

THE LAW REFORM COMMISSION OF HONG KONG

REPORT ON

**LAW OF WILLS, INTESTATE SUCCESSION
AND PROVISION FOR DECEASED PERSONS'
FAMILIES AND DEPENDANTS**

(TOPIC 15)

We, the members of the Law Reform Commission of Hong Kong, present our report on Laws of Wills, Intestate Succession and Provision for Deceased Persons' Families and Dependants.

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Introduction

1. On 3 September 1984, the Chief Justice and Attorney General, under powers granted by the Governor in Council on 15 January 1980, as amended on 7 June 1983, referred to the Law Reform Commission ("the Commission") for consideration and report the following questions –

"Law of Wills

1. Should the law relating to wills be changed having regard –
 - (a) to the reforming provisions of Part IV of the Administration of Justice Act 1982 of the United Kingdom; and
 - (b) to the needs of Chinese testators making wills under section 5(2) of the Wills Ordinance (Cap. 30)?
2. Is it necessary or desirable for the law of Hong Kong to provide for the making of 'international wills' to conform with the Annex to the 'Convention providing a Uniform Law on the Form of an International Will' concluded at Washington on 26 October 1973?

Law of Intestate Succession

3. (a) Generally, is the existing law relating to intestate succession satisfactory or are any changes in that law necessary or desirable?
 - (b) Specifically, is the existing law, which provides on an intestacy for the separate devolution of land to which Part II of the New Territories Ordinance (Cap. 97) applies, satisfactory?

Provision for Deceased Persons' Families and Dependants

4. Is the law relating to the making of adequate provision, including maintenance and support, for the dependants and families of deceased persons, satisfactory or are any changes in that law desirable?"

Summary of work

2. On 5 October 1984 the Law Reform Commission appointed a sub-committee to consider the matter under the chairmanship of Mr Brian

McElney JP, a member of the Commission. The other sub-committee members were: –

Professor Dafydd Evans School of Law, University of Hong Kong

Miss Elsie O S LEUNG Solicitor
Partner, P H Sin & Co

Dr P A L Vine Solicitor
Partner, Deacons

Dr WONG Tin-chun Dentist
Dental Clinic, Central Government Offices

3. In October 1986 the sub-committee completed a working paper which was circulated to the persons or organisations set out in Annexure 2 for their comments. All comments received were considered and, where appropriate, incorporated in the sub-committee's preliminary report. The Commission considered this report at its 56th, 58th and 59th meetings. A revised report was compiled by the sub-committee in the light of the Commission's comments and this report was considered by the Commission at its 67th, 68th, 69th and 71st meetings.

4. We wish to record our appreciation of the assistance given to the Commission by the members of the sub-committee, all of whom have given unstintingly of their time and expertise over a period of almost five years. We also wish to thank all those who so helpfully commented on the working paper. We wish also to express our gratitude to those members of the Law Reform Commission Secretariat who have assisted the sub-committee during that period, namely Geoffrey Grimmett, Michael Darwyne, Michael Scott, Mark Berthold and Michelle Ainsworth.

Chapter 1

Background

1.1 The last major reform of Hong Kong's Law of Succession took place in 1970 and 1971 when a number of statutes concerning the family, its property and succession were enacted. So far as succession is concerned, the Wills Ordinance Cap. 30 was enacted in 1970 and came into force in 1971 at the same time as the Intestates' Estates Ordinance Cap. 73 and the Deceased's Family Maintenance Ordinance Cap. 129 which were enacted in that year. Also enacted in that year was the Probate and Administration Ordinance Cap. 10 but, as this Ordinance is concerned only with matters relating to the procedure of estate administration, it is not considered in detail in this Report.

1.2 It is fair to say that the operation of these three Ordinances has presented no major problem in practice and there has not been a great deal of reported litigation arising from their provisions. Most applications under the Ordinances would be made in Chambers and not in open court. A number of inconsistencies and anomalies have, however, emerged over the years, suggesting that a review would be advantageous. Some of these result from the wholesale adoption of English legislative provisions into Hong Kong without sufficient regard to local conditions but some arise from the legislation itself.

1.3 It is always desirable to keep under review laws which as closely affect the entire community as do the laws concerning succession. Society and the expectations of its members change and the law must be responsive to those changes. On the other hand, people must plan their affairs and those of their family on the basis of the law as it is understood by them and it would not be right to make serious changes at too frequent intervals. Nevertheless, those responsible for the reform of the law must constantly be alert to the possibility that legal provisions may fail to accord with community expectations, either because they have been framed in the first place without sufficient regard to the social context in which they will operate, or because they have now fallen behind the needs of a changing society.

1.4 Hong Kong's ethnically and culturally pluralistic society presents particular problems in arriving at a general set of laws equally fairly applicable to identifiably diverse groups. There are few areas of the law in which these problems are more apparent than that relating to the family and its property. Until 7 October 1971, Hong Kong's legal system still recognised to some extent Chinese custom as it had developed in Hong Kong under English law. Thus, a customary marriage was accorded full validity as, indeed, was de facto a new customary variant which came to be known as a "Chinese

modern marriage", which was virtually an urban transplant of a rural village wedding. Likewise, although the law required that the prescribed procedures be followed, distribution on intestacy of a Chinese person dying domiciled in Hong Kong was allowed to be determined by custom. Furthermore, although the fundamental law governing wills was the English Wills Act 1837, a will by a Chinese testator which did not satisfy the formal requirements could nevertheless be admitted to probate. The years 1970 and 1971 were years of fundamental change which saw a virtually unified body of personal law emerge regardless of the ethnic or cultural or religious background of the subject.

1.5 It is almost nineteen years since these major changes came into force and we think it is now time to look at and question some of the fundamental issues concerned.

1.6 The Commission is also conscious of the greatly increased number of divorces which have affected the pattern of family life for many in Hong Kong since 1972 when various amendments were made to the Matrimonial Causes Ordinance Cap. 179. One of these amendments established the then new sole ground for divorce of irretrievable breakdown (section 3 of Ordinance 33 of 1972: section 11 of Cap. 179).

1.7 The immediate impetus for reconsideration of the law of succession in Hong Kong was the enactment in England and Wales of the Administration of Justice Act 1982, Part IV of which deals with matters relating to wills and makes certain changes to the Wills Act 1837 on which the Hong Kong Wills Ordinance is based.

International Human Rights

1.8 The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights were ratified by the United Kingdom on 20 May 1976. Subject to certain reservations, the United Kingdom extended their application to Hong Kong on the same day. Of the rights enshrined therein, protection from discrimination is of particular relevance in the present context. For example, under the present law the inheritance rights of illegitimate children compare unfavourably with those of their legitimate siblings. The Commission's recommendations include the aim of enhancing the rights provided for in the International Conventions.

Illegitimate children: October 1985 public opinion survey

1.9 The Commission has also been conscious in making some of the recommendations contained in this Report of the results disclosed by a 1985 report. This was the "Report on an opinion survey on public attitudes towards illegitimate children" ("the Public Opinion Survey Report") which was compiled in October 1985 by the Community Information Division of the City

and New Territories Administration ("the CNTA"). Market Decision Research Co. Ltd, ("the Research Company") a private research organisation, was commissioned by the CNTA to conduct the survey which was carried out in August 1985. From the fieldwork carried out by the Research Company, the CNTA has compiled the Public Opinion Survey Report, which is set out in Annexure 1.

1.10 At present, illegitimate children and a dependent cohabitee of a deceased man are not entitled to any part of an estate under the Intestates' Estates Ordinance Cap. 73. Neither can such persons make a claim for maintenance from an estate under the Deceased's Family Maintenance Ordinance Cap. 129 since they are not included in the categories of "dependant" defined in the Ordinance. The survey which the Research Company carried out for the CNTA was designed, with these two Ordinances in mind, to ascertain how the public perceived the rights of illegitimate children and their mothers.

1.11 The survey results show that the Hong Kong public today has a liberal and enlightened outlook in this field. An overwhelming majority (86%) agreed that children born out of wedlock should have the right to claim maintenance from the estate of their deceased father. Only slightly less (83%) agreed that the mother of an illegitimate child should be able to claim maintenance for herself out of the estate of the father of her child if she had been maintained by the deceased father during his lifetime. On the general issue of equal inheritance rights, seven out of ten thought that illegitimate children should have equal rights with those born in lawful wedlock in entitlement to the estate of their deceased father.

1.12 The giving of rights to illegitimate children was not seen by the majority (62%) as being likely to encourage extra-marital relationships.

1.13 The method of collection of data, size of random sample, rate of response and individual findings are all set out in the Public Opinion Survey Report in Annexure 1.

Layout of this Report

1.14 It is logical to consider the law of wills first, then intestacy, and finally Deceased's Family Maintenance. This is the order in which the three component parts of the subject matter of the reference are dealt with in this Report in Parts I, II and III. In Part IV of this Report, the Commission has considered the question of consolidation of the legislation into one Ordinance, and revision. In Part V, forfeiture is considered and finally, in Part VI, the Commission has listed for ease of reference a summary of its recommendations.

PART I - THE LAW OF WILLS

Chapter 2

WILLS : INTRODUCTION

Wills terms of reference

2.1 The terms of reference for this part of the topic relate to Part IV of the UK Administration of Justice Act 1982 ("the AJA"), "Chinese wills" made under section 5(2) of the Wills Ordinance Cap. 30 (in this Part referred to as "the Ordinance") and international wills.

2.2 This part of our report examines the following aspects of the topic in order: form and authentication; Wills Ordinance amendments; rectification and interpretation; registration of wills; and international wills.

WILLS : FORM AND AUTHENTICATION

The present law

2.3 Section 5 of the Ordinance provides as follows –

"5. (1) Subject to subsection (2), no will shall be valid unless it is in writing and executed in accordance with the following rules:

Rule 1 – It shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction.

Rule 2 – Such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and each witness shall attest by his signature the signature of the testator, or of the person signing for him, in the presence of the testator, but no form of attestation shall be necessary.

Rule 3 – It is sufficient if the signature of the testator, or of the person signing for him, is so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his will.

Rule 4 – Without prejudice to the generality of Rule 1, a will shall not be affected if –

- (a) the signature does not follow or is not immediately after the foot or end of the will; or*
- (b) a blank space intervenes between the concluding word of the will and the signature; or*
- (c) the signature –*
 - (i) is placed among the words of the testimonium clause or of the clause of attestation; or*
 - (ii) follows or is after or under the clause of attestation, either with or without a blank space intervening; or*
 - (iii) follows or is after, or under, or beside the names or one of the names of the attesting witnesses; or*
- (d) the signature is on a side or page or other portion of the papers containing the will on which no clause or paragraph or disposing part of the will is written above the signature; or*
- (e) there appears to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature.*

Rule 5 - A signature shall not be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature is made.

(2) Any will of a Chinese testator written wholly or substantially in Chinese and signed by the testator shall be valid and duly executed although not executed in accordance with the rules set out in subsection (1)."

2.4 We believe that it is necessary to look very closely at the fundamental principles underlying the formalities at present required by section 5(1) of the Ordinance for the execution of a valid will.

2.5 The formalities prescribed by section 5(1) of the Ordinance derive from the Wills Act 1837. That Act did not contain a dispensation provision similar to section 5(2) of the Ordinance. Section 17 of the AJA relaxes the formalities required in England and Wales under the Wills Act 1837 as follows: –

"17. The following section shall be substituted for section 9 of the Wills Act 1837 –

'9. 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 two 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.' "

The effect of s. 17 of the A.J.A. Act

2.6 The principal change effected by section 17 of the AJA is that it is no longer mandatory for the testator's signature to be at some particular place on the face of the will, but requires instead that it must appear that the testator intended by his signature to give effect to his will. The signature could, accordingly, in theory be anywhere. This seems a sensible provision which would obviate the somewhat bizarre results at which the courts have arrived at times when the signature is not in the "right" place. The case of Re Beadle [1974] 1 All ER 493) provides an example. In that case, the testatrix dictated to two friends the details of the will she wished to make. The testatrix read the will through and signed on the top-right hand corner. One of the friends also signed. The will was sealed in an envelope on which the testatrix wrote "My last will and testament, E.A. Beadle, to Charley and Maisy." Her 2 friends signed the envelope. On the testatrix's death it was held that the will was invalid since the formalities had not been observed, notwithstanding the fact that the deceased's testamentary intention was not in doubt.

2.7 The attestation rules are also somewhat relaxed by section 17 of the AJA: provided that the testator signs or acknowledges in the presence of both or all witnesses together at the same time, each witness may then attest and sign the will or acknowledge his signature in the presence of the testator, but not necessarily in the presence of the other witness or witnesses.

2.8 We recommend that section 5(1) of the Ordinance be replaced by a provision similar in effect to section 17 of the AJA. (See Clause 2 of the draft Wills (Amendment) Bill ("the Bill") presented with this report (see Annexure 6). Clause 2 is in identical terms to section 17 of the AJA.

Section 5(2): A General Dispensing Power

2.9 We now turn to consider the circumstances in which a will should be regarded as validly executed even though the formalities set out in section 5(1) have not been complied with. Section 5(2) provides that any will of a Chinese testator, written wholly or substantially in Chinese and signed by the testator, shall be valid and duly executed although not executed in accordance with section 5(1). Since 98% of the population in Hong Kong would be eligible to claim exemption from the formal section 5(1) requirements for the making of a valid will under section 5(2) of the Ordinance, it will be immediately apparent that the question of Chinese wills made under section 5(2) is of no small significance. The Registrar of the Supreme Court has advised that such wills are regularly admitted to probate. The significance of section 5(2) in Hong Kong law springs from the opportunity which it affords, in spite of being worded as a saving provision, for informal will making by the vast majority of the population without any formal check as to authenticity.

2.10 Some in the past have wished to delete section 5(2) altogether as anomalous. The Attorney General of the time spoke in 1970 against its inclusion, but conceded its desirability for Chinese testators. The provision in the original draft was not restricted to Chinese, but related to wills in the Chinese language, although this was changed after debate in the Legislative Council.

2.11 In considering section 5(2), we think it is necessary to bear in mind the fundamental reasons for any requirement of formality in the execution of Wills. The English Law Reform Committee ("the Committee") in its 22nd Report ("The Making and Revocation of Wills", 1980; Cmnd 7902) identified the fundamental principle in the following terms:

"The purposes of the law (relating to formal requirements) are, first, to ensure that documents genuinely representing the testator's intentions should be valid and, secondly, to prevent the admission to probate of wills which, because they are forged or for any other reason, do not represent the true wishes of the testator." (para 2.2)

We agree wholeheartedly with this principle (which the Committee described as "unexceptionable"), but we disagree with the Committee's belief in the necessity of retaining as an invariable requirement compliance with the formalities (albeit relaxed by section 17 of the AJA), so as to impress upon a testator the gravity of his act and thus safeguard against "hasty or ill-

conceived dispositions". This latter point is not relevant to the "unexceptionable principle" stated above, and conflicts with the fundamental principle of freedom of testation. The effect of a strict requirement of formality is that persons who had executed wills they thought were valid but were in fact defective through a failure to observe the formalities, will die intestate.

2.12 The principal problem area concerning failure to comply with the formalities occurs usually, but not exclusively, in the case of wills made by the testator without professional assistance. (The Committee found that formal defects had actually occurred in a very small number of professionally drafted wills, but gave no details as to the defects in their execution). We deplore the fact that, in the present state of our law, even a will that is demonstrably perfectly authentic (such as that in Re Beadle) can be struck down. Yet it might now be possible after Ross v Caunters [1979] 3 ALL ER 580 that the effect of the will might be achieved by an award of damages. In that case a solicitor drew up a will in accordance with the testator's instructions, which included gifts of chattels and a share of the residuary estate to the plaintiff. The gifts failed because the will had been attested by the plaintiff's spouse. The court held that the solicitor owed a duty of care to an identified beneficiary under a will. The solicitor was held liable in negligence to the plaintiff for failing to take reasonable care to see that the will was properly executed. In the result, the plaintiff recovered damages for the loss of benefits conferred on her under the terms of the will. That decision was followed in Watts v Public Trustee of Western Australia [1980] WAR 97. In Gartside v Sheffield, Young & Ellis [1983] NZLR 37 it was held that the solicitor's duty of care extended to a person identified in drafting instructions as a beneficiary under a proposed will, and that the duty entailed the reasonably prompt preparation of the will for execution by the client. So the effect of the will might now be achieved by an award of damages through reliance on mere drafting instructions unattended by any of the formalities.

Overseas legislation and views on dispensing with formalities

2.13 Section 9 of the South Australian Wills Amendment Act (No 2) 1975, in adding a new section 12 to the South Australian Wills Act 1936 – 1975, provides as follows:

"A document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed with the formalities required by this Act, be deemed to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his will."

2.14 The Law Reform Commission of Western Australia in its Report on Wills (November 1985) concluded that the South Australian provision was appropriate as a model for legislation in Western Australia, and recommended

that the Western Australian Wills Act be amended to incorporate a provision based on section 12(2) of the South Australian Wills Act 1936–1980.

2.15 An identical provision to that of the South Australian Wills Act has been adopted in the Northern Territory of Australia by its Wills (Amendment) Act 1984 following a report by the Northern Territory Law Reform Committee.

2.16 The Law Reform Commission in New South Wales has, in its 1986 report on "Wills - Execution and Revocation", recommended that there be a general dispensing power to enable the court to validate particular acts of will making or revocation which do not comply with the prescribed formalities, but which nevertheless are found to express the genuine intentions of the testator.

2.17 In Manitoba, section 23 of the Wills Act 1983, modelled on the South Australian legislation, provides –

"Where, upon application, if the court is satisfied that a document or any writing on a document embodies

- (a) the testamentary intentions of a deceased; or*
- (b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,*

the court may, notwithstanding that the document or writing was not executed in compliance with all the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be."

2.18 The Tasmanian Law Reform Commission has published a working paper which refers to mounting pressure for reform in this area. The working paper noted that very few wills failed for defect of form but concluded by asking whether, if even this small number could be saved by a convenient amendment of the rules, there was any good reason why such amendment should not be made. It was noted further that it would be impossible to calculate how many people might have died intestate because they did not have the time or opportunity or inclination to prepare a formal will.

2.19 In 1982 the Law Reform Commission of British Columbia recommended the introduction of a power of dispensation which would allow the admission of a document as a valid will provided the court was satisfied that the testator knew and approved of the contents of the will and intended it to have testamentary effect.

2.20 In Queensland "substantial compliance" with the formalities is required before the court's dispensing power becomes operative by virtue of section 9(a) of the Queensland Succession Act 1981 which provides –

"The Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the Court is satisfied that the instrument expresses the testamentary intention of the testator, ..."

2.21 Having considered the relative merits of, on the one hand a "substantial compliance" test and, on the other, a general power to dispense with formalities we prefer the latter. The concept of "substantial" compliance is inherently vague. Although the wording of the South Australian provision is not entirely free of difficulty, we agree with the principle it embodies of a remedial power to relieve against non-compliance with formal requirements. On the other hand, we note that the concept of a "dispensing power" implies that the court has a discretion as to what level of non-compliance might nonetheless satisfy the requirements of proving a will. The provision we propose differs from that approach and does not entail the notion of "dispensation". The provision we envisage is simply to the effect that if the document appears to the court to be one which the testator intended to have testamentary effect, then regardless of its compliance with the formal requirements, it will be given effect to. We accordingly recommend the introduction in Hong Kong of an entirely new principle of authentication. This would provide an escape from the slavish dependence on form alone which remains a feature of English law even after the AJA. It would, however, be more stringent than the present section 5(2) which fails to ensure that Chinese Wills are intended to have testamentary effect or are not forgeries. Unlike its predecessor, therefore, the new provision would accord with the "fundamental principle" identified by the Committee whilst dispensing with formalities. It would apply to all testators regardless of race.

Change favoured

2.22 In addition to favouring the replacement of section 5(1) of the Ordinance with the version set out in section 17 of the AJA we also recommend a provision that wills which are not validly executed under the new section 5 may nonetheless be admitted to probate if they are in writing, signed by or on behalf of the testator and are intended to have testamentary effect (See the proviso to clause 2 of the Bill at Annexure 6).

2.23 The whole of the existing section 5 would thus be repealed and replaced. The specific savings provisions of the existing section 5(2) would be deleted. Compliance with the formal requirements under the new section 5 would constitute valid execution of the will. Failing this, the new proviso states that a will is validly executed notwithstanding its failure to comply with those formal requirements, provided it represents the testator's finalised

intentions. The requirement that the testator must have intended the will to have testamentary effect is intended to exclude half-formed ideas and discarded drafts. The reason why the new proviso stipulates that a will satisfying its requirements is "validly executed" instead of "valid" is that invalidity could arise from other factors, such as incapacity.

2.24 Under the proposed new section 5 a will whether in English or Chinese, will be admitted to probate, if the testator signed it and intended it to have testamentary effect. The Non-Contentious Probate Rules Cap. 10 will require amendment accordingly.

2.25 We recognise that there exists within the Chinese populace a culturally based sensitivity to putting one's signature to a will. Whilst we have partly accommodated this by providing for the continued use of seals or chops (see para 2.29 below) it follows from our recommendations that oral wills made in Hong Kong will continue to be inadmissible. In our view, the requirements that the will be in writing, and signed or sealed by the testator, represent necessary checks on a will's authenticity. We believe that the requirements of the proviso to the new section 5 are both necessary and sufficient to ensure the necessary degree of simplicity and certainty in the law. Without such requirements regarding a will's authenticity, uncertainty would result and increased litigation could be expected. The Commission also believes that there is an increasing community awareness that a will must be written and signed.

2.26 We should add that wills executed overseas and in accordance with that country's laws are valid in Hong Kong, even if they do not comply with the requirements prescribed here. This situation is covered in section 24 of the Ordinance which provides as follows –

"24. A will shall be treated as properly executed if its execution conformed to the internal law in force in the territory where it was executed, or in the territory where, at the time of its execution or of the testator's death, he was domiciled or had his habitual residence, or in a state of which, at either of those times, he was a national."

