
Hong Kong

International Estate Planning Guide

Individual Tax and Private Client Committee

Contact:

Tze-wei Ng

Stephenson Harwood, Hong Kong

tzewei.ng@shlegal.com

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Introduction

On 1 July 1997, Hong Kong was returned to the People's Republic of China and became the Hong Kong Special Administrative Region ('Hong Kong'), which retains its own legal system rooted in common law tradition.

Pursuant to Article 8 of the Basic Law, the territory's mini constitution and section 7(1) of the Hong Kong Reunification Ordinance (Instrument A601), the laws of Hong Kong in force on 30 June 1997, including common law and rules of equity, shall be maintained.

As such, trust law in Hong Kong remains, to a major extent, modelled on English trust law due to its colonial history, but there is material law on trustee powers, standard of care and also the abolishment of the rule against perpetuity (for trusts created on or after 1 December 2013) found in statutes such as the Trustee Ordinance (Cap 29) (the 'TO').

Meanwhile, there are detailed statutory provisions for wills and probate.

Hong Kong remains one of the most tax-efficient locations for wealth and estate planning. There is no capital gains or gift tax, and estate duty was abolished for the estates of persons who died on or after 11 February 2006.

There are also strong tax incentives for gifting to charities with tax exempt status in Hong Kong, and setting up a charitable entity in Hong Kong provides flexibility for conducting philanthropy benefiting beyond communities in Hong Kong.

I. Wills and disability planning documents

A. Will formalities

A person may, by will, dispose of all property to which he or she is beneficially entitled at the time of his or her death and which at the time of death devolves on his or her personal representatives. It is not a legal requirement for an owner of assets in Hong Kong to make a will, but it is advisable for a person to have a will in some circumstances, such as if he or she has no direct family members such as a spouse, children or parents; has special plans for his or her assets other than inheritance by his or her own family members; or foresees that there might be disputes on the distribution of his or her assets after his or her lifetime.

If there is no will, the administration and distribution of a person's estate will be governed by applicable rules of intestate succession as set out under the Intestates' Estates Ordinance (Cap 73) (the 'IEO') (see further below under II.B).

Pursuant to section 5(1) of the Wills Ordinance (Cap 30) (the 'WO'), subject to limited exceptions, a will is valid if:

- it is in writing, and signed by the testator, or by some other person in his or her presence and by his or her direction;
- it appears that the testator intended by his or her signature to give effect to the will;
- the signature is made or acknowledged by the testator in the presence of two or more witnesses who are present at the same time; and

- each witness either attests and signs the will or acknowledges his or her signature in the presence of the testator (but not necessarily in the presence of any other witness). There are no requirements as to the form of attestation.

However, under special circumstances there are exceptions to the above requirements, such as 'privileged wills' (WO, section 6), which are made by persons during actual naval, military or air force service, or by a mariner or seaman at sea.

Further, pursuant to section 5(2) of the WO, a document purporting to embody the testamentary intentions of a deceased person shall, notwithstanding that it has not been executed in accordance with the requirements under subsection 1, be deemed to be duly executed if, upon application, the court is satisfied that there can be no reasonable doubt that the document embodies the testamentary intentions of the deceased person.

The witnesses must be both aged 18 years or above, with full capacity, and cannot be any person who will be given any property under the will or be the spouse of any such person.

In general, the formalities of executing a will in Hong Kong do not vary because of the nationality, residence and/or domicile of the testator. Moreover, a will executed in accordance with the law of the place of the testator's domicile, residence or nationality will also be treated as properly executed by the Hong Kong courts (see further below under I.B).

B. Enforceability of foreign wills

Pursuant to section 24 of the WO, a foreign will shall be treated as properly executed if its execution conformed to the domestic law of the territory where it was executed, or in the territory where, at the time of its execution or of the testator's death, the testator was domiciled or had his or her habitual residence, or in a state of which, at either of those times, he or she was a national.

Where a conflict of laws situation arises and a foreign law falls to be applied in relation to a will, any requirement by that foreign law that special formalities are to be observed by testators answering a particular description or that witnesses to the execution of a will are to possess certain qualifications, shall be treated, notwithstanding any rule of that law to the contrary, as a formal requirement only, rather than a matter of essential validity.

Pursuant to section 49 and Schedule 2 to the Probate and Administration Ordinance (Cap 10) (PAO), foreign probate or letters of administration from the following designated jurisdictions may be sealed with the seal of the Hong Kong Court (ie, resealing): the Australian states of Tasmania, Victoria and South Australia, and the Northern Territory of Australia; New Zealand; Singapore; Sri Lanka; and the United Kingdom. Such resealed grant shall be of the like force and effect, and have the same operation in Hong Kong as if granted by the Hong Kong Court.

C. Will substitutes

Some common will substitutes include the following.

1. JOINT TENANCY

A joint tenancy allows the interest of a joint tenant, upon his or her death, to automatically pass to the surviving joint tenant(s) (see further below under II.D).

2. WILL TRUST/TESTAMENTARY TRUST

A will trust, also known as a testamentary trust, is a trust that is created by a will and comes into effect on the death of the testator. The settlor of the will trust (the person who has established the trust) is the testator. The settlor would not benefit from the trust as one cannot benefit from his or her own will. The will would appoint executors and list legacies, and the residuary estate is then left to the trustees (who may or may not also be the executors) to hold on trust.

It is worth noting that setting up a trust with a will would render the will a lengthy document. The will would also have to be admitted to probate after the death of the testator and thus the terms of the will trust would be potentially available to interested third parties.

The will trust will usually specify when assets can be distributed to the beneficiaries, such as when the beneficiaries reach a specified age. It may also provide for power for the trustees to use income and/or capital of the will trust for the beneficiaries before the specified date or event for distribution of assets.

3. STANDBY TRUST

A standby trust is created during the lifetime of the testator. Such a trust is validly created by the testator as the settlor but typically with only limited initial assets, and thereafter it exists on standby or in a dormant mode and will become more substantially funded when the testator so decides or when specified trigger events occur, or upon the testator's death pursuant to his or her will.

