

PRELIMINARY ISSUES TO BE CONSIDERED (WITH OR WITHOUT A WILL) I. PRELIMINARY ISSUES TO BE CONSIDERED (WITH OR WITHOUT A WILL) When a person dies, there may be estate (the money in bank accounts, company shares, real estate and other assets, etc.) left under the deceased's name. No matter whether or not the deceased has made a Will, generally a Grant of Representation will have to be obtained from the Probate Registry of the High Court of the Hong Kong Special Administrative Region before any of the deceased's assets in Hong Kong can be dealt with. A Grant of Representation acts as evidence of a person's right to deal with the estate of the deceased. There is always a question as to which jurisdiction (which country's law) should govern the administration and succession of estate if some foreign elements are involved. For example, a deceased might have property in a foreign country. Another example is that a deceased, who is not a Hong Kong resident, leaves property in Hong Kong. Generally speaking, the following rules may provide a reference answer: Succession to "immovable property" (e.g. flat, building, land) is governed by the law of the place where the property is located. For example, if you (as a Hong Kong resident) own a flat in England, that flat will usually be governed by the succession law of England after your death. Succession to "movable property" (e.g. money, company shares, personal belongings) is governed by the law of the deceased's place of domicile as at the date of death. For example, the movable property of a deceased who is a resident of the United States is usually governed by the succession law of the United States, no matter where such property is located.

1. WHAT ARE THE DIFFERENCES BETWEEN AN ESTATE WITH A WILL AND AN ESTATE WITHOUT A WILL (IN RELATION TO THE GRANT OF REPRESENTATION)? 1. WHAT ARE THE DIFFERENCES BETWEEN AN ESTATE WITH A WILL AND AN ESTATE WITHOUT A WILL (IN RELATION TO THE GRANT OF REPRESENTATION)? A "Grant of Representation" is the collective term for a "Grant of Probate" or a "Grant of Letters of Administration". A Grant of Probate is a Grant given to the executor (or executrix, in case of a female) named in the last Will of the deceased person. Whilst a Grant of Letters of Administration is a Grant given to an administrator who is the next-of-kin (e.g. the deceased's spouse, child or parent, etc.) where there is no Will, or where no executor has been appointed in the Will. A "Personal Representative" is a general term for either an executor or an administrator. This Personal Representative has the authority to deal with the deceased's estate, such as to manage and distribute the relevant assets to the beneficiaries. With a Will If the deceased died testate (i.e. he/she had made a Will appointing an executor), the executor is the only person who is entitled to apply for a Grant of Probate of the Will. If the executor does not wish to take up the appointment, or if no executor appointed by the deceased survives, then the person entitled to the residuary legacy in the Will has priority to apply for a Grant of Letters of Administration (with the relevant Will annexed). The person entitled to the residuary legacy is the person who can take the remainder of the deceased's estate after all the other conditions of the Will have been met (i.e. other beneficiaries have been paid, and all the debts and administration expenses have been settled). Without a Will If the deceased died intestate (i.e. no Will is found or if the Will has been revoked), the right of a person to apply for a Grant of Letters of Administration would be governed by the law of intestacy. Under rule 21 of the Non-Contentious Probate Rules (Cap. 10A of the Laws of Hong Kong), the order of priority is as follows: the surviving spouse or the surviving partner or partners to a union of concubinage (e.g. the second wife (and the third...) taken during the life of the first wife) 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; the 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. (Note: "Issue" has a special meaning in the succession law which is different from the daily usage. It means any descendants of a person.) The maximum number of administrators (or administratrix in case of a female) of an estate is four. When there is a dispute between persons entitled to a Grant in the same degree (i.e. they are all equally entitled to apply for the Grant), an application has to be made to the High Court to determine who will be appointed as administrators. The High Court also has the power to appoint a person who

is not in the above hierarchy to administer the estate. This power is useful when the next-of-kin of the deceased, who would otherwise be entitled to be appointed as administrator, is under 21 years old or has insufficient mental or physical capacity to administer the estate. One major difference between an executor and an administrator Although the powers of an executor and an administrator are almost the same, there is one major difference. The power of an executor stems directly from the Will. Therefore, his/her authority and duty as an executor starts from the very moment the testator (the "Will-maker") dies. An administrator, on the other hand, receives the relevant powers from the Grant of Letters of Administration. Therefore, his/her power to act starts from the date of the Grant but not from the date of the death of the deceased.

2. UNDER WHAT CIRCUMSTANCES CAN A WILL BE REVOKED? 2. UNDER WHAT CIRCUMSTANCES CAN A WILL BE REVOKED? Usually a person has to take action to revoke his/her own Will. For example, this might be done by making a new Will or tearing the existing Will into pieces. A circumstance that is often overlooked is the revocation of a Will by the normal operation of law due to a subsequent marriage (a marriage that occurred after the Will was made). A marriage subsequent to the execution of a Will automatically revokes the Will unless it is proved that the Will was drafted in contemplation of that marriage. For example, a clause is inserted in the Will stating that the subsequent marriage with a named person shall not revoke the Will. On the other hand, it should be noted that a divorce subsequent to the making of a Will does not automatically revoke that Will. However, if there are any specific terms in that Will which allow the former spouse to take some assets from the deceased's estate, these terms may be void unless a contrary intention is proved.

