

香港法律改革委員會

研究報告書

遺囑、未留遺囑情況下的繼承
以及死者家屬和受供養人士
的供養問題

（論題十五）

香港法律改革委員會謹提交“遺囑、未留遺囑情況下的繼承以及死者家屬和受供養人士的供養問題”研究報告書，本委員會委員名單如下：

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說明

本報告書所引用的所有法例，僅是法例的譯本，旨在供讀者參考。譯文雖已力求準確，但如須知悉權威性及有法律效力的條文，仍須參閱英文原文。

引言

1. 1984年9月3日，首席按察司與律政司根據1980年1月15日總督會同行政局賦予的權力，以及其後在1983年6月7日所作的有關修訂，提交下列問題予法律改革委員會（“委員會”）研究，並作出報告：

“遺囑法”

1. 鑑於下列情況，遺囑法應否作出更改：
 - (a) 英國在1982年對司法執行法第IV部條文已予修改；及
 - (b) 華裔立遺囑人對按照遺囑條例（香港法例第30章）第5(2)條而訂立遺囑的需求。
2. 1973年10月26日，各國在華盛頓締結‘就國際遺囑形式制定統一法公約’，香港是否有必要或需要就國際遺囑制定法律，以符合該公約附件規定？

無遺囑者繼承法

3. (a) 以一般情況而言，現行無遺囑者繼承法是否令人滿意？是否有必要或需要更改這方面的法律？
 - (b) 特別是，現行法律規定，如無遺囑者的土地屬於新界條例（香港法例第97章）第II部適用的土地，則須另行分開繼承，此情況是否令人滿意？

死者家屬和受供養人士的供養問題

4. 關於供養死者家屬和受供養人士，包括提供足夠贍養費及維持生計方面的法律，是否令人滿意，或是否有需要更改？”

工作概述

2. 1984 年 10 月 5 日，法律改革委員會委任一個小組委員會，研究上述問題，主席由委員會其中一名成員麥雅理先生（Mr. Brian McElney JP）擔任，其他小組委員計有：

艾文士教授	香港大學法律學院
（Professor Dafydd Evans）	

梁愛詩女士	洗秉熹律師行合夥人
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彼得維吾博士	的近律師行合夥人
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黃殿春醫生	政府合署牙科診所牙醫
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3. 1986 年 10 月，小組委員會完成一份工作報告，交予本報告附錄 2 名單上各人士及機構傳閱，並籲請他們提供意見。小組委員會在考慮到各方意見後，已將適用的意見列入初步報告內。委員會於其第 56、第 58 及第 59 次會議上審議該份初步報告，並提出意見。小組委員會根據那些意見而對該報告作出修改，委員會於第 67、第 68 及第 69 次會議上重新審議經修訂的報告。

4. 我們謹藉此機會對小組委員會各成員深表謝意。在過去幾近 5 年內，他們不辭勞苦，獻出寶貴時間和專長。同時，我們亦要對工作文件提出意見的人士，表示致謝。此外，期間亦有不少法律改革委員會秘書處人士，協助小組委員會工作。此包括甘明智先生（Mr. Geoffrey Grimmett）、樂以德先生（Michael Darwyne）、單格全先生（Michael Scott）、布奕堂先生（Mark Berthold）及顏倩華女士（Michelle Ainsworth），我們在此亦一一表示致謝。

第 1 章 背景

1.1 香港最近一次對繼承法作出重大修訂是於 1970 及 1971 年。當時制定了涉及家庭、財產及繼承的法律。以繼承法來說，1970 年制定了遺囑條例（香港法例第 30 章），並於 1971 年生效。同年，亦制定了無遺囑者遺產條例（香港法例第 73 章）及遺屬生活費條例（香港法例第 129 章）。此外，亦制定了遺囑認證及遺產管理條例（香港法例第 10 章），由於這條例祇涉及遺產管理程序，本報告不擬贅述。

1.2 平情而論，這三條例運作時，並未有引起法律執業方面重大問題，而且亦未有大量關於這些條文訴訟的報導。根據這些條例而提出的申請，多在內庭聆訊，而不是在公開法庭審訊。但多年來亦出現了一些矛盾怪異現象，顯示現今對這些條例作出檢討，亦合時宜。其中某些現象是由於採納整套英國法律引用於香港，而未有足夠考慮到本地情況所致。此外，亦有由於條例本身所引起的問題。

1.3 對於影響整個社會的法律，固然應時加檢討，繼承法亦是一樣。社會日變，人的期望亦時刻在變，法律亦必須迎合這些改變。但另一方面，人必須依據他們所認識的法律而為他們的事務及家屬作出安排，如果法律更改頻仍，迭作重大變更，這種做法似亦不恰當，負責改革法律的人士必須提高警覺，經常留意法律條文或有未能迎合社會人士需求的情況出現，這原因有二，一是由於法律制定初期未有全盤考慮到在社會方面的運作，一是法律已跟不上社會方面的改變。

1.4 香港無論在種族或文化上，都是多元化的社會，要為香港制定一套一般性的法律，大致公平地適用於不同組別的人士，實有特別困難。有關家庭及財產法的困難至為明顯，較其他方面的法律有更多問題。1971 年 10 月 7 日前，香港的法律制度既奉行英國法，但同時，在若干程度上亦承認某些中國習俗已在香港植根，因此，香港不單承認舊式婚姻完全有效，而且事實上，一種由這種習俗演變而成的新式婚姻——中國新式婚姻，即將農村婚禮搬移至城市舉行的婚姻，亦獲得全面承認。同樣，雖有法律規定無遺囑時財產分配的辦法，但死於香港的中國人，亦獲准根據習俗分配其遺產。此外，雖然關於遺囑的基本法律源自 1837 年英國遺囑法，華裔立遺囑人雖未有遵循正式規定而立遺囑，但其遺囑亦獲得法庭認證。1970 及 1971 年，有關法律作出基本更改，以致任何人士，不論屬何種族、文化或宗教背景，都有統一的個人法律可遵奉。

1.5 自那次重大改變後，施行距今已有十九年，現在亦須對一些基本問題重新審議。

1.6 委員會亦留意到自 1972 年對婚姻訴訟條例（香港法例第 179 章）作出各種修訂以來，離婚個案大增，香港不少家庭的生活模式也大受影響。當年其中一項修訂規定：提出離婚的唯一理由就是婚姻已破裂至無可挽回的程度（香港法例 1972 年第 33 號第 3 條、香港法例第 179 章第 11 條）。

1.7 至於須審議本港繼承法的近因，就是英格蘭及威爾斯在 1982 年通過司法執行法，其中第 IV 部是關於遺囑的，並對 1837 年遺囑法作出若干修改，該法是香港遺囑法所依循者。

國際人權

1.8 1976 年 5 月 20 日，英國通過採納“經濟、社會與文化權利國際公約”和“公民權利和政治權利國際公約”。除作若干保留外，英國亦於同日將該兩份公約條文的適用範圍，擴至香港。所保障的權利之中，其中“人不應受到歧視”一條在現階段來說最為有關。例如，根據現行法律，在繼承權方面，非婚生子女較婚生子女處於不利地位，委員會建議增加國際公約所規定的權利。

非婚生子女：1985 年 10 月市民意見調查

1.9 委員會在提出某些建議時，亦曾考慮到 1985 年的“市民對非婚生子女態度意見調查報告”（以下簡稱“市民意見調查報告”）所發表的結果。該報告是由政務總署社區資訊科在 1985 年 10 月編製。當時聘請一間私人調查機構“市場策略研究中心”（“研究中心”）進行調查，調查工作於 1985 年 8 月進行。根據研究中心所蒐集的實地調查所得，政務總署編製了一份“市民意見調查報告”，載於附錄 1。

1.10 目前，根據無遺囑者遺產條例（香港法例第 73 章）規定，非婚生子女及曾與死者同居的受供養人均無權根據該條例領取任何遺產。他們亦不能根據遺屬生活費條例（香港法例第 129 章）申請從死者遺產中撥給生活費，原因為他們不屬於條例內所界定的“受供養人”。研究中心為政務總署設計調查時，即針對該兩條例，希望確知市民對非婚生子女及其母親應享權利的意見。

1.11 調查結果顯示，今日香港市民對這問題持有開明態度。大多數人(86%)同意，非由合法妻子所生的子女應有權從死去父親的遺產中申領生活費。略少於以上的大多數，即 83%的人士認為如果非婚生子女母親的生活費，一向由他們父親生前供養，則應有權從其父親的遺產中申領生活費。至於平等繼承權這一般性問題上，十居其七認為非婚生子女應與婚生子女同等享有繼承其父親遺產權利。

1.12 超過半數人士(62%)認為，給與非婚生子女權利不會導致鼓勵婚外情。

1.13 有關蒐集資料的方法、抽樣調查的規模、反應率及個別調查結果經載於附錄 1 市民意見調查報告內。

本報告的編排

1.14 論理上，我們須首先研究遺囑法，繼而無遺囑繼承法，最後研究遺屬生活費問題，本報告第 1、第 2 和第 3 部就是按這次序探討一下我們研究範圍內着令我們審議的三部分問題。至於在本報告第 4 部，本委員會提出應否將各條例合而為一及作出修訂。第 5 部研究剝奪權利問題，最後，在第 6 部，委員會將各建議撮述，以便省覽。

第 I 部 遺囑法

第 2 章 遺囑：引言

遺囑研究範圍

2.1 本部研究範圍涉及 1982 年英國司法執行法第 IV 部，香港法例第 30 章遺囑條例（在本部內以下簡稱“本條例”）第 5(2)條“華裔遺囑”及國際遺囑。

2.2 本報告此部分按以下順序研究下列題目：形式及簽定；遺囑條例的修訂；糾正及釋義；遺囑的登記及國際遺囑；以及並無立遺囑能力的精神病人所遇到的困難。

遺囑：形式及簽證

現行法律

2.3 條例第 5 條規定如下：

5. (1)除第(2)款另有規定外，遺囑應按照下列規則以書面簽立，否則無效——

規則 1—遺囑應由立遺囑人，或由立遺囑人指定的其他人士，在他面前並遵照他的指示，在遺囑的結尾處或末端簽署。

規則 2—上述簽署應由立遺囑人在兩名或兩名以上證人同時在場時簽立或承認，而每一證人應簽名見證立遺囑人的簽署，或見證代立遺囑人在立遺囑人面前的代簽，見證形式則不論。

規則 3—如立遺囑人或其代簽署人的簽署是在遺囑的末端，或緊隨遺囑末端之後、之下、之側或相對地方，而從遺囑表面上看來，明顯地立遺囑人有意藉該簽署而使該份遺囑有效，成為一份由他簽立的遺囑。

規則 4—在不妨礙規則 1 的一般性原則下，遺囑的效力不應因下列情況而受影響——

- (a) 立遺囑人的簽署不是尾隨或緊接遺囑的結尾處或末端；
- (b) 遺囑最後的文句與署名之間留有空隙；
- (c) 署名——
 - (i) 夾雜在署名前條款或見證條款文句之間；
 - (ii) 尾隨見證條款或在該條款之後或之下（不論中間是否有空隙）；或
 - (iii) 尾隨其中一名證人的姓名或在證人姓名之後，之下或之側，或
- (d) 署名是在載錄遺囑各紙張中的一面、或一頁或其他部分，而該面、該頁或該部分並無載有其他條款、段節或處置立遺囑人遺產的文句；或
- (e) 遺囑在署名頁的前一面或前頁之上或底部，或在署名頁的其他部分，似乎留有足夠空間供立遺囑人簽署。

規則 5—於署名之下或之後的任何有關財產處置或指示的條款均屬無效，而在署名後加插的任何有關財產處置或指示的條款亦不能藉該署名而生效。

(2) 華裔立遺囑人如全部或相當大部分用中文書寫遺囑，並在遺囑上簽署，則即使並未有按照第(1)款的規定簽立，仍屬有效及作為正式簽立論。

2.4 我們深信必須審慎研究現行本條例第 5(1)條關於簽立有效遺囑所制定的規定所根據的基本原則。

2.5 本條例第 5(1)條的規定，是根據 1837 年英國遺囑法而制定。該遺囑法並未載有類似本條例第 5(2)條有關可免卻遵守立遺囑的規定。司法執行法第 17 條則將英格蘭及威爾斯須遵守的 1837 年遺囑法的規定放寬，條文如下：

17. 1837 年遺囑法第 9 條將由下列條款取代：

9. 除非遺囑按照下列規定簽立，否則無效——

- (a) 遺囑以書面並由立遺囑人簽署，或由他人名及見證在立遺囑人面前遵照他的指示簽署；及
- (b) 立遺囑人似乎有意藉該署名而使該份遺囑有效；及
- (c) 上述署名是立遺囑人在兩名或兩名以上證人同時在場時簽立或承認；及
- (d) 每名證人須在立遺囑人面前（而毋須規定在另一名證人面前）——
 - (i) 見證及在該份遺囑上簽署；或
 - (ii) 承認其署名；

但見證形式則不論。

司法執行法第 17 條的效力

2.6 司法執行法第 17 條所作出的主要更改是不再強制規定立遺囑人須在遺囑上某一位置簽署，但規定表面上看來立遺囑人有意藉該署名而使其遺囑有效。因此，理論上可在遺囑上任何位置簽署。這似乎是一較合情理的條文，可避免法庭在審理立遺囑人在“不正確”位置上簽署的遺囑時所作出近乎奇異的判決。*Re Beadle* 一案 [1974] 1 All ER 493) 即可作為例子。該名女立遺囑人向兩位朋友默讀其擬立遺囑的內容。在閱畢該份遺囑後即在右上角簽署。其中一位朋友亦在遺囑上簽署，然後放入信封內封密，立遺囑人並在信封上寫上“我，E.A. Beadle 的最後遺囑，致查理和美施”。她的兩位朋友同時亦在信封上簽署。立遺囑人逝世後，法庭認為雖然對於死者有意簽立遺囑一事，法庭並無懷疑，但遺囑並未有按照正式規定簽立，因此判定無效。

2.7 此外，司法執行法第 17 條亦對見證規則略為放寬。該條規定：立遺囑人祇須在兩名或所有證人同時在場時簽署或承認其署名，但每一名證人可在立遺囑人面前作出見證及在遺囑上簽署，或承認其署名而毋須規定必須在其他證人面前簽署或承認其署名。

2.8 我們建議本條例第 5(1)條由類似司法執行法第 17 條的條文所取代(詳見本報告附錄 8 遺囑(修訂)條例草案(以下簡稱“條例草案”)草稿第 2 條)。該條與司法執行法第 17 條所載條文相同。

條例第 5(2)條：一般豁免能力

2.9 現在我們要研究另一種情況，就是即使並未有遵守第 5(1)條的規定，遺囑仍視為有效。根據第 5(2)條規定：華裔立遺囑人如全部或相當大部分用中文書寫遺囑，並加簽署，則即使不按照第 5(1)條的規定簽立，亦應生效及作正式簽立論。本港 98%人口有資格可按照條例第 5(2)條的規定而簽立有效的遺囑，可獲豁免遵守第 5(1)條的規定，顯而易見，根據第 5(2)條立中文遺囑這一問題不容輕視，最高法院經歷司指出法庭經常准許這類遺囑獲得認證。以香港法例來說，第 5(2)條十分重要，雖然該條祇作為保留條款，但大部分人士有機會利用這條款簽立非正式遺囑，而且其真確性毋須受到查核。

2.10 有些人曾提議刪除這怪異的第 5(2)條。1970 年，當年的律政司曾反對列入這條文，但最後終作出讓步，認為確需要為華裔立遺囑人列入這條文。原來的草稿並不祇限於華裔人士，祇涉及以中文書寫遺囑，後來經立法局辯論後才予以修改。

2.11 在研究第 5(2)條時，我們首先考慮到須為簽立遺囑制定正式規定的基本理由。英國法律改革委員會（“該委員會”）在第 22 號報告（“遺囑的訂立及撤銷” 1980；Cmnd 7902）中條陳基本原則如下：

“制定（關於正式規定的）法律原則為：首先：須確保真正代表立遺囑人意願的文件有效；其次：須防止那些偽造的遺囑或由於任何其他原因，並不代表立遺囑人真正意願的遺囑獲得法庭認證。”（第 2.2 段）

我們非常贊同這原則（該委員會形容這原則是“無可指摘的”），但對於該委員會下述的意見，即須保留正式規定及不予改變（雖然司法執行法第 17 條已予放寬），以便立遺囑人了解到其立遺囑這一行為的嚴重性，從而避免作出一些“輕率或未經深思熟慮的財產處理”，這一點我們則並不表示贊同。這意見與上文所述“無可指摘的原則”並無關連，並且與“人應具有立遺囑自由”的基本原則有所衝突。嚴格規定所造成的結果就是那些簽立遺囑的人認為他們所立的遺囑有效，但事實上，由於未有遵守規定以致出現缺點，死後成為無立遺囑者。

2.12 那些未有遵守規定而訂立的遺囑，通常是立遺囑人在未有專業人士協助下而出現問題，雖然並非所有失效的遺囑都是這樣。（該委員會發覺有極少數由專業人士草擬的遺囑亦曾出現未符合規定的缺點，但並未有列出簽立遺囑所出現缺點的詳情）。以現行法律而言。即使顯示一位遺囑完全真確（例如：*Re Beadle* 一案），但仍可失效，這點我們深感惋惜。但現在經 *Ross 訴 Caunters* 一案[1979 3 ALL ER 580]後，一份遺囑可能由於獲判賠償而獲得其當初擬達到的結果。在該案中，一名律師按照立遺囑人的指示而草擬遺囑，其中包括將某些動產及剩餘遺產其中一份額贈與原告。但由於原告的配偶在遺囑上簽署為證人，以致不能享受遺贈。法庭認為律師對一份遺囑上指名的受益人應負上慎重辦事的責任。律師被判疏忽，未有採取合理的慎重態度，使遺囑能夠恰當地簽立，因而須賠償予原告，原告因而能夠藉追討賠償而領回本應可從遺囑上取得的利益。其後 *Watts 訴 Public Trustee of Western Australia* [1980 WAR 97] 一案亦依循這一判例。在 *Gartside 訴 Sheffield, Young & Ellis* [1983] 1 NZLR 37 一案中，法庭宣判將慎重處事的責任擴大，以包括擬立遺囑人發出指示所提到的受益人，律師理當有責任迅速擬備遺囑，供立遺囑人簽立。因此，現可能祇要藉發出草擬遺囑指示，即可毋須遵守簽立遺囑的正式規定，而獲得賠償，達到立遺囑的效果。

海外法例及有關豁免正式規定的意見

2.13 1975 年南澳洲省遺囑法修訂法（第 2 號）第 9 條規定，在原有 1936 - 1975 年南澳洲省遺囑法內新增第 12 條，該條條文如下：

“如果有申請人向法庭申請認證一份死者最後遺囑的文件，最高法院認為死者確有意將該份文件作為其遺囑一事，已無任何合理置疑之處，則即使該份擬記載死者立遺囑意願的文件，並未有遵照本遺囑法制定的規定簽立，亦將被視為該名死者的遺囑。”

2.14 西澳洲省法律改革委員會在其遺囑報告（1985 年 11 月）中總結謂：南澳洲省的條文可予採納，作為西澳洲省法例的藍本，並建議修訂西澳洲省遺囑法，以列入 1936-1980 年南澳洲省遺囑法第 12(2) 條條文。

2.15 至於澳洲北部省，則根據澳洲北部省法律改革委員會提出報告後，亦通過 1984 年澳洲北部省遺囑（修訂）法，將南澳洲省遺囑法內相同條款列入該法內。

2.16 新南威爾斯法律改革委員會在其 1986 年“遺囑——簽定及撤銷”報告中建議法庭應有一般豁免權，以便法庭在發覺某些簽立或撤銷遺囑的行為雖然並未遵守法例的規定，但確已代表立遺囑人的真正意願時，即有權宣布該簽立或撤銷遺囑的行為有效。

2.17 曼尼托巴省 1983 年遺囑法第 23 條亦以南澳洲省法例為藍本，制定規定如下：

“如果有人提出申請，法庭認為一份文件或任何在文件上的書面文字，已載錄：

- (a) 死者立遺囑的意願；或
- (b) 死者擬撤銷、更改遺囑或使前立遺囑重新生效的意願；或死者擬撤銷、更改其並非載於一份正式遺囑而祇在一份文件上的遺囑意圖，或使該份文件重新生效，

則即使該文件或書面文字並未全部遵守由法例制定的正式規定而簽立，法庭可宣令該份文件或書面文字全面有效，一如該份文件或書面文字簽立時，已按照遺囑法的正式規定，成為死者的遺囑，或作為撤銷、更改遺囑或使前立遺囑重新生效，或可作為撤銷，更改其另一份載有死者立遺囑意願的文件，或使該份文件重新生效。”

2.18 塔斯曼尼亞法律改革委員會亦已發表了一份工作文件，論及愈來愈多人要求改革這方面的法律。該份文件提出祇有極少數遺囑因形式上的缺點而失效，但數目雖少，如果祇要對規則作出適當修改而可挽回這些遺囑，則既然理由是這樣充分，為什麼不修訂這方面的法律呢？該委員會亦留意到，實在無法計算有多少人因為未有時間、機會或有意立一份正式遺囑而致死後成為無遺囑者。

2.19 1982 年英屬哥倫比亞法律改革委員會建議制定豁免權，以便法庭認為立遺囑人知道及認可一份遺囑的內容，並有意使其具有立遺囑效力，則可接納該份文件作為有效的遺囑。

2.20 在昆士蘭、根據 1981 年昆士蘭繼承法第 9(a)條規定，祇要“相當大部分符合”正式規定，則法庭可行使豁免權，該條規定：

“如果法庭認為一份文件已表達立遺囑人的意願，而該

份已簽立作為立遺囑的文件其中相當大部分已符合本條的規定，則法庭可接納該份文件獲得認證……”

2.21 我們經研究“相當大部分符合”規定這一檢定標準及一般豁免遵守規定權兩者優劣之後，認為後者較佳。“相當大部分”已符合規定這概念本身比較含糊。雖然南澳洲省條文的字眼並不是絕對不會遇到困難，但我們同意其補救權這一原則，以便在未符合正式規定時有解救辦法。另一方面，我們留意到“豁免權”這一概念，暗示法庭具有酌情處理權，對於一份未全然符合正式規定的遺囑，仍可酌情決定其已符合認證一份遺囑的規定論。我們現在所提出的條文，亦有不同，並未有包含“豁免權”這一概念。我們提示的條文，大意是如果法庭認為一份文件，是立遺囑人有意藉該份文件而使其具有遺囑效力，則不論該份文件有否遵守正式規定簽立，法庭亦會使該份文件具有遺囑效力。因此，我們建議本港制定一套全新的真確性原則。這樣就可不受形式的束縛，而這一點仍是英國在施行司法執行法後仍保留的特色。但這原則會較現行第 5(2)條嚴謹，該條無法確保中文遺囑是否有立遺囑的效力或是否偽造。新條文將會符合本委員會所指出的“基本原則”，但豁免遵守正式規定，此點與以前的條文不同，而且不論種族，對所有立遺囑人都適用。

贊同所作的改變

2.22 我們除贊同條例第 5(1)條由司法執行法第 17 條的條文取代外，同時亦建議制定條文，規定凡遺囑並未有按照新訂第 5 條規定有效地簽立者，則祇要是書面文字，由立遺囑人簽署或代其簽署，而立遺囑人有意使該文件具有遺囑效力者，則應獲接納認證（請參閱附錄 6 條例草案第 2 條）。

2.23 現行條例第 5 條全部將予以撤銷及取代，而第 5(2)條特有保留條款亦會被刪去，一份遺囑祇要符合新訂第 5 條的正式規定，即作為已有效地簽立遺囑論。倘未有符合正式規定，新條文亦有規定如下：即使一份遺囑未有符合正式規定，但已表達立遺囑人的最後意願，則該份遺囑仍作有效地簽立論。有關立遺囑人必須有意使該份遺囑具有立遺囑效力的規定，目的在排除那些尚未想得通徹的念頭和那些已丟棄的草稿。至於新條文規定倘一份遺囑符合規定，即作為已有效地簽立論，而不是“有效”，原因為一份遺囑可由於其他理由，例如：無行為能力而失效。

2.24 根據擬議中新訂第 5 條，一份遺囑，不論中、英文書寫，祇要立遺囑人簽具和有意使該份遺囑具有立遺囑效力，則會獲接納認證。無爭論性遺囑認證規則（香港法例第 10 章）亦因而須作出修訂。

2.25 我們知道，中國人傳統文化對於在遺囑上簽署一事，頗為敏感。為此，我們建議一方面本港不會接納口頭遺囑，但另一方面仍可繼續使用印鑑或印章（請參閱下文第 2.29 段）。我們認為，倘一份遺囑是用書面寫成，由立遺囑人簽署或蓋印，即足以查核一份遺囑的真確性。我們深信，新訂第 5 條但書規定是必需的，足以確保法律既符合簡單而又肯定的程度。如果對於遺囑的真確性並無規定，則相信法律並不是那般肯定，訴訟案件料會增加。本委員會亦相信市民對於一份遺囑必須以書面寫成及簽署一事，已續有認識。

2.26 我們想補充一點，是關於海外簽立遺囑的，倘該份海外遺囑是根據該地的法律簽立，則即使並未有符合本港對遺囑所制定的規定，在本港亦屬有效。條例第 24 條規定如下：

有關正式 有效的一 般規則	“24. 遺囑如遵照簽立地，或簽立時或立遺囑人死時所定居或通常居住地區，或所在國家（而立遺囑人又為該國公民）實施的國內法簽立者，即作為正式簽立。”
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2.27 新訂第 5 條條文亦規定，如果一份親筆書寫的遺囑（即全部親手書寫的遺囑）由立遺囑人簽署後，亦獲法庭接納。這條文是特為避免 *Re Kanani* (1978) 122 Solicitors' Journal 611 一案的判決所造成不幸的後果。在該案中，英國法庭在採用 1963 年遺囑（正式有效）法（即香港現行遺囑條例第 III 部條文）時，拒絕判定死者的遺囑根據瑞士法律是一份有效的親筆遺囑，因為瑞士法律規定遺囑全文必須親筆書寫，但有關遺囑是在瑞士使用具有酒店箋頭的紙張而簽立的！

簽署

2.28 我們亦考慮到立遺囑人在簽署遺囑時可能出現的形式。釋義及通則條例（香港法例第 1 章）界定“簽署”一詞包括“如果某人不能書寫，則意指蓋上印鑑、符號、指模或印章”。

2.29 根據我們的經驗，現今香港在簽署文件及法律文件時，亦接納使用印章。但有關使用問題，則並無直接具權威性的判斷（但可參考：Norton - Kyshe, *History of the Laws and Courts of Hong Kong Vol II* at P.526）一文。但英國長期以來均有權威性的判決而香港實際對這點亦從來未有

質疑（舉例來說：李法官在 *Cheung v Chartered Bank Hong Kong Trustee Co.* [1978] HKLR 264）對於印章的使用並無置評。為順應本地習俗，**我們建議繼續容許使用印章，但如果新訂第 5 條條文獲得採納的話，則一份遺囑必須證明立遺囑人親自使用該印鑑或印章，才可獲接納認證。**

第 3 章 遺囑條例的各項修訂

引言

3.1 香港的遺囑條例（香港法例第 30 章），是直接由 1837 年英國遺囑法引伸而來，但 1970 年制定這條例時，採用了較為簡單和現代化的字眼。因此，英格蘭和威爾斯對 1837 年法例所作的任何改動，均值得我們仔細考慮。本章稍後提出的修訂，一般來說，並非向 1837 年法例的基本原則提出質詢，但在研究這些修訂時，應同時參考第 2 章所提的意見。1982 年司法執行法第 IV 部對 1837 年法例作出若干修訂，當討論到有關的香港條文時，這些修訂會在考慮之列。我們將在本章內對遺囑條例作詳細的討論。

討論的條款

3.2 條例的第 3 條規定——

“3. 任何人均可根據本條例的規定訂立遺囑，處理其死亡時所享有權益的一切財產而該等財產於其死亡後轉移與其遺產代理人。”

爲了把第 3 條的英文法改得更好，英文“to”字應加在“property”而非“entitled”之後。（見附錄 6 條例草案第 2 條）。

3.3 條例的第 4 條規定——

“4. 除第 6 條另有規定外，任何人倘未屆合法年齡，其所立遺囑均告無效。”

3.4 在釋義及通則條例（香港法例第 1 章）內，“合法年齡”爲 18 歲。1989 年法律改革（年齡的法律效力）條例草案將可以訂立有效遺囑人士的年齡，自 21 歲降至 18 歲。這條例草案是跟隨本委員會在“年青人年齡在民事法中的法律效力問題”研究報告書中提出的建議。我們認爲現在無須再作更改。

3.5 1981 年昆士蘭繼承法第 8(2)條規定如下——

“已婚人士，不論年齡，均可訂立有效遺囑，而無論再訂立新的遺囑與否，亦可將已立的遺囑撤銷。”

