Guide to Non-Contentious Probate Practice

JUDICIARY

Foreword

This Practice Guide is a further step undertaken by the Judiciary to tackle the problems impeding the expeditious handling and disposal of applications for grants filed by practitioners with the Probate Registry. The initiative started in 2006 when the Guide to the use of Specified Forms and the Common Requisitions, a working tool to assist the practitioners in preparing applications for grants, was published. It was followed by a circular issued by the Law Society upon the direction of Lam J (as he then was), the then Probate Judge, in June 2011, reminding the practitioners that badly-prepared cases and delays would lead to dismissal of applications for grants. Disappointingly, many of the problems still remain and improvement has been slow. More rigorous efforts are thus required.

Pursuant to my direction, the Probate Masters, Master Katina Levy and Master Jack Wong, have compiled this very informative Guide. It sets out clearly and in considerable detail the current practice adopted by the Probate Registry, in particular, targeting areas that are most problematic. It also helps practitioners navigate through the procedural steps at various stages of applications, providing useful guidance along the way. Its principal objective is not just to enhance the quality of applications for grants or to ease the burden on practitioners. It will ensure that applications are properly prepared from the outset and disposed of as efficiently as practicable. For it is in the public interest that applications for grants are dealt with as expeditiously as the circumstances of the case may permit. I expect practitioners to comply fully and faithfully with this Guide.

I am extremely grateful to the Probate Masters for their highly commendable efforts in preparing this Guide. The task has been onerous and demanding. And they have accomplished it with distinction. I must congratulate them for this exemplary piece of work.

I would also take this opportunity to thank the staff at the Probate Registry.

The Probate Registry was first created by the Probate and Administration Ordinance, Cap.10 in 1971. Following the growth of the population, the workload of the Probate Registry has increased significantly over the years. In 2011, the number of applications for grant is 15,500. The burden imposed on the Probate Registry is enormous indeed. In discharging their duties, the probate officers have the most invidious job to perform. Vetting papers is an important aspect of their daily routine. However drudgery as it may appear, they have in every case gone through the papers thoroughly and carefully, making sure that they are in order and grants are properly granted. Raising requisitions for the Probate Masters' consideration is not easy either. Occasionally, the requisitions raised may prompt a few unsympathetic practitioners to blame the probate officers as being obstructive. This sort of criticism is of course wholly unwarranted. The probate officers do no more than render administrative assistance to Probate Masters, who remain the sole authority as to whether requisitions should be raised or have been satisfactorily answered.

The probate officers are committed to their job. I find their overall performance satisfactory. I am confident that they will continue to serve the public with dedication and professionalism in the years ahead.

Jeremy Poon
Probate Judge
High Court
January 2013

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Table of Abbreviations

ACB	*ad colligenda bona*
CA	Court of Appeal
CJR	Civil Justice Reform
DBN	*de bonis non*
IEO	Intestates' Estates Ordinance (Cap.73)
HKCP	Hong Kong Civil Procedure 2012
MRO	Marriage Reform Ordinance (Cap.178)
NCPR	Non-Contentious Probate Rules (Cap.10A). All references to any rules in this Guide, unless otherwise stated, are references to the rules of the NCPR.
Oath	The oath as required by NCPR, r.6.
PAO	Probate and Administration Ordinance (Cap.10). All references to statutory provisions, unless otherwise stated, are references to the provisions in the PAO.
S.F./ Specified form	Forms specified by the Registrar by G.N. (S) 3 Gazette No.4/2006 pursuant to NCPR, r.2A(1) for use in connection with the rules under the NCPR in accordance with NCPR, r.2A.
T & C	*Tristram & Coote's Probate Practice*, D'Costa, Winegarten and Synak, Butterworths. All references to T & C in this Guide, unless a different edition is stated, are references to the 30th edition.
WO	Wills Ordinance (Cap.30)

PART 1 – INTRODUCTION

1. It is in the public interest that grants for probate and administration in non-contentious probate business should be processed and made as soon as practicable. This is especially so after the implementation of the CJR, which requires cases to be disposed of expeditiously. However, in practice, there are many cases of serious delay and inactivity after filing of the applications for grant. The reasons for the delay and inactivity typically involve:

   (1) badly prepared applications such as:

      (a) The oath is not in the appropriate specified form.

      (b) The contents of the oath lack necessary particulars in respect of:

         (i) the marital status of a deceased and his/her relationship with the beneficiaries;

         (ii) the correct capacity of an applicant showing entitlement to the grant being applied for;

         (iii) the circumstances under which persons with prior rights have been cleared off;

         (iv) the existence of minority interest, which requires the number of administrators to be not less than 2 persons;

   (2) documents filed do not tally with the information shown in the checklist that is required to be lodged together with the application; or

   (3) solicitors' unfamiliarity with the rules, practice and procedure, resulting in the inevitable consequence that requisitions are not answered in a timely and satisfactory manner.

2. In some extreme cases, practitioners, instead of familiarizing themselves with the probate practice and procedure, improperly seek legal advice from probate officers who are not empowered to give such advice.

3. This Guide is introduced as part of the measures adopted by the Judiciary to tackle the problems more rigorously. It sets out the general practice of the Court in dealing with the applications for grant of probate and administration in non-contentious probate business where the applicants are legally represented. It also provides practical guidance for processing applications. Applicants and their legal advisors are expected to follow this Guide closely in handling applications.

4. While this Guide may provide some quick and useful references, it is by no means a substitute for the relevant statutory provisions or case law, with which probate practitioners should familiarize themselves, including:

   (1) PAO;

   (2) WO;

   (3) IEO; and

   (4) NCPR.

5. Practitioners should also refer to the following references when preparing an application:

   (1) HKCP Vol. 2 Part D (3) PAO, and Part D (4) NCPR;

   (2) PD20.1;

   (3) PD20.2;

(4) The Specified Forms and the Guide to the use of Specified Forms[1]; and

(5) Common Requisitions (which are updated periodically and available on the Judiciary website[2]).

6. Section 72 of the PAO mandates that if no provision is made by probate rules and orders, the practice and procedure for the time being in force in the Probate Registry in England shall be deemed to be in force in Hong Kong. In respect of the current probate practice in England, practitioners should consult T & C, which is a leading practitioners' textbook. They may also need to refer to some of the older editions of T & C where the English practice and procedure have changed by virtue of statutory amendments but the corresponding Hong Kong statutory provisions have not been amended.

7. As usual, practitioners are expected to use their best skills and efforts in processing applications for grant. The Court does not tolerate delay or badly prepared applications and may refuse an application (although without prejudice to the applicant's right to make a fresh application) should such incidents occur: see the Law Society's Circular 11-404(PA)) issued on 13 June 2011. Practitioners are further reminded that if they are responsible for the delay and badly prepared applications, the Court may disallow their costs and refer the matter to the Law Society for action.

8. This Guide is not meant to be comprehensive. The Probate Master will, with the assistance of probate officers, continue to deal with applications in accordance with their circumstances and specific needs.

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1 Both of which are available on the Judiciary website at <*http://www.judiciary.gov.hk/en/crt_services/forms/probate.htm*>.

2 <*http://www.judiciary.gov.hk/en/crt_services/pphlt/pdf/commonrequisitions.pdf*>.

PART 2 – JURISDICTION

A. General

9. The jurisdiction of the High Court in probate and administration is constituted by s.3 of the PAO. It includes, among other things, the power to grant probates of wills and letters of administration to the estates of deceased persons.

10. The jurisdiction to make a grant of probate or administration in non-contentious or common form probate business is delegated by s.5 of the PAO, as restricted by s.6, to the Registrar. In the exercise of his jurisdiction under s.5, the Registrar shall or may refer the matter to a Judge under the circumstances as specified in s.6(2)(a) and (b) respectively. The Judge may then either dispose of the matter himself or refer it back to the Registrar with such directions as he thinks fit (PAO, s.6(3)).

11. In practice, it is the Probate Master who exercises the jurisdiction under ss.5 and 6 of the PAO in making the grant of probate or administration in non-contentious or common form business.

12. In discharging his duties and functions, the Probate Master is assisted by the probate officers of the Probate Registry who render administrative assistance to him in processing the applications for grant[3].

B. Inquisitorial jurisdiction

13. The probate jurisdiction is inquisitorial.

14. Under s.8A(1) of the PAO, a Probate Master may require any applicant for a grant to provide any information relating to the estate concerned which appears to him to be necessary for the purposes of exercising his jurisdiction in making the grant. Further, r.5(1) mandates a Probate Master not to allow any grant to issue until all

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[3] See further Part 3 for the role of a probate officer.

inquiries which he may see fit to make have been answered to his satisfaction. Accordingly, if in doubt, the Probate Master is duty bound to raise requisitions[4].

B1. Common requisitions

15. Requisitions that are frequently raised are published on the judiciary website[5] for the benefit of practitioners in helping them to prepare applications. Before an application is filed, practitioners should properly read them through to ensure that all the requisite information has been set out in the oath and that all the necessary supporting documents are provided. By so doing, requisitions on those matters can be avoided, which will help expedite an application and save their clients' costs.

B2. Answering requisitions by correspondence

16. It is the usual practice to raise requisitions by way of correspondence. They may be answered by way of affidavits and documents as well as by answers set out in correspondence[6].

B3. Answering requisitions by an appointment hearing

17. There are also cases where requisitions are raised and dealt with at a hearing before a Probate Master.

18. In order to facilitate grant applications, the Registrar in October 2003 issued a letter to the Law Society, introducing a special appointment system designed to enable practitioners to discuss an application with a Probate Master in respect of cases:

    (1) that have been left outstanding for more than four months; and

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4 *Re Yip Ho* [2005] 4 HKC 330 (CA) at 335I (para 15), Tang JA; *Re Cheung Hung* [2011] 1 HKLRD 455 at 464 (para 23), Lam J (as he then was).

5 <*http://www.judiciary.gov.hk/en/crt_services/pphlt/pdf/commonrequisitions.pdf* >.

6 *Re Yip Ho* [2004] HKEC 798 (CFI), at para 56, A. Cheung J (as he then was); *Cheung Hung*, *supra*, at 465, 469 (paras 28, 49), Lam J.

(2) where the applicants have special difficulties in complying with the requisitions raised or the solicitors consider that they could or ought to be resolved expeditiously.

Subsequently, the appointment system was further extended (by a letter of the Registrar issued on 16 November 2005 to the Law Society) to cover any requisitions raised. An appointment to see a Probate Master may be made if an applicant does not agree with the requisitions or has difficulties in answering it.

19. However, this is not a rigid arrangement and it has been used flexibly especially since the implementation of the CJR. Where expedition is required, the Probate Master will take a more robust approach by resorting to the appointment system more frequently and flexibly. A hearing before a Probate Master should not be confined just to the situations stated above.

20. A hearing before a Probate Master should be held when answers to the requisitions by way of correspondence fail to resolve the matter in question. In such a case, a hearing can be fixed either at the request of the solicitor or as directed by the Master. Further, it is the duty of the practitioner to attend such a hearing and advance full submissions in support of his stance. A solicitor will be failing in such duty if he does not advance all the relevant legal submissions and authorities or place all relevant materials before the Master at such hearing[7].

21. When using this appointment system, practitioners are required to file a Notice of Appointment[8], in which the requisitions the applicant wishes the Master to deal with at the appointment shall be set out.

22. For the purpose of increasing cost-effectiveness, only in complex cases should practitioners prepare a very brief bundle containing a short written skeleton submission, relevant family tree/dramatis personae, and chronology of important events (as required by the Registrar's letter of 16 November 2005). For simple cases, the preparation of a brief bundle is now dispensed with.

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7 *Re Chung Ching Wan* [2011] 2 HKLRD 878 at 138E-G, Lam J.

8 See Attachment "A".

23. The hearing before a Probate Master serves several useful purposes:

(1) It gives a chance to the practitioner to explain to the Probate Master any practical difficulties faced by the applicant in complying with the outstanding requisitions.

(2) The Probate Master can explain to the practitioner his or her concern and why the requisitions are deemed necessary.

(3) The practitioner can explore with the Probate Master other possible means of addressing the relevant concerns which may be more readily achievable by the applicant. To be effective, the solicitor attending such a hearing for an applicant should have obtained the necessary instructions and information from his client and explored the possible options with him before the hearing. Moreover, the probate practitioner should adopt a collaborative mindset which is necessary for effective and efficient resolution of the matter. Failing to do so would only generate delay and unnecessary costly proceedings in the process and this cannot be in line with the interest of the client.

(4) If there are still unresolved issues, the practitioner can fully canvass his or her arguments before the Master who can give a fully reasoned judgment to facilitate the proper understanding of the requisitions by the applicant (and those advising the applicant should then consider the appropriate response to the same and if necessary an appeal to a Judge)[9].

B4. Dealing with answers

24. A Probate Master will deal with the answers to the requisitions with flexibility, and have regard to the following matters in considering whether a requisition is satisfactorily answered:

(1) Purpose of the requisitions;

(2) Nature of the answers;

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9 *Chung Ching Wan*, *supra*, at 138G-139B, Lam J.

(3) Source of the information supporting the answers;

(4) Size and nature of the estate to be administered;

(5) Personal circumstances of the applicant and his or her relationships with other persons interested in the estate; and

(6) Other relevant factors[10].

C. Duty of applicants and their legal advisors

25. Corresponding to the Probate Master's power to raise requisitions is the duty on the part of an applicant to answer requisitions to the former's satisfaction[11]. An applicant's legal adviser is also under a duty to furnish information to the Court in support of an application, which should be supported with the relevant evidence[12].

26. Further, when fulfilling the duty to answer requisitions, practitioners should not simply provide answers without paying attention to the manner of compliance. Substantial compliance is required "to be in a manner which is not less satisfactory having regard to the purpose of the legislation in imposing the requirement"[13]. For example, if an applicant has supplied all the information required but has rearranged the paragraphs of the specified form at random, it cannot be said that because all the information has been supplied there has been substantial compliance.

