

# Probate – Cliffnotes

## A. Introduction

### 1. Wills Definition

As per *Re Berger 1990*.

- (a) The document must contain a revocable disposition of the makers' property which is to effect on death.
- (b) The maker must have animus testandi.
  - (i) Intention that the document shall effect the kind of disposition above.
  - (ii) This is presumed if the document has the necessary dispositive effect and if it is duly executed, unless there is strong (extrinsic) evidence to the contrary.
- (c) Amendments to a will are called codicils.

### 2. Capacity

- (a) 18 years old: [s.4 Wills Ordinance](#).
- (b) **Maker of Will must have known hand approved the contents of the Will.**
  - (i) [Barry v Butlin 1838](#)
    - RULE 1: the onus is on the person propounding the will (wanting probate) to prove that the testator “knew and approved of the contents of the document, and *it is only where this is done* that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the Will”.
    - RULE 2: if a party writes *or* prepares a Will, under which he takes a **benefit**, that is a circumstance that ought generally to excite the suspicion of the Court and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true Will of the deceased.
  - (ii) Due execution by competent testator causes rebuttable presumption of knowledge and approval, unless met by adequate objection – [Cleare v Cleare 1965](#).
  - (iii) [Tyrrell v Painton 1894](#)
    - A son of the testatrix prepared and wrote the will but did not take anything under it. Instead, his close relative did. So Rule 2 of [Barry v Butlin](#) was extended to include parties closely associated to those writing a will.
  - (iv) [Wintle v Nye 1969 HL](#)
    - Held that a solicitor or other person who writes or prepares a Will *might* be able to take under it *provided that* any suspicions created by that be removed by the propounder.

- The degree of suspicion will vary with the circumstances of the case. It may be slight and easily dispelled. It may, on the other hand, be so grave that it can hardly be removed.

(v) *Fuller v Strum 2002*

- “The righteousness of the transaction” is an unfortunate term, suggesting that some moral judgment by the court is required (but is not). **What is involved is simply the satisfaction of the test of knowledge and approval**, but the court insists that, **given that suspicion, it must be the more clearly shown that the deceased knew and approved the contents of the will so that the suspicion is dispelled.**
- Suspicion may be aroused in varying degrees, depending on the circumstances, and what is needed to dispel the suspicion will vary accordingly.
- **In the ordinary probate case knowledge and approval are established** by the propounder of the will **proving the testamentary capacity of the deceased** and the **due execution of the will**, from which the court will infer that knowledge and approval.
- But in a case where the **circumstances are such as to arouse the suspicion of the court** (suspicious triggers must relate to the preparation to the execution of a Will) the propounder must prove affirmatively that knowledge and approval so as to satisfy the court that the will represents the wishes of the deceased. **All the relevant circumstances will be scrutinised by the court** which will be ‘vigilant and jealous’ in examining the evidence in support of the will.

(vi) *Nina Wang 2005 CFA*

- Propounder does not have to answer all suspicious circumstances surrounding a Will.
- Court’s ultimate aim is to ascertain whether the testator really knew and approved of the contents of a Will.

(vii) *Ip Wai Hung v Yip Man Chiu 2007*

- Evidence of the deceased giving instructions for his Will, or of the Will being read over to him or by him is, by nature, the most important evidence.
- Existence of particular facts or unexplained disinheriting of children, etc. insufficient to disprove knowledge and approval, especially if attesting parties of the Will were potent witnesses. Only the testator knows the real reason for disinheriting the children.

(c) **Mental Capacity**

(i) *Banks v Goodfellow 1870:*

- T must understand that he is giving his property to people of his regard;
- T must understand and recollect the extent of his property; and

- T must understand the nature and extent of the claims upon him of those included in his Will as well as those excluded.
  - T must realise that he is signing a Will and must accompany his act with the physical act of execution – *Langlais v Langley 1952*.
  - T must not do anything that he would not have done had his mind been sound.
- (ii) Delusions must be proved to have had or calculated to have had influenced T’s testamentary dispositions – *Boughton v Knight 1873*. Clause subject to delusion may be deleted.
- (iii) Presumed that T was of sound disposing mind unless issue is raised.
- (iv) Get a doctor to examine the testator and sign off with relevant certification.

