

It is one of the privileges of charitable gifts that such can be given for unspecified objects albeit charitable, so that a gift simply for 'charitable purposes' is valid; see *Moggridge v Thackwell* (1792) 1 Ves Jr 464, [1775-1802] All ER Rep 218.

[3.10] Otherwise than on trust

The reason for this exclusion is that if the property is given to trustees on trust for unspecified charitable purposes the trustees can presumably determine the exact charitable beneficiaries of the gift.

[3.11] Definitions

For 'administration', 'court', 'estate', 'probate' and 'will', see s 2 above.

4 Sealing of documents

All probates, letters of administration, orders and other instruments, and copies thereof and all exemplifications and copies thereof, shall be sealed with the seal of the court; and any such document purporting to be so sealed shall be received in evidence in any proceedings without further proof thereof.

[cf. 1925 c 49 s 174 (2) U.K.]

[4.01] England

The corresponding provision in England was the Supreme Court of Judicature (Consolidation) Act 1925 s 174 (2), now replaced by the Supreme Court Act 1981 s 106.

[4.02] General note

The section is self-explanatory and the reference to copies being sealed and thus accepted in proceedings, is useful.

[4.03] Commencement

As to meaning, see [1.03] above.

[4.04] And copies thereof and all exemplifications and copies thereof

This makes clear that copies of the specified documents can also in appropriate circumstances be sealed and indeed literally copies of copies, which is less easy to justify. As to copies of wills or grants of administration, see s 74 below. The use of the word 'exemplifications' is interesting; although it literally means

'illustrations by example', as a term of art it means an attested copy of a document under an official seal and it is used in that sense in the section.

[4.05] Definitions

For 'court' and 'probate', see s 2 above.

5 Registrar may exercise jurisdiction in certain cases

- (1) Subject to section 6, a grant of probate or administration may be made, amended or resealed by the Registrar in the name and under the seal of the court.
- (2) The Registrar may, in any case in which he has jurisdiction under this section, exercise all such powers as are ancillary thereto which the court or a judge may exercise in like circumstances.
- (3) Nothing in this section shall-
 - (a) limit or prevent the exercise by a judge of any jurisdiction conferred upon the Registrar by this section; or
 - (b) confer upon the Registrar jurisdiction to revoke a grant.
- (4) In this section and in section 6 'grant' means a grant, or the resealing of a grant, of probate or administration or any amendment thereof.

[5.01] England

There is no exactly corresponding provision in England but the Courts and Legal Services Act 1990 confers similar powers on Registrars in England.

[5.02] General Note

This important provision establishes the jurisdiction of the Registrar (defined to include the Registrar of the High Court and any Senior Deputy Registrar, Deputy Registrar or Assistant Registrar) to issue grants of probate or administration. The vast majority of such grants, not involving any contentious issues, are so issued. It can be noted that the jurisdiction is limited to making, amending or resealing grants (as defined) and does not extend to the revocation of grants, which is nearly always contentious. As to the manner of making an application for a grant see the NCPR, Rules 2A-12 in the Appendix below.

by parties acting in person and applications for summary administration of an estate by the Official Administrator: see the *Guide*, §§28-29.

[24.03] Commencement

As to meaning, see [1.03] above.

[24.04] Subsection (1)

The subsection is self-explanatory and provides for applications for all forms of grant (and for revocation of grants) to be made through the Registry. The jurisdiction of the Registrar is stated in ss 5, 6 and 7 above. The inclusion of revocation of probates or letters of administration is curious since such will usually be contentious matters.

[24.05] Subsection (2)

Petition refers to the method of commencing an action.

[24.06] Definitions

For 'administration', 'grant' and 'probate', see s 2 above.

24A Affidavit concerning assets and liabilities of estate

(1) In this section—

- (a) 'assets' means assets in the form of real property or personal property situated in Hong Kong;
- (b) 'liabilities', in relation to a deceased person, means—
 - (i) liabilities contracted by the deceased in Hong Kong to persons ordinarily resident in Hong Kong; or
 - (ii) any other liabilities contracted by the deceased and charged on any property of the deceased situated in Hong Kong.

(2) An application for a grant in respect of the estate of a person who dies on or after 11 February 2006 shall be— (Amended L.N. 210 of 2005)

- (a) supported by an affidavit sworn by the applicant and filed by him with the Registry; and
- (b) accompanied by a duplicate of the schedule exhibited by such affidavit under subsection (3).

(3) An affidavit referred to in subsection (2) shall exhibit a schedule setting out the assets and liabilities of the deceased

as at the date of his death (including assets and liabilities of the deceased in the capacity of a trustee or the manager of a Tso or Tong) known to the applicant.

- (4) If, before the court makes a grant under section 3, any inaccuracy in a schedule exhibited under subsection (3) or an additional schedule exhibited under subsection (5) comes to the knowledge of the applicant concerned, he shall file—
 - (a) a corrective affidavit; and
 - (b) a duplicate of the additional schedule exhibited by such affidavit under subsection (5), with the Registry.
- (5) A corrective affidavit referred to in subsection (4) shall exhibit an additional schedule setting out—
 - (a) the details of the inaccuracy in a schedule exhibited under subsection (3) or an additional schedule exhibited under this subsection; and
 - (b) (where applicable) the assets and liabilities of the deceased as at the date of his death known to the applicant that should have been set out in that schedule but are not so set out.
- (6) Where the grant applied for is to cover only a part of the estate of the deceased, the reference to 'the assets and liabilities of the deceased' in subsection (3) or (5) shall be construed to mean the assets and liabilities of the deceased constituting that part of the estate.
- (7) The duplicate schedule referred to in subsection (2) (b) and any duplicate additional schedule filed under subsection (4) in respect of an application for a grant shall be annexed to the grant.
- (8) If, after the court makes a grant under section 3, any inaccuracy in a schedule or additional schedule annexed to the grant comes to the knowledge of the executor or administrator, he shall—
 - (a) file—
 - (i) a corrective affidavit; and
 - (ii) a duplicate of the additional schedule exhibited by such affidavit under subsection (9), with the Registry; and
 - (b) deliver the grant to the Registry together with such affidavit.
- (9) A corrective affidavit referred to in subsection (8) (a) shall

years of age cannot be appointed, see s 39 below. As to the person entitled where the deceased died domiciled abroad, see *In the Estate of Kaufman* [1952] P 325, [1952] 2 All ER 261 and *In the Estate of Humphries* [1934] P 78.