關於上述條款所據的論點，我們理解如下：人在婚後要承擔新的責任，故應可在遺囑這類文件中，表明這些責任，而不是祇限於按照無遺囑繼承條例的條款辦理。**因此，我們建議制定類似昆士蘭條款的條文**（見附錄 6 條例草案第 2 條）。

3.6 條例第 5 條已在第 2 章予以討論。

3.7 條例第 6 條規定——

“6.(1) 任何實際服務於海軍、陸軍或空軍的英國三軍人員，以及任何正出海的海員或水手，可毋須遵照第 5(1)條所列的任何規則，而——

- (a) 處理其任何財產；
- (b) 適用任何指定權；或
- (c) 以遺囑指定某人為其未成年子女的監護人。

(2) 為避免引起疑問起見，現聲明凡本條提及的人，雖未屆合法年齡，亦得以遺囑方式處理其財產。”

首先，我們建議第 6(1)條開始時所用的“英國三軍人員”字眼，由“人士”一詞代替，而英文原文第 3 行“being”這一已過時的字眼則可刪去。我們亦建議廢除第 6(2)條，由另一條款代替，簡單地說明所提及的各類人士“即使未屆合法年齡，亦可訂立有效遺囑，同時亦可有效地將遺囑撤銷”（見條例草案第 2 條）。

3.8 本條是由 1837 年遺囑法第 11 條引申而來，該條是一項保留條款，而本條則是一項授權條款。倘第 5 條一如第 2 章所建議般制定，我們發覺剩下來唯一適用於第 6 條的地方，也許與口述遺囑有關，因為沒有理由說軍人並未有遵照規定而立的遺囑不認證。不過，如果認為須保留現行第 6 條該容許條款，則仍有一個問題尚待解決：第 15 條規定“撤銷遺囑的方式”。但按照現時第 15 條的規定，軍人根據第 6 條訂立遺囑後，不可能以同樣方法另立遺囑，以撤銷及代替原來的遺囑。第 15(6)條容許“按照第 5 條的規定簽立另一遺囑”，以撤銷

原來的遺囑，但卻無類似條款，容許其後按照第 6 條的規定另立遺囑，以把原來的遺囑撤銷。要改正這點絕不困難，我們建議將該段改為——

“(b) 另立一有效遺囑；或”（見附錄 6 條例草案第 4 條）。

一般認為，第 15 條不會適用於根據第 6 條規定而立的遺囑，但由於第 6 條是一項授權而非保留條款，因此這問題在香港是有爭議的地方。建議採用的字眼可澄清這點。除以上提出的事項外，我們認為第 6 條應予保留。

3.9 第 7 條：我們並無意見。

3.10 條例第 8 條規定——

“8. 凡按照第 5 條規定簽立的遺囑，毋須作任何其他公布，即可生效”。

由於再無必要保留這條，我們建議將之廢除。這條文原來目的，是訂明見證人毋須知道自己是見證遺囑的簽署，但這點其實已是現今一般法律的一部分，就是見證人祇須知道有關文件是屬於需要他人見證簽署的一類文件，已屬足夠。

3.11 第 9 條：我們並無意見。

3.12 條例第 10 條規定——

“10.(1) 任何人如見證遺囑的簽立，而該遺囑中有分配任何財產或作出有關任何財產的分配（抵押及償債指示除外）予該見證人或其配偶，凡祇涉及該見證人或其配偶的財產分配，或任何人根據該見證人或其配偶的權利提出的任何要求，均屬無效。

(2) 縱使遺囑有上述的分配，該見證人仍可准予作證，以證明遺囑的簽立，或證明該遺囑是否有效。

(3) 以本條第(1)款而言，遺囑中雖有任何上述財產的分配或作出分配予該款所述的見證人或其配偶，但如該遺囑並無該見證人及任何其他這類人士見證，亦屬正式簽立者，則該項見證應不予理會。”

3.13 本條含義所引致的問題，與 *Ross v Caunters* (1979) 3 ALL ER 580 所指出的不無關係。在該案例中，有清楚和絕不含糊的證據，證明立遺囑人對所立遺囑的條文絕對滿意，而遺囑中的餘產承受人，正是立遺囑人的妯娌，但由於她的丈夫是遺囑的見證人，這點瑕疵使她無法承受遺產，結果，她應得的遺產卻由其他受益人攤分（她最後祇能向疏忽的律師索取賠償，作為取回其應得的“遺產”）。

3.14 第 10(3)條保留將財產分配予見證人及其配偶，條件是如果遺囑無該項見證亦屬正式簽立者。我們已建議祇要能證明立遺囑人希望其遺囑具有遺囑效力，新訂第 5 條的附文可規定遺囑無需見證人見證而簽立。新訂第 5 條和現有第 10(3)條加起來的結果，就是祇要符合新訂第 5 條附文所列的條件，見證人所獲的財產分配在任何情況下都是有效的，因為套用第 10(3)條的字句，“遺囑無該見證人的見證亦屬正式簽立者”。雖然這個結果可以接受，但我們認為另一個方法，不但較為簡單，而且更符合實證更重於形式這項原則。方法就是乾脆將整條第 10 條廢除，讓新訂第 5 條的附文規定，祇要能證明立遺囑人希望其遺囑具有遺囑效力，該遺囑便毋需見證人見證簽立。至於遺囑受到不當影響簽立的問題，我們認為如有這樣的問題出現，現時的普通法規則已足以應付。**因此，我們建議將第 10 條廢除**（見附錄 6 條例草案第 3 條）。

3.15 如第 10 條一如建議般廢除，在現行法律下可能產生的另一難題，也可迎刃而解。這關乎本可根據第 6 條規定而生效，但實際上卻符合第 5 條的規定而簽立的遺囑（出海船員等的遺囑）的見證人。在這情況下，第 10(1)條是否適用於這類遺囑？倘該見證人亦是遺囑的受益人，則可否引用第 10(3)條，以爭辯說該遺囑無該項見證也應屬有效？倘第 10 條按上述建議廢除，這些可能出現的難題將祇會成為學術性問題

3.16 第 11 條本條是以前遺留下來的情况，過往很多人即使能提供有關證據，但如信譽受到懷疑，也不獲准作證。今天，任何人不論其信譽如何，均可作為證人，雖然這明顯會影響到其證供的重要性。**因此，我們建議將第 11 條廢除**（見條例草案第 3 條）。

3.17 第 12 條本條規定遺囑執行人，亦可獲接納為見證人，與第 11 條理由一樣屬多餘累贅。**因此，我們建議將第 12 條廢除**（見附錄 6 條例草案第 3 條）。

3.18 條例第 13 條規定——

“13. (1) 如立遺囑人在訂立遺囑之後結婚，則除非其在遺囑內言明這預期婚姻，否則其遺囑應作為撤銷論。

(2) 如果屬於指定權的遺囑，倘指定的財產，若無該項指定則不能傳與立遺囑人的遺產代理人，則本條的規定不適用。”

從草擬條例草案方面來說，我們認為英文“personal representative”一詞應改為眾數（例如在司法執行法第 20 條內），因為通常遺產代理人會多過一名。

3.19 英格蘭與威爾斯已採用司法執行法第 18 條的下述條款，取代以往根據 1837 年遺囑法第 18 條而實施的條款——

“18. – (1) 除下述第(2)至(4)款另有規定外，立遺囑人如結婚，其所立遺囑應告撤銷。

(2) 縱使立遺囑人其後結婚，由遺囑中附予運用指定權而指定的財產分配仍然有效，除非由此指定的財產，若無該項指定，則會傳與其遺產代理人。

(3) 倘遺囑顯示，立遺囑人在簽立遺囑時，已期望會與某人結婚，並意圖其遺囑不會因其婚姻而告撤銷，則縱使他與該人結婚，其遺囑亦不應視作撤銷。

(4) 倘遺囑顯示，立遺囑人在簽立遺囑時已期望會與某人結婚，並希望遺囑中的財產分配，不會因其婚姻而告撤銷，——

(a) 則縱使立遺囑人與該人結婚，該項財產分配仍然有效；及

(b) 遺囑中的其他任何財產分配，亦應有效，除非遺囑顯示，立遺囑人希望該項財產分配因其婚姻而告撤銷。

18A. – (1) 立遺囑人訂立遺囑後，倘法庭宣判解除或廢除其婚姻關係，或宣布其婚姻無效，——

(a) 立遺囑人所立遺囑仍然有效，而有關指定其前配偶作為遺囑執行人之一，或作為遺囑的執行人及受託人的條文，則可視作刪除；及

(b) 任何對前配偶的動產或不動產的遺贈均告失效，

除非遺囑顯示相反的意願，則當別論。

(2) 上述第(1)(b)條的規定，無損立遺囑人的前配偶根據 1975 年繼承（供養家屬及受供養人）法的條款，申請要求贍養費的權利。

(3) 倘——

(a) 根據遺囑的規定，剩餘權益¹ 受制於終身權益；及

(b) 終身權益因上述第(1)(b)條的規定而失效。

則剩餘權益應視為不受制於終身權益；如剩餘權益要視乎終身權益終止而定，則應將之視為不須視乎終身權益終止而定。”

3.20 遺囑法新訂第 18 條是覓求改正遺囑常因立遺囑人，於訂立遺囑時，已預期會結婚而後結婚，但其遺囑卻未能達到最後出現在 *Re Coleman* [1975] 1 ALL ER 675 一案中，Megarry J 判詞所指的嚴厲規定而遭撤銷。在該案例中，Megarry J 裁定，雖然給予一名被稱為“我的未婚妻”的人的饋贈，是屬於預期有婚姻的饋贈，但遺囑以整體來說（相對於祇屬於遺囑內的某些饋贈），並無預期有該段婚姻，因此，由於立遺囑人其後結婚，其遺囑被裁定撤銷，而給予未婚妻的饋贈亦告無效。如遺囑以整體來說，並不意圖這些分配會因立遺囑人結婚而遭撤銷，則這些分配不會因此而遭撤銷，新的條款更保障了這些財產分配。新訂第 18A 條是全新的條款，考慮到立遺囑人訂立遺囑後離婚，或其婚姻被宣布無效，則——

(a) 立遺囑人所立遺囑依然有效，而有關指定其前配偶作為遺囑執行人的條文，則視作自遺囑中刪除，及

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

- (b) 任何對前配偶的動產或不動產的遺贈，均告失效（除非遺囑顯示相反的意願，則當別論）。

這言之成理，因為可公平地假設在解除婚姻關係時，雙方已達成適當的協議。有關運用遺囑法第 18A 條的案例，可參看 *Re Sinclair* [1985] 1 ALL ER 1066，在該案例中，法庭對第 18A 條有關“失效”一詞作出解釋。

3.21 我們建議本條例的第 13 條應由新的條款取代，條文應與遺囑法新訂第 18 及 18A 條所列出的條款相似。由於可以預見在外國法律下，婚姻關係可毋須經“法庭判決”而告解除（例如根據伊斯蘭法，雙方可協議離婚），我們建議將第 18(A)(1)條內的這類字句刪除，而改用“有效”解除等字眼。第 18(A)(2)條亦須更改，以確保配合有關的香港法例，此處即指婚姻訴訟條例，（見附錄 6 條例草案第 4 條，除上述兩項修改外，這條與司法執行法第 18 及 18A 條的條款完全相同）。

3.22 第 14 條：我們認為這應該是第 13 條其中一款，除此別無意見（見條例草案第 4 條）。

3.23 條例的第 15 條規定——

“15. 除遇下列情況外，遺囑的全部或任何部分，均不得撤銷——

- (a) 立遺囑人結婚（第 13 條規定）；或
- (b) 按照第 5 條的規定簽立另一遺囑；或
- (c) 依簽立遺囑的方式以書面將遺囑撤銷；或
- (d) 由立遺囑人，或由其他人在立遺囑人面前，並依立遺囑人指示，將遺囑燒毀、撕掉或以其他方式毀滅，而用意是將遺囑撤銷。”

我們對這條所採用的否定形式加以斟酌，所得結論是，這形式是可取的，因這樣便可強調遺囑祇有立遺囑人採用特別明確的行動，遺囑才得撤銷。鑑於我們提議對第 5 條作出修改，現建議將第 15(1)(b)條的字句改為“簽立另一有效遺囑；或”。此外，我們亦建議將第 15(1)(c)的“依簽立遺囑的方式”的字眼，改為“依立遺囑人可以有效簽立遺囑的方式”（見附錄 6 條例草案第 4 條）。

3.24 條例第 16 條規定——

“16. (1) 遺囑簽立後，任何塗改，在字裏行間插入文字，或其他更改，除非依簽立該遺囑的同一方式為之，否則不發生任何效力，但如遺囑內的字句或意義不經該項更改實難以明白，則屬例外。

(2) 遺囑更改後，經立遺囑人及每一見證人（如需見證者）按以下規定簽名，該遺囑連同修改部分，即視為正式簽立——

- (a) 於遺囑上相對或接近更改處的欄外或其他部分簽署；或
- (b) 於遺囑結尾處或其他部分所載有關該等更改的備忘錄下端，或結尾或相對處簽署。”

如條例第 5 條按第 2 章所建議加以修改，則第 16 條有關遺囑簽立後作出更改，亦需隨之修訂，**我們建議將第 16(1)條中“依簽立該遺囑的同一方式”字句廢除，改為“由立遺囑人以其可以有效簽立遺囑的方式”**。此外，我們亦建議加上新的第(1A)款，以便可以利用現有的新科技，確定原來字句，即是說，“為執行第(1)款的規定起見，遺囑的字句或意義如能以任何方法發現，即當明顯論。”（見條例草案第 5 條）。提出修訂的目的，是將限制使用現代科學方法以證實書寫內容（例如使用紫外線攝影）的規定消除，先前反對的理由是，倘准許使用這些方法，即表示允許認證不屬於立遺囑人簽立的文件。倘文件必須經過嚴格的檢證，則以往反對的理由，今天便難以站得住腳。使用這些方法檢定以有效方式簽立的遺囑的原來內容，更能確保該遺囑不會因不以有效方式所作的更改而變成無效。

3.25 我們認為如立遺囑人將遺囑的一部分除去，這等於以毀滅方式作部分撤銷，建議的修訂不擬對此作出任何補救。

3.26 第 18 條：我們並無意見。

3.27 第 19 至 22 條：這些條款述及遺囑各方面的法律釋義。根據普通法中法律釋義的嚴格規定，顯示家屬關係的字眼，在若干情況下，會被假設為僅指婚生的合法關係，除非有意願清楚指明非婚生子女亦能受惠，則屬例外。我們先前提到 1985 年進行的本港民意調查，從該項調查所顯示的較開明的社會態度來看，這項法律釋義的嚴格規定，相信未必代表一般立遺囑人的意願。這種見解已成為適用於英格

蘭和威爾斯兩地 1969 年修訂家庭法的第 15 條，而 1987 年修訂家庭法第 1 及 19 條，更使非婚生子女或那些透過非婚生關係而提出要求的人進一步受惠。1987 年修訂家庭法第 1(1)條規定——

“1. - (1) 在本法例中，以及在本條款生效後制定的法令及文件中，有關述及兩人關係的字句（不論如何表達），除非看到相反意願，否則在解釋時，應毋須理會其中任何一方的父母，是否已在某時候結婚。”

法例第 19(1)及(2)條規定——

“19. - (1) 作出下列分配時，即——

- (a) 在本條款生效當日或之後作出的人與人之間的分配；及
- (b) 按在當日或之後簽立的遺囑或遺囑修改附錄²而作出的分配，

有關述及兩人任何關係的字句（不論明示或暗喻），應按上述第(1)條的規定解釋。

(2) 現聲明為執行上述第(1)款引用的第(1)條的規定起見，僅使用‘繼承人’或‘眾繼承人’或任何字眼，以圖限定動產或不動產的繼承權，並非顯示一種相反意願。”

我們建議條例加入具同樣效力的條款（見附錄 6 條例草案第 8 條）。

3.28 現時條例第 23 條規定——

“23. 立遺囑人的子女或其他子孫，如獲給予任何遺產或權益，而兩者皆為該受益人死前或死時不可終止者，倘該受益人先於立遺囑人去世而留有子孫，而其任何子孫於立遺囑人死亡時仍在世，則除遺囑顯示相反意願外，該項遺贈不應失效，應當作為該受益人於立遺囑人死亡後立即去世而發生效力。”

3.29 英國法例中相等於香港條例第 23 條的，是 1837 年遺囑法中的第 33 條，而司法執行法第 19 條，則以下列條款取代該條——

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

“33.-(1) 倘

- (a) 遺囑包含給予立遺囑人的子女或後代一項動產或不動產遺贈；及
- (b) 指定受益人先於立遺囑人去世而遺下子孫；及
- (c) 指定受益人的子孫於立遺囑人死亡時仍在世，則除非遺囑顯示相反意願，否則該項動產或不動產遺贈應生效，作為給予於立遺囑人死亡時仍在世的子孫的一項動產或不動產遺贈。

(2) 倘——

- (a) 遺囑包括給予一組人一項動產或不動產的遺贈，而該組人之中，有立遺囑人的子女或後代；及
- (b) 該組人的其中一名成員，先於立遺囑人去世而留有子孫；及
- (c) 該成員的子孫於立遺囑人死亡時仍在世，則除非遺囑顯示相反意願，否則該項動產或不動產遺贈應生效，而該組受益人，應視作包括已去世成員於立遺囑人死亡時仍在世的子孫在內。

(3) 根據本條的規定，子孫可經所有親系，按其家系，獲取其父母原可獲得的任何遺贈或分配，如子孫超過一人，則可將遺贈平均分配；但如子孫的父母於立遺囑人死亡時仍在世，有能力可以親自收取遺贈，則其子孫不能獲取這些饋贈。

(4) 為執行本條的規定起見——

- (a) 任何人的非婚生問題，均毋須理會；及
- (b) 在立遺囑人死前成胎及隨後活着出生的人，應視作在立遺囑人死亡時已在世。”

3.30 原先條款的規則是，先去世的子女，概括來說，祇是假裝將生命延長，以免其遺贈變成無效，而取代條款則將這項規則廢除。現時，該項遺贈實質上已成為先去世子女的絕對財產，故屬其遺產的一

部分。根據司法執行法新條款的規定，該項遺贈是按家系³ 而對該名子女在立遺囑人去世時仍在生的子孫發生效力，而非作為先去世子女遺產內的一項遺贈。再者，舊的規則混淆不清，顯然會導致反常的結果，故取代條款看來合理。因此，我們建議採用司法執行法第 19 條所列的條款（惟須受下述規限），以取代條例第 23 條（見附錄 6 條例草案第 9 條，條款與英國的完全相同）。

3.31 我們注意到在英格蘭和威爾斯，“子女或其他子孫”的不同定義：現時，1837 年遺囑法第 33 條生效時有以下假設：(a) 凡述及立遺囑人的子女或其他子孫，其意思包括立遺囑人的非婚生子女，以及任何可列為其子孫的人，並視該子女或其子孫出生時是婚生子女；及 (b) 凡述及指定受益人的子孫，或其他指定受益人後裔的人，均視作出生時是婚生子女（司法執行法第 19(4) 條）。符合無遺囑者遺產條例（香港法例第 73 章）及遺屬生活費條例（香港法例第 129 章）的規定起見，我們建議將“子女”的定義擴大，遺囑條例（香港法例第 30 章）第 23 條亦須反映這新的觀念。因此，我們建議將第 23 條修訂，以便經由司法執行法第 19 條取代的 1837 年英國遺囑法第 33(1)、(2) 及 (3) 條轉載於香港的遺囑條例（見條例草案第 9 條）。

3.32 第 24 至 29 條：本委員會研究這些條款後，決定毋須作出修訂。

3.33 條例第 30 條規定——

“30.(1) 立遺囑人如於本條例開始實施前死亡，本條例的規定不得適用於其遺囑；如立遺囑人於條例開始實施之後死亡，則不論其遺囑於實施之前或之後簽立，本條例規定亦屬適用，但祇在於使條例實施前簽立的遺囑，原應有效者，不致因本條例的規定而失效。

(2) 根據已廢除的遺囑條例第 3 條規定生效的遺囑，不應因第 III 部的任何規定而受影響，但如遺囑隨

³ 按家系——“按家系這而非按人數”分配財產，意思是將財產平均分配予數組人，而不理會每組的人數。舉例來說，受益人可能有四組，即使一組可能有五人，另一組可能祇有一人，每組都祇能得到財產的四份之一。故此，立遺囑人可給予 A 君一項終生遺贈，剩餘遺贈則“按家系而非按人數”分配予 A 君去世時尚在生的子女，以及先其去世子女但在他去世時仍在生的孫。A 君有子女六名，其中五名在 A 君生時去世，每名子女均留下子孫，而這些子孫在 A 君去世時仍在生，此外，A 君去世時有一名子女尚存；財產按家系分為六份，一份給予 A 君那名在生的子女，其餘五份，則分別給予五名已去世子女的孫，而每名去世子女的孫不論人數多少，均祇能合分一份財產。

後為根據本條例所訂的有效遺囑所撤銷或更改，則屬例外。

(3) 在不妨礙釋義及通則條例第 23 條一般適用的原則下，以下各條例應繼續適用於本條例開始實施前死亡者的遺囑，一如本條例未有通過——

- (a) 已廢除的遺囑條例、
- (b) 已廢除的遺囑（有效形式）條例，及
- (c) 英國法律適用範圍條例附表已刪去的第 66 項。”

3.34 有關來自修訂本條例的法例，其制定後的條款所適用的範圍問題，**我們建議，處理這個問題的方法，是在第 30 條加入一項條款，規定立遺囑人如實施我們建議的修訂法例開始實施前死亡，該修訂法例則不得對其遺囑適用；如立遺囑人於法例開始實施之後死亡，則不論其遺囑於實施之前或之後簽立，祇要其遺囑不致因而失效，該修訂法例亦屬適用。立遺囑人在修訂法例開始實施前所立遺囑因其結婚所受的影響，應如修訂法例未有通過般去決定。建議的條款可用以確保受我們建議所影響的遺囑不致失效。**

第 4 章 遺囑：糾正、釋義及證據

引言

4.1 一份遺囑有時會遇到一項困難，就是未能表達立遺囑人的真正意願，原因為筆誤或未能充分了解立遺囑人的意願。在 *Re Reynette - James* [1975] 3 All ER 1037 一案，遺囑最後草稿經由女立遺囑人認可，但打字員在繕打正本時，不小心漏打了某些字句，而這錯處並未有在遺囑簽立前發現，結果該份遺囑獲法庭認證，唯已漏掉某些字句。自 *Megarry VC* 在 *Ross v Caunters* 一案所作的判決後，這種疏忽行為可能引致一名受影響的受益人訴諸法律行動（如果起訴在期限未屆滿之前），但如果有人能夠提出明顯的證據，則法庭可糾正該份遺囑的話，這種做法似乎會較為明智。

英格蘭及威爾斯所作出的更改

4.2 司法執行法第 20 條規定——

“20. (1) 如果法庭認為一份遺囑由於以下情況：

- (a) 筆誤；或
- (b) 未能了解立遺囑人的指示，

以致所表達的意思不能使立遺囑人的意願得以實行，則法庭可下令將該份遺囑糾正，以使其意願得以實行。

(2) 除獲法庭批准外，任何人士不得在第一次領取有關死者遺產的遺囑認證及管理書六個月後申請根據這條文發出的命令。

(3) 如有死者的遺產代理人在第一次領取死者的遺囑認證及管理書六個月後，分配了死者任何遺產，而有人提出遺產代理人應考慮到法庭可能在期限屆滿後仍會准許本條的申請，並作出命令，則本條的規定，不得作為可令致遺產代理人為已分配的遺產負上責任，但由於法庭已頒佈本條的命令，本條款的規定亦不會妨礙任何人士討回已分配遺產的權力。

(4) 以本條而言，在考慮何時為第一次領取有關死者遺產的遺囑認證及管理書時，一份祇限於發給‘限制授與土地’或‘受託物業’的遺囑認證或管理書不在考慮之列；而一份祇限於發給不動產或動產的遺囑認證或管理書亦不在考慮之列，除非一份限於剩餘遺產的遺囑認證或管理書前已發出或同時發出。”

4.3 本港雖然並無司法執行法第 20 條第(4)款所提到的“限制授與土地”或“不動產”，但我們建議本港的遺囑條例應加插類似司法執行法第 20 條條文，而第(4)款祇需重新草擬，以顯示本港與英國所適用的法律有所不同。（請參閱附錄 6 條例草案第 10 條，除所提到的修改外，該條與英國條文相同）。

外在證據

4.4 司法執行法第 21 條規定：

“21. (1) 本條款適用於下述遺囑——

- (a) 如一份遺囑有任何部分全無意義；
- (b) 如一份遺囑所使用的部分文句表面上含糊不清；
- (c) 除根據立遺囑人意願的證據外，有任何證據顯示鑑於周圍的情況，遺囑內部分所使用的文句含糊不清；

(2) 倘本條規定適用於上文所述的遺囑時，外在證據，包括立遺囑人意願的證據，可獲法庭接納為證據，以便有助於解釋該份遺囑。”

4.5 司法執行法第 21 條規定，倘遇到遺囑有部分全無意義、表面上含糊不清、或鑑於周圍情況而屬含糊不清，為有助於解釋該份遺囑，法庭容許外在證據，包括有關立遺囑人意願的證據，獲得接納為證據。此條規定使法官長久以來須就遺囑所使用的文句作出解釋，而即使具有清楚明確的外在證據可迅速解答某一含糊之處，亦不獲接納的奇怪現象得以消除。我們建議香港採納類似的條文（詳見條例草案第 10 條）。有關條文與英國的條文相同。*Re Williams* [1985] 1 All ER 964 一案則可作為引用第 21 條時的案例。在該案中，外在證據不獲法庭接納，原因為有關證據無法對解釋有關遺囑有任何幫助。

4.6 此外，我們亦希望清楚述明外在證據在下述情況——即關於遺囑的簽立、撤銷或更改的方式——亦可獲接納為證據。在 *Re Colling* [1972] 3 All ER 729 一案中，Ungoed-Thomas J. 指出：1837 年遺囑條例第 9 條（香港條例現行第 5 條所根據者）內已含有須提出口頭證據的規定。我們建議接納他的意見，並且更進一步提議立遺囑人本人所作的口頭（或其他）證供，應獲接納為證據。因此，我們建議在原有第 17 條之後加添第 17A 條，規定“關於一份遺囑如何簽立、撤銷或更改的外在證據，包括立遺囑人在任何時候所作聲明的證據，均可獲接納為證據”（詳見附錄 6 條例草案第 6 條）。

給予配偶但含糊不清的餽贈

4.7 司法執行法第 22 條規定如下：

“22. 除能提出相反意圖外，如果一名立遺囑人將其財產遺贈或遺留其配偶，從文句上的意義是將財產的絕對權益給予其配偶的，但根據同一份文件，立遺囑人亦有意將同一財產的權益給予其子孫，則即使擬餽贈其子孫，亦可作出一項假設，就是遺贈給配偶的財產是屬於絕對權益。”

4.8 此條文涉及的要點較為次要，而通常祇會在非律師所擬備的遺囑中出現。一名立遺囑人表面上已將餽贈絕對地給予配偶，但同時亦將同一財產表面權益給予子孫，暗示餽贈給予配偶的祇是終身利益。第 22 條現規定：除非能夠肯定顯示有相反意圖，否則應假設給予配偶的餽贈是絕對的餽贈。除有一點要保留外，我們亦贊同這一條文。我們相信在這種情況下，如果立遺囑人的妻子尚存，立遺囑人通常有意將餽贈絕對地給予妻子。為此，我們建議本港亦採納這一條文，規定如果配偶在立遺囑人逝世時仍生存，則給予配偶的餽贈當屬於是絕對的餽贈（詳見條例草案第 10 條）。如果她先逝，餽贈將給予子孫，相信這必然是立遺囑人的真正意願。

第 5 章 遺囑的登記

英國條文

5.1 司法執行法第 23 至 26 條就遺囑的存放和登記事有詳盡的條文規定。

香港條文

5.2 田土登記條例（香港法例第 128 章）第 2 及第 22 條准許除其他文件外，凡涉及香港土地的遺囑亦得以登記及存放。因此，雖然香港今日絕少使用這條文，但實已設立保存遺囑的制度。

5.3 前註冊總署署長 Mr. W.K. Thomson 認為將遺囑列入田土登記條例內，似乎是一項錯誤。我們亦與有同感。現任註冊總署署長在 1987 年 4 月 24 日致函給小組委員會時亦發表同樣意見，全文如下：

“Mr. Thomson 認為將遺囑列入田土登記條例內是一項錯誤，我亦同意他的說法。一份遺囑，即使登記附在某一物業上，其實並不影響該物業，直至立遺囑人死亡，其遺囑獲得認證，並登記在有關物業上，才會對該物業有所影響。不過，立遺囑人即使將其遺囑登記，仍可在生前將其物業脫手。如果他真的這樣做，將遺囑登記祇會浪費人力物力，其次，如果有人和田土註冊處查詢該物業時，祇會引起混淆的感覺。