2.27 The proposed new section 5 also renders a holograph will admissible (i.e. a will which is wholly hand written) if signed by the testator. This formulation deliberately avoids the possibility of the unfortunate result in Re Kanani ((1978) 122 Solicitors' Journal 611) in which an English court, in applying the Wills (Formal Validity) Act 1963 (the Hong Kong equivalent of which is in Part III of the existing Wills Ordinance) rejected a deceased's will as a valid holograph will according to Swiss law, as that law required the whole of the will to be in writing. The will in question had been executed in Switzerland on headed hotel notepaper!

The signature

2.28 We have also given some thought to the mode whereby the testator might sign his will. Section 3 of the Interpretation and General Clauses Ordinance Cap. 1 defines "sign" to include "in the case of a person unable to write, the affixing of a seal, mark, thumbprint or chop".

2.29 It is our experience that seals are still used in modern Hong Kong as an accepted manner of signing documents and instruments. There appears to be no direct modern Hong Kong authority for their use (but see a reference in Norton-Kyshe, History of the Laws and Courts of Hong Kong, Vol II at p 526) but there is long-standing English authority and the practice is not questioned in Hong Kong (see for example the reference without comment to the use of a chop by Li J in Cheung v Chartered Bank Hong Kong Trustee Co [1978] HKLR 264). To accommodate local custom we recommend that the use of a chop continues to be permitted but, if the proposed new section 5 is accepted, then a will would only be admitted on proof that it was the testator who used that seal or chop.

Chapter 3

Various Wills Ordinance amendments

Introduction

3.1 Hong Kong's Wills Ordinance Cap. 30 is derived directly from the UK Wills Act 1837, but somewhat simplified and modernised wording was introduced when the Ordinance was enacted in 1970. Any changes made to the 1837 Act in England and Wales are therefore deserving of careful consideration in Hong Kong. The changes proposed later in this chapter do not generally challenge the fundamental principles underlying the 1837 Act, but should nevertheless be considered in the light of the comments made in Chapter 2. Part IV of the Administration of Justice Act 1982 makes certain amendments to the 1837 Act and these are considered where the relevant Hong Kong provision is discussed. The Wills Ordinance is now discussed in greater detail.

The sections discussed

3.2 Section 3 of the Ordinance provides –

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

Section 3 should be reworded in order to remove the poor grammar by inserting the "to" after "property" instead of "entitled". (See clause 2 of the Bill at Annexure 6).

3.3 Section 4 of the Ordinance provides –

"4. Subject to section 6, no will made by any person who has not attained full age shall be valid."

3.4 "Full age" is defined in the Interpretation and General Clauses Ordinance Cap 1 as meaning the age of 18. The age at which a person might make a valid will is to be lowered from 21 to 18 by the Law Reform (Legal Effects of Age) Bill 1989. This bill follows the recommendations made by this Commission in its report on "Young Persons – Effects of Age in Civil Law" and we see no further need for change.

3.5 Section 8(2) of the Queensland Succession Act 1981 provides as follows –

"A married person may make a valid will and may also revoke a will with or without making a new will irrespective of age."

We see the rationale of this provision as follows: on marriage a person adopts new responsibilities and should be enabled to reflect those responsibilities in a testamentary instrument rather than being restricted to reliance on the provisions of an intestates' succession ordinance. We accordingly recommend that a provision similar to the Queensland provision be enacted (See clause 2 of the Bill at Annexure 6).

3.6 Section 5 of the Ordinance has already been discussed in Chapter 2.

3.7 Section 6 of the Ordinance provides –

"6. (1) Any member of Her Majesty's Forces being in actual naval military or air force service, and any mariner or seaman being at sea, may -

(a) dispose of any of his property;

(b) exercise any power of appointment; or

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

without complying with any of the rules specified in subsection (1) of section 5.

(2) For the avoidance of doubt it is hereby declared that a person referred to in this section is authorized to dispose of his property by will though he has not attained full age."

As a preliminary matter we recommend that, in the introductory words of section 6(1), the words "member of Her Majesty's Forces being" be replaced by "person" and that the archaic expression "being" be deleted from line 3. We also recommend that section 6(2) be repealed and replaced by a provision simple stating that the classes of persons referred to "may make a valid will and may validly revoke a will even though he has not attained full age" (see clause 2 of the Bill).

3.8 Section 11 of the Wills Act 1837 from which this section is derived is a savings section whereas this section is an enabling section. If section 5 is enacted in the form suggested in Chapter 2, we perceive that the only remaining application for section 6 might be in relation to oral wills since there is no reason why a serviceman's non-complying will should not be susceptible to authentication. However, if it is thought desirable to retain section 6 in its present form, one question still remains: section 15 provides

"modes of revocation of will". As it stands, section 15 does not make it possible for a serviceman's will drawn up in compliance with section 6 to be revoked and replaced by drawing up another will in a similar way. Section 15(6) allows revocation by "another will executed in accordance with section 5" but there is no similar provision to allow revocation by a subsequent section 6 will. That can be very easily corrected, and we so recommend, by replacing that paragraph with -

"(b) by another valid will; or" (see clause 4 of the Bill at Annexure 6).

It is generally thought that section 15 would not apply to a section 6 will but this is arguable in Hong Kong given the fact that section 6 is not a saving but an enabling section. The suggested wording would clarify this. Subject to the matters aforesaid we think that section 6 should be retained.

3.9 Section 7: We have no comment.

3.10 Section 8 of the Ordinance provides –

"8. Every will executed in accordance with section 5 shall be valid without any other publication thereof."

We recommend that this section be repealed as being no longer necessary. Its original purpose was to establish that a witness need not know that he was witnessing a signature to a will but this point is really part of the general law today that he need only know that the document is one of that class which requires the signature to be witnessed.

3.11 Section 9: We have no comment.

3.12 Section 10 of the Ordinance provides –

"10. (1) If a person attests the execution of a will, and any disposition of or affecting any property (other than charges and directions for the payment of any debt) is given or made by the will to that person or his spouse, that disposition shall, so far only as concerns the person attesting the execution of the will, or the spouse of that person, or any person claiming under that person or spouse, be void.

(2) The person so attesting shall be admitted as a witness to prove the execution of the will, or to prove the validity or invalidity thereof, notwithstanding such disposition.

(3) For the purposes of subsection (1) of this section the attestation of a will by a person to whom or to whose spouse there is given or made any such disposition as is described in that subsection shall be disregarded if the will is duly executed without his attestation and without that of any other such person."

3.13 The problem with the philosophy of this section is not unrelated to that highlighted by Ross v Caunters [1979] 3 ALL ER 580. In that case there was clear and unambiguous evidence that the testator was perfectly happy with the provisions of the will in which a residuary legatee was his sister-in-law. The flaw was the attestation by the sister-in-law's husband which avoided the legacy to her. The result was that the remaining beneficiaries took her share (and she received her "legacy" by way of damages from the negligent solicitor).

3.14 Section 10(3) saves dispositions to attesting witnesses and their spouses if the will would have been duly executed in the absence of such attestation. We have recommended that the proviso to the new section 5 provide that no attesting witnesses are required, subject to there being proof that the testator intended the will to have testamentary effect. The combined effect to the new section 5 and the present section 10(3) would be that a disposition to an attesting witness would be good in every case because in section 10(3)'s words "the will is duly executed without his attestation", provided that the proviso to the new section 5's requirements can be met. Whilst this is an acceptable result, we consider that there is an alternative approach which is both simpler and more in accord with the principle that proof is more important than form. That alternative would be simply to repeal section 10 in its entirety, leaving the proviso to the new section 5 to accommodate wills where there are no attesting witnesses, but where there is proof of an intention to have testamentary effect. As regards questions of undue influence, we consider that the present common law rules are adequate should that question arise. We therefore recommend that section 10 be repealed (see clause 3 of the Bill at Annexure 6).

3.15 If section 10 is repealed as recommended this would also overcome another possible difficulty under the current law. This relates to witnesses to a will the validity of which could have stemmed from section 6 (wills by sailors at sea, etc) but which has in fact satisfied the requirements of section 5. Does section 10(1) apply to such a will? If a witness is also a beneficiary under it, can section 10(3) be utilised so that it can be argued that the will would have been valid without his attestation? The possible difficulties which may arise will become academic with the repeal of section 10 as suggested above.

3.16 Section 11 This provision is a historical relic of the old position whereby many of those who could give relevant evidence were not allowed to do so, if their credibility was in doubt. Nowadays, a person may give evidence regardless of his credibility, although that obviously is relevant to the weight that is attached to his evidence. We therefore recommend that section 11 be repealed (see clause 3 of the Bill).

3.17 Section 12 This provides that an executor is admissible as a witness. It is redundant for the same reason as section 11 and accordingly we recommend that section 12 be repealed (see clause 3 of the Bill).

3.18 Section 13 of the Ordinance provides –

"13. (1) A will shall be revoked by the subsequent marriage of the testator except a will expressed to be made in contemplation of that marriage.

(2) This section shall not apply to a will made in exercise of a power of appointment when the property thereby appointed would not, in default of the appointment, pass to the personal representative of the testator."

As a drafting point, we considers that "personal representative" should be in the plural (as it is, for example, in section 20 of the AJA), since there is normally more than one administrator.

3.19 In England and Wales, section 18 of the AJA has substituted the following provisions for the provisions previously applying there under section 18 of the Wills Act 1837–

"18. (1) Subject to subsections (2) to (4) below, 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.

18A. (1) Where, after a testator has made a will, a decree of a court dissolves or annuls his marriage or declares it 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) above is without prejudice to any right of the former spouse to apply for financial provision under the Inheritance (Provision for Family and Dependants) Act 1975.*

(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) above,*

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."

3.20 The new section 18 of the Wills Act seeks to correct the frequently harsh revocation of a will by subsequent marriage where the will was made in contemplation of that marriage yet did not match up to the stringent requirements which found their final expression in the judgment of Megarry J in Re Coleman [1975] 1 All ER 675. In this case Megarry J held that whilst a gift to a named person described as "my fiancée" is a gift expressed to be made in contemplation of marriage, the will as a whole (as opposed to merely some gift in it) was not expressed to be made in contemplation of a marriage. Accordingly it was held that the will was revoked by the subsequent marriage, so the gift to the fiancée failed. The new provision goes on to protect particular dispositions not intended to be revoked by the marriage where the will as a whole is not so intended. The new section 18A is an entirely new provision which takes into account a divorce or annulment of a marriage subsequent to the making of the will as follows –

(a) *the will takes effect as if an appointment of a former spouse as executor were omitted from the will, and*

* INTEREST IN REMAINDER - A will may create more than one interest in the same property. Usually the more limited interest will take the property first, but when that interest terminates, the "interest in remainder" will succeed to the property. For example, in his will, testator T has left a "life interest" in his house property to his wife X. He has also left the "interest in remainder" in the property to Y, a child from his first marriage. During X's lifetime the house belongs to her, but she cannot leave it to anyone in her own will, as the property becomes Y's immediately upon her death. By contrast, when Y succeeds to the property it becomes his in full, to dispose as he chooses.

- (b) any devise or bequest to a former spouse lapses (except in so far as a contrary intention appears in the will).

This makes sense since it is fair to assume that an appropriate settlement had been concluded on the dissolution of the marriage. For an example of the operation of section 18A of the Wills Act, see Re Sinclair [1985] 1 All ER 1066, where the court construed section 18A's reference to "lapsed".

3.21 We recommend that section 13 of the Ordinance be replaced with provisions similar in effect to the provisions set out in the new sections 18 and 18A of the Wills Act. As we can envisage situations under foreign law where a marriage may be dissolved without "a decree of a court" (such as a divorce by agreement under Islamic law) we recommend that this expression in section 18(A)(1) be deleted and replaced by dissolved "validly" etc. Changes are also necessary to section 18A(2) to ensure reference to the relevant Hong Kong legislation, namely the Matrimonial Causes Ordinance, (see clause 4 of the Bill at Annexure 6 which, apart from these two modifications, is in identical terms to sections 18 and 18A of the AJA).

3.22 Section 14: We have no comment except that it should be a subsection of section 13 (see clause 4 of the Bill).

3.23 Section 15 of the Ordinance provides –

"15. No will or any part thereof shall be revoked otherwise than -

- (a) by marriage as provided by section 13; or*
- (b) by another will executed in accordance with section 5; or*
- (c) by a written revocation executed in the manner in which the will was executed; 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."*

We pondered on the negative form of this section, but have concluded that this is the desirable form, since it thus emphasises that a will shall only be revoked by specific positive action by a testator. In view of the proposed changes to section 5, we recommend that the words in 15(1)(b) be replaced by "by another valid will, or". We further recommend that the words in 15(1)(c) "executed in a manner in which the will was executed" be replaced by "in a manner in which the testator could validly execute a will" (see clause 4 of the Bill).

3.24 Section 16 of the Ordinance provides –

"16. (1) *No obliteration, interlineation, or other alteration made in a will after execution shall be valid or have any effect, except so far as the words or effect of the will before such alteration are not apparent, unless such alteration is executed in the manner in which the will was executed.*

(2) *The will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator, and the signature of each witness if any is required, is made –*

(a) *in the margin or on some other part of the will opposite or near to such alteration; or*

(b) *at the foot or end of or opposite to a memorandum referring to such alteration and written at the end or some other part of the will."*

If section 5 of the Ordinance is to be changed as recommended in Chapter 2, then section 16 will need consequential amendments in connection with alterations after execution and we recommend that section 16(1) be consequentially amended 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." We also recommend that a new subsection (1A) be added to take advantage of the new technology that is available to determine the original words, namely "for the purpose of subsection (1) the words or effect of a will are apparent if they can by any means be discovered." (see clause 5 to the Bill at Annexure 6). The purpose of the recommended amendments is to remove the restriction on using modern scientific methods to demonstrate what was written (e.g., through ultraviolet photography) where previously the objection was that permitting such methods would be to admit to probate a document other than that executed by the testator. If the document is subject to strict proof, then the old objection should have less force today. Ascertaining through such methods the original text of a validly executed will would better ensure that it was not nullified by an invalidly executed alteration.

3.25 We consider that where the testator has removed a portion of the will this is tantamount to a partial revocation by destruction and is not intended to be cured by the operation of the recommended amendments.

3.26 Section 18: We have no Comment.

3.27 Sections 19-22: These sections deal with various aspects of the construction of wills. In this regard, under a strict rule of construction at common law, words denoting a family relationship are in certain situations presumed to refer only to legitimate relations unless an intention to benefit illegitimate persons was clearly shown. In view of the more enlightened community attitudes revealed by the 1985 local public opinion survey referred to earlier, we believe that this strict rule of construction no longer necessarily represents the intentions of the average testator. This perception in England

and Wales was given statutory recognition by section 15 of the Family Law Reform Act 1969. Those reforms benefiting illegitimate persons or those claiming through an illegitimate link were taken further by sections 1 and 19 of the Family Law Reform Act 1987. Section 1(1) of the Family Law Reform Act 1987 provides –

"1. (1) In this Act and enactments passed and instruments made after the coming into force of this section, references (however expressed) to any relationship between two 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."

Section 19(1) and (2) of the Act provide –

"19. (1) In the following dispositions, namely –

- (a) dispositions inter vivos¹ made on or after the date on which this section comes into force; and*
- (b) dispositions by will or codicil² where the will or codicil is made on or after date,*

references (whether express or implied) to any relationship between two persons shall be construed in accordance with section 1 above.

(2) It is hereby declared that the use, without more, of the word "heir" or "heirs" or any expression which is used to create an entailed interest in real or personal property does not show a contrary intention for the purposes of section 1 as applied by subsection (1) above."

We recommend that a provision of similar effect be added to the Ordinance (see clause 8 of the Bill at Annexure 6).

3.28 Section 23 of the Ordinance presently provides –

"23. Where a person, being a child or other issue of the testator to whom any property is given for any estate or interest not determinable at or before the death of that person, dies in the lifetime of the testator leaving issue, and any such issue of that person is living at the time of the death of the testator, the gift shall not lapse but shall take effect as if the death of that

¹ INTER VIVOS means between living persons.

² CODICIL - a codicil is a supplement to a will containing anything which the testator wishes to add or alter. It must be executed with the same formalities as a will and is construed with the will.

person had happened immediately after the death of the testator, unless a contrary intention appears from the will."

3.29 Section 19 of the AJA substitutes the following provision for section 33 of the Wills Act 1837, the English equivalent of Hong Kong's section 23 of the Ordinance –

"33. (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."*

3.30 The replacement provision removes the rule that broadly the life of the predeceasing child is only artificially prolonged to save a gift to that child from lapsing. The subject matter of the gift, at present, becomes the absolute property of the predeceasing child and thus forms part of his estate. Under the new provision in the AJA, the gift takes effect as a gift per stirpes³ to the child's issue living at the date of the testator's death rather than vesting in the estate of the predeceasing child. Again, this seems sensible as the old rule was very confusing and could produce apparently anomalous results. We accordingly recommend the adoption of a replacement provision (subject to what is said below) for section 23 of the Ordinance as set out in section 19 of the AJA (see clause 9 of the Bill at Annexure 6, which is in identical terms to the English provision).

3.31 We draw attention to the different definition in England and Wales of "child or other issue": section 33 of the Wills Act 1837 now has effect as if (a) the reference to a child or other issue of the testator included a reference to any illegitimate child of the testator and to anyone who would rank as such issue if such child, or some other person through whom he is descended from the testator, had been born legitimate; and (b) the reference to the issue of the intended beneficiary, or such other person through whom he is descended from the intended beneficiary, had been born legitimate (section 19(4) of the AJA). Since we will be recommending an extended definition of "child" for the purposes of both the Intestates' Estates Ordinance Cap. 73 and the Deceased's Family Maintenance Ordinance Cap. 129, it seems appropriate to reflect this new philosophy also in section 23 of the Wills Ordinance Cap. 30. We accordingly recommend that section 23 be amended so as to reproduce the effect of section 33(1), (2) and (3) of the Wills Act 1837 as replaced by section 19 of the AJA (see clause 9 of the Bill).

3.32 Sections 24-29: The Commission considered these provisions and decided that no amendments need be made.

3.33 Section 30 of the Ordinance provides –

"30. (1) This Ordinance shall not apply to a will of a testator who died before the commencement of this Ordinance and shall apply to a will of a testator who dies after its commencement whether the will was executed before or after its commencement, but so that a will which was executed before its commencement and which, but for the provisions of this Ordinance, would be valid shall not thereby be invalidated.

³ PER STIRPES. A distribution of property "per stirpes and not per capita" means distribution equally among a number of classes of person, regardless of how many persons may be in each class. For example, there may be four classes of beneficiary. Each class receives a quarter share, even though there may be five persons in one class and only one in another. Thus, a testator may make a gift to A for life, remainder to his children living at his death and the issue then living of his then deceased children "per stirpes and not per capita". A had six children, five of whom died in his lifetime each leaving issue living at A's death, and one child survived him: the per stirpes distribution is into six parts, one of which goes to A's surviving child, and one is divided among the issue (however numerous) of each of the five deceased children.

(2) *The validity of a will which was valid under section 3 of the repealed Wills Ordinance shall not be affected by any thing in Part III, except insofar as the will may be revoked or altered by any subsequent will valid under this Ordinance.*

(3) *Without prejudice to the general application of section 23 of the Interpretation and General Clauses Ordinance –*

(a) *the repealed Wills Ordinance,*

(b) *the repealed Wills (Formal Validity) Ordinance, and*

(c) *the deleted item 66 of the Schedule to the Application of English Law Ordinance,*

shall continue to apply to the will of any person dying before the commencement of this Ordinance, as if this Ordinance had not been passed."

3.34 The question arises of the application of the provisions of an enactment amending the Ordinance. We recommend that the matter be dealt with by adding to section 30 a provision whereby the amendments effected by legislation implementing our recommendations shall not apply to a will of a testator who died before the commencement of that amending legislation but shall apply to a will of a testator who dies after its commencement whether the will was made before or after its commencement, provided that it is not thereby invalidated. The effect of the marriage of a testator on a will made by him before the commencement of the amending legislation shall be determined as if it had not been passed.

These proposed provisions serve to protect the validity of wills affected by our recommendations.

Chapter 4

Wills: Rectification, interpretation and evidence

Introduction

4.1 One difficulty which occasionally surfaces is a will which fails to express the testator's true intentions, either because of a clerical error, or because the testator's intentions have not been understood. In Re Reynette-James [1975] 3 All ER 1037 the consequence was that the will was admitted to probate with the omission of words which had been in the final draft approved by the testatrix but which were carelessly left out by a typist whose error was not spotted before execution. Since Megarry VC's decision in Ross v Caunters such an act of negligence might lead to an action by an affected beneficiary (if that is possible within the limitation period), but it would seem more sensible to allow rectification upon clear evidence being adduced.

Change in England and Wales

4.2 Section 20 of the AJA provides –

"20. (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 six 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 six 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 settled land or to trust property shall be left out of account, and a grant limited to real estate or to personal 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."

4.3 We recommend that a provision in similar terms to that provided by section 20 or the AJA be inserted in Hong Kong's Wills Ordinance although in Hong Kong there is no "settled land" or "real estate" as mentioned in subsection (4) and the entirety of that subsection requires redrafting to reflect the differences between the applicable law in Hong Kong and England. (see clause 10 of the Bill at Annexure 6, which apart from the modification referred to is in identical terms to the English provision).

Extrinsic evidence

4.4 Section 21 of the AJA provides –

"21. (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."

4.5 Section 21 of the AJA permits the admission of extrinsic evidence including evidence of a testator's intention where it will assist in the interpretation of a will where part of it is meaningless, ambiguous on the face of it, or ambiguous in the light of surrounding circumstances. This removes a long-standing anomaly in the law which has bound judges to struggle with the language of the will and nothing else despite the existence of clear and unequivocal extrinsic evidence which would have provided a speedy answer to an ambiguity. We recommend that a similar provision be adopted in Hong Kong (see clause 10 of the Bill). The relevant provision is in identical terms to

the English one. Re Williams [1985] 1 All ER 964 is, however, an example of the operation of section 21 where the extrinsic evidence was not admitted as it was of no assistance in construing the will.

