

Hong Kong

International Estate Planning Guide

IBA Private Client Tax Committee

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Updated 12/2025

*The authors would like to thank Chi Yan Ho, Sharon Yuen, Abbey Chung, Chester Chia, Carmen Chui and Jack Wan for their contributions.

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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 the 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 the 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 the region's 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) ('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 has been abolished since 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 communities in Hong Kong and beyond.

I. Wills and disability planning documents

A. Will formalities

A person may, by will, dispose of all property to which they are beneficially entitled at the time of their death and which, on their death, devolves on their 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 they have no surviving spouse, children or parents; has special plans for their assets other than inheritance by their own family members; or foresees that there might be disputes on the distribution of their assets after their 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) ('IEO') (see II.B, *Intestate succession and forced heirship*).

Pursuant to section 5(1) of the Wills Ordinance (Cap 30) ('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 their presence and by their direction;
- it appears that the testator intended by their 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 their 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.

To be an eligible witness, the person:

- must be aged 18 years or above;
- must have full mental capacity; and

- cannot be any person who will be given any property (ie, the beneficiary) under the will or be the spouse of any such person as the gift intended for them will be forfeited if they are witnesses.

However, under special circumstances, there are exceptions to the above requirements, such as ‘privileged wills’ (section 6 of WO), 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 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.

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 I.C, *Enforceability of foreign wills*).

B. Mental capacity of the testator

The testator must have testamentary capacity at the time of making the will, as well as not be under undue influence.

The Hong Kong Court of Final Appeal in the *Re Estate of Au Kong Tim* case (*Au Wing Lun also known as Au Wing Lun William v Choy Po Chun, Au Chadwick* [2018] HKCU 4382) provided guidance on testamentary capacity in will drafting. The court dismissed an application for leave to appeal from one of the sons of the testator, and reaffirmed the Court of Appeal’s decision that certain steps should have been taken by a solicitor when assisting with the preparation of a will, especially when the testator is elderly and infirm, and which were not taken in this case.

The court said it is common ground that the approach to determining testamentary capacity is classically laid down in *Banks v Goodfellow* (1870) LR 5 QB 549, as requiring an inquiry into:

- whether the testator understood the nature of the act of making a will and its effects;
- whether they understood the extent of the property of which they were disposing; and
- whether they were able to comprehend and appreciate the claims to which they ought to give effect.

In approaching these questions, solicitors should follow well-established guidelines that can be found, first, in a checklist set out in *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* published by the British Medical Association and the Law Society. Second, solicitors should follow ‘the golden rule’ referred to by Templeman J in *Kenward v Adams* [1975] CLY 3591, that when a solicitor draws up a will for an aged or seriously ill testator, the will should be witnessed or approved by a medical practitioner who ought to record their examination of the testator and their findings, and that an earlier will should be examined and any proposed alterations should be discussed with the testator.

In addition, the Court of Appeal in the *Au Kong Tim* case further stated that solicitors should avoid treating the will-making process as merely a formal act. They should meet personally with the testator and in the appointment, subject to the circumstances of each case, make the following enquiries:

1. the age of the testator;
2. their health condition;
3. whether they have a surviving spouse;
4. the number of children and grandchildren they have;
5. whether there is someone other than their immediate family member dependent on them for support;
6. the beneficiaries they would like to provide for in their will;
7. their properties;
8. whether they have made a previous will;
9. whether they understand that the new will will revoke the previous will; and
10. whether they understand the difference between the new and the previous will.

Even if a medical practitioner is engaged to assess testamentary capacity, solicitors should still independently make a proper assessment of the testator's mental capacity. They should apply the checklist and golden rule as 'common sense' requires.

Commentaries have also noted that solicitors should ensure that the medical practitioner possesses the necessary expertise to conduct the assessment in line with the principles established in *Banks v Goodfellow*.

C. Enforceability of foreign wills and resealing of foreign grants

Pursuant to section 24 of WO, a foreign will shall be treated as properly executed if its execution conforms 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 their habitual residence, or in a state of which, at either of those times, the testator was a national.

Where a conflict of laws situation arises, and a foreign law fails 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.

Pursuant to section 49 and Schedule 2 of 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 a 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.