MAKING A WILL II. MAKING A WILL Any person over the age of 18 may make a Will. A Will is a document which sets out how a person's assets are to be distributed after his or her death. The person making the Will is called the "testator" (if male) or "testatrix" (if female). Therefore, if a person leaves a Will after the death, he or she is said to have died "testate". For those without a Will, they are called "intestate". The advantages of making a Will If a person makes a Will, he/she can:- arrange how his/her assets will be shared amongst relatives other than according to the law of intestate; leave assets to beneficiaries who are not related to him/her, e.g. friends and charities; appoint executor(s) (number of executors not to exceed FOUR) to manage and distribute the assets. If the deceased dies without a Will, the distribution of the assets and who can administer the estate will be governed by the law of intestate. This is discussed in the section "Distribution of estate to the relevant parties".

1. WHAT ARE THE FORMALITIES OF MAKING A WILL? 1. WHAT ARE THE FORMALITIES OF MAKING A WILL? Although you can make a Will by yourself, it is advisable to seek help from a solicitor. This will save time and legal costs should it be necessary to prove (after your death) your intention and mental capacity at the time you prepared and signed the Will. A well-drafted Will can also minimize potential disputes among your family members and inheritors. If you intend to prepare your own Will, the following formalities (which are mostly governed by section 5 and section 10 of the Wills Ordinance, Cap. 30 of the Laws of Hong Kong) should be followed: all of your intentions should be produced in writing; the Will is to be signed by you or a person in your presence and by your direction (the latter is not recommended unless there are special circumstances, such as you are physically unable to sign it); your signature and those of the witnesses should preferably be placed at the end of the Will; the Will should be dated before it is signed; your signature should be witnessed by two persons (aged 18 or above) present at the same time who should then sign your Will in your present; and the witness and his/her spouse should not be a beneficiary under your Will. If a beneficiary or his/her spouse witnesses the Will, the gift to the beneficiary under your Will is forfeited.

2. WHAT OTHER MATTERS SHOULD BE CONSIDERED BEFORE MAKING A WILL? 2. WHAT OTHER MATTERS SHOULD BE CONSIDERED BEFORE MAKING A WILL? Although the following ten points are not an exhaustive list of matters to be considered when making Wills, they can be treated as a good starting point: i) Domicile (place and right of abode) Your domicile as at the date of death can have implications on the disposition of estate in your Will. The law of your country of domicile as at the date of your death governs gifts of movable properties such as shares and money in bank accounts. The law in some countries (but not in Hong Kong) requires that you must leave

a certain proportion of your estate to your children or widow. Unless you specify to adopt a domicile of choice, your domicile will usually be the domicile you acquired at birth from your father, rather than the place of your birth. On the other hand, the law governing disposition of land/flats (real estate) which are "immovable" is the law where the land/flats are located. For example, if the deceased has two flats (one of them in Hong Kong and the other is situated outside Hong Kong), then the foreign property will not be included in the estate in respect of the Grant of Representation in Hong Kong.

ii) The Executor(s) of your Will Executor(s) are the people whom you wish to appoint to be responsible for administering your estate. According to section 39 of the Probate and Administration Ordinance, the executor must be over 21 years old at the time of administering the deceased's estate. Instead of individuals, you may also consider appointing a trust corporation to act as Executor(s). You should consult with the executor(s) to determine whether he or she is willing to accept this role. If you choose your spouse to be the only executor/executrix, you must take into account the possibility that you both may unfortunately die in the same accident. You may name two or more persons (up to a maximum of four) to act as your executors. If so appointed, they must do everything in relation to your Will together. iii) Funeral Arrangements Traditionally, declarations for funeral arrangements/burial/cremation are included in Wills. There is however a risk that if the Will cannot be located immediately, these wishes might be overlooked as a result. iv) Personal Effects (personal belongings) Most often, you will leave your personal belongings to your spouse. If the Will is silent on this matter, these properties will fall into the residue of the estate and will be sold, with the proceeds forming part of the cash residue. v) Legacies You may wish to make specific gifts of money, shares, or real estate to certain persons or charities. One point to note before the abolition of estate duty is that any gift to a registered charity in Hong Kong according to your Will is exempt from estate duty. vi) Distribution of your Estate Age of Distribution: If any beneficiary of an estate is under the age of 18, the executor must hold the child's share in trust (to keep the relevant assets properly on behalf of this child). Some parents also state in their Wills that a child should not receive his or her inheritance at the age of 18, but at a later age such as 21 or 25, when it is more likely that the child will be mature enough to manage his or her inheritance. Discretionary powers will therefore be given to the executor to distribute as much of the income and/or capital for the benefit of the child as the executor sees fit before the child can formally receive all the assets. vii) Common Disaster Clause (in relation to married couples) Most married couples choose to deal with common disaster in their Wills because it is probable that such an event could occur, given that married couples do often travel together. If no provision is made in a Will and a common disaster occurred rendering it uncertain which spouse survives the other, then the younger is deemed to have survived the elder. In other words, the estate of the elder deceased will pass to the younger deceased, which will then be further dealt with according to legal regulations. viii) Persons under Disability When making a Will, it is advisable for special trust provisions to be arranged for a beneficiary who is a disabled. For example, a trustee or a guardian may be appointed to monitor the assets inherited by the disabled. ix) Guardianship of Minor Children You should consider appointing a person to act as guardian (to have legal custody) of any children who are minors (below the age of 18) at the time of your death. The guardian cannot however displace the rights of a surviving legal parent. x) Obligations to Maintain Others This will be discussed under the heading of "Free Testamentary Capacity".

