，但根据同一份文件，立遗嘱人亦有意将同一财产的权益给予其子孙，则即使拟馈赠其子孙，亦可作出一项假设，就是遗赠给配偶的财产是属于绝对权益。”

4.8 此条文涉及的要点较为次要，而通常祇会在非律师所拟备的遗嘱中出现。一名立遗嘱人表面上已将馈赠绝对地给予配偶，但同时亦将同一财产表面权益给予子孙，暗示馈赠给予配偶的只是终身利益。第 22 条现规定：除非能够肯定显示有相反意图，否则应假设给予配偶的馈赠是绝对的馈赠。除有一点要保留外，我们亦赞同这一条文。**我们相信在这种情况下，如果立遗嘱人的妻子尚存，立遗嘱人通常有意将馈赠绝对地给予妻子。为此，我们建议本港亦采纳这一条文，规定如果配偶在立遗嘱人逝世时仍生存，则给予配偶的馈赠当属于是绝对的馈赠**（详见条例草案第 10 条）。如果她先逝，馈赠将给予子孙，相信这必然是立遗嘱人的真正意愿。

第 5 章　遗嘱的登记

英国条文

5.1　　司法执行法第 23 至 26 条就遗嘱的存放和登记事有详尽的条文规定。

香港条文

5.2　　田土登记条例（香港法例第 128 章）第 2 及第 22 条准许除其他文件外，凡涉及香港土地的遗嘱亦得以登记及存放。因此，虽然香港今日绝少使用这条文，但实已设立保存遗嘱的制度。

5.3　　前注册总署署长 Mr. W.K. Thomson 认为将遗嘱列入田土登记条例内，似乎是一项错误。我们亦与有同感。现任注册总署署长在 1987 年 4 月 24 日致函给小组委员会时亦发表同样意见，全文如下：

> “Mr. Thomson 认为将遗嘱列入田土登记条例内是一项错误，我亦同意他的说法。一份遗嘱，即使登记附在某一物业上，其实并不影响该物业，直至立遗嘱人死亡，其遗嘱获得认证，并登记在有关物业上，才会对该物业有所影响。不过，立遗嘱人即使将其遗嘱登记，仍可在生前将其物业脱手。如果他真的这样做，将遗嘱登记祇会浪费人力物力，其次，如果有人在田土注册处查询该物业时，祇会引起混淆的感觉。
>
> 事实上，田土注册处内确有以契据摘要[1]方式将遗嘱登记，但准确数字在未能详细审查 130 万份登记卡之前，无从得悉。
>
> 至于根据田土登记条例第 22 条将遗嘱存放在田土注册处一事，我亦同意 Mr. Thomson 的说法。Mr. Thomson 认为将遗嘱存放在最高法院经历司处较为适合，因为经历司负责遗嘱认证处。现时遗嘱祇可存放于田土注册处，但如果一名立遗嘱人拟将其遗嘱存放在政府部门，但立遗嘱时并无物业，则他不能这样做。

[1] 立契據摘要：是一份載有契據詳情等的登記文件。

截至今日为止，根据田土登记条例第 22 条存放于田土注册处的遗嘱计有 146 份。”

5.4 以一般情况而言，委员会并不同意将遗嘱登记这一概念。我们认为一份遗嘱祇涉及私人家事。将遗嘱存放及登记，祇会加添官方色彩，这实在是无必要的，而且会减弱其机密程度。而且立遗嘱人具有自动更改一份遗嘱的权利，但遗嘱一经登记，其权利即会受到挫折。

建议

5.5 **鉴于上文所提及的政策，我们认为遗嘱不应予以登记。同时，我们对于香港律师会现行的非正式方法，即由香港律师会将逝世的客户姓名传阅予各会员周知，要求各会员提供有关那些客户签立遗嘱的资料这一方法，我们亦感满意，实毋须为遗嘱的登记而作出花费。更且，我们建议修订田土登记条例，以便该条例对那些未获认证的遗嘱不予适用。**

第 6 章　国际遗嘱

英国条文

6.1　　1982 年司法执行法第 27 及 28 条，以及第二附表已将 1973 年 10 月 26 日华盛顿国际遗嘱公约条文列入英国法律内。1974 年 10 月 10 日英国成为该公约的签署国，但至今亦未予以缔约。公约目的在对遗嘱的格式作出规定，以便符合该格式的遗嘱，不论在何处签立、亦不论死者的资产在何处、死者属何居籍、居留地或国籍，均属有效。

6.2　　有关司法执行法第 27、28 条及第二附表现载于附录 3。国际遗嘱的格式载于公约的附件内，列于司法执行法第二附表，现转载于附录 3 内。

建议

6.3　　将公约列入本港的法律内，对于那些资产散布在不同司法管辖范围的香港居民遗嘱的认证，可能大有帮助，同时对于根据香港现行法律签立的遗嘱，所据方式虽有不同，而且亦未有遵守国际遗嘱的规定，但不会影响其有效程度。**将该公约列入香港法律祇会提供额外保留的方法，应该受到欢迎，因此，我们建议将该公约列入香港法律内。**（注：如果将该公约列入法律时，第 5 条规定应有提及，例如：“除须遵守第　条的规定外，任何遗嘱…… 不属于有效……”）

第 II 部

第 7 章　无遗嘱继承法：引言

无遗嘱继承法研究范围

7.1　　对于无遗嘱继承法的研究范围甚为广泛。委员会须研究现行法律一般情况是否令人满意，是否有必要或需要提出更改？委员会亦须研究现行法律规定位于新界的若干土地须另行遗赠，此种情况是否令人满意。

无遗嘱继承法的范围

7.2　　如果一位死者未立有遗嘱，即属一位逝世时“无遗嘱者。”无遗嘱死亡的情况就出现。如果一名死者全未立有任何遗嘱，即称为“完全无遗嘱者”；又如果他留下遗嘱，但只处理其部分遗产，则称为“局部立有遗嘱者”。虽然本港人士已渐趋于签立遗嘱，但大部分人士逝世时均无立下遗嘱。即使死者生前已对遗产有计划安排，但通常都会剩余一些资产，未列入计划内。1971 年无遗嘱者遗产条例（香港法例第 73 章）（以下简称“条例”）对无遗嘱的遗产应如何管理制定规定。该条例大部分根据英国 1925年遗产管理法所订立无遗嘱继承规则，其后并由 1952年无遗嘱遗产法予以修订。

7.3　　有关规则是假设一个未立有遗嘱的人，如果要立遗嘱，会希望留下遗产给某些类别的近亲，而且会先给某些亲属，其后才给与他人。最基本的假设就是人们通常希望子女获得平均分配，而妻子或丈夫则在有生之年生活有供养。如果并未有遗下尚存子女或配偶，或并无子女、配偶，则人们通常会希望留下遗产给与近亲，如无近亲，才会留给较远房的亲属。同时，亦假设人们如果已离婚或法院已判决分居，则他们通常不打算将利益给与已离婚或已分居的配偶。

旧法例

7.4　　1971 年 10 月 7 日无遗嘱者遗产条例生效以前，本港对在本港拥有不动产的无遗嘱者的继承（不论死者属何居籍），以及居籍是香港而在香港逝世时拥有动产的无遗嘱者，须受两套截然不同的法律

规范，至于应遵守那一套法制，则以他是否是中国人而定。再者，本港亦没有一套很明显关于“中国人”一词定义的裁定，因此，亦有一些属于欧亚籍的无遗嘱者，其遗产管理人会选择适合他们的法制，总之，该两套法制不能同时采用。一名中国籍无遗嘱者，其遗产分配法是依据大清律例。而对于一名非中国籍的无遗嘱者，则为英国 1843 年 4 月 5 日时的法律。该英国法律基本上是根据十七世纪时所订立的分配法，及其后英国在上述日子之前对该法作出的数次修改。

1971 年无遗嘱者遗产条例

7.5 除国际私法可能对某一宗遗产适用外，本港自 1971 年 10 月 7 日以来，任何人士，不论国籍、种族或文化，倘在本港死亡而未立有遗嘱，则其遗产是依据无遗嘱者遗产条例进行分配。该条例在 1971 年生效以后，曾即作出修订（1971 年香港法例第 49 号曾对第 2(2)(b)条及附表第 2(2)段作出修订），其后立法当局对这条例少有关注。自 1971 年，稍为重要的修订摘述如下：

(a) 1972 年，增添了第 4A 条，规定由法院判决分居的配偶并无权利对另一配偶的遗产提出声请（1972 年香港法例第 39 号第 33(3)条）；及

(b) 1983 年，尚存配偶根据第 4(3)或(4)条所领取的“法定遗产款额分别由 25,000 元或 100,000 元增加至 50,000 元或 200,000 元（法律告示 1983 年第 220 号）。

假设立遗嘱者

7.6 委员会在审议本港无遗嘱法律时，试图以一名居于香港八十年代有理性的立遗嘱者身份而制定法律。我们试图以这样一位假设的立遗嘱者，在考虑其情况及受供养人后，会有甚么理性的想法去分配其遗产而制定有关法律。任何法典，不能适合每一种可想象得到的家庭情况或会有甚么事情发生，而在某些特别的情况下，确会导致不公平的现象出现。不过，我们相信，如果依据我们稍后所提出对该条例作出的修订，不公平现象应减至最少。如果有个别不公平情况出现，有关为死者家属及受供养人供养的法例可提出补救办法。该办法在本报告第 III 部内详述。

第 8 章　无遗嘱继承：尚存配偶的权利

有关分配剩余遗产的现行规则

8.1　　条例内有关妾侍的过渡性条文将于稍后另行研究，以本章而言，如死者于 1971 年 10 月 7 日前缔结夫妾关系所引致的复杂情况，本章不拟讨论。随着时日的消逝，过渡性条文的重要性亦自当日减。

8.2　　根据条例第 2(1)条的定义，“丈夫”及“妻子”两词，就一名人士而言，指该名人士缔结一段有效婚姻的“丈夫”或“妻子”。至于尚存丈夫或妻子，现称为“尚存配偶”。条例第 3 条亦对“有效婚姻”作出界定，指根据香港法例第 181 章婚姻条例规定而缔结的婚姻；香港法例第 178 章修订婚姻制度条例承认为有效的新式婚姻；修订婚姻制度条例宣布为有效的旧式婚姻；或在本港以外地方根据当地法例而举行仪式或缔结的婚姻。至于一名无遗嘱者的“亲属”，即指他的父母，兄弟姊妹、或兄弟姊妹的子孙。[1]

8.3　　有关如何分配无遗嘱者剩余遗产（即支付一切债务、殡葬费及遗产管理费后余下的净遗产）的规则，详列条例第 4 条。方法如下：

(a)　如果无遗嘱者遗下尚存配偶，但并无遗下子孙或亲属，则该名尚存配偶有权绝对地承受无遗嘱者的全部剩余遗产（即：全部遗产而且无须附带任何条件）。

(b)　如果无遗嘱者遗下尚存配偶及子孙，则尚存配偶有权领取 50,000 元，连同年息 5%，由死者逝世之日起计，以及其余剩余遗产的一半。至于其余剩余遗产另一半则以法定信托保管（即根据条例而制定的信托），代其子孙持有。

(c)　如果无遗嘱者遗下尚存配偶及亲属，但无遗下子孙，则尚存配偶有权承受 200,000 元，连同年息 5%，由死者逝世之日起计，以及绝对地承受其余剩余遗产的一半。至于其余剩余遗产的另一半则由其父 / 母或父母领取，或如果并无遗下父母，则由无遗嘱者的兄弟姊妹或他们的子孙继承。

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[1]　子孙—— 一名人士的子孙包括其子女、孙及其他直系後裔。

(d) 如果无遗嘱者并无遗下尚存配偶，但遗下子孙，则子孙有权承受由法定信托保管的全部剩余遗产。

(e) 如果无遗嘱者并无遗下尚存配偶，或任何子孙，但父母双全，则父母可绝对地领取全部剩余遗产。

(f) 如果无遗嘱者并无遗下尚存配偶、或任何子孙，但祇有父或母，则该父或母可绝对地领取全部剩余遗产。

(g) 如果无遗嘱者并无遗下尚存配偶、任何子孙及父母，则他的兄弟姊妹承受全部剩余遗产。如果无遗嘱者又无遗下任何兄弟姊妹，则遗产归他的祖父母及外祖父母所有。如果也无祖父母或外祖父母，则归其叔伯姑姨舅。如果亦无叔伯姑姨舅，再无其他规定的亲属，遗产全归政府，但政府可从遗产中拨出款项，抚养受该无遗嘱者供养的人士（不论是否为该无遗嘱者的亲戚），以及该无遗嘱者可合理预期会加以抚养的其他人士。

8.4 根据条例规定的分配规则甚为繁复，宜以图表方式说明。麦雅理先生于 1972 年香港法律专刊第 135 页曾撰文“根据 1971 年无遗嘱者遗产条例的分配办法”，并附以图表说明该条例下的分配效果。现征得该文作者（本小组委员会主席）及该专刊的同意，全文刊载于附录 4 内。

配偶有权购买动产但不包括婚姻住所

8.5 如果尚存配偶不能绝对地领取全部剩余遗产，则根据条例第 7 条的规定，尚存配偶可在遗产代理人第一次取得遗产管理书日起计六个月内，要求遗产代理人将无遗嘱者的“个人动产”（即条例第 2(1)条的定义），拨归其所用，作为清偿其 50,000 元或 200,000 元全部或其中一部分（视乎个别情况而定）的“法定遗产”，以及其有权取得的利息。其他有权分摊剩余遗产的人士可提出反对，由法庭决定是否禁止拟议中的拨用。事实上，第 7 条规定：如果有利益关系的亲属不提出反对的话，尚存配偶有权可从其有关的法定遗产中，拨出款项以购买无遗嘱者的个人动产。

8.6 但条例内并无条款规定可使尚存配偶以购买或其他方式取得婚姻住所。

现况令人不满

8.7 对于上文所述第 4 条规定现行分配予各类亲属办法的基本结构，我们亦表赞同。不过，我们认为，如果我们将一名假设有立遗嘱的人士和一名无立遗嘱的人士作出比较，而他们同时遗下子孙或亲属，则假设有立遗嘱的人士会对其尚存的配偶所作出的安排，会较现行根据无遗嘱的分配规则对尚存配偶的安排，更为慷慨。

8.8 条例第 4 条规定尚存配偶所领得的法定遗产，是现行财产转移模式的关键。1971 年所订定的法定遗产款额分别为 25,000 元或 100,000 元，视乎无遗嘱者是否有遗下子孙而定。条例规定立法局有权提高有关款额，而这权力于 1983 年才首次行使，将款额分别倍增至 50,000 元或 200,000 元。我们认为这款额仍是太少。

8.9 在英国，如果遗一名配偶及子孙，其法定遗产，大致上假设是可与一般市郊房屋的价格相比，以便该笔法定遗产，最低限度能达至婚姻住所的价值。在计算根据本条例支付的法定遗产的适当水平时，我们认为理当厘定一款额，足够尚存配偶在本港购买一间普通小型婚姻住所。现时厘定的 50,000 元明显地不足以购买一间住所。

8.10 如果无遗嘱者遗下配偶及亲属，但无子孙，则须另加考虑其他因素。分配规则应能反映无遗嘱者其他尚存家庭成员的合理期望。特别是如果无遗嘱者遗下一大笔财产，法定遗产实不应太大，以致尚存配偶得到一大笔遗产，间接使其家人得益，而减少无遗嘱者的家属的利益。不过，我们亦认为现时厘定的 200,000 元仍属太少。

建议：法定遗产

8.11 **我们建议，如果无遗嘱者遗下子孙，则根据条例第 4(3) 条规定给予尚存配偶的款额，应由 50,000 元增加至 500,000 元。**

8.12 所建议的 500,000 元大致上可与本港一间普通小型楼宇的价值相提并论，以便尚存配偶得以其法定遗产购买该名无遗嘱者名下婚姻住所的利益。至于拨用婚姻住所的权利将于稍后讨论。

8.13 如果无遗嘱者的遗产不多，则在给予尚存配偶 500,000 元后，已分掉全部净遗产。结果，子女可能一无所有。但配偶须在死者逝世后负起照顾子女的责任。尚存的家人通常希望留在婚姻住所内居住，建议的法定遗产就是希望能够有助于达到这个目的。若将法定遗产订于较低水平，这样会影响尚存家人购买及留在婚姻住所的期望。而且，

即使遗产遗给子女，仍是交由信托保管，直至他们达到法定年龄，而且祇有利息（比较上微薄的数目）来维持子女的生计。

8.14 **我们建议，如果无遗嘱者并无遗下子孙而祇有亲属，则根据条例第 4(4)条规定给予尚存配偶的款额，应由 200,000 元增加至 1,000,000 元。**

8.15 **同时，我们亦建议最低限度每五年检讨法定遗产一次。**委员会留意到虽然通货膨胀，但法定遗产款额祇增加过一次。

8.16 **为方便日后对法定遗产款额作出更改，及使意义更为清晰起见，我们建议删除条例第 4(12)条所提及的款额，修订后条文如下：**

> **“(12) 根据第(3)或(4)款付给尚存丈夫或妻子净款额的应付利息，须先从收入中支付。”**（附录 7 条例草案第 4 条）

8.17 **同时，为求清晰起见，我们又建议：**

(1) 删去条例第 6 条所列出的款额，并由下文取代：“可用该无遗嘱者全部或部分剩余遗产作担保，以筹措付给该无遗嘱者尚存丈夫或妻子的净款额，或部分款额，及有关款额的应得利息。”（条例草案第 6 条）

(2) 删去条例第 8 条所列出的款额，并由下列字句取代，即：“应付给尚存丈夫或妻子的净款额。”（附录 7 条例草案第 7 条）

8.18 委员会认为，在应用所建议的法定遗产方案时，将会迎合大部分个案的情况，但可能有少数个案会有不公平现象。这是全面规定法定遗产水平无法避免的结果，但可确保法律的肯定性。但在个别情况，法律的肯定性，也须兼顾公义。我们认为倘普遍使用无遗嘱条款，包括规定法定遗产水平，在遇到困难的个案时，最适合的处理办法莫疑是在为死者遗属及受供养人提供给养的条例内作出规定。有关这方面的法律将在下文第 III 部讨论。如果死者并未有在遗嘱内，或如果并无遗嘱，但根据无遗嘱法，并未有为其家庭成员及其他受供养人提供合理的给养，则该法例规定其家庭成员及受供养人可向法庭提出申请，要求济助。如果该法例能够根据我们的建议而作出修订，当会使这方面的法律有必需的灵活性。我们唯一感到有保留的地方，就是一

切诉讼都很昂贵，相对于那些庞大的遗产而言，提出申请的诉讼费通常会用掉那些数目不大的遗产的大部分。

个人动产

8.19 在英格兰及威尔斯，如果一名无遗嘱者遗下子孙或亲属，则尚存配偶不能承受全部剩余遗产，但可绝对地领取无遗嘱者的个人动产。在香港，如果有同样情况发生，尚存配偶祇获准以其法定遗产购买那些动产。从经验中得悉，在分配个人动产和可能由家庭成员挪走那些动产时，往往会引起问题和家庭纠纷。为消除这些问题，大多数已婚的立遗嘱人倾向于将其个人动产遗留给配偶，为此原因，我们认为本港在处理个人动产方面，亦应仿效英国的法例。如果制定这法例，则尚存配偶可绝对地获得通常一间婚姻住所理应具备的家庭用品、其他物品以及个人物件。

建议：个人动产

8.20 **我们建议，不论无遗嘱者有否遗下子孙或亲属，祇要他遗下尚存配偶，则该尚存配偶得绝对地取得“个人动产”（根据稍后提出的定义），一如英格兰及威尔斯的规则。**如果实施这建议，尚存配偶有权取得一间婚姻住所内的物品，而非其他人士，（倘连同其他建议，包括尚存配偶有权要求将婚姻住所拨归其所用，作为清偿全部或部分的法定遗产），这会确保对尚存配偶的骚扰减至最低。

8.21 至于如何确定一件物品是否“个人动产”，则最主要的检定标准就是在死者逝世时，该物品是否存放在婚姻住所内。如果尚存配偶可绝对地获得个人动产，则该词的定义须另行界定，以不包括任何当时存放在住所内投资、商业或职业有关的物品。此外，如有任何物品并不包括在定义内，但尚存配偶或任何其他受益人希望得到该物品，则遗产代理人可根据香港法例第 10 章遗嘱认证及遗产管理条例第 68 条赋予的权力，将该等物品拨归有关人士之用。

8.22 **因此，我们建议重新界定条例第 2(1)条有关“个人动产”的定义**（见附录 7 条例草案第 2 条）。定义会较为广阔，例如可包括宝贵的邮票或珍藏的玉器。我们认为这或会造成意外得到的遗产，这都是由于在这方面以大刀阔斧手法处理的结果。不过，定义祇包括尚存配偶一间住所的动产。我们曾经考虑应否扩阔定义范围，以包括非婚姻住所，例如，妻子应否有权取得死者与其妾持或情妇住所的动产。但终于决定在条例草案内祇采纳较窄的定义，而不是广义。

8.23 为施行我们对增加法定遗产及个人动产的建议，条例第 3 及第 4 条须予以修订（见条例草案第 4 条）。值得一提的是，拟议中新订第 4(4)条提到同父母血缘的兄弟，这项修订是根据第 10.6 段所提出的建议。**同时，我们建议废除条例第 7 条，即有关尚存配偶有权要求将个人动产拨归己用的条文**（见条例草案第 6 条）。

婚姻住所

8.24 在英格兰及威尔斯，根据 1952 年无遗嘱者遗产法，如果一名无遗嘱者死亡时，其尚存配偶住在一居所内，该名无遗嘱者的尚存配偶有权取得无遗嘱者在该居所内所占权益，作为清偿或其可获无遗嘱者遗产的利益的全部或部分，或用以补偿金钱支付的差额。委员会认为这种做法亦属公平。但本港现时情况不同，尚存配偶并无这种权利，但遗产代理人可根据遗嘱认证及遗产管理条例（香港法例第 10 章）第 68 条有权将该住所拨归其所用。我们认为，配偶无权取得婚姻住所是不公平的。我们估计本港约有三分一家庭拥有自己的住所。本港条例并无这项规定权利，原因可能是在 1971 年立法时，本港自置居所的人口并不显著。时至今日，自置居所的人口日益增加，部分原因是政府鼓励自置居所政策所致。

建议：婚姻住所

8.25 **我们建议如果无遗嘱者遗下尚存配偶，则不论有否遗下子孙或亲属，该尚存配偶应有权获取无遗嘱者在物业所占的利益，而该物业乃指无遗嘱者逝世时其尚存配偶正居住的物业，作为清偿其法定遗产或无遗嘱者遗产的其他利益的全部或部分，或用以补偿金钱支付的差额。更且，我们认为，为补充香港法例第 10 章遗嘱认证及遗产管理条例第 68 条的不足，尚存配偶应有权将婚姻住所拨归其所用，有关拨用情况及程序必须清楚及毫不含糊地列明。**我们深信，如果这项建议及有关个人动产的建议同时付诸实施，则配偶死亡，对家居生活的影响亦可尽量减低。

8.26 **为使建议得以实行，条例须作出下列修订：——**

(1) 条例现有附表应改为附表 1，加上现行 1952 年英国无遗嘱者遗产法第 2 附表，称为附表 2，但为配合香港情况，该附表亦须略作修订（见附录 7 条例草案第 12 条）。

(2) 根据英格兰及威尔斯 1952 年无遗嘱者遗产法有关条文，本港亦应加插新订第 7 条，内容如下：——

尚存配偶有权取得居所

7. 附表 2 的作用是授权无遗嘱者的尚存丈夫或妻子取得物业，而该物业是是无遗嘱者死亡时，尚存丈夫或妻子正居住者（条例草案第 6 条）。

新订附表 2 主要特色包括：

(a) 遗产代理人可将剩余遗产内的物业利益拨归尚存配偶所用，作为清偿尚存配偶所占无遗嘱者遗产利益的全部或部分，或作为清偿部分利益，其余部分由尚存配偶付款予遗产代理人作为补足该物业价款。（在英格兰及威尔斯，并无附表所述特有条文，但上诉庭在 *Re Phelps* [1979] 3 All ER 373 的裁决清楚说明，如果婚姻住所的价值高于尚存配偶法定遗产款额，仍可行使拨用权，使到该项交易部分由拨用、部分以售卖形式结合而成。）

(b) 但如果利益祇包括租约，而且会在无遗嘱者死亡后两年内终止者，则本方案并不适用。

(c) 此外，如果居所是一幢楼宇的一部分，而剩余遗产计有或包括整幢楼宇的利益或如果该居所在无遗嘱者死亡时并不是祇作住宅用，则如无法庭批准，不可行使选择权（即有关要求拨用的决定）。

(d) 在第一次获取遗嘱认证或遗产管理书 12 个月内，必须行使选择权，在该段期间内，遗产代理人除由于管理遗产时缺乏其他资产，不可将居所的权益脱手。

根据外国法律尚存配偶获得利益

8.27 在 *Re Collens* [1986] 2 WLR 919 一案中，法庭裁决：以继承来说，在英国的不动产应受物所在地法（即有关物件所在地的法律）管辖，而不是受居籍法（即某人以某地为其永久居所，并与其在法理上有最紧密的关联）管辖。在该案中，一名无遗嘱者临死时的居籍地是特立尼达及多巴哥。他有遗产在该地及巴巴多斯但另有小部分遗产在英国，其中包括不动产在内。虽然遗孀已从死者在特立尼达及多巴哥的遗产中领取一百万元，英国高等法院仍勉强地决定该名无遗嘱者遗孀

有权根据经修订的1925年遗产管理法第46(1)条，领取全部“法定遗产”（在香港，相同条款载于条例第4(3)和(4)条）。我们认为，在这种情况下，如果某人的遗产散布各地，则尚存配偶须将从他地获得的金钱呈报，以抵销由于无遗嘱者在港死亡或由于部分遗产未在遗嘱中分配，遗孀可从本港不动产中取得的利益，这样才会对死者其他家庭成员较为公平。但有两种情况须予以处理：——

(a) 如果死者遗下不动产，但不是位于香港；及

(b) 如果死者逝世时居籍地不在本港，但在本港遗下不动产。

8.28 **为否决*Re Collens*一案的裁决，我们建议条例内应加插一条款，同时，亦要计及上文(a)及(b)段所述的情况**（见附录7条例草案第8条）。

8.29 我们原先打算建议在条例新订第7条之后加上一“推定条款”，以便遗产代理人将无遗嘱者在婚姻住所的利益拨归尚存配偶时，可减轻无遗嘱者应缴的遗产税。这样，无遗嘱者与有立遗嘱者继承遗产税时情况相同。但财政司在*LAU Yiu-sum v Commissioner of Inland Revenue* (Estate duty appeal No. 1 of 1983)一案审结后，为打消该案的裁决，在1986年2月26日预算案演词中，提议修订香港法例第111章遗产税条例第10A条。在该案中，遗产代理人根据遗嘱认证及遗产管理条例（香港法例第10章）第68条将婚姻住所拨归尚存配偶用，但法庭认为该产业并未有在无遗嘱者死亡时遗给尚存配偶，因而不能根据遗产税条例（香港法例第111章）第10A条获得减免遗产税。财政司的建议已根据1986年遗产税（修订）条例付诸实施。

第 9 章　无遗嘱继承：“子女或子孙”

现时情况

9.1　有关妾侍问题，本报告书将稍后分别讨论，本章不拟谈及1971年10月7日前无遗嘱者曾缔结一段夫妾关系而生下子女所引起的复杂问题。

9.2　现行条例第2(2)条及(3)条规定如下：

> “(2) 本条例内凡提及任何人的子女或子孙，即指：
>
> (a) 该人缔结一段有效婚姻所生的子女；
>
> (b) 如果该人是女性，她最后一名丈夫与另一名女性缔结有效婚姻所生的子女；及（香港法例1971年第49号第2条的修订）；
>
> (c) 该人按下述规定所领养的子女——
>
> (i) 遵照领养条例颁发的领养令；或
>
> (ii) 领养条例第17条适用的领养办法所领养的子女。
>
> (3) 本条例内凡提及任何人逝世时仍在生的子女或子孙，均包括该人逝世时待生的子女[1]或子孙。”

9.3　根据非婚生子女获取合法地位条例（香港法例第184章）第10(1)条规定：

> “10(1) 在本条例开始实施后，一名非婚生子女的母亲逝世时并未有就其所有或任何遗产订立遗嘱，而且亦无遗下任何尚存婚生子孙，则该名非婚生，即未有获取合法地位的子女，或如果该名非婚生子女已死亡但遗下子孙，则其子孙，均有权领取该份遗产的利益，一如他出生时被视为婚生子女一样，有权领取遗产。”

[1] “待生的子女”指“尚在母親胎中”而仍未出生的子女。

现况并不公平

9.4 我们认为现行条例第 2(2)条规定会导致反常及预料不到的不公平现象。有些前夫（妻）所生的子女可获得供养，但其他子女则没有（例如：夫妇两人都是再婚，丈夫前次婚姻所生的子女被视为第二任妻子的子女，但妻子前次婚姻所生的子女则不被视为第二任丈夫的子女）。本条例的范围并不包括非婚生子女，而祇有无遗嘱者是母亲及再无其他尚在生的婚生子女，其非婚生子女才能根据非婚生子女获取合法地位条例第 10(1)条（香港法例第 184 章）的规定获包括在内。我们在研究各种假设的情况后，发觉到条例第 2(2)条的规定，即使辅以非婚生子女获取合法地位条例第 10(1)条（香港法例第 184 章）的规定，仍是很不公平。

9.5 本港前注册总署署长 Mr. W.K. Thomson 曾以笔名“Scipio”撰写一篇题为：“无遗嘱者的一些危险”的文章，刊载于 1976 年 4 月 20 日的南华早报内，指出这些条文可能造成的不公平现象，文章取材丰富，提出尖锐的批评，本委员会现征得作者及南华早报的同意，将该文转载，我们很是感激。

9.6 继该文发表后，Mr. Thomson 对条例第 2(2)(b)条评论如下：“我觉得很奇怪，一名男子与其第一任妻子所生的子女，在第二任妻子逝世时如无订立遗嘱，将被视为第二任妻子的子女一事，妇女团体居然并没有抨击这事为显然不公平……，1971 年无遗嘱者遗产（修订）条例第 2(2)(b)条所作出的修订，表面上即会产生文章内所述“第 6 个案”那种荒诞的结果（见下一段第 6 个案），我认为实应对该条作出修订。

9.7 为表明第 2(2)条条文明显会造成奇特的现象，Mr. Thomson 在其文章中列出 6 个个案，都是关于一名居籍在香港的女士逝世时并没有订立遗嘱的，这些个案对于该条文实施后可能出现的现象颇具启发性，我们现将其中两个有关“子女或子孙”的个案列出如下：