事實上，田土註冊處內確有以契據摘要¹方式將遺囑登記，但準確數字在未能詳細審查 130 萬份登記卡之前，無從得悉。

至於根據田土登記條例第 22 條將遺囑存放在田土註冊處一事，我亦同意 Mr. Thomson 的說法。Mr. Thomson 認為將遺囑存放在最高法院經歷司處較為適合，因為經歷司負責遺囑認證處。現時遺囑祇可存放於田土註冊處，但如果一名立遺囑人擬將其遺囑存放在政府部門，但立遺囑時並無物業，則他不能這樣做。

¹ 立契據摘要：是一份載有契據詳情等的登記文件。

截至今日為止，根據田土登記條例第 22 條存放於田土註冊處的遺囑計有 146 份。”

5.4 以一般情況而言，委員會並不同意將遺囑登記這一概念。我們認為一份遺囑祇涉及私人家事。將遺囑存放及登記，祇會加添官方色彩，這實在是無必要的，而且會減弱其機密程度。而且立遺囑人具有自動更改一份遺囑的權利，但遺囑一經登記，其權利即會受到挫折。

建議

5.5 鑑於上文所提及的政策，我們認為遺囑不應予以登記。同時，我們對於香港律師會現行的非正式方法，即由香港律師會將逝世的客戶姓名傳閱予各會員週知，要求各會員提供有關那些客戶簽立遺囑的資料這一方法，我們亦感滿意，實毋須為遺囑的登記而作出花費。更且，我們建議修訂田土登記條例，以便該條例對那些未獲認證的遺囑不予適用。

第 6 章 國際遺囑

英國條文

6.1 1982 年司法執行法第 27 及 28 條，以及第二附表已將 1973 年 10 月 26 日華盛頓國際遺囑公約條文列入英國法律內。1974 年 10 月 10 日英國成為該公約的簽署國，但至今亦未予以締約。公約目的在對遺囑的格式作出規定，以便符合該格式的遺囑，不論在何處簽立、亦不論死者的資產在何處、死者屬何居籍、居留地或國籍，均屬有效。

6.2 有關司法執行法第 27、28 條及第二附表現載於附錄 3。國際遺囑的格式載於公約的附件內，列於司法執行法第二附表，現轉載於附錄 3 內。

建議

6.3 將公約列入本港的法律內，對於那些資產散佈在不同司法管轄範圍的香港居民遺囑的認證，可能大有幫助，同時對於根據香港現行法律簽立的遺囑，所據方式雖有不同，而且亦未有遵守國際遺囑的規定，但不會影響其有效程度。**將該公約列入香港法律祇會提供額外保留的方法，應該受到歡迎，因此，我們建議將該公約列入香港法律內。**（註：如果將該公約列入法律時，第 5 條規定應有提及，例如：“除須遵守第 條的規定外，任何遺囑…… 不屬於有效……”）

第 II 部

第 7 章 無遺囑繼承法：引言

無遺囑繼承法研究範圍

7.1 對於無遺囑繼承法的研究範圍甚為廣泛。委員會須研究現行法律一般情況是否令人滿意，是否有必要或需要提出更改？委員會亦須研究現行法律規定位於新界的若干土地須另行遺贈，此種情況是否令人滿意。

無遺囑繼承法的範圍

7.2 如果一位死者未立有遺囑，即屬一位逝世時“無遺囑者。”無遺囑死亡的情況就出現。如果一名死者全未立有任何遺囑，即稱為“完全無遺囑者”；又如果他留下遺囑，但只處理其部分遺產，則稱為“局部立有遺囑者”。雖然本港人士已漸趨於簽立遺囑，但大部分人士逝世時均無立下遺囑。即使死者生前已對遺產有計劃安排，但通常都會剩餘一些資產，未列入計劃內。1971 年無遺囑者遺產條例（香港法例第 73 章）（以下簡稱“條例”）對無遺囑的遺產應如何管理制定規定。該條例大部分根據英國 1925 年遺產管理法所訂立無遺囑繼承規則，其後並由 1952 年無遺囑遺產法予以修訂。

7.3 有關規則是假設一個未立有遺囑的人，如果要立遺囑，會希望留下遺產給某些類別的近親，而且會先給某些親屬，其後才給與他人。最基本的假設就是人們通常希望子女獲得平均分配，而妻子或丈夫則在有生之年生活有供養。如果並未有遺下尚存子女或配偶，或並無子女、配偶，則人們通常會希望留下遺產給與近親，如無近親，才會留給較遠房的親屬。同時，亦假設人們如果已離婚或法院已判決分居，則他們通常不打算將利益給與已離婚或已分居的配偶。

舊法例

7.4 1971 年 10 月 7 日無遺囑者遺產條例生效以前，本港對在本港擁有不動產的無遺囑者的繼承（不論死者屬何居籍），以及居籍是香港而在香港逝世時擁有動產的無遺囑者，須受兩套截然不同的法律

規範，至於應遵守那一套法制，則以他是否是中國人而定。再者，本港亦沒有一套很明顯關於“中國人”一詞定義的裁定，因此，亦有一些屬於歐亞籍的無遺囑者，其遺產管理人會選擇適合他們的法制，總之，該兩套法制不能同時採用。一名中國籍無遺囑者，其遺產分配法是依據大清律例。而對於一名非中國籍的無遺囑者，則為英國 1843 年 4 月 5 日時的法律。該英國法律基本上是根據十七世紀時所訂立的分配法，及其後英國在上述日子之前對該法作出的數次修改。

1971 年無遺囑者遺產條例

7.5 除國際私法可能對某一宗遺產適用外，本港自 1971 年 10 月 7 日以來，任何人士，不論國籍、種族或文化，倘在本港死亡而未立有遺囑，則其遺產是依據無遺囑者遺產條例進行分配。該條例在 1971 年生效以後，曾即作出修訂（1971 年香港法例第 49 號曾對第 2(2)(b)條及附表第 2(2)段作出修訂），其後立法當局對這條例少有關注。自 1971 年，稍為重要的修訂摘述如下：

- (a) 1972 年，增添了第 4A 條，規定由法院判決分居的配偶並無權利對另一配偶的遺產提出聲請（1972 年香港法例第 39 號第 33(3)條）；及
- (b) 1983 年，尚存配偶根據第 4(3)或(4)條所領取的“法定遺產款額分別由 25,000 元或 100,000 元增加至 50,000 元或 200,000 元（法律告示 1983 年第 220 號）。

假設立遺囑者

7.6 委員會在審議本港無遺囑法律時，試圖以一名居於香港八十年代有理性的立遺囑者身份而制定法律。我們試圖以這樣一位假設的立遺囑者，在考慮其情況及受供養人後，會有甚麼理性的想法去分配其遺產而制定有關法律。任何法典，不能適合每一種可想像得到的家庭情況或會有甚麼事情發生，而在某些特別的情況下，確會導致不公平的現象出現。不過，我們相信，如果依據我們稍後所提出對該條例作出的修訂，不公平現象應減至最少。如果有個別不公平情況出現，有關為死者家屬及受供養人供養的法例可提出補救辦法。該辦法在本報告第 III 部內詳述。

第 8 章 無遺囑繼承：尚存配偶的權利

有關分配剩餘遺產的現行規則

8.1 條例內有關妾侍的過渡性條文將於稍後另行研究，以本章而言，如死者於 1971 年 10 月 7 日前締結夫妻關係所引致的複雜情況，本章不擬討論。隨着時日的消逝，過渡性條文的重要性亦自當日減。

8.2 根據條例第 2(1)條的定義，“丈夫”及“妻子”兩詞，就一名人士而言，指該名人士締結一段有效婚姻的“丈夫”或“妻子”。至於尚存丈夫或妻子，現稱為“尚存配偶”。條例第 3 條亦對“有效婚姻”作出界定，指根據香港法例第 181 章婚姻條例規定而締結的婚姻；香港法例第 178 章修訂婚姻制度條例承認為有效的新式婚姻；修訂婚姻制度條例宣布為有效的舊式婚姻；或在本港以外地方根據當地法例而舉行儀式或締結的婚姻。至於一名無遺囑者的“親屬”，即指他的父母，兄弟姊妹、或兄弟姊妹的子孫。¹

8.3 有關如何分配無遺囑者剩餘遺產（即支付一切債務、殯葬費及遺產管理費後餘下的淨遺產）的規則，詳列條例第 4 條。方法如下：

- (a) 如果無遺囑者遺下尚存配偶，但並無遺下子孫或親屬，則該名尚存配偶有權絕對地承受無遺囑者的全部剩餘遺產（即：全部遺產而且無須附帶任何條件）。
- (b) 如果無遺囑者遺下尚存配偶及子孫，則尚存配偶有權領取 50,000 元，連同年息 5%，由死者逝世之日起計，以及其餘剩餘遺產的一半。至於其餘剩餘遺產另一半則以法定信託保管（即根據條例而制定的信託），代其子孫持有。
- (c) 如果無遺囑者遺下尚存配偶及親屬，但無遺下子孫，則尚存配偶有權承受 200,000 元，連同年息 5%，由死者逝世之日起計，以及絕對地承受其餘剩餘遺產的一半。至於其餘剩餘遺產的另一半則由其父／母或父母領取，或如果並無遺下父母，則由無遺囑者的兄弟姊妹或他們的子孫繼承。

¹ 子孫——一名人士的子孫包括其子女、孫及其他直系後裔。

- (d) 如果無遺囑者並無遺下尚存配偶，但遺下子孫，則子孫有權承受由法定信託保管的全部剩餘遺產。
- (e) 如果無遺囑者並無遺下尚存配偶，或任何子孫，但父母雙全，則父母可絕對地領取全部剩餘遺產。
- (f) 如果無遺囑者並無遺下尚存配偶、或任何子孫，但祇有父或母，則該父或母可絕對地領取全部剩餘遺產。
- (g) 如果無遺囑者並無遺下尚存配偶、任何子孫及父母，則他的兄弟姊妹承受全部剩餘遺產。如果無遺囑者又無遺下任何兄弟姊妹，則遺產歸他的祖父母及外祖父母所有。如果也無祖父母或外祖父母，則歸其叔伯姑姨舅。如果亦無叔伯姑姨舅，再無其他規定的親屬，遺產全歸政府，但政府可從遺產中撥出款項，撫養受該無遺囑者供養的人士（不論是否為該無遺囑者的親戚），以及該無遺囑者可合理預期會加以撫養的其他人士。

8.4 根據條例規定的分配規則甚為繁複，宜以圖表方式說明。麥雅理先生於 1972 年香港法律專刊第 135 頁曾撰文“根據 1971 年無遺囑者遺產條例的分配辦法”，並附以圖表說明該條例下的分配效果。現徵得該文作者（本小組委員會主席）及該專刊的同意，全文刊載於附錄 4 內。

配偶有權購買動產但不包括婚姻住所

8.5 如果尚存配偶不能絕對地領取全部剩餘遺產，則根據條例第 7 條的規定，尚存配偶可在遺產代理人第一次取得遺產管理書日起計六個月內，要求遺產代理人將無遺囑者的“個人動產”（即條例第 2(1)條的定義），撥歸其所用，作為清償其 50,000 元或 200,000 元全部或其中一部分（視乎個別情況而定）的“法定遺產”，以及其有權取得的利息。其他有權分攤剩餘遺產的人士可提出反對，由法庭決定是否禁止擬議中的撥用。事實上，第 7 條規定：如果有利益關係的親屬不提出反對的話，尚存配偶有權可從其有關的法定遺產中，撥出款項以購買無遺囑者的個人動產。

8.6 但條例內並無條款規定可使尚存配偶以購買或其他方式取得婚姻住所。

現況令人不滿

8.7 對於上文所述第 4 條規定現行分配予各類親屬辦法的基本結構，我們亦表贊同。不過，我們認為，如果我們將一名假設有立遺囑的人士和一名無立遺囑的人士作出比較，而他們同時遺下子孫或親屬，則假設有立遺囑的人士會對其尚存的配偶所作出的安排，會較現行根據無遺囑的分配規則對尚存配偶的安排，更為慷慨。

8.8 條例第 4 條規定尚存配偶所領得的法定遺產，是現行財產轉移模式的關鍵。1971 年所訂定的法定遺產款額分別為 25,000 元或 100,000 元，視乎無遺囑者是否有遺下子孫而定。條例規定立法局有權提高有關款額，而這權力於 1983 年才首次行使，將款額分別倍增至 50,000 元或 200,000 元。我們認為這款額仍是太少。

8.9 在英國，如果遺一名配偶及子孫，其法定遺產，大致上假設是可與一般市郊房屋的價格相比，以便該筆法定遺產，最低限度能達至婚姻住所的價值。在計算根據本條例支付的法定遺產的適當水平時，我們認為理當釐定一款額，足夠尚存配偶在本港購買一間普通小型婚姻住所。現時釐定的 50,000 元明顯地不足以購買一間住所。

8.10 如果無遺囑者遺下配偶及親屬，但無子孫，則須另加考慮其他因素。分配規則應能反映無遺囑者其他尚存家庭成員的合理期望。特別是如果無遺囑者遺下一大筆財產，法定遺產實不應太大，以致尚存配偶得到一大筆遺產，間接使其家人得益，而減少無遺囑者的家屬的利益。不過，我們亦認為現時釐定的 200,000 元仍屬太少。

建議：法定遺產

8.11 我們建議，如果無遺囑者遺下子孫，則根據條例第 4(3) 條規定給予尚存配偶的款額，應由 50,000 元增加至 500,000 元。

8.12 所建議的 500,000 元大致上可與本港一間普通小型樓宇的價值相提並論，以便尚存配偶得以其法定遺產購買該名無遺囑者名下婚姻住所的利益。至於撥用婚姻住所的權利將於稍後討論。

8.13 如果無遺囑者的遺產不多，則在給予尚存配偶 500,000 元後，已分掉全部淨遺產。結果，子女可能一無所有。但配偶須在死者逝世後負起照顧子女的責任。尚存的家人通常希望留在婚姻住所內居住，建議的法定遺產就是希望能夠有助於達到這個目的。若將法定遺產訂於較低水平，這樣會影響尚存家人購買及留在婚姻住所的期望。

而且，即使遺產遺給子女，仍是交由信託保管，直至他們達到法定年齡，而且祇有利息（比較上微薄的數目）來維持子女的生計。

8.14 我們建議，如果無遺囑者並無遺下子孫而祇有親屬，則根據條例第 4(4)條規定給予尙存配偶的款額，應由 200,000 元增加至 1,000,000 元。

8.15 同時，我們亦建議最低限度每五年檢討法定遺產一次。委員會留意到雖然通貨膨脹，但法定遺產款額祇增加過一次。

8.16 為方便日後對法定遺產款額作出更改，及使意義更為清晰起見，我們建議刪除條例第 4(12)條所提及的款額，修訂後條文如下：

“(12) 根據第(3)或(4)款付給尙存丈夫或妻子淨款額的應付利息，須先從收入中支付。”（附錄 7 條例草案第 4 條）

8.17 同時，為求清晰起見，我們又建議：

(1) 刪去條例第 6 條所列出的款額，並由下文取代：“可用該無遺囑者全部或部分剩餘遺產作擔保，以籌措付給該無遺囑者尙存丈夫或妻子的淨款額，或部分款額，及有關款額的應得利息。”（條例草案第 6 條）

(2) 刪去條例第 8 條所列出的款額，並由下列字句取代，即：“應付給尙存丈夫或妻子的淨款額。”（附錄 7 條例草案第 7 條）

8.18 委員會認為，在應用所建議的法定遺產方案時，將會迎合大部分個案的情況，但可能有少數個案會有不公平現象。這是全面規定法定遺產水平無法避免的結果，但可確保法律的肯定性。但在個別情況，法律的肯定性，也須兼顧公義。我們認為倘普遍使用無遺囑條款，包括規定法定遺產水平，在遇到困難的個案時，最適合的處理辦法莫疑是在為死者遺屬及受供養人提供給養的條例內作出規定。有關這方面的法律將在下文第 III 部討論。如果死者並未有在遺囑內，或如果並無遺囑，但根據無遺囑法，並未有為其家庭成員及其他受供養人提供合理的給養，則該法例規定其家庭成員及受供養人可向法庭提出申請，要求濟助。如果該法例能夠根據我們的建議而作出修訂，當會使這方面的法律有必需的靈活性。我們唯一感到有保留的地方，就是一

切訴訟都很昂貴，相對於那些龐大的遺產而言，提出申請的訴訟費通常會用掉那些數目不大的遺產的大部分。

個人動產

8.19 在英格蘭及威爾斯，如果一名無遺囑者遺下子孫或親屬，則尚存配偶不能承受全部剩餘遺產，但可絕對地領取無遺囑者的個人動產。在香港，如果有同樣情況發生，尚存配偶祇獲准以其法定遺產購買那些動產。從經驗中得悉，在分配個人動產和可能由家庭成員挪走那些動產時，往往會引起問題和家庭糾紛。為消除這些問題，大多數已婚的立遺囑人傾向於將其個人動產遺留給配偶，為此原因，我們認為本港在處理個人動產方面，亦應仿效英國的法例。如果制定這法例，則尚存配偶可絕對地獲得通常一間婚姻住所理應具備的家庭用品、其他物品以及個人物件。

建議：個人動產

8.20 我們建議，不論無遺囑者有否遺下子孫或親屬，祇要他遺下尚存配偶，則該尚存配偶得絕對地取得“個人動產”（根據稍後提出的定義），一如英格蘭及威爾斯的規則。如果實施這建議，尚存配偶有權取得一間婚姻住所內的物品，而非其他人士，（倘連同其他建議，包括尚存配偶有權要求將婚姻住所撥歸其所用，作為清償全部或部分的法定遺產），這會確保對尚存配偶的騷擾減至最低。

8.21 至於如何確定一件物品是否“個人動產”，則最主要的檢定標準就是在死者逝世時，該物品是否存放在婚姻住所內。如果尚存配偶可絕對地獲得個人動產，則該詞的定義須另行界定，以不包括任何當時存放在住所內投資、商業或職業有關的物品。此外，如有任何物品並不包括在定義內，但尚存配偶或任何其他受益人希望得到該物品，則遺產代理人可根據香港法例第 10 章遺囑認證及遺產管理條例第 68 條賦予的權力，將該等物品撥歸有關人士之用。

8.22 因此，我們建議重新界定條例第 2(1)條有關“個人動產”的定義（見附錄 7 條例草案第 2 條）。定義會較為廣闊，例如可包括寶貴的郵票或珍藏的玉器。我們認為這或會造成意外得到的遺產，這都是由於在這方面以大刀闊斧手法處理的結果。不過，定義祇包括尚存配偶一間住所的動產。我們曾經考慮應否擴闊定義範圍，以包括非婚姻住所，例如，妻子應否有權取得死者與其妾持或情婦住所的動產。但終於決定在條例草案內祇採納較窄的定義，而不是廣義。

8.23 為施行我們對增加法定遺產及個人動產的建議，條例第 3 及第 4 條須予以修訂（見條例草案第 4 條）。值得一提的是，擬議中新訂第 4(4)條提到同父母血緣的兄弟，這項修訂是根據第 10.6 段所提出的建議。同時，我們建議廢除條例第 7 條，即有關尙存配偶有權要求將個人動產撥歸已用的條文（見條例草案第 6 條）。

婚姻住所

8.24 在英格蘭及威爾斯，根據 1952 年無遺囑者遺產法，如果一名無遺囑者死亡時，其尙存配偶住在一居所內，該名無遺囑者的尙存配偶有權取得無遺囑者在該居所內所佔權益，作為清償或其可獲無遺囑者遺產的利益的的全部或部分，或用以補償金錢支付的差額。委員會認為這種做法亦屬公平。但本港現時情況不同，尙存配偶並無這種權利，但遺產代理人可根據遺囑認證及遺產管理條例（香港法例第 10 章）第 68 條有權將該住所撥歸其所用。我們認為，配偶無權取得婚姻住所是不公平的。我們估計本港約有三分一家庭擁有自己的住所。本港條例並無這項規定權利，原因可能是在 1971 年立法時，本港自置居所的人口並不顯著。時至今日，自置居所的人口日益增加，部分原因是政府鼓勵自置居所政策所致。

建議：婚姻住所

8.25 我們建議如果無遺囑者遺下尙存配偶，則不論有否遺下子孫或親屬，該尙存配偶應有權獲取無遺囑者在物業所佔的利益，而該物業乃指無遺囑者逝世時其尙存配偶正居住的物業，作為清償其法定遺產或無遺囑者遺產的其他利益的的全部或部分，或用以補償金錢支付的差額。更且，我們認為，為補充香港法例第 10 章遺囑認證及遺產管理條例第 68 條的不足，尙存配偶應有權將婚姻住所撥歸其所用，有關撥用情況及程序必須清楚及毫不含糊地列明。我們深信，如果這項建議及有關個人動產的建議同時付諸實施，則配偶死亡，對家居生活的影響亦可盡量減低。

8.26 為使建議得以實行，條例須作出下列修訂：——

- (1) 條例現有附表應改為附表 1，加上現行 1952 年英國無遺囑者遺產法第 2 附表，稱為附表 2，但為配合香港情況，該附表亦須略作修訂（見附錄 7 條例草案第 12 條）。

- (2) 根據英格蘭及威爾斯 1952 年無遺囑者遺產法有關條文，本港亦應加插新訂第 7 條，內容如下：——

尙存配偶有權取得居所

7. 附表 2 的作用是授權無遺囑者的尙存丈夫或妻子取得物業，而該物業是無遺囑者死亡時，尙存丈夫或妻子正居住者（條例草案第 6 條）。

新訂附表 2 主要特色包括：

- (a) 遺產代理人可將剩餘遺產內的物業利益撥歸尙存配偶所用，作為清償尙存配偶所佔無遺囑者遺產利益的全部或部分，或作為清償部分利益，其餘部分由尙存配偶付款予遺產代理人作為補足該物業價款。（在英格蘭及威爾斯，並無附表所述特有條文，但上訴庭在 *Re Phelps* [1979] 3 All ER 373 的裁決清楚說明，如果婚姻住所的價值高於尙存配偶法定遺產款額，仍可行使撥用權，使到該項交易部分由撥用、部分以售賣形式結合而成。）
- (b) 但如果利益祇包括租約，而且會在無遺囑者死亡後兩年內終止者，則本方案並不適用。
- (c) 此外，如果居所是一幢樓宇的一部分，而剩餘遺產計有或包括整幢樓宇的利益或如果該居所在無遺囑者死亡時並不是祇作住宅用，則如無法庭批准，不可行使選擇權（即有關要求撥用的決定）。
- (d) 在第一次獲取遺囑認證或遺產管理書 12 個月內，必須行使選擇權，在該段期間內，遺產代理人除由於管理遺產時缺乏其他資產，不可將居所的權益脫手。

根據外國法律尙存配偶獲得利益

8.27 在 *Re Collens* [1986] 2 WLR 919 一案中，法庭裁決：以繼承來說，在英國的不動產應受物所在地法（即有關物件所在地的法律）管轄，而不是受居籍法（即某人以某地為其永久居所，並與其在法理上有最緊密的關聯）管轄。在該案中，一名無遺囑者臨死時的居籍地是特立尼達及多巴哥。他有遺產在該地及巴巴多斯但另有小部分遺產在英國，其中包括不動產在內。雖然遺孀已從死者在特立尼達及多巴哥的遺產中領取一百萬元，英國高等法院仍勉強地決定該名無遺囑者遺孀

有權根據經修訂的 1925 年遺產管理法第 46(1)條，領取全部“法定遺產”（在香港，相同條款載於條例第 4(3)和(4)條）。我們認為，在這種情況下，如果某人的遺產散佈各地，則尚存配偶須將從他地獲得的金錢呈報，以抵銷由於無遺囑者在港死亡或由於部分遺產未在遺囑中分配，遺孀可從本港不動產中取得的利益，這樣才會對死者其他家庭成員較為公平。但有兩種情況須予以處理：——

(a) 如果死者遺下不動產，但不是位於香港；及

(b) 如果死者逝世時居籍地不在本港，但在本港遺下不動產。

8.28 為否決 *Re Collens* 一案的裁決，我們建議條例內應加插一條款，同時，亦要計及上文(a)及(b)段所述的情況（見附錄 7 條例草案第 8 條）。

8.29 我們原先打算建議在條例新訂第 7 條之後加上一“推定條款”，以便遺產代理人將無遺囑者在婚姻住所的利益撥歸尚存配偶時，可減輕無遺囑者應繳的遺產稅。這樣，無遺囑者與有立遺囑者繼承遺產稅時情況相同。但財政司在 *LAU Yiu-sum v Commissioner of Inland Revenue* (Estate duty appeal No. 1 of 1983) 一案審結後，為打消該案的裁決，在 1986 年 2 月 26 日預算案演詞中，提議修訂香港法例第 111 章遺產稅條例第 10A 條。在該案中，遺產代理人根據遺囑認證及遺產管理條例（香港法例第 10 章）第 68 條將婚姻住所撥歸尚存配偶用，但法庭認為該產業並未有在無遺囑者死亡時遺給尚存配偶，因而不能根據遺產稅條例（香港法例第 111 章）第 10A 條獲得減免遺產稅。財政司的建議已根據 1986 年遺產稅（修訂）條例付諸實施。

第 9 章 無遺囑繼承：“子女或子孫”

現時情況

9.1 有關妾侍問題，本報告書將稍後分別討論，本章不擬談及 1971 年 10 月 7 日前無遺囑者曾締結一段夫妻關係而生下子女所引起的複雜問題。

9.2 現行條例第 2(2)條及(3)條規定如下：

“ (2) 本條例內凡提及任何人的子女或子孫，即指：

- (a) 該人締結一段有效婚姻所生的子女；
- (b) 如果該人是女性，她最後一名丈夫與另一名女性締結有效婚姻所生的子女；及（香港法例 1971 年第 49 號第 2 條的修訂）；
- (c) 該人按下述規定所領養的子女——
 - (i) 遵照領養條例頒發的領養令；或
 - (ii) 領養條例第 17 條適用的領養辦法所領養的子女。

(3) 本條例內凡提及任何人逝世時仍在生的子女或子孫，均包括該人逝世時待生的子女¹ 或子孫。”

9.3 根據非婚生子女獲取合法地位條例（香港法例第 184 章）第 10(1)條規定：

“10(1) 在本條例開始實施後，一名非婚生子女的母親逝世時並未有就其所有或任何遺產訂立遺囑，而且亦無遺下任何尚存婚生子孫，則該名非婚生，即未有獲取合法地位之子女，或如果該名非婚生子女已死亡但遺下子孫，則其子孫，均有權領取該份遺產的利益，一如他出生時被視為婚生子女一樣，有權領取遺產。”

¹ “待生的子女”指“尚在母親胎中”而仍未出生的子女。

現況並不公平

9.4 我們認為現行條例第 2(2)條規定會導致反常及預料不到的不公平現象。有些前夫（妻）所生的子女可獲得供養，但其他子女則沒有（例如：夫婦兩人都是再婚，丈夫前次婚姻所生的子女被視為第二任妻子的子女，但妻子前次婚姻所生的子女則不被視為第二任丈夫的子女）。本條例的範圍並不包括非婚生子女，而祇有無遺囑者是母親及再無其他尚在生的婚生子女，其非婚生子女才能根據非婚生子女獲取合法地位條例第 10(1)條（香港法例第 184 章）的規定獲包括在內。我們在研究各種假設的情況後，發覺到條例第 2(2)條的規定，即使輔以非婚生子女獲取合法地位條例第 10(1)條（香港法例第 184 章）的規定，仍是很不公平。

9.5 本港前註冊總署署長 Mr. W.K. Thomson 曾以筆名 “Scipio” 撰寫一篇題為：“無遺囑者的一些危險”的文章，刊載於 1976 年 4 月 20 日的南華早報內，指出這些條文可能造成的不公平現象，文章取材豐富，提出尖銳的批評，本委員會現徵得作者及南華早報的同意，將該文轉載，我們很是感激。

9.6 繼該文發表後，Mr. Thomson 對條例第 2(2)(b)條評論如下：“我覺得很奇怪，一名男子與其第一任妻子所生的子女，在第二任妻子逝世時如無訂立遺囑，將被視為第二任妻子的子女一事，婦女團體居然並沒有抨擊這事為顯然不公平……，1971 年無遺囑者遺產（修訂）條例第 2(2)(b)條所作出的修訂，表面上即會產生文章內所述“第 6 個案”那種荒誕的結果（見下一段第 6 個案），我認為實應對該條作出修訂。

9.7 為表明第 2(2)條條文明顯會造成奇特的現象，Mr. Thomson 在其文章中列出 6 個個案，都是關於一名居籍在香港的女士逝世時並沒有訂立遺囑的，這些個案對於該條文實施後可能出現的現象頗具啟發性，我們現將其中兩個有關“子女或子孫”的個案列出如下：

（第 3 個案）

“一名未婚女子 W 君，嫁與 H 君，而 H 君曾與前妻生下一名只有一歲的女兒 D 君。W 君並無子女，將 D 君視如己出，撫養成人。二十年後，H 君逝世，相隔一段日子後，W 君再嫁與 NH 君為妻，NH 君本身有一名兒子 B 君，年屆三十，居於澳洲。不久，W 君和 NH 君死於車禍，NH 君先於 W 君逝世 1 小時。