3. I HAVE LOST ALL MY LOVE AND AFFECTION FOR MY WIFE. I PLAN TO LEAVE NOTHING TO HER WITHOUT EVEN MENTIONING HER NAME IN MY WILL. CAN I DO THAT? 3. I HAVE LOST ALL MY LOVE AND AFFECTION FOR MY WIFE. I PLAN TO LEAVE NOTHING TO HER WITHOUT EVEN MENTIONING HER NAME IN MY WILL. CAN I DO THAT? Generally speaking, every person has "free testamentary capacity". That means people can, by Will, leave their assets to whomever they wish. However, the Inheritance (Provision for Family and Dependants) Ordinance (Cap. 481 of the laws of Hong Kong) empowers the Court to make orders that provisions be made out of the deceased's estate for certain members of the deceased's family and dependants. For example, if you were to declare that all your estate goes to your parents, or a charity,

without leaving even one dollar to your wife or minor children, such an intention may not be achieved after your death. Your wife and your children could apply to the Court for provisions to be made for them from your estate. In other words, they may be entitled to get a reasonable amount from your estate in order to maintain their living. This is governed by section 3, section 4 and section 5 of the Inheritance (Provision for Family and Dependants) Ordinance. In theory, the scope of the Inheritance (Provision for Family and Dependants) Ordinance also covers the case of a person who died intestate (without leaving a Will). In practice, it would be of less significance as the beneficiaries ranking in priority under intestacy, being the surviving spouse and children of the deceased, would generally be the persons expecting financial provisions from the deceased's estate.

### ABOLITION OF ESTATE DUTY AND THE PROCEDURES FOR APPLYING FOR A GRANT OF REPRESENTATION

#### III. ABOLITION OF ESTATE DUTY AND THE PROCEDURES FOR APPLYING FOR A GRANT OF REPRESENTATION

A brief history of the Estate Duty Before the abolition of estate duty on 11 th February 2006 , "Estate Duty Clearance" (evidencing the required duty has been paid) needs to be obtained before an application can be made for a Grant of Representation. Estate Duty is charged on the total value of all properties situated in Hong Kong (including all personal assets and real estate) which "pass" (are left behind) or are deemed to pass in connection with a person's death. Simply speaking, the estate duty payable is a percentage of the value of the estate. If you want to know the previous rates of Estate Duty (from 1 April 1996 to 10 February 2006), please visit the Inland Revenue Department's webpage.

#### Abolition of the Estate Duty

There are three stages in relation to the implementation of the abolition of estate duty. For deaths before 15 th July 2005 , estate duty remains payable. The applicant for a Grant of Probate or Letters of Administration ("the Applicant") should follow the old practice to obtain estate duty clearance before lodging an application to the High Court for a Grant of Representation. For deaths between 15 th July 2005 and 10 th February 2006 , the Applicant still needs to follow the old practice to obtain estate duty clearance. Even if the total value of the estate exceeds \$7,500,000, only a \$100 nominal estate duty will be charged. For deaths on or after 11th February 2006, the Applicant should follow the new procedure and arrangement which will be described in the following question 1. (Note: For an application for a Grant of Probate, the deceased should have made a Will. Whilst for a Grant of Letters of Administration, there should be no Will, or no executor has been appointed in the Will. Please go to the relevant question and answer to refresh your memory.)

#### 1. WHAT ARE THE NEW PROCEDURES FOR APPLYING FOR A GRANT OF PROBATE OR LETTERS OF ADMINISTRATION?

1. WHAT ARE THE NEW PROCEDURES FOR APPLYING FOR A GRANT OF PROBATE OR LETTERS OF ADMINISTRATION?

Step 1: The applicant for the Grant executes an Affirmation or Affidavit by Executor/Administrator (see "specified forms" below). The applicant has to sign that document and swear for the truthfulness of its content in front of a solicitor or a court officer. This Affirmation should be filed with the Probate Registry. Please note that different forms should be used for an application without a Will or an application with a Will.

Step 2: The applicant also needs to prepare an Affirmation/Affidavit verifying the Schedule of Assets and Liabilities, and a Schedule of Assets and Liabilities of the Deceased in Hong Kong as at the Date of Death (see "specified forms" below). The above documents must be lodged together with the documents listed in the section "Documents in support of the application" (see below) with the Probate Registry.