27. Applicants and their legal advisers are reminded that unless and until they have answered all the requisitions raised by the Probate Master to his satisfaction, no grant will be issued. It is only in their interest to provide all the information requested in a timely and satisfactory manner so that their applications can be expedited as soon as

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10 See *Cheung Hung*, *supra*, at 465 (para 30), Lam J.

11 *Yip Ho* (CFI), *supra*, at para 51, A. Cheung J.

12 *Cheung Hung*, *supra*, at 469 (para 49), Lam J.

13 See *Yip Ho* (CA), *supra*, at 336C-D (para 18), Tang JA.

practicable. Any failure on their part to do so will inevitably result in unwarranted delay and wasted costs, which is plainly undesirable.

27A. Applicants may sometimes write directly to the court making enquires as to the progress of their case even though they are legally represented. It has been the practice of this court to reply and ask the applicants to contact their own legal advisers for details. However, in line with the spirit of CJR, the practitioners should note that this court may also call for an appointment hearing to investigate the reasons for delay (if any) and see how the matter could be expedited.

PART 3 – GENERAL PROCEDURE AT THE REGISTRY

28. All applications for grant must be filed with the Probate Registry: see s.24 of the PAO.

29. For the purpose of processing the applications, the Registry is administratively divided into "Solicitors Application Section" and "Public Application Section". The Solicitors Application Section mainly processes applications for grant filed by applicants through practitioners. The Public Application Section deals with applications filed by parties acting in person and applications for summary administration of an estate by the Official Administrator.

30. This Part only deals with the general procedure at the "Solicitors Application Section".

A. General procedure at the Solicitors Application Section

31. A flow chart of how the Solicitors Application Section processes the applications can be found at Attachment "B" for easy reference.

B. Role of probate officers

32. The Probate Registry is staffed by a Chief Probate Officer and probate officers. They provide purely administrative assistance to Probate Masters in processing applications. A decision of a probate officer should not be regarded as that of a Probate Master[14].

33. The main administrative function of probate officers is to vet oaths and supporting documents, in particular:

    (1) to check whether the appropriate specified form is used;

    (2) to check whether all the information as required by the specified form has been properly set out;

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14 *Re Kwan Ying Man* [1996] 2 HKLR 4 at 7C, Yam J.

(3) to check whether all necessary documents have been filed;

(4) to check whether the foreign documents are properly authenticated and accompanied by proper translations (as the case may be);

(5) to raise requisitions if the oath and the documents filed are not in order;

(6) to seek directions from Probate Masters if and when necessary.

34. Applicants as well as practitioners are expected to fully co-operate with the probate officers in providing the information sought so that their applications can be expedited without delay. In the unlikely event that they need to seek directions from a Probate Master, they should make an appointment hearing in accordance with B3, Part 2 of this Guide.

35. For the avoidance of doubt, although assisted by probate officers, a Probate Master remains the only authority to decide whether a grant should be made and what requisitions, if necessary, are to be raised.

PART 4 – HOW TO PREPARE AN APPLICATION FOR GRANT

A. Preparing the oath in accordance with the specified form

36. Under r.6(1), an application for a grant shall be supported by an oath in the specified form[15]. As such, the oath is the essential document grounding any application. It must be accurately prepared, setting out all the necessary information in support. Applicants should pay particular attention to the following matters.

37. Basic information of the oath shall follow the specific order as required by the specified forms. The forms are designed to reduce processing time and facilitate processing as well as understanding by applicants (whether represented or otherwise). The proper use of the specified forms in a manner consistent with the purpose of the rules (which are made generally for the better carrying out of the provisions of s.72(1)) is in the public interest. There is likely to be delay if applicants are free to modify the specified forms as they please[16].

38. Rule 2A(2) permits variations of or addition to the specified forms when circumstances require. However, there is no scope for individual creativity that is not required by the circumstances of the case[17].

39. When using the specified forms, an applicant is required to adhere both to the form or format and to the substance. All information required by the specified forms should be supplied[18], otherwise it may result in delay[19]. Thus, where an applicant has supplied all the information required by the specified form but has re-arranged the paragraphs of the specified form at random, he cannot be said to have

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15 *Yip Ho* (CFI), *supra*, at para 25.

16 See *Yip Ho* (CA), *supra*, at 336E (para 19).

17 *Yip Ho* (CFI), *supra*, at paras 26, 31 & 32.

18 *Yip Ho* (CFI), *supra*, at para 27.

19 *Yip Ho* (CA), *supra*, at 336E (para 19).

substantially complied with the statutory requirement simply because all the information has been supplied in the specified form[20].

A1. Title

A1.1 Deceased's name

40. A grant is always issued in the true name of the deceased, which must be stated in the title of the oath. The name as appeared in the grant will be identical to the name as appeared in the title.

41. If an applicant wishes the grant to include both a deceased's English and Chinese names, both the deceased's English and Chinese names should be stated in the title of the oath.

42. If a deceased's alias is included in the title when it is sought to obtain a grant in which he is described by a further name in addition to his true name, the applicant is required to comply with r.7. The applicant must depose to the fact in the oath, setting out the true name of the deceased and that some specified part of the estate was held in the other name or giving any other reason for the inclusion of the other name in the grant.

42A. The following arguments were not accepted by the Court constituting "any other reason" under r.7.

(1) To avoid amendment if property would be found later in the estate under the alias of the deceased[20A].

(2) When the applicant had chosen her name in the US identification documents to be her true name, the inclusion of her other name (i.e. her alias) as shown (even) in her HKID card[20A].

(3) The reasons of good record or paying respect to the deceased[20B].

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20 *Yip Ho* (CA), *supra*, at 336A (para 16).

20A *Re Cynthia Wai-Man Fan*, HCAG 5519/2005 (7 March 2006) (unrep.), Master J. Wong

20B *Re Chan Mei Ling*, HCAG 13429/2012 (28 November 2013) (unrep.), Mr. Registrar Lung

42B. By practice, the argument that the addition of an alias will assist administration of the estate of the deceased in the Mainland and/or other jurisdiction(s) is not accepted by the Court (save in the case of sealing or re-sealing of a foreign grant under s.49 PAO).

43. When a deceased's name in an official document such as his birth certificate or death certificate appears to be different from the deceased's name as stated in the title, the applicant must adduce evidence to prove that these different names in fact refer to the same deceased person. Direct evidence should be adduced by the production of a deed poll, failing which, other documents such as the deceased's statutory declaration or a certificate of registered particulars of the deceased issued by the Immigration Department should be produced.

A1.2 Deceased's address

44. The deceased's full address should be stated. Abbreviations that may cause confusion, ambiguity or uncertainty should not be used in the description (para 2.4 of the Guide to the use of Specified Forms)[21].

A1.3 Deceased's marital status

45. The marital status of a deceased on the date of the death should be clearly stated. Where applicable, it should be described as follows :

Marital status on date of death	**Description of the status**
Married	"married man" or "married woman", "concubine"
Deceased's spouse had died	"widower" or "widow"
Divorced	"single man" or "single woman"
Never married	"bachelor" or "spinster"
Under 18	"infant"

[21] For example, avoid using "3F" when a property is located at Flat F, 3rd Floor. Full address should be stated.

A2. Contents generally

A2.1 Deceased's death

46. The exact date and place of death should be given (para 2.5 of the Guide to the use of Specified Forms)[22].

A2.2 Deceased's domicile

47. An oath leading to a grant of representation must state where the deceased was domiciled at his death. Where a country has no uniform system of law (e.g. in the case of Australia, Canada, or the United States of America) the particular province, state or other judicial division must be specified.

48. Where a deceased died domiciled outside Hong Kong, an applicant's entitlement (with the exception of the situation stated in the proviso of r.29) shall be governed by the law of the place where the deceased died domiciled. The relevant part of the affidavit of law in support of an applicant's entitlement shall be clearly stated.

49. Where a deceased died domiciled in Hong Kong (or in the situation as stated in the proviso of r.29), an applicant's entitlement to a grant shall be governed by r.21 (in respect of an intestate estate) or r.19 (in respect of a testate estate).

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22 For example, if the date of death is unknown, it may be more appropriate to set out the information about the deceased's death as follows: "The deceased died intestate on an unknown date at the age of X years. The deceased was last seen alive at [PLACE] on [DATE] and his dead body was found at [ADDRESS WHERE THE DEAD BODY WAS FOUND].

(a) For deaths before 1.3.2009

50. For deaths before 1 March 2009, pursuant to the Domicile Ordinance (Cap.596), common law shall apply.

51. A married woman's domicile is dependent upon her husband's. Upon the married woman becoming a widow, she can acquire a domicile by choice by establishing a new residence. Hence, if the deceased was a married woman, it is necessary to also state in the oath the domicile of her husband at the time of her death.

52. To prove an assertion of domicile in Hong Kong, a copy of the deceased's permanent HKID card will suffice. There is no need to produce further evidence.

53. However, if a deceased's HKID card indicates that the deceased's stay in Hong Kong was subject to restrictions or the deceased was a foreign national, an applicant is required to adduce evidence to establish on a balance of probabilities that the deceased had acquired a Hong Kong domicile if so asserted in the oath.

54. The affidavit (preferably filed by the deceased's surviving spouse or a member of the family) in support of the domicile should deal with the following matters :

(1) Where the deceased's home was, and the form of residence (e.g. whether it was a rented or owned property);

(2) The length of the deceased's stay in Hong Kong, and whether the deceased had any intention to reside in Hong Kong permanently or for an indefinite period;

(3) Where the deceased's business, the bulk of his investments and assets were;

(4) Where the deceased's family and friends were; and

(5) The place in which his papers and personal belongings were kept, his social habits, etc.

55. If the asserted domicile is outside Hong Kong, the applicant should file a copy of the deceased's passport proving the deceased's nationality and at the same time state in the oath that the deceased died domiciled in that country or territory.

(b) For deaths on or after 1.3.2009

56. The position is governed by the Domicile Ordinance (Cap. 596).

57. Dependency of a married woman's domicile on that of her husband's is now abolished. The domicile of a married woman as at any time after 1 March 2009, instead of being the same as that of her husband's by virtue only of her marriage, is to be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile[23]. Therefore, there is no longer any need to state the domicile of the deceased's husband in the oath.

58. The burden of proof is on a balance of probabilities.

59. If evidence is required to prove domicile, the affidavit to be filed should also deal with similar matters set out in para 54 above in order to establish that the deceased was lawfully present and had an intention to make a home in the country or territory concerned for an indefinite period[24].

A2.3 Description of the persons entitled to an intestate estate

60. For an intestate estate, the applicant shall be required to set out all the persons entitled to the estate. The relationships should be clearly set out.

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23 Domicile Ordinance (Cap. 596), s.14(3)(c).

24 See Domicile Ordinance (Cap. 596), s.5.

Relationship	Description
Surviving husband	"lawful husband" "male partner" (husband of a deceased concubine)
Surviving wife	"lawful widow and relict"; "lawful kit-fat widow and relict" or "lawful tin-fong and relict" (for customary marriage) "concubine"
Children	"lawful and natural son/daughter", "lawful son/daughter "(children of the concubine), "lawful adopted son/daughter", "lawful legitimated son/daughter" or "natural son/daughter"
Siblings	"lawful and natural brother/sister" or "lawful brother/sister of half-blood"

61. As for more remote relationships, the description should follow the table above with the necessary adaptations.

62. In stating the fact of a relationship, an applicant must exercise great care in ensuring consistency in respect of description of various relationships. If the inconsistency is fundamental, the court may reject the application. (For example, there was a case in which an applicant deposed in the oath that his parents were never married, which assertion was in direct contradiction to the applicant's description of himself being the "lawful and natural" son of the deceased in the oath. The application was subsequently withdrawn upon inquiries from the court.[25])

A2.4 Description of the persons entitled to a testate estate

63. For description, see Part 5 of this Guide.

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[25] *Re Chung Loi Ho* [2010] HKEC 367, Master Levy.

A3. Clearing off prior rights

64. In the subsequent paragraphs of the oath, an applicant must set out in full the manner in which persons with prior rights are cleared off in order to show his entitlement to a grant.

65. A person with prior entitlement to a grant can be cleared off by:

(1) Death;

(2) Dissolution of marriage (by filing a copy of decree *nisi* in most cases);

(3) Renunciation; or

(4) Citation.

A3.1 Clearing off by death

66. The death certificates relating to the deaths of all persons who, but for death, would have been entitled to apply, and if no death certificates are available, the oath of an independent witness, if possible, will be required[26]. The death certificates of other deceased persons need not be produced except in the following situations:

(1) In an application for probate by a surviving executor, copy death certificates of other deceased executors shall be required.

(2) In an application for a grant *de bonis non*, a copy of the relevant death certificates in lieu of the original can be accepted, provided that:

(a) The applicant has been named as the next-of-kin of the deceased in the previous application;

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[26] *Re Tam Lai Muk Wan* [1961] HKLR 284, Blair-Kerr J.

(b) A confirmation in the oath that the original death certificate has been filed in the previous application; and

(c) A person who has a prior right to apply for a grant has died.

67. Where the death certificate of the deceased is not available because the death occurred many years ago or the person has disappeared for many years, practitioners should refer to paras 105 to 107 below.

68. If an applicant is unable to file evidence to prove the death of a person who has prior right to a grant, it may be necessary to file an *ex-parte* application under PAO, s.36 for an order to appoint the applicant to be an administrator before an application leading to the grant can be made. However, s.36 application should not be abused as a way to circumvent the difficulty of proving entitlement to a grant[27].

A3.2 Clearing off by renunciation

69. A person who enjoys a prior right to apply for letters of administration under r.21 or probate under r.19 may waive and abandon such a right by executing a written renunciation in the appropriate specified form so that a person having an inferior right may take grant.