由於 W 君再嫁與 NH 君為妻，NH 君成為 W 君最後一名丈夫，因此，第 2(2)條條文並不適用於 D 君，以致 D 君不得承繼 W 君的遺產，而其遺產歸 B 君所有。”

(第 6 個案)

“W 君是一名寡婦，並無子女，嫁與 H 君，數年後 H 君愛上鄰居的風騷女子 LM 君，兩人私逃。W 君於是提出離婚，H 君由是娶 LM 為妻，生下一子 C 君。W 君逝世時並無訂立遺囑，遺下唯一與她很是親愛的姐（妹）S 君。不過，誰是 W 君最後一名丈夫呢？無庸置疑，H 君是也。那麼，C 君不就是 W 君最後一名丈夫與另一名女子締結有效婚姻所生的兒子嗎？有誰人敢說不是呢？這樣，顯而易見，C 君有權承繼 W 君全部遺產，而 S 君則一無所有。”

9.8 但 Mr. Thomson 在其文章中稍後亦提出，雖然條例第 2(2)(b)條明顯會有這樣的效果，但法庭在遇到第 6 個案的情況時，肯定會盡其所能將這種不公平的釋義減至最低。

9.9 更且，條例第 2(2)條(c)段亦屬不公平，雖然根據領養條例（香港法例第 290 章），1972 年 12 月 31 日前無遺囑者按照中國法律及習俗領養的子女，在香港獲承認為其子女，但無遺囑者遺產條例則不承認這些子女為遺囑者的子女。領養條例第 25 條規定：

“25(1) 1972 年 12 月 31 日後，凡在本港領養子女，祇可根據本條例規定進行，才可生效。

(2) 第(1)款規定並不影響在 1972 年 12 月 31 日前按照中國法律及習俗在本港被領養人士的地位或權利。”

順便一提的是，領養條例並未有提及在1972 年 12 月 31 日按照中國法律及習俗領養子女的地位。

9.10 上文提及在 1985 年，本港曾對非婚生子女的繼承權進行民意調查，發覺社會人士對這問題所持的態度頗為開明，本委員會亦受到這調查結果的影響。同時，有人亦提到公民權利和政治權利國際公約第 26 條的規定，即應制定法律以有效地保障人不致受到歧視，尤其是不應由於社會來源或出生而受到歧視。

更改建議

9.11 為糾正這些反常的現象，我們建議將條例第 2 條修訂如下：

- (1) 將第 2(2)條廢除。這樣，第 2(2)(b)條亦因應廢除。而 Mr. Thomson 所舉的例子將不會出現，亦不會違犯公平的概念。在第 3 個案，D 君將會繼承遺產而不是 B 君，而在第 6 個案，S 君將會繼承遺產，而不是 C 君。
- (2) 條例內加插新訂第 2(2)條，條文大致與 1987 年英國修訂家庭法第 1 條相同（載於上文第 3.27 段關於遺囑的條文），規定在解釋子女關係時毋須理會其是否婚生（見附錄 7 條例草案第 2 條，該條與英國條文相同）。
- (3) 在(c)段另加一小段，為 1973 年 1 月 1 日或該日以前按照中國法律及習俗領養的子女作出規定（見條例草案第 2 條）。
- (4) 由於其他建議，應廢除非婚生子女獲取合法地位條例（香港法例第 184 章）第 10(1)條（見條例草案第 17 條）。
- (5) 修訂領養條例（香港法例第 270 章）第 25(2)條，將“1972 年 12 月 31 日”這一日期撤銷，並以“1973 年 1 月 1 日”代替之（見條例草案第 19 條）。

非婚生的無遺囑者

9.12 根據現行法律及其他有關遺產分配的規則（例如：子女較父母有優先權，而父母則較兄弟姊妹等優先領取遺產等），唯一有權領取非婚生而且並未訂立遺囑人士遺產的人是——

- (1) 根據條例一般的規定，無遺囑者自己的子女或子孫，因為非婚生一事對他們並無影響；
- (2) 根據非婚生子女獲取合法地位條例（香港法例第 184 章）第 10(2)條規定，無遺囑者的母親；及
- (3) 根據條例第 2(4)條規定，無遺囑者同父異母的兄弟姊妹。

9.13 為便於參考起見，現將非婚生子女獲取合法地位條例（香港法例第 184 章）第 10(2)條及本條例第 2(4)條臚列如下：

(1) 非婚生子女獲取合法地位條例第 10(2)條：

“(2) 在本條例開始實施後，如果一名非婚生子女未能獲取合法地位，逝世時並無訂立遺囑，則其尚存母親有權領取其全部或任何財產的利益，一如該人出生時是婚生，而她是唯一尚存的母親。”

(2) 無遺囑者遺產條例（香港法例第 73 章）第 2(4)條規定如下：

“2(4) 本條例內凡提及一名人士的兄弟或姊妹，指凡與該名人士同一父親所生的子女，即其兄弟姊妹。”

對現況的批評

9.14 一名非婚生子女的親父，即使曾承認該名子女為其所生，而且曾供養他成人，但如果該名非婚生子女逝世時並無訂立遺囑，則該名親父並無任何權利領取其遺產，祇有其母親有權獲得遺產，儘管她可能在該名子女出生後將其拋棄。當然有可能是該名非婚生子女的父親在其出生後即將他遺棄，但即使該名子女是婚生的，這種情況亦可能出現。

9.15 至於非婚生子女同母異父的兄弟姊妹，即使自小已是一家人，由母親一同撫養長大，但亦無權領取無遺囑者的遺產。

9.16 倘一名非婚生無遺囑者死亡時，即使已無任何近親可領得其遺產，其親祖父母、叔伯姑姨舅（可能是實際撫育他的人）亦不能領取其遺產。結果是該名無遺囑者的剩餘遺產將歸政府所有（政府可撥款供養其受供養人：見第 8.3(g)段）。

9.17 在英格蘭及威爾斯，自 1969 年英國修訂家庭法有關係文生效後，非婚生人士與婚生人士一樣，具有領取財產權利，但其中另一結果就是非婚生子女逝世時，其父母亦有權獲得該名子女遺囑產的利益，一如他們出生時屬於婚生子女，其父母有權獲得遺產一樣。

更改建議

9.18 我們建議，倘一名非婚生子女死亡而並未訂立遺囑，則在決定他的親屬繼承其遺產的權利時，他是非婚生這一點應無須理會。我們對第 2(2)條所提出的修訂，應可達成這個目的。關於非婚生一事，現在尚餘一點仍屬重要，就是須處理一新情況，對死亡時須作出假設，因為非婚生子女的父親現在有權繼承。在大多數情況下，通常不可能追查到他的父親所在，因此，我們建議作出下述假設，就是非婚生人士死亡時，他的父親已先逝世（見附錄 7 條例草案第 3 條）。

第 10 章 無遺囑者繼承：“兄弟或姊妹”

現時情況

10.1 條例第 2(4)條規定如下：

“2(4) 本條例內凡提及一名人士的兄弟或姊妹，指及由該名人士同一父親所生的子女，即為其兄弟或姊妹。”

10.2 條例第 4(2)(b)、4(4)、4(8)及 5(4)條，均有提到“兄弟或姊妹”一詞。

10.3 該詞祇與“橫向”繼承有關，即指一名無遺囑的兄弟或姊妹逝世，他的兄弟或姊妹（或他們的子孫）有權繼承，這點與父母死亡由子女繼承無關。

10.4 在英格蘭及威爾斯，1925 年遺產管理法亦有同樣條文，但規定是“同血緣的兄弟或姊妹”（即由同一父親及母親所生的兄弟姊妹）。在香港，條例第 2(4)條的規定，祇包括了同父異母的兄弟姊妹（即：由同一父親所生的兄弟姊妹）。但在英格蘭及威爾斯的條文規定，如果無遺囑者並未有遺下丈夫或妻子、子孫、父母、同血緣的兄弟或姊妹，這樣，半血緣的兄弟姊妹才有權繼承。更且，如果無遺囑者並無遺下同血緣的叔伯姑姨舅，半血緣的叔伯姑姨舅（即無遺囑者父母的異父或異母的兄弟或姊妹）才有權繼承。

10.5 現行第 2(4)條規定，當一名兄弟姊妹逝世時，祇要是同父所生的兄弟姊妹，不論其為中國習俗傳統家庭中由妻子或妾侍所生的子女，均同樣有權繼承。而且，現行條例並不限於中國傳統家庭，而是普遍適用。

建議

10.6 我們在下文第 10.7 段所作出的建議，與英國現行情況略有不同，在英國，同血緣的子女較半血緣的子女有優先繼承權。在香港，為顧及中國傳統，我們將一名男子與妻或妾所生的子女均視為同血緣的兄弟姊妹，從而甲妾與乙妾所生的子女均被視為同血緣的兄弟姊妹，這樣，即可顧及本港的妾侍制度。除這點之外，我們沿用英國法律，以血緣關係來決定繼承權。

10.7 本委員會現建議如下：

- (1) 廢除第 2(4)條（見附錄 7 條例草案第 2 條）。
- (2) 條例內第 4(2)(b)條、4(4)條、4(8)條及 5(4)條內凡提及“兄弟或姊妹”、“眾兄弟或姊妹”及“眾兄弟姊妹”之處，即予以修訂，泛指同血緣的兄弟姊妹（見條例草案第 4 及 5 條）。
- (3) 條例第 4(8)條應予以修訂，以便在第一節之後加上給予半血緣的兄弟姊妹，以及在現行最後一節之後加上給予無遺囑者父母半血緣的兄弟或姊妹，即半血緣的叔伯姑姨舅（見條例草案第 4 條）。
- (4) 此外，亦增訂一法律條文，規定一名男子不論與其妻或妾所生的子女，均被視為同血緣的兄弟姊妹（見條例草案第 4 條）

第 11 章 無遺囑者繼承：夫妻關係

現時情況

締結夫妻關係

11.1 根據條例的規定，凡於 1971 年 10 月 7 日前所締結的夫妻關係，均獲承認。有關夫妻關係的過渡性條文載於條例第 13 條及附表內。按照過渡性條文，如果在 1971 年 10 月 7 日前締結夫妻關係，該妾（女方）或男方死亡並無簽立遺囑時，另一方得獲若干權益。更且，根據過渡性條文，夫妻關係所生的子女，以條例而言，被視為有效婚姻的子孫，例如在他的父親或母親無遺囑死亡，或父親的結髮（第一任）妻或妾侍但非其生母無遺囑死亡，或兄弟或姊妹無遺囑死亡時，均可根據條例分領遺產。條例過渡性條文規定如下：

“13(1) 附表的規定對於在修訂婚姻制度條例所指定的日期前締結的夫妻關係適用。

(2) 在本條與附表內，‘夫妻關係’指在修訂婚姻制度條例所指定的日期前締結夫妻關係中的男方與女方，在該種制度下，女方在男方生前已被男方的妻子承認為男方的妾侍，而其名分亦已為男方的家人所普遍承認。”

11.2 根據條例附表的規定：

- (1) 以條例而言，由夫與妾所生的子女被視為有效婚姻所生的子女（第 2(1)段）。
- (2) 第 2(2)(b)條所提及“丈夫”一詞，應解釋為已包括夫妻關係中的男方（第 2(2)段）。
- (3) 整條條例對夫妻關係中的夫或妾均適用（第 3 段）。
- (4) 倘夫或妾死亡時，另一方的利益大致上是從尚存配偶、子孫或其他親屬的利益中授給予另一方（第 4 段）。
- (5) 倘一名妾再婚或與人發生性行為，則其可享有男方剩餘遺產中的終身權利即告終止（第 4(12)段）。

對現時情況的批評

11.3 我們認為有關夫妻關係的過渡性條文並不公平，

- (a) 夫妻關係所生的某些子女，即使在死者生前全靠他撫養，亦可能不能申領；
- (b) 如果一名妾與人發生性行為，她的贍養費即告終止，但尚存配偶則無須受這規限，這點甚為不公平；及
- (c) 根據條例第 13(2)條的規定，一名妾侍須證明在男方生前已被男方的妻子接納為丈夫的妾侍，而其名分亦已為男方的家人所普遍承認，從證據觀點來看，如果該名妾侍遇到懷有敵意的妻子及家人，及他們有意佔據所有利益時，則該名妾侍要提出有關證據可能會非常困難。
- (d) 由於建議刪除第 2(4)條，為補償損失，應加插一條關於推定兄弟姊妹關係的條款，一如上文第 10.7 段所建議。

（註：香港律師會認為應增加妾侍根據附表所享有的權利。小組委員會認為無遺囑者可能不會同意律師會建議所增加的權利。不過，對於香港律師會有關建議，即妾侍應有權向法庭申請將終身利益折合為當前價值（即一筆過付款而非終身收取收入），小組委員會亦表示同意）。

建議

11.4 我們建議——

- (1) 條例第 13 條應予修訂，以便規定 1971 年 10 月 7 日前締結夫妻關係的女方，應假設為已被男方的妻子及家人接納為男方的妾侍（見附錄 7 條例草案第 10 條）。
- (2) 非婚生子女獲取合法地位條例（香港法例第 184 章）第 14(2)條亦應增添同一項假設（見附錄 7 條例草案第 18 條）。
- (3) 附表 1 第 4(12)段有關“或與人發生性行為者”字眼應予刪除（見條例草案第 11(g)條）。

- (4) 夫妻關係中的妾侍或男方應有權得回其終身利益（見條例草案第 11 條）。

妾侍及子女

11.5 在上文第 9.11 段，我們建議廢除第 2(2)(b)條。該條規定一名女性的“子女或子孫”即“其最後一名丈夫與另一名女子締結一段有效婚姻所生的子女”。在引用這條文而並未有牽涉及妾侍時，會有若干不公平的現象，我們已在上文舉出數個例子。但如果牽涉到妾侍時，情況略有不同。現時情況是：根據條例，一名男子與其妻子或妾侍所生的子女均被視為其妻子及妾侍的子女。在該名男子，他妻子或任何妾侍逝世時所有子女，均被視為死者的子女。這是按照第 2(2)(b)條及附表第 2 段相加起來的結果，該段規定：

- (a) 由夫妻關係所生的子女應予視為有效婚姻所生的子女；及
- (b) 第 2(2)(b)條所提“丈夫”一詞，包括夫妻關係中的男方。

我們建議現行有關夫妻關係的條文應予保留。如果我們就附表 1 所提出的建議獲得接納而第 2(2)條將會被廢除，我們建議在附表 1 內應加插一段，說明以條例的目的而言，夫妻關係男方的所有子女，不論由妻或妾所生，均屬一大家庭。所有子女均被視為妻及每一名妾侍所生的子女（見條例草案第 11 條）。

11.6 現時一名男子與其妻子所生的子女，及與其妾侍所生的子女死亡時，祇有其親生父母被視為死者的父母。對於這點，我們不打算作出任何更改。

11.7 為顧及妾侍制度，使到這方面的法律更為複雜，但情況可撮述如下：如果採納上述建議，結果說是：在繼承一名男子、其妻子及其妾侍的遺產方面來說，該名男子與其妻及妾所生的所有子女均被視為該名男子、其妻子及每一名妾侍所生的子女。即是說，這些人士死亡而並未有簽立遺囑時，所有子女均可得益，但子女死亡時，情況則不同。如有任何一名子女死亡，祇有其親生父母可作為父母而得益，但其餘子女則以同血緣的兄弟姊妹關係而得益。

妾侍及兄弟姊妹

11.8 上文第 10.5-10.7 段已作出討論。

第 12 章 無遺囑者繼承：雜項

新界土地

中國習俗法例

12.1 除獲新界條例第二部豁免的新界土地之外，無遺囑者遺產條例已代替舊有無遺囑者的財產繼承規則。但以這些新界土地來說，中國習俗法例，或大清律例（除加上分配法外）仍獲保留。

12.2 基本上，中國習俗法目的是將家產由男子孫保存，而很少是傳給女子孫、如果死者並無兒子，其遺孀有責任領養一名兒子，繼其姓氏，並保留傳予男子孫。遺孀的權益祇限於終身獲得贍養，如果再婚，這權益亦告終止。兒子亦可獲得贍養，但女兒祇有權獲得贍養至其出閣之日，唯當日可獲得一筆嫁妝。

12.3 在新界，慣常處置一名死者財產的方法是撥出款項給予同一祖宗當時的男後裔，作為供養及生活費用，以及撥出一筆基金，作為祭祖之用。這些由家族持有的土地，通稱為“祖”或“堂”。

12.4 中國習俗法例亦承認家庭內的男性與第二位妻子的關係，而該名妻子稱為“妾”或“妾侍”。以家族及家產而言，妾均有權利。她的子女（庶出），與正妻的子女（嫡出）一樣，被視為婚生子女。妾侍是由於該名男子有意納她為妾，並獲正妻接納及家人承認，因而取得妾侍地位。

12.5 條例第 11 條規定——

“11.(1) 本條例任何條款，不得作為對新界條例第二部關於土地適用範圍有所影響，而該等土地是指新界條例第二部適用而總督未有根據該條例第 7(2)或(3)條准予豁免遵守新界條例第二部規定的土地。有關條款續對該等土地適用，而適用程度與效力，一如本條例未予通過實施情況一樣。

(2) 在無遺囑死亡情況下，本條適用的土地仍須按以往辦法繼續轉移，一如本條例未予通過時情況一樣。

(3) 在本條內，‘土地’一詞的含義與新界條例第 2 條內載該詞的含義相同。”

12.6 現尚未獲新界條例第二部豁免的新界土地數目較以往大為減少。同時，自 1971 年無遺囑者遺產條例通過以來，這些土地的價值亦大大增加。我們認為，現今社會，在同一司法轄區內，祇因為無遺囑者的某一種資產（即新界條例第二部仍適用的土地）而需保留兩種繼承制度，實屬不當。更且，我們認為，不准女兒承繼及限制一名無遺囑死者的遺孀權利原則上是不對和落伍的，不符合香港今日的新思想。同時，保留這條款可能違背公民權利及政治權利國際公約第 26 條的規定，該條規定：在法律面前，人人平等。更且，自 1971 年，本港整個家庭法的法定架構已全部改變（例如：領養兒女），要保留香港 1971 年以前的境況而事實上中國亦已無這種情況出現，實屬怪誕。**我們建議將條例第 11 條整條廢除。**

12.7 今時今日，本港大多數有關的土地可能均以氏族、家族、“堂”或“祖”名義持有，倘氏族、家族、堂或祖有成員逝世時，他們擁有的土地應如何轉移，通常已有頗詳細的規則可予遵循。大多數規定男子孫可按人數分攤或按家系¹均分，而有時亦有同時採用兩種分配方法，規定某百分率的土地按其中一種方法分配。我們相信，在某些情況下，無遺囑遺產法須考慮到氏族、家族、堂或祖的分配規則。

12.8 我們認為，須清楚列明，如果某一氏族、家族、堂或祖訂立繼承規則，而該氏族、家族、堂或祖有成員逝世時，有關規則應予生效而不應受本條例或遺囑條例所影響，除非該等規則明確或隱含地併入本條例或遺囑條例在內。

12.9 雖然我們已建議保留有關氏族、家族、堂或祖的繼承規則，但政治因素可能不利將整條第 11 條條款廢除。聯合聲明附件三第 2 段須予考慮。該段規定包括新界土地在內的土地須繳納地租。**如果我們有關廢除第 11 條的建議不獲接納，我們建議，最低限度該條應予修訂，以便該條祇限於對新界未獲豁免的土地適用，亦即祇限於以中國氏族、家族、堂或祖的名義持有或為他們的利益而持有的土地。**遇到無遺囑死亡時，以其他名義或方法持有的土地將根據條例內的一般條款加以轉移。在這種情況下，新界條例第二部有關條款應作出相應修訂，用以明確地將“祖”包括在“氏族、家族或堂”的字眼內，以反映長久以來的慣例。一如前新界政務署 Dr. James Hayes 所指

¹ （見第 3.30 段的定義）。

出，其他機構，例如：“會”可能亦須列入，因此，有關更改不得孤立進行。

法定信託

12.10 條例第 5 條規定為無遺囑者的子孫及其他夥親屬設定信託。條例第 5(5)條規定如下——

“(5) 除為無遺囑者的子孫設定的信託外，凡為無遺囑者的任何夥親屬設定的信託，倘因該夥親屬並無任何成員可獲得絕對既定利益，則該無遺囑者的剩餘遺產與該剩餘遺產所得收入，以及如有任何法定積累收入，或如未有行使對上述剩餘遺產及收入有影響的權力，以致有尚未支出及應用的部分款額，均由於本條第(2)及第(3)款內載規定，按本條例的條款將有關財產加以分配、轉移及持有，一如該無遺囑者逝世時並無遺下該夥成員，或任何該夥成員仍在世的子孫。”

12.11 上述條款取材自 1952 年無遺囑者遺產法。在 *Re Lockwood* [1957] 3 All ER 520 一案中，法庭曾對該條規定所造成的後果，批評為“反覆怪誕”。舉例來說，如果並無一位全血緣的叔伯姑姨舅可取得既定利益，但半血緣的叔伯姑姨舅可取得既定利益，則按該條狹義解釋，全血緣的甥姪不被列入，而半血緣的甥姪會較全血緣的甥姪有優先繼承權。在 1966 年，英格蘭及威爾斯通過家庭供養法，廢除這條款。我們亦建議廢除條例第 5(5)條（見附錄 7 條例草案第 5 條）。

保障受託人及遺產代理人

12.12 顯而易見，根據本條例的規定，受託人及遺產代理人的職責繁重。他們必須盡速及妥當地履行職責，但有關遺產代理人的責任，現仍受普通法上有關疏忽的法則管轄。我們認為，這些法則範圍不定，應用時可能非常麻煩。特別是，我們建議非婚生子女與婚生子女同等享有繼承財產的權利，這方面的改革會對受託人及遺產代理人的責任有影響。一名遺產代理人現須確定除婚生子女外，是否尚有其他非婚生子女有權繼承，他們可能會遇到困難。為有助於確保一名遺產代理人在知悉其困難後，仍能不致阻礙其盡速履行職責，我們建議在遺囑認證及遺產管理條例內加插一新條款，以限定其應負責任（見附錄 7 條例草案第 13 條）。

12.13 以本文而言，對並沒有締結婚姻的父母所作的假設（請參閱第 9.1 段）亦有關聯。如果並無證據顯示一名無遺囑非婚生子女的父親尚在世，則遺產代理人可免卻追查其父親是否尚存。

政府

12.14 條例第 4(9)條規定：——

“(9) 如果並無任何人得按上文規定取得絕對權益時，該無遺囑者的剩餘遺產即成為無主財物而歸政府所有，而政府在不妨礙任何其他權力的原則下，可運用交給政府的全部或部分財產，撫養受該無遺囑者供養的人士（不論是否為該無遺囑者的親屬），以及該無遺囑者可合理預期會加以撫養的其他人士。”

12.15 **我們建議修訂條例第 4(9)條，以便刪掉“政府”一詞，而以更合適的字眼代替。（註：註冊總署署長建議採用“財政司立案法團”，該法團是香港政府法定持有財產的代理機構。）**

第 III 部 供養死者家屬及受供養人

第 13 章 遺屬生活費條例

引言

沿革

13.1 英國法的特色，就是制定一項原則，規定人享有立遺囑以處理其財產的自由。但在施行這原則時，有時會導致立遺囑人在死後不給足夠生活費予受他供養的人，因而得以逃避其對受供養人的責任。這種情況頗令人不滿，英國終於提出法律改革。1938 年繼承（供養家屬）法（以下簡稱 1938 年法）限制了立遺囑人隨意決定對他的遺產如何分配的權利。如果受立遺囑人供養的某些人士，未有獲得合理的生活費，可向法庭提出申請，該法即授予法庭有司法權，得干預立遺囑人明確的遺囑意願。初時祇有在死者留有遺囑時，法庭才能行使這權力。其後，不論死者是否立有遺囑，或局部立有遺囑，法庭均可行使權力。

13.2 1975 年英國廢除該法，並由 1975 年繼承（供養家屬及受供養人）法（以下簡稱 1975 年法）所取代。英國 1975 年法較 1938 年法所規定的生活費更為慷慨。大致上，擴大了有權申請供養人士的類別，增加了尚存配偶可獲得的生活費水平，及法庭可頒發的救助方法。同時，亦放寬法庭命令可下達的財產範圍。

本港須予改革

13.3 本港的遺屬生活費條例（香港法例第 129 章）（以下簡稱“條例”）大致上基於 1938 年的英國法。

13.4 最高法院經歷司告知本小組委員會謂：法院並未有保存有關根據遺屬生活費條例提出申請的統計數字，但按照現時與前任法庭書記的記憶，均記不起任何有關這類的申請。看來如果有任何人使用這條例的話，亦是寥寥無幾。委員會深信，這條例鮮為人所用，並不顯示殊不重要。這條例即使保持現行形式，亦可確保正義得以維持，可

使簽立家屬安排協議人士有所遵循，以免訴訟，而且可作為不願那一方的最後制裁。

13.5 不過，委員會認為遺屬生活費條例的大多數條文並不正常。本報告以下數章將會討論其中的困難。如果我們的意見獲接納及建議被採用的話，現行為家屬提供供養的法律將須大幅度修改。**為實施本報告的調查結果，我們建議廢除遺屬生活費條例，而代以一條類似1975年英國法的新訂條例。**本報告附錄8載有繼承（供養家屬及受供養人）條例草案。（以下簡稱“條例草案”）

第 14 章 遺屬生活費條例：有權申請者—— 現況及建議

“受供養人”的定義

14.1 如果一名死者，並未有在其遺囑中，或如果並未立有遺囑但按照無遺囑繼承法，或如果死者局部遺產未立遺囑，以致按照遺囑連同無遺囑繼承法，未有提供合理的生活費予受供養人，則該受供養人可向法庭提出申請，法庭根據遺屬生活費條例賦予的酌情權，得從死者的“淨遺產”中撥出合理的生活費給受供養人（條例第 4(1)條）。受供養人必須親自或由代表向法庭提出申請。“淨遺產”的定義載於條例第 2(2)條，實質指除某些新界土地外，在扣除一切債務、稅項、殯葬費及遺產管理費後剩餘的“淨遺產”。

14.2 一如上文所述，唯一可根據條例而獲益的人士是“受供養人”。按照條例第 2 條規定，祇限於下述人士：——

- “(a) 死者締結有效婚姻中的妻子或丈夫；
- (b) 死者締結有效婚姻所生的未婚女兒；
- (c) 死者締結有效婚姻所生的未成年兒子；
- (d) 死者締結有效婚姻所生的兒子，但由於精神或身體不健全，不能供養自己；及
- (e) 死者父母，而且是在死者生前主要靠其供養者。”

14.3 條例第 17 條及附表列出有關夫妾關係的過渡性條款，在附表內，“受供養人”的定義是：——

- “(a) 死者締結夫妾關係中的妾或男方；
- (b) 在該種關係下死者的未婚女兒；
- (c) 在該種關係下死者未成年的兒子；
- (d) 在該種關係下死者的兒子，但由於精神或身體不健全，不能供養自己；及
- (e) 死者父母，而且是在死者生前主要靠其供養者。”

14.4 根據條例被列入為“受供養人”的人士類別非常有限，而且即使是靠死者供養，但不屬於這些類別的人士，亦不得提出聲請。有實無名的配偶、非婚生子女、在死者臨終前數年可能曾照顧死者和實質靠其供養的兄弟或姊妹，以及某些婚生子女亦不列入可提出聲請的人士類別。目前，除未婚的成年女兒或精神或身體不健全，不能自我供養的成年兒子之外，已成年的子女無權申請。小組委員會注意到，一名人士能否獲得條例規定的裁定額，最終是由法庭決定，法庭是在考慮整件個案的一切情況之後，然後決定是否行使酌情權，就個別情況頒給裁定額。因此，有權提出聲請祇是賦予申請權，而不是有領取權，我們認為，如果將可申請的人士類別範圍擴大，也不見得有害（事實上，即可糾正現時很多不公平的現象）。更且，**我們建議，以“受供養人”一詞去形容那些可按照條例規定提出申請的人士，應予刪掉。而應清楚列明每一類可提出家屬生活費申請的人士類別（見附錄 8 條例草案第 3(1)條）。**

尚存配偶、前配偶、妾侍及男方

14.5 **我們建議，“死者的妻子或丈夫”、“死者的前妻或前夫而未有再婚者”及“死者是夫妾關係中的妾或男方”均得列入為有權提出申請生活費的人士類別內（見條例草案第 3(1)條）。**

14.6 條例內並未載有“丈夫”或“妻子”的定義。**我們建議制定“死者的丈夫或妻子”的定義。**這定義範圍不但包括有效婚姻人的尚存配偶，而且亦包括與死者誠意締結的一段婚姻的當事人，該段婚姻，雖然無效，但亦未有被解除或被廢除（見條例草案第 2(1)條）。