[36.14] On his giving security

As to the court's power to require guarantees or sureties in respect of a grant of administration, see ss 46 and 47 below and the NCP, Rules 38, 41 and 41A (see Appendix below).

[36.15] May be limited

An example might be for the purpose of litigation affecting the estate, *ad litem* or the will, *pendente lite*, see s 40 below. This qualification appears in the English Supreme Court Act 1981 s 116 as subsection (2).

[36.16] Definitions

For 'administration', 'court', 'estate', 'executor', 'grant', 'intestate', 'probate' and 'will', see s 2 above.

37 Grant of special administration

- (1) If at the expiration of twelve months from the death of a person any personal representative of the deceased to whom a grant has been made is residing out of Hong Kong the court may, on the application of any creditor or person interested in the estate of the deceased, grant to him special administration of the estate of such deceased person.
- (2) The court may, for the purpose of any legal proceedings to which the administrator under the special administration is a party, order the transfer into the name of the Registrar of any money or securities belonging to the estate of the deceased person and all persons shall obey any such order.
- (3) If the personal representative, capable of acting as such, returns to and resides within Hong Kong while any legal proceedings to which a special administrator is a party are pending, that personal representative shall be made a party to the legal proceedings.

[cf. 1925 c 49 s 164 U.K.]

[37.01] England

The corresponding legislation in England was the Supreme Court of Judicature (Consolidation) Act 1925 s 164; there appears to be no corresponding provision in the Supreme Court Act 1981.

[37.02] General note

This provision contains a general power in subsection (1) to appoint a special administrator where the personal representative is residing out of Hong Kong. It seems to be envisaging difficulties of administration because of such circumstances but this is not expressly stated. It is suggested that the power could be used where there are legal proceedings involving the estate giving rise to difficulties of service and execution where the personal representative is residing abroad. Rule 54 of NCP (see Appendix below) which applies to orders under this subsection which is headed '*Grants Durante Absentia*', applies to applications for a grant under this section and should be referred to. The status and relationship of the special administrator to the original personal representative is not stated. The provision is expressed in very wide terms and can be contrasted with s 36 above which limits the power therein with phrases of qualification. It can be said that the hypotheses on which it is based do not necessarily justify the power granted and that it is probably unnecessary in any event, in view of the wide power in the previous s to appoint alternative administrators.

Subsections (2) and (3) confers specific powers relation to legal proceedings involving the estate.

[37.03] Commencement

As to meaning, see [1.03] above.

[37.04] Subsection (1)

The section states its import but in wide and somewhat ambiguous terms, see the comments in [37.02] above. The provision as to costs in the next section will act as a severe deterrent to such appointment and it is thought that the section is rarely invoked. Where legal proceedings are involved there are effective alternatives in s 36 above, s 40 below and in subsections (2) and (3) to this section. As drafted the section could also apply generally to ensure the due or continual administration of the estate notwithstanding the absence abroad of the personal representative. Thus it states that in these circumstances, a creditor or any person interested in the estate, can apply for a special grant of administration. However there is no reference in the section to the appointed personal representative neglecting or delaying the due and proper administration of the estate and in modern circumstances it is possible to be residing out of Hong Kong and, although not ideal, yet be perfectly able to carry out the administration of the estate. It can be noted that the section is not concerned with delay in obtaining a grant since it applies where 'a grant has been made'. The section requires simply, first, twelve months from the death, and secondly, that the personal representative is residing out of Hong Kong. Neither circumstance alone or collectively is, it is suggested,

and this phrase is defined for the purposes of that Act in s 55 (1) (xviii), but the present Ordinance does not contain any such definition. 'Purchaser' is defined for the purpose of s 68 but not generally; see [68.35] below. Consequently the meaning of 'purchaser', which strictly means a person taking by words of purchase, is at large, but probably means (by analogy with the definition in s 55 (1) (xviii)), a lessee, mortgagee or other person who in good faith acquires an interest in property for valuable consideration, also an intending purchaser and 'valuable consideration' includes marriage, but does not include a nominal consideration in money". It can be noted that the term is not qualified by the phrase 'in good faith'. The difficulty with the section is that it simply states the obvious. The personal representatives will sell assets to realise money to pay debts and at the time of the sale the debts will be outstanding - if they were not there would be no need to sell. In many cases the third party purchaser will be aware of this when he acquires the property but the sale will be inviolable provided he is a purchaser as defined above and that the sale is properly conducted in the due administration of estate. Thus the provision is designed to facilitate the sale of property by a personal representative by offering reassuring protection to a purchaser.

[66.10] A conveyance

The phrase is not defined, see the comments above in [65.07] above. A 'conveyance' is contrasted with an 'assent' in the section. It can be said that a conveyance is made to a third party purchaser; an assent is made to a volunteer beneficiary. This section does not apply to assents - it would be improper in circumstances of many estates to assent to the passing of property to a beneficiary before debts and liabilities have been paid.

[66.11] Have notice

Notice presumably includes, actual, constructive and imputed. In some cases the purchaser will have no notice of debts outstanding and he is under no duty to make such enquiries since, although he will know that the vendor is a personal representative, he is under no duty to enquire why the property is being sold.

[66.12] All debts ... legacies

This is a comprehensive list of obligations that the estate may bear and it is interesting to see that it includes 'legacies'. Of course one of the reasons for sale is that the personal representatives need money to pay legacies, the alternative of appropriating property in satisfaction being either impractical or not desired.

[66.13] Subsection (5)

This subsection in contrast to those above, applies to both an assent and a conveyance. It preserves the right to recover the property assented or conveyed except in favour of a purchaser, or to be indemnified out of the property, where the circumstances, which are not specified, so require. The right is widely given to 'a personal representative or any other person' without the usual qualification of 'interested in the estate', although it is thought that would be implied.

[66.14] Purchaser

See [66.09] above.

[66.15] To recover the estate

This somewhat curious phrase is thought to mean 'trace the property' within the usual equitable tracing remedy. On this basis it can be read in conjunction with s 67 below. Thus if an asset of the estate had been conveyed or assented to a volunteer the person properly entitled to the property whether as beneficiary or creditor could seek to recover the property.

[66.16] To be indemnified out of such estate

'Estate' is equated with 'property' in s 2 above. This provision seems to be stating a monetary remedy enforceable against the property recovered. The subsection states that the indemnity can be sought in respect of 'any duties, debts, or liability'. The most obvious example of the use of this provision would be where a creditor seeks the remedy for payment of his debt against a beneficiary to whom property, which should have been used to pay his debt, has been assented. Thus the reference to 'such estate (meaning property) would have been subject' but for the assent or conveyance.