### 3. Formalities

- (a) Required together with testamentary capacity to presume *animus testandi*.
- (b) As under [section 5\(1\), WO](#):
- (i) made in writing
  - (ii) signed by the testator or some other person in the testator’s presence and under his direction – see *Re Cook 1960* where “your loving mother” was accepted.
  - (iii) must appear that testator intended, by his signature to give effect to the Will – *Weatherhill v Pearce 1995*.
  - (iv) signature must be acknowledged by the testator in the presence of 2+ witnesses present at the same time.
  - (v) each witness to attest and sign on the Will / acknowledge T’s signature in the presence of T *after* having seen T’s signature, *In the Goods of Gunstan 1882*.

(c) **Dispensing Provision: [s.5\(2\) WO](#) \***

**Even if the requirements are not strictly complied with, due execution is deemed if there is *no reasonable doubt* that the document embodies the testamentary intentions of the deceased.**

(d) **Witnesses: [ss.5\(1\)\(c\), \(d\)](#)**

- (i) present together at signing or acknowledgement of signature of Will by T.
- (ii) each witness to attest and sign on the Will / acknowledge T’s signature in the presence of the testator.
- (iii) Avoidance of gift
  - no gifts or dispositions to witnesses or their spouses *unless*:
    - witness is supernumerary (not necessary, e.g. where third witness signed to “please her father” – *Bravda 1968*): [s.10\(3\)](#);
    - witness/spouse takes as trustee and not beneficially;
    - witness’ spouse marriage occurred after date of Will;
  - witness/spouse may be executor: [s.12 WO](#).

**(iv) Revocation of Wills: see [section 13](#)**

- Marriage: [ss.13 \(summary\), 14 \(detail\) WO](#)
  - Marriage will revoke previous Will – also [Leung Sai Lun 1999 CA](#).
  - Unless testator was expecting to be married *and* he intended that the Will was not to be revoked by marriage: [s.14\(3\), \(4\)](#).
  - Would also apply to particular dispositions: [s.14\(4\)](#).
- A legal divorce, on the other hand, does not revoke a Will, but will cause any gift to a former spouse to lapse: [s.15](#). Note the iterative effect of re-marriage.
- By another valid Will;
- By an express revocation clause (a written revocation executed in the way in which a testator could validly execute a will.
  - If, however, there is ‘settled evidence’ that the testator intended a previous disposition to take effect, the revocation clause can be construed to mean the revocation of the aggregate of the testator’s intentions so the previous dispositions can still have effect and the new Will ‘adds to’ the testator’s Will – [Re Finnemore 1992](#).
- Destruction by testator or under his instruction, with intention to destroy – [Re Adams 1990](#), where T obliterated the will by rendering the signatures illegible by pen-mashing;
- Later inconsistent codicil or Will.
- Alteration of a Will: [s.16 WO](#)
  - No effect unless for clarification purposes and testator executes it in a manner in which he could validly execute a Will.
  - His signature and those of his witnesses must be in the margin or wherever refers to the amendment.

**B. Testamentary Gifts**

**1. Subject Matter**

- (a) Specific gifts of specific articles or property identified as belonging to the testator.
  - (i) ‘My jade etched ring’, ‘all my shares’...
  - (ii) Liable to ademption (liable to extinction because item cannot be found);
  - (iii) Not subject to abatement (not subject to administrative expenses, will always be paid first, but subject to creditor debts).
  - (iv) Carries interest from death.
- (b) General gifts of property described generally.
  - (i) ‘1,000 HSBC shares’...
  - (ii) Not liable to ademption (personal administrator will buy it with cash, if any);
  - (iii) Liable to abatement (creditors’ debts will come out from here before specific gifts are sacrificed).

- (iv) Carries interest from date of grant (later than death).

## 2. Payout Priority

- (a) Creditors' debts will be paid out from the following, in order of priority:
  - (i) residue of estate;
  - (ii) general gifts;
  - (iii) specific gifts.