4.6 There is another context in which we would like there to be a clear statement that extrinsic evidence is admissible. This is in relation to the manner in which a will is executed, revoked or altered. In Re Colling [1972] 3 All ER 729 Ungood-Thomas J observed that section 9 of the Wills Act 1837 (upon which the present section 5 is based) has embedded within it the requirement of oral evidence. We recommend that this be taken but one step further in admitting oral (and other) statements by the testator himself. We accordingly recommend that after section 17 a section 17A be inserted providing that "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" (see clause 6 of the Bill at Annexure 6).

Ambiguous gifts to a spouse

4.7 Section 22 of the AJA provides –

"22. Except where a contrary intention is shown it shall be presumed that 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, the gift to the spouse is absolute notwithstanding the purported gift to the issue."

4.8 This provision deals with a relatively minor point and one which may commonly arise in a will prepared by a non-lawyer. A testator makes an apparently absolute gift to his spouse but then gives an apparent interest in the same property to his issue implying that the gift to the spouse is a life interest only. Section 22 now provides a presumption of an absolute gift to the spouse unless a contrary intention is positively shown. We are in agreement with this subject to one qualification. We believe that in such cases the testator generally intended an absolute gift if the wife survives. For this reason we recommend the adoption of a provision in Hong Kong which would make the gift to the spouse an absolute gift if the spouse survives the testator (see clause 10 of the Bill). If she does not survive, the gift to the issue will take effect, which surely must have been the testator's true intention.

Chapter 5

Registration of wills

The UK provisions

5.1 Sections 23 to 26 of the AJA make thorough provision for the deposit and registration of wills.

Hong Kong provisions

5.2 Sections 2 and 22 of the Land Registration Ordinance Cap. 128 permits among other documents the registration and deposit of wills affecting land in Hong Kong. Thus machinery already exists, albeit almost never used today, for the custody of wills.

5.3 We share the view of Mr. W.K. Thomson, a former Registrar General, that the inclusion of wills in the Land Registration Ordinance appears to have been a mistake. This view is endorsed by the present Registrar General in a letter of 24 April 1987 to the sub-committee which we here set out in full.

"I agree that Mr Thomson is correct and that the inclusion of wills in the Land Registration Ordinance was a mistake. A will, even registered, does not really affect the property against which it is registered until the death of the testator and probate of his will has been granted and registered against that property. However, a testator may dispose of the property during his lifetime notwithstanding registration of his will. If he does, it would be a waste of effort and expense to register the will in the first place and it might sometimes create confusion for a person who searches the Land Office register of that property.

There are in fact wills registered by memorials¹ in the Land Office. The exact number cannot be ascertained without a thorough check on the 1.3 million register cards.

On the question of deposit of wills in the Land Office under Section 22 of the Land Registration Ordinance, I agree with Mr Thomson that it would be more appropriate for wills to be deposited with the Registrar of the Supreme Court, who is in charge of the Probate Registry. Where wills can only be

¹ MEMORIAL. A memorial is the instrument registered, containing particulars of a deed etc.

deposited with the Land Office as at present, a testator who wishes to deposit his will with some public office but who has no landed property at the time of making his will cannot do so.

As at today there are 146 wills deposited in the Land Office under Section 22 of the Land Registration Ordinance."

5.4 On general grounds the Commission does not favour the concept of wills registration. In our view a will concerns private family matters. Their deposit and registration would add an unwanted dimension of officialdom, and lessen their confidentiality. Nor should testators be frustrated in their inherent right to spontaneously alter a will.

Recommendation

5.5 For the policy reasons given above we do not think wills should be registrable. Nor are we persuaded that the expense of provision for registration of wills would be justified in the light of the satisfactory working of an informal scheme operated by the Law Society of Hong Kong whereby the names of deceased clients are circulated by the Law Society to all members with a request for information concerning wills executed by those clients. Moreover, we recommend that the Land Registration Ordinance be amended so that it no longer applies to wills that have not been granted probate.

Chapter 6

International wills

The UK provisions

6.1 Sections 27 and 28 of, and the Second Schedule to the Administration of Justice Act 1982 incorporate into English law the provisions of the Convention on International Wills concluded at Washington on 26 October 1973. The United Kingdom became a signatory to the Convention on 10 October 1974 but to date has not ratified it. The object of the Convention was to provide a form of will which, if complied with, would be valid regardless of where it was made or where the deceased's assets were, or what his domicile, residence or nationality might have been.

6.2 Sections 27 and 28 of the AJA and of the Second Schedule are set out in Annexure 3. The form of an "international will" is spelled out in the Annex to the Convention and this is set out in the Second Schedule to the AJA which is reproduced in Annexure 3.

Recommendation

6.3 Incorporating this Convention into the law of Hong Kong might indeed facilitate the granting of probate of the wills of Hong Kong inhabitants with assets in different jurisdictions and it would not affect the validity of any will made in a different way in accordance with existing Hong Kong law, despite non-compliance with the requirements for international wills. It provides an additional and saving facility which should be welcomed and we recommend it be incorporated into the law of Hong Kong. (Note: if provisions incorporating the Convention are introduced there should also be a reference thereto in section 5, e.g. "subject to section , no will shall be valid ...".)

Part II - THE LAW OF INTESTATE SUCCESSION

Chapter 7

Intestate succession: Introduction

Intestate succession terms of reference

7.1 The terms of reference in relation to intestate succession are wide. The Commission is asked generally whether the existing law is satisfactory, or whether any changes are necessary or desirable. The Commission is also asked whether the existing law which provides for the separate devolution of certain land in the New Territories is satisfactory.

The scope of intestacy law

7.2 When a person dies without making a will he is said to have died "intestate". A state of "intestacy" then arises. A total intestacy occurs when the deceased leaves no will at all; a partial intestacy arises when a will deals with only part of the testator's estate. Although the practice of will-making has been growing in Hong Kong, the majority still die intestate. Even where estate planning has been attended to, the deceased will often have some residue of assets which were not included. The Intestates' Estates Ordinance 1971 Cap. 73 ("the Ordinance") governs the manner in which an intestate estate is to be administered. The Ordinance is largely based on the English rules of intestate succession laid down in the Administration of Estates Act 1925 as amended by the Intestates' Estates Act 1952.

7.3 The rules are based upon the assumption that people who die intestate would, if they had made a will, have wished to make provision for certain classes of near relations, preferring some of those relations to others. The primary assumption is that people usually wish to provide for their children equally, and also to make provision for their widows or widowers during the remainder of their lives. Failing surviving children or a surviving spouse, or both, they usually wish to benefit their nearer relations, and only wish to leave property to remoter relations if there are no nearer ones surviving. It is also assumed that after divorce or judicial separation people do not usually wish to benefit the divorced or separated spouse.

The old law

7.4 Prior to the coming into force of the Intestates' Estates Ordinance on 7 October 1971, the law which regulated both the devolution on intestacy of immovable property in Hong Kong (irrespective of the deceased's domicile), and the movable property of persons dying domiciled in Hong Kong, was determined by two entirely different systems of law, depending on whether the intestate was or was not Chinese. Further, there was no clear ruling as to who was included in the expression "Chinese" and it was not unknown for administrators of Eurasian intestates to opt for whichever system they preferred. The two systems were mutually exclusive. The system of distribution applicable to a Chinese intestate was the Chinese Tsing law. The system applicable to a non-Chinese intestate was the law of England as it was on 5 April 1843. This was basically the law under seventeenth century statutes, the Statutes of Distribution, with amendments made prior to that date.

The Intestates' Estates Ordinance 1971

7.5 Since 7 October 1971, subject to the rules of private international law which may be applicable to the estate in question, the distribution of intestates' estates in Hong Kong has been governed by the Ordinance which applies to all persons who die intestate regardless of nationality, race or culture. Apart from amendments made almost immediately after its coming into force in 1971 (to section 2(2)(b) and paragraph 2(2) of the Schedule by Ordinance 49 of 1971) the Ordinance has received little attention from the legislature. The only amendments of any significance that have been made since then are as follows: –

- (a) In 1972, section 4A was inserted to provide that judicially separated spouses were not entitled to claim on intestacy against the other's estate (section 33(3) Ordinance 39 of 1972); and
- (b) In 1983, the surviving spouse's "statutory legacy" under section 4(3) or (4) of \$25,000 or \$100,000 respectively, was increased to \$50,000 or \$200,000 (LN 220/1983).

The hypothetical testator

7.6 The Commission has, in reviewing the laws governing intestacy in Hong Kong, attempted to formulate the law as if standing in the shoes of a reasonable testator living in Hong Kong in the 1980s. We have formulated rules disposing of the estate of such a hypothetical testator in accordance with what we consider would reasonably have been his wishes, taking into account his circumstances and his dependants. No code can cater for every conceivable family situation or eventuality, and there will always be cases where injustice has resulted in peculiar circumstances. However, we believe that if the Ordinance were amended as recommended later, such injustices

would be reduced to a minimum. Where injustice does result in individual cases, a remedy may be afforded by the legislation relating to provision for deceased persons' family and dependants. This is dealt with in Part III of this report.

Chapter 8

Intestate succession: The rights of the surviving spouse

The existing rules governing the division of residuary estate

8.1 The transitional provisions in the Ordinance dealing with concubinage are considered separately later and, for the purposes of this chapter, the complications arising as a result of the deceased having entered into a union of concubinage before 7 October 1971 are not considered. Of course, as time passes, the transitional provisions will have less and less effect.

8.2 "Husband" and "wife" are defined in section 2(1) of the Ordinance as meaning in relation to a person a husband or wife of that person by a valid marriage. A surviving husband or wife is here referred to as a "surviving spouse". "Valid marriage" is defined in section 3 of the Ordinance as meaning a marriage under the Marriage Ordinance Cap. 181, a modern marriage validated by the Marriage Reform Ordinance Cap. 178, a customary marriage declared valid by the Marriage Reform Ordinance, or a marriage outside Hong Kong celebrated or contracted in accordance with the law of the place where the marriage was performed. A reference to a "relation" of an intestate means a parent, brother or sister, or issue¹ of a brother or sister of that intestate.

8.3 The rules governing the manner of distribution of an intestate's residuary estate (i.e. the net estate after all debts, funeral and administration expenses have been paid) are set out in section 4 of the Ordinance. The scheme is as follows: –

- (a) If the intestate leaves a surviving spouse and no issue or relation, that spouse is entitled to the whole of the residuary estate of the deceased absolutely (i.e. in its entirety and without condition)
- (b) If the intestate leaves a surviving spouse and issue, then the surviving spouse is entitled to \$50,000 plus interest at 5% p.a. from the date of death and one half of the rest of the residuary estate absolutely. The other half of the rest of the residuary estate is held on statutory trusts (i.e. upon trusts provided for under the Ordinance) for the issue.

¹ ISSUE - The issue of a person consists of a person's children, grandchildren and all other lineal descendants.

- (c) If the intestate leaves a surviving spouse but no issue and also leaves a relation, then the surviving spouse is entitled to \$200,000 plus interest at 5% p.a. from the date of death and one half of the rest of the residuary estate absolutely. The other half of the rest of the residuary estate is taken either by the parent or parents, or if there is no surviving parent, by the brothers and sisters of the intestate or their issue.
- (d) If the intestate leaves no surviving spouse but leaves issue, then the issue are entitled to the whole of the residuary estate to be held for them on statutory trusts.
- (e) If the intestate leaves no surviving spouse and no issue but leaves both parents, then the parents take the residuary estate absolutely.
- (f) If the intestate leaves no surviving spouse and no issue but one parent, then that parent takes the residuary estate absolutely.
- (g) If the intestate leave no surviving spouse, no issue and no parent, then the residuary estate goes to the intestate's brothers and sisters. If there are no brothers or sisters it goes to the intestate's grandparents. If there are no grandparents it goes to the brothers or sisters of a parent of the intestate. If there are no brothers or sisters of a parent of an intestate then, there being no further prescribed categories of relations, the estate passes to the Crown; but the Crown may provide for dependants, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision out of the property.

8.4 As the rules governing distribution under the Ordinance are somewhat complex, they are best shown in tabular form. An annotated table showing the distributive effects of the Ordinance was appended to an article entitled "Distribution under the Intestates' Estates Ordinance 1971" by B.S. McElney which appeared in the Hong Kong Law Journal in 1972 at page 135. The article is reproduced with kind permission of the author (the Subcommittee Chairman) and of the Journal, in Annexure 4.

Spouse entitled to purchase chattels but not matrimonial home

8.5 Where the surviving spouse does not take the whole of the residuary estate absolutely, section 7 of the Ordinance confers on a surviving spouse, within six months from the first grant of administration to the personal representatives, the right to require the personal representatives to appropriate the intestate's "personal chattels" (defined in section 2(1)) in or towards the satisfaction of all or part of the sum of \$50,000 or \$200,000, as

the case may be (the "statutory legacy"), and interest to which he or she may be entitled. Others entitled to share in the residuary estate, however, can object and in such a case the court must decide whether or not to prohibit the proposed appropriation. In effect, section 7 gives the surviving spouse the right to buy the intestate's personal chattels out of his or her relevant statutory legacy subject, of course, to other interested relatives not objecting.

8.6 The Ordinance contains no provisions enabling a surviving spouse to acquire the matrimonial home, whether by purchase or otherwise.

Present position unsatisfactory

8.7 We are in agreement with the basic structure of the present scheme of distribution to the various categories of relations provided in section 4 and summarised above. We consider, however, that the hypothetical testator would have treated his surviving spouse more generously than the present rules of distribution permit on an intestacy where the intestate also leaves issue or a relation surviving.

8.8 The statutory legacy to a surviving spouse is the key to the pattern of devolution set out in section 4 of the Ordinance. The amounts of the statutory legacy were fixed in 1971 at \$25,000 or \$100,000, depending on whether or not issue also survive the intestate. The power to raise these amounts, contained in the Ordinance, was exercised for the first time in 1983 when the amounts were doubled to \$50,000 or \$200,000 respectively. We consider that these amounts are still far too small.

8.9 Where a spouse and issue survive, the statutory legacy in England has generally been supposed to be related to the value of an average suburban home, the purpose being that the statutory legacy should extend at least to the value of the matrimonial home. We are of the view that a reasonable basis for calculating an appropriate level for the statutory legacy payable under the Ordinance would be to fix a sum sufficient to allow a surviving spouse in Hong Kong to purchase the average small matrimonial home. The present \$50,000 is obviously insufficient for this purpose.

8.10 Where a spouse and no issue survives but there are relations remaining, additional considerations apply. There, the rules of distribution should also reflect the reasonable expectations of other surviving members of the intestate's family. In particular, it may be thought appropriate that the statutory legacy there should not be so great as to result, where the estate is large, in a huge windfall to the surviving spouse and so indirectly to his or her family at the expense of the intestate's own family. Nonetheless, we consider the existing amount of \$200,000 to be far too small.

Recommendation: the statutory legacies

8.11 We recommend that the amount payable to a surviving spouse under section 4(3) of the Ordinance where issue survive the intestate, should be increased from \$50,000 to \$500,000.

8.12 The figure of \$500,000 recommended would be loosely related to the approximate value of the average small apartment in Hong Kong, so that the surviving spouse could normally expect to be able to buy the intestate's interest in such a matrimonial home with his or her statutory legacy. The right to have the matrimonial home so appropriated is discussed later.

8.13 The payment to the surviving spouse of \$500,000 will absorb the whole net estate of the intestate where the estate is small. As a consequence, there will be nothing left over for the children. It is the spouse who will have the responsibility of looking after the children following the death of the deceased. The surviving family would ordinarily prefer to remain in the matrimonial home and the statutory legacy scheme proposed is aimed at facilitating this. The alternative of setting the statutory legacy level lower would jeopardise the surviving family's prospects of purchasing and hence remaining in the matrimonial home. It is to be borne in mind, that to the extent the estate does go to the children, it will remain locked in trusts until they are of age, and only the interest (a relative pittance) would be available for the children's support.

8.14 We recommend that the amount payable to a surviving spouse under section 4(4) of the Ordinance, where no issue survive the intestate but there are relations of the intestate remaining, be increased from \$200,000 to \$1,000,000.

8.15 We also recommend that the amounts of the statutory legacies be reviewed at least once every five years. The Commission notes that despite inflation the statutory legacies have been raised on only one occasion.

8.16 To facilitate future changes of the amounts of the statutory legacies, and to make the meaning clear, we recommend that the present references to the amounts set out in section 4(12) of the Ordinance be omitted, so that the subsection would read –

"(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." (Clause 4 of the Bill at Annexure 7).

8.17 Similarly, for the purposes of clarity, we also recommend that –

(1) the amounts set out in section 6 of the Ordinance be omitted and replaced by a reference to 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". (Clause 6 to Bill at Annexure 7).

- (2) the amounts set out in section 8 of the Ordinance be omitted and replaced by a reference to the "net sum payable to a surviving husband or wife". (Clause 7 of the Bill).

8.18 Whilst it is the Commission's view that the recommended scheme of statutory legacies will cater for the majority of cases, in a few cases injustice may result from their application. This is an inevitable consequence of stipulating statutory legacy levels that apply across the board, thereby ensuring certainty. But certainty in the law must be tempered by justice in individual cases. We consider that the most appropriate mechanism for dealing with hard cases arising from the general application of intestacy provisions, including statutory legacy levels, is provided in the legislation relating to provision for deceased persons' families and dependants. This area of the law is dealt with below in Part III of this report. That legislation enables family members and other dependants to make application to a court for relief where reasonable provision has not been made by the deceased in his will or, where there is no will, by the law of intestacy. In our view this legislation will, if amended in accordance with our recommendations, best provide the flexibility necessary in this area of the law. Our only reservation relates to the fact that all litigation is expensive and the cost of an application would normally use up a larger proportion of a small estate than it would with a larger estate.

Personal chattels

8.19 In England and Wales where an intestate leaves issue or relations, and accordingly the surviving spouse does not take the whole of the residuary estate, the personal chattels of the intestate are taken by the surviving spouse absolutely. In Hong Kong, all that the surviving spouse has in such circumstances is the possibility of being permitted to buy them out of his or her statutory legacy. Experience shows that the distribution of personal chattels, and the possibility of their removal after death by family members, often lead to problems and sometimes family quarrels. To eliminate these problems most married testators tend to leave their personal chattels to their spouses and for this reason we consider it desirable that Hong Kong should follow the English legislation in respect of such personal chattels. If this were done, the household and other goods and personal effects that one could reasonably expect to be in or about a matrimonial home would be taken by the surviving spouse absolutely.

Recommendation: personal chattels

8.20 We recommend that where the intestate leaves a surviving spouse, whether or not issue or relations also remain, the "personal chattels" (as redefined later) should be taken by the surviving spouse absolutely as is

the rule in England and Wales. If these recommendations were implemented, it would mean that a surviving spouse would be entitled to the contents of the matrimonial home to the exclusion of all others and would ensure (with the other recommendation, if implemented, concerning the right of the surviving spouse to have the matrimonial home appropriated in satisfaction or part satisfaction of his or her statutory legacy) the minimum disruption to the surviving spouse.

8.21 The principal test for ascertaining whether an item is a "personal chattel" is whether it was located in the matrimonial home at the time of death. If the surviving spouse is to take the personal chattels absolutely, however, the expression needs to be redefined so that investments and business and professional items are excluded even if in the matrimonial home at the time. Any articles outside the definition which the surviving spouse or any other beneficiary might wish to take in kind could be appropriated by the personal representatives under the existing powers contained in section 68 of the Probate and Administration Ordinance Cap. 10.

8.22 We recommend that "personal chattels" in section 2(1) of the Ordinance be redefined accordingly (see clause 2 of the Bill at Annexure 7). It is a wide definition and would cover, for example, a valuable stamp or jade collection. But the possibility of such windfalls is in our view a necessary consequence of having to paint with a broad brush in this area. It should be noted, however, that the definition only includes chattels in any residence of the surviving spouse. We considered whether to extend the definition to chattels in homes other than the matrimonial home or homes so that, for example, a wife would be entitled to the chattels in the home which the deceased had shared with his concubine or mistress. In our view, the more restricted definition adopted in the Bill is to be preferred to such a wide definition.

8.23 To effect our recommendations concerning both the increase in statutory legacies and personal chattels, subsections 3 and 4 of section 4 will require amendment (see clause 4 of the Bill). It will be noted that the proposed new section 4(4) inserts references to siblings "of the whole blood" and the basis for these amendments is set out in para 10.6. Also, section 7 (right of surviving spouse to require personal chattels to be appropriated) will need to be repealed and we so recommend (see clause 6 of the Bill).

The matrimonial home

8.24 In England and Wales, under the Intestates' Estates Act 1952, a surviving spouse of an intestate has the right to acquire the interests of the intestate in a dwellinghouse in which the surviving spouse was resident at the time of the intestate's death, in satisfaction or part satisfaction of his or her interest in the intestate's estate or on making up the balance by a money payment. This seems to the Commission to be a fair provision. The present position in Hong Kong is that a surviving spouse has no such right, but the personal representatives have power to appropriate it to him or her under

section 68 of the Probate and Administration Ordinance Cap. 10. In our view, the lack of a spouse's right to acquire the matrimonial home is unfair. It is estimated that more than one third of all families in Hong Kong now own their own homes. It is possible that the reason why the Ordinance makes no provision for such a right is because, in 1971 when the Ordinance became law, the home owning proportion of the population was less significant. However, today it is clear that the proportion of home owners in the population at large is rising due, in part, to the Government's present policy of encouraging home ownership.