（第 3 个案）

> “一名未婚女子 W 君，嫁与 H 君，而 H 君曾与前妻生下一名只有一岁的女儿 D 君。W 君并无子女，将 D 君视如己出，抚养成人。二十年后，H 君逝世，相隔一段日子后，W 君再嫁与 NH 君为妻，NH 君本身有一名儿子 B 君，年届三十，居于澳洲。不久，W 君和 NH 君死于车祸，NH 君先于 W 君逝世 1 小时。

由于W君再嫁与NH君为妻，NH君成为W君最后一名丈夫，因此，第2(2)条条文并不适用于D君，以致D君不得承继W君的遗产，而其遗产归B君所有。”

（第6个案）

“W君是一名寡妇，并无子女，嫁与H君，数年后H君爱上邻居的风骚女子LM君，两人私逃。W君于是提出离婚，H君由是娶LM为妻，生下一子C君。W君逝世时并无订立遗嘱，遗下唯一与她很是亲爱的姐（妹）S君。不过，谁是W君最后一名丈夫呢？无庸置疑，H君是也。那么，C君不就是W君最后一名丈夫与另一名女子缔结有效婚姻所生的儿子吗？有谁人敢说不是呢？这样，显而易见，C君有权承继W君全部遗产，而S君则一无所有。”

9.8 但Mr. Thomson在其文章中稍后亦提出，虽然条例第2(2)(b)条明显会有这样的效果，但法庭在遇到第6个案的情况时，肯定会尽其所能将这种不公平的释义减至最低。

9.9 更且，条例第2(2)条(c)段亦属不公平，虽然根据领养条例（香港法例第290章），1972年12月31日前无遗嘱者按照中国法律及习俗领养的子女，在香港获承认为其子女，但无遗嘱者遗产条例则不承认这些子女为遗嘱者的子女。领养条例第25条规定：

“25(1) 1972年12月31日后，凡在本港领养子女，祇可根据本条例规定进行，才可生效。

(2) 第(1)款规定并不影响在1972年12月31日前按照中国法律及习俗在本港被领养人士的地位或权利。”

顺便一提的是，领养条例并未有提及在1972年12月31日按照中国法律及习俗领养子女的地位。

9.10 上文提及在1985年，本港曾对非婚生子女的继承权进行民意调查，发觉社会人士对这问题所持的态度颇为开明，本委员会亦受到这调查结果的影响。同时，有人亦提到公民权利和政治权利国际公约第26条的规定，即应制定法律以有效地保障人不致受到岐视，尤其是不应由于社会来源或出生而受到岐视。

更改建议

9.11 **为纠正这些反常的现象，我们建议将条例第 2 条修订如下：**

(1) **将第 2(2)条废除。**这样，第 2(2)(b)条亦因应废除。而 Mr. Thomson 所举的例子将不会出现，亦不会违犯公平的概念。在第 3 个案，D 君将会继承遗产而不是 B 君，而在第 6 个案，S 君将会继承遗产，而不是 C 君。

(2) **条例内加插新订第 2(2)条，条文大致与 1987 年英国修订家庭法第 1 条相同（载于上文第 3.27 段关于遗嘱的条文），规定在解释子女关系时毋须理会其是否婚生**（见附录 7 条例草案第 2 条，该条与英国条文相同）。

(3) **在(c)段另加一小段，为 1973 年 1 月 1 日或该日以前按照中国法律及习俗领养的子女作出规定**（见条例草案第 2 条）。

(4) **由于其他建议，应废除非婚生子女获取合法地位条例（香港法例第 184 章）第 10(1)条**（见条例草案第 17 条）。

(5) **修订领养条例（香港法例第 270 章）第 25(2)条，将“1972 年 12 月 31 日”这一日期撤销，并以“1973 年 1 月 1 日”代替之**（见条例草案第 19 条）。

非婚生的无遗嘱者

9.12 根据现行法律及其他有关遗产分配的规则（例如：子女较父母有优先权，而父母则较兄弟姊妹等优先领取遗产等），唯一有权领取非婚生而且并未订立遗嘱人士遗产的人是——

(1) 根据条例一般的规定，无遗嘱者自己的子女或子孙，因为非婚生一事对他们并无影响；

(2) 根据非婚生子女获取合法地位条例（香港法例第 184 章）第 10(2)条规定，无遗嘱者的母亲；及

(3) 根据条例第 2(4)条规定，无遗嘱者同父异母的兄弟姊妹。

9.13 为便于参考起见，现将非婚生子女获取合法地位条例（香港法例第 184 章）第 10(2)条及本条例第 2(4)条胪列如下：

(1) 非婚生子女获取合法地位条例第 10(2)条：

> “(2) 在本条例开始实施后，如果一名非婚生子女未能获取合法地位，逝世时并无订立遗嘱，则其尚存母亲有权领取其全部或任何财产的利益，一如该人出生时是婚生，而她是唯一尚存的母亲。”

(2) 无遗嘱者遗产条例（香港法例第 73 章）第 2(4)条规定如下：

> “2(4) 本条例内凡提及一名人士的兄弟或姊妹，指凡与该名人士同一父亲所生的子女，即其兄弟姊妹。”

对现况的批评

9.14 一名非婚生子女的亲父，即使曾承认该名子女为其所生，而且曾供养他成人，但如果该名非婚生子女逝世时并无订立遗嘱，则该名亲父并无任何权利领取其遗产，祇有其母亲有权获得遗产，尽管她可能在该名子女出生后将其抛弃。当然有可能是该名非婚生子女的父亲在其出生后即将他遗弃，但即使该名子女是婚生的，这种情况亦可能出现。

9.15 至于非婚生子女同母异父的兄弟姊妹，即使自小已是一家人，由母亲一同抚养长大，但亦无权领取无遗嘱者的遗产。

9.16 倘一名非婚生无遗嘱者死亡时，即使已无任何近亲可领得其遗产，其亲祖父母、叔伯姑姨舅（可能是实际抚育他的人）亦不能领取其遗产。结果是该名无遗嘱者的剩余遗产将归政府所有（政府可拨款供养其受供养人：见第 8.3(g)段）。

9.17 在英格兰及威尔斯，自 1969 年英国修订家庭法有关条文生效后，非婚生人士与婚生人士一样，具有领取财产权利，但其中另一结果就是非婚生子女逝世时，其父母亦有权获得该名子女遗嘱产的利益，一如他们出生时属于婚生子女，其父母有权获得遗产一样。

更改建议

9.18 **我们建议，倘一名非婚生子女死亡而并未订立遗嘱，则在决定他的亲属继承其遗产的权利时，他是非婚生这一点应无须理会。我们对第 2(2)条所提出的修订，应可达成这个目的。关于非婚生一事，现在尚余一点仍属重要，就是须处理一新情况，对死亡时间须作出假设，因为非婚生子女的父亲现在有权继承。在大多数情况下，通常不可能追查到他的父亲所在，因此，我们建议作出下述假设，就是非婚生人士死亡时，他的父亲已先逝世**（见附录 7 条例草案第 3 条）。

第 10 章 无遗嘱者继承：“兄弟或姊妹”

现时情况

10.1 条例第 2(4)条规定如下：

> “2(4) 本条例内凡提及一名人士的兄弟或姊妹，指及由该名人士同一父亲所生的子女，即为其兄弟或姊妹。”

10.2 条例第 4(2)(b)、4(4)、4(8)及 5(4)条，均有提到“兄弟或姊妹”一词。

10.3 该词祇与“横向”继承有关，即指一名无遗嘱的兄弟或姊妹逝世，他的兄弟或姊妹（或他们的子孙）有权继承，这点与父母死亡由子女继承无关。

10.4 在英格兰及威尔斯，1925 年遗产管理法亦有同样条文，但规定是“同血缘的兄弟或姊妹”（即由同一父亲及母亲所生的兄弟姊妹）。在香港，条例第 2(4)条的规定，祇包括了同父异母的兄弟姊妹（即：由同一父亲所生的兄弟姊妹）。但在英格兰及威尔斯的条文规定，如果无遗嘱者并未有遗下丈夫或妻子、子孙、父母、同血缘的兄弟或姊妹，这样，半血缘的兄弟姊妹才有权继承。更且，如果无遗嘱者并无遗下同血缘的叔伯姑姨舅，半血缘的叔伯姑姨舅（即无遗嘱者父母的异父或异母的兄弟或姊妹）才有权继承。

10.5 现行第 2(4)条规定，当一名兄弟姊妹逝世时，祇要是同父所生的兄弟姊妹，不论其为中国习俗传统家庭中由妻子或妾侍所生的子女，均同样有权继承。而且，现行条例并不限于中国传统家庭，而是普遍适用。

建议

10.6 我们在下文第 10.7 段所作出的建议，与英国现行情况略有不同，在英国，同血缘的子女较半血缘的子女有优先继承权。在香港，为顾及中国传统，我们将一名男子与妻或妾所生的子女均视为同血缘的兄弟姊妹，从而甲妾与乙妾所生的子女均被视为同血缘的兄弟姊妹，这样，即可顾及本港的妾侍制度。除这点之外，我们沿用英国法律，以血缘关系来决定继承权。

10.7 **本委员会现建议如下：**

(1) **废除第 2(4)条**（见附录 7 条例草案第 2 条）。

(2) **条例内第 4(2)(b)条、4(4)条、4(8)条及 5(4)条内凡提及“兄弟或姊妹”、“众兄弟或姊妹”及“众兄弟姊妹”之处，即予以修订，泛指同血缘的兄弟姊妹**（见条例草案第 4 及 5 条）。

(3) **条例第 4(8)条应予以修订，以便在第一节之后加上给予半血缘的兄弟姊妹，以及在现行最后一节之后加上给予无遗嘱者父母半血缘的兄弟或姊妹，即半血缘的叔伯姑姨舅**（见条例草案第 4 条）。

(4) **此外，亦增订一法律条文，规定一名男子不论与其妻或妾所生的子女，均被视为同血缘的兄弟姊妹**（见条例草案第 4 条）

第 11 章 无遗嘱者继承：夫妾关系

现时情况

缔结夫妾关系

11.1 根据条例的规定，凡于 1971 年 10 月 7 日前所缔结的夫妾关系，均获承认。有关夫妾关系的过渡性条文载于条例第 13 条及附表内。按照过渡性条文，如果在 1971 年 10 月 7 日前缔结夫妾关系，该妾（女方）或男方死亡并无签立遗嘱时，另一方得获若干权益。更且，根据过渡性条文，夫妾关系所生的子女，以条例而言，被视为有效婚姻的子女，例如在他的父亲或母亲无遗嘱死亡，或父亲的结发（第一任）妻或妾侍但非其生母无遗嘱死亡，或兄弟或姊妹无遗嘱死亡时，均可根据条例分领遗产。条例过渡性条文规定如下：

> “13(1) 附表的规定对于在修订婚姻制度条例所指定的日期前缔结的夫妾关系适用。
>
> (2) 在本条与附表内，‘夫妾关系’指在修订婚姻制度条例所指定的日期前缔结夫妾关系中的男方与女方，在该种制度下，女方在男方生前已被男方的妻子承认为男方的妾侍，而其名分亦已为男方的家人所普遍承认。”

11.2 根据条例附表的规定：

(1) 以条例而言，由夫与妾所生的子女被视为有效婚姻所生的子女（第 2(1)段）。

(2) 第 2(2)(b)条所提及“丈夫”一词，应解释为已包括夫妾关系中的男方（第 2(2)段）。

(3) 整条条例对夫妾关系中的夫或妾均适用（第 3 段）。

(4) 倘夫或妾死亡时，另一方的利益大致上是从尚存配偶、子孙或其他亲属的利益中授给予另一方（第 4 段）。

(5) 倘一名妾再婚或与人发生性行为，则其可享有男方剩余遗产中的终身权利即告终止（第 4(12)段）。

对现时情况的批评

11.3 我们认为有关夫妾关系的过渡性条文并不公平，

(a) 夫妾关系所生的某些子女，即使在死者生前全靠他抚养，亦可能不能申领；

(b) 如果一名妾与人发生性行为，她的赡养费即告终止，但尚存配偶则无须受这规限，这点甚为不公平；及

(c) 根据条例第 13(2)条的规定，一名妾侍须证明在男方生前已被男方的妻子接纳为丈夫的妾侍，而其名分亦已为男方的家人所普遍承认，从证据观点来看，如果该名妾侍遇到怀有敌意的妻子及家人，及他们有意占据所有利益时，则该名妾侍要提出有关证据可能会非常困难。

(d) 由于建议删除第 2(4)条，为补偿损失，应加插一条关于推定兄弟姊妹关系的条款，一如上文第 10.7 段所建议。

（注：香港律师会认为应增加妾侍根据附表所享有的权利。小组委员会认为无遗嘱者可能不会同意律师会建议所增加的权利。不过，对于香港律师会有关建议，即妾侍应有权向法庭申请将终身利益折合为当前价值（即一笔过付款而非终身收取收入），小组委员会亦表示同意）。

建议

11.4 **我们建议——**

(1) **条例第 13 条应予修订，以便规定 1971 年 10 月 7 日前缔结夫妾关系的女方，应假设为已被男方的妻子及家人接纳为男方的妾侍**（见附录 7 条例草案第 10 条）。

(2) **非婚生子女获取合法地位条例（香港法例第 184 章）第 14(2)条亦应增添同一项假设**（见附录 7 条例草案第 18 条）。

(3) **附表 1 第 4(12)段有关“或与人发生性行为者”字眼应予删除**（见条例草案第 11(g)条）。

(4) **夫妾关系中的妾侍或男方应有权得回其终身利益**（见条例草案第 11 条）。

妾侍及子女

11.5 在上文第 9.11 段，我们建议废除第 2(2)(b)条。该条规定一名女性的“子女或子孙”即“其最后一名丈夫与另一名女子缔结一段有效婚姻所生的子女”。在引用这条文而并未有牵涉及妾侍时，会有若干不公平的现象，我们已在上文举出数个例子。但如果牵涉到妾侍时，情况略有不同。现时情况是：根据条例，一名男子与其妻子或妾侍所生的子女均被视为其妻子及妾侍的子女。在该名男子，他妻子或任何妾侍逝世时所有子女，均被视为死者的子女。这是按照第 2(2)(b)条及附表第 2 段相加起来的结果，该段规定：

(a) 由夫妾关系所生的子女应予视为有效婚姻所生的子女；及

(b) 第 2(2)(b)条所提“丈夫”一词，包括夫妾关系中的男方。

我们建议现行有关夫妾关系的条文应予保留。如果我们就附表 1 所提出的建议获得接纳而第 2(2)条将会被废除，我们建议在附表 1 内应加插一段，说明以条例的目的而言，夫妾关系男方的所有子女，不论由妻或妾所生，均属一大家庭。所有子女均被视为妻及每一名妾侍所生的子女（见条例草案第 11 条）。

11.6 现时一名男子与其妻子所生的子女，及与其妾侍所生的子女死亡时，祇有其亲生父母被视为死者的父母。对于这点，我们不打算作出任何更改。

11.7 为顾及妾侍制度，使到这方面的法律更为复杂，但情况可撮述如下：如果采纳上述建议，结果说是：在继承一名男子、其妻子及其妾侍的遗产方面来说，该名男子与其妻及妾所生的所有子女均被视为该名男子、其妻子及每一名妾侍所生的子女。即是说，这些人士死亡而并未有签立遗嘱时，所有子女均可得益，但子女死亡时，情况则不同。如有任何一名子女死亡，祇有其亲生父母可作为父母而得益，但其余子女则以同血缘的兄弟姊妹关系而得益。

妾侍及兄弟姊妹

11.8 上文第 10.5-10.7 段已作出讨论。

第 12 章 无遗嘱者继承：杂项

新界土地

中国习俗法例

12.1 除获新界条例第二部豁免的新界土地之外，无遗嘱者遗产条例已代替旧有无遗嘱者的财产继承规则。但以这些新界土地来说，中国习俗法例，或大清律例（除加上分配法外）仍获保留。

12.2 基本上，中国习俗法目的是将家产由男子孙保存，而很少是传给女子孙、如果死者并无儿子，其遗孀有责任领养一名儿子，继其姓氏，并保留传予男子孙。遗孀的权益祇限于终身获得赡养，如果再婚，这权益亦告终止。儿子亦可获得赡养，但女儿祇有权获得赡养至其出阁之日，唯当日可获得一笔嫁妆。

12.3 在新界，惯常处置一名死者财产的方法是拨出款项给予同一祖宗当时的男后裔，作为供养及生活费用，以及拨出一笔基金，作为祭祖之用。这些由家族持有的土地，通称为“祖”或“堂”。

12.4 中国习俗法例亦承认家庭内的男性与第二位妻子的关系，而该名妻子称为“妾”或“妾侍”。以家族及家产而言，妾均有权利。她的子女（庶出），与正妻的子女（嫡出）一样，被视为婚生子女。妾侍是由于该名男子有意纳她为妾，并获正妻接纳及家人承认，因而取得妾侍地位。

12.5 条例第 11 条规定——

> “11.(1) 本条例任何条款，不得作为对新界条例第二部关于土地适用范围有所影响，而该等土地是指新界条例第二部适用而总督未有根据该条例第 7(2)或(3)条准予豁免遵守新界条例第二部规定的土地。有关条款续对该等土地适用，而适用程度与效力，一如本条例未予通过实施情况一样。
>
> (2) 在无遗嘱死亡情况下，本条适用的土地仍须按以往办法继续转移，一如本条例未予通过时情况一样。

(3) 在本条内，‘土地’一词的含义与新界条例第2条内载该词的含义相同。”

12.6 现尚未获新界条例第二部豁免的新界土地数目较以往大为减少。同时，自1971年无遗嘱者遗产条例通过以来，这些土地的价值亦大大增加。我们认为，现今社会，在同一司法辖区内，祇因为无遗嘱者的某一种资产（即新界条例第二部仍适用的土地）而需保留两种继承制度，实属不当。更且，我们认为，不准女儿承继及限制一名无遗嘱死者的遗孀权利原则上是不对和落伍的，不符合香港今日的新思想。同时，保留这条款可能违背公民权利及政治权利国际公约第26条的规定，该条规定：在法律面前，人人平等。更且，自1971年，本港整个家庭法的法定架构已全部改变（例如：领养儿女），要保留香港1971年以前的境况而事实上中国亦已无这种情况出现，实属怪诞。**我们建议将条例第11条整条废除。**

12.7 今时今日，本港大多数有关的土地可能均以氏族、家族、“堂”或“祖”名义持有，倘氏族、家族、堂或祖有成员逝世时，他们拥有的土地应如何转移，通常已有颇详细的规则可予遵循。大多数规定男子孙可按人数分摊或按家系[1]均分，而有时亦有同时采用两种分配方法，规定某百分率的土地按其中一种方法分配。我们相信，在某些情况下，无遗嘱遗产法须考虑到氏族、家族、堂或祖的分配规则。

12.8 我们认为，须清楚列明，如果某一氏族、家族、堂或祖订立继承规则，而该氏族、家族、堂或祖有成员逝世时，有关规则应予生效而不应受本条例或遗嘱条例所影响，除非该等规则明确或隐含地并入本条例或遗嘱条例在内。

12.9 虽然我们已建议保留有关氏族、家族、堂或祖的继承规则，但政治因素可能不利将整条第11条条款废除。联合声明附件三第2段须予考虑。该段规定包括新界土地在内的土地须缴纳地租。**如果我们有关废除第11条的建议不获接纳，我们建议，最低限度该条应予修订，以便该条祇限于对新界未获豁免的土地适用，亦即祇限于以中国氏族、家族、堂或祖的名义持有或为他们的利益而持有的土地。**遇到无遗嘱死亡时，以其他名义或方法持有的土地将根据条例内的一般条款加以转移。在这种情况下，新界条例第二部有关条款应作出相应修订，用以明确地将“祖”包括在“氏族、家族或堂”的字眼内，以反映长久以来的惯例。一如前新界政务署Dr. James Hayes所指出，

[1] （見第3.30段的定義）。

其他机构，例如："会"可能亦须列入，因此，有关更改不得孤立进行。

法定信托

12.10　条例第5条规定为无遗嘱者的子孙及其他伙亲属设定信托。条例第5(5)条规定如下——

> "(5) 除为无遗嘱者的子孙设定的信托外，凡为无遗嘱者的任何伙亲属设定的信托，倘因该伙亲属并无任何成员可获得绝对既定利益，则该无遗嘱者的剩余遗产与该剩余遗产所得收入，以及如有任何法定积累收入，或如未有行使对上述剩余遗产及收入有影响的权力，以致有尚未支出及应用的部分款额，均由于本条第(2)及第(3)款内载规定，按本条例的条款将有关财产加以分配、转移及持有，一如该无遗嘱者逝世时并无遗下该伙成员，或任何该伙成员仍在世的子孙。"

12.11　上述条款取材自1952年无遗嘱者遗产法。在*Re Lockwood* [1957] 3 All ER 520一案中，法庭曾对该条规定所造成的后果，批评为"反复怪诞"。举例来说，如果并无一位全血缘的叔伯姑姨舅可取得既定利益，但半血缘的叔伯姑姨舅可取得既定利益，则按该条狭义解释，全血缘的甥侄不被列入，而半血缘的甥侄会较全血缘的甥侄有优先继承权。在1966年，英格兰及威尔斯通过家庭供养法，废除这条款。**我们亦建议废除条例第5(5)条**（见附录7条例草案第5条）。

保障受托人及遗产代理人

12.12　显而易见，根据本条例的规定，受托人及遗产代理人的职责繁重。他们必须尽速及妥当地履行职责，但有关遗产代理人的责任，现仍受普通法上有关疏忽的法则管辖。我们认为，这些法则范围不定，应用时可能非常麻烦。特别是，我们建议非婚生子女与婚生子女同等享有继承财产的权利，这方面的改革会对受托人及遗产代理人的责任有影响。一名遗产代理人现须确定除婚生子女外，是否尚有其他非婚生子女有权继承，他们可能会遇到困难。**为有助于确保一名遗产代理人在知悉其困难后，仍能不致阻碍其尽速履行职责，我们建议在遗嘱认证及遗产管理条例内加插一新条款，以限定其应负责任**（见附录7条例草案第13条）。

12.13 以本文而言，对并没有缔结婚姻的父母所作的假设（请参阅第 9.1 段）亦有关联。如果并无证据显示一名无遗嘱非婚生子女的父亲尚在世，则遗产代理人可免却追查其父亲是否尚存。

政府

12.14 条例第 4(9)条规定：——

> “(9) 如果并无任何人得按上文规定取得绝对权益时，该无遗嘱者的剩余遗产即成为无主财物而归政府所有，而政府在不妨碍任何其他权力的原则下，可运用交给政府的全部或部分财产，抚养受该无遗嘱者供养的人士（不论是否为该无遗嘱者的亲属），以及该无遗嘱者可合理预期会加以抚养的其他人士。”

12.15 **我们建议修订条例第 4(9)条，以便删掉“政府”一词，而以更合适的字眼代替。**（注：注册总署署长建议采用“财政司立案法团”，该法团是香港政府法定持有财产的代理机构。）

第 III 部　供养死者家属及受供养人

第 13 章 遗属生活费条例

引言

沿革

13.1　英国法的特色，就是制定一项原则，规定人享有立遗嘱以处理其财产的自由。但在施行这原则时，有时会导致立遗嘱人在死后不给足够生活费予受他供养的人，因而得以逃避其对受供养人的责任。这种情况颇令人不满，英国终于提出法律改革。1938 年继承（供养家属）法（以下简称 1938 年法）限制了立遗嘱人随意决定对他的遗产如何分配的权利。如果受立遗嘱人供养的某些人士，未有获得合理的生活费，可向法庭提出申请，该法即授予法庭有司法权，得干预立遗嘱人明确的遗嘱意愿。初时祇有在死者留有遗嘱时，法庭才能行使这权力。其后，不论死者是否立有遗嘱，或局部立有遗嘱，法庭均可行使权力。

13.2　1975 年英国废除该法，并由 1975 年继承（供养家属及受供养人）法（以下简称 1975 年法）所取代。英国 1975 年法较 1938 年法所规定的生活费更为慷慨。大致上，扩大了有权申请供养人士的类别，增加了尚存配偶可获得的生活费水平，及法庭可颁发的救助方法。同时，亦放宽法庭命令可下达的财产范围。

本港须予改革

13.3　本港的遗属生活费条例（香港法例第 129 章）（以下简称“条例”）大致上基于 1938 年的英国法。

13.4　最高法院经历司告知本小组委员会谓：法院并未有保存有关根据遗属生活费条例提出申请的统计数字，但按照现时与前任法庭书记的记忆，均记不起任何有关这类的申请。看来如果有任何人使用这条例的话，亦是寥寥无几。委员会深信，这条例鲜为人所用，并不显示殊不重要。这条例即使保持现行形式，亦可确保正义得以维持，可

使签立家属安排协议人士有所遵循，以免诉讼，而且可作为不愿那一方的最后制裁。

13.5 不过，委员会认为遗属生活费条例的大多数条文并不正常。本报告以下数章将会讨论其中的困难。如果我们的意见获接纳及建议被采用的话，现行为家属提供供养的法律将须大幅度修改。**为实施本报告的调查结果，我们建议废除遗属生活费条例，而代以一条类似1975年英国法的新订条例。**本报告附录8载有继承（供养家属及受供养人）条例草案。（以下简称“条例草案”）

第 14 章 遗属生活费条例：有权申请者——现况及建议

“受供养人”的定义

14.1 如果一名死者，并未有在其遗嘱中，或如果并未立有遗嘱但按照无遗嘱继承法，或如果死者局部遗产未立遗嘱，以致按照遗嘱连同无遗嘱继承法，未有提供合理的生活费予受供养人，则该受供养人可向法庭提出申请，法庭根据遗属生活费条例赋予的酌情权，得从死者的“净遗产”中拨出合理的生活费给受供养人（条例第 4(1)条）。受供养人必须亲自或由代表向法庭提出申请。“净遗产”的定义载于条例第 2(2)条，实质指除某些新界土地外，在扣除一切债务、税项、殡葬费及遗产管理费后剩余的“净遗产”。

14.2 一如上文所述，唯一可根据条例而获益的人士是“受供养人”。按照条例第 2 条规定，祇限于下述人士：——

“(a) 死者缔结有效婚姻中的妻子或丈夫；

(b) 死者缔结有效婚姻所生的未婚女儿；

(c) 死者缔结有效婚姻所生的未成年儿子；

(d) 死者缔结有效婚姻所生的儿子，但由于精神或身体不健全，不能供养自己；及

(e) 死者父母，而且是在死者生前主要靠其供养者。”

14.3 条例第 17 条及附表列出有关夫妾关系的过渡性条款，在附表内，“受供养人”的定义是：——

“(a) 死者缔结夫妾关系中的妾或男方；

(b) 在该种关系下死者的未婚女儿；

(c) 在该种关系下死者未成年的儿子；

(d) 在该种关系下死者的儿子，但由于精神或身体不健全，不能供养自己；及

(e) 死者父母，而且是在死者生前主要靠其供养者。”

14.4 根据条例被列入为“受供养人”的人士类别非常有限，而且即使是靠死者供养，但不属于这些类别的人士，亦不得提出声请。有实无名的配偶、非婚生子女、在死者临终前数年可能曾照顾死者和实质靠其供养的兄弟或姊妹，以及某些婚生子女亦不列入可提出声请的人士类别。目前，除未婚的成年女儿或精神或身体不健全，不能自我供养的成年儿子之外，已成年的子女无权申请。小组委员会注意到，一名人士能否获得条例规定的裁定额，最终是由法庭决定，法庭是在考虑整件个案的一切情况之后，然后决定是否行使酌情权，就个别情况颁给裁定额。因此，有权提出声请祇是赋予申请权，而不是有领取权，我们认为，如果将可申请的人士类别范围扩大，也不见得有害（事实上，即可纠正现时很多不公平的现象）。更且，**我们建议，以“受供养人”一词去形容那些可按照条例规定提出申请的人士，应予删掉。而应清楚列明每一类可提出家属生活费申请的人士类别**（见附录 8 条例草案第 3(1)条）。

尚存配偶、前配偶、妾侍及男方

14.5 **我们建议，“死者的妻子或丈夫”、“死者的前妻或前夫而未有再婚者”及“死者是夫妾关系中的妾或男方”均得列入为有权提出申请生活费的人士类别内**（见条例草案第 3(1)条）。

14.6 条例内并未载有“丈夫”或“妻子”的定义。**我们建议制定“死者的丈夫或妻子”的定义。**这定义范围不但包括有效婚姻人的尚存配偶，而且亦包括与死者诚意缔结的一段婚姻的当事人，该段婚姻，虽然无效，但亦未有被解除或被废除（见条例草案第 2(1)条）。

14.7 根据遗属生活费条例第 3 条，一段“有效婚姻”指按照婚姻条例（香港法例第 181 章）规定而缔结的婚姻，修订婚姻制度条例（香港法例第 178 章）承认为有效的新式婚姻，修订婚姻制度条例宣布为有效的旧式婚姻；或在本港以外地方根据当地法例而举行仪式或缔结的婚姻。**我们建议保留这“有效婚姻”的定义**（见条例草案第 2(1)条）。

14.8 根据现行婚姻诉讼程序法例，一名前配偶或法院判决分居的配偶，如在死者生前一向由死者给予赡养费的，在死者逝世后，可向法庭申请，要求从死者遗产中拨出赡养费，使该赡养令得以继续。不过，如果死者的前配偶或由法院判决分居的配偶祇是刚开始申请赡养费，而死者期间死亡，前配偶或由法院判决分居的配偶可能再无他法获得生活费。为使遗属生活费法例得以统一及纠正上述反常现象，**我**

们建议未有再婚的前配偶（包括由法院判决分居的配偶）得列入条例草案为有权申请生活费的人士类别内（见附录 8 条例草案第 3(1)条）。

14.9 条例中亦承认夫妾关系的存在，但祇承认 1971 年 10 月 7 日前缔结的夫妾关系。条例第 17(2)条订明“夫妾关系”的定义，指男方与女方缔结的一种关系，在该种关系下女方于男方生前已获其妻子承认为妾侍，而她的名分亦被男方家人普遍承认。更且，附表内亦提到“夫妾关系的一方”，指在该种关系下的妾侍或男方。**我们建议，除有关“妾”及“夫妾关系”两词的定义外，条例内有关夫妾关系的过渡性条文，即条例第 17 条及附表予以废除**（见条例草案第 2(1)条）。**而“夫妾关系中死者的妾或男方”应列入为有权提出申请的人士类别内**（见条例草案第 3(1)条）。

死者的父母

14.10 现行遗属生活费条例规定，如果父母是在死者逝世前主要靠其供养者，即可申请（条例第 2(1)条）。**我们建议这些限制父母提出申请权利的条件应予取消**（条例草案第 3(1)条）。