D. Other tools for succession planning

Some common will substitutes include:

1. JOINT TENANCY

A joint tenancy allows the interest of a joint tenant, upon their death, to automatically pass to the surviving joint tenant(s). (See II.D, *Tenancies, survivorship accounts and payable on death accounts*).

2. WILL TRUST/TESTAMENTARY TRUST

A will trust, also known as 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. Typically, the will would appoint executors, 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.

A will trust is commonly used by the testator when there are minor beneficiaries or the testator would like to delay distribution of assets for other reasons, for example, to create a life interest for a beneficiary. The will trust will usually specify when and how assets can be distributed to the beneficiaries, such as when the beneficiaries reach a specified age so that more control over asset distribution and the protection of assets can be achieved. It may also provide power for the trustees to use income and/or capital of the will trust for the beneficiaries before the specified date or event for the distribution of assets for certain stated purposes, such as education, healthcare or basic living expenses while protecting their inheritance.

3. STANDBY TRUST

A 'standby trust' (a commonly used description that is not actually a term of art or law) can be created during the lifetime of the testator. Such a trust would be validly created by the testator as the settlor, but typically with only limited initial assets; thereafter, it exists in standby or dormant mode and will become more substantially funded when the testator so decides, when specified trigger events occur or upon their death pursuant to their will.

In an estate planning scenario, a standby trust allows the settlor to control the terms of the trust while not parting with their assets during their 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.

E. Powers of attorney, directives and similar disability documents

In Hong Kong, a person can make an enduring power of attorney to provide for a time when they are no longer mentally capable to decide their own affairs. A person can also make an advance medical 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 arrangements are different. A guardian appointed by the 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:

General power of attorney

A general power of attorney allows a donor (ie, the person who wishes to give their 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) ('POAO'), a donor can execute a general power of attorney in the specified form set out in the Schedule of POAO, or to the like effect but expressed to be made under POAO.

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

Enduring power of attorney (EPA)

An EPA allows a donor, while they are still mentally capable, to appoint an attorney or attorneys to take care of the donor's property or financial matters in the event that they subsequently become 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 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:

- they are suffering from mental disorder or mental handicap and: (1) they are unable to understand the effect of the power of attorney; or (2) they are unable by reason of their mental disorder or mental handicap to make a decision to grant a power of attorney; or
- they are unable to communicate, to any other person who has made a reasonable effort to understand them, 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) (MHO) as follows:

- Mental disorder means:
 - mental illness;
 - a state of arrested or incomplete development of mind that amounts to a significant impairment of intelligence and social functioning that is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned;
 - psychopathic disorder; or
 - any other disorder or disability of mind that 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 their 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);
- 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 their financial affairs. They cannot give a general power in relation to all of their property and financial affairs.

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

A donor must sign the EPA in front of a registered medical practitioner and a solicitor. Specifically, the EPA must be signed by the donor either:

- in the presence of the solicitor and the registered medical practitioner at the same time; or
- in the presence of the solicitor at any time not more than 28 days after it is signed 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, they may instruct another person to sign the EPA on their behalf. That person must sign the EPA in the presence of the donor, the registered medical practitioner and the solicitor.

The attorney(s) must have attained the age of 18 years and must not be bankrupt nor mentally incapable. A trust corporation can be an attorney.

A donor can revoke an EPA when the donor is mentally capable, or if the donor recovers from their mental incapacity, by making an application to the court for the revocation and when the court makes an order confirming such revocation.

Currently, Hong Kong law does not recognise EPAs or other forms of enduring or lasting powers of attorney 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 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 their 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 MHO (see I.E.3, *Legal guardianship*).

The Hong Kong EPA regime is considered by many as rather dated as, among other restrictions, it gives authority to the attorney to deal with property and financial affairs only and not health and welfare decisions. 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 the property and financial affairs of the donors. However, there have not been any updates since the paper.

2. ADVANCE MEDICAL DIRECTIVE (AMD)

An AMD for health care is a statement, usually in writing, in which a person indicates, when mentally competent, the form of health care they would like to receive at a future time when they are no longer competent. It recognises an individual's right to self-determination and provides the person's family members with a clear indication of the person's wishes. It also helps doctors to fulfil their professional responsibility to patients, particularly when faced with difficult decisions about withholding or withdrawing life-sustaining treatments in the patient's best interests.