Step 3: Answer any requisitions (questions) raised by the Probate Registry after their perusal of the documents.

Step 4: Grant obtained.

For a person who died on or after 11 th February 2006 , the relevant application fee is \$265 and the fee for engrossment of a Grant is \$72. Documents in support of the application (for a Grant of Probate): The death certificate of the deceased (please refer to the Immigration Department's webpage for details of death registration); The original Will of the deceased, plus one copy; A certificate that shows the relationship of the applicant to the deceased where this relationship is clearly expressed in the Will, e.g. a spouse will lodge a marriage certificate, and a son or daughter will lodge a birth certificate. If the Will identifies the applicant by way of an Identity Document number, present a copy of that Identity Document; If none of the above certificate showing the relationship is available, an Affirmation or Affidavit of Identity is required. The

affirmation must be executed in the presence of a Commissioner for Oaths by someone who is not related to the applicant and the deceased by blood, marriage or adoption, but who has known the applicant and the deceased well for more than 5 years. Documents in support of the application (for a Grant of Letters of Administration): The death certificate of the deceased (please refer to the Immigration Department's webpage for details of death registration); No Will can be submitted unless for the case that the deceased had made a Will with no valid executor (i.e. Letters of Administration with Will annexed); A certificate showing the relationship of the applicant to the deceased (e.g. the marriage certificate of the applicant and the deceased, or the birth certificate(s) of the child(ren) of the deceased, or the birth certificate of the deceased for a parent applicant); If such a certificate is not available, e.g. the marriage took place in Hong Kong before 7th October, 1971 or before 1st May, 1950 in Mainland China according to Chinese customary ceremony, the applicant may prove her relationship to the deceased by way of an Affirmation or Affidavit of Identity. The Affirmation must be executed in the presence of a Commissioner for Oaths by someone who is not related to the applicant and the deceased by blood, marriage or adoption, but who has known the applicant and the deceased well for more than 5 years. Specified Forms The Probate Registry has specific forms for use in regard to the above-mentioned documents and procedures. These must be adhered to with such variations or additions as circumstances may require. Samples of the relevant forms are available upon request at the counter of the Probate Registry at LG3, High Court Building, 38 Queensway, Hong Kong. They can also be downloaded from the Judiciary website. Although an application for a Grant of Probate or Letters of Administration can be made in person, you should consider seeking legal advice if there are complicated issues or disputes involved in the estate (e.g. the deceased has a foreign property).

3. IF THE VALUE OF THE DECEASED'S ESTATE DOES NOT EXCEED \$50,000, WILL THE APPLICATION PROCEDURE BE DIFFERENT?

3. IF THE VALUE OF THE DECEASED'S ESTATE DOES NOT EXCEED \$50,000, WILL THE APPLICATION PROCEDURE BE DIFFERENT? With effect from 1st April 2007, under the delegated authority from the Secretary for Home Affairs, the Director of Home Affairs takes over from the Commissioner of Inland Revenue the provision of various services for estate beneficiaries through the establishment of an "Estate Beneficiaries Support Unit". If the value of the estate does not exceed \$50,000 and the estate consisted wholly of cash, the person who intends to apply for the Grant of Probate or Letters of Administration ("the Applicant") can file an application form (HAEU5) and an affirmation/affidavit with the Home Affairs Department. This affirmation must declare that the total value of the estate of the deceased does not exceed \$50,000 and the estate is wholly made up of money, and be filed together with a schedule in duplicate setting out the details of the estate. Details of the application procedure can be viewed from the website of the Home Affairs Department (Estate Beneficiaries Support Services). If the affirmation/affidavit is in order, the Secretary for Home Affairs will issue a confirmation notice exhibiting a duplicate of the schedule of assets of the estate. The Applicant or other third parties dealing with the estate would then be exempt from the relevant statutory restrictions concerning the intermeddling of the estate (handle the estate without permission). If the banks agree to release the balance in the accounts to the Applicant upon issuance of the confirmation notice, it will not be necessary for the Applicant to proceed further with an application to the Probate Registry either for summary administration or for a Grant of Probate/Letters of Administration. Please note that the banks have the discretion to decide whether to release the balance in the bank accounts stated in the schedule annexed to the confirmation notice. If more assets are found later resulting in the value of the estate exceeding \$50,000, the Applicant should apply for summary administration or a Grant of Probate/Letters of Administration (as the case may be).

2. IF THE APPLICANT SUBSEQUENTLY FINDS MORE ASSETS OF THE DECEASED AFTER SUBMITTING THE DOCUMENTS TO THE PROBATE REGISTRY, WHAT SHOULD HE/SHE DO?