Recommendation: the matrimonial home

8.25 We recommend that where the intestate leaves a surviving spouse, whether or not issue or relations also remain, the surviving spouse should have the right to acquire the interests of the intestate in any premises in which the surviving spouse was resident at the time of the intestate's death, in satisfaction or part satisfaction of his or her statutory legacy or other interest in the intestate's estate, or on making up the balance by a money payment. Furthermore, we consider that to supplement the provisions of section 68 of the Probate and Administration Ordinance Cap. 10, it is desirable that the surviving spouse should have a right of appropriation of the matrimonial home and for the circumstances of and procedure for such appropriation to be clearly and unambiguously set out. If this recommendation and the one relating to personal chattels were implemented, we believe they would reduce so far as possible the major disruptive effects to domestic life that the death of a spouse can cause.

8.26 To effect this recommendation the following amendments to the Ordinance would be necessary –

- (1) The Schedule to the Ordinance to become Schedule 1 and a Schedule 2 to be added to follow the Second Schedule to the Intestates' Estates Act 1952, subject to the necessary amendments being made to make the same suitable for Hong Kong's circumstances (see clause 12 of the Bill at Annexure 7).
- (2) A new section 7 to be inserted along the lines of the relevant provision in the Intestates' Estates Act 1952 in England and Wales as follows –

"Rights 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 resident at the time of the intestate's death"
(Clause 6 of the Bill at Annexure 7).

Main features of the scheme set out in the new Schedule 2 include –

- (a) The personal representatives may appropriate the interest in the premises included in the residuary estate, either in or towards satisfaction of any interest of the surviving spouse in the estate of the intestate, or partly in satisfaction of such an interest and partly in return for a payment of money by the surviving spouse to the personal representatives. (In England and Wales there is no specific provision in the Schedule to this effect but the Court of Appeal decision in Re Phelps [1979] 3 All ER 373 made it clear that the power of appropriation thereunder can be exercised where the matrimonial home is worth more than the surviving spouse's statutory legacy, thereby making the transaction part appropriation and part sale.)
- (b) The scheme is not available where the interest comprises a tenancy determinable within two years of the intestate's death.
- (c) An election (i.e. a decision to seek appropriation) is not exercisable without leave of the court where the residence forms part of a building and the residuary estate comprises or includes an interest in the whole of the building, or where the residence was at the time of the intestate's death not used solely for domestic purposes.
- (d) An election must be exercised within 12 months of the first obtaining of probate or the grant of administration, during which period the personal representative may not dispose of the interest in the residence except in the course of administration owing to want of other assets.

Where surviving spouse acquires an interest under foreign law

8.27 In In re Collens [1986] 2 WLR 919 it was held that English immovable assets are to be regulated for the purposes of succession by the lex situs (the law of the place where an object is situated) rather than by the law of the domicile (the law of the country that a person treats as his permanent home and to which he has the closest legal attachment). The facts were that an intestate had died domiciled in Trinidad and Tobago. The deceased had estate there, other estate in Barbados and a small estate in England part of which consisted of immovable property. The High Court reluctantly concluded that the intestate's widow was entitled to the full "statutory legacy" under section 46(1) of the Administration of Estates Act 1925 as amended (the Hong Kong equivalent being section 4(3) and (4) of the Ordinance), despite her having already received \$1 million out of the deceased's estate in Trinidad and Tobago. We consider that in such circumstances, where estate is left in more than one jurisdiction, it would be fairer to the other members of the deceased's family if the surviving spouse were required to account for moneys received elsewhere against any interest

received under the intestacy or partial intestacy in Hong Kong in respect of immovable property. Two situations need to be covered: -

- (a) Where a person dies leaving immovable property outside Hong Kong; and
- (b) Where a person dies domiciled outside Hong Kong, leaving immovable property in Hong Kong.

8.28 We recommend that a provision be inserted in the Ordinance to negative the effect of the decision in In re Collens and deal with situations (a) and (b) (see clause 8 of the Bill at Annexure 7).

8.29 We had originally intended to recommend the insertion of a deeming provision in the Ordinance immediately to follow the new section 7, to alleviate the estate duty payable on the death of an intestate where the personal representative had appropriated to the surviving spouse any interest of the intestate in the matrimonial home. This would assimilate the estate duty position on an intestacy to that of a testate succession. The Financial Secretary, however, in his budget speech on 26 February 1986, proposed amending section 10A of the Estate Duty Ordinance Cap. 111 to counter the effects of the decision in LAU Yiu-sum v Commissioner of Inland Revenue (Estate duty appeal No. 1 of 1983). In that case a matrimonial home, which had been appropriated by the personal representatives to the surviving spouse under section 68 of the Probate and Administration Ordinance Cap. 10, was held not to pass on the death of the intestate to the surviving spouse, it accordingly fell outside the relief for estate duty provided by section 10A of the Estate Duty Ordinance Cap. 111. The Financial Secretary's proposal has been given effect by the Estate Duty (Amendment) Ordinance 1986.

Chapter 9

Intestate succession: "child or issue"

The present position

9.1 Concubinage is dealt with separately later and this chapter is not concerned with the complications that would arise where the intestate had entered into a union of concubinage before 7 October 1971 and there were children of that union.

9.2 Sections 2(2) and (3) of the Ordinance at present provide as follows –

"(2) References in this Ordinance to a child or issue of any person shall mean –

(a) a child of a valid marriage to which that person was a party;

(b) if that person is a female, a child of a valid marriage to which her last husband and another female were parties; and (Amended, 49 of 1971, s.2)

(c) a child adopted by that person –

(i) in pursuance of an adoption order made under the Adoption Ordinance ; or

(ii) by an adoption to which section 17 of the Adoption Ordinance applies.

(3) References in this Ordinance to a child or issue living at the death of any person include a child or issue en ventre sa mere¹ at the death."

9.3 Section 10(1) of the Legitimacy Ordinance Cap. 184 provides –

"10(1) Where, after the commencement of this Ordinance, the mother of an illegitimate child, such child not being a legitimated person, dies intestate as respects all or any of her property, and does not leave any legitimate issue her surviving, the illegitimate child, or, if he is dead, his issue, shall be entitled to take any

¹ "en ventre sa mere" means "in the womb of its mother" and refers to a child not yet born.

interest therein to which he or such issue would have been entitled if he had been born legitimate."

Present position unfair

9.4 We consider that the present provisions of section 2(2) of the Ordinance can give rise to anomalies and quite unexpected injustices. Some step-children are provided for, others are not (e.g. where a husband and wife are each in their second marriage, previous children of the husband are deemed to be his second wife's children but previous children of the wife are not deemed to be her second husband's children). Illegitimate persons are not within the scope of the cover provided by the Ordinance and they are only covered by the provisions of section 10(1) of the Legitimacy Ordinance Cap. 184 if the intestate is the mother and there are no legitimate issue surviving. An examination of various hypothetical cases will reveal how unfair the operation of the provisions of section 2(2) can be, even when they are supplemented by the provisions of section 10(1) of the Legitimacy Ordinance Cap. 184.

9.5 An informed and highly critical article entitled "Some Hazards of Intestacy" by Mr. W.K. Thomson, a former Registrar General of Hong Kong, showed some of the injustices which may result from these provisions. It was published in the South China Morning Post on 20 April 1976 under the pseudonym "Scipio". We are grateful to the author and the South China Morning Post for permission to reproduce from the article.

9.6 Following publication of his article, Mr. Thomson commented on section 2(2)(b) of the Ordinance, "I was very surprised that the question whether the children of a man by his first wife should in all cases be deemed to be his second wife's children on her death intestate was not taken up by women's organisations as a manifest injustice ... it seems to me that some amendment is clearly required in relation to the effect of the amendment made to section 2(2)(b) by the Intestates' Estates (Amendment) Ordinance 1971, which on the face of it can produce the ludicrous result described in the article at "case 6" (for "case 6" see the next para).

9.7 To demonstrate how "distinctly odd" some of the section 2(2) provisions were, Mr. Thomson set out in his article six cases all involving a woman who died intestate domiciled in Hong Kong. The cases are instructive of the possible operation of these provisions and two of the cases relating to "child or issue" are here set out: –

(Case 3)

"W, a spinster, marries H who has a year old daughter D by his former wife. W, who never has a child of her own, brings D up as if she were her own child. Twenty years later, H dies and after a decent interval W marries NH who has a son B aged 30

living in Australia. Soon after, both W and NH are killed in a car accident, W having survived NH by one hour.

B inherits W's estate to the exclusion of D, who as things turned out was disinherited by W's marriage to NH, since on that marriage NH became W's last husband and therefore section 2(2)(b) no longer applied to D."

(Case 6)

"W, a childless widow, marries H, who after a few years runs off with LM, the little minx next door. W gets a divorce, whereupon H marries LM and they have a child C. W dies intestate, leaving as her only relative her beloved sister S. Who was W's last husband? Without a doubt, H. Was C the child of a valid marriage between W's last husband and another female? Who can gainsay it? Then it is as clear as crystal that C is entitled to inherit the whole of W's estate to the exclusion of S."

9.8 Later in his article, however, Mr. Thomson argues that despite the apparently clear effect of the provisions of section 2(2)(b) of the Ordinance, a court would certainly do its utmost to place a less unjust interpretation on the provisions in the circumstances of a case like case 6.

9.9 Further, the provisions of section 2(2) of the Ordinance are unfair because by paragraph (c) a child adopted by an intestate in accordance with Chinese law and custom before 31 December 1972, and recognised as such in Hong Kong, is not recognized by the Ordinance as being a child of the intestate even though such an adoption is specifically preserved by the Adoption Ordinance Cap. 290. Section 25 of that Ordinance provides –

"25 (1) After the 31st December 1972, an adoption in Hong Kong may be effected only in accordance with this Ordinance.

(2) Subsection (1) shall not affect in any way the status or rights of a person adopted in Hong Kong under Chinese law and custom before the 31st December 1972."

Incidentally, the Adoption Ordinance makes no mention of the status of a child adopted under Chinese law and custom on the 31st December 1972.

9.10 The Commission's approach to the question of the inheritance rights of the illegitimate person has been influenced by the more enlightened community attitudes revealed by the 1985 local opinion survey referred to earlier. We have also been mindful of Article 26 of the International Covenant of Civil and Political Rights. This provides that the law should provide effective protection against discrimination on grounds including social origin or birth.

Recommended changes

9.11 We recommend that section 2 of the Ordinance be amended to correct these anomalies as follows –

- (1) Section 2(2) to be repealed. As this entails the repeal of section 2(2)(b), the outcome in Mr. Thompson's examples will no longer offend all concepts of fairness. Hence in case 3 D will inherit to the exclusion of B and in case 6 S will inherit to the exclusion of C.
- (2) A new section 2(2) to be inserted in the Ordinance along the lines of section 1 of the Family Law Reform Act 1987 (which is set out above in para 3.27 dealing with wills) providing that relationships be construed regardless of the concept of legitimacy. (See clause 2 of the Bill at Annexure 7, which is in identical terms to the English provision.)
- (3) An additional sub-paragraph to be added to paragraph (c) to provide for a child adopted in accordance with Chinese law and custom on or before 1 January 1973. (See clause 2 of the Bill).
- (4) That section 10(1) of the Legitimacy Ordinance Cap. 184 be repealed, as a consequence of our other recommendations (see clause 17 of the Bill).
- (5) That section 25(2) of the Adoption Ordinance Cap. 290 be amended by repealing "31 December 1972" and substituting "1 January 1973". (See clause 19 of Bill).

The illegitimate intestate

9.12 As the law stands at present, and subject to the other rules of distribution (for example, children take before parents, parents take before siblings etc.) the only persons who are entitled to the estate of an illegitimate person who dies intestate are –

- (1) the intestate's own children or issue under the normal provisions of the Ordinance, since the illegitimacy does not affect them;
- (2) the intestate's mother, under section 10(2) of the Legitimacy Ordinance Cap. 184, and
- (3) a brother or sister of the half blood of the intestate who has the same father as the intestate by virtue of the provisions of section 2(4) of the Ordinance.

9.13 For ease of reference, section 10(2) of the Legitimacy Ordinance Cap. 184 and section 2(4) of the Ordinance are set out below –

(1) Section 10(2) of the Legitimacy Ordinance –

"(2) Where, after the commencement of this Ordinance, an illegitimate child not being a legitimated person, dies intestate in respect of all or any of his property, his mother if surviving shall be entitled to take any interest therein to which she would have been entitled if the child had been born legitimate and she had been the only surviving parent."

(2) Section 2(4) of the Intestates' Estates Ordinance Cap. 73 –

"2(4) References in this Ordinance to a brother or sister of a person mean a brother or sister who is a child of the same father as that person."

Criticism of the present position

9.14 The natural father of an illegitimate child is not entitled to any part of the estate of an illegitimate child who dies intestate, even though he may have acknowledged the child and maintained the child generously throughout childhood. Only the mother is entitled even though she may have deserted the child at birth. Of course it might happen that a father abandons his illegitimate child at birth. But such a situation could also arise where the child was legitimate.

9.15 Brothers or sisters of the half blood of an illegitimate intestate who have the same mother as the intestate are not entitled, even though they may have formed one family and have all been brought up together by their mother.

9.16 Natural grandparents and uncles and aunts of an illegitimate intestate (who may have actually cared for the intestate as a child) take nothing on the death of an illegitimate person, even though there may be no closer relatives able to claim, with the result that the residuary estate of the intestate would be forfeited to the Crown (although the Crown may provide therefrom for dependants: see paragraph 8.3(g)).

9.17 In England and Wales, a corollary of the coming into force of the relevant provisions of the Family Law Reform Act 1969 equating the property rights of illegitimate persons with those of legitimate persons is that the parents of an illegitimate child who has died have both become entitled to take any interest in the estate of the child that they would have been entitled to take if the child had been born legitimate.

Recommended changes

9.18 We recommend that where an illegitimate child dies intestate, his illegitimacy should be irrelevant in determining the rights of relations to inherit from his estate. This is achieved by the amendment we have recommended to section 2(2). The only remaining significance of illegitimacy will be the presumption of death required to deal with the new position whereby an illegitimate intestate's father will now be entitled to inherit. As in many cases it will not be possible to trace the father, we recommend that the presumption be that an illegitimate person is not survived by his father. (See clause 3 of the Bill at Annexure 7).

Chapter 10

Intestate succession: "brother or sister"

Present position

10.1 Section 2(4) of the Ordinance provides: –

"2. (4) References in this Ordinance to a brother or sister of a person mean a brother or sister who is a child of the same father as that person."

10.2 The expression "brother or sister" is used in sections 4(2)(b), 4(4), 4(8) and 5(4) of the Ordinance.

10.3 The expression is only relevant in relation to "horizontal" inheritance, that is brothers or sisters (or their issue) becoming entitled on the death intestate of a brother or sister, and has no relevance to inheritance by children on the death of a parent.

10.4 In England and Wales, in equivalent provisions, the Administration of Estates Act 1925 specifies "brother or sister of the whole blood" (i.e. siblings sharing both the same father and mother). In Hong Kong the effect of section 2(4) of the Ordinance is to let in siblings of the half blood, but only on the father's side (i.e. siblings sharing only the same father). However, in England and Wales, in later provisions of the Act, brothers and sisters of the half blood are only entitled on an intestacy if the intestate leaves no husband or wife, issue, parent, or brother or sister of the whole blood. Further, uncles and aunts of an intestate (being brothers or sisters of the half blood of a parent of the intestate) become entitled only if there are no surviving uncles and aunts of the whole blood.

10.5 The present wording of section 2(4) allows brothers and sisters of the same father, whether children of the wife or a concubine in a common family according to Chinese custom, to succeed equally to the estate of a deceased sibling but, of course, at present the provision applies generally and is not confined to a Chinese customary family.

Recommendations

10.6 We note that in making the recommendations in para. 10.7 a departure is being made from the English position whereby children of the whole blood are preferred to children of the half blood. The departure caters for Chinese custom by deeming the children of the wife of a man and the

children of all his concubines to be brothers and sisters of the whole blood; so that the children of concubine A and the children of concubine B are deemed to be full brothers and sisters. This is to accommodate the local institution of concubinage. In other respects the recommendations follow the English position which is determined solely by the blood relationship.

10.7 The Commission recommends that –

- (1) Section 2(4) be repealed. (See clause 2 of the Bill at Annexure 7).
- (2) The expressions "brother or sister", "brothers or sisters" and "brothers and sisters" in sections 4(2)(b), 4(4), 4(8) and 5(4) of the Ordinance be amended to refer to such relationships of the whole blood (see clauses 4 and 5 of the Bill).
- (3) Section 4(8) of the Ordinance be amended to provide for brothers and sisters of the half blood immediately after the first sub-paragraph and for uncles and aunts being brothers or sisters of the half blood of a parent of the intestate in a last sub-paragraph to follow the existing last sub-paragraph (see clause 4 of the Bill).
- (4) There be a statutory provision to the effect that children of a man by his wife and concubines are to be regarded as brothers and sisters of the whole blood (see clause 4 of the Bill).

Chapter 11

Intestate succession: Concubinage

Present position

Concubinage

11.1 Concubinage is recognised under the Ordinance, but only if it was entered into before 7 October 1971. Transitional provisions which provide for such concubinage are contained in section 13 and the Schedule to the Ordinance. Under the transitional provisions, if the concubinage was entered into before 7 October 1971, the tsip or female partner, and the male partner, are given certain rights of entitlement on the intestacy of the other. Further, under the transitional provisions, a child of a union of such concubinage is regarded for the purposes of the Ordinance as a child of a valid marriage and can claim under the Ordinance, for example, on the intestacy of his or her father or mother, or on the intestacy of the kit fat (first wife or concubine who is not a mother of the father, or a brother or sister. The transitional provision of the Ordinance provides as follows –

"13. (1) The provisions of the Schedule shall have effect with regard to a union of concubinage entered before the appointed day under the Marriage Reform Ordinance.

(2) In this section and in the Schedule, 'union of concubinage', means a union of concubinage, entered by a male partner and a female partner before the appointed day under the Marriage Reform Ordinance, 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."

11.2 It will be noted from the Schedule to the Ordinance that –

- (1) A child of a union of concubinage is regarded for the purposes of the Ordinance as a child of a valid marriage (paragraph 2(1)).
- (2) The reference in section 2(2)(b) to "husband" is to be construed as including a reference to the male partner of a union of concubinage (paragraph 2(2)).
- (3) The Ordinance as a whole is made to apply to a party to a union of concubinage (paragraph 3).

- (4) Benefits given to a tsip or a male partner of a union of concubinage on the death of the other are generally at the expense of the interests of a surviving spouse, issue or other relatives (paragraph 4).
- (5) The entitlement of a tsip to a life interest in part of the residuary estate of a deceased male partner ceases if she marries or commits an act of sexual intercourse (paragraph 4(12)).

Criticism of the present position

11.3 We consider that the concubinage transitional provisions are unjust in that –

- (a) certain children of the union, even if totally dependent on the deceased prior to death, may be unable to claim;
- (b) to require maintenance for a tsip to cease if she commits an act of sexual intercourse unfairly differentiates between a surviving spouse and a surviving tsip; and
- (c) from an evidentiary viewpoint, the need for a tsip to show, under section 13(2) of the Ordinance, that she had been accepted by the wife as the husband's concubine and had been recognised as such by the husband's family generally, may be extremely difficult in the face of a hostile wife and family wishing to secure all the benefits for themselves.
- (d) To compensate for the loss of section 2(4) a deeming provision should be inserted as to brothers and sisters as indicated in our recommendation at para. 10.7.

(Note: the Law Society considered that the entitlement of tsips under the Schedule should be increased. The sub-committee was of the view that the suggested increase is not what would have been agreed to by the intestate. Nevertheless, the sub-committee agreed with the Law Society's related suggestion that the tsip should be given a right to apply to the court for capitalisation of her life interest (i.e. the payment of a lump sum instead of income for life.))

Recommendations

11.4 We recommend that –

- (1) section 13 be amended to provide that the female partner of a union of concubinage entered into before 7 October 1971 is presumed to have been accepted as such by the male partner's wife and family (see clause 10 of the Bill at Annexure 7).

- (2) A similar presumption be added to section 14(2) of the Legitimacy Ordinance Cap 184 (see clause 18 of the Bill).
- (3) The words "or commits an act of sexual intercourse" be removed from paragraph 4(12) in Schedule 1. (See clause 11(g)).
- (4) A tsip or male partner should be given a right to have his or her life interest redeemed. (See clause 11 of the Bill).

Concubines and children

11.5 In paragraph 9.11 we recommended that section 2(2)(b) be repealed. That provides that "child or issue" of a female means "a child of a valid marriage to which her last husband and another female were parties". Examples were given of the unjust consequences that flow from the provision where concubinage is not involved. The situation is different, however, where concubinage is involved. The present position is that all the children of a man by his wife and his concubines are treated under the Ordinance as the children of his wife and of the concubines. On the death of the man, his wife, or any of the concubines, each of the children are considered children of the deceased. This follows from section 2(2)(b) together with paragraph 2 of the Schedule which provides that –

- (a) a child of a union of concubinage is regarded as the child of a valid marriage; and
- (b) the reference in section 2(2)(b) to "husband" includes a reference to the male partner of a union of concubinage.

We recommend that the present position be preserved as regards concubinage. As section 2(2) will be repealed if our recommendation on Schedule 1 is accepted, we recommend provision be inserted in Schedule 1 to the effect that all children of a male partner of a union of concubinage whether begotten of the wife or any tsip of the male partner shall form a common family for the purposes of the Ordinance. All such children shall accordingly be deemed children of the wife and every such tsip (see clause 11 of the Bill).

11.6 Upon the death of the children of a man by his wife, and his concubines, only the natural father and mother are presently regarded as parents of the deceased. We recommend that no change be made concerning this.

11.7 Catering for the institution of concubinage complicates this area of the law but the position can be summarised as follows: the adoption of the above recommendations will have the result that for the purposes of succession to the estates of a man, his wife and concubines, all the children of the man by his wife and concubines are regarded as the children of the

man, his wife and each of the concubines. This will mean that the children will benefit on the intestacy of any of those people, but not vice versa. On the death of one of the children, only his natural parents will benefit as parents, but all of the other children will benefit as brothers and sisters of the whole blood.