Until recently, Hong Kong did not have any specific laws regulating AMDs. To address practical challenges and legal uncertainties faced by both patients and healthcare providers, the Legislative Council of Hong Kong passed the Advance Decision on Life-Sustaining Treatment Ordinance on 20 November 2024 ('ADLSTO'), which will come into effect in May 2026. The ADLSTO provides a legislative framework for creating and revoking AMDs, thereby safeguarding patients, medical professionals and rescuers.

Under the ADLSTO, any person aged 18 years or above who is mentally capable of making decisions about life-sustaining treatment may execute an AMD to specify their refusal of life-sustaining treatment under specified pre-conditions. However, it is important to note individuals cannot, through an AMD, refuse basic or palliative care, nor can they request the administration or prescription of substances intended to end their life.

AMDs must be made in writing, signed by the maker and witnessed by at least two witnesses, with one being a registered medical practitioner. A scanned and digitised copy of the written form can be stored in a designated electronic system as proof of validity. AMDs may be revoked verbally or in writing or by destroying the directive, provided the maker is mentally capable of doing so.

The ADLSTO also provides the AMD model form, which includes the following features:

- declaration in writing of the maker that they are an adult, makes the directive out of their own free will and understands the nature thereof;
- the registered medical practitioner also needs to declare that they are not an interested person to the maker and they are satisfied that the directive maker was mentally capable of deciding on a life-sustaining treatment at the time when they sign the AMD; and
- there is a separate section in which the maker can revoke the AMD in writing by signing that section.

AMDs that do not adopt the model forms are still effective as long as they comply with the requirements under the ADLSTO.

A related instrument is the Do Not Attempt Cardiopulmonary Resuscitation (DNACPR) order. A DNACPR order is an instrument that directs medical professionals not to perform cardiopulmonary resuscitation on a person experiencing cardiopulmonary arrest. The ADLSTO provides for three categories of DNACPR orders: those based on AMDs; those for a mentally incapable adult; and those for a minor.

A DNACPR order must be signed by two registered medical practitioners, one of whom must be a specialist, using a statutory form specified under the ADLSTO. DNACPR orders can be revoked by the maker through acts such as destroying the order, provided they are mentally capable of making this decision.

The ADLSTO recognises the necessity for medical professionals and rescuers to make quick decisions during emergencies. To address this, it ensures that they are not held legally liable for administering or withholding life-sustaining treatment, provided the specified conditions

are met. This legal protection is designed to cover both medical professionals and rescuers, allowing them to act decisively without fear of legal repercussions.

3. LEGAL GUARDIANSHIP

MHO empowers an independent quasi-judicial Guardianship Board to conduct hearings to make guardianship orders for people aged 18 years 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, being either 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, a registered social worker, a registered medical practitioner or a public officer in the Social Welfare Department can make such an application. An application can be made using 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 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: (1) dementia/Alzheimer's disease/major cognitive impairment; (2) mental handicap; (3) mental illness; or (4) acquired brain damage through an accident or illness, such as stroke.

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

- that the person concerned has a mental disorder or mental handicap of a nature or degree that warrants their reception into guardianship;
- that the mental disorder or handicap limits them in making reasonable decisions in respect of all or a substantial proportion of the matters that relate to their personal circumstances;
- that their 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
- that it is in the interests of their welfare or the protection of others that they should be so received.

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

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

A social worker from 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 the monthly accounts and all relevant information).

II. Estate administration

A. Overview of administration procedures

A grant of administration or grant of representation in Hong Kong includes probate, letters of administration or letters of administration (with the 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 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 to administer the estate of the deceased is vested in the executor(s) named in that will. However, the executor is still required to obtain a Grant of Probate before actually exercising any of their powers in the administration of the deceased's estate in Hong Kong.

If no executor is appointed in the will or if no executor is able or willing to act for whatever reasons, Rule 19 of the Non-Contentious Probate Rules (Cap 10A) ('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 the will annexed).