2. IF THE APPLICANT SUBSEQUENTLY FINDS MORE ASSETS OF THE DECEASED AFTER SUBMITTING THE DOCUMENTS TO THE PROBATE REGISTRY, WHAT SHOULD HE/SHE DO? If the applicant discovers additional assets which have not been included in the verifying affirmation, the applicant should file a Corrective Affirmation/Affidavit verifying the Additional Schedule of Assets and

Liabilities (Before Grant). For cases where a Grant has already been obtained, the original Grant should be delivered, along with the Corrective Affirmation/Affidavit verifying the Additional Schedule of Assets and Liabilities (After Grant), to the Probate Registry. The specified forms can be found in the Judiciary's website. 4. WHAT HAPPEN IF THE VALUE OF THE ESTATE EXCEEDS \$50,000 BUT DOES NOT EXCEED \$150,000? 4. WHAT HAPPEN IF THE VALUE OF THE ESTATE EXCEEDS \$50,000 BUT DOES NOT EXCEED \$150,000? For small estates not exceeding \$150,000, and consisting only of bank accounts and/or Mandatory Provident Fund money, the Public Application Section of the Probate Registry can normally help the Applicant to summarily administer (in a simple way) the estate without a Grant of Representation. However, the Applicant(s) must be over 21 years of age. SEARCHING FOR A WILL AND GAINING ACCESS TO THE DECEASED'S SAFE DEPOSIT BOX IN A BANK IV. SEARCHING FOR A WILL AND GAINING ACCESS TO THE DECEASED'S SAFE DEPOSIT BOX IN A BANK Whether or not a Will is left by the deceased would affect the application procedure for the Grant of Representation. The deceased's family members or legal representative must check carefully to see if the deceased had made a Will (or whether the Will on hand is the latest/last Will or not). Their duties include: checking all the personal documents of the deceased, asking the relatives and friends, and enquiring with the deceased's financial or legal advisers. If the intended executor/administrator has retained a solicitor to obtain the Grant of Probate or Letters of Administration, the solicitor can conduct a Will Search through the Law Society of Hong Kong to find out whether or not the deceased has executed a Will through other solicitors in Hong Kong. However, the Will Search is not conclusive since the deceased might have made a homemade Will. Most often, the deceased might have put his/her Will in a safe deposit box in a bank. Therefore, another starting point for searching for a Will is to check the deceased's safe deposit box. 1. HOW TO GET ACCESS TO THE DECEASED'S SAFE DEPOSIT BOX IN A BANK? 1. HOW TO GET ACCESS TO THE DECEASED'S SAFE DEPOSIT BOX IN A BANK? Applying for a "Certificate for Inspection" With effect from 1st April 2007, the Secretary for Home Affairs has delegated his power as regards access, inspection and inventory taking of a deceased person's safe deposit box to the Director of Home Affairs. Either the executor under the Will, the intended administrator having priority to take out a Grant of Letters of Administration, or a surviving renter of the safe deposit box will need to apply for a "Certificate for Necessity of Inspection of Bank Deposit Box" (certificate for inspection) from the Home Affairs Department. For more information regarding the application procedure, please refer to the website of the Home Affairs Department. On issue of the certificate of inspection, the holder of the certificate for inspection ("the Holder") will need to make an appointment with the Secretary for Home Affairs for the inspection of the deceased's safe deposit box. Such inspection must be carried out in the presence of a bank staff member and two public officers authorized by the Secretary for Home Affairs. If the safe deposit box is rented jointly with another renter, the surviving renter (if he/she is not the Holder) will need to be present at the inspection. If a Will is found, the Holder (if he/she is the named executor) can take the Will away after making a copy of the same and placing the copy in the safe deposit box. Taking inventory The inventory will be prepared by the Holder, with assistance from the public officers whenever necessary. The inventory will be verified by the public officers present at the inspection, and a copy of the inventory will be kept by the bank concerned and the Secretary for Home Affairs for a period of six years. The original inventory will be kept by the Holder. If a Will is found in the safe deposit box and: i) the Holder is not the executor named in the Will, or ii) there is no executor appointed in the Will and the Holder is not the surviving renter, the Holder is not permitted to remove the Will or prepare the inventory. The safe box will then be closed or sealed immediately by the bank staff after a copy of the Will is made and handed over to the public officers present. The copy of the Will will be kept by the Secretary for Home Affairs for six years. 2. WHEN AND HOW CAN THE EXECUTOR/ADMINISTRATOR REMOVE THE ITEMS INSIDE THE DECEASED'S SAFE DEPOSIT BOX AT A BANK? 2. WHEN AND HOW CAN THE EXECUTOR/ADMINISTRATOR REMOVE THE ITEMS INSIDE THE DECEASED'S SAFE DEPOSIT BOX AT A BANK? Solely rented safe deposit box After the taking of inventory, any removal of documents from the box before a Grant of Representation must be authorised by the Home

Affairs Department (details can be found on the website of the Home Affairs Department – Estate Beneficiaries Support Unit) . Generally speaking, only documents relevant to an application for a Grant of Representation, or personal items relating to a person other than the deceased and urgently required by that person, can be removed. Documents and articles of value will not generally be permitted to be removed. Jointly rented safe deposit box If the jointly rented safe deposit box has a survivorship agreement with the bank, after the inventory has been prepared, the surviving renter (if he is the executor/administrator or has obtained the written consent of that executor/administrator) can apply to the Home Affairs Department for authorisation to remove the contents of the safe deposit box. However, the surviving renter will be able to remove all contents of the safe deposit box without authorisation from the Home Affairs Department after 12 month from the date of death of the deceased.