死者的子女

14.11 根据遗属生活费条例，唯一可提出申请的子女是死者缔结有效婚姻或认可的夫妾关系中所生的未婚女儿，有效婚姻或认可的夫妾关系所生的未成年儿子或由于精神或身体不健全而不能自我供养的成年儿子（条例第 2(1)条及附表）。

14.12 至于“儿子”及“女儿”的定义，则分别载于遗属生活费条例第 2(1)条，指：——

> “(a) 由死者缔结的一段有效婚姻所生的未成年儿子或女儿；
>
> (b) 由死者按照下述规定所领养的未成年子女——
>
> (i) 遵照领养条例颁发的领养令；或
>
> (ii) 领养条例第 17 条适用的领养办法所领养的子女；

(c) 死者缔结了一段有效婚姻而在他逝世时待生的子女。”

委员会认为这些有关死者子女的条文在多方面是不正常的。

14.13 根据“儿子”及“女儿”的定义，1972 年 12 月 31 日前死者按照中国法律及习俗领养的子女，虽然有关领养办法在领养条例（香港法例第 290 章）内获保存，在香港获承认为其子女，但在遗属生活费条内则不承认这些子女为死者的子女。该条例第 25 条中有明文规定：——

“25(1) 1972 年 12 月 31 日后，凡在本港领养子女，祇可根据本条例规定进行，方可生效。

(2) 第(1)款规定并不影响在 1972 年 12 月 31 日前按照中国法律及习俗在本港被领养人士的地位或权利。”

一如本报告第 I 部所述，领养条例并未有提及在 1972 年 12 月 31 日按照中国法律及习俗所领养的子女地位。

14.14 祇有由一段有效婚姻或被承认夫妾关系所生的未成年子女有权申请生活费。非婚生子女即使是全靠死者生前供养，亦不被列入。

14.15 根据现行遗属生活费法律，一名并非死者亲生或领养的子女，即使被视为“属于家庭的子女”，亦无权提出申请。因此，举例来说，如果一名男士负起抚养其妻子前次婚姻所生子女的全部责任，但并未有正式领养他们，在他死后，那些子女无权要求从他遗产中拨出家电属生活费。

〔注:“待生的子女”指“尚在母亲胎中”而仍未出生的子女。〕

14.16 成年子女，虽然与死者是父母子女关系，但除未婚女儿及丧失行为能力的儿子外，亦无权申请。

14.17 **我们建议现行遗属生活费条例有关死者子女申请权的条文，应予废除。并由一条限制性较少的条文取代，而该条文将不会限制领养子女、非婚生子女、成年子女及“属于家庭的子女”，提出申请**（见附录 8 条例草案第 3(1)条及 2(1)条有关“子女”的定义）。

其他“受供养人”

14.18　正如上文所强调，遗嘱生活费条例对可提出申请的人士，即使是死者的至亲，亦严加限制。那么，那些不属这些类别的人士但事实上在死者逝世时确是由他供养的，又怎样呢？死者生前曾负起道义上的责任而非法定的责任，法律应否予以执行？

14.19　英格兰及威尔斯 1975 年法制定一新条文，容许在死者生前全靠或部分倚靠死者供养的“任何人士”（除上文所述的人士外），得申请条例中的生活费。这更改无疑是在这法例中最具争论性。特别是有实无名的配偶亦可申请从死者的遗产中拨出生活费。（在香港而言，亦有另一种情况，譬若一名年老的家仆，她可能自少即照顾死者）。要求将申请人士范围扩大其中一个论据就是死者没有拨给生活费予某人，这可能是无意的。如果法庭能够发出命令，从其遗产中拨出生活费予这些人士，即假设死者理应有这意图，而法庭祇是代他执行。无论如何，条文祇赋予人士有权申请，并不是有权领取生活费。申请人须向法庭提出申请所据的理由，并获法庭接纳方可。

14.20　在考虑到这问题所涉及的各方面影响，我们认为本港应制定一条文，类似英国 1975 年法所载者，**我们建议增列一类有权申请人士，即：“在死者死前全部倚靠或部分倚靠死者的任何人士**（非上文所提及的人士）”（见条例草案第 3(1)条）。

第 15 章 遗属生活费条例：司法管辖权及法庭权力现况及建议

司法管辖权

15.1 法庭按照遗属生活费条例颁发命令的司法权由该条例第 9(1)条确定，该条规定如下：——

> “9(1) 如死者逝世时在香港遗下净遗产，则不论死者逝世时在香港或外地居住，该笔净遗产均应按本条例规定处理，以支付法庭根据本条例颁令从死者净遗产中拨出的生活费，一如死者逝世时在香港定居一样。”

因此，现时司法权的基础在于死者逝世时“在香港遗下净遗产”，而不论其定居地何在。（应当注意的是：定居地的问题对于如何处理死者遗下的某一类财产是有影响的。根据国际私法（冲突法）的通则，“动产”或个人财产的继承由死者最后定居地的法律决定，而“不动产”的继承则须按照物所在地法(lex situs)，亦即有关财产所在地的那一套法律所管辖）。

15.2 **委员会建议法庭司法权的基础应有更明确的现定——其一要津就是死者逝世时定居于香港，而另一根据就是死者逝世前三年内曾经有任何时间通常在香港居住，并且逝世时在香港遗下净遗产**（见附录 8 条例草案第 3(1)条）。

法庭颁发命令的权力

15.3 遗属生活费条例规定：司法权经由第 9(1)条确定后，法庭即可行使第 4(1)条所规定的权力：

> “4(1) 在本条例生效后，如果一名死者逝世时遗下一名受供养人，而法庭根据该受供养人或其代表的申请认为：按照遗嘱或无遗嘱的法律，或同时按照两者的规定处理死者遗产时，会使到该受供养人不能获得合理的生活费，则法庭可下令根据法庭所订立的任何条件或限制，从死者净遗产内拨出法庭认为合理的生活费给受供养人；

但如以上述方式处理死者遗产时死者遗下的配偶应得的数额不少于净遗产收益的三分之二，而其唯一或多名受供养人（如有）为该尚存配偶的子女。则任何人或其代表均不得向法庭提出上述申请。”

15.4 法庭可下令以周期付款、整笔总付、或两者并行的方式将生活费付给申请人（条例第 4(2)、(3)及(4)条）。但要注意的是：根据第 4(1)条规定，即使是尚存配偶，亦仅能申请生活费。按照该条例规定，除非充作赡养用途，否则亦不能要求提供一笔资本金。

15.5 根据 1975 年英国法，法庭在考虑到申请个案所有情况可下令向配偶拨付一笔该配偶应得的款项，无论该款项是否其生活所需者（该法第 1(2)条）。这反映了现时流行的想法，即就尚存配偶而言，供养家属的法律实际上应与婚姻诉讼法律相同。这两类诉讼的申请人的处境或有不同，倘婚姻是以法庭判决分居及离婚而结束时，婚姻诉讼中的申请人较有可能请求法庭干预，以确保离异的配偶尽其供养申请人的义务。反之，如果婚姻是由于丈夫或妻子死亡而告终，则死者通常已透过遗嘱或无遗嘱情况的法律规定对其家属履行义务。需要向法庭提出遗属生活费诉讼的情况绝无仅有。然而，委员会认为，英国将配偶申请生活费这两类情况以同样方式处理，亦属可取。**因此，我们建议制定“合理生活费”的定义，订出适用于配偶申请时应特有的水平**（见附录 8 条例草案第 3(2)条）。

15.6 我们认为在大多数个案中，离婚及由法院判决分居的配偶可得的生活费水平，应较适用于尚存配偶的水平为低。要区别对待的理由是：前配偶或判决分居的配偶可以根据婚姻诉讼条例（香港法例第 179 章）在死者生前申请和领取生活费。**倘法庭并未有在婚姻诉讼中就生活费作出颁令**（例如当事人在婚姻诉讼期间死亡）。**我们建议授权法庭将前配偶或判决分居的配偶提出的申请，视作尚存配偶申请般处理。**这样，法庭可以判给较一般情况为高的生活费。（见条例草案第 16 条）。

15.7 **我们建议将法庭在家属生活费诉讼中的权力扩大，以便与法庭在婚姻诉讼中颁令判给生活费的权力相近，一如英国在 1975 年所制定的法例一样。具体上，我们建议赋予法庭下列额外权力：**

— **得颁令为申请人的利益计，而将属于死者遗产一部分的财产作出转让或授与。**（见条例草案第 4(1)(c)及(d)条）

— **得颁令为申请人的利益计，或为拨付其应得利益计，将属于遗产一部分的资产用作取得（其他）财产或权利**（见附录 8 条例草案第 4(1)(e)条）。

— **得颁令作出法庭认为是执行其命令时所必需的相应或补充规定（包括更改按照死者遗嘱或无遗嘱法例或按照两者的规定以处理死者遗产的方式，及向应根据法庭命令准备授与财产的受托人赋予广泛的权力）**（见条例草案第 4(4)条）。

法庭须予考虑的事项

15.8 根据遗属生活费条例第 7 条的规定，法庭在处理家属生活费的申请时应考虑下列事项：——

(a) 该项申请所涉及的受供养人过往、现有或将来可得的任何资本，以及该受供养人从任何来源所得入息；

(b) 对于死者而言该受供养人的行为表现及其他方面；

(c) 其他受供养人的权益；

(d) 根据申请个案情况，对于该名受供养人或在死者遗产中占有权益的人或其他人而言，法庭认为有关或重要的任何其他事项。

法庭还应考虑死者处理财产的理由（如果能够确定该理由的话）。这一特别条文已从英国法例中完全略掉，因为英国法律改革委员会觉得应考虑死者的理由并非祇因为那些是他的理由，如条文所暗示，而是因为其性质。英国法律改革委员会认为如果那些理由是有关的话，等同的第 7(1)(d)条已足够包含应考虑死者的理由。虽然如此，香港法律改革委员会认为在香港法例中一些明确提及死者言祠的条文应予保留。至于遗产方面，法庭应遵守的指示，就是不得下令将遗产中的资产作“不化算”的变卖，以支付生活费。

15.9 **委员会建议采用一新条文，详列法庭须予考虑的事项，计有：——**

— **有关的申请人及任何其他申请人或死者遗产的受益人目前或可见将来的财政来源及需要；**

— **死者对于遗属生活费申请人或遗产受益人所负的义务或责任；**

— **死者净遗产有多少和性质如何；**

— **任何其他相关事项，包括任何有关人士的行为表现；**

— **任何死者的言词，即法庭要考虑事情的证据；**

— **（如申请人为死者的配偶、前配偶、妾侍或男方时），申请人的年龄、夫妻或夫妾双方结合期间、申请人对于死者家庭福利的贡献、以及如果申请人是死者的配偶，假设该段婚姻以离婚而非死者的死亡告终，则申请人应得的生活费；**

— **（如申请人是死者的子女或被视为死者的子女时），申请人曾受或本来应当受到何种教育程度或训练，而如果死者并非其亲生父母时，死者对供养申请人肩负及履行多少责任，以及是否有其他人对申请人应肩负的供养责任；**

— **（如申请人是死者父母时），申请人的年龄以及死者死前为申请人的需要而作出的扶养（现款或有金钱价值的物品）；**

— **（如申请人并非家庭成员但由死者供养），死者负担供养责任的根据以及供养该人的时间。**

（见附录 8 条例草案第 5 条）。

第 4(1)条但书

15.10 至于遗属生活费条例第 4(1)条的条文，应为注意的是：本港条例第 4(1)条但书为立遗嘱人而设的“自动保险设施”，在 1975 年的英国法是没有的。（该但书的作用是：当该条例所规定的“受供养人”仅为其尚存配偶及其子女，而大部分的遗产收益已遗留给尚存配偶，则不得提出申请)。

15.11 前注册总署署长 Mr. W K Thomson 举过一个例子，说明现时第 4(1)条的但书如何可能导致不正常的情况。假设 A 君是可能的申请人，譬如说是死者前一段婚姻所生的未成年儿子。SS 君是尚存配偶，有

权取得净遗产收益的三分之二，而C君是SS君的子女，唯一的“其他受供养人”（除A君以外）。为甚么单单因为SS君有一名子女（C君）有资格提出要求，而A君则不能提出要求呢？再者，如果除C君以外还有其他受供养人，则A君看来便有资格提出要求，这真是很奇怪的现象。委员会认为有关法例不应受到这样的羁绊，而这类问题应当留给法庭按照实际情况和有关人士的行为作出判断。**因此，我们建议遗属生活费条例第4(1)条但书不应列入新草案内。**

申请时限

15.12　根据条例第6条规定，有关申请须于取得遗产管理书日起计6个月内向法庭提出，但法庭有权决定受理超逾这个时限的申请。1975年英国法亦采用同样时限（第4条）。**我们建议这个由法庭颁发遗产管理书日起计6个月的时限继续适用于在香港提出的申请。**

第 16 章 遗属生活费条例：可作为供养家属的财产现况及建议

净遗产

16.1 条例第 2(2)条列出“净遗产”的定义如下：——

> “…… 指死者有权凭遗嘱（而非凭特别委任权）处置的一切财产，但其中必须扣除在其逝世时从其遗产内拨出以支付的殡葬费、遗嘱执行费及遗产管理费、债务及赔偿责任及死亡税，但不包括属于新界条例第二部管辖范围内而未获总督根据该条例第 7(2)及(3)条免其遵守该条例规定的土地。”

净遗产及新界土地

16.2 根据第 2(2)条，最重要的就是新界某些土地将不包括在死者的净遗产内。结果，法庭在颁发命令时，不能将这些土地拨作一名受供养人合理的赡养费之用。

16.3 前属新界政务署 Dr. Hayes 向小组委员会指出，现行遗属生活费条例与无遗嘱者遗产条例在处理新界土地方面的条文颇有不同。在遗属生活费条例，唯一提及新界土地之处，是不将新界土地列入第 2(2)条有关“净遗产”的定义内。但无遗嘱者遗产条例第 11 条特别规定，在无遗嘱死亡情况下，新界条例第二部适用的土地，继续按以往办法加以转移，一如无遗嘱者遗产条例未予通过一样。

16.4 本委员会在本报告书内其他地方曾研究新界土地及无遗嘱者遗产条例问题。我们认为新界土地获得该条例特别豁免一事应予撤除。本委员会认为该两条例取向应一致。**因此，为符合我们较早时就无遗嘱继承法所提出的建议，现我们建议遗属生活费条例有关新界土地获得豁免条文应予废除。**

净遗产及其他财产

16.5 1975 年英国法第 8 及 9 条（载于附录 5）规定死者某些财产须作为其净遗产一部分处理，如果不是由于这两条文，那些财产将不会被视为其净遗产。两条文所指的财产，包括经由其提名给予某人的

财产，临终前的赠与、或合有的物业。**我们建议本港亦应制定类似的条款**（见附录 8 条例草案第 10 及 11 条）。

16.6　在英国有数条法律条文，授权某些财产如果在死者生前经提名给予某人，则在其死后，该等财物即传给该人。1975 年英国法其中一项条文实质上将死者经提名给予某人的任何财产重新纳入死者的遗产内，以便可作为供养家属的财产处理（见 1975 年英国法第 8 条）。（在英国的例子可包括存于某银行或邮政局的投资存款。）不过，为免对分配遗产造成不必要的延误，条文规定：即使要求家属生活费的诉讼获得胜诉，那些根据提名规定负责分配死者遗产的人士，不应为已分配的资产归还问题负责赔偿。不过，如果法庭颁发命令，这项保障亦不会阻止获胜诉的申请人从获提名人士手中取回已分配的财产。在香港亦有不少非法定的计划，容许这种提名分配财产的存在。例如：雇员长俸及退休金计划。本委员会留意到英国条文并未有明确提到那些可能受提名规限但实质上在死者逝世前并未有提名给予某人的财产。因此，**我们建议在香港类似的条文中，应将范围扩大，以包括那些经提名给予某人或死者应可提名给予某人的财产在内**（见条例草案第 10(1)条）。

16.7　临终前的赠与是死者在预期逝世前赠予他人的金钱或其他财物。根据 1975 年英国法第 8(2)条（及条例草案第 10(2)条），这类财产亦应与提名给予某人的财产一样处理（一如上文所讨论）。

16.8　通常死者生前与他人合有租赁的物业在其死后即自动传给尚存的物业合有人，结果，这些物业并不列为其遗产。（这种“物业合有人”的情况该与另一种以“物业共有”形式一同拥有物业的情况比较。尚存者取得拥有权的原则并不适用于“物业共有”，死者在该物业的那一份额将会作为遗产的一部分）。尽管通常尚存者可取得拥有权，在一名物业合有人逝世时，出现的问题是该合有的物业应否亦被拨作供养家属之用。这问题尤为重要在当申请人并非尚存配偶（物业合有人），而婚姻住所是合有的。1975 年英国法第 9 条（及条例草案第 11 条）授权法庭得命令从死者合有的物业中拨出其可分割的份额作为供养家属之用。值得一提的是：第 9 条限制根据该条文的申请必须由首次取得遗产管理书日期起计 6 个月内进行，论据是如果通常尚存者取得拥有权这一原则不获采用，尚存的物业合有人应尽早获得通知。**兹建议本港亦采用同一时限**（见条例草案第 11(1)条）。

第 17 章 遗属生活费条例：防止逃避规定现况及建议

现况

17.1 遗属生活费条例的整体目标就是要确保某些人可以从一笔遗产中取得合理的生活费，即使死者没有作出这样的安排亦然。不过，遗属生活费条例中却没有“防止逃避”的规定。因此，现时一名立遗嘱人如有意令到在他死后根据条例提出的任何申请都徒劳无功的话，他是可以在生前作出某些财政上的安排以达到这目的。因此，如果没有防止逃避的规定，条例的整体目标就会受到挫败。可能根本没有“遗产”作为申请取得的对象。

处理财产

17.2 在英格兰及威尔斯，1975 年英国法第 10 至 13 条（见附录 5）赋予法庭若干权力，可处理那些目的在逃避根据该法例而提出生活费申请的交易。根据第 10 条的规定，在下列情况下，死者死前 6 年内所作出的“财产处置”法庭有权将其废止：——

(1) 所作出的处置意图在阻止根据该法例提出的申请；

(2) 没有付出充分的有价约因。

17.3 按照英国 1975 年法第 10(7)条的规定，一宗“财产处置”包括付款（支付保费亦计算在内）以及其他任何类型财产的任何转让（或物业转让，指定接受财产人或财产赠与），无论是以文据或其他形式作出的转让。这个词并不包括由遗嘱所作出的拨款，财产的“提名给予”、临终前的赠与、或凭借特定的指定权（但非以遗嘱形式）而作出的财产指定（见第 16 章的讨论）。

17.4 至于死者是否“意图”逃避法例规定的检定标准，在于祇要法庭认为死者在处理有关财产时，意图（虽然不一定是他唯一的意图）防止法庭作出拨付生活费的颁令或可减少可能裁定的款额。法庭须根据可信性的比重来确定是否真有此事（见 1975 年英国法第 12(1)条）。

遗嘱赠产契约

17.5　1975年英国法第11条规定，如死者订立“遗嘱赠产契约”时旨在阻止他人根据该法提出生活费的申请，而根据该契约受益人也没有付出充分的有价约因，则法庭可撤销该契约。

受托人

17.6　1975年英国法第13条为根据一项财产处置或遗嘱赠产契约以受托人身分代另一人接受金钱或财产的人士提供保障措施。

对香港的建议

17.7　**委员会建议香港应订立效力与1975年英国法第10至第13条所载规定相若的防止逃避规定**（见附录8条例草案第12至第15条）。

第 IV 部　综结合及修订（条例）

第 18 章 综合条例

研究范围

18.1　委员会的研究范围没有具体规定研究遗嘱认证及遗产管理条例（香港法例第 10 章）。不过，如果要对无遗嘱继承法或遗嘱法作出任何更改，遗嘱认证及遗产管理条例以及根据该条例而制定的无争论性遗嘱认证规则亦无可避免地须作出若干修订。

法律的易明易用性

18.2　如果一个人逝世时，有关其财产处理的各条法例能够综合为一条法例，当有助于一般外行人理解继承法，而律师办起事来也会更为方便和有效率。

建议

18.3　**委员会建议将遗嘱认证及遗产管理条法例（香港法例第 10 章）、无遗嘱者遗产条例（香港法例第 73 章）、遗嘱条例（香港法例第 30 章）及遗嘱生活费条例（香港法例第 129 章）综合而成为一条条例，名为“继承（综合）条例”。本委员会亦同时建议，在新条例中，现行遗嘱条例成为第 I 部、遗嘱认证及遗产管理条例为第 II 部、无遗嘱者遗产条例为第 III 部，以及取代遗属生活费条例的法例成为第 IV 部。**

第 19 章 修改条例

英国惯例及程序

19.1 遗嘱认证及遗产管理条例第 72(2)条规定：

> “(2) 对所有事务而未有制定遗嘱认证规则及法令者，在英国的遗产承办处当时有效的惯例及程序应视为同时在香港的法庭及承办处有效。”

建议

19.2 **委员会建议修改遗嘱认证及遗产管理条例，特别是根据条例第 72(2)条的规定，那些在英国有效并适用于香港的惯例及程序，应在香港明文制定，成为法律。**

第 V 部　剥夺权利

第 20 章 剥夺权利

剥夺权利规则

20.1　在若干情况下，如果某人不合法地杀害另一人，从而获得利益，公共政策规定该人不得因而取得利益。

英国 1982 年剥夺权利法

20.2　根据英国 1982 年剥夺权利法规定，除因谋杀罪名外，法庭可按一宗案件的特殊情况，如认为有维持正义的必要，颁布命令以减缓剥夺权利这规则的效力。根据该法所包含的财产权益范围，当包括从死者遗嘱或无遗嘱继承法可得的权益。该法亦特别规定，即使剥夺权利规则生效，亦不得妨碍任何人士根据 1975 年继承（供养家属）法的规定提出申请。

香港

20.3　本港并没有类似 1982 年英国法的法例，因此，总论任何情况，剥夺权利的规则适用于香港。

拟提出的建议

20.4　这问题亦不属于本委员会研究范围，但如果属于研究范围之内，**本委员会当会建议本港制定类似英国的法例，授权法庭在有必要维持正义时，得减缓剥夺权利这规则的效力。**（见条例草案附录 9）

第 VI 部　建议摘要

第 21 章 建议摘要

对遗嘱条例（香港法例第 30 章）所作出的建议修订

（第 2 章── 形式及鉴证）

21.1　条例第 5(1)条应由类似 1982 年司法执行法第 17 条的条文所取代，从而放宽订立遗嘱的正式规定（第 2.8 段）。

21.2　此外，凡并未有按照经效宽第 5 条的规定有效地签立的遗嘱，祇要是书面文字，由立遗嘱人签署或代其签署，而立遗嘱人有意使该份文件具有遗嘱效力者，仍应有条文规定得获法庭接纳认证（第 2.22 段）。至于印章方一面，应获准继续使用，但必须有证据证明立遗嘱人亲自在该份遗嘱上使用该印鉴或印章，该份遗嘱才可获接纳认证（第 2.29 段）。

（第 3 章── 遗嘱条例的各项修订）

21.3　为把英文文法改得更好，第 3 条的字眼应予修改（第 3.2 段）。

21.4　已婚人士，不论年龄，均有资格订立及撤销遗嘱（第 3.5 段）。

21.5　条例第 6 条应予修订，列明一从事防卫事务的人士，不论已届合法年龄与否，均可订立及撤销遗嘱（第 3.7 段）。此外，亦须增添一项修订，以符合已修订第 5 条的规定（第 3.8 段）。

21.6　条例第 8 条已无保留必要，因而应予以废除（第 3.10 段）。

21.7　由于建议中第 5 条将范围扩大，因此，第 10 条亦应予以废除（第 3.14 段）。

21.8　第 11 及 12 条属多余累赘，应予以废除（第 3.16 及 3.17 段）。

21.9　第 13 条应予废除，并由类似 1837 年英国遗嘱法新订第 18 及 18A 条条文取代，以纠正经常由于再婚而遗嘱被撤销的严厉规则（第 3.21 段）。

21.10　鉴于拟议的第 5 条的修订，第 15 条亦应予以修订（第 3.23 段）。

21.11　此外，由于第 5 条所作出的修订，第 16(1)条亦应作出相应修订，并须增添一新条款，可使用新科技以确定遗嘱所写的事项（第 3.24 段）。

21.12　1987 年英国修订家庭法第 1 条规定应使非婚生子女或其传人获得利益，本港亦应增订类似条款（第 3.27 段）。

21.13　条例第 23 条应由类似 1982 年司法执行法第 19 条条文所取代。后者规定给予先去世子女的馈赠，应由其子女按家系分摊，但其子女必须在立遗嘱人死亡时仍生存（第 3.30 段）。在第 23 条内，凡提及“子孙”者，应包括非婚生子女（第 3.31 段）。

21.14　条例第 30 条应增加另一条款，以便制定修订法例，将我们的建议付诸实施，规定不论遗嘱何时订立，祇要立遗嘱者逝世时本条例已生效，即对其遗嘱适用（第 3.34 段）。

（第 4 章── 遗嘱纠正、释义及证据）

21.15　本港应制定类似 1982 年司法执行法第 20 条的条文，得将遗嘱纠正，使立遗嘱人的意愿得以实现（第 4.3 段）。

21.16　同时，亦应制定类似 1982 年司法执行法第 21 条条文，准许法庭接纳外在证据，以协助解释全无意义或含糊不清的遗嘱（第 4.5 段）。

21.17　关于遗嘱的签立、撤销或更改方式的外部证据，亦应获接纳。有关条款，亦应予以制定（第 4.6 段）。

21.18　此外，亦应制定类似 1982 年司法执行法第 22 条的条文，以便作出一项假设：将一份表面上立遗嘱人已绝对给予尚存配偶的馈赠，纵使亦拟将该份馈赠给予子孙，应作为给予配偶的绝对馈赠（第 4.8 段）。

（第 5 章── 遗嘱的登记）

21.19　遗嘱不应予以登记。田土登记条例亦应予以修订，以便对那些未获法庭认证的遗嘱不予适用（第 5.5 段）。

（第 6 章 —— 国际遗嘱）

21.20　国际遗嘱公约应纳入本港法律内（第 6.3 段）。

对无遗嘱者遗产条例（香港法例第 73 章）所作出的建议修订

（第 8 章 —— 尚存配偶的权利）

21.21　如果无遗嘱者遗下子孙，则根据条例第 4(3)条规定给予尚存配偶的款额，应由 50,000 元增加至 500,000 元（第 8.11 段）。

21.22　如果无遗嘱者并无遗下子孙而祇有亲属，则根据条例第 4(4)条规定给予尚存配偶的款额，应由 200,000 元增加至 1,000,000 元（第 8.14 段）。

21.23　法定遗产最低限度每五年应予检讨一次（第 8.15 段）。

21.24　为方便日后易于更改及为求清晰起见，下述条款应予以修订：

(i)　条例第 4(12)条

(ii)　条例第 6 条

(iii)　条例第 8 条（第 8.16 及 8.17 段）。

21.25　不论无遗嘱者有否遗下子孙或亲属，祇要他遗下尚存配偶，则该尚存配偶得绝对地取得“个人动产”（第 8.20 段）。至于如何确定一件物品是否“个人动产”，则最主要的检定标准就是在死者逝世时，该物品是否存放在婚姻住所内，因此，条例第 2(1)条应予以修订（第 8.22 段）。

21.26　由于上文第 25 段所提出的建议，条例第 7 条，即有关尚存配偶有权要求将个人动产拨归己用的条文应予废除（第 8.23 段）。

21.27　如果无遗嘱者遗下尚存配偶，则不论有否遗下子孙或亲属，该尚存配偶应有权获取无遗嘱者所拥有婚姻住所的利益。更且，尚存配偶应有权按照类似英国 1952 年无遗嘱者遗产法第二附表所规定的程序将婚姻住所拨归己用（第 8.25 段）。现行附表改为附表 1，而条例内另加新订附表 2，大致取材自英国 1952 年无遗嘱者遗产法第二附表的规定（第 8.26 段）。

21.28　为否定 *Re Collens* [1986] 2 WLR 919 一案的裁决，应加插一条款，以便规定尚存配偶须将从他地获得的金钱呈报，以抵销其可从无遗嘱者在本港不动产中取得的任何利益（第 8.28 段）。

（第 9 章── 子女或子孙）

21.29　条例第 2(2)条应予撤销，并代之以另一条款，规定在解释子女关系时，毋须理会其是否婚生（第 9.11 段(1-2)）。

21.30　应加插一条款，为 1973 年 1 月 1 日或该日以前按照中国法律及习俗领养的子女作出规定（第 9.11(3)段）。

21.31　非婚生子女获取合法地位条例（香港法例第 184 章）第 10(1)条应予撤销（第 9.11(4)段），因为该段与我们所提出的建议，即对子女关系的解释可毋须理会其是否婚生一事不符。

21.32　领养条例（香港法例第 290 章）第 25(2)条所提及的日期──“1972 年 12 月 31 日”应由“1973 年 1 月 1 日”这一日期取代（第 9.11(5)段）。

21.33　如果一名非婚生子女死亡并无签立遗嘱，在决定其亲属继承其遗产时，他是否婚生一事应不予理会。他并非婚生这一点，唯一尚余重要者就是须作出一项假设，就是他的父亲先其逝世（第 9.18 段）。

（第 10 章── “兄弟或姊妹”）

21.34　第 2(4)条应予废除（第 10.7(1)段），因为该条并未有将同血缘与半血缘的兄弟姊妹分辨清楚。

21.35　条例内第 4(2)(b)条、4(4)条、4(8)条及 5(4)条凡提及“众兄弟及/或姊妹”之处，应予修订，以便祇指同血缘的兄第姊妹（第 10.7(2)段）

21.36　条例第 4(8)条应予以修订，以便为无遗嘱者半血缘的兄弟姊妹以及其父母半血缘的兄弟或姊妹制定不同的条款（第 10.7(3)段）。

21.37　此外，亦增订一法律条文，规定一名男子不论与其妻或妾所生的子女，均被视为同血缘的兄弟姊妹（第 10.7(4)段）。

（第 11 章── 夫妾关系）

21.38　条例第 13 条应予修订，以便规定 1971 年 10 月 7 日前缔结夫妾关系的女方，应假设为已被男方的妻子及家人接纳为男方的妾侍

（第 11.4(1)段）。非婚生子女获取合法地位条例（香港法例第 184 章）第 14(2)条亦应增添同一项假（第 11.4(2)段）。

21.39　附表 1 第 4(12)段有关“或与人发生性行为者”字眼应予删除（第 11.4(3)段）。

21.40　夫妾关系中的妾侍或男方应有权得回其终身利益（第 11.4(4)段）。附表 1 内应加插一段，说明以条例的目的而言，夫妾关系男方的所有子女，不论由妻或妾所生，均属一大家庭，所有子女，均被视为妻及每一名妾侍所生的子女（第 11.5 段）。