14.7 根據遺屬生活費條例第 3 條，一段“有效婚姻”指按照婚姻條例（香港法例第 181 章）規定而締結的婚姻，修訂婚姻制度條例（香港法例第 178 章）承認為有效的新式婚姻，修訂婚姻制度條例宣布為有效的舊式婚姻；或在本港以外地方根據當地法例而舉行儀式或締結的婚姻。**我們建議保留這“有效婚姻”的定義（見條例草案第 2(1)條）。**

14.8 根據現行婚姻訴訟程序法例，一名前配偶或法院判決分居的配偶，如在死者生前一向由死者給予贍養費的，在死者逝世後，可向法庭申請，要求從死者遺產中撥出贍養費，使該贍養令得以繼續。不過，如果死者的前配偶或由法院判決分居的配偶祇是剛開始申請贍養費，而死者期間死亡，前配偶或由法院判決分居的配偶可能再無他法獲得生活費。為使遺屬生活費法例得以統一及糾正上述反常現象，**我**

們建議未有再婚的前配偶（包括由法院判決分居的配偶）得列入條例草案為有權申請生活費的人士類別內（見附錄 8 條例草案第 3(1)條）。

14.9 條例中亦承認夫妻關係的存在，但祇承認 1971 年 10 月 7 日前締結的夫妻關係。條例第 17(2)條訂明“夫妻關係”的定義，指男方與女方締結的一種關係，在該種關係下女方於男方生前已獲其妻子承認為妾侍，而她的名分亦被男方家人普遍承認。更且，附表內亦提到“夫妻關係的一方”，指在該種關係下的妾侍或男方。**我們建議，除有關“妾”及“夫妻關係”兩詞的定義外，條例內有關夫妻關係的過渡性條文，即條例第 17 條及附表予以廢除（見條例草案第 2(1)條）。而“夫妻關係中死者的妾或男方”應列入為有權提出申請的人士類別內（見條例草案第 3(1)條）。**

死者的父母

14.10 現行遺屬生活費條例規定，如果父母是在死者逝世前主要靠其供養者，即可申請（條例第 2(1)條）。**我們建議這些限制父母提出申請權利的條件應予取消（條例草案第 3(1)條）。**

死者的子女

14.11 根據遺屬生活費條例，唯一可提出申請的子女是死者締結有效婚姻或認可的夫妻關係中所生的未婚女兒，有效婚姻或認可的夫妻關係所生的未成年兒子或由於精神或身體不健全而不能自我供養的成年兒子（條例第 2(1)條及附表）。

14.12 至於“兒子”及“女兒”的定義，則分別載於遺屬生活費條例第 2(1)條，指：——

- “(a) 由死者締結的一段有效婚姻所生的未成年兒子或女兒；
- (b) 由死者按照下述規定所領養的未成年子女——
 - (i) 遵照領養條例頒發的領養令；或
 - (ii) 領養條例第 17 條適用的領養辦法所領養的子女；

- (c) 死者締結了一段有效婚姻而在他逝世時待生的子女。”

委員會認為這些有關死者子女的條文在多方面是不正常的。

14.13 根據“兒子”及“女兒”的定義，1972年12月31日前死者按照中國法律及習俗領養的子女，雖然有關領養辦法在領養條例（香港法例第290章）內獲保存，在香港獲承認為其子女，但在遺屬生活費條內則不承認這些子女為死者的子女。該條例第25條中有明文規定：——

“25(1) 1972年12月31日後，凡在本港領養子女，祇可根據本條例規定進行，方可生效。

(2) 第(1)款規定並不影響在1972年12月31日前按照中國法律及習俗在本港被領養人士的地位或權利。”

一如本報告第I部所述，領養條例並未有提及在1972年12月31日按照中國法律及習俗所領養的子女地位。

14.14 祇有由一段有效婚姻或被承認夫妻關係所生的未成年子女有權申請生活費。非婚生子女即使是全靠死者生前供養，亦不被列入。

14.15 根據現行遺屬生活費法律，一名並非死者親生或領養的子女，即使被視為“屬於家庭的子女”，亦無權提出申請。因此，舉例來說，如果一名男士負起撫養其妻子前次婚姻所生子女的全部責任，但並未有正式領養他們，在他死後，那些子女無權要求從他遺產中撥出家電屬生活費。

〔註：“待生的子女”指“尚在母親胎中”而仍未出生的子女。〕

14.16 成年子女，雖然與死者是父母子女關係，但除未婚女兒及喪失行為能力的兒子外，亦無權申請。

14.17 我們建議現行遺屬生活費條例有關死者子女申請權的條文，應予廢除。並由一條限制性較少的條文取代，而該條文將不會限制領養子女、非婚生子女、成年子女及“屬於家庭的子女”，提出申請（見附錄8條例草案第3(1)條及2(1)條有關“子女”的定義）。

其他“受供養人”

14.18 正如上文所強調，遺囑生活費條例對可提出申請的人士，即使是死者的至親，亦嚴加限制。那麼，那些不屬這些類別的人士但事實上在死者逝世時確是由他供養的，又怎樣呢？死者生前曾負起道義上的責任而非法定的責任，法律應否予以執行？

14.19 英格蘭及威爾斯 1975 年法制定一新條文，容許在死者生前全靠或部分倚靠死者供養的“任何人士”（除上文所述的人士外），得申請條例中的生活費。這更改無疑是在這法例中最具爭論性。特別是有實無名的配偶亦可申請從死者的遺產中撥出生活費。（在香港而言，亦有另一種情況，譬若一名年老的家僕，她可能自少即照顧死者）。要求將申請人士範圍擴大其中一個論據就是死者沒有撥給生活費予某人，這可能是無意的。如果法庭能夠發出命令，從其遺產中撥出生活費予這些人士，即假設死者理應有這意圖，而法庭祇是代他執行。無論如何，條文祇賦予人士有權申請，並不是有權領取生活費。申請人須向法庭提出申請所據的理由，並獲法庭接納方可。

14.20 在考慮到這問題所涉及的各方面影響，我們認為本港應制定一條文，類似英國 1975 年法所載者，**我們建議增列一類有權申請人士，即：“在死者死前全部倚靠或部分倚靠死者的任何人士（非上文所提及的人士）”**（見條例草案第 3(1)條）。

第 15 章 遺屬生活費條例：司法管轄權及法庭權力現況及建議

司法管轄權

15.1 法庭按照遺屬生活費條例頒發命令的司法權由該條例第 9(1) 條確定，該條規定如下：——

“9(1) 如死者逝世時在香港遺下淨遺產，則不論死者逝世時在香港或外地居住，該筆淨遺產均應按本條例規定處理，以支付法庭根據本條例頒令從死者淨遺產中撥出的生活費，一如死者逝世時在香港定居一樣。”

因此，現時司法權的基礎在於死者逝世時“在香港遺下淨遺產”，而不論其定居地何在。（應當注意的是：定居地的問題對於如何處理死者遺下的某一類財產是有影響的。根據國際私法（衝突法）的通則，“動產”或個人財產的繼承由死者最後定居地的法律決定，而“不動產”的繼承則須按照物所在地法 (lex situs)，亦即有關財產所在地的那一套法律所管轄）。

15.2 委員會建議法庭司法權的基礎應有更明確的規定——其一要津就是死者逝世時定居於香港，而另一根據就是死者逝世前三年內曾經有任何時間通常在香港居住，並且逝世時在香港遺下淨遺產（見附錄 8 條例草案第 3(1) 條）。

法庭頒發命令的權力

15.3 遺屬生活費條例規定：司法權經由第 9(1) 條確定後，法庭即可行使第 4(1) 條所規定的權力：

“4(1) 在本條例生效後，如果一名死者逝世時遺下一名受供養人，而法庭根據該受供養人或其代表的申請認為：按照遺囑或無遺囑的法律，或同時按照兩者的規定處理死者遺產時，會使到該受供養人不能獲得合理的生活費，則法庭可下令根據法庭所訂立的任何條件或限制，從死者淨遺產內撥出法庭認為合理的生活費給受供養人；

但如以上述方式處理死者遺產時死者遺下的配偶應得的數額不少於淨遺產收益的三分之二，而其唯一或多名受供養人（如有）為該尚存配偶的子女。則任何人或其代表均不得向法庭提出上述申請。”

15.4 法庭可下令以週期付款、整筆總付、或兩者並行的方式將生活費付給申請人（條例第 4(2)、(3)及(4)條）。但要注意的是：根據第 4(1)條規定，即使是尚存配偶，亦僅能申請生活費。按照該條例規定，除非充作贍養用途，否則亦不能要求提供一筆資本金。

15.5 根據 1975 年英國法，法庭在考慮到申請個案所有情況可下令向配偶撥付一筆該配偶應得的款項，無論該款項是否其生活所需者（該法第 1(2)條）。這反映了現時流行的想法，即就尚存配偶而言，供養家屬的法律實際上應與婚姻訴訟法律相同。這兩類訴訟的申請人的處境或有不同，倘婚姻是以法庭判決分居及離婚而結束時，婚姻訴訟中的申請人較有可能請求法庭干預，以確保離異的配偶盡其供養申請人的義務。反之，如果婚姻是由於丈夫或妻子死亡而告終，則死者通常已透過遺囑或無遺囑情況的法律規定對其家屬履行義務。需要向法庭提出遺屬生活費訴訟的情況絕無僅有。然而，委員會認為，英國將配偶申請生活費這兩類情況以同樣方式處理，亦屬可取。**因此，我們建議制定“合理生活費”的定義，訂出適用於配偶申請時應特有的水平（見附錄 8 條例草案第 3(2)條）。**

15.6 我們認為在大多數個案中，離婚及由法院判決分居的配偶可得的生活費水平，應較適用於尚存配偶的水平為低。要區別對待的理由是：前配偶或判決分居的配偶可以根據婚姻訴訟條例（香港法例第 179 章）在死者生前申請和領取生活費。**倘法庭並未有在婚姻訴訟中就生活費作出頒令（例如當事人在婚姻訴訟期間死亡）。我們建議授權法庭將前配偶或判決分居的配偶提出的申請，視作尚存配偶申請般處理。**這樣，法庭可以判給較一般情況為高的生活費。（見條例草案第 16 條）。

15.7 我們建議將法庭在家屬生活費訴訟中的權力擴大，以便與法庭在婚姻訴訟中頒令判給生活費的權力相近，一如英國在 1975 年所制定的法例一樣。具體上，我們建議賦予法庭下列額外權力：

- 得頒令為申請人的利益計，而將屬於死者遺產一部分的財產作出轉讓或授與。（見條例草案第 4(1)(c)及(d)條）

- 得頒令為申請人的利益計，或為撥付其應得利益計，將屬於遺產一部分的資產用作取得(其他)財產或權利(見附錄 8 條例草案第 4(1)(e)條)。
- 得頒令作出法庭認為是執行其命令時所必需的相應或補充規定(包括更改按照死者遺囑或無遺囑法例或按照兩者的規定以處理死者遺產的方式，及向應根據法庭命令準備授與財產的受託人賦予廣泛的權力)(見條例草案第 4(4)條)。

法庭須予考慮的事項

15.8 根據遺屬生活費條例第 7 條的規定，法庭在處理家屬生活費的申請時應考慮下列事項：——

- (a) 該項申請所涉及的受供養人過往、現有或將來可得的任何資本，以及該受供養人從任何來源所得入息；
- (b) 對於死者而言該受供養人的行為表現及其他方面；
- (c) 其他受供養人的權益；
- (d) 根據申請個案情況，對於該名受供養人或在死者遺產中佔有權益的人或其他人而言，法庭認為有關或重要的任何其他事項。

法庭還應考慮死者處理財產的理由(如果能夠確定該理由的話)。這一特別條文已從英國法例中完全略掉，因為英國法律改革委員會覺得應考慮死者的理由並非祇因為那些是他的理由，如條文所暗示，而是因為其性質。英國法律改革委員會認為如果那些理由是有關的話，等同的第 7(1)(d)條已足夠包含應考慮死者的理由。雖然如此，香港法律改革委員會認為在香港法例中一些明確提及死者言詞的條文應予保留。至於遺產方面，法庭應遵守的指示，就是不得下令將遺產中的資產作“不化算”的變賣，以支付生活費。

15.9 委員會建議採用一新條文，詳列法庭須予考慮的事項，計有：——

- 有關的申請人及任何其他申請人或死者遺產的受益人目前或可見將來的財政來源及需要；

- 死者對於遺屬生活費申請人或遺產受益人所負的義務或責任；
- 死者淨遺產有多少和性質如何；
- 任何其他相關事項，包括任何有關人士的行為表現；
- 任何死者的言詞，即法庭要考慮事情的證據；
- （如申請人為死者的配偶、前配偶、妾侍或男方時），申請人的年齡、夫妻或夫妻雙方結合期間、申請人對於死者家庭福利的貢獻、以及如果申請人是死者的配偶，假設該段婚姻以離婚而非死者的死亡告終，則申請人應得的生活費；
- （如申請人是死者的子女或被視為死者的子女時），申請人曾受或本來應當受到何種教育程度或訓練，而如果死者並非其親生父母時，死者對供養申請人肩負及履行多少責任，以及是否有其他人對申請人應肩負的供養責任；
- （如申請人是死者父母時），申請人的年齡以及死者死前為申請人的需要而作出的扶養（現款或有金錢價值的物品）；
- （如申請人並非家庭成員但由死者供養），死者負擔供養責任的根據以及供養該人的時間。

（見附錄 8 條例草案第 5 條）。

第 4(1)條但書

15.10 至於遺屬生活費條例第 4(1)條的條文，應為注意的是：本港條例第 4(1)條但書為立遺囑人而設的“自動保險設施”，在 1975 年的英國法是沒有的。（該但書的作用是：當該條例所規定的“受供養人”僅為其尚存配偶及其子女，而大部分的遺產收益已遺留給尚存配偶，則不得提出申請）。

15.11 前註冊總署署長 Mr. W K Thomson 舉過一個例子，說明現時第 4(1)條的但書如何可能導致不正常的情況。假設 A 君是可能的申請人，譬如說是死者前一段婚姻所生的未成年兒子。SS 君是尚存配偶，

有權取得淨遺產收益的三分之二，而 C 君是 SS 君的子女，唯一的“其他受供養人”（除 A 君以外）。為甚麼單單因為 SS 君有一名子女（C 君）有資格提出要求，而 A 君則不能提出要求呢？再者，如果除 C 君以外還有其他受供養人，則 A 君看來便有資格提出要求，這真是很奇怪的現象。委員會認為有關法例不應受到這樣的羈絆，而這類問題應當留給法庭按照實際情況和有關人士的行為作出判斷。**因此，我們建議遺屬生活費條例第 4(1)條但書不應列入新草案內。**

申請時限

15.12 根據條例第 6 條規定，有關申請須於取得遺產管理書日起計 6 個月內向法庭提出，但法庭有權決定受理超逾這個時限的申請。1975 年英國法亦採用同樣時限（第 4 條）。**我們建議這個由法庭頒發遺產管理書日起計 6 個月的時限繼續適用於在香港提出的申請。**

第 16 章 遺屬生活費條例：可作為供養家屬的財產現況及建議

淨遺產

16.1 條例第 2(2)條列出“淨遺產”的定義如下：——

“……指死者有權憑遺囑（而非憑特別委任權）處置的一切財產，但其中必須扣除在其逝世時從其遺產內撥出以支付的殯葬費、遺囑執行費及遺產管理費、債務及賠償責任及死亡稅，但不包括屬於新界條例第二部管轄範圍內而未獲總督根據該條例第 7(2)及(3)條免其遵守該條例規定的土地。”

淨遺產及新界土地

16.2 根據第 2(2)條，最重要的就是新界某些土地將不包括在死者的淨遺產內。結果，法庭在頒發命令時，不能將這些土地撥作一名受供養人合理的贍養費之用。

16.3 前屬新界政務署 Dr. Hayes 向小組委員會指出，現行遺屬生活費條例與無遺囑者遺產條例在處理新界土地方面的條文頗有不同。在遺屬生活費條例，唯一提及新界土地之處，是不將新界土地列入第 2(2)條有關“淨遺產”的定義內。但無遺囑者遺產條例第 11 條特別規定，在無遺囑死亡情況下，新界條例第二部適用的土地，繼續按以往辦法加以轉移，一如無遺囑者遺產條例未予通過一樣。

16.4 本委員會在本報告書內其他地方曾研究新界土地及無遺囑者遺產條例問題。我們認為新界土地獲得該條例特別豁免一事應予撤除。本委員會認為該兩條例取向應一致。**因此，為符合我們較早時就無遺囑繼承法所提出的建議，現我們建議遺屬生活費條例有關新界土地獲得豁免條文應予廢除。**

淨遺產及其他財產

16.5 1975 年英國法第 8 及 9 條（載於附錄 5）規定死者某些財產須作為其淨遺產一部分處理，如果不是由於這兩條文，那些財產將不會被視為其淨遺產。兩條文所指的財產，包括經由其提名給予某人的

財產，臨終前的贈與、或合有的物業。**我們建議本港亦應制定類似的條款**（見附錄 8 條例草案第 10 及 11 條）。

16.6 在英國有數條法律條文，授權某些財產如果在死者生前經提名給予某人，則在其死後，該等財物即傳給該人。1975 年英國法其中一項條文實質上將死者經提名給予某人的任何財產重新納入死者的遺產內，以便可作為供養家屬的財產處理（見 1975 年英國法第 8 條）。（在英國的例子可包括存於某銀行或郵政局的投資存款。）不過，為免對分配遺產造成不必要的延誤，條文規定：即使要求家屬生活費的訴訟獲得勝訴，那些根據提名規定負責分配死者遺產的人士，不應為已分配的資產歸還問題負責賠償。不過，如果法庭頒發命令，這項保障亦不會阻止獲勝訴的申請人從獲提名人士手中取回已分配的財產。在香港亦有不少非法定的計劃，容許這種提名分配財產的存在。例如：僱員長俸及退休金計劃。本委員會留意到英國條文並未有明確提到那些可能受提名規限但實質上在死者逝世前並未有提名給予某人的財產。因此，**我們建議在香港類似的條文中，應將範圍擴大，以包括那些經提名給予某人或死者應可提名給予某人的財產在內**（見條例草案第 10(1)條）。

16.7 臨終前的贈與是死者在預期逝世前贈予他人的金錢或其他財物。根據 1975 年英國法第 8(2)條（及條例草案第 10(2)條），這類財產亦應與提名給予某人的財產一樣處理（一如上文所討論）。

16.8 通常死者生前與他人合有租賃的物業在其死後即自動傳給尚存的物業合有人，結果，這些物業並不列為其遺產。（這種“物業合有人”的情況該與另一種以“物業共有”形式一同擁有物業的情況比較。尚存者取得擁有權的原則並不適用於“物業共有”，死者在該物業的那一份額將會作為遺產的一部分）。儘管通常尚存者可取得擁有權，在一名物業合有人逝世時，出現的問題是該合有的物業應否亦被撥作供養家屬之用。這問題尤為重要在當申請人並非尚存配偶（物業合有人），而婚姻住所是合有的。1975 年英國法第 9 條（及條例草案第 11 條）授權法庭得命令從死者合有的物業中撥出其可分割的份額作為供養家屬之用。值得一提的是：第 9 條限制根據該條文的申請必須由首次取得遺產管理書日期起計 6 個月內進行，論據是如果通常尚存者取得擁有權這一原則不獲採用，尚存的物業合有人應盡早獲得通知。**茲建議本港亦採用同一時限**（見條例草案第 11(1)條）。

第 17 章 遺屬生活費條例：防止逃避規定 現況及建議

現況

17.1 遺屬生活費條例的整體目標就是要確保某些人可以從一筆遺產中取得合理的生活費，即使死者沒有作出這樣的安排亦然。不過，遺屬生活費條例中卻沒有“防止逃避”的規定。因此，現時一名立遺囑人如有意令到在他死後根據條例提出的任何申請都徒勞無功的話，他是可以在生前作出某些財政上的安排以達到這目的。因此，如果沒有防止逃避的規定，條例的整體目標就會受到挫敗。可能根本沒有“遺產”作為申請取得的對象。

處理財產

17.2 在英格蘭及威爾斯，1975 年英國法第 10 至 13 條（見附錄 5）賦予法庭若干權力，可處理那些目的在逃避根據該法例而提出生活費申請的交易。根據第 10 條的規定，在下列情況下，死者死前 6 年內所作出的“財產處置”法庭有權將其廢止：——

- (1) 所作出的處置意圖在阻止根據該法例提出的申請；
- (2) 沒有付出充分的有價約因。

17.3 按照英國 1975 年法第 10(7)條的規定，一宗“財產處置”包括付款（支付保費亦計算在內）以及其他任何類型財產的任何轉讓（或物業轉讓，指定接受財產人或財產贈與），無論是以文據或其他形式作出的轉讓。這個詞並不包括由遺囑所作出的撥款，財產的“提名給予”、臨終前的贈與、或憑藉特定的指定權（但非以遺囑形式）而作出的財產指定（見第 16 章的討論）。

17.4 至於死者是否“意圖”逃避法例規定的檢定標準，在於祇要法庭認為死者在處理有關財產時，意圖（雖然不一定是他唯一的意圖）防止法庭作出撥付生活費的頒令或可減少可能裁定的款額。法庭須根據可信性的比重來確定是否真有一事（見 1975 年英國法第 12(1)條）。

遺囑贈產契約

17.5 1975 年英國法第 11 條規定，如死者訂立“遺囑贈產契約”時旨在阻止他人根據該法提出生活費的申請，而根據該契約受益人也沒有付出充分的有價約因，則法庭可撤銷該契約。

受託人

17.6 1975 年英國法第 13 條為根據一項財產處置或遺囑贈產契約以受託人身分代另一人接受金錢或財產的人士提供保障措施。

對香港的建議

17.7 委員會建議香港應訂立效力與 1975 年英國法第 10 至第 13 條所載規定相若的防止逃避規定（見附錄 8 條例草案第 12 至第 15 條）。

第 IV 部 綜結合及修訂（條例）

第 18 章 綜合條例

研究範圍

18.1 委員會的研究範圍沒有具體規定研究遺囑認證及遺產管理條例（香港法例第 10 章）。不過，如果要對無遺囑繼承法或遺囑法作出任何更改，遺囑認證及遺產管理條例以及根據該條例而制定的無爭論性遺囑認證規則亦無可避免地須作出若干修訂。

法律的易明易用性

18.2 如果一個人逝世時，有關其財產處理的各條法例能夠綜合為一條法例，當有助於一般外行人理解繼承法，而律師辦起事來也會更為方便和有效率。

建議

18.3 委員會建議將遺囑認證及遺產管理條法例（香港法例第 10 章）、無遺囑者遺產條例（香港法例第 73 章）、遺囑條例（香港法例第 30 章）及遺囑生活費條例（香港法例第 129 章）綜合而成為一條條例，名為“繼承（綜合）條例”。本委員會亦同時建議，在新條例中，現行遺囑條例成為第 I 部、遺囑認證及遺產管理條例為第 II 部、無遺囑者遺產條例為第 III 部，以及取代遺屬生活費條例的法例成為第 IV 部。

第 19 章 修改條例

英國慣例及程序

19.1 遺囑認證及遺產管理條例第 72(2)條規定：

“(2) 對所有事務而未有制定遺囑認證規則及法令者，在英國的遺產承辦處當時有效的慣例及程序應視為同時在香港的法庭及承辦處有效。”

建議

19.2 委員會建議修改遺囑認證及遺產管理條例，特別是根據條例第 72(2)條的規定，那些在英國有效並適用於香港的慣例及程序，應在香港明文制定，成為法律。

第 V 部 剝奪權利

第 20 章 剝奪權利

剝奪權利規則

20.1 在若干情況下，如果某人不合法地殺害另一人，從而獲得利益，公共政策規定該人不得因而取得利益。

英國 1982 年剝奪權利法

20.2 根據英國 1982 年剝奪權利法規定，除因謀殺罪名外，法庭可按一宗案件的特殊情況，如認為有維持正義的必要，頒佈命令以減緩剝奪權利這規則的效力。根據該法所包含的財產權益範圍，當包括從死者遺囑或無遺囑繼承法可得的權益。該法亦特別規定，即使剝奪權利規則生效，亦不得妨礙任何人士根據 1975 年繼承（供養家屬）法的規定提出申請。

香港

20.3 本港並沒有類似 1982 年英國法的法例，因此，總論任何情況，剝奪權利的規則適用於香港。

擬提出的建議

20.4 這問題亦不屬於本委員會研究範圍，但如果屬於研究範圍之內，本委員會當會建議本港制定類似英國的法例，授權法庭在有必要維持正義時，得減緩剝奪權利這規則的效力。（見條例草案附錄 9）

第 VI 部 建議摘要

第 21 章 建議摘要

對遺囑條例（香港法例第 30 章）所作出的建議修訂

（第 2 章——形式及鑒證）

21.1 條例第 5(1)條應由類似 1982 年司法執行法第 17 條的條文所取代，從而放寬訂立遺囑的正式規定（第 2.8 段）。

21.2 此外，凡並未有按照經放寬第 5 條的規定有效地簽立的遺囑，祇要是書面文字，由立遺囑人簽署或代其簽署，而立遺囑人有意使該份文件具有遺囑效力者，仍應有條文規定得獲法庭接納認證（第 2.22 段）。至於印章方一面，應獲准繼續使用，但必須有證據證明立遺囑人親自在該份遺囑上使用該印鑑或印章，該份遺囑才可獲接納認證（第 2.29 段）。

（第 3 章——遺囑條例的各項修訂）

21.3 為把英文文法改得更好，第 3 條的字眼應予修改（第 3.2 段）。

21.4 已婚人士，不論年齡，均有資格訂立及撤銷遺囑（第 3.5 段）。

21.5 條例第 6 條應予修訂，列明一從事防衛事務的人士，不論已屆合法年齡與否，均可訂立及撤銷遺囑（第 3.7 段）。此外，亦須增添一項修訂，以符合已修訂第 5 條的規定（第 3.8 段）。

21.6 條例第 8 條已無保留必要，因而應予以廢除（第 3.10 段）。

21.7 由於建議中第 5 條將範圍擴大，因此，第 10 條亦應予以廢除（第 3.14 段）。

21.8 第 11 及 12 條屬多餘累贅，應予以廢除（第 3.16 及 3.17 段）。

21.9 第 13 條應予廢除，並由類似 1837 年英國遺囑法新訂第 18 及 18A 條條文取代，以糾正經常由於再婚而遺囑被撤銷的嚴厲規則（第 3.21 段）。

21.10 鑑於擬議的第 5 條的修訂，第 15 條亦應予以修訂（第 3.23 段）。

21.11 此外，由於第 5 條所作出的修訂，第 16(1)條亦應作出相應修訂，並須增添一新條款，可使用新科技以確定遺囑所寫的事項（第 3.24 段）。

21.12 1987 年英國修訂家庭法第 1 條規定應使非婚生子女或其傳人獲得利益，本港亦應增訂類似條款（第 3.27 段）。

21.13 條例第 23 條應由類似 1982 年司法執行法第 19 條條文所取代。後者規定給予先去世子女的餽贈，應由其子女按家系分攤，但其子女必須在立遺囑人死亡時仍生存（第 3.30 段）。在第 23 條內，凡提及“子孫”者，應包括非婚生子女（第 3.31 段）。

21.14 條例第 30 條應增加另一條款，以便制定修訂法例，將我們的建議付諸實施，規定不論遺囑何時訂立，祇要立遺囑者逝世時本條例已生效，即對其遺囑適用（第 3.34 段）。

（第 4 章——遺囑糾正、釋義及證據）

21.15 本港應制定類似 1982 年司法執行法第 20 條的條文，得將遺囑糾正，使立遺囑人的意願得以實現（第 4.3 段）。

21.16 同時，亦應制定類似 1982 年司法執行法第 21 條條文，准許法庭接納外在證據，以協助解釋全無意義或含糊不清的遺囑（第 4.5 段）。

21.17 關於遺囑的簽立、撤銷或更改方式的外部證據，亦應獲接納。有關條款，亦應予以制定（第 4.6 段）。

21.18 此外，亦應制定類似 1982 年司法執行法第 22 條的條文，以便作出一項假設：將一份表面上立遺囑人已絕對給予尚存配偶的餽贈，縱使亦擬將該份餽贈給予子孫，應作為給予配偶的絕對餽贈（第 4.8 段）。

（第 5 章——遺囑的登記）

21.19 遺囑不應予以登記。田土登記條例亦應予以修訂，以便對那些未獲法庭認證的遺囑不予適用（第 5.5 段）。

（第 6 章——國際遺囑）

21.20 國際遺囑公約應納入本港法律內（第 6.3 段）。

對無遺囑者遺產條例（香港法例第 73 章）所作出的建議修訂

（第 8 章——尙存配偶的權利）

21.21 如果無遺囑者遺下子孫，則根據條例第 4(3)條規定給予尙存配偶的款額，應由 50,000 元增加至 500,000 元（第 8.11 段）。

21.22 如果無遺囑者並無遺下子孫而祇有親屬，則根據條例第 4(4)條規定給予尙存配偶的款額，應由 200,000 元增加至 1,000,000 元（第 8.14 段）。