3. HOW TO COLLECT AND TO TAKE INVENTORY OF THE DECEASED'S PERSONAL BELONGINGS IF THEY ARE NOT KEPT INSIDE THE DECEASED'S SAFE DEPOSIT BOX AT THE BANK? 3. HOW TO COLLECT AND TO TAKE INVENTORY OF THE DECEASED'S PERSONAL BELONGINGS IF THEY ARE NOT KEPT INSIDE THE DECEASED'S SAFE DEPOSIT BOX AT THE BANK? It is for the executor named in the Will or the intended administrator to take that inventory. The way to take inventory is to physically search and ascertain those personal belongings of the deceased. That inventory will then be filed in the Schedule of assets and liabilities with the Probate Registry.

DISTRIBUTION OF ESTATE TO THE RELEVANT PARTIES V. DISTRIBUTION OF ESTATE TO THE RELEVANT PARTIES Before distribution of the estate can be made, the executor/administrator needs to arrange payment or make provisions for the payment of the deceased's debts, funeral and other expenses in relation to the estate. Debts Debts can be incurred both before and after the death of the deceased. For example, the deceased might have used his/her credit card to purchase goods and died before the balance becomes due. An example of a debt incurred after death is the management fee of a property that is owned by the deceased. All debts have to be ascertained and paid, or provisions for payment must be made, before the estate is distributed to the beneficiaries. Taxes Before the abolition of estate duty, if the net value of the estate was over \$7,500,000, estate duty was payable. The estate will also need to provide for Salaries Tax, Profits Tax and Property Tax due by the deceased up to the date of his/her death. Other Expenses Other expenses to be paid out of the estate, apart from funeral expenses, include: the expenses incurred for obtaining legal advice, the costs and expenses incurred in the application for a Grant of Representation, and the Court fee.

2. THE ALLOCATION OF ESTATE HAS BEEN CLEARLY SET OUT IN A WILL. CAN THIS PREVENT ALL THE DISPUTES WHICH MAY COME OUT DURING THE DISTRIBUTION PROCESS? 2. THE ALLOCATION OF ESTATE HAS BEEN CLEARLY SET OUT IN A WILL. CAN THIS PREVENT ALL THE DISPUTES WHICH MAY COME OUT DURING THE DISTRIBUTION PROCESS? One of the main functions of a Will is to provide instructions for distributing the estate according to the intention of the testator (person making the Will, i.e. the deceased). Even if the intention of the testator is clearly stated in the Will, it may still be challenged. For example, someone who could be a beneficiary under intestacy, or who is not satisfied with his share of the estate under the deceased's Will, could claim that the Will is invalid on the basis that the deceased did not have the mental capacity to make the Will, or was unduly influenced by a third party in making the Will. Any aggrieved party may bring legal action against the executor to contest the validity of the deceased's Will. A man could have made a Will that left everything to his legitimate children with no provision for his surviving wife or illegitimate child whom he had been maintaining before his death. Under such circumstances, the surviving spouse could make a claim for a share of the estate, and the illegitimate child could claim for maintenance to be provided for him out of the estate pursuant to the Inheritance (Provision for Family and Dependants) Ordinance. Whilst the law in Hong Kong confers absolute testamentary freedom on individuals, it also recognizes the need for an individual to make financial provisions from his estate for his spouse and those who had been dependent on him financially during his lifetime. For more details on the matter, please refer to the relevant question and answer. To a lesser extent, other practical difficulties may arise. An old lady stated in her Will that her diamond necklace is to be left to her granddaughter. This necklace could not be

found in the old lady's home or safe deposit box after her death. Usually the executor is a member of the family or a close and trusted friend of the whole family. How can this executor balance his/her duty to make the requisite inquiries on behalf of the granddaughter and yet maintain a harmonious relationship with the deceased's other family members? An executor who does not wish to prove the Will personally for whatever reason (e.g. awkward family relationships or time constraints), could appoint a Hong Kong registered trust company to take out a Grant of Representation on his/her behalf, subject to the consent of the beneficiaries of the Will.

1. IF THE CREDITORS FAIL TO GET BACK THE MONEY FROM THE EXECUTOR/ADMINISTRATOR/BENEFICIARY AFTER THE DEATH OF A PERSON (I.E. THE DEBTOR), HOW CAN THE CREDITORS PROTECT THEMSELVES AND CHASE FOR REPAYMENT?

1. IF THE CREDITORS FAIL TO GET BACK THE MONEY FROM THE EXECUTOR/ADMINISTRATOR/BENEFICIARY AFTER THE DEATH OF A PERSON (I.E. THE DEBTOR), HOW CAN THE CREDITORS PROTECT THEMSELVES AND CHASE FOR REPAYMENT? The creditors should go after the estate's legal representatives (i.e. the executor or the administrator of the deceased's estate).