## 3. Children

- (a) Age of majority: 18 years, 21 for executors
- (b) Gifts to minors need receipt clause from parent or guardian.
- (c) See [s.23 WO](#) where a gift to testator's child may pass on to issue if child predeceases, etc.
- (d) Gifts to children, issue and descendants will, subject to any express provision to the contrary, include those *en ventre sa mere*, illegitimate children and adopted children.
- (e) However,
  - (i) it will not include: step children from a previous marriage;
  - (ii) The phrase: "children of natural parents of adopted child" excludes the adopted child;
  - (iii) where the right to any property depends on seniority, e.g. assumptions on who died first, then legitimated children (children born before marriage legitimated on date of marriage) will be treated as if they had been born on the day of legitimisation.

## C. Intestacy

### 1. Definitions

- (a) Jurisdiction: Moveable property will be governed by the law of the deceased's domicile.
- (b) Residuary Estate: beneficial interest in an estate after payment of all funeral, administrative expenses, debts and other liabilities are paid out, which the testator could have paid out.
- (c) Statutory Trust for Sale: the trustee holds the trust for someone with a power to convert the thing into money, while still holding the money on trust.

### 2. Basic Scheme

- (a) Scenario 1: [s.4\(2\) IEO](#)
  - (i) Intestate leaves spouse;
  - (ii) No issue, parents, sibling or issue thereof;
  - (iii) THEN surviving spouse gets all.
- (b) Scenario 2: [s.4\(3\) IEO](#)
  - (i) Intestate leaves spouse AND issue;

- (ii) THEN spouse gets \$500,000 statutory legacy + interest; all personal chattels; half of residuary estate;
  - (iii) AND issue gets other half of residuary estate on statutory trust for sale: (1) IEO. If issue predeceases, his issue thereof will get that to which their parent was entitled.
- (c) Scenario 3: s.4(4) IEO
- (i) Intestate leaves spouse AND parent/sibling (whole-blood) or issue thereof;
  - (ii) THEN spouse gets \$1,000,000 statutory legacy + interest; all personal chattels; and half of residuary estate; »»
  - (iii) AND parents, or failing which, siblings get the other half of residuary estate on statutory trusts for sale.
- (d) Scenario 4: s.4(5) IEO
- (i) Intestate leaves issue;
  - (ii) Intestate leaves no spouse;
  - (iii) THEN issue gets all on the statutory trusts.
- (e) Scenario 5: s.4(6) IEO
- (i) Intestate leaves both parents only;
  - (ii) THEN both parents get in equal shares.
- (f) Scenario 6: s.4(7) IEO
- (i) Intestate leaves one parent only;
  - (ii) THEN that parent gets all.
- (g) Scenario 7: s.4(8) IEO
- (i) Intestate leaves siblings, grandparents or uncles/aunts only;
  - (ii) THEN siblings (whole-blood) get in equal shares on statutory trusts;
  - (iii) If no siblings (whole-blood), then siblings (half blood) get in equal shares;
  - (iv) Failing which then grandparents get;
  - (v) Failing which then uncles and aunts (whole-blood) on statutory trusts;
  - (vi) Failing which then uncles and aunts (half-blood) on statutory trusts.
  - (vii) Issue thereof will take *per stirpes*: s.5(3) IEO.
- (h) Scenario 8: s.4(9) IEO
- (i) If cannot fit into any above category, all goes to Government as *bona vacantia*.

### 3. Definitions, etc.

- (a) Spouse: of valid marriage only s.3 IEO. Excludes those judicially separated; cohabitants; and common law spouses.

**(b) Concurrent death**

- (i) For concurrent death of intestate spouses, neither is deemed to survive the other: [s.4\(11\) IEO](#).
- (ii) For concurrent death of everyone else, [s.11\(1\) CPO](#) applies and the older ones are deemed to die first.

**(c) Personal Chattels means: [s.2 IEO](#)**

- (i) furniture, clothes, household, recreational and decorative articles, consumable stores (food), garden effects and domestic animals;
- (ii) motor vehicles and accessories;
- (iii) EXCLUDES: chattels used exclusively or principally for business or professional purposes, money or securities for money.