21.23 法定遺產最低限度每五年應予檢討一次（第 8.15 段）。

21.24 為方便日後易於更改及為求清晰起見，下述條款應予以修訂：

(i) 條例第 4(12)條

(ii) 條例第 6 條

(iii) 條例第 8 條（第 8.16 及 8.17 段）。

21.25 不論無遺囑者有否遺下子孫或親屬，祇要他遺下尙存配偶，則該尙存配偶得絕對地取得“個人動產”（第 8.20 段）。至於如何確定一件物品是否“個人動產”，則最主要的檢定標準就是在死者逝世時，該物品是否存放在婚姻住所內，因此，條例第 2(1)條應予以修訂（第 8.22 段）。

21.26 由於上文第 25 段所提出的建議，條例第 7 條，即有關尙存配偶有權要求將個人動產撥歸己用的條文應予廢除（第 8.23 段）。

21.27 如果無遺囑者遺下尙存配偶，則不論有否遺下子孫或親屬，該尙存配偶應有權獲取無遺囑者所擁有婚姻住所的利益。更且，尙存配偶應有權按照類似英國 1952 年無遺囑者遺產法第二附表所規定的程序將婚姻住所撥歸己用（第 8.25 段）。現行附表改為附表 1，而條例內另加新訂附表 2，大致取材自英國 1952 年無遺囑者遺產法第二附表的規定（第 8.26 段）。

21.28 為否定 *Re Collens* [1986] 2 WLR 919 一案的裁決，應加插一條款，以便規定尚存配偶須將從他地獲得的金錢呈報，以抵銷其可從無遺囑者在本港不動產中取得的任何利益（第 8.28 段）。

（第 9 章——子女或子孫）

21.29 條例第 2(2)條應予撤銷，並代之以另一條款，規定在解釋子女關係時，毋須理會其是否婚生（第 9.11 段(1-2)）。

21.30 應加插一條款，為 1973 年 1 月 1 日或該日以前按照中國法律及習俗領養的子女作出規定（第 9.11(3)段）。

21.31 非婚生子女獲取合法地位條例（香港法例第 184 章）第 10(1)條應予撤銷（第 9.11(4)段），因為該段與我們所提出的建議，即對子女關係的解釋可毋須理會其是否婚生一事不符。

21.32 領養條例（香港法例第 290 章）第 25(2)條所提及的日期——“1972 年 12 月 31 日”應由“1973 年 1 月 1 日”這一日期取代（第 9.11(5)段）。

21.33 如果一名非婚生子女死亡並無簽立遺囑，在決定其親屬繼承其遺產時，他是否婚生一事應不予理會。他並非婚生這一點，唯一尚餘重要者就是須作出一項假設，就是他的父親先其逝世（第 9.18 段）。

（第 10 章——“兄弟或姊妹”）

21.34 第 2(4)條應予廢除（第 10.7(1)段），因為該條並未有將同血緣與半血緣的兄弟姊妹分辨清楚。

21.35 條例內第 4(2)(b)條、4(4)條、4(8)條及 5(4)條凡提及“眾兄弟及／或姊妹”之處，應予修訂，以便祇指同血緣的兄弟姊妹（第 10.7(2)段）

21.36 條例第 4(8)條應予以修訂，以便為無遺囑者半血緣的兄弟姊妹以及其父母半血緣的兄弟或姊妹制定不同的條款（第 10.7(3)段）。

21.37 此外，亦增訂一法律條文，規定一名男子不論與其妻或妾所生的子女，均被視為同血緣的兄弟姊妹（第 10.7(4)段）。

（第 11 章——夫妻關係）

21.38 條例第 13 條應予修訂，以便規定 1971 年 10 月 7 日前締結夫妻關係的女方，應假設為已被男方的妻子及家人接納為男方的妾侍

（第 11.4(1)段）。非婚生子女獲取合法地位條例（香港法例第 184 章）第 14(2)條亦應增添同一項假（第 11.4(2)段）。

21.39 附表 1 第 4(12)段有關“或與人發生性行為者”字眼應予刪除（第 11.4(3)段）。

21.40 夫妻關係中的妾侍或男方應有權得回其終身利益（第 11.4(4)段）。附表 1 內應加插一段，說明以條例的目的而言，夫妻關係男方的所有子女，不論由妻或妾所生，均屬一大家庭，所有子女，均被視為妻及每一名妾侍所生的子女（第 11.5 段）。

（第 12 章 — 雜項）

21.41 由於條例第 11 條為同一司法轄區內的無遺囑死者制定兩種承繼制度，因而該條應予廢除（第 12.6 段）。如果這建議不獲接納，最低限度該條應予修訂，以便該條祇限於對新界未獲豁免的土地適用，亦即祇於為中國民族、家族、堂或祖利益而持有的土地（第 12.9 段）。

21.42 條例第 5(5)條應予廢除（第 12.11 段）。該段曾遭司法界批評為製造反覆的結果。

21.43 鑑於我們建議非婚生子女與婚生子女同等享有繼承財產的權利，預料在確定是否會有非婚生子女提出分產時，遺產代理人會有較大的困難，因此，我們建議在遺囑認證及遺產管理條例內加插一新條款，以限定遺產代理人應負的責任（第 12.12 段）。

21.44 條例第 4 條內凡提及“政府”之處，應予刪掉並須以更合適的字眼代替（第 12.15 段）。

對供養死者家屬及受供養人所作出有關的建議修訂

（第 13 章 — 引言）

21.45 委員會普遍認為本港現行遺屬生活費法例頗不正常，建議最佳的補救辦法就是廢除遺屬生活費條例（香港法例第 129 章），而制定一新條例，類似 1975 年英國繼承（供養家屬及受供養人）法（第 13.5 段）。

（第 14 章 —— 有權申請者）

21.46 以“受供養人”一詞去形容那些可按照現行遺屬生活費條例而提出申請的人士，應予刪掉，而應清楚列明每一類可提出家屬生活費申請的人士類別（第 14.4 段）。

21.47 “死者的妻子或丈夫”、“死者的前夫或前妻而未有再婚者”及“死者是夫妻關係中的妾或男方”均得列入為有權提出申請生活費的人士類別內（第 14.5 及 14.9 段）。

21.48 現行條例並未載有“丈夫”或“妻子”的定義。新訂法例應制定“死者的丈夫或妻子”的定義，這定義應包括與死者誠意締結一段婚姻但婚姻屬於無效的當事人（第 14.6 段）。

21.49 遺屬生活費條例內有關“有效婚姻”的現行定義應予保留（第 14.7 段）。

21.50 有權申請生活費的人士類別範圍應予擴大，以包括未有再婚的前配偶或由法院判決分居的配偶（第 14.8 段）。

21.51 除有關“妾”及“夫妻關係”兩詞的定義外，遺屬生活費條例內有關夫妻關係的過渡性條文，即條例第 17 條及附表，應予以廢除（第 14.9 段）。

21.52 限制父母提出申請權利的條件（即：父母須在死者逝世前主要靠其供養）應予取消（第 14.10 段）。

21.53 現行遺屬生活費條例有關死者子女申請權的條文，應予廢除。並由一條限制住較少的條文取代，而該條文將不會限制領養子女、非婚生子女、成年子女及“屬於家庭的子女”提出申請（第 14.17 段）。

21.54 那些並不屬於死者至親但有權申請的人士範圍應予擴大。應列入一類新申請人，即：（“除上文所述的人士外”），在死者生前全部倚靠或部分倚靠死者供養的任何人士”（第 14.18 至 14.20 段）。

（第 15 章 —— 司法權及法庭權力）

21.55 法庭司法權的基礎應較現行供養死者家屬的法例有更明確的規定。其一要津就是死者逝世時定居於香港，而另一根據就是死者逝世前三年內曾經有任何時間通常在香港居住，並且逝世時在香港遺下淨遺產（第 15.2 段）。

21.56 法庭可頒予死者尙存配偶的供養費應不僅限於贍養費。本港應制定“合理生活費”的定義，訂出適用於配偶申請時應持有的水平（見第 15.5 段）。

21.57 雖然在通常情況下，離婚及由法院判決分居的配偶可得的生活費水平，較適用於尙存配偶的水平為低，但如果法庭並未有在婚姻訴訟中就生活費作出頒令，法庭應獲授權將前配偶或判決分居的配偶提出的申請，視作尙存配偶申請般處理（第 15.6 段）。

21.58 法庭在家屬生活費訴訟中的權力應予擴大，以便與法庭在婚姻訴訟中頒令判給生活費的權力相近。具體方面，法庭應獲下列額外權力：

- 得頒令為申請人的利益計而將屬於死者遺產一部分的財產作出轉讓或授與；
- 得頒令為申請人的利益計，或為撥付其應得利益計，將屬於遺產一部分的資產用作取得（其他）財產或權利；
- 得頒令作出法庭認為是執行其命令時所必需的相應或補充規定（包括更改按照死者遺囑或無遺囑法例或按照兩者的規定以處理死者遺產的方式，及向應根據法庭命令準備授與財產的受託人賦予廣泛的權力（第 15.7 段）。

21.59 法庭在處理申請時，應採用新準則。應考慮的事項計有：

- 有關的申請人及任何其他申請人或死者遺產的受益人目前或可見將來的財政來源及需要；
- 死者對於遺屬生活費申請人或遺產受益人所負的義務或責任；
- 死者淨遺產有多少和性質如何；
- 任何其他相關事項，包括任何有關人士的行為表現；
- 任何死者的言詞，即法庭要考慮事情的證據；
- （如申請人為死者的配偶、前配偶、妾侍或男方時），申請人的年齡、夫妻或夫妻雙方結合期間、申請人對於死者家庭福利的貢獻、以及如果申請人是死者的配偶，假設該

段婚姻以離婚而非死者的死亡告終，則申請人應得的生活費；

- （如申請人是死者的子女或被視為死者的子女時），申請人曾受或本來應當受到何種教育程度或訓練，而如果死者並非其親生父母時，死者對供養申請人肩負及履行多少責任，以及是否有其他人對申請人應肩負的供養責任；
- （如申請人是死者父母時），申請人的年齡以及死者死前為申請人的需要而作出的扶養（現款或有金錢價值的物品）；
- （如申請人並非家庭成員但由死者供養），死者負擔供養責任的根據以及供養該人的時間（第 15.9 段）。

21.60 遺屬生活費條例第 4(1)條但書（該但書的作用是：如果“受供養人”僅為其尚存配偶及子女，而大部分的遺產收益已遺留給尚存配偶，則不得提出申請）不應列入新草案內（第 15.10 及 15.11 段）。

21.61 由法庭頒發遺產管理書日起計六個月的時限繼續適用於在香港提出的申請（第 15.12 段）。

（第 16 章——可作為供養家屬的財產）

21.62 遺屬生活費條例內現行有關新界土地獲得豁免的條文應予廢除（第 16.4 段）。

21.63 死者某些財產通常不會被視為其遺產的一部分（即：經由其提名給予某人的財產、臨終前的贈與、或合有的物業），但為供養家屬起見，該等財產亦應列入為死者的遺產內（第 16.5 至 16.8 段）。

21.64 如果有關財產是或可能受提名規限，不論死者是否經提名給予某人或應可提名給予某人，亦應列入死者的遺產內（第 16.6 段）。

（第 17 章——防止逃避規定）

21.65 本港應制定防止逃避規定，以防止死者在生前利用特別的財務安排，使其財產得以逃避規定（第 17.1 至 17.7 段）。

綜合及修訂條例

（第 18 章 —— 綜合條例）

21.66 遺囑條例（香港法例第 30 章），無遺囑者遺產條例（香港法例第 73 章），以及有關死者家屬及受供養人生活費的法例應綜合而成爲一條條例（第 18.3 段）。

（第 19 章 —— 修改條例）

21.67 遺囑認證及遺產管理條例應予修訂，具體規定在英國有效並適用於香港的慣例及程序，應在香港明文制定成爲法律（第 19.2 段）。

剝奪權利

（第 20 章 —— 剝奪權利規則）

21.88 如果剝奪權利規則屬於委員會研究範圍，委員會當會建議本港制定類似 1982 年英國剝奪權利法的法例，授權法庭在有必要維持正義時，得減緩剝奪權利這規則的效力（第 20.4 段）

公眾對非婚生子女意見調查報告

公眾對非婚生子女態度 意見調查報告

由政務總署社區資訊科編製

1985 年 10 月

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I. 引言

現時，除非死者生前立下遺囑，否則其非婚生子女和受其供養的同居者均不得依據無遺囑者遺產條例（第 73 章）申領其遺產。亦不得根據遺屬生活費條例（第 129 章）申領贍養費，因為他們並不屬於該條例第 2 條“受供養人”的定義範圍內。

2. 有人主張，上述法律規定導致社會上有不公平現象，建議有關法例應作適當修改，以便非婚生子女得從其父親遺產中申領贍養費。另一方面，有人認為根據中國傳統，非由合法妻子所生的子女無權申領死者遺產，現時所作的調查，目的就是在查悉市民對非婚生子女權利的看法。

II. 蒐集數據方法

3. 當局於 1985 年 8 月，聘請一間私人調查機構——市場策略研究中心進行實地調查。在本港抽查了 1,000 名年齡在 15 歲或以上的人士。根據附件 I 的問卷面對面的訪問那些人士。

III. 反應率

4. 研究中心隨意抽取了 1903 個地址登門訪問。其中，成功地與 1434 個住戶取得聯絡，佔聯絡率 75%。其餘 469 個地址，有的是無人居住，有的是在不同時間日期經登門訪問三次後仍無法取得聯絡。由取得聯絡的住戶之中，成功訪問了 1,000 名合資格人士，佔填妥問卷 70%。

IV. 調查結果

附件 II (i) 對非婚生子女權利的認識（表 I）

5. 當被訪者被問到：非婚生子女能否申領其父親遺產時，29%人士能夠答對（即：不能夠申領），而 48%人士答錯（即：能夠申請）。其餘 23%答“不肯定／不知道／無可奉告”。具有專上教育或以上程度的人士回答較為準確，而

老年人或祇有小學或以下程度的人士則較趨向於回答“不肯定／不知道／無可奉告”。

附件 II (ii) 同等權利 (表 II)

6. 當被訪者被問到非婚生子女應否具有與婚生子女同等權利以申領其父親遺產時，72%人士認為非婚生子女“應該”具有同等權利，22%認為“不應該”，而其餘 6%則不置可否。從下述圖表可叫看出，較年輕的人士和受過較高深教育程度的人士傾向於贊成非婚生子女應該具有同等權利。

圖表 A：贊成非婚生子女應具有同等權利的人士所佔百分率

	百分率	(根據：被訪者數目)
<u>總數</u>	72%	(1000)
<u>年齡</u>		
15 - 44	77%	(711)
45+	61%	(289)
<u>教育程度</u>		
小學或以下	64%	(440)
中學或以上	78%	(560)

7. 從下述圖表可以看出，那些贊成非婚生子女應該享有申領父親遺產同等權利的人士，大多數（63%）有錯誤印象，認為根據現行法律，非婚生子已能夠申領父親遺產。另一方面，那些不贊成非婚生子女應具有同等權利的人士，祇有 12%有這錯覺。

圖表 B：被訪者對於非婚生子女應具有申領父親遺產同等權利的態度百分率

對於非婚生子女 能否申領父親遺產的認識					
非婚生子女 應否具有申 領父親遺產 同等權利	能夠	不能夠	不肯定／ 不知道／ 無可奉告	總數	被訪者 數目
應該具有 同等權利	63%	17%	20%	100%	(720)
不應該具有 同等權利	12%	65%	23%	100%	(222)
不肯定／ 不知道／ 無可奉告	12%	28%	60%	100%	(58)
總數	48%	29%	23%	100%	(1000)

附件 II (iii) 從父親遺產中申領贍養費權利 (表 III)

8. 緊隨“同等權利”的問題，被訪者即被問到：非婚生子女應否有權從父親遺產中申領贍養費。86%人士認為，如果他們是由其父親生前供養的，則那些非婚生子女亦應有權從其父親遺產中申領贍養費。而一如預料，那些說非婚生子女不應具有同等權利的人士，（在 1,000 名被訪者中佔 22%），贊成應給這種權利予非婚生子女的人士所佔百分率亦較低(68%)。有關分析見下述圖表：

圖表 C：被訪者對於給與非婚生子女同等權利申領贍養費的態度百分率

對於非婚生子女應否具有申領遺產的同等權利				
<u>非婚生子女應具有申領贍養費權利</u>	<u>應具有同等權利</u>	<u>不應具有同等權利</u>	<u>不肯定／不知道／無可奉告</u>	<u>總數</u>
同意	96%	68%	47%	86%
不同意	2%	29%	9%	9%
不肯定／不知道／無可奉告	2%	3%	44%	5%
總數	100%	100%	100%	100%
被訪者數目	(720)	(222)	(58)	(1000)

9. 與“同等權利”問題情況一樣，那些較年輕或受過較高深教育程度的人士傾向於持有較開明的態度，見於下表。

圖表 D：贊同非婚生子女應有權從父親遺產中申領贍養費的
被訪者所佔百分率

	百分率	(根據：被訪 者數目)
<u>總數</u>	86%	(1000)
<u>年齡</u>		
15 - 44	89%	(711)
45+	80%	(289)
<u>教育程度</u>		
小學或以下	82%	(440)
中學或以上	90%	(560)

附件 II (iv) 非婚生子女母親的權利 (圖表 IV&V)

10. 除了非婚生子女問題外，被訪者亦被問到非婚生子女的母親應否有權從遺產中申領贍養費的問題。68%人士認為非婚生子女的母親應具有這權利，25%認為不應該，其餘7%的答覆是“不肯定／不知道／無可奉告”。後兩組人士在回答這問題後，再被追問同樣，但加上另一條件的問題，即該母親是由其非婚生子女的父親生前所供養的。今次，約有一半人士（在 1000 名被訪者中佔 15%）的答覆是肯定的。

11. 總之，83%人士認為非婚生子女的母親應該有權，而有 13%人士認為不應該，而 4%人士則不置可否。

12. 再一次，較年輕及受過較高深教育程度的人士傾向於贊同非婚生子女的母親應該有權從遺產中申領贍養費。

圖表 E：認為非婚生子女的母親應有權從遺產中申領贍養費
被訪者所佔百分率

	應具有權利 (未加第 10 段的條件)	應具有權利 (加上第 10 段的條件)	(根據：被訪 者數目)
<u>總數</u>	68%	83%	(1000)
<u>年齡</u>			
15-34	73%	88%	(520)
35+	64%	77%	(480)
<u>教育程度</u>			
小學或以下	63%	77%	(440)
中學或以上	72%	87%	(560)

附件 II (v) 對婚外情的影響 (表 VI)

13. 為更了解被訪者對非婚生子女問題的態度，問卷中其中一條問題就是詢問被訪者是否同意下述說法，就是：如果容許非婚生子女得從其父親遺產中申領贍養費，那就會鼓勵婚外情。據調查結果所得，祇有 28% 人士同意這種說法，62% 人士不同意，而其餘 10% 的人士回答說：“不肯定／不知道／無可奉告”。

14. 下述圖表顯示不同意會鼓勵婚外情的人士，是傾向較開明的。

圖表 F：同意／不同意“會鼓勵婚外情”說法的被訪者的態度

被訪者所持態度百分率

態度	同意這說法的人士	不同意這說法的人士	不肯定／不知道／無可奉告人士	被訪者總數
a) 非婚生子女在申領其父親遺產時應與婚生子女享有同等權利	66%	76%	57%	72%
b) 非婚生子女應有權從其父親遺產中申領贍養費	83%	91%	70%	86%
c) 非婚生子女的母親，倘加上第10段的條件，應有權從其子女的父親遺產中申領贍養費	77%	88%	63%	83%
(根據：被訪者數目)	(285)	(623)	(92)	(1000)

#這組被訪者回答其他問題時，多數答謂：“不肯定／不知道／無可奉告”。

V. 結論

14. 今次調查顯示，市民對於非婚生子女的看法是傾向寬容和開通的。壓倒性的多數（86%）人士同意非婚生子女應有權從父親遺產中申領贍養費。略少於該百分比（83%）的人士同意，如果非婚生子女母親，一向由其子女父親生前所供養，則應有權從其父親的遺產中申領贍養費。至於同等權利這一般性問題上，十居其七認為非婚生子女在申領其父親遺產時，應與婚生子女具有同等權利。

15. 不過，調查結果亦顯示，大約半數人士錯誤地認為非婚生子女是能夠從其父親遺產中申領遺產。但 62% 的人士不同意一種說法：如果容許非婚生子女得從其父親遺產中申領贍養費，那就會鼓勵婚外情。

16. 調查結果似顯示：如提議對現行法例作出修訂，以便非婚生子女亦能夠從其父親遺產中申領贍養費，這項修訂將獲市民普通支持。

問卷 編輯：_____ 第 1 卡：_____ (1)

密碼：_____ 工作編號：_____ (2-5)

市場策略研究中心 查核：_____ 問卷號碼：_____ (6-9)

訪問號碼：_____ (10-11)

電話：5-291237

M.1329 意見調查

被訪者姓名：_____ 年齡：_____ 電話：_____

地址：_____ 號碼：_____

被訪日期：_____ 開始訪問時間：_____ 完成：_____

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。你所俾我嘅資料，係會絕對保守秘密嘅，多謝你嘅合作。

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 晚喺到馴嘅。最大年紀係邊位呢？其次呢？

	姓名	性別	年齡	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

讀出：而家我哋想知道一吓你對一 D 社會事物嘅睇法

- 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？

可以申請 _____ 1 (12)
 唔可以申請 _____ 2
 不肯定／不知道／
 無可奉告 _____ 3
- 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？

應該有權 _____ 1 (13)
 唔應該有權 _____ 2
 不肯定／不知道／
 無可奉告 _____ 3
- 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？

同意 _____ 1 (14)
 唔同意 _____ 2
 不肯定／不知道／
 無可奉告 _____ 3

4. 有啲人話如果准許私生子嘅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？
 同意 _____ 1 (15)
 唔同意 _____ 2
 不肯定／不知道／無可奉告 _____ 3
5. 你認為私生子嘅媽媽應該抑或唔應該有權嘅私生子嘅爸爸嘅遺產中申請贍養費呢？
 應該有權 _____ 1 (16)
 唔應該有權 _____ 2 追問
 不肯定／不知道／第6條
 無可奉告 _____ 3
6. 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嘅遺產中申請贍養費呢？
 應該有權 _____ 1 (17)
 唔應該有權 _____ 2
 不肯定／不知道／無可奉告 _____ 3

各組人士數據

1. 記錄性別
 男性 _____ 1 (18)
 女性 _____ 2
2. 請問你今年新曆計算係幾多歲呢？
 15-19 _____ 01 (19)
 20-24 _____ 02
 25-29 _____ 03
 30-34 _____ 04
 35-39 _____ 05
 40-44 _____ 06
 45-49 _____ 07
 50-54 _____ 08
 55-59 _____ 09
 60-64 _____ 10
 65+ _____ 11
3. 請問你讀書讀到邊個程度呢？
 無受過教育 _____ 1 (21)
 小學 _____ 2
 小學畢業 _____ 3
 中學 _____ 4
 中學畢業 _____ 5
 專上或大學 _____ 6
4. 請問你結咗婚未呢？
 結咗婚 _____ 1 (22)
 鰥夫／寡婦 _____ 2
 離婚／分居 _____ 3
 未婚 _____ 4
 拒絕回答／ _____
 D.K. _____ 5

5. 你而家係讀書抑或做緊嘢 做緊嘢(問第 6 題) 1 (23)
 呢? 主婦 (問第 7 題) 2
 學生 (問第 7 題) 3
 退休 (問第 7 題) 4
 失業 (問第 7 題) 5

6. 請問你嘅職業同職位係乜嘢呢? (24)
-

7. 請問你全家每月嘅總收 \$20,000+_____ 01 (25-26)
 入大約係幾多呢? \$19,999-17,500_____ 02
 * \$17,499-15,000_____ 03
 \$14,999-15,500_____ 04
 * \$12,499-10,000_____ 05
 \$ 9,999- 9,000_____ 06
 * \$ 8,999- 8,000_____ 07
 \$ 7,999- 7,000_____ 08
 * \$ 6,999- 6,000_____ 09
 \$ 5,999- 5,000_____ 10
 * \$ 4,999- 4,000_____ 11
 \$ 3,999- 3,000_____ 12
 * \$ 2,999- 2,000_____ 13
 \$ 2,000 _____ 14

表 I：被訪者對非婚生子女能否申領其
父親遺產的認識分佈百分率

被訪者對非婚生子女能否申領其父親遺產的認識

	能夠 申領	不能夠 申領	不肯定／不知 道／無可奉告	總數	被訪者數目
	%	%	%	%	
(a) <u>總數</u>	48	29	23	100	(1000)
(b) <u>性別</u>					
男性	50	29	21	100	(509)
女性	46	29	25	100	(491)
(c) <u>年齡</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>婚姻狀況</u>					
已 婚 ／ 鰥 寡 ／ 離 婚	48	26	26	100	(683)
未 婚	49	34	17	100	(317)
(e) <u>教育程度</u>					
小學或以下	42	27	31	100	(440)
中學	55	25	20	100	(227)
中學畢業	57	29	14	100	(235)
專上	43	44	13	100	(98)

註：由於使成整數，所得數字相加可能未必等於 100%。

表 II：被訪者對於非婚生子女應否享有同等
權利申領其父親遺產的分佈百分率

		<u>應否有同等權利</u>			<u>總數</u>	<u>被訪者數目</u>
		<u>應有同 等權利</u>	<u>不應有 同等權利</u>	<u>不肯定／不知 道／無可奉告</u>		
		%	%	%	%	
(a)	<u>總數</u>	72	22	6	100	(1000)
(b)	<u>性別</u>					
	男性	71	23	6	100	(509)
	女性	72	22	6	100	(491)
(c)	<u>年齡</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>婚姻狀況</u>					
	已婚／鰥寡 ／離婚	69	24	7	100	(683)
	未婚	77	20	3	100	(317)
(e)	<u>教育程度</u>					
	小學或以下	64	26	10	100	(440)
	中學	76	22	2	100	(227)
	中學畢業	80	17	2	100	(235)
	專上	76	17	8	100	(98)

表 III：被訪者對非婚生子女如果以往由其父親供養，則應否有權從其遺產中申領贍養費的意見分佈百分率

應否有權從遺產中申領贍養費

	應具 有權利	不應有權	不肯定／不知 道／無可奉告	總數	被訪者數目
	%	%	%	%	
(a) <u>總數</u>	86	9	5	100	(1000)
(b) <u>性別</u>					
男性	87	8	4	100	(509)
女性	85	10	5	100	(491)
(c) <u>年齡</u>					
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>婚姻狀況</u>					
已婚／鰥寡 ／離婚	85	9	6	100	(683)
未婚	89	9	2	100	(317)
(e) <u>教育程度</u>					
小學或以下	82	10	9	100	(440)
中學	90	9	1	100	(227)
中學畢業	90	8	1	100	(235)
專上	89	6	4	100	(98)

表 IV：被訪者對於非婚生子女的母親應否有權從該等子女
父親的遺產中申領贍養費意見分佈百分率

母親應否有權從遺產中申領贍養費

	應 有權利	不應有權	不肯定／不知 道／無可奉告	總數	被訪者數目
	%	%	%	%	
(a) <u>總數</u>	68	25	7	100	(1000)
(b) <u>性別</u>					
男性	71	23	6	100	(509)
女性	66	27	7	100	(491)
(c) <u>年齡</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>婚姻狀況</u>					
已婚／鰥寡 ／離婚	66	26	8	100	(683)
未婚	73	23	4	100	(317)
(e) <u>教育程度</u>					
小學或以下	63	26	10	100	(440)
中學	75	21	3	100	(227)
中學畢業	70	26	4	100	(235)
專上	70	24	6	100	(98)

表 V：對於如果非婚生子女的母親由其子女的父親生前供養，他們的母親不應有權申領贍養費或對這問題“不表示明確意見的”被訪者分佈百分率

<u>母親應否具有這權利</u>					
	<u>應具 有權利</u>	<u>不應有權</u>	<u>不肯定／不知 道／無可奉告</u>	<u>總數</u>	<u>被訪者數目</u>
	%	%	%	%	
(a) <u>總數</u>	45	41	14	100	(319)
(b) <u>性別</u>					
男性	53	34	12	100	(154)
女性	37	48	15	100	(165)
(c) <u>年齡</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>婚姻狀況</u>					
已 婚 ／ 鰥 寡 ／ 離 婚	40	42	18	100	(229)
未 婚	57	40	3	100	(90)
(e) <u>教育程度</u>					
小學或以下	36	44	20	100	(164)
中學	43	49	7	100	(56)
中學畢業	55	40	5	100	(70)
專上	73	16	11	100	(29)

表 VI：對於如果容許非婚生子女申領贍養費會否鼓勵
婚外情這一問題被訪者意見分佈百分率

“會鼓勵婚外情”這種說法

	同意 這種說法	不同意 這種說法	不肯定／不知 道／無可奉告	總數	被訪者數目
	%	%	%	%	
(a) <u>總數</u>	28	62	10	100	(1000)
(b) <u>性別</u>					
男性	26	66	8	100	(509)
女性	30	58	12	100	(491)
(c) <u>年齡</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>婚姻狀況</u>					
已 婚 ／ 鰥 寡 ／ 離 婚	29	60	11	100	(638)
未 婚	26	68	6	100	(317)
(e) <u>教育程度</u>					
小學或以下	28	58	14	100	(440)
中學	27	68	5	100	(227)
中學畢業	29	64	7	100	(235)
專 上	26	67	7	100	(98)

經諮詢的機構或人士

律政專員（行政）及民事檢察專員

最高法院經歷司

註冊總署署長

法律援助署署長

社會福利署署長

衛生福利司

社會福利諮詢委員會

政務司

香港律師會

香港大律師公會

香港女律師公會

香港家庭法律協會

香港大學法律系

匯豐銀行信託有限公司

Mr. W.K. Thomson

渣打銀行香港信託有限公司

Bank of China Trust and Consultancy Company

鄉議局

保良局

1982 年司法執行法：第 27 及 28 條，和第二附表（英文本）

International wills

The form of an International will

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

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

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

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

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

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

SCHEDULE 2

Section 27

THE ANNEX TO THE CONVENTION ON INTERNATIONAL WILLS

UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

ARTICLE 1

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

ARTICLE 2

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

ARTICLE 3

1. The will shall be made in writing.
2. It need not be written by the testator himself.
3. It may 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.