[66.17] Subsection (6)

This provision facilitates the making of an assent or a conveyance by four measures. It expressly provides that the personal representatives are not entitled to postpone the giving of an assent merely because all debts etc, have not been discharged. There are three specific provisions. First, the personal representatives can require security as a condition of making the assent or conveyance; secondly, they can proceed with the assent or conveyance after making 'reasonable arrangements' to pay debts and liabilities; and thirdly, an assent may be made subject to any subsisting or created, estate, charge or mortgage.

[66.18] Require security

The type of security that may be demanded is not stated. A formal charge could be created over the property which is assented or conveyed or some form of guarantee or indemnity could be obtained from the transferee.

[66.19] Reasonable arrangements

This phrase is not further defined, and a variety of arrangements to pay debts etc, could no doubt be employed. The personal representatives could set aside a fund; they could retain and allocate money in the bank to pay the debts; or identify property for sale and use of the proceeds; they could take security from the beneficiaries or the assentee and they could require guarantees and indemnities to be given. If personal representatives do not make some such 'reasonable arrangement' before assenting to the property they could be held to be liable at

- (2) Where a trust corporation applies for a grant of administration otherwise than as attorney for some person, there shall be lodged with the application the consents of all persons entitled to a grant and of all persons interested in the residuary estate of the deceased, unless the Registrar directs that such consents be dispensed with on such terms, if any, as he may think fit.
- (3) Where a corporation (not being a trust corporation) would, if an individual, be entitled to a grant, administration for its use and benefit, limited until further representation is granted, may be granted to its nominees or, if the corporation has its principal place of business outside Hong Kong, its nominees or lawfully constituted attorney, and a copy of the resolution appointing the nominee or, as the case may be, the power of attorney sealed by the corporation or otherwise authenticated to the Registrar's satisfaction, shall be lodged with the application for a grant, and the oath shall state that the corporation is not a trust corporation.
- (4) Where a corporation (not being a trust corporation) applies for a grant the Registrar may, in his discretion, grant administration to its nominee, for its use and benefit, limited until further representation is granted, and a copy of the resolution appointing the nominee sealed by the corporation or otherwise authenticated to the Registrar's satisfaction, shall be lodged with the application for a grant, and the oath shall state that the corporation is not a trust corporation.

35 Renunciation of probate and administration

- (1) Renunciation of probate by an executor shall not operate as renunciation of any right which he may have to a grant of administration in some other capacity unless he expressly renounces such right.
- (2) Unless the Registrar otherwise directs, no person who has renounced administration in one capacity may obtain a grant thereof in some other capacity.

37 Notice to Government of intended application for grant

Remarks:

Adaptation amendments retroactively made - see 67 of 1999 s 3

In any case in which it appears that the Government is or may be beneficially interested in the estate of a deceased person, notice of intended application for a grant shall be given by the applicant to the Official Administrator, and the Registrar

may direct that no grant shall issue within a specified time after the notice has been given.

(67 of 1999 s 3)

38 Guarantee

- (1) The Registrar shall not require a guarantee under section 46 of the Ordinance as a condition of granting administration except where it is proposed to grant it-
 - (a) by virtue of rule 19 (v) or rule 21 (4) to a creditor or the personal representative of a creditor or to a person who has no immediate beneficial interest in the estate of the deceased but may have such an interest in the event of an accretion to the estate;
 - (b) under rule 27 to a person or some of the persons who would, if the person beneficially entitled to the whole of the estate died intestate, be entitled to his estate;
 - (c) under rule 30 to the attorney of a person entitled to a grant;
 - (d) under rule 31 for the use and benefit of a person under the age of 21 years; (L.N. 231 of 1990)
 - (e) under rule 33 for the use and benefit of a person who is by reason of mental or physical incapacity incapable of managing his affairs;
 - (f) to an applicant who appears to the Registrar to be resident elsewhere than in Hong Kong;or except where the Registrar considers that there are special circumstances making it desirable to require a guarantee.
- (2) Notwithstanding that it is proposed to grant administration as aforesaid, a guarantee shall not be required, except in special circumstances, on an application for administration where the applicant or one of the applicants is-
 - (a) a trust corporation;
 - (b) a solicitor holding a current practising certificate under the Legal Practitioners Ordinance (Cap 159).
- (3) Every guarantee entered into by a surety for the purposes of section 46 of the Ordinance shall be in the specified form. (L.N. 33 of 1992)
- (4) Except where the surety is a corporation, the signature of the surety on every such guarantee shall be attested by an authorised officer, commissioner for oaths or other person authorised by law to administer an oath.
- (5) Unless the Registrar otherwise directs-

and *Allen's Contract for Sale to Harlech* (1876) 4 Ch D 802 at 814 et seq, 46 LJ Ch 133, *Morris v Debenham* (1876) 2 Ch D 540, 34 LJ 205; *Rede v Oakes* (1864) 4 De GJ & Sm 505, 5 New Rep 209. The purchaser is entitled to be satisfied that the sale is not disadvantageous to the trust estate and that the purchase money has been apportioned; see *Re Cooper and Allen's Contract for Sale to Harlech* above. But the terms of the trust may render it unnecessary that the apportioned parts of the purchase money should be paid separately; *Re Parker and Beech's Contract* (1887) 56 LJ Ch 358 at 359 (CA).

As to the power of trustees to concur with other persons interested, where an individual share in the proceeds of sale of land, or in any other property is subject to the trust, see s 26 below.

[13.04] In lots

When a leasehold is sold in lots in exercise of a trust for sale, the conditions may properly provide for the granting of underleases of lots sold in the event of the whole not being disposed of: *Re Judd and Poland and Skelcher's Contract* [1906] 1 Ch 684, [1906] 75 LJ Ch 403 (CA). See also *Alexander v Clarke* [1920] 1 IR 47.

[13.05] Buy in at any auction

In order that land may be lawfully bought in by the seller, or by any person employed by him in that behalf, the particulars or conditions of sale must conform with the provisions of the Sale of Land by Auction Ordinance (Cap 27) ss 3, 4.