There are several steps the creditors could take to protect themselves: First of all, they should conduct a probate search at the Probate Registry at the cost of \$18. This could help ascertain whether there is a current application for a Grant of Representation or whether a Grant has been issued. If a Grant has been issued, the creditors can apply to the Court for a copy of the Grant (which contains the particulars of the executor/ administrator). The creditors can contact the executor/ administrator, and they may take legal actions to chase for the debts. If no Grant has been issued, the creditors can file a Caveat (similar to a caution/warning notice, which costs \$72 and lasts for 6 months) at the Probate Registry to ensure that the Caveat will have to be dealt with before the Grant can be issued. You are advised to consult a solicitor for how to take appropriate legal actions to claim repayment.

3. IF THE DECEASED MADE NO WILL, HOW CAN THE RELEVANT ESTATE BE DISTRIBUTED?

3. IF THE DECEASED MADE NO WILL, HOW CAN THE RELEVANT ESTATE BE DISTRIBUTED? The order of priority under the law relating to the entitlement of the deceased's estate is similar to the order relating to the eligibility to apply for a Grant of Letters of Administration (please refer to the relevant question and answer). In reality, it often happens that 2 or more parties who are entitled to the assets survive and may claim the deceased's estate together. The followings are some of the usual scenarios. For details, please refer to section 4 of the Intestates' Estates Ordinance.

(A) The deceased only leaves a spouse If the deceased leaves a spouse, but leaves no issue, parent, brother or sister of the whole blood (the same parents), or issue of a brother or sister of the whole blood, then the surviving husband or wife is absolutely entitled to the residuary estate (i.e. the whole sum after deduction of the deceased's debts, taxes, funeral, legal and administration expenses from the estate). (Note: "Issue" has a special meaning in the succession law which is different from the daily usage. It means any descendants of a person.)

(B) The deceased leaves a spouse and issue If the deceased leaves a spouse and issue, whether or not survived by his/her parents or siblings, the surviving spouse could take the following first: all of the deceased's personal chattels; a sum of \$500,000 from the residuary estate. After the aforesaid \$500,000 is paid out, if there is any remaining sum, it would be divided in half. One half will be distributed to the surviving spouse and the other half will be divided equally amongst the child/children of the deceased.

(C) The deceased leaves a spouse, parents and siblings, but no issue If the deceased has issue, the deceased's parents, brothers and sisters cannot obtain anything even if the deceased's spouse has predeceased (die before) the deceased. Only if the deceased has no issue can the parents and siblings have a share in the deceased's estate, even if his/her spouse survives. The surviving spouse could take the following first: all of the deceased's personal chattels; a sum of \$1,000,000 from the residuary estate. After the aforesaid \$1,000,000 is paid out, if there is any remaining sum, it would be divided in half. One half will be distributed to the surviving spouse and the other half will be distributed to the surviving parent(s). On the other hand, if one or both parents survive, the siblings cannot obtain a share of the deceased's estate. They will only be entitled to part of the estate (after deduction of the spouse's entitlement) if the deceased leaves no issue and no parents.

(D) The share of "illegitimate children" An



illegitimate child means a child whose natural parents are not married in a manner that the laws of Hong Kong recognize. For details of legal marriage, please go to the topic of "Matrimonial Matters". Before the 19th June 1993, illegitimate children were not entitled to succeed to their deceased father's estate if their father died intestate (without a Will). Illegitimate children could succeed to their mother's estate on her intestacy, but only when there were no surviving legitimate children. If the deceased parent had a Will and he gave "his children" a gift or a sum of money to share, the illegitimate children were not entitled to share in the gift. However, this position has been changed by the Parent and Child Ordinance. Illegitimate children can now enjoy the same succession rights as legitimate ones if their parents die after 19th June 1993. One point to note is that for those adopted children (i.e. they have been adopted by persons through a legal adoption process), they have the same status as the natural children. In other words, they shall be treated as the children of the adopter but not the children of any other persons. For more information regarding the distribution of estate, please go to the "case illustration".

CASE ILLUSTRATION VI. CASE ILLUSTRATION Scenario: Mr. A and Ms. B were a couple but Mr. A died recently. Since Mr. A has left a considerable amount of assets, his family members have to tackle the following problems in relation to the distribution of his estate.

Question 1: Must the matrimonial home (the main residence of Mr. A and Ms. B) be sold and distributed as part of the estate in case Mr. A did not make a Will? Answer 1 Question 2: Can Ms. B choose to keep the matrimonial home if Mr. A had made a Will? Answer 2 Question 3: Suppose Mr. A's sons have also died, but he has a surviving mother and siblings in addition to his surviving wife (Ms. B), how much could each party take from the estate? Answer 3 Question 4: Suddenly a man appears and proves that he is the "secret child" (illegitimate child) of Mr. A. Can he get a share from Mr. A's estate? Answer 4 Question 5: Further to the question of illegitimate children, would the situation be different if the deceased has made a Will? Answer 5