2. IF THE DECEASED DIES INTESTATE, ETC

If the deceased dies without leaving any will, the power for administering the estate of the deceased is vested in an administrator authorised by the Probate Registry of High Court and the administrator derives power from the letters of administration. Therefore, they can only exercise their powers after obtaining a Grant of Letters of Administration.

Rule 21 of 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 powers and responsibilities of the personal representative (which refers to both executors and administrators) include:

- ascertaining and gathering information on the estate of the deceased;

- obtaining a grant of representation;
- paying off tax, debts, testamentary, administration and funeral expenses out of the deceased's estate (see IV, *Taxation*); and
- distributing the remaining assets to those entitled under the will or on intestacy.

Any person with a potential interest in the estate may challenge a will, the executors or the administrators on a number of grounds. These include:

- the will was not executed properly;
- the testator lacked testamentary capacity;
- the testator did not understand the contents of the will;
- the testator was under undue influence when he 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) ('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 their death.

This is subject to the deceased being domiciled in Hong Kong at the time of death or having been ordinarily resident in Hong Kong for three years immediately before their 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 (section 6 of IPFDO).

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 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 their parents or siblings, the surviving spouse would take the following first:

- all of the deceased's personal chattels; and
- 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 has 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 no spouse, issue or parents: the 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; and
 5. on statutory trusts for uncles and aunts who are half siblings of the parent of the deceased.

In addition to section 4, Schedule 2 of the IEO provides that when the deceased leaves a premise in which the surviving spouse was residing at the time of death, the surviving spouse has the right to ask for that premise, which is commonly known as matrimonial property, to be given to them in satisfaction of their share under intestacy. Furthermore, if the matrimonial property is worth more than their share under intestacy, they may pay the shortfall to the estate in return for the whole of the matrimonial property.

In default of any person coming forward to claim an interest in the estate, subject to IPFDO, the estate belongs to the government as *bona vacantia*.

6. INHERITANCE BY MINORS

Under the IEO, a child of the deceased will only have a vested interest in the estate upon reaching 18 years old or if they are married. Therefore, generally, the administrators will hold the estate on behalf of the child with the power to provide *inter vivos* advancement. The administrator holds the estate in such a case upon a statutory trust (see more on this below).

Adopted children enjoy the same status as natural born children under IEO (section 2), and illegitimate children have the same inheritance rights as legitimate children if their parents died after 19 June 1993 (Parent and Child Ordinance).

7. 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 general testamentary freedom in Hong Kong with no forced heirship regime.

8. 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 specifically mentioned, reference must be made to section 5 of IEO for the terms of the trusts on which the estate is held. Statutory trusts apply to issue, brothers and sisters, grandparents, uncles and aunts who are alive at the time of the death of the deceased. Noteworthy features include: a beneficiary will only have a vested interest upon reaching 18 years old or becoming married; the first generation will take first, per capita, with substitutional provision for the second and subsequent generations, *per stirpes*, where their parent predeceases the deceased, or fails to attain a vested interest.

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.

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 their spouse in a marriage. Note that a financially dependent spouse could make a claim under the IPFDO as explained in Part A above.

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, their share in the property passes by succession in accordance with their will or the rules on intestacy.

There are no specific legal concepts for 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 the true intention of the parties still needs 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 the parties' intention. The court further noted that the clause is often

concealed in small print in some of the many account opening documents that the account holders had to sign when opening the account. Hence, the court concluded that 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 which are charitable in nature. A charitable grant-making foundation in Hong Kong may choose to be a trust or a company limited by guarantee. We further discuss charitable trusts under *Types of trust* below.

Other than wills, and increasingly the use of insurance policies (which will not be covered in this chapter), trusts remain a popular structure for succession planning.

With the new profits tax exemption regime for eligible family-owned investment holding vehicles and family-owned special purpose entities in Hong Kong, introduced in May 2023, families can now also structure their wealth with a combination of trusts and companies (and also philanthropic vehicles) with total assets of at least HK\$240m enjoying more tax certainties.

Below, we go through the basic considerations for using a trust structure in Hong Kong.