In an estate planning scenario, a standby trust allows the settlor to control the terms of the trust while not parting with his or her assets during his or her lifetime. The settlor also does not have to pay the maintenance costs of the standby trust during his or her lifetime.

The trust deed may permit the terms of the trust to be changed or for the trust to be revoked during the lifetime of the settlor.

D. Powers of attorney, directives and similar disability documents

In Hong Kong, an individual can make an enduring power of attorney to provide for a time when he or she is no longer mentally capable to decide his or her own affairs; or an advance directive to indicate what life-sustainable treatments should be withheld or withdrawn in specific scenarios. There is also a procedure for when an application for guardianship to the Guardianship Board of the Social Welfare Department can be made to appoint someone to become a guardian for another person who is no longer mentally capable. The powers covered by the three are different. A guardian appointed by Guardianship Board will only have very limited power to manage the finances of the mentally incapacitated person.

1. POWERS OF ATTORNEY

There are two kinds of power of attorney commonly used in Hong Kong:

a. General power of attorney

A general power of attorney allows a donor (ie, the person who wishes to give his or her power of attorney to someone) to confer on a donee or donees (ie, the attorney) the power or authority to do on behalf of the donor anything that can be done lawfully by an attorney, or as limited by restrictions set out in the power of attorney.

Pursuant to section 7 of the Powers of Attorney Ordinance (Cap 31) (the 'POAO'), a donor can execute a general power of attorney in the specified form set out in the Schedule to the POAO, or to the like effect but expressed to be made under the POAO.

A general power of attorney can only be valid while the donor is not mentally incapable.

b. Enduring power of attorney (EPA)

An EPA allows a donor, while he or she is still mentally capable, to appoint an attorney(s) to take care of the donor's property or financial matters in the event that he or she subsequently becomes mentally incapacitated. While a general power of attorney will cease to be effective if the donor becomes mentally incapacitated, an EPA will 'endure' even during the donor's mental incapacity and would give the attorney(s) the power to continue to take care of the donor's financial affairs despite such incapacity of the donor. The governing legislation is the Enduring Powers of Attorney Ordinance (Cap 501).

Under section 1A of the POAO, a person shall be regarded as being mentally incapable or suffering from mental incapacity for any purpose related to a power of attorney if:

- he or she is suffering from mental disorder or mental handicap and: (1) is unable to understand the effect of the power of attorney, or (2) is unable by reason of his or her mental disorder or mental handicap to make a decision to grant a power of attorney; or
- he or she is unable to communicate to any other person who has made a reasonable effort to understand him or her, any intention or wish to grant a power of attorney.

Mental disorder and mental handicap are further defined under the Mental Health Ordinance (Cap 136) (the 'MHO') as follows:

- 'Mental disorder' means:
 1. mental illness;
 2. a state of arrested or incomplete development of mind which amounts to a significant impairment of intelligence and social functioning which is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned;
 3. psychopathic disorder; or
 4. any other disorder or disability of mind which does not amount to mental handicap.
- 'Mental handicap' means sub-average general intellectual functioning with deficiencies in adaptive behaviour.
- A 'mentally incapacitated person' (MIP) means a person who is incapable, by reason of mental incapacity, of managing and administering his or her property and affairs.

For an EPA to be valid in Hong Kong, it must satisfy the following conditions:

- it must be in the prescribed form as set out in the Schedules to the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap 501A) (and paragraphs cannot be left blank if required to be filled in or deleted);

- it must be executed in the prescribed manner by the donor and the attorney(s) (more on this below); and
- it must be registered with the Registrar of the High Court of Hong Kong. Registration can take place while the person is still mentally capable or by the appointed attorney(s) as soon as they believe the person is mentally incapacitated or becoming mentally incapacitated.

The donor must specify what the attorney's authority is in dealing with the donor's particular property or financial affairs, and must not confer on the attorney any authority other than an authority to act in relation to the property of the donor or his or her financial affairs. He or she cannot give general authority over the donor's property and financial affairs.

The donor may specify a date for an EPA's commencement or an event to trigger its commencement.

To execute an EPA, a donor must sign the EPA before a registered medical practitioner and a solicitor at the same time, or in the presence of the solicitor only at any time not more than 28 days after the donor has signed it in the presence of the registered medical practitioner.

The registered medical practitioner must verify and be satisfied that the donor is mentally capable. The solicitor must certify that the donor appears to be mentally capable. The registered medical practitioner or the solicitor cannot be the attorney(s), spouses of the attorney(s), any person related by blood or marriage to the donor or any person related by blood or marriage to the attorney(s).

If the donor is physically incapable of signing, he or she may instruct another person to sign the EPA on his or her behalf, and that person must sign the EPA in the presence of the donor, the registered medical practitioner and solicitor.

The attorney(s) must have attained the age of 18 years, and must not be bankrupt or mentally incapable. A trust corporation can be an attorney.

A donor can revoke an EPA when the donor is mentally capable, or the EPA can be revoked if the donor recovers from his or her mental incapacity and makes an application to the court for the revocation and the court makes an order confirming such a revocation.

Currently, Hong Kong law does not recognise EPAs or other forms of enduring or lasting powers executed in accordance with the laws of other jurisdictions.

If there is no EPA, the Hong Kong court may, on application under section 7 of the MHO, make an order directing an inquiry as to whether any person subject to the jurisdiction of the Hong Kong court who is alleged to be mentally incapacitated is incapable, by reason of mental incapacity, of managing and administering his or her property and affairs.

Application for such inquiry may be made by any relative of the person alleged to be a MIP, but if no such application is made by the relative, then by:

- the Director of Social Welfare;
- the Official Solicitor (a public officer who represents the interests of persons under a disability of age or mental capacity in proceedings); or

- any guardian of that person appointed under Part IVB of the MHO (see further below under I.D.3).