70. A renunciation can be withdrawn at any time up to the time that it is filed at court[28], but can only be retracted on the order of the court after it is filed (s.31).

(a) Renunciation of letters of administration (S.F. L2.1)

71. The renunciant should execute S.F. L2.1. All the deceased's next of kin having an immediate beneficial interest must be clearly set out in the specified form.

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27 *Re Li Wing Chun* [2011] 3 HKLRD 523 at 527 (para 7), Master Levy.

28 *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed.) Sweet and Maxwell 2008, paras 30-31.

(b) Renunciation of probate (S.F. W2.1)

72. Before any party having an inferior right can take grant, an executor must renounce or be cited (for citation, see A3.3 below). The applicant must file the oath together with a properly executed renunciation in S.F. W2.1. If an executor is entitled under the will in some other capacities in addition to the capacity of an executor under r.19, practitioners should ensure that all the different capacities under r.19 as set out in para 1 of S.F.W2.1 are accurately identified (by insertion or deletion as appropriate).

73. Since an executor's renunciation of probate does not operate as renunciation of any right which he may have to a grant of administration (with the will annexed) in some other capacity unless he expressly renounces such right (r.35), the form of renunciation must also include a renunciation of his right to letters of administration (with the will annexed) in order to enable a grant to be made to some person having an inferior right (unless an application for probate is made by another executor).

(c) Renunciation of administration (with the will annexed) (S.F. W2.2)

74. If a person (other than an executor) with prior rights under r.19 renounces his rights, the renunciation in S.F. W2.2 shall be filed.

75. This form of renunciation is most problematic as practitioners tend to copy the specified form wholesale rather than adapting the specified form to the circumstances of the case. Hence, when preparing the specified form, practitioners must confirm with the renunciant whether he is only renouncing in one capacity or whether he also wishes to renounce in other capacities that he is entitled to under the will (with reference to his character and entitlement under r.19). If the renunciant fails to renounce his entitlement in a lower character with reference to r.19, a person having an inferior right may not be able to apply if he is not able to clear off any entitlement in a higher character than his.

76. Thus, it is important that the renunciant's entitlement and character with reference to r.19 (such as a residuary legatee or devisee holding in trust, a person entitled to the undisposed-of estate etc. in respect of which the renunciant has higher entitlement[29]) must be correctly set out in para 1 of S.F. W2.2, otherwise it will delay the application (as well as any future application for retraction) because of the need for requisitions to clarify the capacity in which a renunciant is waiving.

A3.3 Clearing off by citations

77. Clearing off by citation is the least used method of clearing off a prior right to grant.

78. Rules 45 to 48 provide for the procedures on the issuance and service of citations and entry of appearance by a person cited as well as the application for an order for a grant upon non-appearance. Practitioners should familiarize themselves with these provisions as well as the detailed practice and procedure in T & C, Chapter 24.

79. Citation is an instrument by which a person (the Citor) (who can be a person having an inferior right to accept or refuse a grant) having an interest in a deceased's estate may call upon a party (the Person Cited or Citee) to enter an appearance (by filing S.F. C2.3) for accepting or refusing a grant of probate or administration, or taking probate.

80. Thus, depending on the type of citation, the Citor should lodge a draft citation to be settled by the Registrar (r.45(1)) as well as a draft affidavit for approval.

81. Rules 46 to 47 recognize three types of citation. The following specified forms should be adopted according to the types of citation. For a citation:

(1) To accept or refuse:

(a) letters of administration (under r.46(1)), S.F. C2.1;

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[29] If there are other persons with equal entitlement, there is no need to renounce in this capacity when applying for grant.

(b) probate (under r.46(1)), S.F. C2.2;

(c) probate (under r.46 (2)), S.F. C2.2[30];

(2) To take probate (or to take a grant (under r.46(3)), S.F. C2.2[31]; or

(3) To propound a will[32].

82. After the draft citation and the draft verifying affidavit are approved, the Citor should file the citation together with the properly sworn affidavit (the case will be allotted a case reference under the prefix "HCCI") and at the same time enter a caveat (if it has not been previously entered) (r.45(3)). Every will referred to in a citation must also be lodged in the Probate Registry (r.45(5)).

83. The citation and verifying affidavit must be personally served (r.45(4)). Other substituted modes of service (such as by advertisement) will only be granted if it is shown that personal service cannot be effected after reasonable attempts have been made.

84. When the time limited for appearance has expired, if the Citee fails to appear or prosecute his application for a grant with reasonable diligence, the Citor may apply by *inter-partes* summons returnable to the Registrar for the appropriate order as provided by r.46(7)(a)-(c).

85. However, when the time limited for appearance has expired, if the Citee fails to appear or propound a will with reasonable diligence, the Citor may apply by motion to be heard by a Judge in open court for an order for a grant as if the will were invalid (r.47). In such a case, the

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30 There is no specified form designated for a citation against an executor to whom power has been reserved. S.F. C2.2 should be adopted with necessary modifications but reference should be made to T & C, Form 52 (at p.1413).

31 There is no specified form designated for a citation against an executor who has intermeddled under Rule 46(3). S.F. C2.2 should be adopted with necessary modifications but reference should be made to T & C, Form 53 (at p.1414).

32 There is no specified form designated for this type of citation under Rule 47. S.F. C.2.1 and S.F.C2.2 may be adopted with necessary modifications but reference should be made to T & C, Form 54 (at p.1414).

Judge may make an order for a grant contrary to the terms in a testamentary document[33].

A3.4 Others: clearing off an otherwise prior right by proving a relationship of cohabitation instead of a lawful marriage

86. In some cases, proof of cohabitation is required when an applicant asserts in the oath that a relationship formed between an intestate and a named person was not a marital relationship but mere cohabitation. For example, a child of an intestate may file an application for letters of administration by asserting that his father (or mother as the case may be) had only cohabited (rather than lawfully married) with the deceased, in which event the father as a cohabitee of the deceased would not enjoy any right to a grant that a surviving spouse from a lawful marriage would.

87. In such a situation, an applicant is required to state in the oath the particulars of cohabitation, which should include:

    (1) The name of the cohabitee and the period of the cohabitation; and

    (2) If an application is made by a lawful spouse, a confirmation as to whether there are children born of the cohabitation (so as to ensure that all beneficiaries are included in the oath). If there are such children, the names of the natural children must also be included as persons entitled to share in the deceased's intestate estate.

88. Corroborative evidence such as the result of a marriage search from the Marriage Registry, a cohabitee's death certificate or even an affidavit from the cohabitee to confirm cohabitation (if the cohabitee is living) may be required.

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[33] *Sin Sin Yu Tella v Man Lai Chi* [2010] 2 HKLRD 350 at 353-4 (para 10).

A4. Whether a minority or life interest arises

89. In the penultimate paragraph of an oath, an applicant is required to state whether a minority or life interest arises.[34]

A4.1 A minority interest

90. Minority interest arises when a person having an immediate beneficial interest in a deceased estate is below the age of 18 years. However, if the whole of the estate is charged with the payment of the net sum ("Fixed Net Sum") under ss.3 and 4 of the IEO to the surviving spouse, no minority interest arises under intestacy. The Fixed Net Sum is $25,000 where the deceased died before 29 June 1983; $50,000 on or after 29 June 1983; and $500,000 on or after 3 November 1995.

91. The permitted deductions for the purpose of showing a deceased's net estate does not exceed the Fixed Net Sum are:

    (1) the value of the personal chattels;

    (2) estate duty (if any);

    (3) costs incurred or to be incurred; and

    (4) interest at judgment rate (calculated in accordance with High Court Ordinance (Cap.4), s.49(1)(b)) on the Fixed Net Sum from the date of death until paid or appropriated.[35]

A4.2 A life interest

92. A life interest arises:

    (1) where an intestate deceased, at the time of his death, leaves a concubine or a male partner if:

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34 Under s.25, whenever a minority or life interest arises, a grant will only be issued either to a trust corporation (with or without an individual) or to not less than 2 individuals.

35 See IEO, s.4 and T & C, para 6.102.

(a) "the residuary estate is held as to one half on trust for the surviving wife absolutely in accordance with section 4(3)" IEO (IEO, Sch.1, para 4(3)) (in other words, the intestate deceased leaves a wife and a concubine, but no issue).

(b) "the residuary estate is held on the statutory trusts for the intestate's issue in accordance with section 4(5)" IEO (IEO, Sch.1, para 4(7)) (in other words, the intestate deceased leaves no husband or wife but only issues and a concubine/male partner).

(2) where a testate deceased has conferred a life interest on an individual by his will.

93. In the case of a concubine obtaining a life interest, the life interest ceases upon the marriage of that concubine.

A5. Description of the capacity of the applicant

94. In the concluding paragraph of the oath, an applicant must state the applicant's capacity and entitlement to the grant being applied for.

95. Where a deceased died domiciled in Hong Kong, an applicant's entitlement can only be with reference to r.19 or r.21 as the case may be.

96. Where a deceased died domiciled outside Hong Kong, an applicant's entitlement with reference to the foreign succession law should be clearly stated, such as "one of the persons entitled to administer the estate of the deceased by the law of the place where the deceased died domiciled" (as in the application made under r.29(b)).

97. If an unknown or incomprehensible capacity is stated, the application may be rejected[36].

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[36] See e.g. *Re Poon Lai Ying* [2010] HKEC 358, Master Levy. In that case, the applicants in the concluding paragraph of the oath described their capacities "as the Joint Administrator (sic.) for letters of administration (with the Will annexed) of the estate of the deceased, the sole residuary legatees and devisees named in the Will". Such capacities are not found in either r.19 or r.21.

A6. Form of affidavit

98. Since the oath is deposed by way of affidavit, it shall be in the form as required by Order 41 rule 11 of the Rules of the High Court, except that a copy of a document to be used in conjunction with the affidavit need not be exhibited to the oath (or any affidavit filed in an application) if the original document is already filed in the Probate Registry (NCPR, r.65).

98A. An affidavit is neither a writ nor a pleading. PD19.1 does not apply. By way of practice of the Probate Registry, the amendments are to be done in black only. An affidavit should not be amended in red, green, violet and so forth.

98B. Order 41 rule 1 (4) RHC is often forgotten. The applicant must state his place of residence (not address at which he works) and occupation or description (not marital status). See paragraph 41/1/5 at p.899 of HKCP 2018 (or its equivalent provision in subsequent editions).

98C. Order 41 rule 1 (8) RHC is often not complied with. The jurat must be completed. When, where and before whom the affidavit was sworn are at times missing. The affidavit shall be properly administered. A clerk or a beneficiary of the estate cannot administer an oath. See paragraphs 41/1/9-10 at p. 899 and 900 of HKCP 2018 (or its equivalent provisions in subsequent editions).

A7. Due diligence, full and frank disclosure

99. Non-contentious applications for grants are *ex-parte* applications. An applicant and those advising him shall be required "to exercise due diligence in the making of an affirmation in support of his or her application for a grant"[37].

100. Since the court relies on the content of these documents to decide whether the grant should or should not be made and to whom the grant should be made, any mistake in those documents will have to be explained[38].

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37 *Re Yeh Lien Teh* [2008] HKEC 1752, at para 7, Lam J.

38 *Yeh Lien Teh, supra,* at para 10.

101. The requirement of full and frank disclosure also applies to the content of the oath in support of an application for grant[39].

102. Any failure to fulfil these requirements will be treated very seriously by the Court, and may be referred to the Law Society for investigation[40] or the Department of Justice for further action[41].

B. Filing the death certificate of the deceased

103. The death certificate of a deceased person in respect of whose estate an application for grant is made must be produced to prove his death. In some places such as Taiwan and Japan, the fact of death is recorded in a government's Family Register, which document (when duly authenticated) may be used as proof of death instead of the usual death certificate.

104. Where the death certificate of the deceased is not available, for example, where the death occurred many years ago when no such document was retained by the place where the deceased died, the death can be proved by filing an affidavit in S.F. M1.1 deposed by a person who personally attended the funeral of this deceased person.

105. If a deceased person has disappeared pointing to suicide or accidental death or has not been heard for a considerable period[42] by those with whom he might be expected to communicate, an applicant may not be able to adduce any direct documentary proof to prove a person's death. An applicant in such a case may invoke r.52 by filing an *ex-parte*

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39 *Re Wan Sing Hon* [2010] 4 HKLRD 621 at 627 (para 22), Lam J (as he then was); *Cheung Hung*, *supra*, at 465 (para 29).

40 *Re Estate of Wong Yuen Leong* [2012] 2 HKLRD 124 at 128 (paras 16 & 17), Poon J.

41 *Re Estate of Ang Chiok* [2011] HKLRD 389. In this case Master Levy referred the case to the Department of Justice for investigation in respect of the untrue content of an applicant's affirmation in support of an application for letters of administration. The applicant was prosecuted for an offence of "Using a false affidavit" pursuant to s.49 of the Crimes Ordinance. He pleaded guilty and was sentenced to 4 weeks imprisonment suspended for 12 months.

42 The Probate Registry has adopted the rebuttable presumption of death after 7 years of absence in its application of r.52.

application for an order from the Registrar for leave to swear to the death of this person (who is referred to as the "presumed deceased") leading to a grant.

106. In such an *ex-parte* application, an applicant should set out the grounds of the application as well as the particulars of any policies of insurance effected on the life of the presumed deceased (r.52). The affidavit should also state the following matters:

(1) When the presumed deceased was last heard of and his age.

(2) The belief of the applicant that the presumed deceased is now dead.

(3) Whether any advertisements for the presumed deceased have been inserted - if so, with what success; if inserted, the newspapers or page extracts should be filed.

(4) Whether any letters have been received from the presumed deceased after he was last seen or known to be alive (if any exist, they should also be produced).

(5) Whether the life of the presumed deceased was insured, if so, giving particulars of all policies, including the name of, and whether notice of the application has been given to, the insurance company, and either producing the reply from the office, or filing an affidavit of service of the notice.