Answer 1 Not necessarily. The surviving spouse (Ms. B) has a right to acquire the matrimonial home by law. She can choose to take the matrimonial home in satisfaction of her entitlement in the estate. For example, the couple lived in a matrimonial home valued at \$1,000,000, held solely in Mr. A's name. Mr. A died without making a Will and was survived by Ms. B and two sons. He leaves an estate valued at \$1,450,000 (inclusive of the matrimonial home but excluding his personal chattels to be fully taken by his wife). Ignoring the funeral and administration expenses, Ms. B is entitled to a statutory legacy of \$500,000 plus one-half of the residue estate  $[(\$1,450,000 - \$500,000) \div 2]$  yielding a total of \$975,000. Mr. A's two sons would equally share the other half of the residue estate, i.e. \$475,000. Ms. B can claim the matrimonial home by using her \$975,000 (i.e. the flat is not sold and she does not take this \$975,000) and paying the balance \$25,000 to the estate by her own means. The estate to be taken by the two sons remains at the value of \$475,000. Note that in intestate cases (no Will is found or the Will has been revoked), any money or property given by the deceased by way of an advancement, or on the marriage of his children before his death, has to be taken into account and be deducted from that child's entitlement under the law of intestacy, unless there is any contrary intention expressed or appearing from the circumstances of the case.

Answer 2 There must be a specific gift of the matrimonial home to the surviving spouse in the deceased's Will. There is no law enabling the surviving spouse to choose to keep the matrimonial home in satisfaction of her entitlement under the Will. A further point to note is that there is no law in Hong Kong enabling the surviving spouse to take the matrimonial home without any payment or contribution to the deceased's estate (unless there is a Will which specifies that the surviving spouse can take it freely).

Answer 3 If Mr. A made no Will for his estate of \$1,450,000, then his wife Ms. B could firstly obtain a statutory legacy of \$1,000,000. Note that the amount of statutory legacy the surviving wife is entitled to in this situation is different from the case where the deceased has descendants (in which case the statutory legacy to the spouse is only \$500,000). Ignoring the funeral and administration expenses, the distribution of estate to all relevant parties is as follows: Ms. B is entitled to  $\$1,000,000 + (\$450,000 \div 2) = \$1,225,000$ ; Old Mrs. A is entitled to \$225,000; Mr. A's siblings are entitled to nothing (they will only have a

share if Mr. A leaves no descendant and no parent). Answer 4 An illegitimate child means a child whose natural parents are not married in the manner which the laws of Hong Kong recognize. For details of legal marriage, please go to the topic of "Matrimonial Matters". Under the Parent and Child Ordinance, illegitimate children enjoy the same succession rights as legitimate ones if their parents die after 19 th June 1993 . Suppose Mr. A has one surviving wife (Ms. B), two legitimate sons and one "illegitimate son". His estate is valued at \$1,450,000. Ignoring the funeral and administration expenses, the distribution of estate to all relevant parties would be as follows: Ms. B is entitled to  $\$500,000 + [(\$1,450,000 - \$500,000) \div 2] = \$975,000$ ; the two legitimate sons are entitled to  $(\$1,450,000 - \$975,000) \div 3 = \$158,333$  each; the illegitimate son is entitled to  $(\$1,450,000 - \$975,000) \div 3 = \$158,333$ . Answer 5 For situations with Wills in relation to illegitimate children, the position can be summarized as follows: In deciding whether or not an illegitimate child is entitled to the estate, the first requirement is that the Will must have been executed on or after 19 th June 1993 . If the Will was executed before 19 th June 1993 , illegitimate children are not automatically included. The cut off date is not determined by the date of death. Secondly, it will depend on the drafting of the Will. For Wills executed after 19 th June 1993 , if the words used are "to my children", illegitimate children will be included as well. If a person does not wish to benefit any illegitimate children, he should name his legitimate children by names specifically in his Will. 5. HOW DOES ONE AVOID INTERMEDDLING OF THE ESTATE (HANDLING THE ESTATE WITHOUT PERMISSION) AFTER ABOLITION OF THE ESTATE DUTY? 5. HOW DOES ONE AVOID INTERMEDDLING OF THE ESTATE (HANDLING THE ESTATE WITHOUT PERMISSION) AFTER ABOLITION OF THE ESTATE DUTY? Before the abolition of estate duty, as the Applicant needs to obtain estate duty clearance before filing the application for a Grant with the Probate Registry, the Inland Revenue Department acted as the gate keeper to prevent possible intermeddling of the deceased's estate. After the abolition of estate duty, provisions have been made in the laws of Hong Kong to safeguard against intermeddling of an estate. These provisions will be similar to those used in the estate duty era: Intermeddling of the deceased's estate is an offence; A person would be liable to a fine of \$10,000 plus and additional penalty equal to the value of the assets intermeddled if: that person intermeddles the estate or the income therefrom and either fails to file an application for summary administration (for cases where the value of the estate does not exceed \$150,000) or fails to file an application for a Grant of Probate or Letters of Administration within 12 months from the death of the deceased; OR that person intermeddles with the estate after the 12-month's period without a Grant of Probate or Letters of Administration or summary administration. For more information on this matter, you can go to the Home Affairs Bureau's webpage.