The Hong Kong Government is proposing to reform the existing EPA regime, following a report by the Law Reform Commission on 'Enduring Powers of Attorney: Personal Care' in 2011. The Department of Justice proposed in a consultation paper in December 2017 that a new Continuing Powers of Attorney Ordinance be enacted to replace the existing EPA regime. The statutory framework for the creation of continuing powers of attorney will allow donors to give their appointed attorney(s) authority to act for the donors in relation to matters relating to personal care, in addition to property and financial affairs of the donor.

2. ADVANCE DIRECTIVE

An advance directive (AD) for healthcare is a statement, usually in writing, in which a person indicates when mentally competent the form of healthcare he or she would like to have at a future time when he or she is no longer competent. It is a recognition of an individual's right to self-determination and provides the individual's family members a clear indication of the former's wishes, and also helps doctors fulfil their professional responsibility to patients, especially when facing the difficult choice of whether life-sustaining treatment should be withheld or withdrawn in the best interests of the patients.

There is neither statute nor case law in Hong Kong on the legal status of ADs, but validly made ADs refusing life sustaining treatment have been held to be legally binding in the UK and other common law jurisdictions. According to government consultation papers, any person is free to make an AD if he or she so wishes, and such AD will be recognised as valid if it is sufficiently clear and not challenged, for example, on the grounds of incapacity or undue influence.

A patient cannot make an AD for an act that contradicts the law or professional ethics, for example, euthanasia.

The Hospital Authority (HA) has provided a set of AD guidance for clinicians working in the public hospital setting, which provides for certain model forms depending on the medical circumstances.

Both HA AD forms require two witnesses, one of whom must be a medical practitioner, and neither witness should have an interest in the estate of the person making the AD. This witness requirement is not mandatory under the common law framework, and an AD without such witnesses could still be valid. However, as the HA guidance highlighted, without such witnesses the validity of the AD may be prone to challenge.

Before a doctor signs as witness on an HA AD form, he or she should be satisfied that the patient is mentally capable of understanding the nature and effect of making an AD and is properly informed, although there is no requirement of a formal assessment of the patient's mental capacity by psychiatrists, unless circumstances suggest it.

At the time of writing, an AD can be made, modified or revoked orally, but the latest government proposal is that an AD can only be made and modified in writing.

The AD has been the subject for law reform papers in Hong Kong since 2006 followed by two public consultations in 2009 and 2019.

The Hong Kong Government's proposals include:

- codifying the current common law position:
 1. in respect of an advance directive; and
 2. to increase the safeguards attached to an advance directive;
- removing legislative impediments to the implementation of advance directives by emergency rescue personnel; and
- amending the relevant provisions to facilitate ‘dying in place’ (ie, an individual spending his or her final days at a place chosen by him or her, whether in a residential care home, at home or otherwise).

The Hong Kong Government is taking steps to iron out details of the legislation and expects to finalise a draft bill for introduction in the Hong Kong legislature during 2021–2025.

3. Legal guardianship

The MHO empowers an independent Guardianship Board, under the Social Welfare Department, to conduct hearings to make guardianship orders for people aged 18 and over who are mentally incapable of making their own decisions about their personal affairs, financial matters or medical/dental treatment. The order will specify the appointment of a guardian, a private guardian (a family member or friend) or the public guardian (Director of Social Welfare), and the powers conferred. In normal circumstances, application for guardianship will only proceed where effective informal arrangements cannot be made.

A relative of the MIP, registered social worker, registered medical practitioner or public officer in the Social Welfare Department can make such an application. Application can be made in the specified forms available from the Guardianship Board or relevant service units of the Social Welfare Department.

Upon receipt of an application, the Guardianship Board will arrange a date for a hearing in which board members will examine all the information and evidence collected, and interview the MIP and relevant witnesses to reach a decision.

In general, an application can be made to the Guardianship Board in relation to a person who suffers from the four types of disabilities:

- dementia/Alzheimer’s disease/major cognitive impairment;
- mental handicap;
- mental illness; or
- acquired brain damage through an accident or illness, such as a stroke.

The Guardianship Board will appoint a guardian if it is satisfied with the following criteria:

- the person concerned has a mental disorder or mental handicap of a nature or degree, which warrants his or her reception into guardianship;
- the mental disorder or handicap limits him or her in making reasonable decisions in respect of all or a substantial proportion of the matters that relate to his or her personal circumstances;

- his or her particular needs may only be met or attended to by guardianship and that no other less restrictive or intrusive means are available in the circumstances; and
- it is in the interests of his or her welfare, or the protection of others, that he or she should be so received.

The Guardianship Board may give the guardian the legal power to make important decisions relating to personal circumstances for such an adult about his or her place of residence or consenting to his or her medical or dental treatment.

However, one important thing to note is that the financial power is very limited. The guardian may be given legal power to manage the person's money, but subject to a maximum amount per month.

A social worker of the Social Welfare Department will be assigned to follow up on a guardianship case until the order is discharged. The social worker will visit the subject each month, and the guardian should provide reports every month to the social worker (including monthly accounts and all relevant information).

II. Estate administration

A. Overview of administration procedures

A grant to administration or grant of representation in Hong Kong includes probate, letters of administration or letters of administration (with will annexed). All such grants have to be applied for from the Probate Registry of the High Court of Hong Kong.

It is a criminal offence under the PAO to intermeddle with an estate, that is, to administer or deal with any part of an estate or any property of a person (who died on or after 11 February 2006) without lawful authority or reasonable excuse. A person guilty of intermeddling is liable to a fine at level 3 (currently HK\$10,000) and an additional penalty equal to the value of the relevant part of the estate or the income of such part of the estate.

1. IF THE DECEASED DIES WITH A WILL

If the deceased dies with a valid will, the power for administering the estate of the deceased is vested with the executor named in that will. An executor derives power from the will and legally speaking can exercise his or her powers when the testator dies. However, the executor is still required to obtain a grant of probate before exercising any of his or her powers in the administration of the deceased's estate in Hong Kong.