(6) If the deceased has bank accounts, whether these accounts have been operated since his disappearance (see T & C, para 25.35).

(7) The value of the estate of the presumed death.

(8) Whether minority or life interests arise.

107. Since this kind of evidence is presumptive in nature, the applicant's affidavit should be corroborated on some material points by a member of the family, and, if not possible, by another person such as a friend of the presumed deceased or of his family, who is not interested in the estate.

C. Estate duty papers

C1. Deaths before 11.2.2006

108. Estate duty is payable if the death occurred before 11 February 2006. An applicant is therefore required to comply with r.43 by obtaining the estate duty documents from the Inland Revenue Department after clearing estate duty.

109. An applicant shall then file the relevant parts of the estate duty documents. Usually the following types of the estate duty documents of the deceased must be filed:

(1) Property in the deceased's sole name;

(2) Trust property (the original copy must be filed as it is required to be annexed to the grant);

(3) Property exempted (i.e. matrimonial property) under s.10A of the Estate Duty Ordinance (Cap.111);

(4) Property in the joint name of another person and gifted property (only photocopy should be filed).

C2. Deaths on or after 11.2.2006

110. For deaths following the abolition of the estate duty, an applicant is required to file the following documents:

(1) **S.F. N2.1** (for re-sealing of grant, S.F. N3.1) – Affidavit verifying the Schedule of Assets and Liabilities for Grant (for sealing of foreign grant)[43].

(2) **S.F. N4.1** – Schedule of Assets and Liabilities of the Deceased in Hong Kong as at the Date of Death.

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[43] For the purpose of S.F. N2.1, N3.1 and N4.1, "assets" means properties situated in Hong Kong only; "liabilities" are confined to liabilities contracted or incurred by the deceased in Hong Kong.

111. Practitioners should also take note of the following matters when executing S.F. N4.1:

(1) Overseas assets and liabilities should not be included.

(2) The original inventory list prepared under s.60D(3) should be annexed to S.F. N4.1. It is not necessary to set out any items under the heading "Contents" in Item 3.

(3) The date of execution can be the same or earlier but must not be later than the date of executing S.F. N2.1.

D. Document checklist

D1. Essential documents

112. The following documents must be filed with all applications for grant:

(1) A properly executed oath in the appropriate specified form. An affidavit sworn outside Hong Kong must be sworn before a notary public, Chinese diplomat or consular official, but must not be sworn before a foreign lawyer (see HKCP (2012) para 41/12/1).

(2) The deceased's death certificate (if issued by an overseas authority, it should be properly authenticated[44]). If the foreign

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[44] **General Guidance on Authentication**

(1) Practitioners must refer to Part XIII of the pamphlet published by the Probate Registry, which is also available at the judiciary website at <*http://www.judiciary.gov.hk/*>.

(2) Broadly speaking, a foreign document can be authenticated in the following ways:

(a) For a document issued by a Convention State (see para 13.4 of the Probate Registry's pamphlet), by apostillization.

(b) For a document that is not issued by a Convention State, the following steps are to be taken:

(i) Authentication of the seal and signature of the foreign document by local Notary Public; and

document is in a foreign language, a translator's affidavit (the format as per T & C, A6.16) /declaration[45] is required.

(3) The original will (see C5, Part 5 of this Guide for marking of the will) and a clean copy will (for testate estate).

(4) S.F. N2.1 and N4.1 (For deaths before 11 February 2006, see estate duty papers mentioned in C1 above).

D.2 Other documents

113. Rule 6(1) further requires that an application for a grant shall be supported "by such other papers as the Registrar may require". An applicant should accordingly produce all such documents such as marriage certificates.

D2.1 To prove relationship

(a) Marriage Certificate

114. A marriage certificate is the most direct proof of a marriage relationship.

115. A notarized marriage certificate should be produced for a marriage contracted in Mainland China (after 1 May 1950), and if the marriage certificate cannot be produced due to loss or any other reasons, the applicant may (after stating the reason for the inability to produce the

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(ii) Subsequent authentication by the consulate office of the People's Republic of China of that country.

(3) Any application for waiver for non-compliance must be supported by good reasons, which application will be considered by a Probate Master on a case-by-case basis.

[45] Where the translation of a foreign document (except Will) is done by a consulate officer, a court officer or a sworn translator of the foreign court, and the translated document is securely bound, the usual translator's declaration can be dispensed with if the name and the title of the officer are clearly shown. However, where the officer authenticating the document has expressly disclaimed responsibility for the content of the translation, the usual translator's declaration shall be required.

marriage certificate on affidavit) prove the validity of marriage by adducing all available evidence (such as a certificate of registered particulars of himself and of the deceased issued by the Immigration Department).

(b) Notarial Certificate of Kinship (親屬關係證明書)

116. A notarial certificate of kinship (even if it is duly authenticated) is generally not accepted by the Probate Registry as proper proof of relationship. It may be used as corroborative evidence when direct evidence is not available.

(c) Authenticated family register

117. Some jurisdictions, such as Taiwan and Japan, maintain registers of their nationals' births and marriages. A properly authenticated register may be accepted to prove a marriage in lieu of a marriage certificate.

(d) Affidavit of identity

118. In cases where the Probate Master considers it necessary to require proof of the identity of the party applying for the grant, in addition to the oath, a separate affidavit of identity (in S.F. M2.1) may be required to be filed.

119. Practitioners should note that an affidavit of identity is by its nature a self-serving piece of evidence. It would therefore be rarely accepted as evidence to prove the status of a person or a relationship with another person.

D2.2 Identity cards of the deceased and the applicant

120. Although it is not set down as a requirement, a copy of the HKID cards of both the deceased and the applicant would be of great assistance to the Probate Registry for checking their names.

D2.3 Affidavit of justification for sureties (S.F. M3.1) and surety's guarantee (S.F. M3.2)

(a) Provision of guarantee

121. Notwithstanding the abolition of such requirement in the UK, r.38 requires the provision of guarantee to be entered by two sureties (S.F. M3.1 and S.F. M3.2) under PAO, s.46 as a condition of granting administration in respect of the situations stipulated in sub-sections (a) to (f) of r.38(1).

(b) Dispensation of guarantee

(i) A practicing solicitor applicant

122. Where the application for grant is made by a practising solicitor, there shall be filed a copy of the applicant's current practising certificate under the Legal Practitioners Ordinance (Cap.159) (r.38(2) provides that surety's guarantee shall not be required where the application is made by a solicitor). In lieu of the practising certificate, the solicitor may (for the purpose of r.38(2)) depose in the oath that he is holding a current practising certificate under the Legal Practitioners Ordinance[46].

(ii) Other applicants

123. Where the application for grant is made by an applicant other than a practicing solicitor, an application to dispense with the requirement of guarantee may be made to the Registrar. Surety's guarantee may be waived if an applicant can show that:

(1) The estate has no known creditors or liabilities (whether actual or potential), or alternatively all creditors have consented to the dispensation and their written consents are lodged; and

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[46] The latter practice is accepted so long as the grant is issued in the same year as the year in which the oath is executed. If not, the certificate may be required before the grant is issued notwithstanding the assertion having been made in the oath.

(2) There are no beneficiaries that require protection, or such beneficiaries have consented to the dispensation (and their written consents, if possible, should also be lodged).

E. Grants to Corporate Bodies

123A. The Probate Registry has been following the practice in England by requiring the corporation to show that it has power under its constitution to take the grant through its nominee and attorney[46A]

123B. The practice has been reviewed in accordance with changes in the companies law, as commented by Lam J[46B]. The position is in the followings.

46A *Re Leung Wai Jing* [2004] 1 HKLRD B26, Yam J.

46B *Re Tang Muk Kwai* [2011] 1 HKLRD 858, Lam J.

	Memorandum of Articles ("MA") (including subsequent amendment(s), if any)	**Articles of Association ("AA") (including subsequent amendment(s), if any)**	**Object Clause**	**Relevant law/ provision(s) in the then Companies Ordinance**	**Capacity to take grant?**
Companies Ordinance (Cap.32) (before 10.2.1997)	Yes	Yes	Yes (include power to take grant)		Yes
	Yes	Yes	Yes (does not include power to take grant)	The principle of *ultra vires*	No
Companies (Amendment) Ordinance 1997 (10.2.1997 - 2.3.2014)	Yes	Yes	Yes (include power to take grant)	s. 5A(2)	Yes
	Yes	Yes	Yes (does not include power to take grant or power to take grant is expressly excluded)	s. 5B(1) (a) & (b)	No

	Yes	Yes	No (power to take grant is implied as if the Company was a natural person)	s. 5A(1)	Yes
Companies Ordinance (Cap.622) (3.3.2014 onwards)	N/A (No MA is required and MA of existing company is deemed to be regarded as its AA (s. 98)	Yes	Yes (include power to take grant)	s. 115(2)	Yes
	N/A	Yes	Yes (does not include power to take grant or power to take grant is expressly excluded)	s. 116(1) &(2)	No
	N/A	Yes	No (power to take grant is implied as if the Company was a natural person of full age	115(1)	Yes

Note: The above table does not apply to a licensed company under s.103 or other institutions (e.g. a church) of which the Companies Ordinance is not applicable.

PART 5 - DECEASED DIED TESTATE

A. Probate or letters of administration with will annexed

124. Where a deceased died testate, practitioners may apply for either:

(1) a grant of probate to be issued to an executor; or

(2) letters of administration with the will annexed to be granted to persons other than an executor, where PAO, s.35 applies.

B. Formality

B1. For deaths before 13.3.1970

125. Practitioners should refer to (i) the repealed Wills Ordinance (Cap.30, 19th ed.), (ii) the repealed Wills (Formal Validity) Ordinance (Cap.350, 1964 ed.), and (iii) the deleted item 66 of the Schedule to the non-adopted Application of English Law Ordinance (Cap.88).

B2. For deaths on or after 13.3.1970

126. Validity of a will is governed by WO, s.5(1) regardless of whether the will was executed before or after that date (WO, s.30). It requires a will to be in writing and signed by the testator in the presence of two attesting witnesses. On the other hand, a will made by a Chinese testator executed and written wholly and substantially in Chinese is valid although it does not comply with WO, s.5(1).

B3. For deaths on or after 3.11.1995

127. The Wills Ordinance was amended by the Wills (Amendment) Ordinance on 3 November 1995, which amendments are applicable to a will of a testator who died after the commencement of the said Amendment Ordinance, whether or not the will was made before or after that date. Section 5 of the old Wills Ordinance was repealed and replaced by a new s.5.

128. After the amendment, the distinction between a will written in Chinese and a will in English is removed by s.5(1).

129. The new WO, s.5(2) allows the Court to admit a will to probate even though it fails to comply with the statutory requirement under WO, s.5(1), provided that "the Court is satisfied that there can be no reasonable doubt that the document embodies the testamentary intentions of the deceased person."

130. The standard of proof under WO, s.5(2) is more stringent than the ordinary civil standard, and the Court has to be satisfied beyond reasonable doubt that the document in question embodies the testamentary intentions of the deceased[47].

130A. The document is a will if it contains either

(1) a disposition of property in Hong Kong at the time of the death of the Deceased, or

(2) an appointment of executor(s) or executor(s) according to tenor.

131. The application under this rule may be made by an *ex-parte* application within NCPR before the Registrar under the prefix "HCAG" [48].

C. Requirements

C1. Execution, plight and condition of the will

132. Although no form of attestation is required under WO, s.5(1), it is still necessary for the Court to be satisfied that the testator signed the will and intended by his signature to give effect to the will, and that such signature was acknowledged by the attesting witnesses.

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47 *Cai Guo Xiang v Mok Hang Won Esla* [2001] HKEC 340, Yam J; *Lam Ping v Zi Yan Lu* [2010] HKEC 490, Lam J.

48 See *Cai Guo Xiang*, *supra*, Yam J.

133. In practice, if the will was prepared by a firm of solicitors and executed before its solicitors or clerks, no requisition will be raised to confirm that the will was duly executed or interpreted to the deceased even where there is no interpretation clause or the deceased only executed the will by affixing his finger print, putting a cross/chop or signing in a language different from that of the will.

134. Further, usually no requisition is raised pertaining to the proof of the sound mind of the testator if the will was executed before solicitors, clerks or doctors. However, if none of the above situations arises, practitioners should file an affidavit as per S.F. W3.1 at the time of the application (see NCPR, r.10).

135. If the will is not engrossed by typewriter or computer, but done in handwriting, an affidavit as per S.F. W3.2 is required to inform the Court as to who wrote the will – whether it was the deceased or somebody else on his behalf.

136. Rule 12(2) provides that if, from any mark on a will, it appears to the Registrar that some other document has been attached to the will, he may require the document to be produced and may call for such evidence as he may think fit. Therefore, if there exist unusual features on the will, practitioners should file an affidavit by the applicant (or a person who can account for the unusual features) in accordance with S.F. W3.3 to account for any obliterations, interlineations, corrections, alterations, clip marks, pin holes and punch holes, etc. The affidavit accounting for the marks should state clearly whether there was any other testamentary document or codicil attached to the will. Such account should be made by the person who caused the marks on the will.

C2. Alterations in the will after execution

(a) How alterations can be proved?

137. No obliteration, interlineation, or other alteration made in a will after execution shall be valid (apart from the conditions set out in WO, s.16).

138. There is a *prima facie* presumption that alterations are made after execution of the will (see T & C, para 3.231) (and according to WO, s.16, are invalid) unless such presumption can be rebutted by the conditions set out in WO, s.16(2) by the initials of the testator and the witnesses in the margin or on some other part of the will opposite or near to such alterations.