[13.06] Exercise of power

In exercising a power such as power of sale, advancement or appointment, a trustee must in good faith consider all the relevant circumstances and refrain from taking into account any irrelevant considerations: *In re Hastings-Bass, decd* [1975] Ch 25, [1974] 2 All ER 193 (CA, Eng). The so-called 'rule in *Hastings-Bass*' should be understood as meaning that the court should not interfere with the decision of a trustee exercising a discretionary power in good faith even if it did not have the full effect intended. The application of the rule depends on the act in issue being done within the trustees' powers. Even though acting under apparently competent professional advice, trustees may still be liable if they act outside the scope of their powers or contrary to the general law: *Pitt v Holt* [2013] 2 AC 108.

[13.08] Consultation of beneficiaries

There is no implied duty on the part of the trustees for sale to consult the beneficiaries unless they are expressly required by the trust instrument to do so.

[13.09] Duty to obtain best price

Trustees have an overriding duty to obtain the best price for their beneficiaries; see *Buttle v Saunders* [1950] 2 All ER 193, 66 (Pt 1) TLR 1026, where an

injunction was granted to restrain trustees from selling at a lower price than was subsequently offered by another prospective purchaser, although the negotiations with the original purchaser were in an advanced stage and the trustees had considered themselves bound by commercial morality to complete the sale to him.

[13.10] Definitions

For 'land', 'property' and 'trustee', see s 2.

14 Power to sell subject to depreciatory conditions

- (1) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.
- (2) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.
- (3) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon any of the grounds aforesaid.
- (4) This section applies to sales made before or after the commencement of this Ordinance.

[cf. 1925 c 19 s 13 U.K.]

[14.01] England

The wording of this section is the same as that of the Trustee Act 1925 s 13, except that in s 13 the term 'this Act' is used instead of 'this Ordinance'.

[14.02] Conditions ... unnecessarily depreciatory

To sell under such conditions prior to this section was a breach of trust and the court would, at the suit of a *cestui que* trust, restrain a purchaser from completing a sale of trust property under such conditions (*Dance v Goldingham* (1873) 8 Ch App 902, 42 LJ Ch 777), or refuse an action for specific performance against a purchaser by the trustees (*Dunn v Flood* (1885) 28 Ch D 586, 54 LJ Ch 661 (CA)). After execution of the conveyance, the sale should not be impeached as against the purchaser, unless it is proved that the purchaser had been acting in collusion with the trustee: *Myatt & Ors v Browne* [2005] All ER (D) 276 (Nov).

effect subject to the terms of that instrument. There need not be an express exclusion of the power of advancement or something equivalent thereto to exclude it, if, on a fair reading of the instrument, the application of this section would be inconsistent with the instrument; see *IRC v Bernstein* [1961] Ch 399, [1961] 1 All ER 320 (CA) at 412, 413 and 325, respectively, where Lord Evershed MR held that a trust for accumulation was inconsistent with the power. Thus, although the inclusion of an express power of advancement in a settlement will not necessarily exclude the statutory power, it will do so where the two powers are inconsistent with each other and cannot co-exist; see *Re Evan's Settlement, Watkins v Whitworth-Jones* [1967] 3 All ER 343, [1967] 1 WLR 1294, but cf *Gregg v Richards* [1926] Ch 521, 95 LJ Ch 209, in which a right arising under the English Conveyancing Act 1881, s 6 (repealed, see now the English Law of Property Act 1925, s 62), corresponding to s 16 of the Conveyancing and Property Ordinance (Cap 219), was not inconsistent with a right arising outside the instrument and could co-exist.

Apart from statute, advancement may be made by trustees in suitable cases out of the capital of the personal estate in which the person to be advanced has a vested or presumptive or contingent interest, where it is authorised by the terms of the trust (*Re Aldridge, Abram v Aldridge* (1886) 55 LT 554 (CA)), and by the High Court out of capital in which the person has an absolute interest, or, with the consent of the other persons interested, out of capital in which he has less than an absolute interest.

[34.14] Forfeiture

Where a settlement provided for the termination of the trusts in favour of the tenant for life on the happening of an event whereby the income, or any part thereof, payable to him became vested in or charged in favour of some other person, it was held that the consent of the tenant for life to the exercise by the trustees of a power of advancement expressly given by the settlement did not effect a forfeiture; see *Re Shaw's Settlement, Shaw v Shaw, Re Wisely's Settlement, Wisely v Public Trustee* [1951] Ch 833, [1951] 1 All ER 656, following *Re Hodgson, Weston v Hodgson* [1913] 1 Ch 34, 82 LJ Ch 31; and distinguishing *Re Stimpson's Trusts, Stimpson v Stimpson* [1931] 2 Ch 77, [1931] All ER Rep 809 where the settlement contained no express advancement clause. *Re Rees' Will Trusts, Lloyds Bank Ltd v Rees* [1954] Ch 202, [1954] 1 All ER 7, followed *Re Hodgson* (above), and *Re Shaw's Settlement Trusts* (above), and distinguished *Re Stimpson's Trusts* (above), in which the will was made in 1906 and, although it did not come into operation until 1929, the draftsman could not, in 1906, have had in mind s 32 of the Trustee Act (corresponding to this section) enacted twenty years later in 1925. Where the income of capital money is held on protective trusts under s 35 below, the consent of 'the principal beneficiary' to an advance under any statutory or express power does not cause a forfeiture of his life interest, see s 35 (1) (a) below and *Re Harris' Settlement, Dent v Harris* (1940) 162 LT 358, 56 TLR 429.

[34.15] Valuation of advances for distribution

For the purpose of distribution of the estate, advances should be valued as at the time they are brought into account (*Watson v Watson* (1864) 33 Beav 574), but appointed sums for purposes of hotchpot are valued at the time of division (*Re*

Kelly's Settlement Trusts, Gustard v Berkeley [1910] 1 Ch 78, [1910] 79 LJ Ch 60).

[34.16] Administrator pendent lite

Section 34 does not apply to an administrator *pendent lite*: *Au Cheuk Wei Wilson v Hang Seng Bank (Trustee) Ltd* [2013] 2 HKC 296 (CA), paras 16-17.

[34.17] Definitions

For 'contingent interest', 'land', 'possession', 'property', 'securities', 'trust' and 'trustees' and 'trust for sale', see s 2.