根據 1971 年無遺囑者遺產條例的遺產分配表 *

* 經獲作者麥雅心理先生（小組委員會主席）及香港法律專刊同意刊登，謹此致謝。

附件 A

1971 年無遺囑者遺產條例

無遺囑者或局部未立遺囑所剩餘遺產的繼承表

如果死者遺下	剩餘遺產的分配（附註 A）	有權管理遺產人士（附註 D）
丈夫或妻子，但並無其他親屬（附註 J(1)）	全歸丈夫／妻子絕對擁有	丈夫／妻子
妻及妾，但並無其他親屬（附註 J(1) 及附註(B)）	妻佔三分二，其餘由妾或各妾均分	妻及妾
妾或各妾，並無妻子或其他親屬（附註 J(2)）	三分一由妾或各妾均分，其餘歸政府（附註 C）	妾或各妾
妾的男伴侶（附註 B）並無其他親屬（附註 J(2)）	三分一歸男伴侶，其餘歸政府（附註 C）	男伴侶
丈夫或妻子及子孫（附註 E）	(i) 25,000 元歸丈夫／妻子，另加年息 5%，由逝世之日起計至付款或撥付之日止（附註 F） (ii) 剩餘一半遺產歸丈夫／妻子 (iii) 其餘一半由法定信託保管，歸死者子孫均分（附註 E 及 G）	丈夫／妻子

妻、妾及子孫	(i) 25,000 元歸妻子，另加年息 5%，由逝世之日起計至付款或撥付之日止（附註 F） (ii) 剩餘一半遺產歸妻子，但如有妾，須先給與下文所述有關妾的終身利益 (iii) 妻子所獲的一半遺產之中，其中三分一收入由妾終身享用，如妾的數目超過一名，則由各妾或尚存者均分 (iv) 其餘一半遺產由法定信託保管，歸各子孫均分（附註 E 及 G）	妻及妾
妾及子孫	(i) 由法定信託保管，除須給與妾的終身利益外，全歸子孫均分（附註 E 及 G） (ii) 剩餘遺產三分一的收入由妾終身享用，如妾的數目超過一名，則由各妾或尚存者均分	妾
妾的男伴侶及子孫	(i) 由法定信託保管，除須給與妾的男伴侶終身利益外，全歸子孫均分（附註 E 及 G） (ii) 剩餘遺產三分一的收入由妾的男伴侶終身享用	妾的男伴侶
子孫，並無妾、丈夫或妻子	全由法定信託保管，歸子孫均分（附註 E 及 G）	子孫，死者的子女較死者的孫有優先權
丈夫或妻子及下述人士——父母、兄弟、姊妹、甥姪但無子孫	(i) 100,000 元歸丈夫／妻子，另加年息 5%，由逝世之日起計至付款或撥付之日止（附註 F）	丈夫／妻子

	(ii) 剩餘一半遺產歸丈夫／妻子 (iii) 其餘一半歸父／母或如父母雙全，則由父母均分 (iv) 若無父母，則其餘一半遺產由法定信託管，歸兄弟姊妹均分（附註 G 及 H）	
妻妾及下述人士——父母、兄弟、姊妹、甥姪但無子孫	(i) 100,000 元歸妻子，另加年息 5%，由逝世之日起計至付款或撥付之日止（附註 F） (ii) 剩餘一半遺產，除須先給與妾的終身利益外，全歸妻子 (iii) 由妻的半份遺產中收入三分之一由妾終身享用，如妾的數目超過一名，則由各妾或尚存者均分 (iv) 其餘一半歸父／母或如父母雙全，則由父母均分，但如父母雙亡，則由法定信託保管，歸兄弟姊妹均分（附註 G 及 H）	妻妾
祇餘妾或妾的男伴侶及下述人士——父母、兄弟姊妹、甥姪、祖父母、外祖父母、叔伯姑舅（附註 I）但無丈夫、妻子及子孫	(i) 妾或妾的男伴侶佔三分之一，如妾的數目超過一名，則由各妾均分 (ii) 其餘三分二歸父／母或如父母雙全，則由父母均分； (iii) 如父母雙亡，則由下列人士按下列順序領取該三分二遺產： (a) 由法定信託保管，歸兄弟姊妹均分（附註 H） (b) 由法定信託保管，歸甥姪均分（附註 H） (c) 祖父母及外祖父母均分 (d) 由法定信託保管，歸叔伯姑舅（附註 I）均分	妾／妾的男伴侶

父母、兄弟姊妹、甥姪、祖父母及外祖父母、叔伯姑舅及其子孫但無丈夫、妻子、妾的男伴侶，妾或子孫	全歸父／母，如父母雙全，則由父母均分。如父母雙亡，則由下述人士按下列順序領取全部遺產： (a) 由法定信託保管，兄弟姊妹均分（附註 H） (b) 由法定信託保管，甥姪均分（附註 E 及 H） (c) 祖父母及外祖父母均分 (d) 由法定信託保管，叔伯姑舅均分	有權繼承遺產人士
親生母親及公認的父親（死者是非婚生子女），並無子孫、男伴侶、丈夫、妻或妾	全歸生母（非婚生子女獲取合法地位條例第 10(2)條）	生母
並無遺下子孫、男伴侶、丈夫、妻妾、父母、兄弟姊妹、甥姪、祖父母，外祖父母、叔伯姑舅及其子孫	全歸政府（附註 C）	政府

附註 A：剩餘遺產

指一名人士死亡時並無留下遺囑，其遺產在扣除適當的殯葬費、遺產管理費、欠債及其他債務後每一項受益人權益，而該項權益，亦即指該名人士（非根據其已擁有的指定），如是成年人並具有完全行為能力時，可立遺囑處理其遺產的權益。本條例亦適用於局部未立遺囑的遺產，即指未由遺囑或遺囑修改附錄處理的資產。

附註 B：妾的男伴侶，妻子及妾

丈夫及妻子是指一段有效婚姻中的丈夫或妻子，妾是指有效的夫妻關係中的女方，而男方則稱為“男伴侶”。男伴侶死亡時並無留下遺囑，妾亦具有受益人的權益，一如丈夫死時並無留下遺囑而其妻子具有權益一樣。至於妻子或妾死亡而

無留下遺囑，丈夫則有受益人權益，更且，條例將妻及妾視為陌生人，舉例來說，一位男士死亡，遺下一妻一妾，其後，妻子逝世但無留下遺囑，妾不能享有該名妻子遺產的任何權益，反之，如妾死亡，妻亦不能享有其遺產。同時，如果妾再婚或與人發生性行為，則亦會喪失其終身權益。以本條例而言，一名填房妻（即結髮妻子死後，丈夫提升一名妾為正妻或另娶新妻的稱號）似被視為妻子，而且，就本條例而言，將妾升為正妻的儀式或娶新妻的儀式似被視為一段有效婚姻。

附註 C：政府

按照條例規定，如無人取得絕對權益時，無遺囑者的剩餘財產即成為無主財物而歸政府所有，政府可（在不妨礙其他權力的原則下）將歸其所有的全部或部分財產，撫養受該無遺囑者供養的人士（不論是否為該無遺囑者的親屬），與及可合理預期該無遺囑者會加以撫養的其他人士。（見 4(9)節）

附註 D：有權管理遺產的人士

欄內所指人士，即可根據 1971 年無爭論性遺囑認證規則第 21 條規則有優先權利申領管理遺產的人士。管理遺產人士不會超過四名，如果牽涉有未成年人或終身權益，法庭會頒令由信託機構或不少於兩名人士管理遺產。如有局部未立遺囑的遺產，則欄內所指人士或未必有權管理遺產，申領次序則根據規則第 19 條而非第 21 條。

附註 E：“子孫”：——

- (a) 如死者是一段有效婚姻的一方，為其子女；
- (b) 如果死者是女性
 - (i) 為其最後一名丈夫與另一名女子所締結有效婚姻的子女；
 - (ii) 為其男伴侶與另一名女子所締結有效婚姻的子女；
 - (iii) 為其最後一名丈夫與另一名女子所締結有效的夫妻關係所屬的子女（見條例第 2(2)(6)條及修訂條例）。

- (c) 按照領養條例所領養的子女或根據領養條例第 17 條保留中國傳統領養法所領養的子女；
- (d) 夫妻關係中死者的子女；
- (e) 死者逝世時待生的子女；
- (f) 根據 1971 年非婚生子女獲取合法地位條例而獲取合法地位，或宣佈或視為已獲取合法地位的子女；
- (g) 如果死者是女性而並無遺下任何尚存獲取合法地位的子孫，為其私生子女（非婚生子女獲取合法地位條例第 10(1)條）。
- (h) 以上獲取合法地位的受供養人（如父母均已逝世才可領取遺產）。

附註 F：\$25,000.000 及 \$100,000.00

無須繳納遺產稅及費用的淨款額（第 4(3)及(4)條）。尚存配偶可用書面要求遺產管理人撥出個人動產，以折價清付該筆淨款額（第 7 條）。

附註 G：法定信託（第 5 條）

以信託形式，為可領取無遺囑者遺產的某組別人士保管，如該組人士人數超過一名，則由死者逝世時仍活着而年滿 21 歲或已婚者均分；如有子女於無遺囑者逝世前先逝世，則其子女（即無遺囑者的孫兒）可按家系均分，如該家系人數超過一名，則可均分其父母應可享得的份數，一如其父母較無遺囑者活得較長，但其家系須年滿 21 歲或已婚。

附註 H：兄弟姊妹

條例所指的兄弟姊妹，即由無遺囑者同一父親所生的兄弟姊妹（第 2(4)條）。如果同母異父，在本條例內提到繼承時並不視為兄弟姊妹，政府會包括同母異父的兄弟姊妹的優先繼承權，雖然如果他們提出書面請求，相信政府亦會批准該項申請（見第 4(9)條）。

附註 I： 叔伯姑舅

無遺囑者父母（須符合附註 H 的定義）的兄弟姊妹。死者母親的兄弟姊妹亦包括在內，此點與條例內祇重視父系的情況不同。

附註 J(1)： 親屬

親屬指下述人士：

- (a) 子孫；
- (b) 父母；
- (c) 兄弟姊妹；
- (d) 甥姪

附註 J(2)： 親屬

除上述附註 J(1)所指的人士外，亦包括下述人士：

- (a) 祖父母、外祖父母；
- (b) 叔伯姑舅；
- (c) 叔伯姑舅的子孫。

註：(1) 除無遺囑者表示相反意圖外，共有三條條文規定須將財產混同：

- (a) 在確定某一子女所佔份數時，倘無遺囑者生前已預付或設定金錢予該名子女，則該筆款項必須記入遺產的帳項內；
- (b) 如屬於局部未立遺囑的遺產，則遺囑內給予丈夫或妻子的餽贈（不包括特別遺贈的個人動產）必須記入遺產的帳項內，以減少支付\$25,000.000 或 100,000.00 元款項（按情況而定）；
- (c) 如有局部未立遺囑的遺產，由遺囑給予子孫的餽贈必須記入帳項內。

在計算這些財產混同條文所指的款項時，其價值當以死者逝世當日的價值計算，列入帳項內，以決定子孫應獲得的利益。

- (2) 如果無遺囑者與配偶逝世時，無法確定其中一人是否在另一人逝世時仍活着，則無遺囑者的遺產的繼承一如該名配偶已死亡處理。

1975 年繼承（供養家屬）法：第 3 及 8-13 條 （英文本）

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

(1) Where an application is made for an order under section 2 of this Act, the court shall, in determining whether the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is such as to make reasonable financial provision for the applicant and, if the court considers that reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters, that is to say –

- (a) the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;
- (b) the financial resources and financial needs which any other applicant for an order under section 2 of this Act has or is likely to have in the foreseeable future;
- (c) the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;
- (d) any obligations and responsibilities which the deceased had towards any applicant for an order under the said section 2 or towards any beneficiary of the estate of the deceased;
- (e) the size and nature of the net estate of the deceased;
- (f) any physical or mental disability of any applicant for an order under the said section 2 or any beneficiary of the estate of the deceased;
- (g) any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.

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

- (a) the age of the applicant and the duration of the marriage;
- (b) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family;

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

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

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

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

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

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

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

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

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

Properly available for financial provision

8. Property treated as part of “net estate”

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

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

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

9. Property held on a joint tenancy

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

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

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

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

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

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

10. Dispositions Intended to defeat applications for financial provision

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

- (2) Where on an application under subsection (1) above the court is satisfied –
- (a) that, less than six years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Act made a disposition, and
 - (b) that full valuable consideration for that disposition was not given by the person to whom or for the benefit of whom the disposition was made (in this section referred to as “the donee”) or by any other person, and
 - (c) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Act,

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

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

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

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

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

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

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

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

(7) In this section “disposition” does not include –

- (a) any provision in a will, any such nomination as is mentioned in section 8(1) of this Act or any donatio mortis causa, or
- (b) any appointment of property made, otherwise than by will, in the exercise of a special power of appointment,

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

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

11. Contracts to leave property by will

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

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

- (a) that the deceased made a contract by which he agreed to leave by his will a sum of money or other property to any person or by which he agreed that a sum of money or other property would be paid or transferred to any person out of his estate, and
- (b) that the deceased made that contract with the intention of defeating an application for financial provision under this Act, and
- (c) that when the contract was made full valuable consideration for that contract was not given or promised by the person with whom or for the benefit of whom the contract was made (in this section referred to as “the donee”) or by any other person, and
- (d) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Act,

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

- (i) if any money has been paid or any other property has been transferred to or for the benefit of the donee in accordance with the contract, an order directing the donee to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order;
- (ii) if the money or all the money has not been paid or the property or all the property has not been transferred in accordance with the contract, an order directing the personal representatives not to make any payment or transfer

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

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

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

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

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

12. Provisions supplementary to ss. 10 and 11

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

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

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

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

- (a) any reference in section 10(4) to the disposal of property by the donee shall include a reference to disposal by the personal representative of the donee, and
- (b) any reference in section 10(5) to an application by the donee under that subsection shall include a reference to an application by the personal representative of the donee;

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

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

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

- (1) Where an application is made for –
- (a) an order under section 10 of this Act in respect of a disposition made by the deceased to any person as a trustee, or
 - (b) an order under section 11 of this Act in respect of any payment made or property transferred, in accordance with a contract made by the deceased, to any person as a trustee,

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

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

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

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

遺囑（修訂）條例草案（英文本）

WILLS (AMENDMENT) BILL 1990**ARRANGEMENT OF CLAUSES**

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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.]”.

Section added

10. The following are added after section 23 –

“Rectification

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

- (a) of a clerical error; or
- (b) of a failure to understand his instructions,

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

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

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

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

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

Interpretation of wills – general rules as to evidence

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

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

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

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

Presumption as to effect of gifts to spouses

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

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

PART IIA

INTERNATIONAL WILLS

Form of international will

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

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

(3) In this Part –

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

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

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

Procedure

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

- (a) solicitors; and
- (b) notaries public duly registered under section 40 of the Legal Practitioners Ordinance (Cap. 159).

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

[cf. 1982 c. 53 s. 28 U.K.]”.

Application

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

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

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

Schedule added

12. The following is added after section 30 –

“SCHEDULE [s. 23D]

THE ANNEX TO THE CONVENTION ON INTERNATIONAL WILLS

UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

ARTICLE 1

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

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

ARTICLE 2

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

ARTICLE 3

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

ARTICLE 4

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

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

ARTICLE 5

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

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

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

ARTICLE 6

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

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

ARTICLE 7

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

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

ARTICLE 8

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

ARTICLE 9

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

ARTICLE 10

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

CERTIFICATE (Convention of October 26th, 1973)

1. I, (name, address and capacity), a person authorized to act in connection with international wills
2. Certify that on (date) at (place)
.....
3. (testator)
(name, address, date and place of birth)
in my presence and that of the witnesses
4. (a)
(name, address, date and place of birth)

(b)
(name, address, date and place of birth)
has declared that the attached document is his will and that he knows the contents thereof.
5. I furthermore certify that:
6. (a) in my presence and in that of the witnesses
 - (1) the testator has signed the will or has acknowledged his signature previously affixed.
 - *(2) following a declaration of the testator stating that he was unable to sign his will for the following reason
.....
.....
– I have mentioned this declaration on the will

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

7. (b) the witnesses and I have signed the will;
8. *(c) each page of the will has been signed by
.....and numbered;
9. (d) I have satisfied myself as to the identity of the testator and of the witnesses
as designated above;
10. (e) the witnesses met the conditions requisite to act as such according to the
law under which I am acting;
11. *(f) the testator has requested me to include the following statement
concerning the safekeeping of his will:
.....
.....
.....
12. PLACE
13. DATE
14. SIGNATURE and, if necessary, SEAL

*To be completed if appropriate.

ARTICLE 11

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

ARTICLE 12

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

ARTICLE 13

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

ARTICLE 14

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

ARTICLE 15

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

Consequential Amendments

Trustee Ordinance

Protective trusts

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

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

Land Registration Ordinance

Repeal of references to wills

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

SCHEDULE

[s. 14]

Amendments to Land Registration Ordinance

1. The long title is amended by repealing “wills”.
2. Sections 2, 3, 5 and 28 are amended by repealing “and wills” wherever it occurs.
3. Sections 4, 23, 23A, 24, 26A, 28 and 29 are amended by repealing “or will” wherever it occurs.
4. Section 5 is amended by repealing “(except wills)” and “and all wills which are registered within one month after the decease of every devisor respectively”.
5. Section 22 is amended by repealing “or his last will and testament,” “wills, and testaments” in both places where it occurs, “testator or” and the proviso.
6. Section 30(1) is amended –
 - (a) by repealing “wills,”;
 - (b) by adding after subsection (1) –

“(1A) As from the commencement of the Wills (Amendment) Ordinance 1990 (of 1990), the provisions referred to in subsection (1) shall cease to apply, in any circumstances, to the registration of wills and the First Schedule has been amended accordingly.”.
7. The First Schedule is amended –
 - (a) in sections 2 and 3, by repealing “and wills” wherever it occurs;

- (b) in section 6, by repealing “except a will,” and “and in the case of a will by some or one of the devisees or his guardian or trustees,”;
- (c) in section 8(1), by repealing “and of any will”, “or of such will,” “and of the devisor and devisee or devisees of such will,” “or by such will,” and “(except in the case of a will)”;
- (d) in section 9(3), by repealing “will or”;
- (e) in section 11, by repealing “and of the devisors and devisees in the case of wills,”;
- (f) in the Schedule, by repealing “or will” and “or of the devisors or devisees”

Amendment to Land Registration Regulations

- 8. Regulation 2 is amended by repealing “will,”.

Amendments to Land Registration Fees Regulations

- 9. Regulation 1A is amended by repealing “will,”.
- 10. Item 4 of the Schedule is amended by repealing “will,”.

Amendment to Land Registration (New Territories) Fees Regulations

- 11. Item 4 of the Schedule is amended by repealing “will,”.

Explanatory - Memorandum

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

- 2. Clause 2 repeals and replaces sections 3 to 6 of the Wills Ordinance to provide as follows.
 - (a) New section 3 restates in a better style the rule that a testator may, by a properly executed will, dispose of all his property.
 - (b) New section 4 largely restates the law relating to the age at which a person may make a valid will, but provides for the first time that a married person may validly make and revoke a will even though he or she has not attained full age.
 - (c) New section 5 relaxes the formalities required for the valid execution of a will by –

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

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

- (d) The proviso to section 5 states that a will that is in writing and signed, but is not otherwise executed in accordance with the formalities required by section 5, is validly executed if, at the time it was signed, it expressed the testator’s testamentary intentions. Section 5(2) (which provided that a will was validly executed if it was a will of a Chinese testator written wholly or substantially in Chinese and signed by the testator) is repealed.
- (e) New section 6, which deals with persons who may make a valid will without complying with section 5, largely restates the law, but the reference to a member of Her Majesty’s Forces in actual service is changed to any person is actual naval, military or air force service.

3. Clause 3 repeals the following sections –

- (a) section 8, which no longer added anything to the general law applicable to wills;
- (b) section 10, which previously provided that a person who witnessed a will could not obtain any property under the will;
- (c) section 11, which previously permitted a person to give evidence as to the execution or validity of a will, notwithstanding that he was a creditor of the testator and that the will charged some property with payment of his debt;
- (d) section 12, which previously permitted a person to give such evidence notwithstanding that he was an executor of the will.

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

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

- (a) The new section 13 restates, in a more logical position and with minor drafting amendments, the provisions found in the former sections 15 and 16.
- (b) The new section 14 deals with the effect on a will of the subsequent marriage of the testator. The former section 13 provided that a will was revoked by that marriage except where it was “expressed to be made in contemplation of marriage”. The exception now allows more flexibility by providing that where it appears from the will that at the time it was made the testator was expecting to be married to a particular person and he intended the will or any part of it to survive the marriage, the will remains valid except in respect of any disposition that the testator intended to be revoked by the marriage.
- (c) The new section 15 deals with the effect on a will of the subsequent dissolution or annulment of the testator’s marriage. Previously these events had no effect

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

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

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

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

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

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

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

7. Clause 7 is a consequential amendment.

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

9. Clause 9 repeals and replaces section 23, which relates to the rule that a gift by will lapses if the donee dies before the testator. The former section 23 provided an exception 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.]

無遺囑者遺產（修訂）條例草案（英文本）

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 in the new subsection (8); this list differs from the previous list in that –
 - (i) brothers and sisters of the intestate who are children of the same parents as the intestate, and brothers and sisters who are children of one of the parents of the intestate are provided for in the first 2 categories; previously only brothers and sisters who were children of the same father as the intestate were provided for; and
 - (ii) uncles and aunts of the intestate who are full brothers or sisters of a parent of the intestate, and those who are half brothers or sisters of such a parent,

are provided for in categories 4 and 5; previously the only uncles and aunts provided for were those who were children of the same father as the intestate;

- (e) interest is payable on the amounts referred to in paragraphs (a) and (b) above from the date of death until payment at the same rate as is payable on judgment debts (instead of at 5% a year).

5. Clause 5 amends section 5 –

- (a) as a consequence of the amendments referred to in paragraph 4 above; and
- (b) by repealing subsection (5), which dealt with the situation where assets of an estate are held on trust for a category of relatives of the intestate (other than his descendants) and no member of that category attained an absolute vested interests in those assets (e.g. because they all died unmarried and before reaching full age).

6. Clause 6 repeals and replaces sections 6 and 7. The new section 6, which relates to the powers of personal representatives to borrow the net sum payable to the surviving spouse, no longer refers to the amount of that sum (this being stated in section 4) and provides that the personal representatives may also borrow the amount of the costs of raising such a loan. The former section 7 enabled the surviving spouse (in effect) to purchase any personal chattels of the intestate. That section is no longer necessary since, under this Bill, the surviving spouse automatically acquires the personal chattels. The new section 7 enables the surviving spouse of an intestate to acquire the premises in which he or she was residing at the time of the intestate's death.

7. Clause 7 amends section 8 by deleting the reference to the amount of the net sum payable to the surviving spouse.

8. Clause 8 adds a new section 8A, which provides that where a surviving spouse acquires, under a foreign law of intestacy, any interest in the intestate's estate, the net sum payable to that spouse under the Ordinance shall be reduced by the value of that interest.

9. Clause 9 repeals section 11, which provided that the Ordinance did not apply to land in the New Territories which had not been exempted by the Governor from Part II of the New Territories Ordinance (Cap. 97). Such land previously devolved –

- (a) in the case of a Chinese intestate, under the Tsing Chinese customary law; and
- (b) in the case of a non-Chinese intestate, under English legislation as it existed in 1843.

The devolution of such land is now governed by the Ordinance.

10. Clause 10 repeals and replaces section 13, which provides that special rule (contained in Schedule 1) apply with regard to unions of concubinage –

- (a) entered into before the appointed day under the Marriage Reform Ordinance (Cap. 178); and

- (b) under which union the female partner has, during the lifetime of the male partner, been accepted by his wife as his concubine and recognized as such by his family generally.

The amendment substitutes “7 October 1971” (which was the appointed day) for “the appointed day” and provides that it shall be presumed (until the contrary is proved) that the female partner of such a union has, during the lifetime of the male partner, been so accepted and recognized.

11. Clause 11 amends the Schedule, which contains the special rules relating to recognized unions of concubinage.

12. Paragraph 2 of the Schedule is repealed as unnecessary, given the amendments referred to paragraph 2(c) above, and replaced by provisions stating –

- (a) that a child of a union of concubinage is regarded for the purposes of section 3A (see paragraph 3 above) as a person whose parents were married to each other at the time of his birth;
- (b) that a child of a concubine is also regarded as the child of the wife of the male partner of the union of concubinage, and of any other concubine of that male partner;
- (c) that a child of a married woman is also regarded as the child of a concubine of her husband;
- (d) that a child of a union of concubinage and a child of the male partner of that union and of his wife or another concubine are regarded (for the purposes of the provisions referred to in paragraph 4(a), (c) and (d) above) as being children of the same parents.

13. Clause 11(d), (e) and (f) amends the position where, under the general law, the residuary estate passes to the Crown (because there is no relative who can succeed to it). Under the present law, if the intestate was a party to one or more unions of concubinage, one third of the estate goes to the surviving party or parties to that union. Under the Bill, the whole of the estate will go to the surviving party or parties.

14. Clause 11(g) amends the Schedule so that the entitlement of a tsip to income from the intestate’s estate does not cease if she has sexual intercourse.

15. Clause 11(h) and (i) enables a surviving party to a union of concubinage who would normally receive income from the estate for so long as he or she lives to receive a capital sum instead of that income.

16. Clause 12 adds a new Schedule setting out the manner in which a surviving spouse may purchase the premises in which he or she was residing at the time of the intestate’s death.

17. Clause 13 amends the Probate and Administration Ordinance (Cap. 10) to provide protection for personal representatives who distribute assets under a will or intestacy, but who are unaware of the entitlement of a person who claims through an illegitimate link.

18. Clauses 14 to 19 are consequential.

19. Clause 20 provides that the amendments do not apply in relation to persons dying before the commencement of the Ordinance resulting from this Bill.

20. [Public Service staffing and financial implications.]

繼承（供養家屬及受供養人）條例草案（英文本）

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, as the court may impose and to any further order of the court, there shall be paid to the applicant out of the net estate of the deceased such sum or sums and (if more than one) at such intervals as the court thinks reasonable; and the court may order that, subject to this Ordinance, such payments are to be made until such date as the court may specify, not being later than the date on which the court either makes an order under section 4 or decides not to exercise its powers under that section.

(2) Subsections (2), (3) and (4) of section 4 shall apply in relation to an order under this section as they apply in relation to an order under that section.

(3) In determining what order, if any, should be made under this section the court shall, so far as the urgency of the case admits, have regard to the same matters as those to which the court is required to have regard under section 5.

(4) An order made under section 4 may provide that any sum paid to the applicant by virtue of this section shall be treated to such an extent and in such manner as may be provided by that order as having been paid on account of any payment provided for by that order.

[cf. 1975 c. 63 s. 5 U.K.]

8. Variation, discharge, etc. of orders for periodical payments

(1) Where the court has made an order under section 4(1)(a) (in this section referred to as “the original order” ()) for the making of periodical payments to any person (in this section referred to as “the original recipient” ()), the court, on an application under this section, shall have power by order to vary or discharge the original order or to suspend any provision of it temporarily and to revive the operation of any provision so suspended.

(2) Without prejudice to the generality of subsection (1), an order made on an application for the variation of the original order may –

- (a) provide for the making out of any relevant property of such periodical payments and for such term as may be specified in the order to any person who has applied, or would but for section 6 be entitled to apply, for an order under section 4 (whether or not, in the case of any application, an order was made in favour of the applicant);
- (b) provide for the payment out of any relevant property of a lump sum of such amount as may be so specified to the original recipient or to any such person as is mentioned in paragraph (a);
- (c) provide for the transfer of the relevant property, or such part thereof as may be so specified, to the original recipient or to any such person as is so mentioned.