139. In the absence of such initials, (unless the alterations appear to the Registrar to be of no practical importance) evidence shall be adduced (in accordance with NCPR, r.12 and reference can be made to S.F. W3.4) by an attesting witness who observed the making of the alterations, or whose attention was drawn to them, before or at the time of the execution; by the draftsman of the will, who may be able to depose that the parts apparently interpolated or altered accord with his draft; or by the writer or engrosser of the will, who can prove that he himself made the alterations or additions, either as the correction of his own error in copying, or as a change of intention on the part of the testator previously to the execution of the will. (See T & C 26th ed., p.68)

140. If no affirmative evidence can be obtained, alterations are presumed to have been made after execution of the will and are excluded from probate (see also T & C 26th ed., p.69).

(b) When a fiat copy will is required?

141. Where a will contains alterations which are not admissible to proof, a copy of the will known as a "fiat copy" (prepared in accordance with r.9) reproducing the will in its state as at the time of execution, is required. The fiat copy will shall omit all such alterations by restoring obliterations where they can be read, and omitting additions. Where, however, the obliterations of words are complete, and the words cannot be deciphered, a blank space shall be left in the copy.

C3. Rectification of a will

142. As to a will of a testator who passed away after 3 November 1995, WO, s.23A allows rectification where there is a clerical error or a failure to understand the instructions of the testator. It is an exception created by statute to the general rule that no extrinsic evidence is admissible to interpret a will.

143. There are three ways[49] whereby an application for rectification of a will under WO, s.23A can be made[50]. The will must be lodged for endorsement for all applications for rectification.

144. See also PD20.2 for steps to be taken under different situations.

C4. Codicil

145. A codicil is an instrument executed by a testator for adding to, altering, explaining or confirming a will previously made by him or her. Therefore, it is part of the will and shall be executed with the same formalities as a will. The definition of "will" as per WO, s.2 includes a codicil.

146. A codicil or codicils must be proved together with the will. The practice in relation to the proof of the will applies equally to codicils. (See T & C, paras 3.160 to 3.165)

C5. Marking of the will

147. Rule 8 provides for the marking of wills. Every will must be marked by the signatures of the applicant and the person before whom the oath is sworn, and be exhibited to the oath. In practice, instead of having a copy of the will exhibited, the original will should be marked at the back-sheet by an endorsement whenever such will is referred to in any affidavit.

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49 *Wu Man Shan v Registrar of Probate* [2006] 2 HKC 106.

50 See e.g. *Re Ho Nai Chew (No 2)* [2010] 3 HKLRD 403, Lam J.

C6. Original will lost or not available

148. Where the original will or codicil is lost, mislaid, or not available, and when an applicant is applying to admit a copy, practitioners' attention is drawn to the rebuttable presumption of revocation. In order to have the copy will admitted to probate, practitioners need to file an *ex-parte* application to rebut the presumption. If the Court admits the copy will to probate, the order normally includes a direction that the grant is limited until the original will or a more authentic copy will thereof has been proved.

149. An applicant who seeks to admit the copy will to proof has the burden of proving that it has not been revoked by adducing evidence of surrounding circumstances, e.g. declaration of unchanged affection or intention (T & C, para 34.70) to rebut the presumption. The evidence may vary according to the circumstances, including relevant matters like the character of the custody, the character of the testator, his relationship with the beneficiaries under the will and other next of kin since the making of the will up to his death, the contents of the will, and whether he had any cause to revoke it[51].

D. Order of priority: NCPR, Rule 19

150. Rule 19 governs entitlement and priority to a grant. The order of priority is as follows:

(1) the executor;

(2) any trustee of residuary legatee (or devisee);

(3) any life residuary legatee (or devisee);

(4) (a) the ultimate residuary legatee (or devisee) (or his personal representative);

(b) any person (or his personal representative) entitled to share in the residue not wholly disposed of; or

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[51] *Re Lioe Ka Khie* [2009] 2 HKLRD 115, Lam J.

(c) proviso: if the Registrar is satisfied, any legatee (or devisee) entitled to share in the whole or substantially the whole of the estate, notwithstanding that the residue is not wholly disposed of under the will;

(5) (a) any specific legatee (or devisee) (or his personal representative);

(b) any creditor (or his personal representative); and

(c) any person who, though having no immediate beneficial interest, may enjoy the same in the event of an accretion;

(6) (a) any legatee (or devisee), whether residuary or specific, entitled on the happening of any contingency; and

(b) any person, though having no interest under the will, would have been entitled to a grant if the deceased had died wholly intestate.

151. It is extremely important for practitioners to identify priority when an application for a grant of probate is made. Depending on the contents of a will, an applicant may possess more than one capacity under r.19. It is also not uncommon that some categories of persons as per the rule cannot be located under a will. An applicant is only entitled to a grant if he can bring himself within the capacity under r.19, with all persons having prior rights having been cleared off.

152. "Executors" enjoy the first priority to the grant under the rule. By practice, the grant will name the executors in the order in which they appear in the will and as such, the oath should also follow the same order (T & C, para 4.113).

153. "Executor according to tenor" is the same as "executor", save that he is not expressly appointed or named as executor in the will, but has been asked to perform one or more of the duties of an executor.

154. Appointment of an executor must be certain, i.e. there cannot be any argument on the identity of the executor. Appointment of more than one executor is not uncommon. The usual way to identify them is by using clauses like "A and B" or "A, B and C". In these cases, the deceased's intention is understood to mean that one or more of them may take up the administration.

155. If the appointment is ambiguous, the same may be held by the Court as "void for uncertainty": e.g. where phrases like "any of my two sons", "one of my sisters", "A or B" (T & C, para 4.25), "manager for the time being of a company" and/or "joint and/or several executor(s)" are used.

155A. On 26 October 2016, the Probate Master issued a letter to the Law Society reminding practitioners that the phrase of "jointly and/or severally" should not be used in appointment of executors under wills.

155B. Sometimes, s.23A and s.23B WO might help in the situation. An affidavit (together with exhibits of contemporaneous notes and/or letter of instructions) from the drafter of the will could be filed to clarify the intention of the testator. Depending on the facts of each case, a fiat copy will is to be prepared and exhibited in the grant to be issued.

155C. The practitioners should note that notwithstanding the appointment of executor is held by the Court to be void for uncertainty, other parts of the will could still be valid. In such circumstances, he should see and advise if his client is also entitled to apply for a grant in another capacity under the same will pursuant to rule 19 NCPR.

156. As to "joint executors", the deceased was presumably desirous of asking the persons named to administer the estate together, but not otherwise individually. Hence, the application should be made by all the joint executors named in the will unless any of them have passed away or renounced the probate.

E. COMMON PROBLEMS

E1. More than one wills

157. Any person can dispose of all his property all over the world by one will. It is however not uncommon for a deceased to execute a will to deal with his local property (see T & C, paras 3.191 to 3.207). Practitioners should be aware that the Hong Kong Court will not accept the proof of a foreign will disposing of property outside the jurisdiction of Hong Kong only. (See also T & C, paras 3.191 to 3.207).

E2. Wills limited as to property

158. A testator may limit the scope of disposal of his property or the power of the executor in whatever particular way he so desires. The probate to be issued will bear the same limitation accordingly. However, it should be borne in mind that there is a general policy against the issuance of a grant limited only to certain property because administration of the estate of the deceased should not be done in a piecemeal fashion.

159. When a will only disposes of one property, it is common for practitioners to apply for a grant limited to such property accordingly. However, practitioners should note that, by practice, if there is no express restriction on an executor in relation to his "power", a general grant will be issued. No limited grant is to be issued unless the applicant can show evidence of contrary intention of the testator.

E3. Home-made will

160. Where a will, written wholly and substantially in Chinese, was made by a Chinese testator before 3 November 1995, who also passed away before that date, it is to be held valid although it does not comply with s.5(1) of the Wills Ordinance (1970 ed.). After 3 November 1995, such distinction as between a will written in Chinese and a will in English has been abolished.

161. Practitioners should look into the contents of the home-made will to decide whether the document is indeed a will or not. There was a case in which documents drawn up by a church were held to be a trust document but not a will[52]. Ancestral worship trusts are an institution of Chinese law and custom and a document containing them cannot be a will as they are not created by a testamentary disposition[53].

162. Sometimes, there might be difficulties in understanding the exact meanings of certain words or phrases within a document or a will. Extracts from authoritative Chinese dictionaries may be helpful. If the Court deems necessary, it is also entitled to seek assistance from experts in the Chinese language in order to understand the meanings of such words or phrases.

E4. Others

E4.1 Name of executor

163. If the name of an executor is mis-spelt or imperfectly or incompletely stated in the will, it is necessary to set out clearly in the oath such fact. The oath should contain a phrase to the effect that "in the will called…." so that the same will be reproduced in the grant to be issued. Supporting evidence is required to confirm the identity of the executor, unless the discrepancy is very slight. An affidavit of identity may be accepted (see T & C, paras 4.94 to 4.96).

E4.2 Number of executors

164. Section 25 of the PAO governs the number of grantees to be allowed. It ranges from one to four, except where life or minority interests are involved, in which case a minimum of two individuals are required unless the grantee is a trust corporation or the sole executor named under the will.

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52 *Re Leung Wai Jing* [2004] 1 HKLRD B26, Yam J.

53 *Lau Leung Chau v Lau Yuk Kui* (2000) 3 HKCFAR 98.

165. Practitioners should note that, for the purpose of ascertaining a life or minority interest, reference is made to the date when the grant is issued. Between the date of the application for grant and the date of issuance, the existence of such interest may cease. This alone does not contradict the requirements of PAO, s.25. Should such situation arise, it may become necessary to withdraw the existing application and file a new application by one administrator (if that is deemed to be more convenient for one administrator to make the application).

PART 6 – DECEASED DIED INTESTATE

A. Proof of intestacy

166. Letters of administration of the estate of a deceased person are granted where the deceased died wholly intestate. The right to a grant of administration on intestacy depends in general on the beneficial interests on distribution on intestacy.

167. Distribution on intestacy is not confined to the situation where a deceased died without executing any testamentary instrument, as intestacy may also arise even when testamentary documents have been found.

168. When an applicant applies for letters of administration, he is required to prove intestacy.

A1. Where the deceased died without executing a will

169. Practitioners in such a case should take all reasonable steps in ensuring that an intended applicant has conducted a thorough and diligent search amongst a deceased's belongings (including the title deeds if there is landed property in the estate) and made all necessary inquiries including inquiries from the deceased's relatives[54] and the Law Society.

A.2 Where the deceased died having executed a testamentary instrument

170. If a testamentary instrument is found, such an instrument must be properly dealt with in accordance with the procedures governing the different situations as set out below before an applicant can swear to the intestacy of a deceased[55], regardless of whether there is consent as to how such instrument is to be treated from persons interested in the

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54 *Yeh Lien Teh, supra,* at para 7.

55 *Sin Sin Yu Tella, supra,* at 356 (para 20).

instrument. The consent of persons interested proves nothing; no person's consent can make a will no will[56].

A2.1 Refusal of probate

171. A will that contains no attestation clause or insufficient attestation clause is not properly executed. An applicant who wishes to prove a will would need to adduce evidence to prove due execution as required by r.10(1). A home-made will very often is not properly executed.

172. If an applicant fails to adduce sufficient evidence to prove due execution to the satisfaction of a Probate Master, the Master shall refuse probate and mark the will accordingly (r.10(3)).

173. As for the procedure for obtaining a Probate Master's marking of "Probate Refused", practitioners should refer to T & C, para 3.140. Before marking "Probate Refused", a Probate Master may require an applicant to file written consent of all persons whose interests may be prejudiced by the refusal of probate.

A2.2 Revocation of a will under WO, s.13(1)

174. Intestacy may arise if a will is revoked under WO, s.13(1) by[57]:

(1) Marriage, s.13(1)(a);

(2) A written revocation, s.13(1)(c); or

(3) The burning, tearing or destroying of it by the testator, or by some person in his presence and by his direction, with the intention of revoking it, s.13(1)(d).

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56 *Re Breen* [1961] VR 522 at 528, *per* Sholl J, cited in *Sin Sin Yu Tella*, *supra*, at 356 (para 21).

57 WO, s13(1)(b) provides for revocation by another valid will, which is irrelevant to the discussion for the present purpose.

175. Irrespective of the circumstances of revocation, an applicant for grant on the basis of intestacy is required to give in the oath a brief description of the will (which need not be filed) that has been revoked, and state (succinctly) the circumstances giving rise to intestacy.

(a) Revocation by marriage

176. In the oath, before asserting intestacy, an applicant must set out particulars of marriage (including the date of the marriage). The marriage certificate is not required to be filed for this purpose (although it may be required for the purpose of proving relationship).

(b) Revocation by a written revocation

177. Apart from filing the written revocation with the application, an applicant must state in the oath particulars of the written revocation.

***(c) Revocation by destruction with the intention of revoking* a will**

(1) The circumstances of destruction or loss are known

178. If an applicant has knowledge as to how the will was destroyed, particulars of the circumstances of destruction or loss must be given in the oath.

(2) The circumstances of destruction or loss are unknown

179. In the absence of actual loss or destruction, an applicant must state in the oath that despite reasonable efforts having been made to locate the will, it cannot be found, and there is no evidence to rebut the presumption of destruction *animo revocandi* (intention to revoke).

A2.3 Propounding a will

180. Where an apparently valid will exists, the executors and persons entitled thereunder can be cited to propound it. In default of appearance to the citation, or where the persons cited have not proceeded to propound the will with reasonable diligence, letters of administration can be granted as on intestacy, for the will is treated for this purpose as if it were invalid. (For the procedure on citation, see paras 77-85, Part 4 of this Guide).

B. Order of priority for grant: Rule 21

181. Where a deceased died wholly intestate, his next-of-kin who has a beneficial interest in the estate shall be entitled to a grant of administration in the order of priority as set out in r.21, namely:

(1) a surviving spouse including a partner to a union of concubinage (S.F. L1.1a, L1.1b, L1.2a, L1.2b);

(2) children (S.F. L1.3a, L1.3b);

(3) parents (S.F. L1.4a, L1.4b);

(3A) siblings (S.F. L1.5a, L1.5b)

(4) grandparents (S.F. L.1.6a, L1.6b in the capacity of the lawful grandmother/grandfather of the deceased); and

(5) uncles and aunts (S.F. L.1.6a or L1.6b in the capacity of the lawful uncle/aunt of the deceased).