35 Protective trusts

- (1) Where any income, including an annuity or other periodical income payment, is directed to be held on protective trusts for the benefit of any person (in this section called *the principal beneficiary*) for the period of his life or for any less period, then, during the period (in this section called *the trust period*) the said income shall, without prejudice to any prior interest, be held on the following trusts, namely-
- (a) upon trust for the principal beneficiary during the trust period or until he, whether before or after the termination of any prior interest, does or attempts to do or suffers any act or thing, or until any event happens, other than an advance under any statutory or express power, whereby, if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof, in any of which cases, as well as on the termination of the trust period, whichever first happens, this trust of the said income shall fail or determine;
 - (b) if the trust aforesaid fails or determines during the subsistence of the trust period, then, during the residue of that period, the said income shall be held upon trust for the application thereof for the maintenance or support, or otherwise for the benefit, of all or any one or more exclusively of the other or others of the following persons (that is to say)-
(Amended L.N. 7 of 1979)
 - (i) the principal beneficiary and his or her wife

1990), by adding 'would be under the age of 21 years or' after 'appointed'.

[38.02] England

The wording of this section is the same as that of the Trustee Act 1925 s 37 except that:

- (1) in s 37 the term 'this Act' is used instead of 'this Ordinance';
- (2) this section does not authorise the appointment of a sole trustee where the trustee, when appointed, 'would be under the age of 21 years'.

[38.03] Subject to the restrictions etc

The number of trustees of settlements of land and dispositions on trust for sale of land is limited by s 36 above. Section 37 (6) above limits the number of additional trustees that may be appointed under the statutory power.

[38.04] Separate ... trustees ... for any part

Separate trustees may be appointed under subsection (1) (b) above for a part of the trust property held on distinct trusts although those trusts may ultimately coalesce with the trusts of other parts of the trust property: see *Re Hetherington's Trusts* (1886) 34 Ch D 211, 56 LJ Ch 174. Where a trustee had absconded with part of the trust property, the court appointed trustees of the remainder which was subject to separate trusts: see *Re Aston's Trusts* (1890) 25 LR Ir 96.

[38.05] Vesting the trust property

Land, chattels and choses in action will usually be vested in the trustees by the vesting declaration inserted in appointments before the commencement of this Ordinance, or implied on their appointment by s 41 (1) (b) below in appointments after this Ordinance; mortgages and securities will have to be transferred, and consents obtained to the assignment of land held on lease containing a covenant against assignment.

[38.06] Individuals

It was held in *Jasmine Trustees Ltd v Wells & Hind (a firm)* [2007] All ER (D) 112 (Jan) that the word 'individuals' in the English corresponding provision to s 38 (1) (c) means natural persons. In giving the word its natural meaning, the court noted that the words 'person', 'persons' and 'corporation' were used many times. Thus, the use of the word 'individuals' indicated a deliberate use to mean something different from persons.

[38.07] Definitions

For 'trustee' and 'trust' and 'trust corporation', see s 2.

39 Evidence as to a vacancy in a trust

- (1) A statement, contained in any instrument coming into operation after the commencement of this Ordinance by which a new trustee is appointed for any purpose connected with land, to the effect that a trustee has remained out of Hong Kong for more than 12 months or refuses or is unfit to act, or is incapable of acting, or that he is not entitled to a beneficial interest in the trust property in possession, shall, in favour of a purchaser of a legal estate, be conclusive evidence of the matter stated. (Amended 9 of 1993 s 7)
- (2) In favour of such purchaser any appointment of a new trustee depending on that statement, and any vesting declaration, express or implied, consequent on the appointment, shall be valid.

[cf. 1925 c 19 s 38 U.K.]

[39.01] England

The wording of this section is the same as that of the Trustee Act 1925 s 38, except that in s 38 the terms 'this Act' and 'the United Kingdom' are used instead of 'this Ordinance' and 'Hong Kong'.

[39.02] Commencement of this Ordinance

1e 27 July 1934.

[39.03] Remained out of Hong Kong

See the corresponding note to s 37 above.

[39.04] Months

See the note to s 27 above.

[39.05] Not entitled to a beneficial interest ... in possession

Statements to this effect are relevant where a new trustee is appointed to take the place of a trustee incapable because of mental disorder: see s 37 (9) above.

making of a policy statement under that section.

(5) For the purposes of subsection (1)—

power of intervention (干預權力) includes—

- (a) a power to give directions to the agent; and
- (b) a power to revoke the authorisation or appointment of the agent.

[41M.01] Enactment history

This section was added by the Trust Law (Amendment) Ordinance (13 of 2013) s 27, commencing 1 December 2013.

[41M.02] England

This section is similar to the Trustee Act 2000 s 22 which also applies to review of nominees and custodians.

[41M.03] General & application

The statutory duty to review is imposed for the protection of the interests of beneficiaries. Where an agent is authorised or a nominee or custodian appointed under the trust instrument or an enactment, the relevant provisions (ie 41M, 41N and 41O) also apply, except in a case where the application is inconsistent with the terms of the trust instrument or an enactment: s 41L. See also [41B.03].

[41M.04] Need to exercise the power of intervention

The major concerns include suitability of the agent, manner of the agent in performing the delegated functions and appropriateness of the terms on which the agent acts. There is a need to exercise the power of intervention if, for example, it is doubtful whether the agent (or nominee or custodian as the case may be) remains a suitable person or whether the agent is carrying out the delegated functions effectively. See further the explanatory notes to clause 22 of the draft Bill in the Report of the UK Law Commission and the Scottish Law Commission on Trustees' Powers and Duties (1999) (Law Com No. 260).

[41M.05] Statutory duty of care

The statutory duty of care applies to the duty to review under this section: s 3A, Schedule 3 s 3 (d) below. See generally [3A.03]. See also [7.04].

[41M.06] Definitions

For the meanings of 'trust' and 'trustee', see s 2 above. For the meaning of 'custodian', see s 41H (2) above.

41N Review of nominees and custodians

(1) While a nominee or custodian continues to act for a trust, the trustees of the trust must—

- (a) keep under review the arrangements under which the nominee or custodian acts and the way in which those arrangements are being put into effect;
- (b) if circumstances make it appropriate to do so, consider whether there is a need to exercise any power of intervention that the trustees have; and
- (c) if the trustees consider that there is a need to do so, exercise the power of intervention.

(2) The trustees must carry out the review as frequently as the circumstances of the trust may require having regard to the nature of the functions required to be exercised by the nominee or custodian.

For the purposes of subsection (1)—

power of intervention (干預權力) includes—

- (a) a power to give directions to the nominee or custodian; and
- (b) a power to revoke the appointment of the nominee or custodian.