（第 12 章── 杂项）

21.41　由于条例第 11 条为同一司法辖区内的无遗嘱死者制定两种承继制度，因而该条应予废除（第 12.6 段）。如果这建议不获接纳，最低限度该条应予修订，以便该条祇限于对新界未获豁免的土地适用，亦即祇于为中国民族、家族、堂或祖利益而持有的土地（第 12.9 段）。

21.42　条例第 5(5)条应予废除（第 12.11 段）。该段曾遭司法界批评为制造反复的结果。

21.43　鉴于我们建议非婚生子女与婚生子女同等享有继承财产的权利，预料在确定是否会有非婚生子女提出分产时，遗产代理人会有较大的困难，因此，我们建议在遗嘱认证及遗产管理条例内加插一新条款，以限定遗产代理人应负的责任（第 12.12 段）。

21.44　条例第 4 条内凡提及“政府”之处，应予删掉并须以更合适的字眼代替（第 12.15 段）。

对供养死者家属及受供养人所作出有关的建议修订

（第 13 章── 引言）

21.45　委员会普遍认为本港现行遗属生活费法例颇不正常，建议最佳的补救办法就是废除遗属生活费条例（香港法例第 129 章），而制定一新条例，类似 1975 年英国继承（供养家属及受供养人）法（第 13.5 段）。

（第 14 章 —— 有权申请者）

21.46　以“受供养人”一词去形容那些可按照现行遗属生活费条例而提出申请的人士，应予删掉，而应清楚列明每一类可提出家属生活费申请的人士类别（第 14.4 段）。

21.47　“死者的妻子或丈夫”、“死者的前夫或前妻而未有再婚者”及“死者是夫妾关系中的妾或男方”均得列入为有权提出申请生活费的人士类别内（第 14.5 及 14.9 段）。

21.48　现行条例并未载有“丈夫”或“妻子”的定义。新订法例应制定“死者的丈夫或妻子”的定义，这定义应包括与死者诚意缔结一段婚姻但婚姻属于无效的当事人（第 14.6 段）。

21.49　遗属生活费条例内有关“有效婚姻”的现行定义应予保留（第 14.7 段）。

21.50　有权申请生活费的人士类别范围应予扩大，以包括未有再婚的前配偶或由法院判决分居的配偶（第 14.8 段）。

21.51　除有关“妾”及“夫妾关系”两词的定义外，遗属生活费条例内有关夫妾关系的过渡性条文，即条例第 17 条及附表，应予以废除（第 14.9 段）。

21.52　限制父母提出申请权利的条件（即：父母须在死者逝世前主要靠其供养）应予取消（第 14.10 段）。

21.53　现行遗属生活费条例有关死者子女申请权的条文，应予废除。并由一条限制住较少的条文取代，而该条文将不会限制领养子女、非婚生子女、成年子女及“属于家庭的子女”提出申请（第 14.17 段）。

21.54　那些并不属于死者至亲但有权申请的人士范围应予扩大。应列入一类新申请人，即：（“除上文所述的人士外”），在死者生前全部倚靠或部分倚靠死者供养的任何人士”（第 14.18 至 14.20 段）。

（第 15 章 —— 司法权及法庭权力）

21.55　法庭司法权的基础应较现行供养死者家属的法例有更明确的规定。其一要津就是死者逝世时定居于香港，而另一根据就是死者逝世前三年内曾经有任何时间通常在香港居住，并且逝世时在香港遗下净遗产（第 15.2 段）。

21.56　法庭可颁予死者尚存配偶的供养费应不仅限于赡养费。本港应制定“合理生活费”的定义，订出适用于配偶申请时应持有的水平（见第 15.5 段）。

21.57　虽然在通常情况下，离婚及由法院判决分居的配偶可得的生活费水平，较适用于尚存配偶的水平为低，但如果法庭并未有在婚姻诉讼中就生活费作出颁令，法庭应获授权将前配偶或判决分居的配偶提出的申请，视作尚存配偶申请般处理（第 15.6 段）。

21.58　法庭在家属生活费诉讼中的权力应予扩大，以便与法庭在婚姻诉讼中颁令判给生活费的权力相近。具体方面，法庭应获下列额外权力：

— 得颁令为申请人的利益计而将属于死者遗产一部分的财产作出转让或授与；

— 得颁令为申请人的利益计，或为拨付其应得利益计，将属于遗产一部分的资产用作取得（其他）财产或权利；

— 得颁令作出法庭认为是执行其命令时所必需的相应或补充规定（包括更改按照死者遗嘱或无遗嘱法例或按照两者的规定以处理死者遗产的方式，及向应根据法庭命令准备授与财产的受托人赋予广泛的权力（第 15.7 段）。

21.59　法庭在处理申请时，应采用新准则。应考虑的事项计有：

— 有关的申请人及任何其他申请人或死者遗产的受益人目前或可见将来的财政来源及需要；

— 死者对于遗属生活费申请人或遗产受益人所负的义务或责任；

— 死者净遗产有多少和性质如何；

— 任何其他相关事项，包括任何有关人士的行为表现；

— 任何死者的言词，即法庭要考虑事情的证据；

— （如申请人为死者的配偶、前配偶、妾侍或男方时），申请人的年龄、夫妻或夫妾双方结合期间、申请人对于死者家庭福利的贡献、以及如果申请人是死者的配偶，假设该

段婚姻以离婚而非死者的死亡告终，则申请人应得的生活费；

— （如申请人是死者的子女或被视为死者的子女时），申请人曾受或本来应当受到何种教育程度或训练，而如果死者并非其亲生父母时，死者对供养申请人肩负及履行多少责任，以及是否有其他人对申请人应肩负的供养责任；

— （如申请人是死者父母时），申请人的年龄以及死者死前为申请人的需要而作出的扶养（现款或有金钱价值的物品）；

— （如申请人并非家庭成员但由死者供养），死者负担供养责任的根据以及供养该人的时间（第 15.9 段）。

21.60 遗属生活费条例第 4(1)条但书（该但书的作用是：如果“受供养人”仅为其尚存配偶及子女，而大部分的遗产收益已遗留给尚存配偶，则不得提出申请）不应列入新草案内（第 15.10 及 15.11 段）。

21.61 由法庭颁发遗产管理书日起计六个月的时限继续适用于在香港提出的申请（第 15.12 段）。

（第 16 章── 可作为供养家属的财产）

21.62 遗属生活费条例内现行有关新界土地获得豁免的条文应予废除（第 16.4 段）。

21.63 死者某些财产通常不会被视为其遗产的一部分（即：经由其提名给予某人的财产、临终前的赠与、或合有的物业），但为供养家属起见，该等财产亦应列入为死者的遗产内（第 16.5 至 16.8 段）。

21.64 如果有关财产是或可能受提名规限，不论死者是否经提名给予某人或应可提名给予某人，亦应列入死者的遗产内（第 16.6 段）。

（第 17 章── 防止逃避规定）

21.65 本港应制定防止逃避规定，以防止死者在生前利用特别的财务安排，使其财产得以逃避规定（第 17.1 至 17.7 段）。

综合及修订条例

（第 18 章—— 综合条例）

21.66　遗嘱条例（香港法例第 30 章），无遗嘱者遗产条例（香港法例第 73 章），以及有关死者家属及受供养人生活费的法例应综合而成为一条条例（第 18.3 段）。

（第 19 章—— 修改条例）

21.67　遗嘱认证及遗产管理条例应予修订，具体规定在英国有效并适用于香港的惯例及程序，应在香港明文制定成为法律（第 19.2 段）。

剥夺权利

（第 20 章—— 剥夺权利规则）

21.88　如果剥夺权利规则属于委员会研究范围，委员会当会建议本港制定类似 1982 年英国剥夺权利法的法例，授权法庭在有必要维持正义时，得减缓剥夺权利这规则的效力（第 20.4 段）

附录 1

公众对非婚生子女意见调查报告

公众对非婚生子女态度

意见调查报告

由政务总署社区资讯科编制

1985 年 10 月

目录

I. 引言

现时，除非死者生前立下遗嘱，否则其非婚生子女和受其供养的同居者均不得依据无遗嘱者遗产条例（第 73 章）申领其遗产。亦不得根据遗属生活费条例（第 129 章）申领赡养费，因为他们并不属于该条例第 2 条“受供养人”的定义范围内。

2. 有人主张，上述法律规定导致社会上有不公平现象，建议有关法例应作适当修改，以便非婚生子女得从其父亲遗产中申领赡养费。另一方面，有人认为根据中国传统，非由合法妻子所生的子女无权申领死者遗产，现时所作的调查，目的就是在查悉市民对非婚生子女权利的看法。

II. 搜集数据方法

3. 当局于 1985 年 8 月，聘请一间私人调查机构——市场策略研究中心进行实地调查。在本港抽查了 1,000 名年龄在 15 岁或以上的人士。根据附件 I 的问卷面对面的访问那些人士。

附件 I

III. 反应率

4. 研究中心随意抽取了 1903 个地址登门访问。其中，成功地与 1434 个住户取得联络，占联络率 75%。其余 469 个地址，有的是无人居住，有的是在不同时间日期经登门访问三次后仍无法取得联络。由取得联络的住户之中，成功访问了 1,000 名合资格人士，占填妥问卷 70%。

IV. 调查结果

附件 II

(i) 对非婚生子女权利的认识（表 I）

5. 当被访者被问到：非婚生子女能否申领其父亲遗产时，29%人士能够答对（即：不能够申领），而 48%人士答错（即：能够申请）。其余 23%答“不肯定 / 不知道 / 无可奉告”。具有专上教育或以上程度的人士回答较为准确，而

老年人或祇有小学或以下程度的人士则较趋向于回答“不肯定/不知道/无可奉告”。

附件 II *(ii) 同等权利（表 II）*

6. 当被访者被问到非婚生子女应否具有与婚生子女同等权利以申领其父亲遗产时，72%人士认为非婚生子女“应该”具有同等权利，22%认为“不应该”，而其余 6%则不置可否。从下述图表可叫看出，较年轻的人士和受过较高深教育程度的人士倾向于赞成非婚生子女应该具有同等权利。

图表 A：赞成非婚生子女应具有同等权利的人士所占百分率

	百分率	（根据：被访者数目）
总数	72%	(1000)
年龄		
15 - 44	77%	(711)
45+	61%	(289)
教育程度		
小学或以下	64%	(440)
中学或以上	78%	(560)

7. 从下述图表可以看出，那些赞成非婚生子女应该享有申领父亲遗产同等权利的人士，大多数（63%）有错误印象，认为根据现行法律，非婚生子已能够申领父亲遗产。另一方面，那些不赞成非婚生子女应具有同等权利的人士，祇有 12%有这错觉。

图表 B：被访者对于非婚生子女应具有申领父亲遗产同等权利的态度百分率

对于非婚生子女
能否申领父亲遗产的认识

非婚生子女应否具有申领父亲遗产同等权利	能够	不能够	不肯定 / 不知道 / 无可奉告	总数	被访者数目
应该具有同等权利	63%	17%	20%	100%	(720)
不应该具有同等权利	12%	65%	23%	100%	(222)
不肯定 / 不知道 / 无可奉告	12%	28%	60%	100%	(58)
总数	48%	29%	23%	100%	(1000)

附件 II *(iii) 从父亲遗产中申领赡养费权利（表 III）*

8. 紧随“同等权利”的问题，被访者即被问到：非婚生子女应否有权从父亲遗产中申领赡养费。86%人士认为，如果他们是由其父亲生前供养的，则那些非婚生子女亦应有权从其父亲遗产中申领赡养费。而一如预料，那些说非婚生子女不应具有同等权利的人士，（在 1,000 名被访者中占 22%），赞成应给这种权利予非婚生子女的人士所占百分率亦较低(68%)。有关分析见下述图表：

图表 C：被访者对于给与非婚生子女同等权利申领赡养费的态度百分率

非婚生子女应具有申领赡养费权利	对于非婚生子女应否具有申领遗产的同等权利 应具有同等权利	不应具有同等权利	不肯定 / 不知道 / 无可奉告	总数
同意	96%	68%	47%	86%
不同意	2%	29%	9%	9%
不肯定 / 不知道 / 无可奉告	2%	3%	44%	5%
总数	100%	100%	100%	100%
被访者数目	(720)	(222)	(58)	(1000)

9. 与“同等权利”问题情况一样，那些较年轻或受过较高深教育程度的人士倾向于持有较开明的态度，见于下表。

图表 D：赞同非婚生子女应有权从父亲遗产中申领赡养费的被访者所占百分率

	百分率	（根据：被访者数目）
总数	86%	(1000)
年龄		
15 - 44	89%	(711)
45+	80%	(289)
教育程度		
小学或以下	82%	(440)
中学或以上	90%	(560)

附件 II *(iv) 非婚生子女母亲的权利（图表 IV&V）*

10. 除了非婚生子女问题外，被访者亦被问到非婚生子女的母亲应否有权从遗产中申领赡养费的问题。68%人士认为非婚生子女的母亲应具有这权利，25%认为不应该，其余7%的答复是“不肯定 / 不知道 / 无可奉告”。后两组人士在回答这问题后，再被追问同样，但加上另一条件的问题，即该母亲是由其非婚生子女的父亲生前所供养的。今次，约有一半人士（在 1000 名被访者中占 15%）的答复是肯定的。

11. 总之，83%人士认为非婚生子女的母亲应该有权，而有 13%人士认为不应该，而 4%人士则不置可否。

12. 再一次，较年轻及受过较高深教育程度的人士倾向于赞同非婚生子女的母亲应该有权从遗产中申领赡养费。

图表 E：认为非婚生子女的母亲应有权从遗产中申领赡养费被访者所占百分率

	应具有权利（未加第 10 段的条件）	应具有权利（加上第 10 段的条件）	（根据：被访者数目）
总数	68%	83%	(1000)
年龄			
15–34	73%	88%	(520)
35+	64%	77%	(480)
教育程度			
小学或以下	63%	77%	(440)
中学或以上	72%	87%	(560)

附件 II *(v) 对婚外情的影响（表 VI）*

13. 为更了解被访者对非婚生子女问题的态度，问卷中其中一条问题就是询问被访者是否同意下述说法，就是：如果容许非婚生子女得从其父亲遗产中申领赡养费，那就会鼓励婚外情。据调查结果所得，祇有 28%人士同意这种说法，62%人士不同意，而其余 10%的人士回答说："不肯定 / 不知道 / 无可奉告"。

14. 下述图表显示不同意会鼓励婚外情的人士，是倾向较开明的。

图表 F：同意 / 不同意“会鼓励婚外情”说法的被访者的态度

被访者所持态度百分率

	态度	同意这说法的人士	不同意这说法的人士	不肯定 / 不知道 / # 无可奉告人士	被访者总数
a)	非婚生子女在申领其父亲遗产时应与婚生子女享有同等权利	66%	76%	57%	72%
b)	非婚生子女应有权从其父亲遗产中申领赡养费	83%	91%	70%	86%
c)	非婚生子女的母亲，倘加上第10段的条件，应有权从其子女的父亲遗产中申领赡养费	77%	88%	63%	83%
	（根据：被访者数目）	(285)	(623)	(92)	(1000)

#这组被访者回答其他问题时，多数答谓：“不肯定 / 不知道 / 无可奉告”。

V. 结论

14. 今次调查显示，市民对于非婚生子女的看法是倾向宽容和开通的。压倒性的多数（86%）人士同意非婚生子女应有权从父亲遗产中申领赡养费。略少于该百分比（83%）的人士同意，如果非婚生子女母亲，一向由其子女父亲生前所供养，则应有权从其父亲的遗产中申领赡养费。至于同等权利这一般性问题上，十居其七认为非婚生子女在申领其父亲遗产时，应与婚生子女具有同等权利。

15. 不过，调查结果亦显示，大约半数人士错误地认为非婚生子女是能够从其父亲遗产中申领遗产。但62%的人士不同意一种说法：如果容许非婚生子女得从其父亲遗产中申领赡养费，那就会鼓励婚外情。

16. 调查结果似显示：如提议对现行法例作出修订，以便非婚生子女亦能够从其父亲遗产中申领赡养费，这项修订将获市民普通支持。

问卷 编辑：_____ 第1卡：_____ (1)

密码：_____ 工作编号：_____ (2–5)

市场策略研究中心 查核：_____ 问卷号码：_____ (6–9)

访问号码：_____ (10–11)

电话：5–291237

M.1329意见调查

被访者姓名：_____年龄：_____电话：_____

地址：_____号码：_____

被访日期：_____开始访问时间：_____完成：_____

早晨/午安/晚安。我叫做_____。我系市場策略研究中心嘅访问员，我哋想知道你对一啲社会事物嘅意见。你所俾我嘅资料，系会绝对保守秘密嘅，多谢你嘅合作。

请问你哋喺伙有几多位 15 岁或者以上嘅家庭成员喺度住嘅。平均嚟讲，一个礼拜系有 5 晚喺到瞓嘅。最大年纪系边位呢？其次呢？

	姓名	性别	年龄		1	2	3	4	5	6	7	8
1.					1	2	1	3	4	2	6	7
2.					1	2	2	1	2	5	5	1
3.					1	1	3	2	3	4	7	4
4.					1	1	2	4	1	6	4	6
5.					1	2	1	1	5	6	2	5
6.					1	1	2	4	5	3	1	3
7.					1	1	3	3	3	1	7	2
8.					1	2	1	2	1	4	3	8

读出：而家我哋想知道一吓你对一 D 社会事物嘅睇法

1. 照你所知，私生子可以抑或唔可以申请领取佢地爸爸嘅遗产呢？

   可以申请 _____ 1
   唔可以申请 _____ 2
   不肯定 / 不知道 / 无可奉告 _____ 3

   (12)

2. 你认为私生子应该抑或唔应该同合法婚姻所生嘅仔女同样有权申请领取佢地爸爸嘅遗产呢？

   应该有权 _____ 1
   唔应该有权 _____ 2
   不肯定 / 不知道 / 无可奉告 _____ 3

   (13)

3. 有啲人提议如果私生子系由佢地爸爸生前赡养嘅。佢地应该有权喺遗产中申请领取赡养费。你同意抑或唔同意呢个提议呢？

   同意 _____ 1
   唔同意 _____ 2
   不肯定 / 不知道 / 无可奉告 _____ 3

   (14)

4. 有啲人话如果准许私生子喺遗产中申请赡养费就会助长婚外男女关系。你同意抑或唔同意呢种讲法呢？

同意 1 (15)
唔同意 2
不肯定 / 不知道 / 无可奉告 3

5. 你认为私生子嘅妈妈应该抑或唔应该有权喺私生子嘅爸爸嘅遗产中申请赡养费呢？

应该有权 1 (16)
唔应该有权 2 追问第6条
不肯定 / 不知道 / 无可奉告 3

6. 如果私生子嘅妈妈系由个爸爸生前赡养嘅。你认为个妈妈应该抑或唔应该有权喺遗产中申请赡养费呢？

应该有权 1 (17)
唔应该有权 2
不肯定 / 不知道 / 无可奉告 3

各组人士数据

1. 记录性别

男性 1 (18)
女性 2

2. 请问你今年新历计算系几多岁呢？

15–19 01 (19)
20–24 02
25–29 03
30–34 04
35–39 05
40–44 06
45–49 07
50–54 08
55–59 09
60–64 10
65+ 11

3. 请问你读书读到边个程度呢？

无受过教育 1 (21)
小学 2
小学毕业 3
中学 4
中学毕业 5
专上或大学 6

4. 请问你结咗婚未呢？

结咗婚 1 (22)
鳏夫 / 寡妇 2
离婚 / 分居 3
未婚 4
拒绝回答 / D.K. 5

5. 你而家系读书抑或做紧嘢呢？

做紧嘢	（问第6题）	1	(23)
主妇	（问第7题）	2	
学生	（问第7题）	3	
退休	（问第7题）	4	
失业	（问第7题）	5	

6. 请问你嘅职业同职位系乜嘢呢？

_____ (24)

7. 请问你全家每月嘅总收入大约系几多呢？

	$20,000+	01	(25–26)
	$19,999–17,500	02	
*	$17,499–15,000	03	
	$14,999–15,500	04	
*	$12,499–10,000	05	
	$ 9,999– 9,000	06	
*	$ 8,999– 8,000	07	
	$ 7,999– 7,000	08	
*	$ 6,999– 6,000	09	
	$ 5,999– 5,000	10	
*	$ 4,999– 4,000	11	
	$ 3,999– 3,000	12	
*	$ 2,999– 2,000	13	
	$ 2,000	14	

表 I：被访者对非婚生子女能否申领其父亲遗产的认识分布百分率

		被访者对非婚生子女能否申领其父亲遗产的认识				
		能够申领	不能够申领	不肯定 / 不知道 / 无可奉告	总数	被访者数目
		%	%	%	%	
(a)	总数	48	29	23	100	(1000)
(b)	性别					
	男性	50	29	21	100	(509)
	女性	46	29	25	100	(491)
(c)	年龄					
	15 - 24	51	34	15	100	(238)
	25 - 34	56	28	16	100	(282)
	35 - 44	52	20	28	100	(191)
	45 - 54	44	30	26	100	(104)
	55^{+}	36	26	37	100	(185)
(d)	婚姻状况					
	已婚 / 鳏寡 / 离婚	48	26	26	100	(683)
	未婚	49	34	17	100	(317)
(e)	教育程度					
	小学或以下	42	27	31	100	(440)
	中学	55	25	20	100	(227)
	中学毕业	57	29	14	100	(235)
	专上	43	44	13	100	(98)

注：由于使成整数，所得数字相加可能未必等于 100%。

表 II：被访者对于非婚生子女应否享有同等权利申领其父亲遗产的分布百分率

		应否有同等权利				
		应有同等权利	不应有同等权利	不肯定 / 不知道 / 无可奉告	总数	被访者数目
		%	%	%	%	
(a)	总数	72	22	6	100	(1000)
(b)	性别					
	男性	71	23	6	100	(509)
	女性	72	22	6	100	(491)
(c)	年龄					
	15 - 24	82	17	2	100	(238)
	25 - 34	74	22	4	100	(282)
	35 - 44	75	20	5	100	(191)
	45 - 54	61	32	6	100	(104)
	55^{+}	60	26	14	100	(185)
(d)	婚姻状况					
	已婚 / 鳏寡 / 离婚	69	24	7	100	(683)
	未婚	77	20	3	100	(317)
(e)	教育程度					
	小学或以下	64	26	10	100	(440)
	中学	76	22	2	100	(227)
	中学毕业	80	17	2	100	(235)
	专上	76	17	8	100	(98)

表 III：被访者对非婚生子女如果以往由其父亲供养，则应否有权从其遗产中申领赡养费的意见分布百分率

		应否有权从遗产中申领赡养费				
		应具有权利	不应有权	不肯定／不知道／无可奉告	总数	被访者数目
		%	%	%	%	
(a)	总数	86	9	5	100	(1000)
(b)	性别					
	男性	87	8	4	100	(509)
	女性	85	10	5	100	(491)
(c)	年龄					
	15－24	92	7	1	100	(238)
	25－34	87	10	3	100	(282)
	35－44	91	5	4	100	(191)
	45－54	85	10	6	100	(104)
	55^{+}	78	12	11	100	(185)
(d)	婚姻状况					
	已婚／鳏寡／离婚	85	9	6	100	(683)
	未婚	89	9	2	100	(317)
(e)	教育程度					
	小学或以下	82	10	9	100	(440)
	中学	90	9	1	100	(227)
	中学毕业	90	8	1	100	(235)
	专上	89	6	4	100	(98)

表 IV：被访者对于非婚生子女的母亲应否有权从该等子女父亲的遗产中申领赡养费意见分布百分率

		母亲应否有权从遗产中申领赡养费				
		应有权利	不应有权	不肯定／不知道／无可奉告	总数	被访者数目
		%	%	%	%	
(a)	总数	68	25	7	100	(1000)
(b)	性别					
	男性	71	23	6	100	(509)
	女性	66	27	7	100	(491)
(c)	年龄					
	15－24	75	22	3	100	(238)
	25－34	70	24	6	100	(282)
	35－44	65	28	7	100	(191)
	45－54	65	31	5	100	(104)
	55^{+}	62	24	14	100	(185)
(d)	婚姻状况					
	已婚／鳏寡／离婚	66	26	8	100	(683)
	未婚	73	23	4	100	(317)
(e)	教育程度					
	小学或以下	63	26	10	100	(440)
	中学	75	21	3	100	(227)
	中学毕业	70	26	4	100	(235)
	专上	70	24	6	100	(98)

表 V：对于如果非婚生子女的母亲由其子女的父亲生前供养，他们的母亲不应有权申领赡养费或对这问题“不表示明确意见的”被访者分布百分率

母亲应否具有这权利

		应具有权利	不应有权	不肯定／不知道／无可奉告	总数	被访者数目
		%	%	%	%	
(a)	总数	45	41	14	100	(319)
(b)	性别					
	男性	53	34	12	100	(154)
	女性	37	48	15	100	(165)
(c)	年龄					
	15－24	63	32	5	100	(66)
	25－34	48	45	7	100	(77)
	35－44	42	48	11	100	(51)
	45－54	38	49	13	100	(46)
	55^{+}	33	38	30	100	(79)
(d)	婚姻状况					
	已婚／鳏寡／离婚	40	42	18	100	(229)
	未婚	57	40	3	100	(90)
(e)	教育程度					
	小学或以下	36	44	20	100	(164)
	中学	43	49	7	100	(56)
	中学毕业	55	40	5	100	(70)
	专上	73	16	11	100	(29)

表 VI：对于如果容许非婚生子女申领赡养费会否鼓励婚外情这一问题被访者意见分布百分率

		“会鼓励婚外情”这种说法				
		同意这种说法	不同意这种说法	不肯定／不知道／无可奉告	总数	被访者数目
		%	%	%	%	
(a)	总数	28	62	10	100	(1000)
(b)	性别					
	男性	26	66	8	100	(509)
	女性	30	58	12	100	(491)
(c)	年龄					
	15－24	23	71	5	100	(238)
	25－34	26	66	8	100	(282)
	35－44	35	59	5	100	(191)
	45－54	32	58	10	100	(104)
	55^{+}	29	52	20	100	(185)
(d)	婚姻状况					
	已婚／鳏寡／离婚	29	60	11	100	(638)
	未婚	26	68	6	100	(317)
(e)	教育程度					
	小学或以下	28	58	14	100	(440)
	中学	27	68	5	100	(227)
	中学毕业	29	64	7	100	(235)
	专上	26	67	7	100	(98)

经咨询的机构或人士

律政专员（行政）及民事检察专员

最高法院经历司

注册总署署长

法律援助署署长

社会福利署署长

卫生福利司

社会福利咨询委员会

政务司

香港律师会

香港大律师公会

香港女律师公会

香港家庭法律协会

香港大学法律系

汇丰银行信托有限公司

Mr. W.K. Thomson

渣打银行香港信托有限公司

Bank of China Trust and Consultancy Company

乡议局

保良局

1982 年司法执行法：第 27 及 28 条，和第二附表（英文本）

International wills

The form of an International will

27.– (1) The Annex to the Convention on International Wills shall have the force of law in the United Kingdom.

(2) The Annex is set out in Schedule 2 to this Act.

(3) ln this Part of this Act –

"international will" means a will made in accordance with the requirements of the Annex, as set out in Schedule 2 to this Act; and

"the Convention on International Wills" means the Convention providing a Uniform Law on the Form of an International Will concluded at Washington on 26th October, 1973.

International wills – procedure

28.– (1) The persons authorised to act in the United Kingdom in connection with international wills are –

(a) solicitors; and

(b) notaries public.

(2) A person who is authorised under section 6(1) of the Commissioners for Oaths Act 1889 to do notarial acts in any foreign country or place is authorised to act there in connection with international wills.

(3) All international will certified by virtue of subsection (1) or (2) above may be deposited in a depository provided under section 23 above.

(4) Section 23 above shall accordingly have effect in relation to such international wills.

(5) Subject to subsection (6) below, regulations under section 25 above shall have effect in relation to such international wills as they have effect in relation to wills deposited under section 23 above.

(6) Without prejudice to the generality of section 25 above, regulations under that section may make special provision with regard to such international wills.

SCHEDULE 2

Section 27

THE ANNEX TO THE CONVENTION ON INTERNATIONAL WILLS

UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

ARTICLE 1

1. A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Articles 2 to 5 hereinafter.
2. The invalidity of the will as an international will shall not affect its formal validity as a will of another kind.

ARTICLE 2

This law shall not apply to the form of testamentary dispositions made by two or more persons in one instrument.

ARTICLE 3

1. The will shall be made in writing.
2. It need not be written by the testator himself.
3. It may he written in any language, by hand or by any other means.

ARTICLE 4

1. The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof.
2. The testator need not inform the witnesses, or the authorized person, of the contents of the will.

ARTICLE 5

1. In the presence of the witnesses and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.
2. When the testator is unable to sign, he shall indicate the reason therefor to the authorized person who shall make note of this on the will. Moreover, the testator may be authorized by the law under which the authorized person was designated to direct another person to sign on his behalf.
3. The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

ARTICLE 6

1. The signatures shall be placed at the end of the will.
2. If the will consists of several sheets, each sheet shall be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

ARTICLE 7

1. The date of the will shall be the date of its signature by the authorized person.
2. This date shall be noted at the end of the will by the authorized person.

ARTICLE 8

In the absence of any mandatory rule pertaining to the safekeeping of the will, the authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to have his will kept shall he mentioned in the certificate provided for in Article 9.

ARTICLE 9

The authorized person shall attach to the will a certificate in the form prescribed in Article 10 establishing that the obligations of this law have been complied with.

ARTICLE 10

The certificate drawn up by the authorized person shall be in the following form or in a substantially similar form:

CERTIFICATE

(Convention of October 26th, 1973)

1. I. ..... (name, address and capacity), a person authorized to act in connection with international wills
2. Certify that on ..... (date) at ..... (place)
3. (testator) ..... (name, address, date and place of birth) in my presence and that of the witnesses
4. (a) ..... (name, address, date and place of birth)
   (b) ..... (name, address, date and place of birth) has declared that the attached document is his will and that he knows the contents thereof.
5. 1 furthermore certify that:
6. (a) in my presence and in that of the witnesses
   (1) the testator has signed the will or has acknowledged his signature previously affixed.
   *(2) following a declaration of the testator stating that he was unable to sign his will for the following reason .....
   .....
   - I have mentioned this declaration on the will
   *- the signature has been affixed by ..... (name, address)
7. (b) the witnesses and I have signed the will:
8. *(c) each page of the will has been signed by ..... and numbered:
9. (d) I have satisfied myself as to the identify of the testator and of the witnesses as designated above;
10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;
11. *(f) the testator has requested me to include the following statement concerning the safekeeping of his will:

.....
.....