Concubines and siblings

11.8 This is discussed in paragraphs 10.5 – 10.7.

Chapter 12

Intestate succession: Miscellaneous matters

New Territories land

Chinese customary law

12.1 The Intestates' Estates Ordinance replaced the old rules of devolution on intestacy, except in respect of land in the New Territories that has not been exempted from Part II of the New Territories Ordinance. The Chinese customary, or Tsing, law (in addition to the Statutes of Distribution) is therefore preserved in respect of such land.

12.2 The Chinese customary law was essentially aimed at keeping the family property in the male line; descent was seldom through the female line. If there was no son of the deceased, the widow was under an obligation to adopt a son to have the same surname and to maintain the male line. The widow's beneficial rights were confined to maintenance during her lifetime and would cease on her remarriage. The sons were also entitled to maintenance, but daughters were entitled to maintenance only until marriage, whereupon they were entitled to a dowry.

12.3 It was the practice in the New Territories to settle a deceased's property in such a way as to provide maintenance and support for the male descendants for the time being of a common ancestor, as well as to provide a fund for the worship of that common ancestor. These family landholdings are generally called tso or tong.

12.4 Chinese customary law also recognised a relationship between males in the family and secondary wives, with the woman being referred to as a tsip or concubine. The tsip has rights within the family structure and in respect of the family property. Her children (shu-tzu) are regarded as legitimate as the children (ti-tzu) of the actual wife. The status of a concubine or tsip is acquired by the man having the intention to take the woman as a tsip, acceptance of the tsip by the actual wife, and recognition by the family.

12.5 Section 11 of the Ordinance provides –

"11. (1) Nothing in this Ordinance shall be taken to affect the application of the provisions of Part II of the New Territories Ordinance to land to which Part II of that Ordinance applies and which has not been exempted by the Governor under subsection (2) or (3) of section 7 of that Ordinance from the provisions of Part II of that Ordinance and the said provisions

shall continue to apply to such land to the same extent and with the same effect as if this Ordinance had not been enacted.

(2) *Land to which this section applies shall continue to devolve upon intestacy in like manner as it would have devolved if this Ordinance had not been passed.*

(3) *In this section 'land' has the meaning attaching to it under section 2 of the New Territories Ordinance."*

12.6 The amount of land in the New Territories which is still not exempted from Part II of the New Territories Ordinance is now much less than previously. It is also true that the value of such land has risen tremendously since the Intestates' Estates Ordinance was passed in 1971. We consider it difficult to justify in this modern age the preservation of two systems of inheritance tied to a particular class of assets (namely land to which Part II of the New Territories Ordinance still applies) of a deceased intestate within one jurisdiction. Further, the cutting out of the daughters and the restriction on the rights of a widow of a deceased Chinese intestate are considered by us to be wrong in principle and out of touch with modern thought in Hong Kong. Also it is thought that the retention may be at variance with Article 26 of the International Covenant of Civil and Political Rights which provides that all persons are equal before the law. Furthermore, the entire statutory structure of family law in Hong Kong was changed in 1971 (e.g. adoptions) and the retention of the pre-1971 Hong Kong position which does not obtain in China any longer is an increasing anomaly. We recommend that section 11 of the Ordinance be repealed in its entirety.

12.7 It is probable that at this stage in Hong Kong's history, most of the land involved is held in the names of a clan, family, Tong or Tso, the rules of which normally set out in quite considerable detail how such land should devolve on the death of a member of the clan, family, Tong or Tso in question. This frequently provides for the male offspring inheriting per capita or equally per stirpes¹ and, occasionally, the rules provide for both systems of distribution governing certain percentages of the devolution of the property in question. We believe, however, that in some incidences regard has to be had under the rules of the clan, family, Tong or Tso to the general intestacy law.

12.8 We also consider that it would be desirable to make it clear that (where the rules of a clan, family, Tong or Tso lay down what is to happen to the clan, family, Tong or Tso property in the event of the death of a member) such rules will be given effect to and will not be affected by this Ordinance or the Wills Ordinance, unless such rules themselves incorporate reference to those Ordinances, either expressly or by implication.

12.9 Political considerations might militate against the total repeal of section 11, despite our recommendation concerning the preservation of the rules for inheritance laid down in the rules of the clan, family, Tong or Tso in

¹ defined in para 3.30.

question. Consideration would have to be given to Annex III paragraph 2 of the Joint Declaration. This confers benefits regarding rental payments in respect of land, including New Territories land. Should our recommendation that section 11 be repealed not be followed, we recommend the very least that should be done is that the section be amended, so that its operation is limited only to non-exempted land in the New Territories which is registered in the name of or held for the benefit of a Chinese clan, family, Tong or Tso. Land registered or held otherwise would accordingly devolve upon intestacy under the normal provisions of the Ordinance. There would in this event also have to be consequential amendments to the relevant sections in Part II of the New Territories Ordinance, so that a Tso is expressly included in the expression "clan, family or Tong" to reflect long established practice. We note, however, that as pointed out by Dr. James Hayes, formerly of the City and New Territories Administration, other institutions, e.g. Wui, might also be included therefore the change should not be made in isolation.

Statutory Trusts

12.10 Section 5 of the Ordinance makes provision for trusts in favour of issue and other classes of relatives of the intestate. Section 5(5) provides –

"(5) Where the trusts in favour of any class of relatives of the intestate, other than issue of the intestate, fail by reason of no member of that class attaining an absolutely vested interest, the residuary estate of the intestate and the income thereof and all statutory accumulations, if any, of the income thereof, or so much thereof as may not have been paid or applied under any power affecting the same, shall, by virtue of subsections (2) and (3) of this section, go, devolve and be held under the provisions of this Ordinance as if the intestate had died without leaving any member of that class, or issue of any member of that class, living at the death of the intestate."

12.11 This provision derives from the Intestates Estates Act 1952. It was criticised in Re Lockwood [1957] 3 All E R 520 as creating results which were "capricious and absurd". For example, if no uncle or aunt of the whole blood attained a vested interest but an uncle or aunt of the half blood did, then a strict construction of the provision would result in all cousins of the whole blood being excluded and all cousins of the half blood would succeed in their preference. The Family Provision Act 1966 repealed the provision in England and Wales. We recommend that section 5(5) of the Ordinance be similarly repealed. (See clause 5 of the Bill at Annexure 7)

Protection of trustees and personal representatives

12.12 It will be apparent that the duties of personal representatives and trustees under the Ordinance are many. Their prompt and proper

discharge is vital, but the liability of personal representatives is presently governed by the common law rules of negligence. In our view these rules are uncertain in scope and potentially onerous in their application. Our particular concern in this regard arises from the reforms we have recommended to equate the property rights of illegitimate persons with those of legitimate persons. It will be apparent that a personal representative is more likely to encounter difficulties in ascertaining whether there are illegitimate persons entitled to an estate than will be the case with legitimate persons. To help ensure that a personal representative's recognition of these difficulties does not unduly inhibit the prompt discharge of his duties we recommend that a new provision be added to the Probate and Administration Ordinance carefully delimiting his liability. (See clause 13 of the Bill at Annexure 7).

12.13 The presumption concerning persons whose parents were not married (referred to in paragraph 9.18) is also relevant in this context. It will absolve a personal representative from the obligation to inquire whether an illegitimate intestate is survived by his father, should there be no evidence suggesting that this is the case.

The Crown

12.14 Section 4(9) of the Ordinance provides –

"(9) In default of any person taking an absolute interest under the foregoing provisions, the residuary estate of the intestate shall belong to the Crown as bona vacantia and the Crown may (without prejudice to any other powers), out of the whole of any part of the property devolving on it, provide for dependants, whether kindred or not, of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision."

12.15 We recommend, that subsection (9) of section 4 of the Ordinance be amended so that the reference to "the Crown" is removed and replaced with another suitable expression. (Note: the Registrar General has suggested "the Financial Secretary Incorporated" which is the expression for the Hong Kong Government's statutory property holding agency.)

PART III – PROVISION FOR DECEASED PERSONS' FAMILIES AND DEPENDANTS

Chapter 13

Deceased's Family Maintenance Ordinance

Introduction

History

13.1 The principle of freedom of testamentary disposition was a feature of English law. In action, however, this principle would sometimes result in a testator avoiding his duty to his dependants, by failing to make adequate provision for them after his death. This unsatisfactory situation eventually led to statutory reform. The Inheritance (Family Provision) Act of 1938 ("the 1938 Act") restricted the testator's right to arbitrarily determine how his estate would be distributed. It gave jurisdiction to the courts, where applications were made by certain dependants, to interfere with the testator's expressed testamentary intentions in cases where a reasonable provision had not been made for the dependant's maintenance. Initially the court could only exercise its power where the deceased had left a will. Later reform extended this power to cases where the deceased had died wholly or partially intestate.

13.2 In 1975 the Act was repealed in England and replaced by the Inheritance (Provision for Family and Dependants) Act 1975 ("the 1975 Act"). This later English Act was generally much more generous in its provisions than the 1938 Act. It expanded the classes of those entitled to apply for provision, increased the level of provision which might be made for the surviving spouse and widened generally the forms of relief which could be granted by the courts. It also extended the scope of the property available from which a court order might be met.

Need for reform in Hong Kong

13.3 Hong Kong's Deceased's Family Maintenance Ordinance Cap. 129 ("the DFMO" or "the Ordinance") is based largely upon the English Act of 1938.

13.4 The Registrar of the Supreme Court has advised the sub-committee that no statistics are kept of applications under the DFMO but that both the current clerk of court and his predecessor had no recollection of any applications having been made. It would seem that if the Ordinance is used

at all, it is used very sparingly. The Commission believes, however, that its little use is no indication of its lack of importance. The very existence of the Ordinance, even in its present form, ensures that some justice may be done. It guides would-be litigants in making deeds of family arrangement and acts as an ultimate sanction against a reluctant party.

13.5 The Commission considers nonetheless that many of the present provisions of the DFMO are anomalous. These difficulties are addressed in the following chapters of this report. If our views are accepted and our recommendations adopted, this would entail substantial revision of the present principles of family maintenance law. We therefore recommend that, in order to give effect to the findings in this report, the DFMO be repealed and replaced by a new Ordinance similar to the 1975 Act. The draft Inheritance (Provision for Family and Dependants) Bill ("the Bill") is therefore presented with this report (See Annexure 8).

Chapter 14

Demo: Those entitled to apply - present position and recommendations

Definition of "dependant"

14.1 Where a proper application has been made, the DFMO gives the court a discretion to make reasonable provision for the maintenance of a deceased's "dependant" out of the "net estate", where no such reasonable provision has been made by the deceased in his will or, where there is no will, by the law of intestacy, or by a combination of both the will and the law of intestacy if the deceased died partially intestate (section 4(1)). The application to the court must be made by or on behalf of a "dependant". "Net estate" is defined in section 2(2) of the DFMO and means in effect what is left over, other than certain land in the New Territories, after all debts, duties, funeral and administration expenses have been paid.

14.2 As stated above, the only persons able to benefit under the DFMO are "dependants". The Ordinance limits these persons, under section 2, to –

- "(a) a wife or husband of the deceased by a valid marriage;*
- (b) a daughter of the deceased by a valid marriage who has not been married;*
- (c) an infant son of the deceased by a valid marriage;*
- (d) a son of the deceased by a valid marriage who is, by reason of some mental or physical disability, incapable of maintaining himself; and*
- (e) a parent of the deceased substantially maintained by him immediately before his death."*

14.3 Section 17 and the Schedule to the Ordinance set out the transitional provisions relating to concubinage. "Dependant", as defined in the Schedule, means –

- "(a) a tsip or male partner of the deceased by a union of concubinage;*

- (b) *a daughter of the deceased by such a union who has not been married;*
- (c) *an infant son of the deceased by such a union;*
- (d) *a son of the deceased by such a union who is, by reason of some mental or physical disability, incapable of maintaining himself; and*
- (e) *a parent of the deceased substantially maintained by him immediately before his death."*

14.4 The classes of individuals able to claim as a "dependant" under the Ordinance are very limited and do not permit a person outside those classes, who also may have been dependent on the deceased, to make a claim. De facto spouses, illegitimate children, brothers or sisters who may have cared for the deceased in his or her later years and may have been actually dependent on the deceased, and certain legitimate sons and daughters are, accordingly, all outside the classes of persons permitted to claim. At present, adult children have no right to apply unless they are female and unmarried, or male and have some mental or physical disability preventing self-maintenance. The Sub-committee notes that the ultimate decision on whether a person shall be made an award under the Ordinance depends on the court considering all the circumstances of a case and deciding whether to exercise its discretion to make an award in those particular circumstances. Consequently, a right to make a claim merely confers a right to apply, not a right to receive, and we consider that there would be no harm (indeed a great deal of present injustice would be remedied) if the classes of persons able to make a claim were to be widened. Furthermore, we recommend that the use of the term "dependant" to describe those who may apply under the Ordinance, should be deleted. In its place, the particular classes of persons who may apply for family provision should be set out. (See clause 3(1) of the Bill at Annexure 8.)

Surviving spouse, former spouse, concubine and male partner

14.5 We recommend that the specific classes of "wife or husband of the deceased", "former husband or former wife of the deceased who has not remarried" and "tsip or male partner of the deceased by a union of concubinage" be included within the classes of persons entitled to apply for provision. (See clause 3(1) of the Bill.)

14.6 The Ordinance does not contain a definition of either "husband" or "wife". We recommend the inclusion of a definition of " 'husband' or 'wife' in relation to the deceased." This definition would extend to cover not only a surviving spouse of a valid marriage, but also a person who, in good faith, entered into a void marriage with the deceased which had not been dissolved or annulled. (See clause 2(1) of the Bill.)

14.7 A valid marriage is defined in section 3 of the DFMO as meaning a marriage under the Marriage Ordinance Cap. 181, a modern marriage validated by the Marriage Reform Ordinance Cap. 178, a customary marriage declared valid by the Marriage Reform Ordinance, or a marriage outside Hong Kong celebrated or contracted in accordance with the law of the place where the marriage was performed. We recommend that this definition of "valid marriage" be retained. (See clause 2(1) of the Bill.)

14.8 Under the present matrimonial proceedings legislation, a former spouse or judicially separated spouse who was receiving maintenance from the deceased prior to his death, can apply for the maintenance order to continue against the deceased's estate after his death. However, in the case where a former spouse or judicially separated spouse of the deceased has commenced an application for maintenance, but the death of the deceased has supervened, the former or separated spouse may be left without further recourse to seek financial provision. In order both to further unify the law of deceased family maintenance and to correct the anomaly stated above, we recommend that a former spouse (which would include also a judicially separated spouse) who has not remarried be added to the classes of persons entitled to apply for provision under the Bill (see clause 3(1) of the Bill at Annexure 8).

14.9 Concubinage is recognised under the Ordinance, but only if the union was entered into before 7 October 1971. Section 17(2) defines "union of concubinage" as a union of a male partner and a female partner under which 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. Further, "party to a union of concubinage" is defined in the Schedule to mean a tsip or a male partner of such a union and "tsip" is defined to mean the female partner of a union of concubinage. We recommend the repeal of the transitional provisions in the Ordinance which deal with concubinage, comprising section 17 and the Schedule, except for the meanings ascribed to the terms "tsip" and "union of concubinage". (See clause 2(1) of the Bill.) The class of "a tsip or male partner of the deceased by a union of concubinage" should be added to the list of classes of persons entitled to apply. (See clause 3(1) of the Bill.)

Parent of the deceased

14.10 The DFMO presently provides that a parent of the deceased may apply if "substantially maintained by him immediately before his death" (section 2(1) of the Ordinance). We recommend that these qualifications on the parent's right to apply be removed. (See clause 3(1) of the Bill.)

Child of the deceased

14.11 Under the DFMO, the only children of the deceased who may apply are a daughter by a valid marriage or a recognised union of concubinage who has not been married, a son by a valid marriage or a recognised union of concubinage who is either an infant or is incapable of maintaining himself because of some mental or physical disability (section 2(1) and the Schedule).

14.12 "Son" and "daughter", respectively, are defined in the section 2(1) of the DFMO as –

- "(a) a male or female child of a valid marriage to which the deceased was a party;*
- (b) a male or female child adopted by the deceased –*
 - (i) in pursuance of an adoption order made under the Adoption Ordinance; or*
 - (ii) by an adoption to which section 17 of the Adoption Ordinance applies;*
- (c) a male or female child of the deceased by a valid marriage en ventre sa mere at the time of the death of the deceased."*

[Note: "en ventre sa mere" means "in the womb of its mother" and refers to a child not yet born.]

The Commission feels that these provisions relating to children of the deceased are anomalous in several respects.

14.13 By virtue of the definition of "son" and "daughter", a child adopted by the deceased in accordance with Chinese law and custom before 31 December 1972, and recognised as such in Hong Kong, is not recognised by the Ordinance as being a son or daughter of the deceased even though such an adoption is specifically preserved by the Adoption Ordinance Cap. 290. Section 25 of that Ordinance provides –

"25 (1) After the 31st December 1972, an adoption in Hong Kong may be effected only in accordance with this Ordinance.

(2) Subsection (1) shall not affect in any way the status or rights of a person adopted in Hong Kong under Chinese law and custom before the 31st December 1972."

As was mentioned in Part 1 of this report, the Adoption Ordinance makes no mention of the status of a child adopted under Chinese law and custom on 31 December 1972.

14.14 Only a child of a valid marriage or a recognised union of concubinage has the right to apply for provision. Illegitimate children are therefore excluded, even though they may have been totally dependent on the deceased prior to his death.

14.15 A child who is not the deceased's own or adopted child but was nonetheless considered a "child of the family", has no right to claim under the present family provision law. Thus, for example, if a man accepted full responsibility for his wife's children from a former marriage but he never formally adopted them, they will have no rights to family maintenance against his estate after his death.

14.16 Adult children, other than daughters who have never been married and incapacitated sons, have no right to apply, despite their parent-child relationship with the deceased.

14.17 We recommend that the existing provisions in the DFMO which set out the rights of children of the deceased to apply, be repealed. We recommend that they should be replaced by less restrictive provisions which do not preclude applications by adopted children, illegitimate children, adult children and "children of the family". (See clause 3(1) and the definition of "child" in clause 2(1) of the Bill at Annexure 8).

Other "dependant"

14.18 As emphasised in the foregoing paragraphs, the DFMO places strict limits on those who may apply for provision, even within the deceased's immediate family. What of other persons not within this group who, nonetheless, may have been actually dependent upon the deceased at the time of his death? Should the law enforce after his death what may have been a moral, but not a legal obligation assumed by the deceased during his lifetime?

14.19 The 1975 Act introduced into England and Wales a new provision which allowed "any person" (other than one of those discussed above) who was being maintained, wholly or partly, by the deceased immediately prior to his death, to apply for provision under the Act. This was undoubtedly one of the most controversial changes introduced by the legislation. In particular, it opened the door to applications for maintenance by de facto spouses against the deceased's estate. (Consider also in Hong Kong the case of a family servant who is kept on into old age. She may have looked after the deceased since his infancy.) An argument in favour of the extension is that the deceased's failure to make provision may well have been unintentional. An order for family provision in such cases therefore would be doing for the deceased what he might reasonably be assumed to have

intended himself. In any event, the provision grants a right to apply only, not a right to receive maintenance. The applicant of course would need to justify the claim to the court's satisfaction.

14.20 Having given consideration to the various implications of this issue, we are of the view that a provision similar to that contained in the 1975 Act should be introduced into Hong Kong. We therefore recommend the inclusion of a new class of person entitled to apply, namely "any person [not being a person already included] who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased." (See clause 3(1) of the Bill.)

Chapter 15

DFMO: Jurisdiction and court's powers Present position and recommendations

Jurisdiction

15.1 The jurisdiction of the court to make orders under the DFMO is established by section 9(1) of the Ordinance which provides –

"9.(1) If a deceased person dies leaving net estate situate in the Colony such net estate shall, whether the deceased at the time of his death was domiciled in the Colony or outside the Colony, be liable in accordance with the provisions of this Ordinance for the payment of any provision for maintenance ordered to be made under this Ordinance out of the net estate of the deceased as if the deceased at the time of his death had been domiciled in the Colony."

The present basis for jurisdiction therefore is that the deceased, regardless of his or her domicile, died leaving "net estate situate in the Colony". (It should be noted that the question of domicile has implications for the treatment of the type of property left by the deceased. Under the general rule of conflict of laws, inheritance of "movables", or personal property, is determined by the laws of the last domicile of the deceased. Inheritance of "immovables", or real property, falls by contrast under the lex situs, the particular law of the property's location.)

15.2 The Commission recommends that the bases of the court's jurisdiction be set out more clearly – one head being simply that the deceased died domiciled in Hong Kong, the other specifying that the deceased has been ordinarily resident here at any time within the three years immediately prior to his death, and that he had died leaving net estate in Hong Kong. (See clause 3(1) of the Bill at Annexure 8.)

Powers of the court to make orders

15.3 The DFMO provides that once jurisdiction has been established under section 9(1), the court's powers under section 4(1) may be exercised –

"4.(1) Where, after the commencement of this Ordinance, a person dies leaving a dependant and the court on application made by or on behalf of that dependant is of opinion 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 provision for the maintenance of that dependant, the court may order that such reasonable provision as the court thinks fit shall, subject to such conditions or restrictions, if any, as the court may impose, be made out of the deceased's net estate for the maintenance of that dependant:

Provided that no application shall be made to the court by or on behalf of any person in any case where the disposition of the deceased's estate effected as aforesaid is such that the surviving spouse is entitled to not less than two-thirds of the income of the net estate and where the only other dependant or dependants, if any, is or are a child or children of the surviving spouse."

15.4 The court may order the maintenance to be paid to the applicant by way of periodical payments, or a lump sum or both (section 4(2), (3) and (4)). It will be noted however, that under section 4(1) even a surviving spouse is limited to an application for maintenance only. The provision of a capital sum, except for maintenance purposes, is not possible under the Ordinance.