A. Common techniques

In Hong Kong, trusts are recognised, and their establishment, management and administration are governed by both the statutory framework and 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 for holding and administering the trust property, and distributing the income or capital of the trust property to the beneficiaries. The legal ownership of the trust property is vested in the trustees so that the trustees can 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 III.B.1, *Trustees' fiduciary duties*).

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

2. TYPES OF TRUSTS

There are different types of trusts 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

(Cap 257), Hong Kong abolished the law or rule against perpetuities for any trust established after 1 December 2013. Amendments of the TO further expressly permit a settlor to reserve to himself/herself investment and asset management powers over the trust fund during their lifetime and while they have mental capacity, and such reservation will not invalidate the trust.

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.

In contrast 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 exclusively charitable purposes. If the charitable trust founder or trustee decides to apply for tax-exempt status pursuant to section 88 of Inland Revenue Ordinance (Cap 112) ('IRO'), the trust deed would have to be approved by the Inland Revenue Department (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 include restrictions on how income and property can be distributed. The charitable trust will also be subject to ongoing monitoring by 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 other purpose trusts. Families that wish to use a purpose trust in their non-charitable Hong Kong structures would have to consider choosing a suitable foreign governing law.

3. FEATURES OF TRUSTS

In Hong Kong, trusts have been commonly used to preserve and grow family wealth, or for charitable purposes or 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 where the beneficiaries are incapacitated, minors or are spendthrifts. For instance, the settlor may indicate their wishes that the beneficiaries may only obtain a certain sum upon reaching a certain mature age, which can prevent the assets from being vested absolutely in the beneficiaries when they are still young and may dissipate family wealth 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 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 are 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 a trust or declare the trust to be void (eg, due to undue influence, lack of capacity, unfair preference or sham);
- where the transfer may be considered a transaction at an undervalue or a transfer of unfair preference under Bankruptcy Ordinance (Cap 6);

- where the settlor is entitled to require distributions from the trust (eg, where the settlor has reserved the power to revoke the trust);
- where the settlor is the sole realistic beneficiary of a supposedly discretionary trust; and
- where 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 a trustee owes fiduciary duties towards the beneficiaries of a trust. Such duties include:

- *No-conflict duty*: The fiduciary should not enter into engagements in which they have or can have a personal interest conflicting with the interests of the principal.
- *No-profit duty*: The fiduciary should not obtain a benefit either for themselves or for a third party by using an opportunity or knowledge that they obtained by virtue of their position as a fiduciary without the beneficiary's fully informed consent.
- *Duty of good faith*: The fiduciary must act honestly and loyally in performing the trust, avoiding any conduct that would undermine the trust relationship or the confidence reposed in them.
- The fiduciary must exercise powers and discretions for the proper purposes of the trust and in the best interests of all beneficiaries, present and future. Trustees must act impartially among all beneficiaries, not one or some of them.

The rationale behind these rules is that the trustee acting as the fiduciary of the beneficiaries should not be using their fiduciary position to advance anybody's interests other than those of the beneficiaries as a whole. For instance, in the absence of express provisions in the trust instrument that 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 themselves as beneficiaries 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 would be 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 their role of trustee and not due to their 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 themselves 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 that is under their 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 their judgement and for the performance of their duty;
- duty to act fairly and equally 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 render them 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 their hands, which cannot be applied for the other purposes of the trust.

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 when dealing 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 a protector/investment committee so that the trustees will need to seek consent or direction (as the case may be) from, or at least notify, 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 themselves 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 of association of the company, common law and also under the Companies Ordinance (Cap 622) (CO). For instance, these are the general principles of director's duties in Hong Kong:

- 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 (which became a statutory duty since the new CO came into effect in 2014);
- 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 an advantage from the use of position as a director;
- duty not to make unauthorised use of the 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 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

We have set out below basic Hong Kong tax considerations in relation to succession planning but also in general for an individual or family with Hong Kong ties.

A. Gift, estate and inheritance taxes

In general, Hong Kong does not have inheritance tax or gift tax. It abolished estate duty for any deaths occurring on or after 11 February 2006.

There is also no stamp duty on any transfer from an estate to a beneficiary. We elaborate on this under *Stamp duty*.