12. PLACE

13. DATE
14. SIGNATURE and, if necessary, SEAL

*To be completed if appropriate.

ARTICLE 11

The authorized person shall keep a copy of the certificate and deliver another to the testator.

ARTICLE 12

In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this Law.

ARTICLE 13

The absence or irregularity of a certificate shall not affect the formal validity of a will under this Law.

ARTICLE 14

The international will shall be subject to the ordinary rules of revocation of wills.

ARTICLE 15

In interpreting and applying the provisions of this law, regard shall be had to its international origin and to the need for uniformity in its interpretation.

附录 4

根据 1971 年无遗嘱者遗产条例的遗产分配表 *

* 经获作者麦雅心理先生（小组委员会主席）及香港法律专刊同意刊登，谨此致谢。

附件 A

1971 年无遗嘱者遗产条例

无遗嘱者或局部未立遗嘱所剩余遗产的继承表

如果死者遗下	剩余遗产的分配（附注 A）	有权管理遗产人士（附注 D）
丈夫或妻子，但并无其他亲属（附注 J(1)）	全归丈夫 / 妻子绝对拥有	丈夫 / 妻子
妻及妾，但并无其他亲属（附注 J(1)及附注(B)）	妻占三分二，其余由妾或各妾均分	妻及妾
妾或各妾，并无妻子或其他亲属（附注 J(2)）	三分一由妾或各妾均分，其余归政府（附注 C）	妾或各妾
妾的男伴侣（附注 B）并无其他亲属（附注 J(2)）	三分一归男伴侣，其余归政府（附注 C）	男伴侣
丈夫或妻子及子孙（附注 E）	(i) 25,000 元归丈夫 / 妻子，另加年息 5%，由逝世之日起计至付款或拨付之日止（附注 F） (ii) 剩余一半遗产归丈夫 / 妻子 (iii) 其余一半由法定信托保管，归死者子孙均分（附注 E 及 G）	丈夫 / 妻子

妻、妾及子孙	(i) 25,000 元归妻子，另加年息 5%，由逝世之日起计至付款或拨付之日止（附注 F） (ii) 剩余一半遗产归妻子，但如有妾，须先给与下文所述有关妾的终身利益 (iii) 妻子所获的一半遗产之中，其中三分一收入由妾终身享用，如妾的数目超过一名，则由各妾或尚存者均分 (iv) 其余一半遗产由法定信托保管，归各子孙均分（附注 E 及 G）	妻及妾
妾及子孙	(i) 由法定信托保管，除须给与妾的终身利益外，全归子孙均分（附注 E 及 G） (ii) 剩余遗产三分一的收入由妾终身享用，如妾的数目超过一名，则由各妾或尚存者均分	妾
妾的男伴侣及子孙	(i) 由法定信托保管，除须给与妾的男伴侣终身利益外，全归子孙均分（附注 E 及 G） (ii) 剩余遗产三分一的收入由妾的男伴侣终身享用	妾的男伴侣
子孙，并无妾、丈夫或妻子	全由法定信托保管，归子孙均分（附注 E 及 G）	子孙，死者的子女较死者的孙有优先权
丈夫或妻子及下述人士——父母、兄弟、姊妹、甥侄但无子孙	(i) 100,000 元归丈夫 / 妻子，另加年息 5%，由逝世之日起计至付款或拨付之日止（附注 F）	丈夫 / 妻子

	(ii) 剩余一半遗产归丈夫 / 妻子 (iii) 其余一半归父 / 母或如父母双全，则由父母均分 (iv) 若无父母，则其余一半遗产由法定信托管，归兄弟姊妹均分（附注 G 及 H)	
妻妾及下述人士——父母、兄弟、姊妹、甥侄但无子孙	(i) 100,000 元归妻子，另加年息 5%，由逝世之日起计至付款或拨付之日止（附注 F） (ii) 剩余一半遗产，除须先给与妾的终身利益外，全归妻子 (iii) 由妻的半份遗产中收入三分一由妾终身享用，如妾的数目超过一名，则由各妾或尚存者均分 (iv) 其余一半归父 / 母或如父母双全，则由父母均分，但如父母双亡，则由法定信托保管，归兄弟姊妹均分（附注 G 及 H）	妻妾
祇余妾或妾的男伴侣及下述人士——父母、兄弟姊妹，甥侄、祖父母、外祖父母、叔伯姑舅（附注 I）但无丈夫、妻子及子孙	(i) 妾或妾的男伴侣占三分一，如妾的数目超过一名，则由各妾均分 (ii) 其余三分二归父 / 母或如父母双全，则由父母均分； (iii) 如父母双亡，则由下列人士按下列顺序领取该三分二遗产： (a) 由法定信托保管，归兄弟姊妹均分（附注 H） (b) 由法定信托保管，归甥侄均分（附注 H） (c) 祖父母及外祖父母均分 (d) 由法定信托保管，归叔伯姑舅（附注 I）均分	妾 / 妾的男伴侣

父母、兄弟姊妹、甥侄、祖父母及外祖父母、叔伯姑舅及其子孙但无丈夫、妻子、妾的男伴侣，妾或子孙	全归父/母，如父母双全，则由父母均分。如父母双亡，则由下述人士按下列顺序领取全部遗产： (a) 由法定信托保管，兄弟姊妹均分（附注 H） (b) 由法定信托保管，甥侄均分（附注 E 及 H） (c) 祖父母及外祖父母均分 (d) 由法定信托保管，叔伯姑舅均分	有权继承遗产人士
亲生母亲及公认的父亲（死者是非婚生子女），并无子孙、男伴侣、丈夫、妻或妾	全归生母（非婚生子女获取合法地位条例第 10(2)条）	生母
并无遗下子孙、男伴侣、丈夫、妻妾、父母、兄弟姊妹、甥侄、祖父母，外祖父母、叔伯姑舅及其子孙	全归政府（附注 C）	政府

附注 A：剩余遗产

指一名人士死亡时并无留下遗嘱，其遗产在扣除适当的殡葬费、遗产管理费、欠债及其他债务后每一项受益人权益，而该项权益，亦即指该名人士（非根据其已拥有的指定），如是成年人并具有完全行为能力时，可立遗嘱处理其遗产的权益。本条例亦适用于局部未立遗嘱的遗产，即指未由遗嘱或遗嘱修改附录处理的资产。

附注 B：妾的男伴侣，妻子及妾

丈夫及妻子是指一段有效婚姻中的丈夫或妻子，妾是指有效的夫妾关系中的女方，而男方则称为“男伴侣”。男伴侣死亡时并无留下遗嘱，妾亦具有受益人的权益，一如丈夫死时并无留下遗嘱而其妻子具有权益一样。至于妻子或妾死亡而

无留下遗嘱，丈夫则有受益人权益，更且，条例将妻及妾视为陌生人，举例来说，一位男士死亡，遗下一妻一妾，其后，妻子逝世但无留下遗嘱，妾不能享有该名妻子遗产的任何权益，反之，如妾死亡，妻亦不能享有其遗产。同时，如果妾再婚或与人发生性行为，则亦会丧失其终身权益。以本条例而言，一名填房妻（即结发妻子死后，丈夫提升一名妾为正妻或另娶新妻的称号）似被视为妻子，而且，就本条例而言，将妾升为正妻的仪式或娶新妻的仪式似被视为一段有效婚姻。

附注 C： 政府

按照条例规定，如无人取得绝对权益时，无遗嘱者的剩余财产即成为无主财物而归政府所有，政府可（在不妨碍其他权力的原则下）将归其所有的全部或部分财产，抚养受该无遗嘱者供养的人士（不论是否为该无遗嘱者的亲属），与及可合理预期该无遗嘱者会加以抚养的其他人士。（见 4(9)节）

附注 D： 有权管理遗产的人士

栏内所指人士，即可根据 1971 年无争论性遗嘱认证规则第 21 条规则有优先权利申领管理遗产的人士。管理遗产人士不会超过四名，如果牵涉有未成年人或终身权益，法庭会颁令由信托机构或不少于两名人士管理遗产。如有局部未立遗嘱的遗产，则栏内所指人士或未必有权管理遗产，申领次序则根据规则第 19 条而非第 21 条。

附注 E： “子孙”：——

(a) 如死者是一段有效婚姻的一方，为其子女；

(b) 如果死者是女性

(i) 为其最后一名丈夫与另一名女子所缔结有效婚姻的子女；

(ii) 为其男伴侣与另一名女子所缔结有效婚姻的子女；

(iii) 为其最后一名丈夫与另一名女子所缔结有效的夫妾关系所属的子女（见条例第 2(2)(6)条及修订条例）。

(c) 按照领养条例所领养的子女或根据领养条例第 17 条保留中国传统领养法所领养的子女；

(d) 夫妾关系中死者的子女；

(e) 死者逝世时待生的子女；

(f) 根据 1971 年非婚生子女获取合法地位条例而获取合法地位，或宣布或视为已获取合法地位的子女；

(g) 如果死者是女性而并无遗下任何尚存获取合法地位的子孙，为其私生子女（非婚生子女获取合法地位条例第 10(1)条）。

(h) 以上获取合法地位的受供养人（如父母均已逝世才可领取遗产）。

附注 F： $25,000.000 及 $100,000.00

无须缴纳遗产税及费用的净款额（第 4(3)及(4)条）。尚存配偶可用书面要求遗产管理人拨出个人动产，以折价清付该笔净款额（第 7 条）。

附注 G： 法定信托（第 5 条）

以信托形式，为可领取无遗嘱者遗产的某组别人士保管，如该组人士人数超过一名，则由死者逝世时仍活着而年满 21 岁或已婚者均分；如有子女于无遗嘱者逝世前先逝世，则其子女（即无遗嘱者的孙儿）可按家系均分，如该家系人数超过一名，则可均分其父母应可享得的份数，一如其父母较无遗嘱者活得较长，但其家系须年满 21 岁或已婚。

附注 H： 兄弟姊妹

条例所指的兄弟姊妹，即由无遗嘱者同一父亲所生的兄弟姊妹（第 2(4)条）。如果同母异父，在本条例内提到继承时并不视为兄弟姊妹，政府会包括同母异父的兄弟姊妹的优先继承权，虽然如果他们提出书面请求，相信政府亦会批准该项申请（见第 4(9)条）。

附注 I： 叔伯姑舅

无遗嘱者父母（须符合附注 H 的定义）的兄弟姊妹。死者母亲的兄弟姊妹亦包括在内，此点与条例内祇重视父系的情况不同。

附注 J(1)：亲属

亲属指下述人士：

(a) 子孙；

(b) 父母；

(c) 兄弟姊妹；

(d) 甥侄

附注 J(2)：亲属

除上述附注 J(1)所指的人士外，亦包括下述人士：

(a) 祖父母、外祖父母；

(b) 叔伯姑舅；

(c) 叔伯姑舅的子孙。

注：(1) 除无遗嘱者表示相反意图外，共有三条条文规定须将财产混同：

(a) 在确定某一子女所占份数时，倘无遗嘱者生前已预付或设定金钱予该名子女，则该笔款项必须记入遗产的帐项内；

(b) 如属于局部未立遗嘱的遗产，则遗嘱内给予丈夫或妻子的馈赠（不包括特别遗赠的个人动产）必须记入遗产的帐项内，以减少支付$25,000.000 或 100,000.00 元款项（按情况而定）；

(c) 如有局部未立遗嘱的遗产，由遗嘱给予子孙的馈赠必须记入账项内。

在计算这些财产混同条文所指的款项时，其价值当以死者逝世当日的价值计算，列入账项内，以决定子孙应获得的利益。

(2) 如果无遗嘱者与配偶逝世时，无法确定其中一人是否在另一人逝世时仍活着，则无遗嘱者的遗产的继承一如该名配偶已死亡处理。

1975 年继承（供养家属）法：第 3 及 8-13 条（英文本）

3. Matters to which court is to have regard in exercising powers under s. 2

(1) Where an application is made for an order under section 2 of this Act, the court shall, in determining whether 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 such as to make reasonable financial provision for the applicant and, if the court considers that reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters, that is to say –

(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;

(b) the financial resources and financial needs which any other applicant for an order under section 2 of this Act has or is likely to have in the foreseeable future;

(c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;

(d) any obligations and responsibilities which the deceased had towards any applicant for an order under the said section 2 or towards any beneficiary of the estate of the deceased;

(e) the size and nature of the net estate of the deceased;

(f) any physical or mental disability of any applicant for an order under the said section 2 or any beneficiary of the estate of the deceased;

(g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.

(2) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(a) or 1(1)(b) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to –

(a) the age of the applicant and the duration of the marriage;

(b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family;

and, in the case of an application by the wife or husband of the deceased, the court shall also, unless at the date of death a decree of judicial separation was in force and the separation was continuing, have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce.

(3) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(c) or 1(1)(d) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to the manner in which the applicant was being or in which he might expect to be educated or trained, and where the application is made by virtue of section 1(1)(d) the court shall also have regard –

(a) to whether the deceased had assumed any responsibility for the applicant's maintenance and, if so, to the extent to which and the basis upon which the

deceased assumed that responsibility and to the length of time for which the deceased discharged that responsibility;

(b) to whether in assuming and discharging that responsibility the deceased did so knowing that the applicant was not his own child;

(c) to the liability of any other person to maintain the applicant.

(4) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(c) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to the extent to which and the basis upon which the deceased assumed responsibility for the maintenance of the applicant, and to the length of time for which the deceased discharged that responsibility.

(5) In considering the matters to which the court is required to have regard under this section, the court shall take into account the facts as known to the court at the date of the hearing.

(6) In considering the financial resources of any person for the purposes of this section the court shall take into account his earning capacity and in considering the financial needs of any person for the purposes of this section the court shall take into account his financial obligations and responsibilities.

Properly available for financial provision

8. Property treated as part of "net estate"

(1) Where a deceased person has in accordance with the provisions of any enactment nominated any person to receive any sum of money or other property on his death and that nomination is in force at the time of his death, that sum of money, after deducting therefrom any capital transfer tax payable in respect thereof, or that other property, to the extent of the value thereof at the date of the death of the deceased after deducting therefrom any capital transfer tax so payable, shall be treated for the purposes of this Act as part of the net estate of the deceased; but this subsection shall not render any person liable for having paid that sum or transferred that other property to the person named in the nomination in accordance with the directions given in the nomination.

(2) Where any sum of money or other property is received by any person as a donatio mortis causa made by a deceased person, that sum of money, after deducting therefrom any capital transfer tax payable thereon, or that other property, to the extent of the value thereof at the date of the death of the deceased after deducting therefrom any capital transfer tax so payable, shall be treated for the purposes of this Act as part of the net estate of the deceased; but this subsection shall not render any person liable for having paid that sum or transferred that other property in order to give effect to that donatio mortis causa.

(3) The amount of capital transfer tax to be deducted for the purposes of this section shall not exceed the amount of that tax which has been borne by the person nominated by the deceased or, as the case may be, the person who has received a sum of money or other property as a donatio mortis causa.

9. Property held on a joint tenancy

(1) Where a deceased person was immediately before his death beneficially entitled to a joint tenancy of any property, then, if, before the end of the period of six months from the date on which representation with respect to the estate of the deceased was first taken out, an application is made for an order under section 2 of this Act, the court for the purpose of facilitating the making of financial provision for the applicant under this Act may order that the deceased's severable share of that property, at the value thereof immediately before his

death, shall, to such extent as appears to the court to be just in all the circumstances of the case, be treated for the purposes of this Act as part of the net estate of the deceased.

(2) In determining the extent to which any severable share is to be treated as part of the net estate of the deceased by virtue of an order under subsection (1) above, the court shall have regard to any capital transfer tax payable in respect of that severable share.

(3) Where an order is made under subsection (1) above, the provisions of this section shall not render any person liable for anything done by him before the order was made.

(4) For the avoidance of doubt it is hereby declared that for the purposes of this section there may be a joint tenancy of a chose in action.

Powers of court in relation to transactions intended to defeat applications for financial provision

10. Dispositions Intended to defeat applications for financial provision

(1) Where an application is made to the court for an order under section 2 of this Act, the applicant may, in the proceedings on that application, apply to the court for an order under subsection (2) below.

(2) Where on an application under subsection (1) above the court is satisfied –

(a) that, less than six years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Act made a disposition, and

(b) that full valuable consideration for that disposition was not given by the person to whom or for the benefit of whom the disposition was made (in this section referred to as "the donee") or by any other person, and

(c) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Act,

then, subject to the provisions of this section and of sections 12 and 13 of this Act, the court may order the donee (whether or not at the date of the order he holds any interest in the property disposed of to him or for his benefit by the deceased) to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order.

(3) Where an order is made under subsection (2) above as respects any disposition made by the deceased which consisted of the payment of money to or for the benefit of the donee, the amount of any sum of money or the value of any property ordered to be provided under that subsection shall not exceed the amount of the payment made by the deceased after deducting therefrom any capital transfer tax borne by the donee in respect of that payment.

(4) Where an order is made under subsection (2) above as respects any disposition made by the deceased which consisted of the transfer of property (other than a sum of money) to or for the benefit of the donee, the amount of any sum of money or the value of any property ordered to be provided under that subsection shall not exceed the value at the date of the death of the deceased of the property disposed of by him to or for the benefit of the donee (or if that property has been disposed of by the person to whom it was transferred by the deceased, the value at the date of that disposal thereof) after deducting therefrom any capital transfer tax borne by the donee in respect of the transfer of that property by the deceased.

(5) Where an application (in this subsection referred to as "the original application") is made for an order under subsection (2) above in relation to any disposition, then, if on an application under this subsection by the donee or by any applicant for an order under section 2 of this Act the court is satisfied –

(a) that, less than six years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Act made a disposition other than the disposition which is the subject of the original application, and

(b) that full valuable consideration for that other disposition was not given by the person to whom or for the benefit of whom that other disposition was made or by any other person,

the court may exercise in relation to the person to whom or for the benefit of whom that other disposition was made the powers which the court would have had under subsection (2) above if the original application had been made in respect of that other disposition and the court had been satisfied as to the matters set out in paragraphs *(a)*, *(b)* and *(c)* of that subsection; and where any application is made under this subsection, any reference in this section (except in subsection (2)*(b)*) to the donee shall include a reference to the person to whom or for the benefit of whom that other disposition was made.

(6) In determining whether and in what manner to exercise its powers under this section, the court shall have regard to the circumstances in which any disposition was made and any valuable consideration which was given therefor, the relationship, if any, of the donee to the deceased, the conduct and financial resources of the donee and all the other circumstances of the case.

(7) In this section "disposition" does not include –

(a) any provision in a will, any such nomination as is mentioned in section 8(1) of this Act or any donatio mortis causa, or

(b) any appointment of property made, otherwise than by will, in the exercise of a special power of appointment,

but, subject to these exceptions, includes any payment of money (including the payment of a premium under a policy of assurance) and any conveyance, assurance, appointment or gift of property of any description, whether made by an instrument or otherwise.

(8) The provisions of this section do not apply to any disposition made before the commencement of this Act.

11. Contracts to leave property by will

(1) Where an application is made to a court for an order under section 2 of this Act, the applicant may, in the proceedings on that application, apply to the court for an order under this section.

(2) Where on an application under subsection (1) above the court is satisfied –

(a) that the deceased made a contract by which he agreed to leave by his will a sum of money or other property to any person or by which he agreed that a sum of money or other property would be paid or transferred to any person out of his estate, and

(b) that the deceased made that contract with the intention of defeating an application for financial provision under this Act, and

(c) that when the contract was made full valuable consideration for that contract was not given or promised by the person with whom or for the benefit of whom the contract was made (in this section referred to as "the donee") or by any other person, and

(d) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Act,

then, subject to the provisions of this section and of sections 12 and 13 of this Act, the court may make any one or more of the following orders, that is to say –

(i) if any money has been paid or any other property has been transferred to or for the benefit of the donee in accordance with the contract, an order directing the donee to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order;

(ii) if the money or all the money has not been paid or the property or all the property has not been transferred in accordance with the contract, an order directing the personal representatives not to make any payment or transfer

any property, or not to make any further payment or transfer any further property, as the case may be, in accordance therewith or directing the personal representatives only to make such payment or transfer such property as may be specified in the order.

(3) Notwithstanding anything in subsection (2) above, the court may exercise its powers thereunder in relation to any contract made by the deceased only to the extent that the court considers that the amount of any sum of money paid or to be paid or the value of any property transferred or to be transferred in accordance with the contract exceeds the value of any valuable consideration given or to be given for that contract, and for this purpose the court shall have regard to the value of property at the date of the hearing.

(4) In determining whether and in what manner to exercise its powers under this section, the court shall have regard to the circumstances in which the contract was made, the relationship, if any, of the donee to the deceased, the conduct and financial resources of the donee and all the other circumstances of the case.

(5) Where an order has been made under subsection (2) above in relation to any contract, the rights of any person to enforce that contract or to recover damages or to obtain other relief for the breach thereof shall be subject to any adjustment made by the court under section 12(3) of this Act and shall survive to such extent only as is consistent with giving effect to the terms of that order.

(6) The provisions of this section do not apply to a contract made before the commencement of this Act.

12. Provisions supplementary to ss. 10 and 11

(1) Where the exercise of any of the powers conferred by section 10 or 11 of this Act is conditional on the court being satisfied that a disposition or contract was made by a deceased person with the intention of defeating an application for financial provision under this Act, that condition shall be fulfilled if the court is of the opinion that, on a balance of probabilities, the intention of the deceased (though not necessarily his sole intention) in making the disposition or contract was to prevent an order for financial provision being made under this Act or to reduce the amount of the provision which might otherwise be granted by an order thereunder.

(2) Where an application is made under section 11 of this Act with respect to any contract made by the deceased and no valuable consideration was given or promised by any person for that contract then, notwithstanding anything in subsection (1) above, it shall be presumed, unless the contrary is shown, that the deceased made that contract with the intention of defeating an application for financial provision under this Act.

(3) Where the court makes an order under section 10 or 11 of this Act it may give such consequential directions as it thinks fit (including directions requiring the making of any payment or the transfer of any property) for giving effect to the order or for securing a fair adjustment of the rights of the persons affected thereby.

(4) Any power conferred on the court by the said section 10 or 11 to order the donee, in relation to any disposition or contract, to provide any sum of money or other property shall be exercisable in like manner in relation to the personal representative of the donee, and –

(a) any reference in section 10(4) to the disposal of property by the donee shall include a reference to disposal by the personal representative of the donee, and

(b) any reference in section 10(5) to an application by the donee under that subsection shall include a reference to an application by the personal representative of the donee;

but the court shall not have power under the said section 10 or 11 to make an order in respect of any property forming part of the estate of the donee which has been distributed by the personal representative; and the personal representative shall not be liable for having

distributed any such property before he has notice of the making of an application under the said section 10 or 11 on the ground that he ought to have taken into account the possibility that such an application would be made.

13. Provisions as to trustees in relation to ss. 10 and 11

(1) Where an application is made for –

(a) an order under section 10 of this Act in respect of a disposition made by the deceased to any person as a trustee, or

(b) an order under section 11 of this Act in respect of any payment made or property transferred, in accordance with a contract made by the deceased, to any person as a trustee,

the powers of the court under the said section 10 or 11 to order that trustee to provide a sum of money or other property shall be subject to the following limitation (in addition, in a case of an application under section 10, to any provision regarding the deduction of capital transfer tax) namely, that the amount of any sum of money or the value of any property ordered to be provided –

(i) in the case of an application in respect of a disposition which consisted of the payment of money or an application in respect of the payment of money in accordance with a contract, shall not exceed the aggregate of so much of that money as is at the date of the order in the hands of the trustee and the value at that date of any property which represents that money or is derived therefrom and is at that date in the hands of the trustee;

(ii) in the case of an application in respect of a disposition which consisted of the transfer of property (other than a sum of money) or an application in respect of the transfer of property (other than a sum of money) in accordance with a contract, shall not exceed the aggregate of the value at the date of the order of so much of that property as is at that date in the hands of the trustee and the value at that date of any property which represents the first mentioned property or is derived therefrom and is at that date in the hands of the trustee.

(2) Where any such application is made in respect of a disposition made to any person as a trustee or in respect of any payment made or property transferred in pursuance of a contract to any person as a trustee, the trustee shall not be liable for having distributed any money or other property on the ground that he ought to have taken into account the possibility that an application would be made.

(3) Where any such application is made in respect of a disposition made to any person as a trustee or in respect of any payment made or property transferred in accordance with a contract to any person as a trustee, any reference in the said section 10 or 11 to the donee shall be construed as including a reference to the trustee or trustees for the time being of the trust in question and any reference in subsection (1) or (2) above to a trustee shall be construed in the same way.

遗嘱（修订）条例草案（英文本）

WILLS (AMENDMENT) BILL 1990

ARRANGEMENT OF CLAUSES

A BILL

To

Amend the Wills Ordinance.

Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof.

Short title and commencement

1. (1) This Ordinance may be cited as the Wills (Amendment) Ordinance 1990.

(2) This Ordinance shall come into operation on

Sections substituted

2. Sections 3, 4, 5 and 6 of the Wills Ordinance (Cap. 30) are repealed and the following substituted –

"All property may be disposed of by will

3. A person may by will, executed in accordance with this Ordinance, dispose of all property to which he is beneficially entitled at the time of his death and which on his death devolves on his personal representatives.

Wills of persons not of full age

4. (1) Subject to subsection (2), no will made by a person who has not attained full age shall be valid.

(2) A married person, a person in actual naval, military or air force service, and a mariner or seaman at sea, may make a valid will and may validly revoke a will even though he has not attained full age.

[cf. 1837 c. 26 s. 7 U.K. and 1918 c. 58 U.K.]

(3) For the purpose of this section, "married person" means a party to a marriage within the meaning of the Married Persons Status Ordinance (Cap. 182).

Signing and witnessing of will

5. Subject to sections 6 and 23D, no will shall be valid unless –

(a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and

(b) it appears that the testator intended by his signature to give effect to the will; and

(c) the signature is made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time; and

(d) each witness either –

(i) attests and signs the will; or

(ii) acknowledges his signature,

in the presence of the testator (but not necessarily in the presence of any other witness),

but no form of attestation shall be necessary:

[cf. 1982 c. 53 s. 17 U.K.]

Provided that a will that is in writing, and signed by the testator, or by some other person in his presence and by his direction, but is not otherwise executed in accordance with the above formalities, is nevertheless validly executed if, at the time it was so signed, it expressed the testator's testamentary intentions.

Privileged wills

6. Any person in actual naval, military or air force service, and any mariner or seaman at sea may –

(a) dispose of any of his property;

(b) exercise any power of appointment; or

(c) appoint a person or guardian of his infant children by will,

without complying with section 5.

[cf. 1837 c. 26 s. 11 U. K. and 1918 c. 58 U.K.]".

Sections repealed

3. Sections 8, 10, 11 and 12 are repealed.

Sections substituted

4. Sections 13, 14 and 15 are repealed and the following substituted –

"Modes of revocation of will

13. (1) No will or part of a will shall be revoked otherwise than –

(a) by marriage as provided by section 14; or

(b) by another valid will; or

(c) by a written revocation executed in a manner in which the testator could validly execute a will; or

(d) by the burning, tearing or otherwise destroying of it by the testator, or by some person in his presence and by his direction, with the intention of revoking it.

(2) No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

[cf. 1837 c. 26 ss. 19 and 20 U.K.]

Will to be revoked by marriage, except in certain cases

14. (1) Subject to subsections (2), (3) and (4), a will shall be revoked by the testator's marriage.

(2) A disposition in a will in exercise of a power of appointment shall take effect notwithstanding the testator's subsequent marriage unless the property so appointed would in default of appointment pass to his personal representatives.

(3) Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that the will should not be revoked by the marriage, the will shall not be revoked by his marriage to that person.

(4) Where it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that a disposition in the will should not be revoked by his marriage to that person, –

(a) that disposition shall take effect notwithstanding the marriage; and

(b) any other disposition in the will shall take effect also, unless it appears from the will that the testator intended the disposition to be revoked by the marriage.

(5) In this section, "marriage" has the same meaning as in section 2 of the Married Persons Status Ordinance (Cap. 182).

[cf. 1982 c. 53 s. 18 U.K.]

Effect of dissolution or annulment of marriage

15. (1) Where, after a testator has made a will, his marriage is validly dissolved, annulled or declared void, –

(a) the will shall take effect as if any appointment of the former spouse as an executor or as the executor and trustee of the will were omitted; and

(b) any devise or bequest to the former spouse shall lapse,

except in so far as a contrary intention appears by the will.

(2) Subsection (1)(b) is without prejudice to any right of the former spouse to apply for provision for maintenance under the Matrimonial Causes Ordinance (Cap. 179).

(3) Where –

(a) by the terms of a will an interest in remainder is subject to a life interest; and

(b) the life interest lapses by virtue of subsection (1)(b),

the interest in remainder shall be treated as if it had not been subject to the life interest and, if it was contingent upon the termination of the life interest, as if it had not been so contingent.

[cf. 1982 c. 53 s. 18 U.K.]".

Alterations in will after execution

5. Section 16 is amended –

(a) in subsection (1), by repealing "in the manner in which the will was executed in" and substituting "by the testator in a manner in which he could validly execute a will";

(b) by adding after subsection (1) –

"(1A) For the purpose of subsection (1), the words or effect of a will are apparent if they can by any means be discovered.".

Section added

6. The following is added after section 17 –

"Evidence of execution, revocation and alteration

17A. Extrinsic evidence, including evidence of a statement made at any time by the testator, may be admitted of the manner in which a will was executed, revoked or altered.".

Subsequent conveyance or other act not to prevent operation of will

7. Section 18 is amended by repealing "15" and substituting "13(1)".

Section added

8. The following is added after section 19 –

"Construction of references to any relationship

19A. (1) In a disposition by will made after the commencement of the Wills (Amendment) Ordinance 1990 (of 1990), references (whether express or implied) to any relationship between 2 persons shall, unless the contrary intention appears, be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time.

(2) The use, without more, of the word "heir" or "heirs" does not show a contrary intention for the purposes of subsection (1).

(3) Notwithstanding any rule of law, a disposition made by will executed before the commencement of the Wills (Amendment) Ordinance 1990 shall not be treated for the purposes of this section as made after that commencement by reason only that the will is confirmed by a codicil executed after that commencement.

[cf. 1987 c. 42 ss. 1 and 19 U.K.]".

Section substituted

9. Section 23 is repealed and the following substituted –

"Gifts to children or other issue who leave issue living at the testator's death

23. (1) Where –

(a) a will contains a devise or bequest to a child or remoter descendant of the testator; and

(b) the intended beneficiary dies before the testator, leaving issue; and

(c) issue of the intended beneficiary are living at the testator's death,

then, unless a contrary intention appears by the will, the devise or bequest shall take effect as a devise or bequest to the issue living at the testator's death.