15.5 The position under the 1975 Act is that the court can order such financial provision as it would be reasonable in all the circumstances of the case for the spouse to receive, whether or not that provision is required for his or her maintenance (section 1(2) of the Act). This reflects the current opinion that, in the case of a surviving spouse, family provision law should be similar in effect to the matrimonial proceedings legislation. It has been recognised that the circumstances of the applicants in these two types of proceedings may differ. Where a marriage ends through judicial separation and divorce, an applicant in matrimonial proceedings is more likely to require the court to intervene to ensure that the estranged spouse fulfils his obligations to provide for the applicant. In contrast, where the marriage has been ended by the death of one of the spouses, the deceased would have, in the usual case, fulfilled his obligations to his family, either by will or under the intestacy provisions. Taking family maintenance proceedings would rarely be required. Nonetheless, the Commission still prefers to take the English approach of treating both types of spousal applications for maintenance as similar. We therefore recommend that a definition of "reasonable financial provision" be introduced which recognises the special standard applying in applications by spouses. (See clause 3(2) of the Bill at Annexure 8.)

15.6 We feel that the standard of provision available to divorced and judicially separated spouses should in most cases be less than that applicable to a surviving spouse. The rationale for the distinction is that a former spouse or a judicially separated spouse may apply for and receive provision during the deceased's lifetime under the Matrimonial Causes Ordinance Cap 179. In cases where no such grant of matrimonial provision has been made (for example, where the deceased's death supervened upon the matrimonial

proceedings action), we recommend that the court be empowered to treat the application of the former or judicially separated spouse as if it were an application by a surviving spouse. Accordingly, a higher standard of provision, than in the usual case, may be awarded. (See clause 16 of the Bill at Annexure 8.)

15.7 We recommend that the powers of the court in family provision proceedings be extended, as they have been in the 1975 Act, so that they are similar to the court's powers to order financial provision in matrimonial proceedings. In particular, we recommend that the court be given the additional powers to –

- order the transfer or settlement of property which forms part of the deceased's estate for the benefit of the applicant (see clause 4(1)(c) and (d) of the Bill)
- order that assets forming part of the estate be applied in acquiring (other) property or rights for the benefit of the applicant or for settlement of his benefit (see clause 4(1)(e) of the Bill)
- order such consequential and supplemental provisions as the court thinks necessary to give effect to its order (including the varying of the disposition of the deceased's estate by his will or upon his intestacy or a combination of both and the conferring of wide powers on trustees of any property to be settled under the orders of the court). (See clause 4(4) of the Bill.)

Matters to be considered by the court

15.8 Under section 7 of the DFMO, the court is to have regard to the following matters when considering a family maintenance application –

- (a) any past, present or future capital of the dependant to whom the application relates and to any income of that dependant from any source
- (b) the conduct of that dependant in relation to the deceased and otherwise
- (c) the interests of other dependants
- (d) any other matter or thing which, in the circumstances of the case, the court may consider relevant or material in relation to that dependant or to persons interested in the estate of the deceased, or otherwise.

The court is also to have regard to the deceased's reasons (insofar as they are ascertainable) for his disposition. (This particular provision was dropped in toto from the English legislation, as the English Law Commission felt that

the deceased's reasons were not matters to be considered merely because they were his reasons, as the provision seems to imply, but on their merits. If they were not based on truth but on some misapprehension or absence of full knowledge, then weight should not be given to them. The English Law Commission felt that their equivalent to section 7(1)(d) was sufficient to cover consideration of the deceased's reasons, if they were relevant. In Hong Kong, the Commission is of the view that some express reference to the statements of the deceased should nonetheless remain within the legislation.) In relation to the estate property, the court is directed not to order any provision for maintenance which would require an "improvident" realisation of the assets of the estate.

15.9 The Commission recommends the adoption of a new provision detailing the matters for consideration by the court and that these be expressed to include –

- the present or foreseeable financial resources and needs of the particular applicant and any other applicants or beneficiaries of the deceased's estate
- the obligations and responsibilities which the deceased had towards an applicant for family provision or a beneficiary of the estate
- the size and nature of the deceased's net estate
- any other relevant matter, including the conduct of any persons involved
- any statement of the deceased which is evidence of the matters of which the court is to take account
- (where the applicant was a spouse, former spouse, tsip or male partner of the deceased) the age of the applicant, duration of the marriage or union of concubinage, the applicant's contribution to the welfare of the family of the deceased, and, where the applicant was the spouse of the deceased, what provision the applicant might have expected had the marriage ended in divorce, not on the death of the deceased
- (where the applicant was a child of, or treated as a child of, the deceased) the manner in which the applicant was, or might have expected to be, educated or trained, and, where the deceased was not the biological parent, the extent to which the deceased had assumed and discharged any responsibility for the applicant's maintenance, and also the liability of anyone else to maintain the applicant
- (where the applicant was a parent of the deceased) the age of the applicant and any contribution (in money or money's worth)

which the deceased, immediately prior to his death, may have made towards the needs of the applicant

- (where the applicant was someone outside the family who was being maintained by the deceased) the basis upon which the deceased had assumed responsibility for maintenance and the length of time involved.

(See clause 5 of the Bill at Annexure 8.)

Section 4(1) proviso

15.10 Referring back to the text of section 4(1) of the DFMO, it should be noted that the 1975 Act does not establish the same "fail safe mechanism" for testators as is contained in the proviso to section 4(1) of the Ordinance. (The proviso has the effect of precluding applications where the only "dependants" under the Ordinance are the surviving spouse and his or her children, and the bulk of the income of the estate has been left to the surviving spouse.)

15.11 Mr W K Thomson, a former Registrar General, gave an example of how the present proviso to section 4(1) may give rise to anomalies. Suppose A is a would-be applicant, say an infant son by the deceased's former marriage. SS is the surviving spouse entitled to two-thirds of the income of the net estate and C, as a child of SS, is the only "other dependant" (ie - other than A). Why should A's claim be disallowed simply because there is a child of SS (C) who is eligible to claim? Moreover, oddly enough, it seems A would be eligible to claim if there were other dependants besides C. The Commission considers that the legislation should not be fettered in this way and that such matters should be left to the court to decide in the light of the circumstances of the case and the behaviour of the persons involved. We therefore recommend that the proviso to section 4(1) of the DFMO be not brought forward into the new Bill provisions.

Time limit for applications

15.12 By section 6 of the Ordinance, applications to the court must be made within six months from the date of a grant of representation, but the court has power to permit applications outside this time limit. This same time limit applies in the 1975 Act (section 4). We recommend that this same time limit of six months from the date of the grant of representation be retained for applications in Hong Kong.

Chapter 16

DFMO: Property available for family provision Present position and recommendations

"Net estate"

16.1 "Net estate" is defined in section 2(2) of the DFMO to mean –

" ... all the property of which a deceased person had power to dispose of 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 and death duties payable out of his estate on his death, but does not include land to which Part II of the New Territories Ordinance applies and which has not been exempted by the Governor under subsection (2) or (3) of section 7 of that Ordinance from the provisions of that Ordinance."

Net estate and New Territories land

16.2 It is most significant that under section 2(2) certain land in the New Territories would not be included in the net estate of the deceased. Consequently, such land would not be available to meet a court order making reasonable provision for the maintenance of a dependant.

16.3 Dr James Hayes, formerly of the City and New Territories Administration, pointed out to the sub-committee that there is presently a difference between the DFMO and the Intestates' Estates Ordinance in their respective provisions relating to New Territories land. In the DFMO the only reference to New Territories land is by way of exclusion from the definition of "net estate" in section 2(2). However, section 11 of the Intestates' Estates Ordinance specifically provides that, where there is an intestacy, land subject to Part II of the New Territories Ordinance continues to devolve as if the Intestates' Estates Ordinance had not been passed.

16.4 The Commission has considered the issue of New Territories land and the Intestates' Estates Ordinance elsewhere in this report. We expressed the view there that the special exemptions for New Territories land under that Ordinance should be removed. The Commission feels that the approaches taken under the two Ordinances must be consistent. We therefore recommend, in line with its earlier recommendation on the law of

intestacy, that the present exemptions in the DFMO with respect to New Territories land be abolished.

Net estate and other property

16.5 Sections 8 and 9 of the 1975 Act (set out in Annexure 5) provide for the treatment of certain property of the deceased as forming part of his net estate even though, apart from these provisions, such property would not otherwise be treated this way. The property referred to in these sections is property the subject of a nomination, a donatio mortis causa or a joint tenancy. We recommend that provisions similar to these be introduced in Hong Kong. (See clauses 10 and 11 of the Bill at Annexure 8.)

16.6 In the UK, there are a number of statutory provisions which authorise money or property of the estate to pass to a particular person after the death of the deceased, by virtue of a nomination made by the deceased during his lifetime. A section is included in the 1975 Act which effectively re-incorporates into the estate any property of the deceased's so nominated, in order that it may be treated as property of the estate available for family provision (see section 8 of the 1975 Act). (Examples in the UK might include monies placed on investment deposit with particular banks or with the Post Office.) Nonetheless, in order not to cause undue delay in the distribution of the estate, the section provides that those distributing the property in accordance with the terms of the nomination, shall not be liable to make restitution for the assets so distributed, should an action for family provision succeed. This protection does not however preclude the successful applicant from following the distributed assets into the hands of the nominee, should this be ordered by the court. In Hong Kong there are many non-statutory schemes which allow such nominations. Examples include employee pension and superannuation schemes. The Commission notes that the UK provision does not expressly cover instances where property could have been the subject of a nomination, but no actual nomination was made by the deceased before his death. We therefore recommend that the equivalent Hong Kong provision be extended to include both property where a nomination has been made and where a nomination could have been made by the deceased in respect of it. (See clause 10(1) of the Bill).

16.7 A donatio mortis causa is a gift of money or other property given by the deceased in anticipation of his death. Under section 8(2) of the 1975 Act (and clause 10(2) of the Bill) this type of property is treated similarly to the property which is the subject of a nomination (discussed above).

16.8 Property owned by the deceased as a joint tenant during his lifetime would, in the usual case, pass automatically to the surviving joint tenant or tenants upon his death. Consequently, such property does not form part of his estate. (The joint tenancy situation should be compared to the other type of co-ownership, the "tenancy in common". The survivorship principle does not apply to tenants in common, so the deceased's share in such property would be retained as part of his estate.) The issue arises upon

the death of a joint tenant whether, despite the usual survivorship rule, the deceased's share of the jointly owned property should be available nonetheless for family provision purposes. This is particularly relevant in relation to the jointly owned matrimonial home, where the applicant for provision is someone other than the surviving spouse (joint tenant). Section 9 of the 1975 Act (and clause 11 of the Bill) therefore gives the court the power to make orders for financial provision out of the severable share of the property owned by the deceased as a joint tenant. It should be noted that section 9 limits the application period under this provision to six months from the date when representation is first taken out, on the basis that if the usual survivorship rule is to be displaced, this should be made known to the surviving joint tenant as soon as possible. It is proposed that the same time limit apply in Hong Kong. (See clause 11(1) of the Bill at Annexure 8.)

Chapter 17

DFMO: Anti-avoidance Present position and recommendations

Present position

17.1 The whole object of the DFMO is to ensure that certain individuals are able to secure reasonable provision for maintenance from an estate, in the event of no such provision having been made by the deceased. However, the DFMO contains no "anti-avoidance" provisions. It is therefore possible at present for a testator who wishes to make fruitless any application under the Ordinance after his death, to do so by the arrangement of his financial affairs during his lifetime. Without anti-avoidance provisions, the whole object of the Ordinance may therefore be frustrated. There may be no "estate" left against which to make an application.

Disposition

17.2 In England and Wales, sections 10-13 of the 1975 Act (set out in Annexure 5) give the court certain powers in relation to transactions which are intended to avoid applications for financial provision under the Act. Under the terms of section 10, the court has power, in effect, to set aside "dispositions" made by the deceased up to six years before the deceased's death, if –

- (1) they were made with the intention of defeating an application under the Act; and
- (2) full valuable consideration was not given.

17.3 Under section 10(7) of the 1975 Act, a "disposition" includes a payment of money (including a payment of an insurance premium), and any conveyance of other property (or assurance, appointment or gift of property) of any description, whether made by instrument or otherwise. It does not include a provision made in a will, a "nomination" of property, a donatio mortis causa, or an appointment of property made (otherwise than by will) under a special power of appointment. (See the discussion in Chapter 16.)

17.4 The test of whether the deceased "intended" to avoid the legislation is satisfied if, in the court's opinion, the deceased's intention (though not necessarily his sole intention) in making the disposition, was to prevent the making of an order for financial provision or to reduce the likely

amount awarded. The court must be satisfied on the balance of probabilities that this was the case. (See section 12(1) of the 1975 Act.)

Contracts to leave property by will

17.5 Under the provisions of section 11 of the 1975 Act, a "contract to leave property by will", if made by the deceased with the intention of defeating an application for financial provision under the Act, and where full valuable consideration had not been given by the beneficiary under the contract, may in effect be set aside by the court.

Trustees

17.6 Section 13 of the 1975 Act provides a measure of protection to a person who receives money or property as a trustee for another under a disposition or contract to leave property by will.

Recommendation for Hong Kong

17.7 The Commission recommends that anti-avoidance provisions similar in effect to those contained in sections 10-13 of the 1975 Act be introduced in Hong Kong. (See clauses 12 to 15 of the Bill at Annexure 8.)

PART IV - CONSOLIDATION AND REVISION

Chapter 18

Consolidation

Terms of reference

18.1 The Commission's terms of reference do not specifically relate to consideration of the Probate and Administration Ordinance Cap. 10. However, any changes in the law of intestate succession and wills will inevitably require some amendment to the provisions of the Probate and Administration Ordinance and the Non-Contentious Probate Rules made under that Ordinance.

Accessibility of law

18.2 A lay person's access to the law of succession would be facilitated and a lawyer's work made more convenient and efficient if the various statutory provisions relating to the disposition of property on death were consolidated into one Ordinance.

Recommendations

18.3 The Commission recommends that the Probate and Administration Ordinance Cap. 10, the Intestates' Estates Ordinance Cap. 73, the Wills Ordinance Cap. 30 and the Deceased's Family Maintenance Ordinance Cap. 129, be consolidated into one Ordinance to be entitled the "Succession (Consolidation) Ordinance". The Commission also recommends that in the new Ordinance, the existing Wills Ordinance becomes Part 1, the Probate and Administration Ordinance Part 2, the Intestates' Estates Ordinance Part 3, and the legislation replacing the Deceased's Family Maintenance Ordinance Part 4.

Chapter 19

Revision

English practice and procedure

19.1 Section 72 (2) of the Probate and Administration Ordinance provides –

"(2) In all such business in respect of which no provision is made by probate rules and orders, the practice and procedure for the time being in force in the Probate Registry in England shall be deemed to be in force in the court and the Registry."

Recommendation

19.2 The Commission recommends that a revision of the Probate and Administration Ordinance be undertaken and in particular that the practice and procedure in force in England and applicable in Hong Kong under section 72(2) should be specifically enacted in Hong Kong.

PART V - FORFEITURE

Chapter 20

Forfeiture

The forfeiture rule

20.1 There is a 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.

The UK Forfeiture Act 1982

20.2 Under the UK Forfeiture Act 1982, the court has power, in cases other than murder, to make an order modifying the effect of the forfeiture rule in the circumstances of a particular case where justice requires it. The beneficial interests in property which are covered by the Act include benefits derived under the deceased's will or in relation to the deceased's intestacy. The Act specifically provides that the forfeiture rule shall not be taken to preclude applications under the provisions of the Inheritance (Provision for Family and Dependants) Act 1975.

Hong Kong

20.3 Hong Kong has no equivalent to the 1982 UK Act and the full force of the forfeiture rule therefore applies in Hong Kong in all circumstances.

Desired recommendation

20.4 This matter is also outside the Commission's terms of reference but, if it had been within such terms, the Commission would have wished to recommend that Hong Kong enact similar legislation to empower the court to modify the forfeiture rule where justice requires it as in the UK Act. A draft bill along those lines is annexed at Annexure 9.

PART VI

Chapter 21

Summary of recommendations

Recommended amendments to the Wills Ordinance, Cap 30

(Chapter 2 – form and authentication)

21.1 Section 5(1) should be replaced by a provision similar in effect to section 17 of the Administration of Justice Act 1982 in order to relax the formal requirements for making wills (para 2.8).

21.2 In addition, there should be a provision that wills which are not validly executed under the relaxed requirements of section 5 may nonetheless be admitted to probate if they are in writing, signed by or on behalf of the testator and are intended to have testamentary effect (para 2.22). The use of a chop should continue to be permitted but a will should only be admitted on proof that it was the testator who used that seal or chop (para 2.29).

(Chapter 3 – various Wills Ordinance amendments)

21.3 Section 3 should be reworded to remove the poor grammar (para 3.2).

21.4 A married person should be competent to make and to revoke a will irrespective of age (para 3.5).

21.5 Section 6 should be amended to state that a person in the defence services may make and revoke a will even though he has not attained full age (para 3.7). An additional amendment is required so that the section accommodates the amended section 5 (para 3.8).

21.6 Section 8 should be repealed as being no longer necessary (para 3.10).

21.7 Section 10 should be repealed in view of the expanded scope recommended for section 5 (para 3.14).

21.8 Sections 11 and 12 should be repealed as redundant (paras 3.16 and 3.17).

21.9 Section 13 should be repealed and replaced with provisions similar in effect to the new sections 18 and 18A of the English Wills Act 1837. This is to correct the frequently harsh revocation of a will by subsequent marriage (para 3.21).

21.10 Section 15 should be amended in view of the recommended amendment of section 5 (para 3.23).

21.11 Section 16(1) should be consequentially amended in view of the amended section 5 and a provision be added to take advantage of the new technology available to ascertain what is written in a will (para 3.24).

21.12 A new provision should be added of similar effect to section 1 of the English Family Law Reform Act 1987 to benefit illegitimate persons or those claiming through an illegitimate link (para 3.27).

21.13 Section 23 should be replaced by a provision similar in effect to section 19 of the Administration of Justice Act 1982. The latter provides that a gift to a predeceasing child takes effect as a gift per stirpes to the child's issue living at the time of the testator's death (para 3.30). Section 23's reference to "child or other issue" should include illegitimate children (para 3.31).

21.14 Section 30 should have added a provision whereby amending legislation implementing our recommendations should apply to a will of a testator who dies after its commencement, regardless of when the will was made (para 3.34).

(Chapter 4 – wills rectification, interpretation and evidence)

21.15 A provision should be introduced similar in effect to section 20 of the English Administration of Justice Act 1982 to enable a will to be rectified to enable the testator's intentions to be carried out (para 4.3).

21.16 A provision should be introduced similar in effect to section 21 of the Administration of Justice Act 1982 to permit the admission of extrinsic evidence to assist in the interpretation of meaningless or ambiguous wills (para 4.5).

21.17 A provision should be introduced permitting the admission of extrinsic evidence concerning the manner in which a will was executed, revoked or altered (para 4.6).

21.18 A provision be introduced similar in effect to section 22 of the Administration of Justice 1982 whereby it is presumed an ostensible absolute gift to a spouse who survives the testator is indeed an absolute gift, notwithstanding a purported gift to issue (para 4.8).

(Chapter 5 – registration of wills)

21.19 Wills should not be registrable. The Land Registration Ordinance should be amended so that it no longer applies to wills that have not been granted probate (para 5.5).

(Chapter 6 – international wills)

21.20 The Convention on International Wills should be incorporated into the law of Hong Kong (para 6.3).

Recommended amendments to the Intestates' Estates Ordinance Cap 73

(Chapter 8 – rights of the surviving spouse)

21.21 The amount payable to a surviving spouse under section 4(3) where issue survive the intestate, should be increased from \$50,000 to \$500,000 (para 8.11).

21.22 The amount payable to a surviving spouse under section 4(4), where no issue survive the intestate but there are relations of the intestate remaining, should be increased from \$200,000 to \$1,000,000 (para 8.14).

21.23 The amounts of the statutory legacies should be reviewed at least once every five years (para 8.15).

21.24 To facilitate change in the future and for the purpose of clarity, the following provisions should be amended:

- (i) section 4(12)
- (ii) section 6
- (iii) section 8 (paras 8.16 and 8.17).

21.25 Where the intestate leaves a surviving spouse, whether or not issue or relations also remain, the surviving spouse should take the "personal chattels" absolutely (para 8.20). The principal test for ascertaining whether an item is a personal chattel is whether it was located in the matrimonial home at the time of death and section 2(1) should be amended accordingly (para 8.22).

21.26 Section 7 (right of surviving spouse to require personal chattels to be appropriated) should be repealed in view of the recommendation at 25 above (para 8.23).

21.27 Where the intestate leaves a surviving spouse, whether or not issue or relations also remain, the surviving spouse should have the right to

acquire the interest of the intestate in the matrimonial home. Further the surviving spouse should have the right of appropriation of the matrimonial home in accordance with a procedure similar to that prescribed in the Second Schedule to the Intestates' Estates Act 1952 (para 8.25). The present Schedule is to become Schedule 1 and a Schedule 2 to be added to the Ordinance generally following the Second Schedule of the Intestates Estates Act 1952 (para 8.26).

21.28 A provision should be inserted to negative the effect of the decision in In re Collens [1986] 2 WLR 919 so that a surviving spouse will be required to account for moneys received elsewhere against any interest received under intestacy in Hong Kong in respect of immovable property (para 8.28).

(Chapter 9 – "child or issue")

21.29 Section 2(2) should be repealed and replaced by a provision providing that relationships be construed regardless of the concept of legitimacy (para 9.11(1–2)).

21.30 Provision should be added concerning children adopted in accordance with Chinese law or custom on or before 1 January 1973 (para 9.11(3)).

21.31 Section 10(1) of the Legitimacy Ordinance Cap 184 should be repealed (para 9.11(4)) as it does not accord with our recommendation that relationships be construed regardless of the concept of legitimacy.

21.32 Section 25(2) of the Adoption Ordinance Cap 290's reference to "31 December 1972" should be replaced by "1 January 1973" (para 9.11(5)).