**(d) Matrimonial home: [s.7 IEO](#)**

- (i) If testator was sole owner, check resulting (ascertainable contribution) / constructive (uncertain contribution) trusts.
- (ii) If owned as tenants in common, then testator's estate only has half the beneficial interest. The spouse has the other.
- (iii) If owned as joint tenants, the surviving spouse takes the whole interest under the right of survivorship.
- (iv) Spouse has the right to acquire ONE residence in which survivor was residing at the intestate's death.
  - If the residence was worth more than the residuary estate that she was entitled to, then the spouse can pay into the estate the difference.
  - The residence is to be valued on the date of appropriation;
  - Disposal of the residence is restricted.
  - No self dealing even if the spouse is the executor of the estate.

**4. Statutory Trusts**

- (a) Generally for children but also applies to siblings, uncles and aunts.
- (b) [S.5\(1\)\(a\) IEO](#): Vests at 18 or marriage, whether before or after death of the intestate.
- (c) If child survives the intestate but fails to fulfil [s.5\(1\)\(a\)](#), the vested interest goes as if predeceased: [s.5\(2\)\(a\) IEO](#).
- (d) **Accounting for Advancements: [s.5\(1\)\(c\)](#)** and in partial intestacy, below...
  - (i) Applies to advancements of significant sums.
  - (ii) Example
    - Intestate leaves 3 children: A, B, C.
    - Total amount of entitlement under intestacy is \$12,000.
    - There was a \$3,000 inter vivos transfer to A.
    - So A must account for that inter vivos transfer.
    - Add advancement to total entitlement: \$15,000.

- Divide that into 3 parts: \$5,000 each.
- Reduce A's part by his inter-vivos advancement:  

$$\$5,000 - \$3,000 = \$2,000.$$
- |        |                 |
|--------|-----------------|
| A:     | \$ 2,000        |
| B:     | \$ 5,000        |
| C:     | <u>\$ 5,000</u> |
| Total: | \$12,000        |

## 5. Partial Intestacy

- (a) Arises when the Will fails to dispose of all property by omission, failure of gift, etc.
- (b) Since intestacy provisions are “subject to a Will”, the testate part of the estate is distributed first: [s.8 IEO](#).
- (c) The intestate part of the estate is distributed according to the aforementioned rules: [s.8\(1\) IEO](#).
- (d) **Accounting in Partial Intestacy**
  - (i) Contrasted with accounting by issue, for partial testacy, the spouse must too account *against the net sum* (\$500k or \$1M) for anything distributed in her favour through the Will: [s.8\(1\) IEO](#).
  - (ii) All issue must too account for testamentary benefits against any intestate entitlement: [s.8\(1\)\(b\) IEO](#).

## D. Applying for Grant of Probate

### 1. Introduction

- (a) **Personal Representatives (generic term)**
  - (i) **Executors:** appointed by Will, who obtain probate.
  - (ii) **Administrators:** appointed by Court, who get letters of administration.
- (b) **Grants of Representation**
  - (i) Grant of **probate**
    - proves Will;
    - is document of title for executors.
  - (ii) Grant of **Letters of Administration**
    - establishes that person is entitled to act as administrator;
    - vests property in the administrator.
    - Pre-grant property vests in Official Administrator: [s.10 PAO](#).

### 2. Executors

- (a) **Appointment**
  - (i) Appointed in the Will, usually by express provision.

- (ii) Implied appointment possible where a person is to “pay all my just debts and then hold the estate for...” or “discharge the responsibility of administering my estate”.

**(b) Capacity**

- (i) Anyone over 21 years not suffering from mental incapacity (unable to manage his own affairs) can *act*.
- (ii) Court has jurisdiction to pass over appointed person in favour of more suitable persons: [s.36 PAO](#).

**(iii) Minors**

- Any minor can be *appointed* but cannot *act* until s/he has attained 21.
- If a minor is the sole executor, the grant of probate will have to be made to his/her guardian or other fit person for the use and benefit of the minor: [s.39 PAO](#).
- When minor attains majority, the earlier grant to the guardian will be revoked and a fresh grant be made to the now adult. Until that has been done, mere appointment of the minor does not give him any interest in the property or any powers to deal as executor: [s.39 PAO](#).