If no executor is appointed in the will or that no executor is able or willing to act for whatever reasons, Rule 19 of the Non-Contentious Probate Rules (Cap 10A) (the 'NCPR') governs the order of priority for different persons to make the application for a grant, which in this case will be called a Grant of Letters of Administration (with will annexed).

2. IF THE DECEASED DIES INTESTATE

If the deceased dies without leaving any will, the power for administering the estate of the deceased is vested with an administrator authorised by the Probate Registry of the High Court and the administrator derives power from the letters of administration. Therefore, the administrator can only exercise his or her powers after obtaining a grant of letters of administration.

Rule 21 of the NCPR regulates the order of priority for who can apply for the grant of letters of administration where a person dies wholly intestate, namely:

- the surviving spouse or the surviving partner or partners to a union of concubinage entered into before 7 October 1971;
- the children of the deceased including any children born of a union of concubinage entered into before 7 October 1971, or the issue of any such child who has died during the lifetime of the deceased;
- the father or mother of the deceased;
- brothers and sisters of the deceased or the issue of any deceased brother or sister of the deceased who has died during the lifetime of the deceased;
- grandparents; and
- uncles and aunts of the deceased, or the issue of any deceased uncle or aunt of the deceased who has died during the lifetime of the deceased.

The main difference between an executor and an administrator (both are also called personal representatives) is their source of power.

The powers and responsibilities of the personal representative include the following.

- a. Ascertaining and gathering information on the estate of the deceased

The personal representative is required to ascertain the particulars of all assets and liabilities of the deceased and prepare an inventory or schedule of assets and liabilities. For such a purpose, the personal representative may have to check with any banks in which the deceased might have maintained accounts and obtain details of the account balance as at the date of death of the deceased. In relation to safe deposit boxes owned by the deceased, the personal representative must apply for a Certificate of Inspection from the Home Affairs Department before he or she can inspect the deceased's safe deposit boxes upon prior appointment with the Secretary for Home Affairs. After taking inventory of the deceased's safe deposit boxes, the personal representative may only remove the contents with the authorisation of the Home Affairs Department (the removal is only limited to a document of no monetary value and must also satisfy certain conditions, for example, that the document is necessary for or relevant to an application for a grant or sealing of a grant issued by a foreign court). The removal of other contents from the safe deposit box is subject to the issuance of a grant of representation.

- b. Obtaining a grant of representation

After gathering the assets and liabilities of the deceased, as set out above, the personal representative can apply to the Probate Registry of the High Court of Hong Kong for a grant of probate (if the deceased died testate), grant of letters of administration (if the deceased died intestate) or a grant of letters of administration with will annexed (if the deceased died with a will but no executor is appointed or no executor is able or willing to act for whatever reasons). The grant of representation is required to establish title to the deceased's estate. However, there are certain assets, such as those jointly owned with another, which cannot pass by will or on intestacy. After the grant of representation is issued, the personal

representative can distribute the assets either under a will or under the applicable rules of intestate succession.

- c. Paying off tax, debts, testamentary, administration and funeral expenses out of the deceased's estate

Hong Kong has abolished estate duty for any deaths occurring on or after 11 February 2006 (see further below under IV).

In relation to other tax liabilities (eg, income tax), it is the responsibility of the personal representative to contact the Inland Revenue Department (IRD) and file a tax return on behalf of the deceased. Once the IRD makes an assessment of the amount of tax payable by the deceased up to the time of death, the personal representative should ensure that the tax is paid as soon as possible.

- d. Distributing the remaining assets to those entitled under the will or on intestacy

In general, the personal representative is not bound to distribute the estate of the deceased before the expiration of one year from the date of death.

Any person with a potential interest in the estate (ie, the beneficiaries) may challenge a will, the executors or the administrators on a number of grounds. These include, but are not limited to, the following:

- the will was not executed properly;
- the testator lacked testamentary capacity;
- the testator did not understand the contents of the will;
- the testator was unduly influenced when he or she executed the will;
- there was fraud or forgery;
- the will has been revoked by another will;
- the executors or the administrators are not entitled to administer the estate; and
- the executors or the administrators have not administered the estate properly.

Section 3 of the Inheritance (Provisions for Family and Dependents) Ordinance (Cap 481) (the 'IPFDO') sets out a list of persons who can apply to court for an order of reasonable financial provision out of the estate of the deceased, including spouses, former spouses, parents, children, siblings and any other person who has been wholly or substantially maintained by the deceased immediately before his or her death.

This is subject to the deceased being domiciled in Hong Kong at the time of death, or had been ordinarily resident in Hong Kong for three years immediately before his or her death.

However, a claim for financial provision cannot be made after six months from the date on which an application for the grant of representation of the deceased's estate was first taken out, except with the permission of the court (IPFDO, section 6).

B. Intestate succession and forced heirship

The applicable succession rules depend on whether there is a surviving spouse, surviving issue (children, grandchildren etc) and surviving parents, siblings or other relatives (see below), as set out in section 4 of the IEO.

1. SURVIVING SPOUSE WITH NO ISSUE, PARENTS OR FULL SIBLINGS OR THEIR ISSUE

If the deceased leaves a surviving spouse, but leaves no surviving issue, parent, or siblings of whole blood or issue of a brother or sister of whole blood, the surviving spouse is absolutely entitled to the residuary estate.

2. SURVIVING SPOUSE WITH ISSUE

If the deceased leaves a surviving spouse and issue, whether or not survived by his or her parents or siblings, the surviving spouse would take the following first:

- all of the deceased's personal chattels; and
- a sum of HK\$500,000 from the residuary estate.

Any remaining sum would be divided in half: half will be distributed to the surviving spouse, and the other half will be held on statutory trusts and divided equally among the surviving issue of the deceased.