182. In default of any person having a beneficial interest in the estate, a grant may be made to the Official Administrator or to the creditor if the latter can clear off all persons entitled to a grant set out in the categories mentioned above (r.21(3) and (4)).

B.1 Preference of living interests

B1.1 A living person is preferred to a personal representative

183. If the person in any of the classes of the kin or a creditor has died, his legal personal representative[58] shall have the same right to a grant as the person (who had died) whom he represents subject to the preference of a living person (who is beneficially interested in the estate) to the personal representative of a deceased person who would, if living, be entitled in the same degree unless the Registrar otherwise directs: see rr.21(5) and 25(3). The preference of a living person will

[58] The Specified Form of the oath shall be in L1.6a or L1.6b and the capacity to be stated should be "as the legal personal representative of XX (the person who had died), the (relationship) of the deceased (i.e. stating the capacity of the person who had died in relation to the Deceased's estate)".

be further governed by the proviso of r.21(5) if it involves the personal representative of a spouse as explained below.

B1.2 A personal representative of a spouse

(a) A spouse <u>not</u> beneficially entitled to the whole estate of the deceased as ascertained at the time of the application for grant

184. Where a spouse was beneficially entitled to the deceased's estate together with the other next-of-kin (such as the children, or the parents of the deceased if there were no children) at the time of the death of the deceased, and no grant had been obtained during the spouse's lifetime, the other living persons who were entitled to the deceased's estate would have preference to the personal representative of the spouse (who had subsequently died) to apply for the grant of the deceased.

185. Similarly, if the surviving spouse had obtained the grant of the deceased, but subsequently died without completing administration, the other living next-of-kin would have preference to the personal representative of the spouse to apply for a grant *de bonis non* in respect of the unadministered estate of the deceased.

(b) A spouse beneficially entitled to the whole estate of the deceased as ascertained at the time of the application for grant

186. Where a spouse was beneficially entitled to the <u>whole estate</u> of the deceased, and no grant had been obtained during the lifetime of the spouse, the personal representative of the spouse (who had died) would have preference to the deceased's next-of-kin. Thus a "representative" grant, usually referred to as a "leading grant", would be required before making the application in the capacity of the personal representative of a deceased.

187. Similarly, if the spouse had obtained the grant of the deceased, but subsequently died without completing administration, an application for a grant *de bonis non* in respect of the unadministered estate of the deceased should be taken out by the personal representative of the

deceased spouse who has priority over the deceased's living next-of-kin.

B1.3 Ascertaining the value of the deceased's estate

188. In deciding whether a spouse is beneficially entitled to the whole of the deceased's estate, practitioners must at the time of the application for grant ascertain the value of the Fixed Net Sum as set out in para 90, Part 4 of this Guide.

C. Spouse or partner as the applicant

C1. Marriage in Hong Kong on or after 7 October 1971("the Appointed Date")

189. For a marriage contracted in Hong Kong on or after the Appointed Date (the enactment of the MRO), a marriage certificate will be the most direct form of proof.

C2. A marriage contracted in Hong Kong before the Appointed Date

190. When a marriage was contracted in Hong Kong before the Appointed Date, it was usually a customary marriage and not registered. Proving this kind of marriage would require evidence proving the fact of marriage from an applicant or a person witnessing the marriage ceremony as well as evidence on the validity of a marriage with reference to the prevailing law and custom in Hong Kong from an expert.

C2.1 Customary marriage

191. A customary marriage means a marriage celebrated in Hong Kong in accordance with MRO, s.7 (MRO, s.7).

192. To be a valid customary marriage, it has to be a customary marriage celebrated in Hong Kong before the Appointed Date in accordance with "Chinese law and custom" (see MRO, s.7(1)), which is defined as "*such of the laws and customs of China as would immediately prior to 5 April 1843 have been applicable to Chinese inhabitants of Hong Kong*" (see MRO, s.2). The custom as practiced in the *Tsing* period

would be applicable. The customary marriage of "Three Books and Six Rites" 《三書六禮》and the requirement of the parents' consent shall be followed[59].

193. Section 7(2) of the MRO provides a presumption that a marriage is deemed to "accord with Chinese law and custom if it was celebrated before the appointed date in Hong Kong in accordance with the traditional Chinese customs accepted at the time of the marriage as appropriate for the celebration of marriage either:

(1) in the part of Hong Kong where the marriage took place; or

(2) in the place recognized by the family of either party to the marriage as their family place of origin".

194. Thus, MRO, s.7(2) dispenses with proof of practices prevailing in 1843 in Hong Kong. It enables appropriate current practices to raise, once proven, a presumption that the marriage had been celebrated according to such permissible forms and practices as prevailing in 1843[60].

195. The purpose of MRO, s.7(2) is to alleviate the immense difficulty of proving compliance with the proper requirements, but it is not intended to alter the existing law by allowing new categories to be added to customary marriages as existed in 1843. In other words, if a marriage deemed to have been a *Tsing* customary marriage by reason of proof of compliance with appropriate current traditional requirements is shown to have in fact contravened the requirements of *Tsing* customary marriages, the new form of marriage will not be sanctioned and the presumption is rebutted[61].

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59 *Wong Chi Kin v Wong Kim Fung (Re 雷苑文)* [2008] HKCNS 126 Chinese Judgment, at para 47.

60 *Ng Yeung Lai Lin v Fung Shui Kwan (Re Ng Shum (No 2))* [1990] 1 HKLR 67 at 73B, Liu J; [1989] HKLY 566.

61 *Ng Yeung Lai Lin*, *supra*, at 73D-E, Liu J.

196. By the operation of the deeming provision of MRO, s.7(2), two forms of potentially polygamous marriages/unions are recognized as forms of customary marriages – Kim Tiu (兼挑) marriage (known as "*Ping Chai*"(平妻)[62]), and union of concubinage[63].

(a) Kim Tiu marriage

197. The term "Kim Tiu" means "a man responsible for the worship of two ancestral temples as well as for the propagation of the future generations of the two branches of the family". This man is called Kim Tiu son, whose wives are "Ping Chai", wives of equal standing.[64] The number of wives a Kim Tiu is entitled to marry depends on the number of branches of the family he represents.

198. Thus a "Kim Tiu" marriage could occur when there were two brothers, one of whom had a son (and no more) while the other had none. The brother who had no son was able to adopt his nephew, notwithstanding that he was already married, for the purposes of propagating his own branch of the family. The son then took another wife and kept two families to propagate the lines of both his natural and adoptive fathers[65]. It does not apply to a situation where the wife of the deceased's brother is taken by the surviving brother as his own wife. The taking of the wife of a deceased brother was a serious offence under *Tsing* law[66].

(b) Concubinage in Hong Kong

199. "Concubinage" is "the institution of Chinese law and custom under which a man was able to take a principal wife (*tsai*) and an unlimited number of women as concubines (*tsip*) who would cohabit with him

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62 "*Chai*" or "*tsai*" (妻): means wife (*Leung Sai Lun v Leung May Ling* (1999) 2 HKCFAR 94 at 102G, 105A).

63 *Leung Sai Lun*, *supra*, at 104A-104D.

64 *Ng Yeung Lai Lin*, *supra*, at 79F-H, Liu J.

65 *Leung Sai Lun*, *supra*, at 103A.

66 *Leung Sai Lun*, *supra*, at 102I-J.

and bear him legitimate children[67]." Strictly speaking therefore, the taking of a concubine is not really a marriage at all: it is a "special kind of union[68]."

200. Before the Appointed Date, a Chinese man who had entered into a Chinese customary marriage domiciled in Hong Kong could enter into a concubinage union.

201. To be a valid union, no formalities or particular form of ceremony is required. A common intention among the parties to form the concubinage is necessary[69]. A valid concubinage union depends on open acceptance by the wife and open recognition by the man's family generally[70].

202. Hence, a union of concubinage entered into before the Appointed Date is a recognized form of marital relationship. The IEO has statutorily formalized this marital institution to deal with intestate estate in respect of a union of concubinage that was formed before the Appointed Date.

203. Section 13(2) of the IEO provides:

> " 'union of concubinage' (夫妾關係) means a union of concubinage, entered into by a male partner and a female partner before 7 October1971, under which union the female partner has, during the lifetime of the male partner, been accepted by his wife as his concubine and recognized as such by his family generally."

204. Section 13(3) of the IEO further provides a presumption of acceptance by the wife.

> "Where in any proceedings a union of concubinage is proved to have been entered into by a male partner and a female partner before 7 October 1971, it shall be presumed until the contrary is proved that the female partner has, during the lifetime of the male partner, been accepted by his wife as his concubine and recognized as such by his family generally."

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67 *Suen Toi Lee v Yau Yee Ping* [2001] 4 HKCFAR 474 at 480F (CFA), *per* Bokhary PJ.

68 *Wong Kam Ying v Man Chi Tai* [1967] HKLR 201, at 212, Huggins J.

69 *Wong Kam Ying, supra,* followed by *Chan Chiu Lam & Ors v Yau Yee Ping* [2000] 3 HKLRD 443 at 453A & 462F (CA).

70 *Suen Toi Lee v Yau Yee, supra,* at 481F, *per* Bokhary PJ.

205. Evidence shall be filed to prove concubinage. Evidence of the entry of the union can be provided by a person (such as the principal wife) who had attended the ceremony of the union.

(c) Entitlement under intestacy for deaths after the Appointed Date

206. Under r.21(1)(i), a surviving partner or partners to a union of concubinage entered into before the Appointed Date have priority over the children to apply for letters of administration.

207. The benefits of a surviving "*tsip*" and a male partner's entitlement to a deceased's intestate estate are governed by IEO, Schedule 1, para 4.

C3. Marriage in Mainland China

C3.1 Before 1 May 1950

208. When a Chinese person died domiciled in Mainland China, the governing law is either the law of the Republic of China which was founded in 1911, or the law of the People's Republic of China ("PRC") which was founded in 1949.

209. Practitioners should consider one important case heard in both the Court of Appeal and the Court of Final Appeal: *Chan Chiu Lam v Yau Yee Ping* [2000] 3 HKLRD 443 (Court of Appeal) and *Suen Toi Lee v Yau Yee Ping*, *supra*, (Court of Final Appeal). Both judgments give a succinct summary as to when concubinage came to an end in Mainland China.

210. In *Suen Toi Lee v Yau Yee Ping*[71]:

> "Concubinage in the Mainland was not brought to an end immediately upon the founding of the Republic of China in 1911. But the Republican Civil Code (the RCC) which came into force on 5 May 1931 stated (in Book IV, art.985) that 'A person who has a spouse may not contract another marriage'. The courts below concurrently found, upon the expert evidence of Professor Antony Dicks SC, who needs no introduction in the courts of Hong Kong, that this prohibition abolished

[71] *Supra*, at 481I-482A *per* Bokhary PJ.

concubinage. This finding is not challenged before us. A statutory institution called 'the house' was created and provided for by various other articles of the RCC. By virtue of these other articles, a woman who cohabited on a permanent basis other than as a wife with the head of the house or any other male member of the house qualified as a "member of the house" and was as such entitled to maintenance."

211. Concubinage likewise in Hong Kong was part of the customary law of China, which was recognized as a status in China up until the promulgation of the Civil Code of the Republic of China on 5 May 1931 (which provided that a man should only have one wife). However, as Chapter V of the Civil Code (relating to maintenance) made provision for maintenance of a *tsip* (not in her capacity as a *tsip* but a member of the house) it was therefore clear that Chinese customary marriages continued after the coming into force of the Code. No union of concubinage could have been created in respect of persons on account of their having taken or become concubines in China after 5 May 1931[72].

212. Under the law of the Mainland, notwithstanding the express abolition of concubinage by the Civil Code (Article 985), a married Chinese could contract a second marriage with a female conferring on her the status of a wife, which status would continue for so long as no interested party successfully applied to void or annul this second union. That status carried with it the right to an equal share as the first wife in the estate of a deceased husband (this result was the combined effect of Article 988 of the Civil Code which dealt with void marriages and which did not include a second marriage as a void one, and Article 992 which only rendered a second marriage voidable at the instance of an interested party but not void *ab initio*[73]). Hence, until the second marriage is set aside, the status of the second wife cannot be denied and she is not a "*tsip*"[74].

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72 Note the decision of *Wong Zhong Lan-Xiang v Frank Wong* [2002] HKEC 470 (CFI), Deputy HC Judge A Cheung (as he then was), in which the court stated that a second marriage is not void ab initio but voidable as discussed in para 212 below.

73 *Wong Zhong Lan-Xiang* (CFI), *supra*, at paras 69-70.

74 *Wong Zhong Lan-Xiang v Frank Wong* [2003] HKEC 421 (CA), at para 90.

C3.2 On or after 1 May 1950

213. On 29 September 1949, the Civil Code was abrogated. It was not, however, until 30 April 1950 that the new Marriage Law was promulgated. Article 2 of that banned the status of concubinage in specific terms. Hence, it follows that in Mainland China, after 1 May 1950, the legal status of concubinage could no longer be created.

(a) Registered Marriage

214. After 1 May 1950, a valid marriage requires registration. Marriage is usually proved by two kinds of documents:

(1) A marriage certificate issued by the appropriate authority in the Mainland (see P.D. 20.1 Part V). Authentication is not required, and a true copy of the original may be produced if it is inconvenient to produce the original.

(2) A properly authenticated notarial certificate issued by the appropriate authority in the Mainland confirming the registration of a marriage. If the certificate is silent as to whether the marriage was a registered marriage, further requisitions may be raised. In order to avoid any delay arising from such requisitions, practitioners must ensure that the certificate contains such information. If a marriage had not been registered, practitioners shall be required to observe sub-part (b) on unregistered marriage below.