**(iv) Corporations**

- Corporation will check the charging clause in the Will and will renounce if not satisfied.
- Probate will not be granted to a syndicate or nominee on behalf of a trust corporation although a trust corporation is allowed.
- Officers of the (trust) corporation must swear the necessary affidavits and give security, etc. required in order to obtain the grant and these acts will be binding on the corporation: [s.26 PAO](#).

**(v) Professionals (lawyers, accountants)**

- Named individuals can act as can a class of legal entities. However, a firm alone cannot be appointed because that has no legal status.
- [Re Rogers 2006](#) formula:
  - “I appointment the partners at the time of my death in the firm of [•] or the firm which at that date has succeeded to and carried on the practice to be the Executors and Trustees of this Will [and I express the wish that 2 and only 2 of them shall prove my Will and act initially in its trusts].”
  - “Any trustee being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for business done, services rendered or time spent by him or his firm.”

*appointment*

*charging clause*

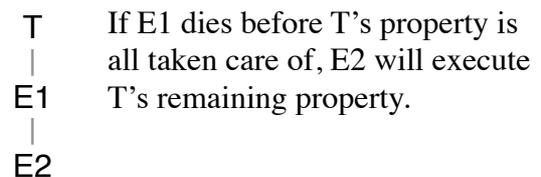
**(c) Number of Executors**

- (i) No more than 4 in respect of the same property: [s.25 PAO](#).

- (ii) Where 1 of them apply for probate, power is reserved for the others to apply subsequently or to complete the administration of the estate.
- (iii) **Minority or Life Interest: [s.25 PAO](#).**
  - Still, only 1 executor required because he has trust reposed in him, but if none appointed, the Court must appoint 2 administrators.
  - If 1 executor nominated, the Court may in rare circumstances, appoint a second person acting as 2<sup>nd</sup> administrator.

**(d) Transmission / Chain of Executors**

- (i) The executor of the last executor of a testator is the executor of that testator.



- (ii) The chain is broken where:
  - there is an intestacy (no Will made to appoint executor)
  - the testator fails to appoint an executor through the Will; or
  - no one obtains the probate of the Will (temporary grant of administration does not break chain if probate is subsequently granted).

- (iii) Once the chain is broken, it will be necessary to apply for a grant of administration *de bonis non administratis* (of the goods not administered).

- (e) **Executor de son tort:** people who intermeddle with the estate without a formal grant may be held by the Court to assume the office of the executor and be liable to account accordingly: [James v Williams 1999](#).

- (f) **Renunciation:** an appointed executor may renounce his executorship at any time after death even if he had agreed during the testator's lifetime: [s.29 PAO](#).

- (i) [S.29 PAO](#) Express Renunciation: oral (in court) or in writing (attested).

- (ii) [S.30 PAO](#) Constructive Renunciation: deemed renounced if person nominated as executor does not reply to query sent by person interested under the Will.

- (iii) [s.31 PAO](#) Retracting Renunciations:

**3. Applying for Grant of Probate**

- (a) ... procedural matters ...

**4. Applying for Grant of Administration**

- (a) Number of Administrators

- (i) Usually 1, but up to 4: [s.25 PAO](#).

- (ii) Minority or Life Interest: [s.25\(1\) PAO](#).

- Administration must go to a trust corporation or 2 individuals.

- If one of the administrators die, another does not have to be appointed in his place.
- Where there is only 1 competent administrator available under the rules, the sole administrator may nominate another competent and fit person to take the grant and a joint grant may be made with that person: [NC-PR r.31\(4\)](#).

**(b) Capacity of Administrators**

- (i) Same as for executors, *above*.

**(c) Grant with Will Annexed (Will exists, but no executor)**

- (i) Letters of administration will be granted and the person so appointed will administer the estate as if probate had been granted to him as executor: [s.35 PAO](#).
- (ii) Order of priority where there is a Will, [r.19 NC-PR](#):
- the executor;
  - residual devisee holding in trust for any other person;
  - residual devisee for life;
  - ultimate residual devisee;
  - in case of partial intestacy, any person entitled to a share in the residue but not entitled to share in the part not disposed by the Will;
  - any specific devisee;
  - any creditor;
  - personal representatives of any such person;
  - in case of intestacy, any person who does not benefit immediately under the estate but who might have such an interest through an increase of the estate;
  - any devisee entitled on fulfilment of any condition in the Will;
  - any person not benefiting under the Will but who would have been entitled had the intestacy rules been applied.