3. SURVIVING SPOUSE WITH NO ISSUE

The surviving spouse can take the following first:

- all of the deceased's personal chattels; and
- a sum of HK\$1m from the residuary estate.

Any remaining sum would be divided in half: half will be distributed to the surviving spouse and the other half will be distributed to the surviving parent(s).

If one or both parents survive, the siblings cannot obtain a share of the deceased's estate. If the deceased does not leave any issue or parents, that half of the estate will be held on statutory trusts for full brothers and sisters.

4. ISSUE ONLY

If the deceased leaves issue but no spouse, the residuary estate of the deceased shall be held on statutory trusts for the issue of the deceased.

5. OTHER CIRCUMSTANCES

The following specific rules apply to other circumstances:

- deceased leaves surviving parents but leaves no spouse and no issue: residuary estate is divided equally among the surviving parents or goes entirely to the surviving father or mother;
- deceased leaves behind full siblings, but does not leave behind spouse, issue or parents: entire estate is distributed in the following order of priority:

1. on statutory trusts for full siblings;

2. on statutory trusts for half siblings;
 3. for grandparents;
 4. on statutory trusts for uncles and aunts who are full siblings of the parent of the deceased; or
 5. on statutory trusts for uncles and aunts who are half siblings of the parent of the deceased; and
- in default of any person coming forward to claim interest in the estate, subject to the IPFDO, the estate belongs to the government as *bona vacantia*.

6. ILLEGITIMATE CHILDREN

If the deceased leaves behind illegitimate children, they can now enjoy the same succession rights as legitimate children if their parents die after 19 June 1993.

7. INHERITANCE OF MINORS

In general, if a young child inherits a property on intestacy, the child is not legally entitled to take control of property until he or she is 18 years old. Instead, the law creates a trust so that trustees can manage the property on behalf of the child until he or she can take control of it him or herself.

8. FORCED HEIRSHIP REGIME

Apart from land in the New Territories that may be affected by Chinese customary law of succession, which the courts in Hong Kong have the power to recognise and enforce according to section 13 of the New Territories Ordinance (Cap 97), there is otherwise full testamentary freedom in Hong Kong with no forced heirship regime.

9. STATUTORY TRUSTS

The entire residuary estate is held in trust, and thus the personal representative holds the residuary estate as trustee for the persons entitled. Where statutory trusts are mentioned, reference must be made to section 5 of the IEO for the terms of the trusts on which the estate is held. A surviving spouse, parents and grandparents' entitlement to the residuary estate is absolute; issue, brothers, sisters, uncles and aunts take on statutory trusts. Statutory trusts have specific characteristics: for example, the relatives take equal shares without any preference for age or gender; the first generation of survivorship, for example, children, siblings and so on, always take their share to the exclusion of the second generation, for example, grandchildren, nephews, nieces and so on, but the second generation can take their parents' share by substitution if the parents are deceased.

C. Marital property

There is no special rule in Hong Kong dealing with marital property in estate administration.

Hong Kong, like most common law countries, has a separation of property regime.

If assets acquired during marriage are placed into a trust, the rights of each spouse in relation to the trust assets would depend on many factors including (among others):

- the terms of the trust deed;
- their beneficial entitlement;

- the degree of control a party has over the trust property; and
- the overall distribution pattern.

In terms of succession, there is no concept of forced heirship in Hong Kong. Therefore, there is no overriding principle or rule requiring the maker of a will to give a specific percentage of the estate to his or her spouse in a marriage.

D. Tenancies, survivorship accounts and payable on death accounts

There are two ways in which the equitable interest in assets can be jointly owned in Hong Kong:

- *Joint tenants*: All joint tenants are treated as one sole owner and are equally entitled to the whole asset. When one of the joint tenants dies, their interest will automatically pass to the surviving joint tenant by the right of survivorship.
- *Tenants in common*: The interests of all the tenants-in-common are presumed proportional to their respective contributions to the asset and each of the tenants-in-common has a distinct beneficial share in the asset. When one of the tenants-in-common dies, his or her share in the property passes by succession in accordance with his or her will or the rules on intestacy.

There are no specific legal concepts of survivorship accounts or payable on death accounts in Hong Kong.

While there may be survivorship clauses in the conditions of a joint bank account, the court has held that true intention of the parties still need to be ascertained. In *Nanyang Commercial Bank Ltd v Personal Representative of Vannee Nativivat* [2013] HKEC 450, the court held the view that survivorship clauses in joint account opening documents are usually used to protect the bank rather than to reflect the intention of the account holders. Such a clause usually provides that upon the death of either of the account holders, the balance would belong to the survivor. The court held that a survivorship clause is merely a contractual arrangement between the bank and the account holders as to how to deal with the funds, which should not be conclusive evidence of parties' intention. Further, the clause is often concealed in small print in some of the many account opening documents that the account holders have to sign when opening the account. Hence, greater weight should be given to the source of funds and the presumption of resulting trust in favour of the joint account holder who provided the funds.

III. Trusts, foundations and other planning structures

There is no such legal structure as a foundation in Hong Kong, although the term is quite commonly used by non-profit organisations, many of them charitable in nature and have adopted the legal structure of a company limited by guarantee, and usually applied for the tax-exempt status available for charitable organisations of a public character pursuant to section 88 of the Inland Revenue Ordinance (Cap 112) (the 'IRO'). A charitable grant-making foundation may choose to be a trust or a company limited by guarantee. The differences between the two include more privacy and flexibility with a trust structure, while the latter may generate more public confidence because of the governance requirements applicable to a company, and also the transparency that comes with a company structure.

In general, trusts remain a popular structure for wealth planning.

A. *Common techniques*

In Hong Kong, trusts are recognised, and their establishment, management and administration are governed by both the statutory framework and the common law.

1. INTRODUCTION TO TRUSTS

A trust will be created when the owner of property transfers it to another person or corporation (ie, a trustee) to hold such property for the benefit of one or more beneficiaries and/or for a purpose (eg, a charitable purpose).