215. If a marriage certificate cannot be produced due to loss or any other reasons, and if a notarial certificate is not available, practitioners must file evidence from an applicant to account for his failure to provide any marriage documents. In the absence of these documents, an applicant may prove a marriage by adducing all available evidence (such as a certificate of registered particulars of himself and of the deceased issued by the Immigration Department).

(b) Unregistered marriage

216. Notwithstanding the enactment of the new Marriage Law on 30 April 1950, marriages contracted in accordance with Chinese custom continued (especially amongst people living in the smaller provinces). Parties to such marriages continued to live as husband and wife without registering their marriages. Upon the death of a party to such a marriage, post-registration would have become impossible.

217. In such a situation, proving a marriage may be rather difficult. Before filing an application for grant, practitioners should consult an expert on Mainland law to ascertain whether this kind of unregistered but de facto marriage (事實婚姻) is valid in accordance with the relevant Mainland law.

C4 Married outside Hong Kong other than in Mainland China

218. If a marriage was contracted in a place outside Hong Kong, other than in Mainland China, it should be proved by filing a properly authenticated marriage certificate (see D1, Part 4 above for the procedures governing authentication).

D. Parent and child

D1. Documentary Proof

219. A birth certificate is the most direct form of documentary proof. Where a birth certificate is issued in Hong Kong, a copy of the original may be produced as proof (provided the original can be produced for inspection upon request).

220. Where a birth certificate is issued by an overseas authority (other than a Mainland authority), a properly authenticated[75] birth certificate issued by an overseas authority must be produced. For places such as Japan and Taiwan, a properly authenticated family register recording the birth and the names of the parents may also be produced as proof.

221. The proof of birth in the Mainland may be by a birth certificate or a properly authenticated notarial certificate of birth.

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75 For the procedures governing authentication, see D1, Part 4 above.

D2. Step-mother and legal mother

222. Under IEO, s.4(7), the meaning of "mother" only refers to the natural mother of an intestate; it does not include a "legal mother" under Chinese law and custom or a step-mother of an intestate deceased unless the former has adopted the deceased child[76].

D3. Adopted child

223. An adopted child is accorded the same legal status of a lawful and natural child of the deceased for the purpose of r.21 (see IEO, s.2(2) and (2A)[77]).

224. Where an adoption was made in Hong Kong, such adoption is to be proved by the production of a valid adoption certificate. If an adoption was made by Chinese law and custom before 1 January 1973, such adoption is to be proved by the evidence of the fact of adoption as well as evidence of an expert on the validity of the adoption.

225. However, after 1 January 1973, customary adoption is no longer permitted. Thus, any posthumous adoption under *Tsing* law on or after this date would equally be invalid[78].

226. Where an adoption was made outside Hong Kong (other than the Mainland), an applicant is required to prove the validity of adoption by producing an authenticated adoption certificate issued by the appropriate authority.

227. Where an adoption was made in the Mainland, an adoption certificate (收養證) or a properly authenticated notarial certificate should be produced. In order to avoid any requisitions arising from a notarial certificate, the relevant law of adoption shall be stated in the certificate. Expert evidence shall be adduced if an adoption was made in accordance with Chinese custom.

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76 *Leung Lai Fong v Ho Sin Ying* (2009) 12 HKCFAR 581 at 592G (para 36).

77 *Re Estate of Chan Fong* [2011] HKEC 696, at para 11, Lam J.

78 *Liu Ying Lan v Liu Ting Yiu* [2002] HKEC 565 (CFI), at para 49, Deputy HC Judge A. Cheung (as he then was), affirmed by the Court of Appeal in [2003] 3 HKLRD 249.

D4. Illegitimate child and step-child

D4.1 Illegitimate child

228. There is no definition of the word "child" or "issue" in the current provisions of the IEO. For deaths before 19 June 1993[79], an illegitimate child was not entitled to his father's estate (but was entitled to the estate of his natural mother).

D4.2 Step-child

229. A step-child (unless adopted) is not treated as a "child" within the meaning of "child" and "issue" of a deceased person for the purpose of IEO[80].

E. Siblings

E1. Siblings of the half blood

E1.1 Before 3 November 1995

230. Where a death occurred before 3 November 1995, when an applicant applies for grant in the capacity of a brother or sister of the intestate, practitioners must first consider whether the applicant and the intestate had the same father, and if so, then whether the marriages of the respective natural mothers of the deceased and the applicant with their father were lawful[81] before the applicant is entitled to a grant as a half-sibling of the deceased.

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79 This is the combined effect of the adding of a new section 3A to the IEO, the repeal of s.10 of the Legitimacy Ordinance; and the enactment of the new Parent and Child Ordinance (Cap.429) abolishing the distinction between legitimate and illegitimate relationships.

80 In *Re Estate of Chan Fong, supra*, para 67, Lam J confirmed the view by Chu J. *per curiam* in *Re Fong Iong (Deceased)* [2002] 1 HKC 688. This decision appears to have cleared up the uncertain situation created in an earlier coordinate decision of Yam J, *Re Estate of Chan Lai Fong* [2004] HKEC 654, in which he held that a step-child could be a child within the meaning of the IEO.

81 This is the combined effect of s.2(2)(a) and (b) and s.2(4) of the 1971 edition of the IEO before their repeal on 3 November 1995.

E1.2 On or after 3 November 1995

231. Where a death occurred on or after 3 November 1995, the parents' lawful relationship becomes irrelevant as a result of the repeal of the former provisions contained in the 1971 version of the IEO. The priority of a half-blood sibling is lower in rank than that of a whole-blood.

E2. Documentary proof

232. When an applicant's application is based on his entitlement as a lawful and natural brother or sister (i.e. a whole-blood sibling, and if there is no whole-blood sibling, a half-blood sibling) of an intestate deceased who died as a bachelor or spinster without children or parents surviving him or her, the following documents should be filed to prove entitlement:

(1) The death certificates of the deceased's parents (to clear off the parents' prior right to a grant);

(2) A photocopy of the marriage certificate of the parents in order to properly establish the relationship of an applicant with the deceased (whether it is lawful and natural siblings of the whole-blood or the half-blood); and

(3) The birth certificate of the deceased and that of the applicant to prove sibling relationship.

Section 2(2)(a) & (b):

"References in this Ordinance to a child or issue of any person shall mean-

*(a) a child of a **valid** marriage to which that person was a party;*

*(b) if that person is a female, a child of a **valid** marriage to which her last husband and another female were parties"*

Section 2(4) :

"References in this Ordinance to a brother or sister of a person's mean a brother or sister who is a child of the same father as that person."

F. *Tsing* law

F1. Applicability

F1.1 For deaths before 7 October 1971

233. Where a Chinese person died intestate domiciled in Hong Kong before the commencement of the IEO, that is, 7 October 1971, succession shall be governed by *Tsing* law.

F1.2 Estate comprising New Territories land only and deaths before 24 June 1994

234. Before the enactment of the New Territories Land (Exemption) Ordinance (Cap.452) ("NTL(E)O") on 24 June 1994, succession to New Territories land (which is not exempted from the New Territories Ordinance, Cap.97 ("NTO")) was governed by the now repealed s.11 of the IEO (notwithstanding the provisions of the IEO having already taken effect[82]).

235. Section 13 of the NTO provides that in any proceedings in the High Court or the District Court in relation to land in the New Territories, the court shall have power to recognize and enforce any Chinese custom or customary right affecting such land. This means, in effect, that the rules of inheritance applicable are those of *Tsing* Chinese customary law, and not the usual Hong Kong law[83].

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82 Section 11, IEO (1986 ed.):

"*(1) Nothing in this Ordinance shall be taken to affect the application of the provisions of Part II of the New Territories Ordinance to land to which Part II of that Ordinance applies and which has not been exempted by the Governor under section 7(2) or (3) of that Ordinance from the provisions of Part II of that Ordinance and the said provision shall continue to apply to such land to the same extent and with the same effect as if this Ordinance had not been enacted.*

(2) Land to which this section applies shall continue to devolve upon intestacy in like manner as it would have devolved if this Ordinance had not been passed.

(3) In this section, "land" has the meaning attaching to it under section 2 of the New Territories Ordinance."

83 *Liu Ying Lan* (CFI), *supra*, at paras 11-15.

236. Thus, practitioners should have regard to the prevailing customary law governing intestate succession if an intestate estate comprises New Territories land only.

F2. Expert evidence

237. By practice, expert evidence on *Tsing* law usually requires a consideration of *Ta Tsing Lu Li* (大清律例) (which is sometimes referred as the "*Tsing Code*") and the prevailing custom. Before an expert is engaged, practitioners shall ensure that he is suitably qualified. It would be prudent to seek the approval of a Probate Master should there be any doubt regarding the suitability of an expert.

238. When instructing an expert, practitioners shall ensure that the expert he has engaged is fully apprised of the facts and evidence of the case. In the affidavit, the expert shall discuss the relevant law before applying such law to the facts of the case and setting out his concluded opinion based on the facts and the applicable law.

239. When succession of an intestate is governed by *Tsing* law, practitioners, when preparing an application, must be familiar with the relevant case law. Practitioners may also find it useful to refer to some of the Hong Kong publications on *Tsing* law[84]. A summary of the broad principles pertinent to this area of law, based on the courts' decisions, is included in this Guide as a quick reference for practitioners (see Attachment "C"). However, it should not be treated as a definitive statement of principles or as a substitute for any relevant case law.

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84 *Marriage Law and Custom of China* by Vermier Y. Chiu (Chinese University Press, Hong Kong, 1966) and *Chinese Family and Commercial Law* by G. Jamieson (Vetch and Lee Limited, Hong Kong,1970).

Part 7 – SPECIFIC APPLICATIONS

A. Sealing of foreign grant

240. Section 49 of the PAO provides that a grant issued by a court of a designated country or place (the Australian States of Tasmania, Victoria and South Australia and the Northern Territory of Australia, New Zealand, Singapore, Sri Lanka, and United Kingdom (Scotland, England and Wales, and Republic of Northern Island) per Schedule 2 of the PAO) may be sealed (or resealed) with the seal of the High Court of the Hong Kong Special Administrative Region. (see S.F. F1.1, N3.1 and N4.1).

241. Practitioners should follow the following practice:

(1) The original grant or a court sealed or certified copy grant shall be filed for the purpose of resealing. Further, a photocopy of the same duly attested on each and every page by the solicitors for the Applicant or two clerks of the solicitors' firm is required for record purpose.

(2) The foreign grant to be resealed must not be a limited grant. If a limited grant requires resealing, leave of the court shall be required. By practice, the matter is usually raised by correspondence and, if necessary, evidence will be required.

(3) The grant to be resealed by the Hong Kong Court will be in identical terms to the foreign grant, including the name of the deceased (except that the Chinese characters may be included).

(4) Surety's guarantee is required (NCPR, r.41).

(5) Part VII of PD20.1 allows the application for resealing to be signed by the applicant, his attorney or his solicitor in Hong Kong.

B. Grant under NCPR, r.29

242. Where the deceased died domiciled outside Hong Kong other than the designated countries and places that allow an application for resealing discussed in para 240 above, all applications for grant shall be brought under r.29. All applications for a grant under r.29 (apart from an application under the proviso of r.29) should be preceded by filing an *ex-parte* application (see S.F. F2.1, F3.1 or F4.1) for an order before the application for grant will be processed. By practice, the *ex-parte* application can be filed together with the main application leading to the grant. However, it is not proper to file an application for grant without filing the necessary *ex-parte* application[85].

243. It is important that the appropriate sub-rule under r.29 is identified at an early stage so as to avoid delay. See the 26th Ed. of T & C at pp.398-402 for some useful guidance on the practice.

B1. Rule 29(a)

244. The application under this rule is straight-forward. It is usually invoked when an applicant has already obtained a grant in the court of the place where a deceased died domiciled, but resealing of that foreign grant is not permissible. A Court sealed and/or certified copy grant is required to be filed and usually no affidavit of law is required. However, a decree or order merely declaring who is/are the heir(s) of the deceased, i.e. the beneficiaries of the estate, will not qualify for r.29(a) grant.

245. The particulars of the grant issued under r.29, including the name of the grantee, condition or limitation imposed on the grant, should be in most cases the same as the foreign grant.

B2. Rule 29(b)

246. Practitioners often confuse sub-rules (b) and (c). The former, sub-rule (b), should be invoked when a deceased died domiciled in a country or place that does not require any formal grant to be obtained for the

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85 *Re Wu Yee Lai* [2010] HKEC 481, paras 45 & 46, Master Levy.

purpose of administration of a deceased's estate, in other words, in places where the concept of grant does not exist at all. Examples of such countries or places are Taiwan, Japan and some continental European countries such as Germany and Holland.

247. Since sub-rule (b) provides that a person can be issued a grant when he "is entitled to administer the estate by the law of the place where the deceased died domiciled", practitioners sometimes tend to think that as long as an applicant is entitled to administer a deceased's estate, sub-rule (b) will apply. Hence, sub-rule (b) is sometimes relied on (incorrectly) when a deceased in fact died domiciled in a place that requires a grant to be obtained for the purpose of administration but no grant has been obtained for various reasons (when, for example, a deceased did not have any asset in the foreign jurisdiction).

B3. Rule 29(c)

248. Sub-rule (c) usually applies in respect of those countries or places in which a grant is required to administer the estate at the country or place where the deceased died domiciled but no such grant has been made because, for example, no estate is left there. In such circumstances, affidavit of law is required.

249. Sub-rule (c) is also resorted to when the circumstances do not fulfil the requirements prescribed by r.29(a) or (b).

B4. The Mainland: r.29(b) or r.29(c)?