**(d) Grant in Event of Intestacy**

- (i) Order of priority where there is no Will, [r.21 NC-PR](#):
- surviving spouse / partner(s) to a union of concubinage entered into before 7 Oct. 1971;
  - children of the deceased (incl. those born of concubinage), or issue of such child if predeceased;
  - a parent of the deceased;
  - siblings (whole-blood then half-blood) or issue thereof;
  - a grandparent of the deceased;
  - uncles and aunts (whole-blood then half-blood) or issue thereof.

**(ii) Conflict, grants to minors**

- Where there are too many potential administrators in a class of entitled persons, the court will grant the Letters to those whom it considers will most effectively administer the estate: [r.25 NC-PR](#):
  - First come first served, since no notice has to be issued to ignorant people;
  - any dispute should be resolved by Registrar Summonses;
  - preference will go to living persons instead of personal representatives of deceased persons entitled in the same degree.
  - preference will go to a person not disabled in preference to an infant entitled in the same degree.
- Where there are children under 21 entitled to a grant, administration for his use and benefit would be granted under [r.31\(1\) NC-PR](#):
  - (a) to the parents of that person jointly or to any court-appointed guardian;
  - (b) if there is no such guardian and the person has reached 16 years, to any next-of-kin nominated by the person or her husband. According to [r.31\(2\)](#), any next-of-kin or husband nominated under [\(b\)](#) can still represent any other person who is under 16 entitled in the same degree as the person who nominated him first.
- Notwithstanding anything in [r.31](#), administration can be granted to any person assigned as guardian by order of the Registrar jointly, or to the exclusion of any person in [\(1\)](#) and such guardian needs to apply with affidavit with affidavit of fitness sworn by a responsible person: [r.31\(3\)](#).
- [R.31\(5\)](#): where a person under 21 is a sole executor but has no interest in the residuary estate, administration for the use and benefit of that person until he reaches 21 will be granted to the person entitled to the residuary estate.

**(e) Grants in Special Circumstances**

- (i) Under [s.36 PAO](#), the court can **pass over** a person entitled as an administrator if it finds it expeditious to do so.
- (ii) The person wishing to remove the administrator has the burden to show the court that the potential administrator is clearly unsuitable – [Re Gienger 2007](#), e.g.:
  - insolvent, leads unsuitable lifestyle, criminal tendency, drunken habits;
  - strong objections by all beneficiaries;
  - nomination under s.36 by deed of family arrangement.

**(f) Revocation of Grant**

- (i) Where grant ought not to have been granted or contains an error, the court can call it in and revoke it – [PAO s.33](#) e.g.:
  - later will is found;
  - will shown to be invalid;
  - deceased shown to be alive;

- person claiming to be entitled is not actually entitled;
  - person with a higher priority comes forward;
  - grant issued without considering an existing caveat.
  - grant issued to unfit person – *Re Lam Choi Hing 2007*, where the executor failed to do anything to administer the estate and furthermore became bankrupt.
- (ii) Effect of revocation:
- Beneficiaries subsequently disentitled will not be protected since they are ‘volunteers’ under [s.67 PAO](#): assets will be traced.
  - Third party purchasers in good faith are protected under [s.57 PAO](#).
  - The person who originally got the grant and distributed property in good faith is indemnified: [s.57 PAO](#).

## E. Miscellaneous

### Married Persons Status Ordinance, Section 2

#### Application (to both IEO and WO)

(1) Save where otherwise appears, this Ordinance applies to persons who are parties to a marriage, whether married before or after the commencement of this Ordinance.

(2) In subsection (1), “marriage” means-

- (a) a marriage celebrated or contracted in accordance with the provisions of the Marriage Ordinance ( Cap 181);
- (b) a modern marriage validated by the Marriage Reform Ordinance (Cap 178);
- (c) a customary marriage declared to be valid by the Marriage Reform Ordinance ( Cap 178); or
- (d) a marriage celebrated or contracted outside Hong Kong in accordance with the law in force at the time and in the place where the marriage was performed.

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