B. 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:

- they ordinarily reside in Hong Kong; or
- they stay 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 residing 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 that 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 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, and 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 take place, in addition to the location in which the trustee physically resides or is incorporated.

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 they are liable to salaries tax in Hong Kong. Only income sourced in Hong Kong would be taxable, whereas a person's overseas income generally would not be taxable in Hong Kong.

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 at the same rate as any resident of Hong Kong.

2. PROFITS TAX

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

- they carry on a trade, profession or business;
- the trade, profession or business must be carried out in Hong Kong; and
- the profits arise in or are derived from such trade, profession or business in Hong Kong.

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. Only profits that 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.

Please note that the definition of 'person' also includes a 'trustee', meaning 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 year of assessment 2018/19 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.

After the passage of the Inland Revenue (Amendment) (Taxation on Foreign-sourced Income) Ordinance 2022 (the '2022 Amendment') and the Inland Revenue (Amendment) (Taxation on Foreign-sourced Disposal Gains) Ordinance 2023 (the '2023 Amendment'), certain types of foreign-sourced income received (or deemed to be received in Hong Kong) by entities within a multinational enterprise group conducting business in Hong Kong are now considered Hong Kong-source income and are thus taxable:

- *Effective from 1 January 2023:* interest, dividends, intellectual property income and equity interest disposal gain.
- *Effective from 1 January 2024:* disposal gain other than equity interest disposal gain.

Such income is taxable if it satisfies the relevant criteria, unless the entity meets the economic substance requirements or qualifies for another specified exemption.

3. PROPERTY TAX

For property tax, an individual can be subject to property tax if they derive rental income from properties located in Hong Kong. The property tax rate for the year of assessment 2008/09 onwards is 15 per cent of the net assessable value of such properties.

4. CAPITAL GAINS TAX

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).

5. STAMP DUTY

Pursuant to the Stamp Duty Ordinance (Cap 117) ('SDO'), stamp duty is chargeable on the sale or transfer of real estate located in Hong Kong or the sale or transfer of shares of a Hong Kong company or a company listed in Hong Kong. The stamp duty rates differ depending on the type of and value of the asset (and not according to the capital gain).

In relation to the purchase or transfer of Hong Kong real estate, Hong Kong stamp duty is chargeable at an *ad valorem* rate and computed by applying the relevant rate to the stated consideration or market value of the property (whichever is higher). Effective from 28 February 2024, *ad valorem* rate is charged at a progressive rate ranging from HK\$100 for property consideration of up to HK\$3m, to 4.25 per cent for property consideration exceeding HK\$20m. The special stamp duty on the resale of residential property in Hong Kong within 24 months from the date of acquisition and the buyer's stamp duty on the acquisition of Hong Kong residential properties by a person other than a Hong Kong permanent resident have been reduced to zero per cent.

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 purchasers and sellers (as each of the purchasers and the sellers 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. Although 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 stamp duty.

A seller may also be subject to profits tax in Hong Kong, regardless of whether they are a Hong Kong resident or a foreign national, if they derive a gain from the 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 a transaction amounts to a 'speculative activity'.

There is specific relief from stamp duty under the SDO for certain types of transactions. For example, a transfer of residential property under an estate pursuant to a will or in accordance with the law of intestacy is not chargeable with stamp duty. However, the beneficiaries of the estate may deviate from the provisions of the will or the law of intestacy and agree among themselves to redistribute the property. Where such redistribution results in the receipt of property valued in excess of some beneficiaries' entitlements under the will or the law of intestacy, the excess portion could be assessed by the Stamp Office as a voluntary disposition subject to stamp duty.

6. CHARITABLE ORGANISATION WITH TAX-EXEMPT STATUS

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

A charity that has successfully applied for tax exempt status pursuant to section 88 of IRO, also commonly called an 's88 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.

In addition, donations given to an s88 organisation will be deductible against tax if it fulfils the criteria of 'approved charitable donations'. Conditions for deductibility 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 their assessable income or profits.

In addition, section 44 of SDO provides that stamp duty shall not be chargeable on any conveyance of immovable property (*ad valorem* stamp duty on property transaction) 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 s88 organisation. The instrument in question must still be submitted to the Collector of Stamp Revenue for adjudication under section 13 of SDO.