

What can you do for your loved ones in the midst of this pandemic?



Two years after the pandemic hit, Hong Kong is facing the steepest surge in Covid cases since it all began. With much in flux and many life plans thrown off-track, one trend we have observed is that more clients are seeking support with updating their Wills or drafting one for the first time, alongside a rise in requests for support with estate or legacy planning. With so many personal and family transitions happening, having a Will in place may help you to think more about how you can provide for your loved ones when you are gone, to gain control over this process and to reduce room for future disputes.

We have summarized some of the common scenarios when it comes to Will planning, and how they may impact the way you would structure your Will.

1. My family is planning to move overseas

Where you are domiciled and where your beneficiaries reside are two of the key factors that will impact how you want to structure your gifts. Generally, when you move to a new jurisdiction with the intention to make a permanent home there, you acquire a new domicile at the new jurisdiction. The law in the new jurisdiction would affect your capacity as a testator and how your Will would be interpreted. Therefore you should consider whether you should create or update your Will that can cover your global assets, or you should have one Will in some or each of the jurisdictions where your assets are located.

Having multiple Wills provides convenience to the executors when they are dealing with the estate's assets. In certain jurisdictions this approach may also bring some estate duty savings. However, having more than one Will may bring confusion and can cause possible disputes amongst beneficiaries, delay in the probate processes, or worse still an accidental overlap in the terms can potentially invalidate one or more of the multiple Wills.

Where the testator has assets in both common law and civil law jurisdictions where the laws governing Wills are very different (e.g. Hong Kong vs mainland China), having separate Wills may be the preferred approach but advisors across different jurisdictions must coordinate their efforts to the extent possible in order to address the risk factors associated with multiple Wills. In practice, it is often beneficial to engage an advisor who is experienced in dealing with cross-jurisdiction issues as the lead counsel in drafting Wills involving multiple jurisdictions.

If the beneficiaries of your Will have moved or are planning to move to high tax jurisdictions (e.g. the United Kingdom, Canada), they may be subject to gift tax or high income tax rates once they receive a significant gift from your estate. In these circumstances incorporating testamentary trust provisions into your Will can be extremely useful for tax planning purposes. We will discuss further on testamentary trusts below. Other than Wills, inter vivos trust is also a common estate planning tool for high net worth families with beneficiaries residing in high tax jurisdictions. With appropriate tax advice, a carefully planned trust structure can often bring significant asset protection benefits and tax savings.

2. I just bought a new real estate property

As real estate properties typically constitute a substantial portion of an individual's estate in Hong Kong, it is often advisable to address real estate specifically in the Will. This is because Wills usually

provide for a residual estate that would be used to settle the debts and expenses of the estate before it can be distributed to the residuary beneficiary. Unless it is mentioned as a specific gift, a real estate property will form part of the residuary estate and may have to be sold for cash in the course of the estate administration. If you would like to avoid this outcome, you should consider specifically mentioning the gift of real estate in your Will.

Real estate properties are immovable properties and are passed on death in accordance with the law of the jurisdiction where they are located. Therefore if you own real estate properties in different jurisdictions, you would want advice on how real estate properties will be passed on death and the applicable tax in each of these jurisdictions. Jointly owned properties may or may not be governed by your Will. It may also be necessary to do some tax planning in respect of your real estate holdings, or to create separate Wills under the jurisdictions where your real estate properties are located. Therefore you may find it more efficient to engage a law firm with offices or connections at all of the relevant jurisdictions to plan or draft your Wills.

3. My children are too young to inherit my assets

If you just had a baby or if your children are still young, you must consider the appointment of a guardian for your children in your Will. If your child's guardian lives far away from you, you and your spouse could even consider appointing a temporary guardian for the children in your current jurisdiction so that the children would not be taken away by social services as wards of the state even for a short period pending the arrival of the more permanent guardian. Your executor and your guardian might require different abilities or have different relationships with your children and may well be different people. You may also consider creating a testamentary trust in your Will, so that upon your death your assets will not be directly passed to the beneficiaries but will be held by the trustee of your choice for their benefits. The trustee would have discretion on how assets should be distributed when you are no longer around. Testamentary trusts are very flexible and there are many ways which you could tailor the testamentary trust provisions in your Will to meet your specific needs and concerns. For example, it is possible to allow your trustees to allocate your assets according to your children's needs and distribute the balance to your children after they reach a specific age. You may also consider preventing your children (even after reaching 18 years old) from selling their income interest for a sum of money, thus keeping your estate out of reach from their creditors.

While there is no law in Hong Kong that prohibits people from writing their own Wills, a Will that fails to sufficiently consider legal and tax implications or one that contains vague or inconsistent language may result in unexpected tax consequences for your loved ones, a Will with inoperable clauses or a Will that fails to reflect the intentions of the testator. To be prudent, it is always best to seek assistance from professionals who can tailor your Will and adopt a holistic approach to your succession planning needs.

Please note that the above is for information only and is not intended to be legal advice. Wills are highly personal and must be tailored to the circumstances of each individual. There are many more issues that one should consider before making or updating a Will. If you or your client would like to know more of the above, please feel free to contact us at any time.

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