The trustees are responsible to hold and administer the trust property and to distribute the income or the capital of the trust property to the beneficiaries. The legal ownership of the trust property is vested in the trustees so that the trustees could efficiently manage and deal with the trust property. However, the trust property will never become the trustees' personal estate and the trust property may only be used according to the terms of the trust instrument. There are also rigorous obligations imposed on the trustees to prevent them from abusing or misappropriating the trust property (see further below under III.B.1).

It is important to note that a trust does not have a separate legal personality in Hong Kong and the term simply describes the relationship between the trust parties, and the trustees will be the party responsible for entering into contract or undertaking any legal arrangement in their own names.

2. TYPES OF TRUSTS

There are different types of trusts that exist in Hong Kong. Some common types of trusts include discretionary trusts, settlor reserved powers trusts, fixed trusts and charitable trusts.

With effect from 1 December 2013, several major changes took place in relation to trust law in Hong Kong. Pursuant to amendments of the Perpetuities and Accumulation Ordinance, Hong Kong has abolished the law or rule against perpetuities for any trust established after 1 December 2013. Amendments of the TO further expressly permits a settlor to reserve to himself/herself full investment powers over the trust fund during his or her lifetime and while he or she has mental capacity.

Under a discretionary trust, the beneficiaries do not have any vested or fixed interest in the trust assets and the trustees will have the absolute discretion to distribute the income and capital. Accordingly, the trustees are free to decide how to allocate the trust funds and such amounts of distribution to certain beneficiaries.

Contrary to discretionary trusts, a fixed trust is a type of trust in which a beneficiary has a fixed entitlement or proportionate interest in relation to the income and capital of the trust.

A charitable trust allows the trustees to apply the income or capital of the trust for charitable purposes. If the charitable trust decides to apply for tax-exempt status pursuant to section 88 of the IRO, the trust deed would have to be approved by the IRD, and fulfil certain conditions such as having valid charitable objects that fall under one or more of the four heads of charitable objects recognised by the IRD, and restrictions on how income and property can be distributed. The charitable trust will also be subject to ongoing monitoring of the IRD to make sure the funds are properly spent to further the trust's charitable objects.

Aside from charitable purpose trusts, there is no Hong Kong trust law specifically permitting the creation of non-charitable purpose trusts.

3. FEATURES OF TRUSTS

In Hong Kong, trusts have been commonly used to preserve and develop family wealth or for furthering charitable purposes or for employee benefits purposes. Trusts also allow the beneficiaries to be provided for adequately according to the settlor's wishes, this is especially useful in circumstances in which the beneficiaries are incapacitated, still minors or spendthrifts. For instance, the settlor may indicate his or her wishes that the beneficiaries may only obtain a certain sum upon reaching a certain mature age, which can prevent the assets to be vested absolutely in the beneficiaries when they are still young and dissipate it at their whim.

As mentioned above, the beneficiaries under discretionary trusts do not have a vested or fixed interest in the trust assets and they have no right to direct the trustees to distribute any part of the trust assets. The beneficiaries can merely request that the trustees will exercise their discretion in the beneficiaries' favour. If the beneficiaries are bankrupt, then the creditor has no more right than the beneficiaries to demand payment from the trustees. Accordingly, discretionary trusts are useful devices to ring-fence the family's personal assets from third-party claims, but always subject to specific creditor remedies depending on the facts of each case.

As a general note, trust assets may be vulnerable to claims by creditors in the following circumstances where:

- there are grounds to set aside the transfer into trust or declare the trust to be void (eg, due to undue influence, lack of capacity, unfair preference and sham);
- the settlor is entitled to require distributions from the trust (eg, the settlor may reserve the power to revoke the trust);
- the settlor is the sole realistic beneficiary of a supposedly discretionary trust; and
- the settlor has reserved such extensive powers over the trust that in substance there is a bare trust or nominee arrangement, or even a sham trust as a result.

B. Fiduciary duties

1. TRUSTEES' FIDUCIARY DUTIES

It is well established that the relationship between a trustee and a beneficiary is a fiduciary relationship. The essence of fiduciary duties is one of loyalty and involves these two fundamental duties:

- *no-conflict duty*: the fiduciary should not enter into engagements in which he or she has, or can have, a personal interest conflicting with the interests of the principal; and
- *no-profit duty*: the fiduciary should not obtain a benefit either for himself/herself or for a third party by using an opportunity or knowledge that he or she obtained by virtue of his or her position as fiduciary without the beneficiary's fully informed consent.

The rationale behind these rules is that the trustee acting as the fiduciary of the beneficiaries should not be using his or her fiduciary position to advance anybody's interests other than those of the beneficiaries. For instance, in the absence of express provisions in the trust instrument which permit self-dealing, the trustees are generally prohibited from selling the trust property to themselves or any related party or enter into any transactions with third

parties who compete commercially with the beneficiaries. Distributions from a trustee to him or herself as beneficiary would, on the face of it, appear to be contraventions of the strict prohibitions against self-dealing or acting in conflict for fiduciaries. However, the trust instrument could again expressly permit such transactions, and moreover, there is a relaxation of such prohibitions if the trust was created to clearly envisage such circumstances.

Trustees are also subject to a number of duties under common law and the trust deed regarding the administration of trust and the disposition of trust property in relation to the beneficiaries of the trust. Subject to the type of trust and the terms of the trust instrument, a trustee owes the following duties due to his or her role of trustee and not due to his or her position as a fiduciary:

- duty to comply with the standard of skill and care expected of all trustees (ie, duty of care) both under common law and under the TO in the exercise of their administrative and dispositive powers in relation to the trust;
- duty to acquaint him or herself with the terms of the trust, with the state of the trust property, and with the contents of all the deeds, notices and other documents and papers relating to or affecting the trust property which is under his or her control or possession;
- duty to conform to and carry out the terms of the trust;
- duty to take possession of and preserve trust property;
- duty to use diligence and prudence when dealing with trust property;
- duty to act personally for the exercise of his or her judgement and for the performance of his or her duty;
- duty to act fairly and equally as between beneficiaries;
- duty to act honestly and act not arbitrarily or with regard to any consideration other than the best interests of the beneficiaries;
- duty to keep accurate trust accounts and always prepared to render it when required;
- duty to supply certain information to a beneficiary on demand in relation to the trust property;
- duty to pay the income and the capital of the trust property to the beneficiaries in accordance with the trust instrument;
- duty to sell and convert the trust property in accordance with the directions or requests given to it; and
- duty to duly and promptly invest trust money coming to his or her hands that cannot be applied for the other purposes of the trust.