21.33 Where an illegitimate child dies intestate, his illegitimacy should be irrelevant in determining the rights of relations to inherit from his estate. The only remaining significance of illegitimacy will be the presumption that an illegitimate person is not survived by his father (para 9.18).

(Chapter 10 – "brother or sister")

21.34 Section 2(4) should be repealed (para 10.7(1)) as it does not differentiate between siblings of the whole blood and siblings of the half blood.

21.35 The expressions "brother(s) and/or sister(s)" in sections 4(2)(b), 4(4), 4(8) and 5(4) should be amended to refer to such relationships of the whole blood (para 10.7(2)).

21.36 Section 4(8) should be amended to make differential provision for brothers and sisters of the half blood and for brothers or sisters of the half blood of a parent of an intestate (para 10.7(3)).

21.37 Statutory provision should be made that children of a man by his wife and concubines are to be regarded as brothers and sisters of the whole blood (para 10.7(4)).

(Chapter 11 – concubinage)

21.38 Section 13 should be amended to provide that the female partner of a union of concubinage entered into before 7 October 1971 is presumed to have been accepted as such by the male partner's wife and family (para 11.4(1)). A similar presumption should be added to section 14(2) of the Legitimacy Ordinance Cap 184 (para 11.4(2)).

21.39 The words "or commits an act of sexual intercourse" should be deleted from para 4(12) of Schedule 1 (para 11.4(3)).

21.40 A tsip or male partner should be given a right to have his or her life interest redeemed (para 11.4(4)). Provision should be inserted in Schedule 1 to the effect that all children of a male partner of a union of concubinage whether begotten of the wife or by tsip of the male partner shall form a common family for the purposes of the Ordinance, so that all such children shall be deemed children of the wife and every such tsip (para 11.5).

(Chapter 12 – miscellaneous matters)

21.41 Section 11 should be repealed as it preserves two systems of inheritance of a deceased intestate within one jurisdiction (para 12.6). If this recommendation is not followed, the section should be amended, so that its operation is limited only to non-exempted land in the New Territories which is held for the benefit of a Chinese clan, family, Tong or Tso (para 12.9).

21.42 Section 5(5) of the Ordinance should be repealed (para 12.11). The provision has been judicially criticised for creating capricious results.

21.43 In view of the reforms recommended to equate the property rights of illegitimate persons with those of legitimate persons and the greater difficulty to be expected in ascertaining whether there are claims from the former, provision should be added to the Probate and Administration Ordinance carefully delimiting the tortious liability of personal representatives (para 12.12).

21.44 Section 4's reference to the "Crown" should be removed and replaced by another suitable expression (para 12.15).

Recommended amendments concerning deceased persons' families and dependants

(Chapter 13 – introduction)

21.45 The Commission's general recommendation is that the various anomalies in Hong Kong's present deceased's family maintenance legislation would best be remedied by the repeal of the Deceased's Family Maintenance Ordinance Cap 129, and the enactment of a new replacement Ordinance similar to the English Inheritance (Provision for Family and Dependants) Act 1975 (para 13.5).

(Chapter 14 – those entitled to apply)

21.46 The use of the term "dependant" to describe those who may apply under the present Deceased's Family Maintenance Ordinance, should be dispensed with. In its place, the particular classes of persons who may apply for family provision should be set out (para 14.4).

21.47 The specific classes of "wife or husband of the deceased", "former husband or former wife of the deceased who has not remarried" and "tsip or male partner of the deceased by a union of concubinage" should be included within the classes of persons entitled to apply for provision (paras 14.5 and 14.9).

21.48 The present Ordinance does not contain a definition of either "husband" or "wife". The new legislation should contain a definition of "'husband' or 'wife' in relation to the deceased." This definition should extend to include void marriages entered into in good faith (para 14.6).

21.49 The present definition of "valid marriage" contained in the Deceased's Family Maintenance Ordinance should be retained (para 14.7).

21.50 The classes of persons entitled to apply for provision should be extended to include a former or judicially separated spouse who has not remarried (para 14.8).

21.51 Except for the meanings ascribed to the terms "tsip" and "union of concubinage", the transitional provisions in the Deceased's Family Maintenance Ordinance which deal with concubinage, comprising section 17 and the Schedule should be repealed (para 14.9).

21.52 The qualification on the parent's right to apply (i.e. – that the parent be substantially maintained by the deceased immediately before his death) should be removed (para 14.10).

21.53 The existing provisions in the Deceased's Family Maintenance Ordinance which set out the rights of children of the deceased to apply should be repealed. They should be replaced by less restrictive provisions which do

not preclude applications by adopted children, illegitimate children, adult children and "children of the family" (para 14.17).

21.54 The range of persons entitled to apply who are outside the deceased's immediate family should be extended. A new class of applicant should be included, namely "any person [not being a person already included] who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased" (paras 14.18 to 14.20).

(Chapter 15 – jurisdiction and court's powers)

21.55 The bases of the court's jurisdiction should be set out more clearly than is the case in the present deceased's family maintenance legislation. One head should be simply that the deceased died domiciled in Hong Kong, the other should specify that the deceased had been ordinarily resident here at any time within the three years immediately prior to his death, and that he had died leaving net estate in Hong Kong (para 15.2).

21.56 The type of provision which a court can grant to a surviving spouse of the deceased should not be limited simply to maintenance. A definition of "reasonable financial provision" should be introduced which recognises this special standard applicable in applications by spouses (See para 15.5).

21.57 Although in the usual case the standard of provision available to divorced and judicially separated spouses would be less than that applicable to a surviving spouse, in cases where no grant of matrimonial provision has been made under matrimonial proceedings legislation, the court should be empowered to treat the application of the former or judicially separated spouse as if it were an application by a surviving spouse (para 15.6).

21.58 The powers of the court in family provision proceedings should be extended so that they are similar to the court's powers to order financial provision in matrimonial proceedings. In particular, the court should have additional powers to:

- order the transfer or settlement of property which forms part of the deceased's estate for the benefit of the applicant
- order that assets forming part of the estate be applied in acquiring (other) property or rights for the benefit of the applicant or for settlement of his benefit
- order such consequential and supplemental provisions as the court thinks necessary to give effect to its order (including the varying of the disposition of the deceased's estate by his will or upon his intestacy or a combination of both and the conferring of wide powers on trustees of any property to be settled under the orders of the court) (para 15.7).

21.59 New guidelines for the court in considering applications should be adopted. Matters to be taken into account should include:

- the present or foreseeable financial resources and needs of the particular applicant and any other applicants or beneficiaries of the deceased's estate
- the obligations and responsibilities which the deceased had towards an applicant or a beneficiary of the estate
- the size and nature of the deceased's net estate
- other relevant matters, including the conduct of persons involved
- statements of the deceased which are evidence of the other matters of which the court is to take account
- (where the applicant was a spouse, former spouse, tsip or male partner of the deceased) the age of the applicant, duration of the marriage or union of concubinage, the applicant's contribution to the welfare of the family of the deceased, and, where the applicant was the spouse of the deceased, what provision the applicant might have expected had the marriage ended in divorce, not on the death of the deceased
- (where the applicant was a child of, or treated as a child of, the deceased) the manner in which the applicant was, or might have expected to be, educated or trained, and, where the deceased was not the biological parent, the extent to which the deceased had assumed and discharged any responsibility for the applicant's maintenance, and also the liability of anyone else to maintain the applicant
- (where the applicant was a parent of the deceased) the age of the applicant and any contribution (in money or money's worth) which the deceased, immediately prior to his death, may have made towards the needs of the applicant
- (where the applicant was someone outside the family who was being maintained by the deceased) the basis upon which the deceased had assumed responsibility for maintenance and the length of time involved (para 15.9).

21.60 The proviso to section 4(1) of the Deceased's Family Maintenance Ordinance (which has the effect of precluding applications where the only "dependants" are the surviving spouse and his or her children, and the bulk of the income of the estate has been left to the surviving spouse) should not be brought forward into the new Bill provisions (paras 15.10 and 15.11).

21.61 The present time limit of six months from the date of the grant of representation should be retained for applications in Hong Kong (para 15.12).

(Chapter 16 – property available for family provision)

21.62 The present exemptions in the Deceased's Family Maintenance Ordinance with respect to New Territories land should be abolished (para 16.4).

21.63 Certain property of the deceased's which would not normally be treated as part of his estate (namely property the subject of a nomination, a donatio mortis causa or a joint tenancy) should be included within his estate for family provision purposes (paras 16.5 to 16.8).

21.64 Where the property concerned is or may be the subject of a nomination, it should be included in the deceased's estate both where a nomination has been made and where a nomination could have been made by the deceased in respect of it (para 16.6).

(Chapter 17 – anti-avoidance)

21.65 Anti-avoidance provisions should be introduced in Hong Kong to prevent the deceased from being able to avoid future applications against his estate by particular financial arrangements made during his lifetime (paras 17.1 to 17.7).

Consolidation and revision

(Chapter 18 – consolidation)

21.66 The Wills Ordinance Cap 30, the Intestates' Estates Ordinance Cap 73 and legislation providing for Deceased Persons' Families and Dependents should be consolidated into one ordinance (para 18.3).

(Chapter 19 – revision)

21.67 The Probate and Administration Ordinance should be revised and in particular the practice and procedure in force in England and applied in Hong Kong should be specifically enacted in Hong Kong (para 19.2).

Forfeiture

(Chapter 20 – the forfeiture rule)

21.68 Should the matter have been within its Terms of Reference the Commission would have wished to recommend that Hong Kong enact legislation to modify the forfeiture rule where justice so requires along the lines of the UK Forfeiture Act 1982 (para 20.4).

Report on an opinion survey on public attitudes
towards illegitimate children by the
City and New Territories Administration

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I. Introduction

At present illegitimate children and dependent cohabitants of a deceased man have no claim to his estate under the Intestates' Estates Ordinance (Cap. 73) unless specific provision is made by his will. Neither can they claim for maintenance from the estate under the Deceased's Family Maintenance Ordinance (Cap. 129) because they are not included in the categories of "dependent" as defined under Section 2 of the said Ordinance.

2. Some people maintain that the above legal position causes social injustice and suggest that the legislation should be suitably amended so as to enable illegitimate children to claim maintenance out of the estate. On the other hand, some consider that, as a Chinese tradition, children born out of wedlock should have no claim to the estate of a deceased man. The present survey is designed to find out how the public perceive the right of illegitimate children.

II. Method of data collection

3. The fieldwork, commissioned to a private research firm, Market Decision Research Co. Ltd. (MDR), was conducted in August 1985. The survey covered a random sample of 1,000 persons aged 15 or over living in the territory. Face-to-face interview, on the basis of a structured questionnaire shown at Appendix I, was adopted.

Appendix I

III. Rate of response

4. A total of 1903 addresses had been randomly selected and visited. Of these, 1434 households were successfully contacted, representing a contact rate of 75%. The remaining 469 were mainly unoccupied addresses or non-contact cases after three attempts at different times and dates. Among the contacted households, 1000 eligible respondents were successfully interviewed, representing a completion rate of 70%.

IV. Findings

(i) Knowledge of the right of illegitimate children
(Table I)

Appendix II

5. When respondents were asked whether

children born out of wedlock can claim the estate of their deceased father, 29% were able to give a correct answer (i.e. cannot claim) whereas as many as 48% gave a wrong answer (i.e. can claim). The remaining 23% gave "not sure/don't know/no comment" answers. Comparatively speaking, people with post-secondary education or above were more likely to give a correct answer whereas people in the older age group or with primary education or below had a greater tendency to give "not sure/don't know/no comment" answers.

Appendix II

(ii) Equal right (Table II)

6. When being asked whether children born out of wedlock should or should not have equal right as those born in wedlock in claiming the estate of their deceased father, 72% of people said that illegitimate children "should" have equal right, 22% said "should not" and the rest of 6% were non-committal. As can be seen from the following table, people who were of younger age or had a higher education tended to say that illegitimate children should have equal right.

Table A: % of respondents who said that children born out of wedlock should have equal right

	<u>Percentage</u>	<u>(Base: No. of Respondents)</u>
<u>Overall</u>	72%	(1000)
<u>Age</u>		
15-44	77%	(711)
45 ⁺	61%	(289)
<u>Educational level</u>		
Primary or below	64%	(440)
Secondary or above	78%	(560)

7. As shown in the following table, among the group of people who said that illegitimate children should have equal right in claiming the estate, the majority (63%) had the wrong impression that illegitimate children are able to do so under the present law. On the other hand, only 12% of those who said that illegitimate children should not have equal right had the wrong impression.

Table B : % of respondents by their attitudes towards equal right in claiming the estate

Whether illegitimate children should have equal right in claiming <u>the estate</u>	The knowledge of whether illegitimate children <u>can claim the estate</u>			Total	(No. of Respondents)
	<u>Can claim</u>	<u>Cannot claim</u>	<u>Not sure/ don't know/ no comment</u>		
Should have equal right	63%	17%	20%	100%	(720)
Should not have equal right	12%	65%	23%	100%	(222)
Not sure/ don't know/ no comment	12%	28%	60%	100%	(58)
Total	48%	29%	23%	100%	(1,000)

Appendix II

(iii) Right to claim maintenance out of the estate
(Table III)

8. Immediately after the question on "equal right", the respondents were asked if illegitimate children should have the right to claim maintenance out of the estate. As many as 86% of the respondents agreed that children born out of wedlock should have the right to claim maintenance out of the estate if they had been maintained by their deceased father. As expected, this percentage was lower (68%) among the group of people (22% of the 1000 respondents) who said that illegitimate children should not have equal right. The following table shows the analysis.

Table C: % of respondents by their attitudes towards equal right and claiming maintenance

Whether illegitimate children should have equal right in <u>claiming the estate</u>	Illegitimate children should have the right to claim maintenance			
	Should have equal right	Should not have equal right	Not sure/ don't know/ no comment	Total
Agree	96%	68%	47%	86%
Disagree	2%	29%	9%	9%
Not sure/ don't know/ no comment	2%	3%	44%	5%
Total	100%	100%	100%	100%
(No. of Respondents)	(720)	(222)	(58)	(1000)

9. Similar to the "equal right" issue, people who were of younger age or had a higher education tended to be more open-minded as shown in the following table.

Table D : % of respondents who said that children born out of wedlock should have the right to claim maintenance out of the estate

	<u>Percentage</u>	<u>(Base: No. of respondents)</u>
<u>Overall</u>	86%	(1000)
<u>Age</u>		
15-44	89%	(711)
45+	80%	(289)
<u>Educational level</u>		
Primary or below	82%	(440)
Secondary or above	90%	(560)

Appendix II

(iv) Right of mothers of illegitimate children (Table IV & V)

10. Apart from the issue of illegitimate children, a question was asked about the right of their mothers in claiming maintenance out of the estate. 68% of people said that the mothers of illegitimate children should have the right, 25% said they should not and the rest of 7% gave "not sure/don't know/no comment" answers. The latter two groups were asked the same question again but with a qualification that the mother was maintained by the deceased father of the illegitimate children during his lifetime. This time, about half of them (or 15% of the 1000 respondents) gave an affirmative answer.

11. Altogether, 83% of people opined that mothers of illegitimate children should have the right whereas 13% opined that they should not and the rest of 4% were non-committal.

12. Once again, people who were of younger age or had a higher education tended to say that mother of illegitimate children should have the right to claim maintenance out of estate.

Table E : % of respondents who thought that mothers of illegitimate children should have the right to claim maintenance out of the estate

	Should have the right (without the qualification <u>in para. 10</u>)	Should have the right (with the qualification <u>in para. 10</u>)	(Base: No. of respondents)
<u>Overall</u>	68%	83%	(1000)
<u>Age</u>			
15-34	73%	88%	(520)
35+	64%	77%	(480)
<u>Educational level</u>			
Primary or below	63%	77%	(440)
Secondary or above	72%	87%	(560)

Appendix II

(v) Effect on extra-marital relations (Table VI)

13. To have a better understanding of respondents' attitudes toward the issue of illegitimate children, a question was asked to see whether the respondent would agree to the statement that if children born out of wedlock are allowed to claim maintenance out of the estate, extra-marital relations will be encouraged. It has been that only 28% agreed with the statement whereas 62% disagreed and the rest of 10% gave "not sure/don't know/no comment" answers.

14. The following table shows that the group of people disagreeing with the statement that extra-marital relations will be encouraged tended to be more open-minded.

Table F : Attitudes of respondents by their agreement/disagreement with the statement "extra-marital relations will be encouraged"

% of respondents holding the attitude among

<u>Attitude</u>	<u>The group agreeing with the statement</u>	<u>The group disagreeing with the statement</u>	<u>"Not sure/ don't know/no comment" group #</u>	<u>All respondents</u>
a) Children born out of wedlock <u>should have equal right</u> as those born in wedlock in claiming the estate of their deceased father	66%	76%	57%	72%

b) Children born out of wedlock <u>should have the right to claim maintenance out of the estate</u>	83%	91%	70%	86%
c) Mother of children born out of wedlock <u>should have the right to claim maintenance out of the estate of the deceased father of the children, with the qualification in para.10</u>	77%	88%	63%	83%
(Base: No. of respondents)	(285)	(623)	(92)	(1000)

This group of respondents tended to give relatively more "not sure/don't know/no comment" answers to other questions on attitude

V. Conclusion

14. The present survey indicates that people tend to adopt a liberal and enlightened view on illegitimate children. An overwhelming majority (86%) agreed that children born out of wedlock should have the right to claim maintenance out of the estate. A slightly lower percentage (83%) agreed that the mother of illegitimate children can claim maintenance out of the estate if she was maintained by the deceased father during his lifetime. On the general issue of equal right, seven in ten people thought that illegitimate children should have equal right as those born in wedlock in claiming the estate of deceased father.

15. However, the survey reveals that nearly half of the people had the wrong impression that illegitimate children can claim the estate of their deceased father. But 62% disagreed

with the statement that if children born out of wedlock are allowed to claim maintenance out of the estate, extra-marital relations will be encouraged.

16. It appears that the survey findings indicate popular support of any suggested amendments to the legislation to enable illegitimate children to claim maintenance out of the estate.

Appendix I

MARKETING DECISION RESEARCH CO LTD TEL NO.: 5-291237 M.1329 OPINION SURVEY	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="border-right: 1px solid black; padding: 2px;">EDIT _____</td> <td style="padding: 2px;">CARD 1 (1)</td> </tr> <tr> <td style="border-right: 1px solid black; padding: 2px;">CODE _____</td> <td style="padding: 2px;">JOB NO. _____ (2-5)</td> </tr> <tr> <td style="border-right: 1px solid black; padding: 2px;">CHECK _____</td> <td style="padding: 2px;">Q'NARIE NO. (6-9)</td> </tr> <tr> <td style="border-right: 1px solid black; padding: 2px;"></td> <td style="padding: 2px;">INT NO. (10-11)</td> </tr> </table>	EDIT _____	CARD 1 (1)	CODE _____	JOB NO. _____ (2-5)	CHECK _____	Q'NARIE NO. (6-9)		INT NO. (10-11)
EDIT _____	CARD 1 (1)								
CODE _____	JOB NO. _____ (2-5)								
CHECK _____	Q'NARIE NO. (6-9)								
	INT NO. (10-11)								

RESPONDENT NAME: _____ AGE: _____ TEL NO.: _____

ADDRESS: _____ INT. NO.: _____

DATE OF INTERVIEW: _____ TIME STARTED: _____ FINISH: _____

早晨/午安/晚安，我叫做_____。我係市場策略研究中心嘅訪問員，我哋想知道你對一啲社會事物嘅意見。你所俾我哋資料，係會絕對保守秘密嘅，多謝你嘅合作。

Good morning/afternoon/evening. I am an interviewer of Marketing Research Co Ltd. My name is _____. I would like to take a few minutes of your time to ask you some questions on social issue. All the information you provide us will be kept strictly confidential. Thank you.

請問你哋啲伙有幾多位 15 歲或者以上嘅家庭成員喺度住嘅，平均嚟講，一個禮拜係有 5 晚喺到瞓嘅。最大年紀係邊位呢？其次呢？

Would you please name all your household members age between 15 or above in the order of their age? The oldest first please.

	NAME	SEX	AGE	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

READ: Now, we would like to know your views on some of the social issues in Hong Kong.