(3) Where the original order provides that any periodical payment payable thereunder to the original recipient are to cease on the occurrence of an event specified in the order (other than the remarriage of a former wife or former husband) or on the expiration of a period so specified, then, if, before the end of the period of 6 months from the date of the occurrence of that event or of the expiration of that period, an application is made for an order under this section, the court shall have power to make any order which it would have had power to make if the application had been made before the date (whether in favour of the original recipient or any such person as is mentioned in subsection (2)(a) and whether having effect from that date or from such later date as the court may specify).

(4) Any reference in this section to the original order shall include a reference to an order made under this section and any reference in this section to the original recipient shall include a reference to any person to whom periodical payments are required to be made by virtue of an order under this section.

(5) An application under this section may be made by any of the following persons, that is to say –

- (a) any person who by virtue of section 3(1) has applied, or would but for section 6 be entitled to apply, for an order under section 4;
- (b) the personal representatives of the deceased;
- (c) the trustees of any relevant property; and
- (d) any beneficiary of the estate of the deceased.

(6) An order under this section may only affect –

- (a) property the income of which is at the date of the order applicable wholly or in part for the making of periodical payments to any person who has applied for an order under this Ordinance; or
- (b) in the case of an application under subsection (3) in respect of payments which have ceased to be payable on the occurrence of an event or the expiration of a period, property the income of which was so applicable immediately before the occurrence of that event or the expiration of that period, as the case may be,

and any such property as is mentioned in paragraph (a) or (b) is in subsections (2) and (5) referred to as “relevant property” ().

(7) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any change in any of the matters to which the court was required to have regard when making the order to which the application relates.

(8) Where the court makes an order under this section, it may give such consequential directions as it thinks necessary or expedient having regard to the provisions of the order.

(9) No such order as is mentioned in section 4(1)(d) or (e), 11, 12 or 13 shall be made on an application under this section.

(10) For the avoidance of doubt it is hereby declared that, in relation to an order which provides for the making of periodical payments which are to cease on the occurrence of an event specified in the order (other than the remarriage of a former wife or former husband) or on the expiration of a period so specified, the power to vary an order includes power to provide for the making of periodical payments after the expiration of that period or the occurrence of that event.

[cf. 1975 c. 63 s. 6 U.K.]

9. Payment of lump sums by instalments

(1) An order under section 4(1)(b) or 8(2)(b) for the payment of a lump sum may provide for the payment of that sum by instalments of such amount as may be specified in the order.

(2) Where an order is made by virtue of subsection (1), the court shall have power, on an application made by the person to whom the lump sum is payable, by the personal representatives of the deceased or by the trustees of the property out of which the lump sum is payable, to vary that order by varying the number of instalments payable, the amount of any instalment and the date on which any instalment becomes payable.

[cf. 1975 c. 63 s. 7 U.K.]

PART III

PROPERTY AVAILABLE FOR FINANCIAL PROVISION

10. Property treated as part of “net estate”

(1) Where a deceased person –

- (a) has nominated any person to receive any sum of money or other property on his death and that nomination is in force at the time of his death; or
- (b) immediately before his death, could have nominated any person to receive any sum of money or other property on his death,

that sum of money, after deducting therefrom any estate duty payable in respect thereof, or that other property, to the extent of the value thereof at the date of the death of the deceased after deducting therefrom any estate duty so payable, shall be treated for the purposes of this Ordinance as part of the net estate of the deceased; but this subsection shall not render any person liable for having paid that sum or transferred that other property –

- (i) where a nomination is in force at the time of the deceased person’s death, to the person named in the nomination in accordance with the directions given in the nomination; or
- (ii) where a nomination is not then in force, in accordance with any authority vested in him.

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

[cf. 1975 c. 63 s. 8 U.K.]

11. Property held on a joint tenancy

(1) Where a deceased person was immediately before his death beneficially entitled to a joint tenancy of any property, then, if, before the end of the period of 6 months from the date on which representation with respect to the estate of the deceased was first taken out, an

application is made for an order under section 4, the court for the purpose of facilitating the making of financial provision for the applicant under this Ordinance may order that the deceased's severable share of that property, at the value thereof immediately before his death, shall, to such extent as appears to the court to be just in all the circumstances of the case, be treated for the purposes of this Ordinance as part of the net estate of the deceased.

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

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

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

[cf. 1975 c. 63 s. 9 U.K.]

PART IV

POWERS OF COURT IN RELATION TO TRANSACTIONS INTENDED TO DEFEAT APPLICATIONS FOR FINANCIAL PROVISION

12. Dispositions intended to defeat applications for financial provisions

(1) Where an application is made to the court for an order under section 4, the applicant may, in the proceedings on that application, apply to the court for an order under subsection (2).

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

- (a) that, less than 6 years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Ordinance made a disposition; and
- (b) that full valuable consideration for that disposition was not given by the person to whom or for the benefit of whom the disposition was made (in this section referred to as “the donee” ()) or by any other person; and
- (c) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Ordinance,

then, subject to the provisions of this section and of sections 14 and 15, the court may order the donee (whether or not at the date of the order he holds any interest in the property disposed of to him or for his benefit by the deceased) to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order.

(3) Where an order is made under subsection (2) as respects any disposition made by the deceased which consisted of the payment of money to or for the benefit of the donee, the

amount of any sum of money or the value of any property ordered to be provided under that subsection shall not exceed the amount of the payment made by the deceased after deducting therefrom any estate duty payable in respect of that payment.

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

(5) Where an application (in this subsection referred to as “the original application” ()) is made for an order under subsection (2) in relation to any disposition, then, if on an application under this subsection by the donee or by any applicant for an order under section 4 the court is satisfied –

- (a) that, less than 6 years before the date of the death of the deceased, the deceased with the intention of defeating an application for financial provision under this Ordinance made a disposition other than the disposition which is the subject of the original application; and
- (b) that full valuable consideration for that other disposition was not given by the person to whom or for the benefit of whom that other disposition was made or by any other person,

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

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

(7) In this section “disposition” () does not include –

- (a) any provision in a will, any such nomination as is mentioned in section 10(1) or any donatio mortis causa; or
- (b) any appointment of property made, otherwise than by will, in the exercise of a special power of appointment,

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

(8) This section does not apply to any disposition made before the commencement of this Ordinance.

[cf. 1975 c. 63 s. 10 U.K.]

13. Contracts to leave property by will

(1) Where an application is made to a court for an order under section 4, the applicant may, in the proceedings on that application, apply to court for an order under this section.

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

- (a) that the deceased made a contract by which he agreed to leave by his will a sum of money or other property to any person or by which he agreed that a sum of money or other property would be paid or transferred to any person out of his estate; and
- (b) that the deceased made that contract with the intention of defeating an application for financial provision under this Ordinance; and
- (c) that when the contract was made full valuable consideration for that contract was not given or promised by the person with whom or for the benefit of whom the contract was made (in this section referred to as “the donee”) or by any other person; and
- (d) that the exercise of the powers conferred by this section would facilitate the making of financial provision for the applicant under this Ordinance,

then, subject to the provisions of this section and of sections 14 and 15, the court may make any one or more of the following orders, that is to say –

- (i) if any money has been paid or any other property has been transferred to or for the benefit of the donee in accordance with the contract, an order directing the donee to provide, for the purpose of the making of that financial provision, such sum of money or other property as may be specified in the order;
- (ii) if the money or all the money has not been paid or the property or all the property has not been transferred in accordance with the contract, an order directing the personal representatives not to make any payment or transfer any property, or not to make any further payment or transfer any further property, as the case may be, in accordance therewith or directing the personal representatives only to make such payment or transfer such property as may be specified in the order.

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

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

(5) Where an order has been made under subsection (2) in relation to any contract, the rights of any person to enforce that contract or to recover damages or to obtain other relief for the breach thereof shall be subject to any adjustment made by the court under section 14(3) and shall survive to such extent only as is consistent with giving effect to the terms of that order.

(6) This section does not apply to a contract made before the commencement of this Ordinance.

[cf. 1975 c. 63 s. 11 U.K.]

14. Provision supplementary to sections 12 and 13

(1) Where the exercise of any of the powers conferred by section 12 or 13 is conditional on the court being satisfied that a disposition or contract was made by a deceased person with the intention of defeating an application for financial provision under this Ordinance, that condition shall be fulfilled if the court is of the opinion that, on a balance of probabilities, the intention of the deceased (though not necessarily his sole intention) in making the disposition or contract was to prevent an order for financial provision being made under this Ordinance or to reduce the amount of the provision which might otherwise be granted by an order thereunder.

(2) Where the court makes an order under section 12 or 13 it may give such consequential directions as it thinks fit (including directions requiring the making of any payment or the transfer of any property) for giving effect to the order or for securing a fair adjustment of the rights of the persons affected thereby.

(3) Any power conferred on the court by section 12 or 13 to order the donee, in relation to any disposition or contract, to provide any sum of money or other property shall be exercisable in like manner in relation to the personal representative of the donee, and –

- (a) any reference in section 12(4) to the disposal of property by the donee shall include a reference to disposal by the personal representative of the donee; and
- (b) any reference in section 12(5) to an application by the donee under that subsection shall include a reference to an application by the personal representative of the donee,

but the court shall not have power under section 12 or 13 to make an order in respect of any property forming part of the estate of the donee which has been distributed by the personal representative; and the personal representative shall not be liable for having distributed any such property before he has notice of the making of an application under section 12 or 13 on the ground that he ought to have taken into account the possibility that such an application would be made.

[cf. 1975 c. 63 s. 12 U.K.]

15. Provision as to trustees in relation to sections 12 and 13

(1) Where an application is made for –

- (a) an order under section 12 in respect of a disposition made by the deceased to any person as a trustee; or
- (b) an order under section 13 in respect of any payment made or property transferred, in accordance with a contract made by the deceased, to any person as a trustee,

the powers of the court under section 12 or 13 to order that trustee to provide a sum of money or other property shall be subject to the following limitation (in addition, in a case of an application under section 12, to any provision regarding the deduction of estate duty) namely, that the amount of any sum of money or the value of any property ordered to be provided –

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

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

(3) Where any such application is made in respect of a disposition made to any person as a trustee or in respect of any payment made or property transferred in accordance with a contract to any person as a trustee, any reference in section 12 or 13 to the donee shall be construed as including a reference to the trustee or trustees for the time being of the trust in question and any reference in subsection (1) or (2) to a trustee shall be construed in the same way.

[cf. 1975 c. 63 s. 13 U.K.]

PART V

SPECIAL PROVISIONS RELATING TO CASES OF DIVORCE, SEPARATION, ETC.

16. Provision as to cases where no financial relief was granted in divorced proceedings, etc.

(1) Where, within 12 months from the date on which a decree of divorce or nullity of marriage has been made absolute or a decree of judicial separation has been granted, a party to the marriage dies and –

- (a) an application for a financial provision order under section 4 of the Matrimonial Proceedings and Property Ordinance (Cap. 192) or an order under section 6 of that Ordinance has not been made by the other party to that marriage; or
- (b) such an application has been made but the proceedings thereon have not been determined at the time of the death of the deceased,

then, if an application for an order under section 4 of this Ordinance is made by that other party, the court shall, notwithstanding anything in section 3 or 5 of this Ordinance, have power, if it thinks it just to do so, to treat that party for the purposes of that application as if the decree of divorce or nullity of marriage had not been made absolute or the decree of judicial separation had not been granted, as the case may be.

(2) This section shall not apply in relation to a decree of judicial separation unless at the date of the death of the deceased the decree was in force and the separation was continuing.

[cf. 1975 c. 63 s. 14 U.K.]

17. Restriction imposed in divorce proceedings, etc. on application under this Ordinance

(1) On the grant of a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter the court, if it considers it just to do so, may, on the application of either party to the marriage, order that the other party to the marriage shall not on the death of the applicant be entitled to apply for an order under section 4.

(2) In the case of a decree of divorce or nullity of marriage an order may be made under subsection (1) before or after the decree is made absolute, but if it is made before the decree is made absolute it shall not take effect unless the decree is made absolute.

(3) Where an order made under subsection (1) on the grant of a decree of divorce or nullity of marriage has come into force with respect to a party to a marriage, then, on the death of the other party to that marriage, the court shall not entertain any application for an order under section 4 made by the first-mentioned party.

(4) Where an order made under subsection (1) on the grant of a decree of judicial separation has come into force with respect to any party to a marriage, then, if the other party

to that marriage dies while the decree is in force and the separation is continuing, the court shall not entertain any application for an order under section 4 made by the first-mentioned party.

[cf. 1975 c. 63 s. 15 U.K.]

18. Variation and discharge of secured periodical payments orders made under Matrimonial Proceedings and Property Ordinance

(1) Where an application for an order under section 4 is made to the court by any person who was at the time of the death of the deceased entitled to payments from the deceased under a secured periodical payments order made under the Matrimonial Proceedings and Property Ordinance (Cap. 192), then, in the proceedings on that application, the court shall have power, if an application is made under this section by that person or by the personal representative of the deceased, to vary or discharge that periodical payments order or to revive the operation of any provision thereof which has been suspended under section 11 of that Ordinance.

(2) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any order which the court proposes to make under section 4 or 7 and any change (whether resulting from the death of the deceased or otherwise) in any of the matters to which the court was required to have regard when making the secured periodical payments order.

(3) The powers exercisable by the court under this section in relation to an order shall be exercisable also in relation to any instrument executed in pursuance of the order

[cf. 1975 c. 63 s. 16 U.K.]

19. Variation and revocation of maintenance agreements

(1) Where an application for an order under section 4 is made to the court by any person who was at the time of the death of the deceased entitled to payments from the deceased under a maintenance agreement which provided for the continuation of payments under the agreement after the death of the deceased, then, in the proceedings on that application, the court shall have power, if an application is made under this section by that person or by the personal representative of the deceased, to vary or revoke that agreement.

(2) In exercising the powers conferred by this section the court shall have regard to all the circumstances of the case, including any order which the court proposes to make under section 4 or 7 and any change (whether resulting from the death of the deceased or otherwise) in any of the circumstances in the light of which the agreement was made.

(3) If a maintenance agreement is varied by the court under this section the like consequences shall ensue as if the variation had been made immediately before the death of the deceased by agreement between the parties and for valuable consideration.

(4) In this section “maintenance agreement” (), in relation to a deceased person, means any agreement made, whether in writing or not and whether before or after the commencement of this Ordinance, by the deceased with any person with whom he entered into a marriage, being an agreement which contained provisions governing the rights and

liabilities towards one another when living separately of the parties to that marriage (whether or not the marriage has been dissolved or annulled) in respect of the making or securing of payments or the disposition or use of any property, including such rights and liabilities with respect to the maintenance or education of any child, whether or not a child of the deceased or a person who was treated by the deceased as a child of the family in relation to that marriage.

[cf. 1975 c. 63 s. 16 U.K.]

20. Availability of court's powers under this Ordinance in applications under sections 11 and 16 of the Matrimonial Proceedings and Property Ordinance

(1) Where –

- (a) a person against whom a secured periodical payments order was made under the Matrimonial Proceedings and Property Ordinance (Cap. 192) has died and an application is made under section 11(6) of that Ordinance for the variation or discharge of that order or for the revival of the operation of any provision thereof which has been suspended; or
- (b) a party to a maintenance agreement within the meaning of section 14 of that Ordinance has died, the agreement being one which provides for the continuation of payments thereunder after the death of one of the parties, and an application is made under section 16(1) of that Ordinance for the alteration of the agreement under section 15 thereof,

the court shall have power to direct that the application made under the said section 11(6) or 16(1) shall be deemed to have been accompanied by an application for an order under section 4 of this Ordinance.

(2) Where the court gives a direction under subsection (1) it shall have power, in the proceedings on the application under the said section 11(6) or 16(1), to make any order which the court would have had power to make under this Ordinance if the application under the said section 11(6) or 16(1), as the case may be, had been made jointly with an application for an order under section 4 of this Ordinance, and the court shall have power to give such consequential directions as may be necessary for enabling the court to exercise any of the powers available to the court under this Ordinance in the case of an application for an order under section 4 of this Ordinance.

(3) Where an order made under section 17(1) is in force with respect to a party to a marriage, the court shall not give a direction under subsection (1) with respect to any application made under the said section 11(6) or 16(1) by that party on the death of the other party.

[cf. 1975 c. 63 s. 18 U.K.]

PART VI

MISCELLANEOUS AND SUPPLEMENTARY PROVISIONS

21. Effect, duration and form of orders

(1) Where an order is made under section 4 then for all purposes, including the purposes of the enactments relating to estate duty, the will or the law relating to intestacy, or both the will and the law relating to intestacy, as the case may be, shall have effect and be deemed to have had effect as from the deceased's death subject to the provisions of the order.

(2) Any order made under section 4 or 7 in favour of –

- (a) an applicant who was the former husband or former wife of the deceased;
or
- (b) an applicant who was the husband or wife of the deceased in a case where the marriage with the deceased was the subject of a decree of judicial separation and at the date of death the decree was in force and the separation was continuing,

shall, in so far as it provides for the making of periodical payments, cease to have effect on the remarriage of the applicant, except in relation to any arrears due under the order on the date of the remarriage.

(3) A copy of every order made under this Ordinance (other than an order made under section 17(1)) shall be sent to the Probate Registry of the Supreme Court for entry and filing, and a memorandum of the order shall be endorsed on, or permanently annexed to, the probate or letters of administration under which the estate is being administered.

[cf. 1975 c. 63 s. 19 U.K.]

22. Provisions as to personal representatives

(1) This Ordinance shall not render the personal representative of a deceased person liable for having distributed any part of the estate of the deceased, after the end of the period of 6 months from the date on which representation with respect to the estate of the deceased is first taken out, on the ground that he ought to have taken into account the possibility –

- (a) that the court might permit the making of an application for an order under section 4 after the end of that period; or
- (b) that, where an order has been made under section 4, the court might exercise in relation thereto the powers conferred on it by section 8,

but this subsection shall not prejudice any power to recover, by reason of the making of an order under this Ordinance, any part of the estate so distributed.

(2) Where the personal representative of a deceased person pays any sum directed by an order under section 7 to be paid out of the deceased's net estate, he shall not be under any

liability by reason of that estate not being sufficient to make the payment, unless at the time of making the payment he has reasonable cause to believe that the estate is not sufficient.

(3) Where a deceased person entered into a contract by which he agreed to leave by his will any sum of money or other property to any person or by which he agreed that a sum of money or other property would be paid or transferred to any person out of his estate, then, if the personal representative of the deceased has reason to believe that the deceased entered into the contract with the intention of defeating an application for financial provision under this Ordinance, he may, notwithstanding anything in that contract, postpone the payment of that sum of money or the transfer of that property until the expiration of the period of 6 months from the date on which representation with respect to the estate of the 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 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 Dependents.

Part I

2. Clause 1 gives the short title of the Bill and the date of commencement, and clause 2 is an interpretation provision.

Part II

3. Clause 3 provides that where a person dies domiciled in Hong Kong or having been ordinarily resident in Hong Kong at any time in the 3 years before his death, any of the persons listed in clause 3(1) may apply to the court for an order under clause 4. Such an application is made on the ground that the applicant has not received reasonable financial provision under the will or intestacy of the deceased. The list of potential applicants is wider than that in the repealed Deceased's Family Maintenance Ordinance and includes –

- (a) an illegitimate child of the deceased;
- (b) a person treated by the deceased as a child of his family; and
- (c) a person who, immediately before the death of deceased, was being maintained by the deceased.

4. Clause 4 lists the types of order that a court may make in favour of an applicant. The types of order set out in clause 4 (1)(c), (d) and (e) were not possible under the repealed Ordinance.

5. Clause 5 sets out the matters to which the court is to have regard in exercising its powers under clause 4. Sub-clause (1) lists the matters which are relevant in all cases, and sub-clauses (2) to (5) specify additional matters which are relevant to particular categories of applicant.

6. Clause 6 provides that applications shall not, except with the permission of the court, be made later than 6 months after the date of the grant of probate or letters of administration in respect of the deceased's estate.

7. Clause 7 sets out the power of the court to make an interim order where the applicant is in immediate need of financial assistance.

8. Clause 8 sets out the power of the court to vary or discharge an order for periodical payments made under clause 4(1)(a), or to suspend or revive any provision in such an order. An application for an order under clause 8 may be made by any person listed in clause 3(1), the personal representatives of the deceased, the trustees of any relevant property or any beneficiary of the estate of the deceased.

9. Clause 9 provides that an order for the payment of a lump sum may provide for payment by instalments, and that the number or amount of the instalments may, on application, be varied.

Part III

10. Part III provides that certain types of property that do not normally fall into the estate of a deceased person are to be treated as part of the net estate of the deceased (and therefore may be taken into account on an application for financial provision under this Bill). The types of property are –

- (a) money or other property which is, or could have been, the subject of a nomination by the deceased (e.g. where the deceased has nominated a person to receive an entitlement under a pension scheme to which the deceased belonged) (clause 10(1));
- (b) money or other property which the deceased, in contemplation of his death, gave to a person (clause 10(2)); and
- (c) property which, immediately before his death, the deceased owned jointly with another person (clause 11(1)).

Part IV

11. Part IV gives the court certain powers in relation to transactions intended to defeat applications under this Bill.

12. Clause 12 applies in respect of a disposition made by the deceased –

- (a) less than 6 years before his death;
- (b) with the intention of defeating an application under this legislation; and
- (c) where full value was not given for that disposition.

Clause 12(2) provides that the court may order the donee under such a disposition to provide money or other property for the purpose of making financial provision for an applicant. Clause 12(5) enables the donee under such a disposition to apply for a similar order in respect of any other such disposition made by the deceased.

13. Clause 13 applies in respect of a contract made by the deceased –

- (a) by which he agreed to leave by his will money or other property to any person;
- (b) with the intention of defeating an application under this legislation; and
- (c) where full value was not given or promised for the contract.

Clause 13(2) provides that the court may –

- (i) if the money has been paid or the property transferred, order the donee to provide money or property for the purpose of making financial provision; or
- (ii) if the money has not been paid or the property has not been transferred, order that it not be paid or transferred.

14. Clause 14 contains provisions supplementary to clauses 12 and 13.

15. Clause 15 contains provisions which limit the powers of the court under clauses 12 and 13 where the donee of money or property receives it as trustee.

Part V

16. Clause 16 provides that, in certain circumstances the court may treat an application by the former spouse or a judicially separated spouse as if the divorce, annulment or judicial separation had not taken place.

17. Clause 17 provides that a court may, on or after granting a decree of divorce, nullity or judicial separation, order that a party to the marriage shall, on the death of the other party, be barred from making an application under clause 4.

18. Clause 18 provides that a court may, on an application under clause 4, vary or discharge any order for periodical payments made against the deceased in favour of the applicant, under the Matrimonial Proceedings and Property Ordinance (Cap. 192).

19. Clause 19 enables a court, on an application under clause 4, to vary any maintenance agreement under which the applicant is entitled to payments from the deceased.

20. Clause 20 provides that where –

- (a) an application is made under the Matrimonial Proceedings and Property Ordinance (Cap. 192) for the variation of an order for secured periodical payments made against a deceased person; or
- (b) an application is made under that Ordinance for the alteration of a maintenance agreement made by a deceased person,

the court shall have the same powers to make an order for financial provision as it would have had if an application had been made under clause 4 of this Bill.

Part VI

21. Clause 21 provides that an order shall have effect as from the deceased's death and that an order for periodical payments made in favour of a former spouse or a judicially separated spouse shall cease on that person's remarriage.

22. Clause 22 contains provisions for the protection of the personal representative of a deceased person.

23. Clause 23 renders statements made by the deceased admissible under the Bill as evidence of any fact stated therein.
24. Clause 24 provides a presumption, in respect of unions of concubinage entered into before 7 October 1971, to the effect that the female partner has, during the lifetime of the male partner, been accepted by his wife as his concubine and recognized as such by his family generally.
25. Clause 25 provides that proceedings shall commence in the District Court and that rules of court may provide for the transfer of proceedings to the Supreme Court.
26. Clause 26 is an interpretation provision.
27. Clause 27 contains consequential amendments, repeals and transitional provisions.
28. Clause 28 amends the Non-Contentious Probate Rules (Cap. 10 sub. leg.) to entitle a person listed in clause 3(1) to a grant to administration to the estate of the deceased.
29. [Public Service staffing and financial implications].

法律修訂及改革（綜合）（修訂）條例草案（英文本）

A BILL

To

Amend the Law Amendment and Reform (Consolidation) Ordinance.

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

Short title and commencement

1. (1) This Ordinance may be cited as the Law Amendment and Reform (Consolidation) (Amendment) Ordinance 1990.

(2) This Ordinance shall come into operation on

New Part VA added

2. The Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) is amended by adding after section 25 –

“PART VA

FORFEITURE

The “forfeiture rule”

25A. (1) In this Part, the “forfeiture rule” means the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing.

(2) References in this Part to a person who has unlawfully killed another includes a reference to a person who has unlawfully aided, abetted, counselled or procured the death of that other and references in this Part to unlawful killing shall be interpreted accordingly.

[cf. 1982 c. 34 s. 1 U.K.]

Power to modify the rule

25B. (1) Where a court determines that the forfeiture rule has precluded a person (in this section referred to as “the offender”) who has unlawfully killed another from acquiring any interest in property mentioned in subsection (4), the court may make an order under this section modifying the effect of that rule.

(2) The court shall not make an order under this section modifying the effect of the forfeiture rule in any case unless it is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified in that case

(3) In any case where a person stands convicted of an offence of which unlawful killing is an element, the court shall not make an order under this section modifying the effect of the forfeiture rule in that case unless proceedings for the purpose are brought before the expiry of the period of 3 months beginning with his conviction.

(4) The interests in property referred to in subsection (1) are –

(a) any beneficial interest in property which (apart from the forfeiture rule) the offender would have acquired –

(i) under the deceased’s will or the law relating to intestacy;

(ii) on the nomination of the deceased or on the failure of the deceased to make a nomination;

(iii) as a donatio mortis causa made by the deceased; or

(b) any beneficial interest in property which (apart from the forfeiture rule) the offender would have acquired in consequence of the death of the deceased, being property which, before the death, was held on trust for any person.

(5) An order under this section may modify the effect of the forfeiture rule in respect of any interest in property to which the determination referred to in subsection (1) relates and may do so in either or both of the following ways, that is –

(a) where there is more than one such interest, by excluding the application of the rule in respect of any (but not all) of those interests; and

(b) in the case of any such interest in property, by excluding the application of the rule in respect of part of the property.

(6) On the making of an order under this section, the forfeiture rule shall have effect for all purposes (including purposes relating to anything done before the order is made) subject to the modifications made by the order.

(7) The court shall not make an order under this section modifying the effect of the forfeiture rule in respect of any interest in property which, in consequence of the

rule, has been acquired before the coming into force of this section by a person other than the offender or a person claiming through him.

(8) In this section -

“property” includes any chose in action or incorporeal moveable property; and

“will” includes codicil.

[cf. 1982 c. 34 s. 2 U.K.]

Application for financial provision not affected by the rule

25C. (1) The forfeiture rule shall not be taken to preclude any person from making any application under a provision mentioned in subsection (2) or the making of any order on the application.

(2) The provisions referred to in subsection (1) are –

- (a) any provision of the Inheritance (Provision for Family and Dependants) Ordinance (of 1990);
- (b) sections 11 (variation, discharge, etc. of orders for financial provision) and 16 (alteration of agreements by court after death of one party) of the Matrimonial Proceedings and Property Ordinance (Cap. 192).

[cf. 1982 c. 34 s. 3 U.K.]

..... to decide whether rule applies to social security benefits

25D. (1) Where a question arises as to whether, if a person were otherwise entitled to or eligible for any benefit or advantage under a relevant enactment, he would be precluded by virtue of the forfeiture rule from receiving the whole or part of the benefit or advantage, that question shall (notwithstanding anything in any relevant enactment) be determined by

(2) Regulations under this section may make such provision as appears to to be necessary or expedient for carrying this section into effect; and (without prejudice to the generality of that) the regulations may, in relation to the question mentioned in subsection (1) or any determination under that subsection –

- (a) apply any provision of any relevant enactment, with or without modifications, or exclude or contain provision corresponding to any such provision; and
- (b) make provision for purposes corresponding to those for which provision may be made by regulations under

(3) In this section, “relevant enactment” means

.....

[cf. 1982 c. 34 s. 4 U.K.]

Exclusion of murderers

25E. Nothing in this Part or in any order made under section 25B or referred to in section 25C shall affect the application of the forfeiture rule in the case of a person who stands convicted of murder.

[cf. 1982 c. 34 s. 5 U.K.]”.

Explanatory-Memorandum

This Bill adds a new Part to the Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) in order to modify the rule that precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing (the “forfeiture rule”).

2. New section 25A contains definitions.
3. New section 25B empowers the court to modify the effect of the forfeiture rule where the justice of the case so requires.
4. New section 25C provides that the forfeiture rule does not preclude a person from applying for an order for provision under the inheritance (Provision for Family and 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.]