It is important to note that the trustees are subject to a number of rigorous duties to ensure that they act only in the best interests of the beneficiaries. Provided that the trustees uphold these duties when managing the trusts, in the case of typical family trusts established under Hong Kong law, they usually have independent and unfettered discretion to deal with the

trust fund in accordance with the terms of the trust deed. However, it is quite common for the settlor to put in place the role of protector/investment committee so that the trustees will need to seek consent or direction (as the case may be) from these persons/entities before exercising certain powers. For instance, the settlor may appoint a trusted individual as the protector who will 'monitor' the trustees to ensure attention is given to the settlor's wishes. The settlor may appoint himself or other trusted individuals to act as an investment committee who could either make recommendations or even actually direct the trustees in making relevant investment decisions depending on the nature of the trust.

2. COMPANY DIRECTOR'S DUTIES

Company directors are another recognised category of fiduciary relationship, and they also owe to the company similar fiduciary duties that the trustees owe to the beneficiaries as mentioned above. Aside from being the fiduciaries of the company, company directors are also subject to various duties and responsibilities that are derived from the articles and association of the company, common law and also under the Companies Ordinance (Cap 622) (the 'CO'). For instance, the general principles of director's duties in Hong Kong are as follows:

- duty to act in good faith for the benefit of the company as a whole;
- duty to use powers for a proper purpose for the benefit of members as a whole;
- duty not to delegate powers except with proper authorisation and duty to exercise independent judgement;
- duty to exercise reasonable care, skill and diligence (became a statutory duty when the new CO came into effect);
- duty to avoid conflicts between personal interests and interests of the company;
- duty not to enter into transactions in which the directors have an interest except in compliance with the requirements of the law;
- duty not to gain advantage from use of position as a director;
- duty not to make unauthorised use of company's property or information;
- duty not to accept personal benefit from third parties conferred because of position as a director;
- duty to observe the company's constitution and resolutions; and
- duty to keep proper accounting records.

C. Treatment of foreign trusts and foundations

Hong Kong adopted and therefore accepted The Hague Conference on Private International Law Convention on the Law Applicable to Trusts and on their Recognition 1985 (the 'Hague Trust Convention') as having the force of law in Hong Kong and recognises the validity of trusts created voluntarily, evidenced in writing and governed by another jurisdiction's laws according to the Hague Trust Convention.

IV. Taxation

A. *Domicile and residency*

Since Hong Kong adopts a territorial source principle of taxation, a person's residence or domicile or an entity's residence is not relevant to determining tax liability in Hong Kong, unless an individual/entity is seeking relief from an applicable comprehensive double taxation agreement or arrangement.

1. INDIVIDUAL

An individual is regarded as a tax resident in Hong Kong, if:

- he or she ordinarily resides in Hong Kong; or
- he or she stays in Hong Kong for more than 180 days during a year of assessment or for more than 300 days in two consecutive years of assessment, one of which is the relevant year of assessment.

The term 'ordinarily resides' should be interpreted according to its natural and ordinary meaning. It refers to a person, to a certain degree, habitually and normally resides at a place, apart from temporary or occasional absences of long or short duration. Further, it refers to a person's abode in a particular place or country which the person has adopted voluntarily and for settlement purposes as part of the regular order of the person's life for the time being, although such purposes could be of long or short term.

2. COMPANIES

The residence of companies for tax purposes is determined by looking at a combination of factors, for example, the location in which it is incorporated, the location where the director physically resides and also where the central management and control of the business of the companies takes place.

3. TRUSTS

Similar to companies, the residence of a trust for tax purposes is also determined by the location in which the central management and control of the trust administration, assets and affairs takes place in addition to the location in which the trustee physically resides or is incorporated.

B. *Gift, estate and inheritance taxes*

Hong Kong does not have an inheritance tax or gift tax regime. Hong Kong has abolished estate duty for any deaths occurring on or after 11 February 2006.

C. *Tax on income and capital*

In Hong Kong, there are three categories of tax chargeable against individuals or entities which include salaries tax, profits tax and property tax. Individuals or entities may also be subject to stamp duty in certain situations.

1. SALARIES TAX

All individuals must pay salaries tax on income arising in or derived from Hong Kong from:

- an office;

- employment; or
- a pension.

The geographical source of a taxpayer's income is crucial in determining whether he or she is liable to salaries tax in Hong Kong. Only income sourced in Hong Kong would be taxable whereas a person's overseas income will not be taxable.

For individuals, salaries derived from employment in Hong Kong will be taxed at a progressive rate of two per cent to 17 per cent, or a standard rate of 15 per cent (whichever is lower).

For the avoidance of doubt, non-residents of Hong Kong are taxed on the same basis and rates as any resident of Hong Kong.

2. PROFITS TAX

For profits tax, all individuals and corporations must pay profits tax if all the following conditions are met:

- they carry on a trade, profession or business in Hong Kong;
- the trade, profession or business creates profits; and
- the profits arise in or are derived in Hong Kong.

As mentioned above, since Hong Kong adopts a territorial source principle of taxation, the concept of 'residence' is not by itself a basis for taxation in Hong Kong. It is important to note that only profits which have a source in Hong Kong are taxable here. Generally speaking, a person or a corporate entity that carries on business in Hong Kong and earns profits from a Hong Kong source is chargeable to profits tax.