[41N.01] Enactment history

This section was added by the Trust Law (Amendment) Ordinance (13 of 2013) s 27, commencing 1 December 2013.

[41N.02] England

This section is similar to the Trustee Act 2000 s 22 which also applies to review of agents.

[41N.03] General & application

See generally [41B.03], [41M.03].

[41N.04] Need to exercise the power of intervention

See [41M.04].

order consequential thereon, under the Trustee Ordinance: see Partition Ordinance (Cap 352) s 8.

[45.22] Application

The provisions of this Ordinance relating to vesting orders (ie this section to s 55 below) and to orders appointing a person to convey (s 51 below) apply to vesting orders authorised to be made by the Probate and Administration Ordinance (Cap 10) ss 67 (2), 70 (2).

[45.23] Definitions

For 'conveyance', 'land', 'mortgage', 'personal representative', 'possessed' and 'trustee', see s 2.

46 Orders as to contingent rights of unborn persons

Where any interest in land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence would, in respect thereof, become entitled to or possessed of that interest on any trust, the court may make an order releasing the land or interest therein from the contingent right, or may make an order vesting in any person the estate or interest to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land.

[cf. 1925 c 19 s 45 U.K.]

[46.01] England

The wording of this section is the same as that of the Trustee Act 1925 s 45.

[46.02] Unborn person

For meaning, see [49.04] 'Unborn person' below.

[46.03] Application

For the application of this section to vesting orders made under other Ordinances, see the note to s 45 above.

[46.04] Definitions

For 'land' and 'trust', see s 2.

47 Vesting order in place of conveyance by infant mortgagee

Where any person entitled to or possessed of any interest in land, or entitled to a contingent right in land, by way of security for money, is an infant, the court may make an order vesting or releasing or disposing of the interest in the land or the right in like manner as in the case of a trustee under disability.

[cf. 1925 c 19 s 46 U.K.]

[47.01] England

The wording of this section is the same as that of the Trustee Act 1925 s 46.

[47.02] Person entitled to ... land, etc

There is no provision prohibiting an infant from holding a legal estate. The court could vest in the executors of a mortgagee a legal estate which had devolved on his infant heir-at-law (*Re Franklyn's Mortgage* [1888] WN 217).

[47.03] Infant

Since 1 October 1990 (L.N. 202 of 1990) a person attains full age on the eighteenth anniversary of his date of birth or on 1 October 1990, whichever first occurred, instead of on the day before the twenty-first anniversary of that date, and 'infant' is construed accordingly; see the Age of Majority (Related Provisions) Ordinance (Cap 410), ss 2 (1), (2).

[47.04] In like manner as in the case of a trustee under disability

As to the making of vesting or other orders in the case of an infant trustee, see s 45 (b) (i) above.

[47.05] Definitions

For 'land' and 'possessed', see s 2.

[58.01] England

The wording of this section is the same as that of the Trustee Act 1925 s 59, except that in s 59 the term 'his solicitor' is used instead of 'his counsel and solicitor'.

[58.02] Action

'Action' is defined in the High Court Ordinance (Cap 4), s 2 as 'any civil proceeding commenced by writ of summons or such other manner as may be prescribed by any law'.

Where, therefore, rules of court prescribed an originating summons as a method of procedure, the proceedings so commenced constitute an action: see *Re Fawcitt, Galland v Burton* (1885) 30 Ch D 231; *Gee v Bell* (1887) 35 Ch D 160.

[58.02A] Diligent Search

As to what may amount to diligent search, see, for example, *廣西華錫集團股份有限公司 v Cheung Cho Tik* [2011] HKCU 1929 (unreported, HCMP 329/2011, 5 September 2011).

[58.03] Definitions

For 'trustee', see s 2.

59 Power to charge costs on trust estate

The court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be raised and paid out of the property in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the court may seem just.

[cf. 1925 c 19 s 60 U.K.]

[59.01] England

The wording of this section is the same as that of the Trustee Act 1925 s 60.

[59.02] Costs and expenses

By s 32 (2) above, a trustee is entitled to reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers.

[59.03] By such persons as to the court may seem just

Where a trustee refuses without good cause to transfer property after being required by a person entitled to require the transfer, the court may order the recusant to pay the costs of the application: see *Re Knox's Trusts* [1895] 2 Ch 483, 64 LJ Ch 402 (CA).

Costs of a reconveyance fall on the mortgagor, and the cost of a vesting order required where the legal estate is in an absconding trustee-mortgagee is no exception: see *Webb v Crosse* [1912] 1 Ch 323, 81 LJ Ch 259.

[59.04] Definitions

For 'conveyance', 'income', 'property', 'transfer' and 'new trustee' see s 2.

60 Power to relieve trustee from personal liability

If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Ordinance, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same.

[cf. 1925 c 19 s 61 U.K.]

[60.01] England

The wording of this section is the same as that of the Trustee Act 1925 s 61, except that in s 61 the term 'this Act' is used instead of 'this Ordinance'.

[60.02] If it appears to the court

The matter is essentially within the discretion of the judge. The Court of Appeal is reluctant to decide that a judge misdirected himself or left out something which he should have taken into account: see *Marsden v Regan* [1954] 1 All ER 475, [1954] 1 WLR 423 (CA). It would interfere with the trial judge's decision only if 'it is shown that the judge erred in law, or was under a misapprehension of material facts, or if he has taken into account some matter which he should not have taken into account, or has left out of account some matter which he should have taken into account, or if the decision was so plainly wrong that it must have been reached by a faulty assessment of the weights of the different factors which have to be taken into account': *Man Fong Hang v Man Ping Nam* [2005] 1 HKC 535 (CA), paragraph 47 per Yuen JA.