(2) Where –

(a) a will contains a devise or bequest to a class of persons consisting of children or remoter descendants of the testator; and

(b) a member of the class dies before the testator, leaving issue; and

(c) issue of that member are living at the testator's death,

then, unless a contrary intention appears by the will, the devise or bequest shall take effect as if the class included the issue of its deceased member living at the testator's death.

(3) Issue shall take under this section through all degrees, according to their stock, in equal shares if more than one, any gift or share which their parent would have taken and so that no issue shall take whose parent is living at the testator's death and so capable of taking.

(4) For the purposes of this section –

(a) the illegitimacy of any person is to be disregarded; and

(b) a person conceived before the testator's death and born living thereafter is to be taken to have been living at the testator's death.

[cf. 1982 c. 53 s. 19 U.K.]".

Section added

10. The following are added after section 23 –

"Rectification

23A. (1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence –

(a) of a clerical error; or

(b) of a failure to understand his instructions,

it may order that the will shall be rectified so as to carry out his intentions.

(2) An application for an order under this section shall not, except with the permission of the court, be made after the end of the period of 6 months from the date on which representation with respect to the estate of the deceased is first taken out.

(3) The provisions of this section shall not render the personal representatives of a deceased person liable for having distributed any part of the estate of the deceased, after the end of the period of 6 months from the date on which representation with respect to the estate of the deceased is first taken out, on the ground that they ought to have taken into account the possibility that the court might permit the making of an application for an order under this section after the end of that period; but this subsection shall not prejudice any power to recover, by reason of the making of an order under this section, any part of the estate so distributed.

(4) In considering for the purposes of this section when representation with respect to the estate of a deceased person was first taken out, a grant limited to part only of the estate shall be left out of account unless a grant limited to the remainder of the estate has previously been made or is made at the same time.

[cf. 1982 c. 53 s. 20 U.K.]

Interpretation of wills – general rules as to evidence

23B. (1) This section applies to a will –

(a) in so far as any part of it is meaningless;

(b) in so far as the language used in any part of it is ambiguous on the face of it;

(c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.

(2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation.

[cf. 1982 c. 53 s. 21 U.K.]

Presumption as to effect of gifts to spouses

23C. If a testator devises or bequeaths property to his spouse in terms which in themselves would give an absolute interest to the spouse, but by the same instrument purports to give his issue an interest in the same property, and the spouse survives the testator, it shall, unless a contrary intention is shown, be presumed that the gift to the spouse is absolute notwithstanding the purported gift to the issue.

[cf. 1982 c. 53 s. 22 U.K.]

PART IIA

INTERNATIONAL WILLS

Form of international will

23D. (1) The Annex to the Convention on International Wills shall have the force of law in Hong Kong.

(2) The Annex is set out in the Schedule.

(3) In this Part –

"International will" means a will made in accordance with the requirements of the Annex, as set out in the Schedule;

"the Convention on International Wills" means the Convention providing a Uniform Law on the Form of an International Will concluded at Washington on 26 October 1973.

[cf. 1982 c. 53 s. 27 U.K.]

Procedure

23E. (1) The persons authorized to act in Hong Kong in connection with international wills are -

(a) solicitors; and

(b) notaries public duly registered under section 40 of the Legal Practitioners Ordinance (Cap. 159).

(2) A person who is authorized under section 6(1) of the Commissioners for Oaths Act 1889 (1889 c. 10 U.K.) to do notarial acts in any foreign country or place is authorized to act there in connection with international wills.

[cf. 1982 c. 53 s. 28 U.K.]".

Application

11. Section 30 is amended by adding after subsection (3) –

"(4) The amendments to this Ordinance effected by the Wills (Amendment) Ordinance 1990 (of 1990) shall not apply to a will of a testator who died before the commencement of that Ordinance but, subject to subsection (5), shall apply to a will of a testator who dies after its commencement whether the will was made before or after its commencement, but so that a will that was made before its commencement and that, but for the provisions of that Ordinance, would be valid shall not thereby be invalidated.

(5) The effect of the marriage of a testator on a will made by him before the commencement of the Wills (Amendment) Ordinance 1990 shall be determined as if that Ordinance had not been passed.".

Schedule added

12. The following is added after section 30 –

"SCHEDULE [s. 23D]

THE ANNEX TO THE CONVENTION ON INTERNATIONAL WILLS

UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

ARTICLE 1

1. A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Articles 2 to 5 hereinafter.

2. The invalidity of the will as an international will shall not affect its formal validity as a will of another kind.

ARTICLE 2

This law shall not apply to the form of testamentary dispositions made by 2 or more persons in one instrument.

ARTICLE 3

1. The will shall be made in writing.

2. It need not be written by the testator himself.

3. It may be written in any language, by hand or by any other means.

ARTICLE 4

1. The testator shall declare in the presence of 2 witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof.

2. The testator need not inform the witnesses, or the authorized person, of the contents of the will.

ARTICLE 5

1. In the presence of the witnesses and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.

2. When the testator is unable to sign, he shall indicate the reason therefor to the authorized person who shall make note of this on the will. Moreover, the testator may be authorized by the law under which the authorized person was designated to direct another person to sign on his behalf.

3. The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

ARTICLE 6

1. The signatures shall be placed at the end of the will.

2. If the will consists of several sheets, each sheet shall be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

ARTICLE 7

1. The date of the will shall be the date of its signature by the authorized person.

2. This date shall be noted at the end of the will by the authorized person.

ARTICLE 8

In the absence of any mandatory rule pertaining to the safekeeping of the will, the authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to have his will kept shall be mentioned in the certificate provided for in Article 9.

ARTICLE 9

The authorized person shall attach to the will a certificate in the form prescribed in Article 10 establishing that the obligations of this law have been complied with.

ARTICLE 10

The certificate drawn up by the authorized person shall be in the following form or in a substantially similar form:

CERTIFICATE
(Convention of October 26th, 1973)

1. I, ... (name, address and capacity), a person authorized to act in connection with international wills

2. Certify that on ..... (date) at.....
..... (place)

3. (testator) .....
(name, address, date and place of birth)
in my presence and that of the witnesses

4. (a) .....
(name, address, date and place of birth)

(b) .....
(name, address, date and place of birth)
has declared that the attached document is his will and that he knows the contents thereof.

5. I furthermore certify that:

6. (a) in my presence and in that of the witnesses

(1) the testator has signed the will or has acknowledged his signature previously affixed.

*(2) following a declaration of the testator stating that he was unable to sign his will for the following reason .....
.....
.....
– I have mentioned this declaration on the will

*– the signature has been affixed by .....
.....
(name, address)

7. (b) the witnesses and I have signed the will;

8. *(c) each page of the will has been signed by .....
.....and numbered;

9. (d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;

10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;

11. *(f) the testator has requested me to include the following statement concerning the safekeeping of his will:
.....
.....
.....

12. PLACE

13. DATE

14. SIGNATURE and, if necessary, SEAL

*To be completed if appropriate.

ARTICLE 11

The authorized person shall keep a copy of the certificate and deliver another to the testator.

ARTICLE 12

In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this Law.

ARTICLE 13

The absence or irregularity of a certificate shall not affect the formal validity of a will under this Law.

ARTICLE 14

The international will shall be subject to the ordinary rules of revocation of wills.

ARTICLE 15

In interpreting and applying the provisions of this Law, regard shall be had to its international origin and to the need for uniformity in its interpretation.”.

Consequential Amendments

Trustee Ordinance

Protective trusts

13. Section 35 of the Trustee Ordinance (Cap. 29) is amended by adding after subsection (3) –

"(4) In relation to a disposition mentioned in section 19A of the Wills Ordinance (Cap. 30), this section shall have effect as if any reference (however expressed) to any relationship between 2 persons were construed in accordance with that section.".

Land Registration Ordinance

Repeal of references to wills

14. The Land Registration Ordinance (Cap. 128) is amended in the manner specified in the Schedule.

SCHEDULE [s. 14]

Amendments to Land Registration Ordinance

1. The long title is amended by repealing "wills,".

2. Sections 2, 3, 5 and 28 are amended by repealing "and wills" wherever it occurs.

3. Sections 4, 23, 23A, 24, 26A, 28 and 29 are amended by repealing "or will" wherever it occurs.

4. Section 5 is amended by repealing "(except wills)" and "and all wills which are registered within one month after the decease of every devisor respectively,".

5. Section 22 is amended by repealing "or his last will and testament,", "wills, and testaments" in both places where it occurs, "testator or" and the proviso.

6. Section 30(1) is amended –

(a) by repealing "wills,";

(b) by adding after subsection (1) –

"(1A) As from the commencement of the Wills (Amendment) Ordinance 1990 (of 1990), the provisions referred to in subsection (1) shall cease to apply, in any circumstances, to the registration of wills and the First Schedule has been amended accordingly.".

7. The First Schedule is amended –

(a) in sections 2 and 3, by repealing "and wills" wherever it occurs;

(b) in section 6, by repealing "except a will," and "and in the case of a will by some or one of the devisees or his guardian or trustees,";

(c) in section 8(1), by repealing "and of any will", "or of such will,", "and of the devisor and devisee or devisees of such will,", "or by such will," and "(except in the case of a will)";

(d) in section 9(3), by repealing "will or";

(e) in section 11, by repealing "and of the devisors and devisees in the case of wills,";

(f) in the Schedule, by repealing "or will" and "or of the devisors or devisees"

Amendment to Land Registration Regulations

8. Regulation 2 is amended by repealing "will,".

Amendments to Land Registration Fees Regulations

9. Regulation 1A is amended by repealing "will,".

10. Item 4 of the Schedule is amended by repealing "will,".

Amendment to Land Registration (New Territories) Fees Regulations

11. Item 4 of the Schedule is amended by repealing "will,".

Explanatory - Memorandum

This Bill implements part of the Report of the Law Reform Commission of Hong Kong on the Law of Wills, Intestate Succession and Provision for Deceased Persons' Families and Dependants.

2. Clause 2 repeals and replaces sections 3 to 6 of the Wills Ordinance to provide as follows.

(a) New section 3 restates in a better style the rule that a testator may, by a properly executed will, dispose of all his property.

(b) New section 4 largely restates the law relating to the age at which a person may make a valid will, but provides for the first time that a married person may validly make and revoke a will even though he or she has not attained full age.

(c) New section 5 relaxes the formalities required for the valid execution of a will by –

(i) no longer requiring that the will be signed "at the foot or end thereof"; the signature can now be anywhere on the will, provided that it appears that the testator intended by his signature to give effect to the will; and

(ii) allowing a witness to acknowledge his own signature, instead of signing the will, in the presence of the testator.

(d) The proviso to section 5 states that a will that is in writing and signed, but is not otherwise executed in accordance with the formalities required by section 5, is validly executed if, at the time it was signed, it expressed the testator's testamentary intentions. Section 5(2) (which provided that a will was validly executed if it was a will of a Chinese testator written wholly or substantially in Chinese and signed by the testator) is repealed.

(e) New section 6, which deals with persons who may make a valid will without complying with section 5, largely restates the law, but the reference to a member of Her Majesty's Forces in actual service is changed to any person is actual naval, military or air force service.

3. Clause 3 repeals the following sections –

(a) section 8, which no longer added anything to the general law applicable to wills;

(b) section 10, which previously provided that a person who witnessed a will could not obtain any property under the will;

(c) section 11, which previously permitted a person to give evidence as to the execution or validity of a will, notwithstanding that he was a creditor of the testator and that the will charged some property with payment of his debt;

(d) section 12, which previously permitted a person to give such evidence notwithstanding that he was an executor of the will.

The repeal of sections 11 and 12 does not effect any change in the law, since those sections had become exceptions to a rule that no longer exists.

4. Clause 4 repeals and replaces the sections dealing with the revocation of a will to provide as follows.

(a) The new section 13 restates, in a more logical position and with minor drafting amendments, the provisions found in the former sections 15 and 16.

(b) The new section 14 deals with the effect on a will of the subsequent marriage of the testator. The former section 13 provided that a will was revoked by that marriage except where it was "expressed to be made in contemplation of marriage". The exception now allows more flexibility by providing that where it appears from the will that at the time it was made the testator was expecting to be married to a particular person and he intended the will or any part of it to survive the marriage, the will remains valid except in respect of any disposition that the testator intended to be revoked by the marriage.

(c) The new section 15 deals with the effect on a will of the subsequent dissolution or annulment of the testator's marriage. Previously these events had no effect

on a will. It is now provided that, except in so far as a contrary intention appears in the will, –

(i) an appointment of the former spouse as an executor or executor and trustee of the will does not take effect;

(ii) any gift to the former spouse does not take effect;

(iii) any gift to another person subject to a life interest in favour of the former spouse is treated as not being so subject.

The right of the former spouse to apply for maintenance under the Matrimonial Causes Ordinance (Cap. 179) is preserved.

5. Clause 5 amends section 16, which provides that, as a general rule, an alteration to a will is only valid if it is properly executed. Where, however, there is an improperly executed alteration and the words or effect of the will before that alteration are not apparent, the alteration effectively revokes those words. The new subsection (1A) now enables the words or effect of the will before an alteration to be made apparent by any means. The amendment to subsection (1) is consequential upon the amendment of section 5.

6. Clause 6 enables evidence outside the will, including evidence of any statement made by the testator, to be admitted of the manner in which a will was executed, revoked or altered.

7. Clause 7 is a consequential amendment.

8. Clause 8 adds a new section relating to the construction of wills made after the enactment of this Bill and the commencement of the resulting Ordinance. New section 19A provides that references in such a will to any relationship between 2 persons (e.g. "my son", "her issue") shall, unless the contrary intention appears, be construed without regard to any illegitimate link in the relationship. Thus "my son" will include my illegitimate son, and "her issue" will include her illegitimate grandson.

9. Clause 9 repeals and replaces section 23, which relates to the rule that a gift by will lapses if the donee dies before the testator. The former section 23 provided an execution to this rule in favour of children or remoter descendants of the testator who die before the testator, leaving issue who are alive at the testator's death. The effect of the former section was that the gift was transferred to the estate of the deceased child, the result of which might be that the gift did not pass to the deceased child's issue. The new section 23(1) now provides that, unless a contrary intention appears in the will, the gift passes directly to the issue of the deceased child. The new section 23(2) deals with the situation where the deceased child or remoter descendant of the testator was one of a class of such persons to whom a gift was made, and provides that, unless a contrary intention appears, the issue of the deceased child are to receive the share of the gift that would have gone to the child had he survived the testator.

10. Clause 10 adds 5 new sections.

(a) New section 23A permits a court to correct a will that fails to carry out the testator's intentions because of either a clerical error or a failure to understand his instructions. An application to the court for this purpose must generally be made within 6 months of representation with respect to the estate being taken out.

Subsection (3) protects the personal representatives of the deceased person if, after the end of that 6 month period, they distribute any part of the estate and a later application under this section is permitted by the court.

(b) New section 23B restates the principles relating to the admissibility of extrinsic evidence, including evidence of the testator's intentions, to assist in the interpretation of a will.

(c) New section 23C relates to a will that gives property to the testator's spouse and also purports to give an interest in the same property to the testator's issue. Formerly, such a will would normally confer only a life interest in the property on the spouse. The new section provides that if the spouse survives the testator it shall, unless a contrary intention is shown, be presumed that the gift to the spouse is absolute.

(d) New section 23D accords the force of law in Hong Kong to the Annex to the Convention on International Wills, which is (by virtue of clause 12) set out in the Schedule to the principal Ordinance. A will made in accordance with the Annex is termed an "international will" and is formally valid under Hong Kong law.

(e) New section 23E specifies the persons who are authorized to act in Hong Kong in connection with international wills.

11. Clause 11 adds 2 new subsections to the principal Ordinance providing that the amendments introduced by this Bill apply only to wills of testators dying after the commencement of the resulting Ordinance.

12. Clause 12 creates a Schedule to the principal Ordinance containing the Annex to the Convention on International Wills (see paragraph 10(d) above).

13. Clause 13 amends section 35 of the Trustee Ordinance (Cap. 29), which deals with income directed to be held on protective trusts for the benefit of any person for the period of his life or for any less period. The amendment provides that, in relation to a protective trust created by a will, the reference in that section to relationships between 2 persons shall be construed without regard to any illegitimate link in the relationship (cf. paragraph 8 above).

14. Clause 14 amends the Land Registration Ordinance (Cap. 128) by providing that it no longer applies to wills.

15. [Public Service staffing and financial implications.]

无遗嘱者遗产（修订）条例草案（英文本）

INTESTATES' ESTATES (AMENDMENT) BILL 1990

ARRANGEMENT OF CLAUSES

A BILL

To

Amend the Intestates' Estates Ordinance.

Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof.

Short title and commencement

1. (1) This Ordinance may be cited as the Intestates' Estates (Amendment) Ordinance 1990.

(2) This Ordinance shall come into operation on

Interpretation

2. Section 2 of the Intestates' Estates Ordinance (Cap. 73) is amended –

(a) in subsection (1), by repealing the definition of "personal chattels" and substituting –

""personal chattels" means –

(a) the following things situated at the time of the intestate's death at any residence of a surviving husband or wife of the intestate, namely furniture, clothes, articles of adornment, articles of household, personal, recreational or decorative use, consumable stores, garden effects and domestic animals; and

(b) motor vehicles and accessories,

but does not include any chattel used exclusively or principally for business or professional purposes, or money or securities for money;";

(b) by repealing subsection (2) and substituting –

"(2) In this Ordinance, references (however expressed) to any relationship between 2 persons shall, unless the context otherwise requires, be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time. [cf. 1987 c. 42 s. 1 U.K.]

(2A) For the purposes of this Ordinance, a person adopted under –

(a) an adoption order made under the Adoption Ordinance (Cap. 290);

(b) an adoption to which section 17 of the Adoption Ordinance applies; or

(c) an adoption made in Hong Kong in accordance with Chinese law and custom before 1 January 1973,

shall be treated as the child of the adopter, and not as the child of any other person, and all relationships to the adopted person shall be deduced accordingly.";

(c) by repealing subsection (4).

Section added

3. The following is added after section 3 –

"Presumption concerning person whose parents were not married

3A. (1) For the purposes of this Ordinance, a person whose father and mother were not parties to a valid marriage at the time of his birth shall be presumed not to have been survived by his father, or by any person related to him only through his father, unless the contrary is shown. [cf. 1987 c. 42 s. 18(2) U.K.]

(2) The presumption in subsection (1) does not apply to a person who –

(a) is a legitimated person within the meaning of the Legitimacy Ordinance (Cap. 184);

(b) is recognized as having been legitimated, or is deemed to be or treated as legitimate, under the Legitimacy Ordinance;

(c) is an adopted person under –

(i) an adoption order made under the Adoption Ordinance (Cap. 290);

(ii) an adoption to which section 17 of the Adoption Ordinance applies; or

(iii) an adoption made in Hong Kong in accordance with Chinese law and custom before 1 January 1973; or

(d) is otherwise treated as legitimate.

(3) For the purposes of this section, the time of a person's birth shall be taken to include any time during the period beginning with –

(a) the insemination resulting in his birth; or

(b) where there was no such insemination, his conception,

and (in either case) ending with his birth. [cf. 1987 c. 42 s. 1(4) U.K.]".

Succession to estate on intestacy

4. Section 4 is amended –

(a) in subsection (2)(b), by adding "of the whole blood" after "sister" in both places where it occurs;

(b) by repealing subsections (3) and (4) and substituting –

"(3) If the intestate leaves a husband or wife and issue, whether or not persons mentioned in subsection (2)(b) also survive, the surviving husband or wife shall take the personal chattels absolutely and, in addition, the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a net sum of $500,000, free of death duties and costs, to the surviving husband or wife with interest on that sum from the date of the death at the rate payable on judgment debts at that date until paid or appropriated and, subject to providing for that sum and interest, the residuary estate (other than the personal chattels) shall be held –

(a) as to one half, in trust for the surviving husband or wife absolutely; and

(b) as to the other half, on the statutory trusts for the issue of the intestate.

(4) If the intestate leaves no issue but does leave a husband or wife and one or more of the following, namely a parent, a brother or sister of the whole blood, or issue of a brother or sister of the whole blood, the surviving husband or wife shall take the personal chattels absolutely and, in addition, the residuary estate of the intestate shall stand charged with the payment of a net sum of $1,000,000, free of death duties and costs, to the surviving husband or wife with interest on that sum from the date of death at the rate payable on judgment debts at that date until paid or appropriated and, subject to providing for that sum and interest, the residuary estate shall be held –

(a) as to one half, in trust for the surviving husband or wife absolutely; and

(b) as to the other half –

(i) where the intestate leaves one parent or both parents (whether or not brothers or sisters of the intestate or their issue also survive) in trust for the parent absolutely or, as the case may be, for the two parents in equal shares absolutely; or

(ii) where the intestate leaves no parent, on the statutory trusts for the brothers and sisters of the whole blood of the intestate.";

(c) by repealing subsection (8) and substituting –

"(8) If the intestate leaves no husband or wife and no issue and no parent, then the residuary estate of the intestate shall be held in trust for the following persons living at the death of the intestate, and in the following order and manner, namely –

firstly, on the statutory trusts for the brothers and sisters of the whole blood of the intestate; but if no person takes an absolutely vested interest under such trusts; then

secondly, on the statutory trusts for the brothers and sisters of the half blood of the intestate; but if no person takes an absolutely vested interest under such trusts; then

thirdly, for the grandparents of the intestate and, if more than one survive the intestate, in equal shares; but if there is no member of this class; then

fourthly, on the statutory trusts for the uncles and aunts of the intestate who are brothers or sisters of the whole blood of a parent of the intestate; but if no person takes an absolutely vested interest under such trusts; then

fifthly, on the statutory trusts for the uncles and aunts of the intestate who are brothers or sisters of the half blood of a parent of the intestate.";

[(d) in subsection (9), by adding ", subject to the Inheritance (Provision for Family and Others) Ordinance 1990 (of 1990)," after "shall";]

(e) by repealing subsection (12) and substituting –

"(12) The interest payable on the net sum payable under subsection (3) or (4) to the surviving husband or wife shall be primarily payable out of income.".

Statutory trusts in favour of issue and other classes of relatives of intestate

5. Section 5 is amended –

(a) in subsection (4), by adding "of the whole blood" after "sisters" in both places where it occurs;

(b) by repealing subsection (5).

Sections substituted

6. Sections 6 and 7 are repealed and the following substituted –

"Powers of personal representatives in respect of sums payable to surviving husband or wife

6. The personal representatives may raise –

(a) the net sum payable to the surviving husband or wife of the intestate or any part of that sum and the interest upon it on the security of the whole or any part of the residuary estate of the intestate (other than the personal chattels), so far as that estate may be sufficient for the purpose or that sum and interest upon it may not have been satisfied by an appropriation under the statutory power available in that behalf; and

(b) the amount, if any, properly required for the payment of the costs of the transaction.

[cf. 1925 c. 23 s. 48(2) U.K.]

Right of surviving spouse to acquire residence

7. Schedule 2 shall have effect for enabling the surviving husband or wife of an intestate to acquire the premises in which the surviving husband or wife was residing at the time of the intestate's death.

[cf. 1952 c. 64 s. 5 U.K.]".

Application to cases of partial intestacy

7. Section 8(1) is amended –

(a) by repealing the comma after "his property" where it occurs for the second time;

(b) in paragraph (a), by repealing "of $50,000 or $200,000, as the case may be,".

Section added

8. The following is added after section 8 –

"Application where surviving husband or wife acquires an interest under foreign law

8A. (1) Where the intestate leaves a husband or wife who acquires under the law of intestacy or of partial intestacy of a place other than Hong Kong any beneficial interests in the intestate's estate, subsection (2) applies to that estate.

(2) The references in this Ordinance to the net sum payable to a surviving husband or wife, and to interest on that sum, shall be taken to be references to the net sum diminished by the value at the date of death of the beneficial interests referred to in subsection (1), and to interest on that sum as so diminished and, accordingly, where the value of those beneficial interests exceeds the net sum, this Ordinance shall have effect as if references to the net sum, and interest on that sum, were omitted.

(3) For the purposes of subsection (2), the personal representatives shall employ a duly qualified valuer in any case where such employment may be necessary."

Land to which Part II of the New Territories Ordinance applies

9. Section 11 is repealed.

Section substituted

10. Section 13 is repealed and the following substituted –

"Transitional provisions for concubinage

13. (1) Schedule 1 shall have effect with regard to a union of concubinage entered into before 7 October 1971.

(2) In subsection (1) and Schedule 1, "union of concubinage" means a union of concubinage, entered into by a male partner and a female partner before 7 October 1971, under which union the female partner has, during the lifetime of the male partner, been accepted by his wife as his concubine and recognized as such by his family generally.

(3) Where in any proceedings a union of concubinage is proved to have been entered into by a male partner and a female partner before 7 October 1971, it shall be presumed until the contrary is proved that the female partner has, during the lifetime of the male partner, been accepted by his wife as his concubine and recognized as such by his family generally.".

Schedule amended

11. The Schedule is amended –

(a) by adding "1" after "SCHEDULE";

(b) by renumbering paragraph 1 as paragraph 1(1) and adding after subparagraph (1) –

"(2) For the purposes of this Schedule –

(a) "taking out representation" refers to the obtaining of the probate of a will or the grant of administration; and

(b) in deciding when representation was first taken out, a grant limited to part only of the estate of the deceased shall be left out of account unless a grant limited to the remainder of the estate has previously been made or is made at the same time.";

(c) by repealing paragraph 2 and substituting –

"Application of Ordinance to child of common family

2. (1) A child of a union of concubinage shall be regarded for the purposes of section 3A as a person whose father and mother were married to each other at the time of his birth.

(2) References in the Ordinance to a child of any person include –

(a) if that person is the tsip of a union of concubinage, references to –

(i) a child of the male partner of that union and his wife; and

(ii) a child of any other union of concubinage to which the male partner of that union is or was a party; and

(b) if that person is the wife of the male partner of a union of concubinage, references to a child of that union of concubinage,

and issue shall be construed accordingly.

(3) A child of a union of concubinage and –

(a) a child of the male partner of that union and his wife; and

(b) a child of any other union of concubinage to which that male partner is or was a party,

shall be regarded for the purposes of section 4(2)(b), (4) and (8) as siblings of the whole blood.";

(d) in paragraph 4(9) –

(i) by repealing ",(8) or (9)," and substituting "or (8),";

(ii) by repealing "of" in the fourth place where it occurs and substituting "to";

(e) in paragraph 4(10), by repealing ",(8) or (9)," and substituting "or (8),";

(f) by adding after paragraph 4(10) –

"(10A) Where the intestate is at the time of death a party to one union of concubinage and the residuary estate belongs to the Crown in accordance with section 4(9), the residuary estate shall be held on trust for the surviving party to the union of concubinage absolutely.

(10B) Where the intestate is at the time of death a party to more than one union of concubinage and the residuary estate belongs to the

Crown in accordance with section 4(9), the residuary estate shall be held on trust for such of his tsips who survive him in equal shares absolutely.";

(g) in paragraph 4(12), by repealing "or commits an act of sexual intercourse";

(h) by adding after paragraph 4(12) –

"(13) Paragraph 5 shall have effect for enabling a surviving party to a union of concubinage to have his or her life interest redeemed.";

(i) by adding after paragraph 4 –

"Right of surviving tsip or male partner to have life interest redeemed

5. (1) Where a surviving tsip or male partner is entitled to a life interest in part of the residuary estate, and so elects, the personal representatives shall purchase or redeem the life interest by paying the capital value thereof to the tenant for life, or the persons deriving title under the tenant for life, and the costs of the transaction; and thereupon the residuary estate of the intestate may be dealt with and distributed free from the life interest.

(2) An election under this paragraph shall only be exercisable if at the time of the election the whole of the relevant part of the residuary estate consists of property in possession, but, for the purposes of this paragraph, a life interest in property partly in possession and partly not in possession shall be treated as consisting of 2 separate life interests in those respective parts of the property.

(3) The capital value shall be reckoned in such manner as ..... may by notice in the Gazette prescribe.

(4) An election under this paragraph shall be exercisable –

(a) only within the period of 12 months from the date on which representation with respect to the estate of the intestate is first taken out;

(b) by notifying the personal representatives in writing.

(5) The personal representatives may raise –

(a) the capital sum, if any, required for the purchase or redemption of a life interest under this paragraph, or any part thereof not satisfied by the application for that purpose of any part of the residuary estate of the intestate, on the security of the whole or any part of that residuary estate (other than the personal chattels), so far as –

(i) that estate may be sufficient for the purpose; or

(ii) the sum may not have been satisfied by an appropriation under the statutory power available in that behalf; and

(b) the amount, if any, properly required for the payment of the costs of the transaction.

[cf. 1925 c. 23 ss. 47A and 48 U.K.]".

Schedule added

12. The following is added after Schedule 1 –

"SCHEDULE 2 [s. 7]

Right of surviving spouse to require residence to be appropriated

1. (1) Where the residuary estate of the intestate comprises or includes an interest in premises in which the surviving husband or wife was residing at the time of the intestate's death (referred to in this Schedule as the "residence") and the surviving husband or wife so elects, the personal representatives shall appropriate that interest –

(a) in or towards satisfaction of any interest of the surviving husband or wife in the estate of the intestate; or

(b) partly in satisfaction of an interest of the surviving husband or wife in the estate of the intestate and partly in return for a payment of money by the surviving husband or wife to the personal representatives.

(2) Subparagraph (1) does not apply where the interest is –

(a) a tenancy that at the date of the intestate's death was a tenancy that would determine within a period of 2 years from that date; or

(b) a tenancy that the landlord by notice given after that date could determine within the remainder of that period.

(3) For the purposes of such appropriation, the personal representatives shall ascertain and fix the value of the interest in the residence and shall for that purpose employ a duly qualified valuer and may make any transfer or conveyance (including an assent) that may be necessary for giving effect to the appropriation.

Restrictions on exercise of election

2. Where the residence –

(a) forms part of a building and the residuary estate comprises or includes an interest in the whole of the building; or

(b) was, at the time of the intestate's death, partly used for purposes other than domestic purposes,

an election under paragraph 1 shall not be exercisable unless the court, on being satisfied that the exercise of that election is not likely to diminish the value of the assets in the residuary estate (other than the interest in the residence) or make them more difficult to dispose of, so orders.

Exercise of election

3. (1) An election under paragraph 1 –

(a) shall not be exercisable after the expiration of 12 months from the first taking out of representation with respect to the intestate's estate;

(b) shall not be exercisable after the death of the surviving husband or wife;

(c) shall be exercisable by notifying the personal representatives in writing.

(2) A notification in writing under subparagraph (1)(c) is not revocable except with the consent of the personal representatives; but the surviving husband or wife may require the personal representatives to have the interest in the residence valued in accordance with paragraph 1(3) and to inform him or her of the result of that valuation before he or she decides whether to exercise the right.