讀出：而家，我地想知道一吓你對一 D 社會事物嘅睇法

- | | | | |
|----|---|--|---------------------------------|
| 1 | <p>According to what you know, can children born out of wedlock claim the estate of their deceased father?</p> <p>照你所知，私生子可以抑或唔可以申請領取佢地爸爸嘅遺產呢？</p> | <p>可以申請
Can Claim</p> <p>唔可以申請
Cannot claim</p> <p>Not sure/don't know/
no comment</p> | <p>1 (12)</p> <p>2</p> <p>3</p> |
| 2. | <p>Do you think children born out of wedlock should or should not have equal right as those born in wedlock in claiming the estate of their deceased father?</p> <p>你認為私生子應該抑或唔應該同合法婚姻所生嘅子女同樣有權申請領取佢地爸爸嘅遺產呢？</p> | <p>應該有權
Should have equal right ...</p> <p>唔應該有權
Should not have equal right.....</p> <p>Not sure/don't know/
No comment</p> | <p>1 (13)</p> <p>2</p> <p>3</p> |
| 3. | <p>Some people suggest that if children born out of wedlock had been maintained by their deceased father, they should have the right to claim maintenance out of the estate. Do you agree or disagree with this suggestion?</p> <p>有啲人提議如果私生子係由佢地爸爸生前贍養嘅，佢地應該有權喺遺產中申請領取贍養費。你同意抑或唔同意呢個提議呢？</p> | <p>同意
Agree</p> <p>唔同意
Disagree</p> <p>Not sure/don't know/
no comment</p> | <p>1 (14)</p> <p>2</p> <p>3</p> |

4.	<p>Some people say that if children born out of wedlock are allowed to claim maintenance out of the estate, extra-marital relations will be encouraged. Do you agree or disagree with this statement?</p> <p>有啲人話如果准許私生子喺遺產中申請贍養費就會助長婚外男女關係，你同意抑或唔同意呢種講法呢？</p>	<p>同意 Agree</p> <p>不同意 Disagree</p> <p>Not sure/don't know/ no comment</p>	<p>1 (15)</p> <p>2</p> <p>3</p>
5.	<p>Do you think that mother of children born out of wedlock should or should not have the right to claim maintenance out of the estate of the deceased father of the children?</p> <p>你認為私生子嘅媽媽應該抑或唔應該有權喺私生子嘅爸爸嘅遺產中申請贍養費呢？</p>	<p>應該有權 Should have the right</p> <p>唔應該有權 Should not have the right</p> <p>Not sure/don't know/ no comment</p>	<p>(16)</p> <p>1 (GO TO CLASS DATA)</p> <p>2 } (GO TO Q.6)</p> <p>3 }</p>
6	<p>If she was maintained by him during his lifetime, do you think she should or should not have the right to claim maintenance out of the estate?</p> <p>如果私生子嘅媽媽係由個爸爸生前贍養嘅，你認為個媽媽應該抑或唔應該有權喺遺產中申請贍養費呢？</p>	<p>應該有權 Should have the right</p> <p>唔應該有權 Should not have the right</p> <p>Not sure/don't know no comment</p>	<p>1(17)</p> <p>2</p> <p>3</p>

CLASS. DATA

1.	RECORD SEX 記錄性別	Male	1 (18)
		Female	2
2.	Would you please tell me what is your age? 請問你今年新曆計算係几多歲 呢?	15 - 19	01 (19-20)
		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.	How much education did you yourself receive? 請問你讀書讀到邊個程度呢?	No formal schooling	1 (21)
		Some primary	2
		Primary completed	3
		Some secondary	4
		Secondary completed ..	5
		Post-secondary or University	6
4.	Are yourself <u>MARRIED</u> or not? 請問你結咗婚未呢?	Married	1 (22)
		Widow/Widower	2
		Divorced/separate	3
		Single	4
		Refused/D.K.	5
5.	Are you now working, studying or not working? 你而家係讀書抑或做緊嘢呢?	Working (Go to Q.6)	1 (23)
		Housewife (Go to Q.7)	2
		Student (Go to Q.7)	3
		Retired (Go to Q.7)	4
		Unemployed (Go to Q.7)	5
6.	What is your occupation and position? 請問你嘅職業同職位係乜嘢呢?		(24)

7.	What is your total monthly income of your household? 請問你全家每月嘅總收入大約 係几多呢？	\$20,000 +	01 (25-26)
		\$19,999 - 17,500	02
		* \$17,499 - 15,000.....	03
		\$14,999 - 12,500.....	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

Table I : Percentage distribution of respondents by whether they know children born out of wedlock can claim the estate of their deceased father

<u>Whether respondents know that children born out of wedlock can claim the estate</u>					
	<u>Can claim</u>	<u>Cannot claim</u>	<u>Not sure/ don't know/ no comment</u>	<u>Total</u>	<u>(No. of respondents)</u>
	%	%	%	%	
(a) <u>Overall</u>	48	29	23	100	(1000)
(b) <u>Sex</u>					
Male	50	29	21	100	(509)
Female	46	29	25	100	(491)
(c) <u>Age</u>					
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) <u>Marital status</u>					
Married/Widowed/ Divorced	48	26	26	100	(683)
Single	49	34	17	100	(317)
(e) <u>Education</u>					
Primary completed or below	42	27	31	100	(440)
Some secondary	55	25	20	100	(227)
Secondary completed	57	29	14	100	(235)
Post secondary or above	43	44	13	100	(98)

Note: Figures may not add up to 100% because of rounding

Table II : Percentage distribution of respondents by whether children born out of wedlock should have equal right in claiming the estate of their deceased father

		<u>Whether should have equal right</u>				
		Should have equal right	Should not have equal right	Not sure/ don't know/ no comment	Total	(No. of respondents)
		%	%	%	%	
(a)	<u>Overall</u>	72	22	6	100	(1000)
(b)	<u>Sex</u>					
	Male	71	23	6	100	(509)
	Female	72	22	6	100	(491)
(c)	<u>Age</u>					
	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)	<u>Marital status</u>					
	Married/Widowed/ Divorced	69	24	7	100	(683)
	Single	77	20	3	100	(317)
(e)	<u>Education</u>					
	Primary completed or below	64	26	10	100	(440)
	Some secondary	76	22	2	100	(227)
	Secondary completed	80	17	2	100	(235)
	Post secondary or above	76	17	8	100	(98)

Table III : Percentage distribution of respondents by whether children born out of wedlock should have the right to claim maintenance out of the estate if they had been maintained by their deceased father

		<u>Whether should have the right to claim maintenance out of the estate</u>				
		<u>Should have the right</u>	<u>Should not have the right</u>	<u>Not sure/ don't know/ no comment</u>	<u>Total</u>	<u>(No. of respondents)</u>
		%	%	%	%	
(a)	Overall	86	9	5	100	(1000)
(b)	Sex					
	Male	87	8	4	100	(509)
	Female	85	10	5	100	(491)
(c)	Age					
	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)	<u>Marital status</u>					
	Married/Widowed/ Divorced	85	9	6	100	(683)
	Single	89	9	2	100	(317)
(e)	<u>Education</u>					
	Primary completed or below	82	10	9	100	(440)
	Some secondary	90	9	1	100	(227)
	Secondary completed	90	8	1	100	(235)
	Post secondary or above	89	6	4	100	(98)

Table IV : Percentage distribution of respondents by whether mother of children born out of wedlock should have the right to claim maintenance out of the estate of the deceased father of the children

<u>Whether the mother should have the right to claim maintenance out of the estate</u>					
	<u>Should have the right</u>	<u>Should not have the right</u>	<u>Not sure/ don't know/ no comment</u>	<u>Total</u>	<u>(No. of respondents)</u>
	%	%	%	%	
(a) <u>Overall</u>	68	25	7	100	(1000)
(b) <u>Sex</u>					
Male	71	23	6	100	(509)
Female	66	27	7	100	(491)
(c) <u>Age</u>					
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) <u>Marital status</u>					
Married/Widowed	66	26	8	100	(683)
Divorced					
Single	73	23	4	100	(317)
(e) <u>Education</u>					
Primary completed or below	63	26	10	100	(440)
Some secondary	75	21	3	100	(227)
Secondary completed	70	26	4	100	(235)
Post secondary or above	70	24	6	100	(98)

Table V : Percentage distribution of respondents who thought that mother of illegitimate children should not have the right or who were "non-committal" by whether she should have the right to claim maintenance if she was maintained by him during his lifetime

		<u>Whether the mother should have the right</u>				
		<u>Should have the right</u>	<u>Should not have the right</u>	<u>Not sure/ don't know/ no comment</u>	<u>Total</u>	<u>(No. of respondents)</u>
		%	%	%	%	
(a)	<u>Overall</u>	45	41	14	100	(319)
(b)	<u>Sex</u>					
	Male	53	34	12	100	(154)
	Female	37	48	15	100	(165)
(c)	<u>Age</u>					
	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)	<u>Marital status</u>					
	Married/Widowed/ Divorced	40	42	18	100	(229)
	Single	57	40	3	100	(90)
(e)	<u>Education</u>					
	Primary completed or below	36	44	20	100	(164)
	Some secondary	43	49	7	100	(56)
	Secondary completed	55	40	5	100	(70)
	Post secondary or above	73	16	11	100	(29)

Table VI : Percentage distribution of respondents by whether extra-marital relations will be encouraged if children born out of wedlock are allowed to claim maintenance out of the estate

	<u>The statement "extra-marital relations will be encouraged"</u>				<u>(No. of respondents)</u>
	<u>Agree with the statement</u>	<u>Disagree with the statement</u>	<u>Not sure/ don't know/ no comment</u>	<u>Total</u>	
	%	%	%	%	
(a) <u>Overall</u>	28	62	10	100	(1000)
(b) <u>Sex</u>					
Male	26	66	8	100	(509)
Female	30	58	12	100	(491)
(c) <u>Age</u>					
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) <u>Marital status</u>					
Married/ Widowed/ Divorced	29	60	11	100	(683)
Single	26	68	6	100	(317)
(e) <u>Education</u>					
Primary completed or below	28	58	14	100	(440)
Some secondary	27	68	5	100	(227)
Secondary completed	29	64	7	100	(235)
Post secondary or above	26	67	7	100	(98)

PERSONS OR ORGANISATIONS CONSULTED

Solicitor General and Crown Solicitor

Registrar, Supreme Court

Registrar General

Director of Legal Aid

Director of Social Welfare

Secretary for Health and Welfare

The Social Welfare Advisory Committee

Secretary for District Administration

The Law Society

The Bar Association

The Hong Kong Federation of Women Lawyers

The Family Law Association

The Faculty of Law, University of Hong Kong

The Hong Kong Bank Trustee Limited

Mr. W.K. Thomson

Standard Chartered Bank Hong Kong Trustee Limited

Bank of China Trust and Consultancy Company

The Heung Yee Kuk

Po Leung Kuk

Administration of Justice Act 1982
Sections 27 and 28, and Second Schedule

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

APPENDIX A
 INTESTATES' ESTATES ORDINANCE 1971
 TABLE OF SUCCESSION TO RESIDUARY ESTATES ON INTESTACY OR PARTIAL INTESTACY

<i>If a person dies leaving</i>	<i>Distribution of the Residuary Estate (Note A)</i>	<i>Persons entitled to Administration (Note D)</i>
Either husband or wife and no relations (Note J(1))	All to husband/wife absolutely	Husband/wife
Wife and <i>tsip</i> but no relations (Note J(1) and also see Note B)	Two thirds to wife absolutely, rest to <i>tsip</i> (or <i>tsips</i> equally if more than one) absolutely	Wife and <i>tsip</i>
<i>Tsip</i> or <i>tsips</i> and no wife or relations (Note J(2))	One third to <i>tsip</i> (or <i>tsips</i> if more than one equally) absolutely, rest to Crown (Note C)	<i>Tsip</i> or <i>tsips</i>
Male partner (Note B) but no relations (Note J(2))	One third to male partner absolutely, rest to the Crown (Note C)	Male partner
Either husband or wife and issue (Note E)	(i) \$25,000 plus interest at 5% per annum from date of death until payment or appropriation (Note F) to husband/wife, as the case may be, absolutely (ii) One half of the rest of the estate to husband/wife absolutely (iii) One half of the rest of the estate on statutory trusts for issue of deceased absolutely (Notes E and G)	Husband/wife

Table showing distribution under Intestates' Estates Ordinance 1971

Annexure 4

APPENDIX A (Contd.)

<i>If a person dies leaving</i>	<i>Distribution of the Residuary Estate (Note A)</i>	<i>Persons entitled to Administration (Note D)</i>
Wife, <i>tsip</i> and issue	<ul style="list-style-type: none"> (i) \$25,000.00 plus interest at 5% per annum from date of death to payment or appropriation to wife absolutely (Note F) (ii) One half of the rest of the estate to wife absolutely subject to <i>tsip's</i> life interest as mentioned hereafter (iii) Life interest on one third of wife's one half share to <i>tsip</i> and if more than one <i>tsip</i> between them or the survivor of them in equal shares (iv) One half of the rest of the estate to issue on statutory trusts (Notes E and G) 	Wife and <i>tsip</i>
<i>Tsip</i> and issue	<ul style="list-style-type: none"> (i) All to issue on the statutory trusts absolutely (Notes E and G) subject to <i>tsip's</i> life interest (ii) Life interest in one third of the residuary estate to <i>tsip</i> and if more than one <i>tsip</i> in equal shares between them or survivors or survivor of them 	<i>Tsip</i>
Male partner and issue	<ul style="list-style-type: none"> (i) All to issue on the statutory trusts absolutely (Notes E & G) subject to male partner's life interest (ii) Life interest in one third of the residuary estate to male partner 	Male partner
Issue but no <i>tsip</i> , husband or wife	All to issue on the statutory trusts absolutely (Notes E and G)	Issue, a child of deceased being it is believed preferred over issue of deceased child

APPENDIX A (Contd.)

<i>If a person dies leaving</i>	<i>Distribution of the Residuary Estate (Note A)</i>	<i>Persons entitled to Administration (Note D)</i>
Either husband or wife and one or more of the following: – parent, brother, sister or issue of brother or sister BUT no issue	<ul style="list-style-type: none"> (i) \$100,000.00 plus interest at 5% per annum from date of death to payment or appropriation to husband/wife as the case may be absolutely (Note F) (ii) One half of the rest of the estate to husband/wife absolutely (iii) One half of the rest of the estate to parent (or parents if more than one in equal shares) absolutely (iv) If no parent one half of the rest of the estate on the statutory trusts for brothers and sisters of the intestate (Notes G & H) 	Husband/wife
Wife and <i>tsip</i> , and one or more of the following:- parent, brother, sister, or issue of brother or sister BUT no issue	<ul style="list-style-type: none"> (i) \$100,000.00 plus interest at 5% per annum from date of death to payment or appropriation to wife absolutely (Note F) (ii) One half of the rest of the estate to wife absolutely subject to <i>tsip</i>'s life interest (iii) Life interest on one third of wife's one half share to <i>tsip</i> and if more than one <i>tsip</i> in equal shares between them or to surviving <i>tsip</i> (iv) One half of the rest of the estate to parent or parents equally but if no parent, to brothers and sisters on the statutory trusts absolutely (Notes G and H) 	Wife and <i>tsip</i>

APPENDIX A (Contd.)

<i>If a person dies leaving</i>	<i>Distribution of the Residuary Estate (Note A)</i>	<i>Persons entitled to Administration (Note D)</i>
<p>Either male partner or <i>tsip</i> and one or more of the following: – parent, brother, sister, issue of brother or sister, grandparent or uncle or aunt (Note I) BUT no husband and wife and no issue</p>	<ul style="list-style-type: none"> (i) One third to male partner absolutely or to <i>tsip</i> or <i>tsips</i>, as the case may be, (if more than one <i>tsip</i> in equal shares) absolutely (ii) Two thirds to parent (or parents if more than one in equal shares) absolutely (iii) If no parent, the following take two thirds of the estate absolutely in this order: <ul style="list-style-type: none"> (a) brothers and sisters (Note H) on the statutory trusts (b) issue of brothers and sisters (Note H) on the statutory trusts (c) grandparent or grandparents if more than one in equal shares absolutely (d) uncles and aunts (Note I) on the statutory trusts 	<p>Male partner/<i>tsip</i></p>
<p>Parent, brothers and sisters, issue of brothers and sisters, grandparent, uncle and aunts, issue of uncles and aunts BUT no husband, wife, male partner, <i>tsip</i> or issue</p>	<p>All to parent or parents if more than one in equal shares absolutely. If no parent, the following take the whole of the estate in this order:</p> <ul style="list-style-type: none"> (a) brothers and sisters in equal shares (Note H) on the statutory trusts (b) issue of brothers and sisters (Note E and H) on the statutory trusts (c) grandparent or grandparents if more than one in equal shares absolutely (d) uncles and aunts (Note I) on the statutory trusts 	<p>Person or persons entitled to estate</p>

APPENDIX A (Contd.)

<i>If a person dies leaving</i>	<i>Distribution of the Residuary Estate (Note A)</i>	<i>Persons entitled to Administration (Note D)</i>
No issue, male partner, husband, wife or <i>tsip</i> , but though illegitimate, leaves a mother and putative father	All to mother (Legitimacy Ordinance, s. 10(2))	Mother
No issue, male partner, husband, wife, <i>tsip</i> , parent, brother, sister, issue of brother or sister, grandparent, uncle, aunt, issue of uncle or aunt	All to Crown (Note C)	Crown

APPENDIX A (Contd.)

NOTE A. *Residuary estate*

Means every beneficial interest in an estate as to which a person died intestate, after payment of all such funeral and administration expenses, debts and other liabilities as are properly payable thereout, which (otherwise than in right of a power of appointment) the intestate could, if of full age and capacity, have disposed by his will. This Ordinance also applies to partial intestacy, *i.e.* where the will or codicil has not disposed of all the intestate's assets.

NOTE B. *Male partner, wife and tsip*

Husband and wife in relation to a person mean a husband or wife of that person by a valid marriage. *Tsip* means the female partner of a valid union of concubinage, the man being known as the male partner. The *tsip* always has a beneficial interest when the male partner dies intestate and so has the wife when the husband dies intestate. The husband always has a beneficial interest when the wife or *tsip* dies intestate. Further, the Ordinance treats relations between wife and *tsip* as if they are strangers. For example, a man dies leaving a wife and a *tsip*. Later, the wife dies intestate. The *tsip* cannot take any beneficial interest under the intestacy of the wife and *vice versa*. Also the *tsip* loses her right to a life interest if she marries or commits an act of sexual intercourse. A *tin fong* wife (a *tsip* elevated to status of principal wife or new wife taken on in both cases after the death of the *kit-fat* wife) appears to be regarded as wife for the purposes of the Ordinance and further the ceremony by which she is elevated or taken on seems to be regarded as a valid marriage for the purpose of this Ordinance.

NOTE C. *The Crown*

In default of any person taking an absolute interest under the provisions of the Ordinance, the residuary estate of the intestate shall belong to the Crown as *bona vacantia* and the Crown may (without prejudice to any other powers) out of the whole or any part of the property devolving on it, provide for dependants, whether kindred or not, of the intestate and other persons for whom the intestate might reasonably have been expected to make provision. (See section 4(9)).

NOTE D. *Persons entitled to administration*

Persons named under the column are those who have priority to be entitled to a grant of administration under rule 21 of Non-Contentious Probate Rules 1971. Administration will not be granted to more than four persons and if there is a minority or a life interest administration must be granted either to a trust corporation or not less than two individuals. In the case of a partial intestacy the persons named may not be entitled, the priority to a grant being determined under rule 19 and not rule 21.

NOTE E. *Issue means: –*

- (a) A child of a valid marriage to which the deceased was a party.
- (b) If the deceased is a female
 - (i) a child of a valid marriage to which her last husband and another female were parties;
 - (ii) a child of a valid marriage to which her male partner and another female were parties;
 - (iii) a child of a union of concubinage to which her last husband and another female were parties (See section 2(2)(b) of the Ordinance and amending Ordinance).
- (c) Adopted child pursuant to the Adoption Ordinance or pursuant to a Chinese customary adoption preserved by section 17 of the Adoption Ordinance.
- (d) A child of the deceased by a union of concubinage.
- (e) A child *en ventre sa mère* at the death.
- (f) A child legitimated or declared or deemed legitimate by virtue of the Legitimacy Ordinance 1971.
- (g) If the deceased is a female and does not leave any legitimate issue surviving her, her illegitimate child (Legitimacy Ordinance, s. 10(1)).
- (h) Legitimate descendants of above (only taking where immediate parent deceased).

NOTE F. *\$25,000.00 and \$100,000.00*

Net sums charged on the estate free of death duties and costs (ss. 4 (3) and (4)). The surviving spouse has power in writing to require the personal representative to appropriate personal chattels towards the net sums charged on the estate (s. 7)

NOTE G. *Statutory trusts (s. 5)*

On trust for any members of the class living at the intestate's death who attain 21 or marry, in equal shares if more than one; the issue of any who predecease the intestate taking *per stirpes* in equal shares and equally if more than one the share their parents would have taken had the parent outlived the intestate provided they attain 21 or marry.

NOTE H. *Brothers and sisters*

In the Ordinance these mean a brother or sister of the same father as the intestate (s. 2(4)). If they have the same mother but different fathers they are not brother or sister for the purpose of inheritance under the Ordinance, and it seems that even the Crown would take in priority to such a half-brother or half-sister, though it is submitted that the Crown on petition would give effect to a claim made by such a half-brother or half-sister. (See s. 4(9))

NOTE I. *Uncles and aunts*

Brother(s) or sister(s) as defined in Note H of a parent of the intestate. Here, interestingly enough, the brothers and sisters of the deceased's mother are included contrary to the position elsewhere in the Ordinance, which only pays regard to the male line.

NOTE J(1) *Relations*

Relations mean the following persons:

- (a) issue;
- (b) parent;
- (c) brothers and sisters;
- (d) issue of brothers and sisters.

NOTE J(2) *Relations*

Here, they include, in addition to these as defined in Note J(1), the following persons:

- (a) grandparent

- (b) uncles and aunts
- (c) issue of uncles and aunts

- N.B. (1) There are three hotchpot provisions which apply, subject to contrary intention of the intestate:
- (a) advances to or money settled on a child of the intestate in the lifetime of the intestate must be brought into account in ascertaining that child's shares;
 - (b) on a partial intestacy, any gifts by the will (excluding personal chattels specially bequeathed) to husband or wife of the intestate must be brought into account to reduce the payment of \$25,000.00 or \$100,000.00 (as the case may be);
 - (c) on a partial intestacy any gifts by the will to issue of the intestate must be brought into account.

The amount covered by these hotchpot provisions valued as at the date of death have to be brought into account in determining the benefits to be taken by issue.

- (2) Where the intestate and spouse have died in circumstances which render it uncertain which survived the other, the property of the intestate passes as if the spouse did not survive.

Inheritance (Provision for Family & Dependents)
Act 1875: Sections 3 and 8 –13

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) all 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.

Wills (Amendment) Bill

WILLS (AMENDMENT) BILL 1990

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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.]".

Sections 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 –

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 in 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.]

Intestates' Estates (Amendment) Bill

INTESTATES' ESTATES (AMENDMENT) BILL 1990

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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 rules (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.]

Inheritance (Provision for Family and Dependants) Bill

**INHERITANCE (PROVISION FOR FAMILY
AND DEPENDANTS) BILL 1990**

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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, 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 payments 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 provisions 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 power 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 divorce 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 deceased 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 is 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. Subclause (1) lists the matters which are relevant in all cases, and subclauses (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 representatives 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].

Law Amendment and Reform (Consolidation)(Amendment) Bill

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 Dependents) 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 Dependents) 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.]