98 Offences

- (1) Any director, officer or servant of a trust company who wilfully and with intent to defraud neglects to make any entry in the books of the company which it is his duty to make shall be guilty of an offence triable upon indictment.
- (2) Any director, officer or servant of a trust company, who wilfully and with intent to defraud makes or abets the making of any false entry in the books of the company, or subscribes or exhibits any false document with intent to deceive any person appointed under this Part to investigate the affairs and management of the company shall be guilty of an offence triable upon indictment.
- (3) Any director, officer or servant of a trust company who refuses to produce for examination to any person appointed under this Part to investigate the affairs and management of the company all books and documents relevant to such investigation which are in his custody or control shall be guilty of an offence triable upon indictment.
- (4) A trust company which contravenes section 77 (4), (4A) or (4B), 81 (3), 91 (4), 92 or 93 commits an offence and is liable on conviction to a fine at level 4 and if the offence is continued after conviction the trust company commits a further offence and is liable on conviction to a fine of \$ 10,000 for every day or part of a day on which the offence is so continued. (Added 9 of 1993 s 6)

(Amended 23 of 1975 s 5;
50 of 1991 s 4; E.R. 2 of 2014)

[98.01] Enactment history

Section 98 (1), (2), (3) were amended by the Administration of Justice (Felonies and Misdemeanours) Ordinance 1991 (50 of 1991) s 4 (1) (item 5 in the Schedule), commencing 1 July 1991 (LN 236 of 1991) by substituting 'a misdemeanour' for 'an offence triable upon indictment'. Section 98 (4) was deleted by the Trustee (Amendment) Ordinance 1975 (23 of 1975) s 5, commencing 1 July 1975 (LN 146 of 1975). Section 98 (4) was added by the Trustee (Amendment) Ordinance 1993 (9 of 1993) s 6, commencing 15 January 1993.

[98.02] A fine at level 4

I.e., \$ 25,000, see the Criminal Procedure Ordinance (Cap 221), Schedule 8 (Level of Fines for Offences).

Not to be guardian or committee

- 99 No trust company shall be appointed to be guardian of the person of an infant or committee of the person of a lunatic.

Restriction on holding shares in a trust company

- 100 No member of a trust company shall at any time hold shares in the capital of the company to an amount exceeding one-fifth of the issued capital of the company for the time being.
- (1) Subsection (1) does not apply to a trust company that is the subsidiary of a bank within the meaning of section 2 of the Banking Ordinance (Cap 155). (Added 23 of 1975 s 6. Amended 49 of 1995 s 53)
 - (2) For the purposes of subsection (2) of this section, section 15 of the Companies Ordinance (Cap 622) applies as if a reference in that section to 'a body corporate' were read as a reference to a trust company and as if the reference in that section to 'another body corporate' or 'other body corporate' were read as a reference to a bank within the meaning of section 2 of the Banking Ordinance (Cap 155). (Added 23 of 1975 s 6. Amended 49 of 1995 s 53; 28 of 2012 ss 912 & 920)

(Amended 27 of 1986 s 149)

[100.01] Enactment history

Sections 100 (2) and (3) were added by the Trustee (Amendment) Ordinance 1975 (23 of 1975), s 6 (6), commencing 1 July 1975 (LN 146 of 1975). Section 100 (2) was amended by the Banking Ordinance 1986, (27 of 1986) s 149, commencing 1 September 1986 (LN 199 of 1986) which repealed the previous Banking Ordinance and all the subsidiary legislations made under that Ordinance, so that reference to the Banking Ordinance is reference to the Banking Ordinance (Cap 155) (27 of 1986). Section 100 (2) was later amended by the Banking (Amendment) Ordinance 1995 (49 of 1995) s 53, commencing 15 November 1995 (LN 515 of 1995) by substituting 'within the meaning of section 2' for 'licensed under section 16'. By virtue of the Companies Ordinance (28 of 2012) ss 912 & 920, Schedule 10, Part 10, commencing 3 March 2014 (LN 163 of 2013), the phrase "section 2 (4), (5) and (6) of the Companies Ordinance (Cap 32) shall apply as if each reference in those subsections to 'a company' or 'the first-mentioned company' were read as a reference to a trust company and as if each reference in those subsections to 'another company' or 'other company'" was repealed and substituted by "section 15 of the Companies Ordinance (28 of 2012) applies as if a reference in that section to 'a body corporate' were read as a reference to a trust company and as if the reference in that section to 'another body corporate' or 'other body corporate'".

[cf. 1837 c 26 s 7 U.K.; 1918 c 58 U.K.]

- (3) For the purpose of this section, 'married person' (已婚者) means a party to a marriage within the meaning of the Married Persons Status Ordinance (Cap 182).

(Replaced 56 of 1995 s 3)

[4.01] Enactment history

This section was replaced by the Wills (Amendment) Ordinance (56 of 1995) s 3, commencing 3 November 1995. Subsection (1) is in the same terms (commencing 13 March 1970), whereas subs (2) and (3) were added by the Amendment Ordinance and apply to the will of a testator who dies on or after 3 November 1995 (see note [4.05] below).

[4.02] England

With reference to subs (2), of the Wills Act 1837 (c 26) s 7; and the Wills (Soldiers and Sailors) Act 1918 (c 58).

[4.03] General note

It can be noted that this section makes no reference to mental capacity to make a will which is wholly governed by case law. See, for eg, *Wood v Smith* [1993] 1 All ER 90, [1992] 3 All ER 556, where a will was held void for want of capacity and *Perrins v Holland* [2011] 2 All ER 174 on the rule in *Parker v Felgate* (1883) LR 8 PD 1781. In England there is a Mental Capacity Act 2005 which can apply to wills but this has no correspondence in Hong Kong, see *Scammel v Farmer* [2008] All ER (D) 296. As to knowledge and approval, see the Introductory note above.

[4.04] Subs (1): Full age

A person attains 'full age' on attaining the age of 18 years: see the Age of Majority (Related Provisions) Ordinance (Cap 410) s 2 (1), enacted 1 October 1990. Before the commencement of that Ordinance a person attained full age at 21 years. See also the Interpretation and General Clauses Ordinance (Cap 1) s 3 for a similar definition.

[4.05] Subs (2)

The substance of this subsection in so far as it relates to privileged wills, was previously in s 6 (2) below and was replaced as s 4 (2), by the Wills (Amendment) Ordinance (56 of 1995) s 3. But there is a significant addition: the previous s 6 (2) was only concerned with privileged wills, but this subsection adds the wholly unrelated category of 'married person'. The inclusion of 'married person' is new

and has no parallel in English law, although the practical effect of the inclusion is not likely to be great.

As to the reference to 'a person in actual naval, military or air force service', and 'a mariner or seaman at sea', see also s 6 below in respect of 'privileged wills', where the wording quoted is the same: see [6.01] *et seq* below. This provision now states expressly what was always understood to be the law regarding privileged wills, at least since the Wills (Soldiers and Sailors) Act 1918 (c 58), and probably before. See further, *In the Goods of Hiscock* [1901] P 78, [1900-1903] All ER Rep 63, 70 LJP 22; *Re Stable (dec'd), Dalrymple v Campbell* [1919] P 7, [1918-1919] All ER Rep 299; *Re Rapley's Estate, Rapley v Rapley* [1983] 3 All ER 248, [1983] 1 WLR 1069; and *Re Servoz-Gavin (dec'd), Ayling v Summers* [2009] EWHC 3168 (Ch), [2011] Ch 162, [2010] 1 All ER 410, [2011] 2 WLR 808.