(3) Paragraph 1(2) of Schedule 1 shall apply for the purposes of the construction of the reference in this paragraph to the first taking out of representation.

Restrictions on disposal of residence

4. (1) During the period of 12 months mentioned in paragraph 3, the personal representatives shall not without the written consent of the surviving husband or wife sell or otherwise dispose of the interest in the residence except in the course of administration owing to want of other assets.

(2) An application to the court under paragraph 2 may be made by the personal representatives as well as by the surviving husband or wife, and if, on an application under that paragraph, the court does not order that an election under paragraph 1 shall be exercisable by the surviving husband or wife, the court may authorize the personal representatives to dispose of the interest in the residence within the period of 12 months referred to.

(3) This paragraph shall not apply where the surviving husband or wife is the sole personal representative or one of 2 or more personal representatives.

(4) Nothing in this paragraph shall confer any right on the surviving husband or wife as against any person who in good faith acquires an interest in property for valuable consideration (including marriage but not including a nominal consideration in money) from the personal representatives.

Purchase of residence by personal representative

5. Where the surviving husband or wife is one of 2 or more personal representatives, the rule that a trustee may not be a purchaser of trust property shall not prevent the surviving husband or wife from purchasing the residence in accordance with this Schedule.

Persons of unsound mind and infants

6. (1) Where the surviving husband or wife is a person of unsound mind [or a defective], an election, requirement or consent under this Schedule may be made or given on his or her behalf by the [guardian,] committee or receiver, if any, or where there is no [guardian,] committee or receiver, by the court.

(2) An election, requirement or consent made or given under this Schedule by a surviving husband or wife who is an infant shall be as valid and binding as it would be if he or she were of age.".

Probate and Administration Ordinance

Section added

13. The Probate and Administration Ordinance (Cap. 10) is amended by adding after section 57 –

"Protection in respect of entitlement under certain statutory provisions

57A. (1) Trustees or personal representatives may assign or distribute any property to or among the persons entitled to it without having ascertained that there is no person who is or may be entitled to any interest in it by virtue of –

(a) section 2(2) of the Intestates' Estates Ordinance (Cap. 73); or

(b) section 19A or 23(4)(a) of the Wills Ordinance (Cap. 30),

and shall not be liable to any such person of whose claim they have not had notice at the time of the assignment or distribution.

(2) Nothing in this section shall prejudice the right of any such person to follow the property, or any property representing it, into the hands of any person, other than a purchaser, who may have received it.

[cf. 1969 c. 46 s. 17 U.K.]".

Consequential Amendments

New Territories Ordinance

High Court or the District Court may enforce Chinese customs

14. Section 13 of the New Territories Ordinance (Cap. 97) is amended –

(a) by renumbering it as subsection (1); and

(b) by adding after subsection (1) –

"(2) Subsection (1) is subject to the provisions of the Intestates' Estates Ordinance (Cap. 73).".

Registration of manager of "t'ong", etc.

15. Section 15 of Cap. 97 is amended by adding ", tso" after "family" wherever it occurs.

Exemption of certain clans from the Companies Ordinance

16. Section 16 of Cap. 97 is amended by adding ", tso" after "family" wherever it occurs.

Legitimacy Ordinance

Right of illegitimate child and mother of illegitimate child to succeed on intestacy of the other

17. Section 10 of the Legitimacy Ordinance (Cap. 184) is repealed.

Avoidance of doubt

18. Section 14 of Cap. 184 is amended –

(a) in subsection (2), by repealing "the appointed day under the Marriage Reform Ordinance" and substituting "7 October 1971";

(b) by adding after subsection (2) –

"(3) Where in any proceedings a union of concubinage is proved to have been entered into by a male partner and a female partner before 7 October 1971, it shall be presumed until the contrary is proved that the female partner has, during the lifetime of the male partner, been accepted by his wife as his concubine and recognized as such by his family generally.".

Adoption Ordinance

Adoption to be effected under the Ordinance

19. Section 25(2) of the Adoption Ordinance (Cap. 290) is amended by repealing "31 December 1972" and substituting "1 January 1973".

Application of Ordinance

20. This Ordinance does not affect any rights under the intestacy of a person dying before the commencement of this Ordinance.

Explanatory Memorandum

This Bill amends the law relating to intestacy with the following principal effects –

(a) the surviving spouse of an intestate is to receive a greater benefit from the estate than previously, and is to be entitled to purchase the matrimonial home;

(b) relatives of an intestate are entitled to succeed to his estate regardless of any illegitimate link in their relationship;

(c) the rights of brothers and sisters and uncles and aunts of an intestate are amended;

(d) land in the New Territories will devolve on intestacy in the same manner as other property in Hong Kong;

(e) the positions of a surviving party to a recognized union of concubinage and children of such a union are improved.

2. Clause 2 amends section 2 of the Intestates' Estates Ordinance by –

(a) redefining "personal chattels" (which, under the Bill, will pass to the surviving spouse (if any) of the intestate);

(b) repealing the provision stating that for the purposes of the Ordinance, a child of a female includes a child of a valid marriage to which her last husband and another female were parties;

(c) providing that references in the Ordinance to any relationship between 2 persons (e.g. the parent or brother of the intestate) shall, unless the context otherwise requires, be construed without regard to any illegitimate link there may be in that relationship (e.g. the father of the intestate is his parent even though he was not married to the mother of the intestate); the effect of this is that illegitimate children and other persons claiming through an illegitimate link have the same rights on intestacy as legitimate children and those claiming through a legitimate link;

(d) providing that, for the purposes of the Ordinance, a child adopted in Hong Kong in accordance with Chinese law and custom before 1 January 1973 shall be treated as the child of the adopter;

(e) repealing the provision stating that references to a brother or sister of a person mean a brother or sister who is a child of the same father as that person (the Bill making separate provision for brothers and sisters who are children of the same parents and those who are children of only one common parent).

3. Clause 3 adds a new section 3A concerning a person whose parents were not married at any time between his conception and birth. The new section provides that, when such a person dies, he is presumed not to have been survived by his father or any person related to him only through his father. The section does not apply in relation to persons who have been legitimated or lawfully adopted.

4. Clause 4 amends section 4, which provides how the residuary estate of an intestate (i.e. those assets of the intestate that are not disposed of by will and that remain after payment of all funeral and administration expenses, debts and other liabilities) is to be distributed. The amendments provide that –

(a) the surviving spouse (if any) is to receive the whole residuary estate if the intestate leaves no descendant, parent, brother or sister who is a child of the same parents as the intestate, or descendant of such a brother or sister (previously the reference to brothers and sisters was to children of the same father as the intestate);

(b) if the intestate leaves a spouse and a descendant, the spouse is to receive the personal chattels, $500,000 (instead of $50,000) and one half of the remainder of the estate, the other half going on trust for the descendant(s);

(c) if the intestate leaves no descendant but does leave a surviving spouse and a parent, a brother or sister who is a child of the same parents as the intestate (previously a brother or sister who was a child of the same father), or a descendant of such a brother or sister, the surviving spouse is to receive the personal chattels, $1,000,000 (previously $200,000) and one half of the remainder of the estate; the other half going to the parent(s) of the intestate or, where there is no parent, on trust for the brothers and sisters who are children of the same parents;

(d) if the intestate leaves no spouse, descendant or parent, the estate is distributed in the order and manner set out in the new subsection (8); this list differs from the previous list in that –

(i) brothers and sisters of the intestate who are children of the same parents as the intestate, and brothers and sisters who are children of one of the parents of the intestate are provided for in the first 2 categories; previously only brothers and sisters who were children of the same father as the intestate were provided for; and

(ii) uncles and aunts of the intestate who are full brothers or sisters of a parent of the intestate, and those who are half brothers or sisters of such a parent,

are provided for in categories 4 and 5; previously the only uncles and aunts provided for were those who were children of the same father as the intestate;

(e) interest is payable on the amounts referred to in paragraphs (a) and (b) above from the date of death until payment at the same rate as is payable on judgment debts (instead of at 5% a year).

5. Clause 5 amends section 5 –

(a) as a consequence of the amendments referred to in paragraph 4 above; and

(b) by repealing subsection (5), which dealt with the situation where assets of an estate are held on trust for a category of relatives of the intestate (other than his descendants) and no member of that category attained an absolute vested interests in those assets (e.g. because they all died unmarried and before reaching full age).

6. Clause 6 repeals and replaces sections 6 and 7. The new section 6, which relates to the powers of personal representatives to borrow the net sum payable to the surviving spouse, no longer refers to the amount of that sum (this being stated in section 4) and provides that the personal representatives may also borrow the amount of the costs of raising such a loan. The former section 7 enabled the surviving spouse (in effect) to purchase any personal chattels of the intestate. That section is no longer necessary since, under this Bill, the surviving spouse automatically acquires the personal chattels. The new section 7 enables the surviving spouse of an intestate to acquire the premises in which he or she was residing at the time of the intestate's death.

7. Clause 7 amends section 8 by deleting the reference to the amount of the net sum payable to the surviving spouse.

8. Clause 8 adds a new section 8A, which provides that where a surviving spouse acquires, under a foreign law of intestacy, any interest in the intestate's estate, the net sum payable to that spouse under the Ordinance shall be reduced by the value of that interest.

9. Clause 9 repeals section 11, which provided that the Ordinance did not apply to land in the New Territories which had not been exempted by the Governor from Part II of the New Territories Ordinance (Cap. 97). Such land previously devolved –

(a) in the case of a Chinese intestate, under the Tsing Chinese customary law; and

(b) in the case of a non-Chinese intestate, under English legislation as it existed in 1843.

The devolution of such land is now governed by the Ordinance.

10. Clause 10 repeals and replaces section 13, which provides that special rule (contained in Schedule 1) apply with regard to unions of concubinage –

(a) entered into before the appointed day under the Marriage Reform Ordinance (Cap. 178); and

(b) under which union the female partner has, during the lifetime of the male partner, been accepted by his wife as his concubine and recognized as such by his family generally.

The amendment substitutes "7 October 1971" (which was the appointed day) for "the appointed day" and provides that it shall be presumed (until the contrary is proved) that the female partner of such a union has, during the lifetime of the male partner, been so accepted and recognized.

11. Clause 11 amends the Schedule, which contains the special rules relating to recognized unions of concubinage.

12. Paragraph 2 of the Schedule is repealed as unnecessary, given the amendments referred to paragraph 2(c) above, and replaced by provisions stating –

(a) that a child of a union of concubinage is regarded for the purposes of section 3A (see paragraph 3 above) as a person whose parents were married to each other at the time of his birth;

(b) that a child of a concubine is also regarded as the child of the wife of the male partner of the union of concubinage, and of any other concubine of that male partner;

(c) that a child of a married woman is also regarded as the child of a concubine of her husband;

(d) that a child of a union of concubinage and a child of the male partner of that union and of his wife or another concubine are regarded (for the purposes of the provisions referred to in paragraph 4(a), (c) and (d) above) as being children of the same parents.

13. Clause 11(d), (e) and (f) amends the position where, under the general law, the residuary estate passes to the Crown (because there is no relative who can succeed to it). Under the present law, if the intestate was a party to one or more unions of concubinage, one third of the estate goes to the surviving party or parties to that union. Under the Bill, the whole of the estate will go to the surviving party or parties.

14. Clause 11(g) amends the Schedule so that the entitlement of a tsip to income from the intestate's estate does not cease if she has sexual intercourse.

15. Clause 11(h) and (i) enables a surviving party to a union of concubinage who would normally receive income from the estate for so long as he or she lives to receive a capital sum instead of that income.

16. Clause 12 adds a new Schedule setting out the manner in which a surviving spouse may purchase the premises in which he or she was residing at the time of the intestate's death.

17. Clause 13 amends the Probate and Administration Ordinance (Cap. 10) to provide protection for personal representatives who distribute assets under a will or intestacy, but who are unaware of the entitlement of a person who claims through an illegitimate link.

18. Clauses 14 to 19 are consequential.

19. Clause 20 provides that the amendments do not apply in relation to persons dying before the commencement of the Ordinance resulting from this Bill.

20. [Public Service staffing and financial implications.]

继承（供养家属及受供养人）条例草案（英文本）

INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) BILL 1990

ARRANGEMENT OF CLAUSES

A BILL

To

Make fresh provision for empowering the court to make orders for the making out of the estate of a deceased person of provision for certain members of that person's family and dependants of that person; and for connected matters.

Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof.

PART I

PRELIMINARY

1. Short title and commencement

(1) This Ordinance may be cited as the Inheritance (Provision for Family and Dependants) Ordinance 1990.

(2) This Ordinance shall come into operation on _____ 1990.

2. Interpretation

(1) In this Ordinance –

"beneficiary" ( ), in relation to the estate of a deceased person,

means –

(a) a person who under the will of the deceased or under the law relating to intestacy is beneficially interested in the estate or would be so interested if an order had not been made under this Ordinance; and

(b) a person who has received any sum of money or other property which by virtue of section 10(1) or (2) is treated as part of the net estate of the deceased or would have received that sum or other property if an order had not been made under this Ordinance;

"child" ( ) includes –

(a) a child whose father and mother were not married to each other at the time of his birth;

(b) a child en ventre sa mere at the death of the deceased;

(c) a child of a union of concubinage; and

(d) a child adopted in Hong Kong in accordance with Chinese law and custom before 1 January 1973;

"court" (　　) (unless the context otherwise requires) means the Supreme Court or the District Court;

"former wife" (　　) or "former husband" (　　) means a person whose marriage with the deceased was during the lifetime of the deceased either –

(a) dissolved or annulled by a decree of divorce or a decree of nullity of marriage granted under the law of Hong Kong; or

(b) dissolved or annulled in any country or territory outside Hong Kong by a divorce or annulment which is entitled to be recognized as valid by the law of Hong Kong;

"husband"(　　) or "wife" (　　), in relation to a deceased person, means -

(a) a husband or wife by a valid marriage; and

(b) a person who in good faith entered into a void marriage with the deceased unless either –

(i) the marriage of the deceased and that person was dissolved or annulled during the lifetime of the deceased and the dissolution or annulment is recognized by the law of Hong Kong; or

(ii) that person has during the lifetime of the deceased entered into a later marriage;

"net estate" (　　), in relation to a deceased person, means –

(a) all property of which the deceased had power to dispose by his will (otherwise than by virtue of a special power of appointment) less the amount of his funeral, testamentary and administration expenses, debts and liabilities, including estate duty;

(b) any property in respect of which the deceased held a general power of appointment (not being a power exercisable by will) which has not been exercised;

(c) any sum of money or other property which is treated for the purposes of this Ordinance as part of the net estate of the deceased by virtue of section 10(1) or (2);

(d) any property which is treated for the purposes of this Ordinance as part of the net estate of the deceased by virtue of an order made under section 11;

(e) any sum of money or other property which is, by reason of a disposition or contract made by the deceased, ordered under section 12 or 13 to be provided for the purpose of the making of financial provision under this Ordinance;

"property" (　　) includes any chose in action;

"reasonable financial provision" ( ) has the meaning assigned to it by section 3;

"tsip" ( ) means the female partner of a union of concubinage;

"union of concubinage" ( ) means a union of concubinage; entered into by a male partner and a female partner before 7 October 1971, under which union the female partner has, during the lifetime of the male partner, been accepted by his wife as his concubine and recognized as such by his family generally;

"valid marriage" ( ) means –

(a) a marriage celebrated or contracted in accordance with the Marriage Ordinance (Cap. 181);

(b) a modern marriage validated by the Marriage Reform Ordinance (Cap. 178);

(c) a customary marriage declared to be valid by the Marriage Reform Ordinance (Cap. 178);

(d) a marriage celebrated or contracted outside Hong Kong in accordance with the law in force at the time and in the place where the marriage was performed;

"valuable consideration" ( ) does not include marriage or a promise of marriage;

"will" ( ) includes codicil.

(2) For the purposes of paragraph (a) of the definition of "net estate" in subsection (1) a person who is not of full age and capacity shall be treated as having power to dispose by will of all property of which he would have had power to dispose by will if he had been of full age and capacity.

(3) Any reference in this Ordinance to provision out of the net estate of a deceased person includes a reference to provision extending to the whole of that estate.

(4) Any reference in this Ordinance to remarriage or to a person who has remarried includes a reference to a marriage which is by law void or voidable or to a person who has entered into such a marriage, as the case may be, and a marriage shall be treated for the purposes of this Ordinance as a remarriage, in relation to any party thereto, notwithstanding that the previous marriage of that party was void or voidable.

(5) Any reference in this Ordinance to an order or decree made under the Matrimonial Causes Ordinance (Cap. 179) or under any section of that Ordinance shall be construed as including a reference to an order or decree which is deemed to have been made under that Ordinance or under that section thereof, as the case may be.

PART II

APPLICATIONS AND ORDERS FOR FINANCIAL PROVISION

3. Application for financial provision from deceased's estate

(1) Where after the commencement of this Ordinance a person dies –

(a) domiciled in Hong Kong; or

(b) having been ordinarily resident in Hong Kong at any time in the 3 years immediately preceding his death,

and is survived by any of the following persons –

(i) the wife or husband of the deceased;

(ii) a former wife or former husband of the deceased who has not remarried;

(iii) a tsip or male partner of the deceased by a union of concubinage;

(iv) a parent of the deceased;

(v) a child of the deceased;

(vi) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;

(vii) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased,

that person may apply to the court for an order under section 4 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.

(2) In this Ordinance "reasonable financial provision" –

(a) in the case of an application made –

(i) by virtue of subsection (1)(i) by the husband or wife of the deceased (except where the marriage with the deceased was the subject of a decree of judicial separation and at the date of death the decree was in force and the separation was continuing); or

(ii) by virtue of subsection (1)(iii) by a tsip or male partner of the deceased by a union of concubinage,

means such financial provision as it would be reasonable in all the circumstances of the case for such a person to receive, whether or not that provision is required for his or her maintenance;

(b) in the case of any other application made by virtue of subsection (1), means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.

(3) For the purposes of subsection (1)(vi), a person shall be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person.

[cf. 1975 c. 63 s. 1 U.K.]

4. Powers of court to make orders

(1) Where an application is made for an order under this section, the court may, if it is satisfied 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, make any one or more of the following orders –

(a) an order for the making to the applicant out of the net estate of the deceased of such periodical payments and for such term as may be specified in the order;

(b) an order for the payment to the applicant out of that estate of a lump sum of such amount as may be so specified;

(c) an order for the transfer to the applicant of such property comprised in that estate as may be so specified;

(d) an order for the settlement for the benefit of the applicant of such property comprised in that estate as may be so specified;

(e) an order for the acquisition out of property comprised in that estate of such property as may be so specified and for the transfer of the property so acquired to the applicant or for the settlement thereof for his benefit.

(2) An order under subsection (1)(a) providing for the making out of the net estate of the deceased of periodical payments may provide for –

(a) payments of such amount as may be specified in the order;

(b) payments equal to the whole of the income of the net estate or of such portion thereof as may be so specified;

(c) payments equal to the whole of the income of such part of the net estate as the court may direct to be set aside or appropriated for the making out of the income thereof of payments under this section,

or may provide for the amount of the payments or any of them to be determined in any other way the court thinks fit.

(3) Where an order under subsection (1)(a) provides for the making of payments of an amount specified in the order, the order may direct that such part of the net estate as may be so specified shall be set aside or appropriated for the making out of the income thereof of those payments; but no larger part of the net estate shall be so set aside or appropriated than is sufficient, at the date of the order, to produce by the income thereof the amount required for the making of those payments.

(4) An order under this section may contain such consequential and supplemental provisions as the court thinks necessary or expedient for the purpose of giving effect to the order or for the purpose of securing that the order operates fairly as between one beneficiary of the estate of the deceased and another and may, in particular, but without prejudice to the generality of this subsection –

(a) order any person who holds any property which forms part of the net estate of the deceased to make such payment or transfer such property as may be specified in the order;

(b) vary the disposition of the deceased's estate effected by the will or the law relating to intestacy, or by both the will and the law relating to intestacy, in such manner as the court thinks fair and reasonable having regard to the provisions of the order and all the circumstances of the case;

(c) confer on the trustees of any property which is the subject of an order under this section such powers as appear to the court to be necessary or expedient.

[cf. 1975 c. 63 s. 2 U.K.]

5. Matters to which court is to have regard in exercising powers under section 4

(1) Where an application is made for an order under section 4, the court shall, in determining whether 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 such as to make reasonable financial provision for the applicant and, if the court considers that reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters, that is to say –

(a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;

(b) the financial resources and financial needs which any other applicant for an order under section 4 has or is likely to have in the foreseeable future;

(c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;

(d) any obligations and responsibilities which the deceased had towards any applicant for an order under section 4 or towards any beneficiary of the estate of the deceased;

(e) the size and nature of the net estate of the deceased;

(f) any physical or mental disability of any applicant for an order under section 4 or any beneficiary of the estate of the deceased;

(g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant;

(h) any statement made by the deceased to the extent that it is evidence of any of the above matters.

(2) Without prejudice to the generality of paragraph (g) of subsection (1), where an application for an order under section 4 is made by virtue of section 3(1)(i), (ii) or (iii), the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to –

(a) the age of the applicant and the duration of the marriage or union of concubinage;

(b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family,

and, in the case of an application by the wife or husband of the deceased, the court shall also, unless at the date of death a decree of judicial separation was in force and the separation was continuing, have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce.

(3) Without prejudice to the generality of paragraph (g) of subsection (1), where an application for an order under section 4 is made by virtue of section 3(1)(iv), the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to the age of the applicant and the contribution (if any) in money or money's worth made by the deceased towards the needs of the applicant immediately before the death of the deceased.

(4) Without prejudice to the generality of paragraph (g) of subsection (1), where an application for an order under section 4 is made by virtue of section 3(1)(v) or (vi), the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to the manner in which the applicant was being or in which he might expect to be educated or trained, and where the application is made by virtue of section 3(1)(vi) the court shall also have regard –

(a) to whether the deceased had assumed any responsibility for the applicant's maintenance and, if so, to the extent to which and the basis upon which the deceased assumed that responsibility and to the length of time for which the deceased discharged that responsibility;

(b) to whether in assuming and discharging that responsibility the deceased did so knowing that the applicant was not his own child;

(c) to the liability of any other person to maintain the applicant.

(5) Without prejudice to the generality of paragraph (g) of subsection (1), where an application for an order under section 4 is made by virtue of section 3(1)(vii), the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to the extent to which and the basis upon which the deceased assumed responsibility for the maintenance of the applicant, and to the length of time for which the deceased discharged that responsibility.

(6) In considering the matters to which the court is required to have regard under this section, the court shall take into account the facts as known to the court at the date of the hearing.

(7) In considering the financial resources of any person for the purposes of this section the court shall take into account his earning capacity and in considering the financial needs of any person for the purposes of this section the court shall take into account his financial obligations and responsibilities.

[cf. 1975 c. 63 s. 3 U.K.]

6. Time-limit for applications

An application for an order under section 4 shall not, except with the permission of the court, be made after the end of the period of 6 months from the date on which representation with respect to the estate of the deceased is first taken out.

[cf. 1975 c. 63 s. 4 U.K.]

7. Interim orders

(1) Where on an application for an order under section 4 it appears to the court –

(a) that the applicant is in immediate need of financial assistance, but it is not yet possible to determine what order (if any) should be made under that section; and

(b) that property forming part of the net estate of the deceased is or can be made available to meet the need of the applicant,

the court may order that, subject to such conditions or restrictions, if any, as the court may impose and to any further order of the court, there shall be paid to the applicant out of the net estate of the deceased such sum or sums and (if more than one) at such intervals as the court thinks reasonable; and the court may order that, subject to this Ordinance, such payments are to be made until such date as the court may specify, not being later than the date on which the court either makes an order under section 4 or decides not to exercise its powers under that section.

(2) Subsections (2), (3) and (4) of section 4 shall apply in relation to an order under this section as they apply in relation to an order under that section.

(3) In determining what order, if any, should be made under this section the court shall, so far as the urgency of the case admits, have regard to the same matters as those to which the court is required to have regard under section 5.

(4) An order made under section 4 may provide that any sum paid to the applicant by virtue of this section shall be treated to such an extent and in such manner as may be provided by that order as having been paid on account of any payment provided for by that order.

[cf. 1975 c. 63 s. 5 U.K.]

8. Variation, discharge, etc. of orders for periodical payments

(1) Where the court has made an order under section 4(1)(a) (in this section referred to as "the original order" ( )) for the making of periodical payments to any person (in this section referred to as "the original recipient" ( )), the court, on an application under this section, shall have power by order to vary or discharge the original order or to suspend any provision of it temporarily and to revive the operation of any provision so suspended.

(2) Without prejudice to the generality of subsection (1), an order made on an application for the variation of the original order may –

(a) provide for the making out of any relevant property of such periodical payments and for such term as may be specified in the order to any person who has applied, or would but for section 6 be entitled to apply, for an order under section 4 (whether or not, in the case of any application, an order was made in favour of the applicant);

(b) provide for the payment out of any relevant property of a lump sum of such amount as may be so specified to the original recipient or to any such person as is mentioned in paragraph (a);

(c) provide for the transfer of the relevant property, or such part thereof as may be so specified, to the original recipient or to any such person as is so mentioned.

(3) Where the original order provides that any periodical payment payable thereunder to the original recipient are to cease on the occurrence of an event specified in the order (other than the remarriage of a former wife or former husband) or on the expiration of a period so specified, then, if, before the end of the period of 6 months from the date of the occurrence of that event or of the expiration of that period, an application is made for an order under this section, the court shall have power to make any order which it would have had power to make if the application had been made before the date (whether in favour of the original recipient or any such person as is mentioned in subsection (2)(a) and whether having effect from that date or from such later date as the court may specify).

(4) Any reference in this section to the original order shall include a reference to an order made under this section and any reference in this section to the original recipient shall include a reference to any person to whom periodical payments are required to be made by virtue of an order under this section.

(5) An application under this section may be made by any of the following persons, that is to say –

(a) any person who by virtue of section 3(1) has applied, or would but for section 6 be entitled to apply, for an order under section 4;

(b) the personal representatives of the deceased;

(c) the trustees of any relevant property; and

(d) any beneficiary of the estate of the deceased.

(6) An order under this section may only affect –

(a) property the income of which is at the date of the order applicable wholly or in part for the making of periodical payments to any person who has applied for an order under this Ordinance; or

(b) in the case of an application under subsection (3) in respect of payments which have ceased to be payable on the occurrence of an event or the expiration of a period, property the income of which was so applicable immediately before the occurrence of that event or the expiration of that period, as the case may be,

and any such property as is mentioned in paragraph (a) or (b) is in subsections (2) and (5) referred to as "relevant property" ( ).

(7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates.

(8) Where the court makes an order under this section, it may give such consequential directions as it thinks necessary or expedient having regard to the provisions of the order.

(9) No such order as is mentioned in section 4(1)(d) or (e), 11, 12 or 13 shall be made on an application under this section.

(10) For the avoidance of doubt it is hereby declared that, in relation to an order which provides for the making of periodical payments which are to cease on the occurrence of an event specified in the order (other than the remarriage of a former wife or former husband) or on the expiration of a period so specified, the power to vary an order includes power to provide for the making of periodical payments after the expiration of that period or the occurrence of that event.

[cf. 1975 c. 63 s. 6 U.K.]

9. Payment of lump sums by instalments

(1) An order under section 4(1)(b) or 8(2)(b) for the payment of a lump sum may provide for the payment of that sum by instalments of such amount as may be specified in the order.

(2) Where an order is made by virtue of subsection (1), the court shall have power, on an application made by the person to whom the lump sum is payable, by the personal representatives of the deceased or by the trustees of the property out of which the lump sum is payable, to vary that order by varying the number of instalments payable, the amount of any instalment and the date on which any instalment becomes payable.

[cf. 1975 c. 63 s. 7 U.K.]

PART III

PROPERTY AVAILABLE FOR FINANCIAL PROVISION

10. Property treated as part of "net estate"

(1) Where a deceased person –

(a) has nominated any person to receive any sum of money or other property on his death and that nomination is in force at the time of his death; or

(b) immediately before his death, could have nominated any person to receive any sum of money or other property on his death,

that sum of money, after deducting therefrom any estate duty payable in respect thereof, or that other property, to the extent of the value thereof at the date of the death of the deceased after deducting therefrom any estate duty so payable, shall be treated for the purposes of this Ordinance as part of the net estate of the deceased; but this subsection shall not render any person liable for having paid that sum or transferred that other property –

(i) where a nomination is in force at the time of the deceased person's death, to the person named in the nomination in accordance with the directions given in the nomination; or

(ii) where a nomination is not then in force, in accordance with any authority vested in him.

(2) Where any sum of money or other property is received by any person as a donatio mortis causa made by a deceased person, that sum of money, after deducting therefrom any estate duty payable thereon, or that other property, to the extent of the value thereof at the date of the death of the deceased after deducting therefrom any estate duty so payable, shall be treated for the purposes of this Ordinance as part of the net estate of the deceased; but this subsection shall not render any person liable for having paid that sum or transferred that other property in order to give effect to that donatio mortis causa.

[cf. 1975 c. 63 s. 8 U.K.]

11. Property held on a joint tenancy

(1) Where a deceased person was immediately before his death beneficially entitled to a joint tenancy of any property, then, if, before the end of the period of 6 months from the date on which representation with respect to the estate of the deceased was first taken out, an

application is made for an order under section 4, the court for the purpose of facilitating the making of financial provision for the applicant under this Ordinance may order that the deceased's severable share of that property, at the value thereof immediately before his death, shall, to such extent as appears to the court to be just in all the circumstances of the case, be treated for the purposes of this Ordinance as part of the net estate of the deceased.

(2) In determining the extent to which any severable share is to be treated as part of the net estate of the deceased by virtue of an order under subsection (1), the court shall have regard to any estate duty payable in respect of that severable share.

(3) Where an order is made under subsection (1), this section shall not render any person liable for anything done by him before the order was made.

(4) For the avoidance of doubt it is hereby declared that for the purposes of this section there may be a joint tenancy of a chose in action.

[cf. 1975 c. 63 s. 9 U.K.]

PART IV

POWERS OF COURT IN RELATION TO TRANSACTIONS INTENDED TO DEFEAT APPLICATIONS FOR FINANCIAL PROVISION

12. Dispositions intended to defeat applications for financial provisions

(1) Where an application is made to the court for an order under section 4, the applicant may, in the proceedings on that application, apply to the court for an order under subsection (2).

(2) Where on an application under subsection (1) the court is satisfied –

(a) that, less than 6 years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Ordinance made a disposition; and

(b) that full valuable consideration for that disposition was not given by the person to whom or for the benefit of whom the disposition was made (in this section referred to as "the donee" ( )) or by any other person; and

(c) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Ordinance,

then, subject to the provisions of this section and of sections 14 and 15, the court may order the donee (whether or not at the date of the order he holds any interest in the property disposed of to him or for his benefit by the deceased) to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order.