Note that the definition of 'person' also includes a 'trustee', and this means that trustees' fees are potentially taxable. Although a trust does not have a separate legal personality in Hong Kong, it is a separate taxable entity distinct from the settlor, trustees and beneficiaries. Accordingly, if the profits from the trust fund are derived from a Hong Kong source, the profits can also be chargeable to profits tax as if the trust is a separate taxpayer.

For corporations, the profits tax rates for the 2018/19 year of assessment and onwards are:

- 8.25 per cent on assessable profits up to HK\$2m; and
- 16.5 per cent on any part of assessable profits over HK\$2m.

For unincorporated businesses, the profits tax rates for the year of assessment 2018/19 and onwards are:

- 7.5 per cent on assessable profits up to HK\$2m; and
- 15 per cent on any part of assessable profits over HK\$2m.

3. PROPERTY TAX

For property tax, individuals can be subject to property tax if they derive rental income from properties located in Hong Kong. The property tax rates for the year of assessment 2008/09 onwards is 15 per cent.

4. CAPITAL GAINS, INHERITANCE AND GIFT TAXES

Hong Kong does not have any capital gains tax. There is generally no withholding tax on dividends, interest or rents in Hong Kong. Hong Kong taxpayers are only required to withhold tax in specific circumstances (eg, where royalties are paid to foreign nationals for the use of any intellectual property in Hong Kong, or where the Hong Kong party is acting as an agent for a non-resident carrying on trading activities in Hong Kong).

Hong Kong does not have an inheritance tax or gift tax regime. Hong Kong has also abolished the estate duty for any deaths after 11 February 2006.

5. STAMP DUTY

Stamp duty is chargeable on sale or transfer of real estate located in Hong Kong or a sale or transfer of shares of a Hong Kong-based entity. The stamp duty rates differ depending on the value of the asset (and not according to the capital gain). In relation to the purchase of Hong Kong real estate, Hong Kong stamp duty is chargeable at an ad valorem rate of up to 15 per cent of the stated consideration or the market value of the property (whichever is higher). An additional buyer's stamp duty and special stamp duty may also apply to certain transactions.

The buyer's stamp duty is chargeable on transactions involving the acquisition of residential property entered into on or after 27 October 2012, except where the purchaser or transferee is a Hong Kong permanent resident and is acquiring the property on his or her own behalf (ie, he or she is both the legal and beneficial owner of the property). The buyer's stamp duty is charged at 15 per cent on the stated consideration or the market value of the property (whichever is higher) in addition to the ad valorem rate of Hong Kong stamp duty.

The special stamp duty is chargeable if all the following conditions are met:

- the transaction involves the sale and purchase or transfer of a residential property;
- the property is acquired by the seller or transferor on or after 20 November 2010; and
- the property is disposed of (which includes a resale or transfer) by the seller or transferor within 24 months (if the property was acquired between 20 November 2010 and 26 October 2012) or 36 months (if the property was acquired on or after 27 October 2012) from the date of acquisition.

In other words, if the residential property was acquired by a person before 20 November 2010, the subsequent disposal of that property by him or her at any time will not be subject to the special stamp duty.

The special stamp duty is calculated by multiplying the applicable rate by the stated consideration or the market value of the property (whichever is the higher). The applicable rate ranges from five per cent to 20 per cent depending on the holding period of the property by the seller or transferor before disposal.

In relation to the purchase of Hong Kong company shares or shares of companies listed on the Hong Kong Stock Exchange (regardless of the jurisdiction in which the listed company is incorporated), the ad valorem stamp duty chargeable on the contract note is at a rate of 0.1 per cent of the stated consideration or the value of the shares (whichever is higher) for each of the purchaser and seller (as each of the purchaser and the seller must execute a contract

note, the total stamp duty on a set of contract notes is 0.2 per cent). A fixed sum of HK\$5 is also payable. The rate of the ad valorem stamp duty may be further increased to 0.13 per cent (and the total stamp duty will be increased to 0.26 per cent), pursuant to the 2021–22 Budget announced by the Financial Secretary of the Hong Kong Government. Although the stamp duty is required to be paid by both the purchaser and seller, the parties can agree among themselves as to which party shall bear the stamp duty.

A seller may be subject to profits tax in Hong Kong, regardless whether he or she is a Hong Kong resident or a foreign national, if he or she derives a gain from a sale of real property in Hong Kong, listed shares in Hong Kong or other assets if the IRD is satisfied that the nature of the transaction is speculative and amounts to trading. The IRD will consider the nature of the transaction, the motive and the financial arrangements to determine whether such transaction amounts to a 'speculative activity'.

6. CHARITABLE ORGANISATION WITH TAX EXEMPT STATUS

There is no statutory definition of a charity in Hong Kong, nor a charities law or charities commission.

A charity that has successfully applied for tax exempt status pursuant to section 88 of the IRO, also commonly called a 's.88 organisation', is exempt from profits tax subject to certain conditions to be fulfilled in relation to the trade or business carried on by the charity concerned.

Generally, donors giving to an s.88 organisation will be able to claim tax deductions for such giving if it fulfils the criteria of 'approved charitable donations'. Conditions include, for example, that the donation must be a donation of money, and that there must be no material benefit to the donor. A donor, individual or corporate can claim such tax deduction up to 35 per cent of his or her assessable income or profits.

In addition, section 44 of Stamp Duty Ordinance (Cap 117) (the 'SDO') provides that stamp duty shall not be chargeable on any conveyance of immovable property (ad valorem stamp duty on property transaction, special stamp duty and buyer's stamp duty), or any transfer of Hong Kong stock (ad valorem stamp duty and fixed duty on stock transaction) where the beneficial interest therein passes by way of gift from the donor to an s.88 organisation. The instrument in question must still be submitted to the Collector of Stamp Revenue for adjudication under section 13 of the SDO.