[4.06] Subs (3): Married person

As to what is a 'married person', see s 2 of the Married Persons Status Ordinance (Cap 182).

[4.07] Definitions

For 'will', see s 2 above.

5 Signing and witnessing of a will

- (1) Subject to sections 6 and *[23D], no will shall be valid unless-
- it is in writing, and signed by the testator, or by some other person in his presence and by his direction;
 - it appears that the testator intended by his signature to give effect to the will;
 - the signature is made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time; and
 - each witness either-
 - attests and signs the will; or
 - acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness),
 but no form of attestation shall be necessary. [cf. 1982 c 53 s 17 U.K.]
- (2) 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

law. However, it must be noted that the intestacy rules in England and Wales changed further on 1 October 2014 with the introduction of the Inheritance and Trustees' Powers Act 2014. Now, the spouse or civil partner will be entitled to a statutory legacy of GBP 250,000 if the deceased died on/or after 1 October 2014 has issue. But if the deceased leaves no issue, the statutory legacy would be inapplicable and the surviving spouse or civil partner would inherit everything. The new rules have the effect of removing the complicated trust structure, and it is further distinguished from the current intestacy law of Hong Kong whereas statutory trust still plays a core role in the circumstance. Further, with effect from 1 October 2014, the Inheritance and Trustees' Powers Act 2014 introduces new rules requiring the Lord Chancellor to review the level of the statutory legacy at least every five years.

The English law was based on the presumed intentions of the hypothetical testator in the sense that the statutory code provided a system of distribution and entitlement consistent with what the deceased would, or might, have done if he or she had made a will. The Ordinance can be similarly regarded.

An amending Ordinance

The Ordinance amends the law relating to the distribution of intestates' estates and as such is a new legislative provision affecting the law replacing the previous statute and customary law. A useful summary of the pre-1971 law of intestate succession applicable in Hong Kong can be found in The Law Commission of Hong Kong, "*Report on Law of Wills, Intestate Succession and Provision for Deceased Persons' Family and Dependants*", (September 1989). As noted there (para 7.4), prior to the coming into force of the Intestates' Estates Ordinance (Cap 73), the law which regulated both the devolution on intestacy of immovable property in Hong Kong and the movable property of persons dying domiciled in Hong Kong was determined by two entirely different systems of law depending on whether the intestate was or was not Chinese. The law applicable to ethnic Chinese persons in Hong Kong was Chinese customary law and custom, the so-called *T'sing* law. The system applicable to a non-Chinese intestate was basically the law of England as at 5 April 1843 - ie the provisions of the Statutes of Distribution. Although that law was swept away in England by the Administration of Estates Act 1925, it remained applicable in Hong Kong. The Intestates' Estates Ordinance (Cap 73) replaced that law in 1971 with a modern uniform code of intestate succession law providing for the entitlement to and distribution of intestates' estates. See *Leung Lai Fong v Ho Sin Ying* (2009) 12 HKCFAR 581, [2010] 2 HKC 216 for a discussion by the Court of Final Appeal on the legislative background and legislative intention.

Thus, the pre-1971 legislation and cases thereon are of only marginal relevance to the modern law.

Jurisdiction

The Intestates' Estates Ordinance (Cap 73) governs the distribution of a deceased's intestate estates which is governed by the law of Hong Kong. The Ordinance does not contain any express jurisdictional provisions (although there is reference to

foreign elements in the Non-Contentious Probate Rules (Cap 10A) r 29), but according to the common law rules of private international law, movable property is governed by the law of the domicile; immovable property by the *lex situs*. Thus, the Ordinance will govern the distribution of the intestate movable property of a person who dies domiciled in Hong Kong and the distribution of immovable property in Hong Kong. It will not govern immovable property not situated in Hong Kong - regardless of the domicile of the deceased.

Amendment in 1995

The Ordinance as originally enacted came into force in its original form on the day of its enactment, 7 October 1971. But it has been subject to significant subsequent amendments notably by the Intestates' Estates (Amendment) Ordinance 1995 (Ordinance No 57 of 1995) which was described as an Ordinance to amend the Intestates' Estates Ordinance (Cap 73). The 1995 amendments stemmed very largely from the Law Reform Commission of Hong Kong's "*Report on Law of Wills, Intestate Succession and Provision for Deceased Persons' Family and Dependants*", (September 1989). Some of the amendments reflect changes in English law affected by the Administration of Justice Act 1982.

The amendments came into force on 3 November 1995. Deaths intestate before that date are governed by the Ordinance as originally enacted (subject to other amendments); deaths after that date are governed by the Ordinance as amended in 1995 (s 18 of the Amendment Ordinance).

The Amendment Ordinance preserved the basic structure of the Ordinance but made significant changes and additions to several of the sections. These amendments will be fully commented on in their due places but a summary can be noted here: s 2 (1) a new definition of 'personal chattels' which are now given absolutely to the surviving spouse; s 2 (2) a substituted and amended definition relating to 'children'; s 4 amended, particularly with reference to the amounts of the 'net sum' and with the addition of 'half blood' in distinction to 'whole blood'; s 5 likewise with the addition of 'half blood'; s 6 substituted with minor changes; s 7 substituted to provide for a right of the surviving spouse to acquire the residence by appropriation - with a new Schedule 2 added governing this; s 8 slightly amended; a new s 8A added relating to acquisition of interests under foreign law; s 13 substituted and Schedule 1 amended providing for transitional provisions for concubinage. This commentary will state and comment on the current law but the pre-1995 position will be referred to in the relevant commentaries to the sections amended or affected by the Amendment Ordinance.

Other Amendments

The Ordinance as originally enacted has also been amended or affected by other legislative provisions. The most important of these are as follows. The Age of Majority (Related Provisions) Ordinance (Cap 410) reduced the age of majority from 21 to 18 and this affects references to 'attaining full age' in s 5 of the Intestates' Estates Ordinance (Cap 73), with effect from 1 October 1990. The Parent and Child Ordinance (Cap 429) (17 of 1993 which came into force on 19 June 1993) affects the entitlement of illegitimate persons, including the entitlement on