(3) Where an order is made under subsection (2) as respects any disposition made by the deceased which consisted of the payment of money to or for the benefit of the donee, the

amount of any sum of money or the value of any property ordered to be provided under that subsection shall not exceed the amount of the payment made by the deceased after deducting therefrom any estate duty payable in respect of that payment.

(4) Where an order is made under subsection (2) as respects any disposition made by the deceased which consisted of the transfer of property (other than a sum of money) to or for the benefit of the donee, the amount of any sum of money or the value of any property ordered to be provided under that subsection shall not exceed the value at the date of the death of the deceased of the property disposed of by him to or for the benefit of the donee (or if that property has been disposed of by the person to whom it was transferred by the deceased, the value at the date of that disposal thereof) after deducting therefrom any estate duty paid in respect of the transfer of that property by the deceased.

(5) Where an application (in this subsection referred to as "the original application" ( )) is made for an order under subsection (2) in relation to any disposition, then, if on an application under this subsection by the donee or by any applicant for an order under section 4 the court is satisfied –

(a) that, less than 6 years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Ordinance made a disposition other than the disposition which is the subject of the original application; and

(b) that full valuable consideration for that other disposition was not given by the person to whom or for the benefit of whom that other disposition was made or by any other person,

the court may exercise in relation to the person to whom or for the benefit of whom that other disposition was made the powers which the court would have had under subsection (2) if the original application had been made in respect of that other disposition and the court had been satisfied as to the matters set out in paragraphs (a), (b) and (c) of that subsection; and where any application is made under this subsection, any reference in this section (except in subsection (2)(b)) to the donee shall include a reference to the person to whom or for the benefit of whom that other disposition was made.

(6) In determining whether and in what manner to exercise its powers under this section, the court shall have regard to the circumstances in which any disposition was made and any valuable consideration which was given therefor, the relationship, if any, of the donee to the deceased, the conduct and financial resources of the donee and all the other circumstances of the case.

(7) In this section "disposition" ( ) does not include –

(a) any provision in a will, any such nomination as is mentioned in section 10(1) or any donatio mortis causa; or

(b) any appointment of property made, otherwise than by will, in the exercise of a special power of appointment,

but, subject to these exceptions, includes any payment of money (including the payment of a premium under a policy of assurance) and any conveyance, assurance, appointment or gift of property of any description, whether made by an instrument or otherwise.

(8) This section does not apply to any disposition made before the commencement of this Ordinance.

[cf. 1975 c. 63 s. 10 U.K.]

13. Contracts to leave property by will

(1) Where an application is made to a court for an order under section 4, the applicant may, in the proceedings on that application, apply to court for an order under this section.

(2) Where on an application under subsection (1) the court is satisfied –

(a) that the deceased made a contract by which he agreed to leave by his will a sum of money or other property to any person or by which he agreed that a sum of money or other property would be paid or transferred to any person out of his estate; and

(b) that the deceased made that contract with the intention of defeating an application for financial provision under this Ordinance; and

(c) that when the contract was made full valuable consideration for that contract was not given or promised by the person with whom or for the benefit of whom the contract was made (in this section referred to as "the donee") or by any other person; and

(d) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Ordinance,

then, subject to the provisions of this section and of sections 14 and 15, the court may make any one or more of the following orders, that is to say –

(i) if any money has been paid or any other property has been transferred to or for the benefit of the donee in accordance with the contract, an order directing the donee to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order;

(ii) if the money or all the money has not been paid or the property or all the property has not been transferred in accordance with the contract, an order directing the personal representatives not to make any payment or transfer any property, or not to make any further payment or transfer any further property, as the case may be, in accordance therewith or directing the personal representatives only to make such payment or transfer such property as may be specified in the order.

(3) Notwithstanding anything in subsection (2), the court may exercise its powers thereunder in relation to any contract made by the deceased only to the extent that the court considers that the amount of any sum of money paid or to be paid or the value of any property transferred or to be transferred in accordance with the contract exceeds the value of any valuable consideration given or to be given for that contract, and for this purpose the court shall have regard to the value of property at the date of the hearing.

(4) In determining whether and in what manner to exercise its powers under this section, the court shall have regard to the circumstances in which the contract was made, the relationship, if any, of the donee to the deceased, the conduct and financial resources of the donee and all the other circumstances of the case.

(5) Where an order has been made under subsection (2) in relation to any contract, the rights of any person to enforce that contract or to recover damages or to obtain other relief for the breach thereof shall be subject to any adjustment made by the court under section 14(3) and shall survive to such extent only as is consistent with giving effect to the terms of that order.

(6) This section does not apply to a contract made before the commencement of this Ordinance.

[cf. 1975 c. 63 s. 11 U.K.]

14. Provision supplementary to sections 12 and 13

(1) Where the exercise of any of the powers conferred by section 12 or 13 is conditional on the court being satisfied that a disposition or contract was made by a deceased person with the intention of defeating an application for financial provision under this Ordinance, that condition shall be fulfilled if the court is of the opinion that, on a balance of probabilities, the intention of the deceased (though not necessarily his sole intention) in making the disposition or contract was to prevent an order for financial provision being made under this Ordinance or to reduce the amount of the provision which might otherwise be granted by an order thereunder.

(2) Where the court makes an order under section 12 or 13 it may give such consequential directions as it thinks fit (including directions requiring the making of any payment or the transfer of any property) for giving effect to the order or for securing a fair adjustment of the rights of the persons affected thereby.

(3) Any power conferred on the court by section 12 or 13 to order the donee, in relation to any disposition or contract, to provide any sum of money or other property shall be exercisable in like manner in relation to the personal representative of the donee, and –

(a) any reference in section 12(4) to the disposal of property by the donee shall include a reference to disposal by the personal representative of the donee; and

(b) any reference in section 12(5) to an application by the donee under that subsection shall include a reference to an application by the personal representative of the donee,

but the court shall not have power under section 12 or 13 to make an order in respect of any property forming part of the estate of the donee which has been distributed by the personal representative; and the personal representative shall not be liable for having distributed any such property before he has notice of the making of an application under section 12 or 13 on the ground that he ought to have taken into account the possibility that such an application would be made.

[cf. 1975 c. 63 s. 12 U.K.]

15. Provision as to trustees in relation to sections 12 and 13

(1) Where an application is made for –

(a) an order under section 12 in respect of a disposition made by the deceased to any person as a trustee; or

(b) an order under section 13 in respect of any payment made or property transferred, in accordance with a contract made by the deceased, to any person as a trustee,

the powers of the court under section 12 or 13 to order that trustee to provide a sum of money or other property shall be subject to the following limitation (in addition, in a case of an application under section 12, to any provision regarding the deduction of estate duty) namely, that the amount of any sum of money or the value of any property ordered to be provided –

(i) in the case of an application in respect of a disposition which consisted of the payment of money or an application in respect of the payment of money in accordance with a contract, shall not exceed the aggregate of so much of that money as is at the date of the order in the hands of the trustee and the value at that date of any property which represents that money or is derived therefrom and is at that date in the hands of the trustee;

(ii) in the case of an application in respect of a disposition which consisted of the transfer of property (other than a sum of money) or an application in respect of the transfer of property (other than a sum of money) in accordance with a contract, shall not exceed the aggregate of the value at the date of the order of so much of that property as is at that date in the hands of the trustee and the value at that date of any property which represents the first mentioned property or is derived therefrom and is at that date in the hands of the trustee.

(2) Where any such application is made in respect of a disposition made to any person as a trustee or in respect of any payment made or property transferred in pursuance of a contract to any person as a trustee, the trustee shall not be liable for having distributed any money or other property on the ground that he ought to have taken into account the possibility that such an application would be made.

(3) Where any such application is made in respect of a disposition made to any person as a trustee or in respect of any payment made or property transferred in accordance with a contract to any person as a trustee, any reference in section 12 or 13 to the donee shall be construed as including a reference to the trustee or trustees for the time being of the trust in question and any reference in subsection (1) or (2) to a trustee shall be construed in the same way.

[cf. 1975 c. 63 s. 13 U.K.]

PART V

SPECIAL PROVISIONS RELATING TO CASES
OF DIVORCE, SEPARATION, ETC.

16. Provision as to cases where no financial relief was granted in divorced proceedings, etc.

(1) Where, within 12 months from the date on which a decree of divorce or nullity of marriage has been made absolute or a decree of judicial separation has been granted, a party to the marriage dies and –

(a) an application for a financial provision order under section 4 of the Matrimonial Proceedings and Property Ordinance (Cap. 192) or an order under section 6 of that Ordinance has not been made by the other party to that marriage; or

(b) such an application has been made but the proceedings thereon have not been determined at the time of the death of the deceased,

then, if an application for an order under section 4 of this Ordinance is made by that other party, the court shall, notwithstanding anything in section 3 or 5 of this Ordinance, have power, if it thinks it just to do so, to treat that party for the purposes of that application as if the decree of divorce or nullity of marriage had not been made absolute or the decree of judicial separation had not been granted, as the case may be.

(2) This section shall not apply in relation to a decree of judicial separation unless at the date of the death of the deceased the decree was in force and the separation was continuing.

[cf. 1975 c. 63 s. 14 U.K.]

17. Restriction imposed in divorce proceedings, etc. on application under this Ordinance

(1) On the grant of a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter the court, if it considers it just to do so, may, on the application of either party to the marriage, order that the other party to the marriage shall not on the death of the applicant be entitled to apply for an order under section 4.

(2) In the case of a decree of divorce or nullity of marriage an order may be made under subsection (1) before or after the decree is made absolute, but if it is made before the decree is made absolute it shall not take effect unless the decree is made absolute.

(3) Where an order made under subsection (1) on the grant of a decree of divorce or nullity of marriage has come into force with respect to a party to a marriage, then, on the death of the other party to that marriage, the court shall not entertain any application for an order under section 4 made by the first-mentioned party.

(4) Where an order made under subsection (1) on the grant of a decree of judicial separation has come into force with respect to any party to a marriage, then, if the other party

to that marriage dies while the decree is in force and the separation is continuing, the court shall not entertain any application for an order under section 4 made by the first-mentioned party.

[cf. 1975 c. 63 s. 15 U.K.]

18. Variation and discharge of secured periodical payments orders made under Matrimonial Proceedings and Property Ordinance

(1) Where an application for an order under section 4 is made to the court by any person who was at the time of the death of the deceased entitled to payments from the deceased under a secured periodical payments order made under the Matrimonial Proceedings and Property Ordinance (Cap. 192), then, in the proceedings on that application, the court shall have power, if an application is made under this section by that person or by the personal representative of the deceased, to vary or discharge that periodical payments order or to revive the operation of any provision thereof which has been suspended under section 11 of that Ordinance.

(2) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any order which the court proposes to make under section 4 or 7 and any change (whether resulting from the death of the deceased or otherwise) in any of the matters to which the court was required to have regard when making the secured periodical payments order.

(3) The powers exercisable by the court under this section in relation to an order shall be exercisable also in relation to any instrument executed in pursuance of the order

[cf. 1975 c. 63 s. 16 U.K.]

19. Variation and revocation of maintenance agreements

(1) Where an application for an order under section 4 is made to the court by any person who was at the time of the death of the deceased entitled to payments from the deceased under a maintenance agreement which provided for the continuation of payments under the agreement after the death of the deceased, then, in the proceedings on that application, the court shall have power, if an application is made under this section by that person or by the personal representative of the deceased, to vary or revoke that agreement.

(2) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any order which the court proposes to make under section 4 or 7 and any change (whether resulting from the death of the deceased or otherwise) in any of the circumstances in the light of which the agreement was made.

(3) If a maintenance agreement is varied by the court under this section the like consequences shall ensue as if the variation had been made immediately before the death of the deceased by agreement between the parties and for valuable consideration.

(4) In this section "maintenance agreement" ( ), in relation to a deceased person, means any agreement made, whether in writing or not and whether before or after the commencement of this Ordinance, by the deceased with any person with whom he entered into a marriage, being an agreement which contained provisions governing the rights and

liabilities towards one another when living separately of the parties to that marriage (whether or not the marriage has been dissolved or annulled) in respect of the making or securing of payments or the disposition or use of any property, including such rights and liabilities with respect to the maintenance or education of any child, whether or not a child of the deceased or a person who was treated by the deceased as a child of the family in relation to that marriage.

[cf. 1975 c. 63 s. 16 U.K.]

20. Availability of court's powers under this Ordinance in applications under sections 11 and 16 of the Matrimonial Proceedings and Property Ordinance

(1) Where –

(a) a person against whom a secured periodical payments order was made under the Matrimonial Proceedings and Property Ordinance (Cap. 192) has died and an application is made under section 11(6) of that Ordinance for the variation or discharge of that order or for the revival of the operation of any provision thereof which has been suspended; or

(b) a party to a maintenance agreement within the meaning of section 14 of that Ordinance has died, the agreement being one which provides for the continuation of payments thereunder after the death of one of the parties, and an application is made under section 16(1) of that Ordinance for the alteration of the agreement under section 15 thereof,

the court shall have power to direct that the application made under the said section 11(6) or 16(1) shall be deemed to have been accompanied by an application for an order under section 4 of this Ordinance.

(2) Where the court gives a direction under subsection (1) it shall have power, in the proceedings on the application under the said section 11(6) or 16(1), to make any order which the court would have had power to make under this Ordinance if the application under the said section 11(6) or 16(1), as the case may be, had been made jointly with an application for an order under section 4 of this Ordinance, and the court shall have power to give such consequential directions as may be necessary for enabling the court to exercise any of the powers available to the court under this Ordinance in the case of an application for an order under section 4 of this Ordinance.

(3) Where an order made under section 17(1) is in force with respect to a party to a marriage, the court shall not give a direction under subsection (1) with respect to any application made under the said section 11(6) or 16(1) by that party on the death of the other party.

[cf. 1975 c. 63 s. 18 U.K.]

PART VI

MISCELLANEOUS AND SUPPLEMENTARY PROVISIONS

21. Effect, duration and form of orders

(1) Where an order is made under section 4 then for all purposes, including the purposes of the enactments relating to estate duty, the will or the law relating to intestacy, or both the will and the law relating to intestacy, as the case may be, shall have effect and be deemed to have had effect as from the deceased's death subject to the provisions of the order.

(2) Any order made under section 4 or 7 in favour of –

(a) an applicant who was the former husband or former wife of the deceased; or

(b) an applicant who was the husband or wife of the deceased in a case where the marriage with the deceased was the subject of a decree of judicial separation and at the date of death the decree was in force and the separation was continuing,

shall, in so far as it provides for the making of periodical payments, cease to have effect on the remarriage of the applicant, except in relation to any arrears due under the order on the date of the remarriage.

(3) A copy of every order made under this Ordinance (other than an order made under section 17(1)) shall be sent to the Probate Registry of the Supreme Court for entry and filing, and a memorandum of the order shall be endorsed on, or permanently annexed to, the probate or letters of administration under which the estate is being administered.

[cf. 1975 c. 63 s. 19 U.K.]

22. Provisions as to personal representatives

(1) This Ordinance shall not render the personal representative of a deceased person liable for having distributed any part of the estate of the deceased, after the end of the period of 6 months from the date on which representation with respect to the estate of the deceased is first taken out, on the ground that he ought to have taken into account the possibility –

(a) that the court might permit the making of an application for an order under section 4 after the end of that period; or

(b) that, where an order has been made under section 4, the court might exercise in relation thereto the powers conferred on it by section 8,

but this subsection shall not prejudice any power to recover, by reason of the making of an order under this Ordinance, any part of the estate so distributed.

(2) Where the personal representative of a deceased person pays any sum directed by an order under section 7 to be paid out of the deceased's net estate, he shall not be under any

liability by reason of that estate not being sufficient to make the payment, unless at the time of making the payment he has reasonable cause to believe that the estate is not sufficient.

(3) Where a deceased person entered into a contract by which he agreed to leave by his will any sum of money or other property to any person or by which he agreed that a sum of money or other property would be paid or transferred to any person out of his estate, then, if the personal representative of the deceased has reason to believe that the deceased entered into the contract with the intention of defeating an application for financial provision under this Ordinance, he may, notwithstanding anything in that contract, postpone the payment of that sum of money or the transfer of that property until the expiration of the period of 6 months from the date on which representation with respect to the estate of the decease is first taken out or, if during that period an application is made for an order under section 4, until the determination of the proceedings on that application.

[cf. 1975 c. 63 s. 20 U.K.]

23. Admissibility as evidence of statements made by deceased

In any proceedings under this Ordinance a statement made by the deceased, whether orally or in a document or otherwise, shall be admissible under section 47 of the Evidence Ordinance (Cap. 8) as evidence of any fact stated therein in like manner as if the statement were a statement falling within section 47(1) of that Ordinance; and any reference in that Ordinance to a statement admissible, or given or proposed to be given, in evidence under section 47 thereof or to the admissibility or the giving in evidence of a statement by virtue of that section or to any statement falling within section 47(1) of that Ordinance shall be construed accordingly.

[cf. 1975 c. 63 s. 20 U.K.]

24. Onus of proof

Where in any proceedings under this Ordinance a union of concubinage is proved to have been entered into before 7 October 1971, it shall be presumed, until the contrary is proved, that the female partner has, during the lifetime of the male partner, been accepted by his wife as his concubine and recognized as such by his family generally.

25. Commencement and transfer of proceedings

(1) Subject to subsections (2) and (3), proceedings under this Ordinance shall be commenced in the District Court.

(2) Rules of court may make provision –

(a) for the transfer to the Supreme Court of any proceedings upon the application of any party or at the instance of the District Court; and

(b) for the transfer and retransfer from the Supreme Court of any proceedings to the District Court.

(3) Applications under sections 8 and 9(2) shall be made to the court that made the order to which the application relates; but rules court may make provision for the transfer of applications from one to the other.

26. Determination of date on which representation was first taken out

In considering for the purposes of this Ordinance when representation with respect to the estate of a deceased person was first taken out, a grant limited to part only of the estate shall be left out of account unless a grant limited to the remainder of the estate has previously been made or is made at the same time.

[cf. 1975 c. 63 s. 23 U.K.]

27. Consequential amendments, repeals and transitional provisions

(1) The Deceased's Family Maintenance Ordinance (Cap. 129) is repealed.

(2) Sections 38 to 40 of the Matrimonial Causes Ordinance (Cap. 179) are repealed.

(3) The repeal of provisions referred to in subsections (1) and (2) shall not affect their operation in relation to any application made thereunder (whether before or after the commencement of this Ordinance) with reference to the death of any person who died before the commencement of this Ordinance.

(4) Without prejudice to section 23 of the Interpretation and General Clauses Ordinance (Cap. 1) (which relates to the effect of repeals) nothing in any repeal made by this Ordinance shall affect any order made or direction given under any enactment repealed by this Ordinance, and, subject to this Ordinance, every such order or direction (other than an order made under section 11 of the Deceased's Family Maintenance Ordinance (Cap. 129)) shall, if it in force at the commencement of this Ordinance or is made by virtue of subsection (3), continue in force as if it had been made under section 4(1)(a) of this Ordinance, and for the purposes of section 8(7) of this Ordinance the court in exercising its powers under that section in relation to an order continued in force by this subsection shall be required to have regard to any change in any of the circumstances to which the court would have been required to have regard when making that order if the order had been made with reference to the death of any person who died after the commencement of this Ordinance.

[cf. 1975 c. 63 s. 26 U.K.]

Non-Contentious Probate Rules

28. Order of priority for grant in case of intestacy

Rule 21(4) of the Non-Contentious Probate Rules (Cap. 10 sub. leg.) is amended by repealing the full stop and substituting –

", or is, by virtue of section 3 of the Inheritance (Provision for Family and Dependants) Ordinance 1990 (of 1990), entitled to apply to the court for an order under section 4 of that Ordinance.".

Explanatory Memorandum

This Bill enables the court to order that financial provision be made out of the estate of a deceased person for certain members of that person's family and for dependants of that person. The Bill repeals and replaces the Deceased's Family Maintenance Ordinance (Cap. 129) and implements recommendations of the Law Reform Commission made in its Report on the Law of Wills, Intestate Succession and Provision for Deceased Persons' Families and Dependants.

Part I

2. Clause 1 gives the short title of the Bill and the date of commencement, and clause 2 is an interpretation provision.

Part II

3. Clause 3 provides that where a person dies domiciled in Hong Kong or having been ordinarily resident in Hong Kong at any time in the 3 years before his death, any of the persons listed in clause 3(1) may apply to the court for an order under clause 4. Such an application is made on the ground that the applicant has not received reasonable financial provision under the will or intestacy of the deceased. The list of potential applicants is wider than that in the repealed Deceased's Family Maintenance Ordinance and includes –

(a) an illegitimate child of the deceased;

(b) a person treated by the deceased as a child of his family; and

(c) a person who, immediately before the death of deceased, was being maintained by the deceased.

4. Clause 4 lists the types of order that a court may make in favour of an applicant. The types of order set out in clause 4 (1)(c), (d) and (e) were not possible under the repealed Ordinance.

5. Clause 5 sets out the matters to which the court is to have regard in exercising its powers under clause 4. Sub-clause (1) lists the matters which are relevant in all cases, and sub-clauses (2) to (5) specify additional matters which are relevant to particular categories of applicant.

6. Clause 6 provides that applications shall not, except with the permission of the court, be made later than 6 months after the date of the grant of probate or letters of administration in respect of the deceased's estate.

7. Clause 7 sets out the power of the court to make an interim order where the applicant is in immediate need of financial assistance.

8. Clause 8 sets out the power of the court to vary or discharge an order for periodical payments made under clause 4(1)(a), or to suspend or revive any provision in such an order. An application for an order under clause 8 may be made by any person listed in clause 3(1), the personal representatives of the deceased, the trustees of any relevant property or any beneficiary of the estate of the deceased.

9. Clause 9 provides that an order for the payment of a lump sum may provide for payment by instalments, and that the number or amount of the instalments may, on application, be varied.

Part III

10. Part III provides that certain types of property that do not normally fall into the estate of a deceased person are to be treated as part of the net estate of the deceased (and therefore may be taken into account on an application for financial provision under this Bill). The types of property are –

(a) money or other property which is, or could have been, the subject of a nomination by the deceased (e.g. where the deceased has nominated a person to receive an entitlement under a pension scheme to which the deceased belonged) (clause 10(1));

(b) money or other property which the deceased, in contemplation of his death, gave to a person (clause 10(2)); and

(c) property which, immediately before his death, the deceased owned jointly with another person (clause 11(1)).

Part IV

11. Part IV gives the court certain powers in relation to transactions intended to defeat applications under this Bill.

12. Clause 12 applies in respect of a disposition made by the deceased –

(a) less than 6 years before his death;

(b) with the intention of defeating an application under this legislation; and

(c) where full value was not given for that disposition.

Clause 12(2) provides that the court may order the donee under such a disposition to provide money or other property for the purpose of making financial provision for an applicant. Clause 12(5) enables the donee under such a disposition to apply for a similar order in respect of any other such disposition made by the deceased.

13. Clause 13 applies in respect of a contract made by the deceased –

(a) by which he agreed to leave by his will money or other property to any person;

(b) with the intention of defeating an application under this legislation; and

(c) where full value was not given or promised for the contract.

Clause 13(2) provides that the court may –

(i) if the money has been paid or the property transferred, order the donee to provide money or property for the purpose of making financial provision; or

(ii) if the money has not been paid or the property has not been transferred, order that it not be paid or transferred.

14. Clause 14 contains provisions supplementary to clauses 12 and 13.

15 Clause 15 contains provisions which limit the powers of the court under clauses 12 and 13 where the donee of money or property receives it as trustee.

Part V

16. Clause 16 provides that, in certain circumstances the court may treat an application by the former spouse or a judicially separated spouse as if the divorce, annulment or judicial separation had not taken place.

17. Clause 17 provides that a court may, on or after granting a decree of divorce, nullity or judicial separation, order that a party to the marriage shall, on the death of the other party, be barred from making an application under clause 4.

18. Clause 18 provides that a court may, on an application under clause 4, vary or discharge any order for periodical payments made against the deceased in favour of the applicant, under the Matrimonial Proceedings and Property Ordinance (Cap. 192).

19. Clause 19 enables a court, on an application under clause 4, to vary any maintenance agreement under which the applicant is entitled to payments from the deceased.

20. Clause 20 provides that where –

(a) an application is made under the Matrimonial Proceedings and Property Ordinance (Cap. 192) for the variation of an order for secured periodical payments made against a deceased person; or

(b) an application is made under that Ordinance for the alteration of a maintenance agreement made by a deceased person,

the court shall have the same powers to make an order for financial provision as it would have had if an application had been made under clause 4 of this Bill.

Part VI

21. Clause 21 provides that an order shall have effect as from the deceased's death and that an order for periodical payments made in favour of a former spouse or a judicially separated spouse shall cease on that person's remarriage.

22. Clause 22 contains provisions for the protection of the personal representative of a deceased person.

23. Clause 23 renders statements made by the deceased admissible under the Bill as evidence of any fact stated therein.

24. Clause 24 provides a presumption, in respect of unions of concubinage entered into before 7 October 1971, to the effect that the female partner has, during the lifetime of the male partner, been accepted by his wife as his concubine and recognized as such by his family generally.

25. Clause 25 provides that proceedings shall commence in the District Court and that rules of court may provide for the transfer of proceedings to the Supreme Court.

26. Clause 26 is an interpretation provision.

27. Clause 27 contains consequential amendments, repeals and transitional provisions.

28. Clause 28 amends the Non-Contentious Probate Rules (Cap. 10 sub. leg.) to entitle a person listed in clause 3(1) to a grant to administration to the estate of the deceased.

29. [Public Service staffing and financial implications].

法律修订及改革（综合）（修订）条例草案（英文本）

A BILL

To

Amend the Law Amendment and Reform (Consolidation) Ordinance.

Enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof.

Short title and commencement

1. (1) This Ordinance may be cited as the Law Amendment and Reform (Consolidation) (Amendment) Ordinance 1990.

(2) This Ordinance shall come into operation on

New Part VA added

2. The Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) is amended by adding after section 25 –

"PART VA

FORFEITURE

The "forfeiture rule"

25A. (1) In this Part, the "forfeiture rule" means the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing.

(2) References in this Part to a person who has unlawfully killed another includes a reference to a person who has unlawfully aided, abetted, counselled or procured the death of that other and references in this Part to unlawful killing shall be interpreted accordingly.

[cf. 1982 c. 34 s. 1 U.K.]

Power to modify the rule

25B. (1) Where a court determines that the forfeiture rule has precluded a person (in this section referred to as "the offender") who has unlawfully killed another from acquiring any interest in property mentioned in subsection (4), the court may make an order under this section modifying the effect of that rule.

(2) The court shall not make an order under this section modifying the effect of the forfeiture rule in any case unless it is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified in that case

(3) In any case where a person stands convicted of an offence of which unlawful killing is an element, the court shall not make an order under this section modifying the effect of the forfeiture rule in that case unless proceedings for the purpose are brought before the expiry of the period of 3 months beginning with his conviction.

(4) The interests in property referred to in subsection (1) are –

(a) any beneficial interest in property which (apart from the forfeiture rule) the offender would have acquired –

(i) under the deceased's will or the law relating to intestacy;

(ii) on the nomination of the deceased or on the failure of the deceased to make a nomination;

(iii) as a donatio mortis causa made by the deceased; or

(b) any beneficial interest in property which (apart from the forfeiture rule) the offender would have acquired in consequence of the death of the deceased, being property which, before the death, was held on trust for any person.

(5) An order under this section may modify the effect of the forfeiture rule in respect of any interest in property to which the determination referred to in subsection (1) relates and may do so in either or both of the following ways, that is –

(a) where there is more than one such interest, by excluding the application of the rule in respect of any (but not all) of those interests; and

(b) in the case of any such interest in property, by excluding the application of the rule in respect of part of the property.

(6) On the making of an order under this section, the forfeiture rule shall have effect for all purposes (including purposes relating to anything done before the order is made) subject to the modifications made by the order.

(7) The court shall not make an order under this section modifying the effect of the forfeiture rule in respect of any interest in property which, in consequence of the

rule, has been acquired before the coming into force of this section by a person other than the offender or a person claiming through him.

(8) In this section -

"property" includes any chose in action or incorporeal moveable property; and

"will" includes codicil.

[cf. 1982 c. 34 s. 2 U.K.]

Application for financial provision not affected by the rule

25C. (1) The forfeiture rule shall not be taken to preclude any person from making any application under a provision mentioned in subsection (2) or the making of any order on the application.

(2) The provisions referred to in subsection (1) are –

(a) any provision of the Inheritance (Provision for Family and Dependants) Ordinance (of 1990);

(b) sections 11 (variation, discharge, etc. of orders for financial provision) and 16 (alteration of agreements by court after death of one party) of the Matrimonial Proceedings and Property Ordinance (Cap. 192).

[cf. 1982 c. 34 s. 3 U.K.]

..... to decide whether rule applies to social security benefits

25D. (1) Where a question arises as to whether, if a person were otherwise entitled to or eligible for any benefit or advantage under a relevant enactment, he would be precluded by virtue of the forfeiture rule from receiving the whole or part of the benefit or advantage, that question shall (notwithstanding anything in any relevant enactment) be determined by .....

(2) Regulations under this section may make such provision as appears to ..... to be necessary or expedient for carrying this section into effect; and (without prejudice to the generality of that) the regulations may, in relation to the question mentioned in subsection (1) or any determination under that subsection –

(a) apply any provision of any relevant enactment, with or without modifications, or exclude or contain provision corresponding to any such provision; and

(b) make provision for purposes corresponding to those for which provision may be made by regulations under .....

(3) In this section, "relevant enactment" means .....
…….....……

[cf. 1982 c. 34 s. 4 U.K.]

Exclusion of murderers

25E. Nothing in this Part or in any order made under section 25B or referred to in section 25C shall affect the application of the forfeiture rule in the case of a person who stands convicted of murder.

[cf. 1982 c. 34 s. 5 U.K.]".

Explanatory Memorandum

This Bill adds a new Part to the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) in order to modify the rule that precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing (the "forfeiture rule").

2. New section 25A contains definitions.

3. New section 25B empowers the court to modify the effect of the forfeiture rule where the justice of the case so requires.

4. New section 25C provides that the forfeiture rule does not preclude a person from applying for an order for provision under the inheritance (Provision for Family and Dependants) Ordinance (of 1990) or for certain orders under the Matrimonial Proceedings and Property Ordinance (Cap. 192).

5. New section 25D provides that a person may be granted specified social security benefits despite the forfeiture rule.

6. New section 25E provides that the modifications to the forfeiture rule do not apply in the case of a person convicted of murder.

7. [Public Service staffing and financial implications.]