250. Before 1997, most applications were made under r.29(c) on the basis of "duly authenticated Certificates of Inheritance" issued by a proper Chinese authority in the Mainland. By practice, affidavit of law was not required. After 1997, there has been a trend that some applications were made under r.29(b) relying on affidavits of law made by lawyers in the Mainland. Hence, the current position is that practitioners may resort to either r.29(b) or r.29(c), depending on the evidence to be filed with the Court.

B5. Affidavit of law

251. Applications under sub-rules (b) and (c) will, in most cases, require evidence on foreign law showing an applicant's entitlement to administration or to a grant according to the law of the place of a deceased's domicile.

252. Rule 18 provides that evidence of foreign law is to be adduced by an affidavit of a person who is an expert of the law of that country or place acceptable to the Registrar.

253. In preparing an affidavit of law, practitioners should take note of the following matters:

(1) The affidavit of law should recite the facts of the particular case and state the applicable law of the place where the deceased died domiciled. The relevant provisions of the law relied upon should be cited and, if appropriate, exhibited.

(2) It is not sufficient for the affidavit merely to state who is beneficially entitled to the estate. Instead, it shall state who, according to the law of the country of domicile, is entitled in priority to administer the estate or to apply for the grant.

(3) The affidavit should also deal with the validity of any will unless this has been proved in the Court of domicile.

(4) The affidavit should also state whether a grant is necessary in order to administer the estate in the country of domicile and, if so, why no grant has been applied for there.

(5) The affidavit should also state whether a minority interest or life interest arises. The expert must set out in detail and in clear terms as to how he has come to the conclusion.

(6) The affidavit should be made by an expert of the law of that country or place, usually a practicing lawyer with not less than 5 years of post qualification experience (see r.18 [86]) and that the

[86] See also *Wu Yee Lai, supra,* at para 39.

office of Consul is not of itself regarded as a qualification enabling the holder to speak to the law of his country (T & C, para 12.27).

B6. Whether a co-administrator is needed?

254. A co-administrator is needed if it is required under PAO, s.25 and NCPR, r.29(d) notwithstanding that there is no such requirement in the foreign country or place where the deceased died domiciled.

B7. Provisos under r.29

255. The proviso under r.29 provides two situations where an *ex-parte* order is not required.

B7.1 Proviso (a)

256. Where a deceased died testate, a grant may be issued to an appointed executor or an executor according to the tenor in the deceased's will written in the English or Chinese language.

B7.2 Proviso (b)

257. Where the whole of the deceased's estate in Hong Kong consists of immovable property, a grant limited to the property may be issued to the person entitled in accordance with the law of Hong Kong as if the deceased had died domiciled in Hong Kong.

B7.3 Summary

257A. To sum up, there are 6 usual ways for a local grant to be issued when the deceased died domiciled outside Hong Kong.

	Relevant legal provision	Filing of Foreign Grant	Filing of Affidavit of law	Remarks
1.	s.49 PAO (sealing)	Yes	No (usually)	Applicable country (Schedule 2 of PAO)
2.	r.29 (a) NCPR	Yes (or Order /Decree)	No (usually)	Administration, not Inheritance
3.	r.29 (b) NCPR	No (no concept of grant at all)	Yes	Not less than 5 years of p.q.e. for the foreign lawyer Usual requirement of Court should be made known
4.	r.29 (c) NCPR	No (usually)	Yes	As above (in r.29 (b) NCPR) The most usual case being that grant could have been obtained, but not done
5.	r.29 proviso (a) NCPR	Not relevant	No	The Will was written in English or Chinese Applicant is the executor or executor according to tenor
6.	r.29 proviso (b) NCPR	Not relevant	No	Applicable if the whole of the estate in HK consist of immovable property Grant limited to the immovable property only

C. Grant under PAO, s.36

258. An application for a grant under PAO, s.36 can be commenced with as a HCEA *ex-parte* application together with the underlying application for grant in the Probate Registry. In some cases, it may be commenced in the caveat proceedings (bearing the prefix "HCCA") or by writ or originating summons.

C1. Applicable situations

259. Section 36 of the PAO is applicable to a number of different, although overlapping, situations:

(1) where a person dies wholly intestate as to his estate;

(2) where a person dies leaving a will affecting estate but without having appointed an executor thereof willing and competent to take probate;

(3) where the executor is, at the time of the death of such person [i.e. a person who has died leaving a will affecting estate], resident out of Hong Kong; or

(4) where it appears to the Court to be necessary or convenient to appoint some person to be the administrator of the estate of the deceased person or of any part of such estate, other than the person who, if the PAO had not been passed, would by law have been entitled to a grant of administration of such estate[87].

C2. Discretion

260. Section 36 of the PAO gives the Court statutory power to:

(1) grant administration in its discretion to persons who are not primarily entitled to a grant (the so called "passing over"), or even to persons who have no title at all. It may be granted to a stranger connected as an agent or otherwise with the deceased's affairs or a creditor[88]. Conversely, a person with prior right can be passed over for bad character or on the ground of insolvency,[89] and/or

(2) make a limited grant, particularly an ACB grant[90].

261. Section 36 of the PAO would not, however, be applicable to a situation where the deceased person leaves a will appointing an executor or an applicant who is willing and competent to take probate and who is resident within the jurisdiction. In such a case, the need for the executor himself to apply for an ACB grant to get in and

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87 *Re Ho Wai Man* [2006] 4 HKLRD 421 at 426E-H (para 18), A. Cheung J.

88 *Ho Wai Man*, *supra*, at 428H (paras 31, 34).

89 *Re Haque Shaquil* [2012] 1 HKLRD 689 at 697, 699 (paras 26, 37), Poon J.

90 *Ho Wai Man*, *supra*, at 428I (para 32).

preserve the estate would seem to be little, given that an executor derives his title to the estate from the will and upon the death of the testator. He has a limited power to manage the estate even without a grant. Under such limited power, he could get in and preserve the estate[91].

262. The words "necessary or convenient" in situation (4) as mentioned in para 259 above give the court a broad discretion, which is to be exercised in the best interests of the estate[92]. However, a s.36 PAO application may be dismissed if it is being abused for the purpose of circumventing the difficulty of proving entitlement to a grant[93].

263. The Court has a wide discretion under PAO, s.36[94].

263A. In proceedings under Part II of Mental Health Ordinance (Cap.136), the committee is sometimes authorized by the court to apply and obtain grant (under s.36 PAO) for the estate of a deceased person for and on behalf of the mentally incapacitated person ("MIP"). Practitioners should note that two steps are needed to pursue the matter further in the Probate Registry.

(1) The committee will apply under HCEA proceedings to obtain an order from the Registrar to appoint him as special administrator under s. 36 PAO if the committee order has not appointed the committee to be the special administrator.

(2) Thereafter, pursuant to the said order under s.36 PAO, the committee will file his application under HCAG proceedings for a grant to be issued to the committee for the use and benefit of the MIP.

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91 *Ho Wai Man, supra,* at 430A-C (para 38).

92 *Haque Shaquil, supra,* at 693 (para 10).

93 See *Li Wing Chun, supra,* Master Levy, where an application was dismissed because a full grant had already been issued to all the executors appointed under the will, and the grant was still valid and subsisting. An application for a DBN grant should have been made.

94 *Re Yeung Wan Chee Ching* HCAG 5489/2002 (24 January 2006) (unrep.); *Re Li Yip Wang* [2006] HKEC 211.

D. DBN grant

264. When the grantee himself has died without fully administering the estate of the deceased, unless there is a chain of executorship, a further or a new grant is required to appoint a personal representative in respect of the unadministered estate. Such grant is commonly known as *grant de bonis non* ("DBN").

265. The application for a DBN grant shall be made by S.F. S3.1a (or S3.1b) or S3.2a (or S3.2b).

266. The following principles are also summarized in T & C, para 13.08.

    (1) A grant *de bonis non* may be made to any person who had a title to a grant equal to that of the previous grantee.

    (2) If the deceased grantee was the only person taking a beneficial interest in the residuary estate of the deceased (e.g. the only person entitled to the estate on an intestacy, or the sole residuary legatee and devise named in a will), a grant *de bonis non* will be made to his personal representative.

        This may necessitate application for a 'leading grant' in the estate of the deceased grantee prior to the application for the grant *de bonis non*.

    (3) On an intestacy (total or partial), where the deceased left a surviving spouse, special considerations apply in view of the nature of interest of the spouse in the residuary estate.

    (4) The general rule applies: a living person is preferred (except by direction of a registrar) to the personal representative of a deceased person who had an equal title to a grant.

267. The concept of "chain of executorship" should be borne in mind by practitioners. A probate does not have to cease on the death of the grantee. An executor having taken probate of his own testator's will becomes by the same act an executor, not only of that will, but also of the will of any testator of whom the other was sole, or sole surviving, proving executor, and so on, without limit, upwards provided that the

will of each testator shall have been proved and the grant is not limited in its operation. Similarly, the office of executor is transmissible downwards without limit. However, the chain of representation is broken by:

(1) an intestacy;

(2) the failure of a testator to appoint an executor; or

(3) the failure to obtain probate of a will.

E. ACB grant

268. When an estate (or any part thereof) of a deceased person is endangered by delay in administering it, the Registrar may order an a*d colligenda bona* grant to be granted for the purpose of preserving the same (akin in function to a provisional liquidator in liquidation proceedings).

269. The application for an ACB grant may be issued by way of an *ex-parte* application as a non-contentious probate by "HCEA" proceedings in the Probate Registry or by way of an *ex-parte* originating summons as "HCMP" proceedings.

270. The application in the Probate Registry involves two stages. Firstly an *ex-parte* affidavit for an order leading to the ACB grant must be filed (see S.F. S2.1a or S2.1b). When the order is obtained, an application for the grant should then be made (see S.F. S2.2a or S2.2b).

271. In the *ex parte* application for an order leading to the ACB grant, the oath need not necessarily state whether the deceased died testate or intestate (if it is not known to the applicant because of insufficiency of time to check the same), but it must show whether a life or minority interest arises in the estate. Further, it is necessary to identify clearly the property to be preserved, the urgency and/or the danger of its destruction in case of delay in administering it.

272. Similarly, in the application for the grant, the oath need not state whether the deceased died testate or intestate (if it is not known to the applicant because of insufficiency of time to check the same), but it must show whether a life or minority interest arises in the estate. In a case where the deceased person died before the abolition of the estate duty, a special estate duty paper containing only the property under the ACB grant is to be obtained from the estate duty office and filed with the Probate Registry for the purpose of including the same in the ACB grant.

273. The ACB grant is limited until further representation is granted, and ceases completely on the issue of a general grant.

274. Surety's guarantee is usually required.

275. If the application is not too complicated, it would be more expedient for practitioners to make an application for a full grant rather than an ACB grant. In order to expedite the application due to the urgent need for a grant, practitioners should submit the application together with a letter requesting for priority. Alternatively, practitioners can make a special appointment to appear before the Probate Master to expedite the application as soon as such an application has been filed.

276. In uncontroversial cases, an application for an ACB grant should be dealt with as non-contentious business by the Probate Registry and can be disposed of by a Master. If an urgent hearing is required, practitioners should make a request for an urgent hearing in writing, setting out the grounds for urgency. On the other hand, if an application contains serious allegations and substantial disputes, an application for an ACB grant should be dealt with on *inter-parte* basis (within the HCEA proceedings or HCMP proceedings) and if the other side responds to the applicant's evidence, the matter should be referred to a Judge[95].

F. Grant pending suit

277. See Section C, Part II of PD20.2 for the practice and procedure.

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95 *Wan Sing Hon*, *supra*, Lam J.

278. As a grant of administration pending suit ceases on the determination of the suit and not upon the issue of a grant in substitution, a full grant, not a cessate grant, is to be made when such limited grant ceases.

279. *Grant pendente lite* or grant pending suit should also be distinguished from "a grant limited to proceedings". In the latter case, administration is granted to take or defend legal proceedings, and such grant ceases on the termination of the proceedings, or on the prior death of the grantee. When full grant is to be applied for subsequently, details of the former limited grant must be mentioned in the oath (see T & C, paras 13.105, 11.353 and Form No.137).

280. A grant pending suit will only be issued when there is a pending probate claim, without which such grant will not be issued[96]. It can also be issued for the limited purpose of prosecuting an action in respect of a particular asset of an estate before the resolution of a probate action[97].

G. Nil grant

281. Usually, no grant will be issued if the deceased leaves no estate in Hong Kong. However, PAO, s.3(2) empowers the Court to do so for good reasons. The most common reason is for administration of trust property held by the deceased and usually the reasons are stated in the supporting affidavit when the application is filed with the Court. The grant issued under such circumstances is commonly known as a "Nil" grant.

H. Caveat proceedings

282. A caveat is "merely notice to the registry to do nothing without notice to the solicitor or person who entered it[98]." When a person wishes to stop a grant from being sealed, he (the "caveator") may enter a caveat (S.F. C1.1) in the Probate Registry.

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96 *Re Ho Nai Chew* [2009] 5 HKLRD 129, Master Levy.

97 *Re Yien Chi Ren* [2009] 5 HKLRD 413, Deputy High Court Judge Horace Wong, SC.

98 *Salter v Salter* [1896] P 291 (CA) at 293-294.

283. A caveat may serve the purposes of:

(1) giving time to the caveator to make enquiries;

(2) giving an opportunity to any person interested in the estate to bring questions before the Court; and

(3) serving as a preliminary step to a probate action or a citation.

284. Once a caveat is entered, the Probate Registry will not process the application except to ask the applicant to deal with the caveat. A caveat may be entered before commencement of a probate action. The Probate Registry would keep an index of all the caveats, and will check on the caveat register to ensure that there are no valid and subsisting caveats before a grant will be issued. It should be noted, however, that a grant can still be issued on the date on which a caveat is entered.

285. A caveat is valid for 6 months (NCPR, r.44(4)) unless it is withdrawn (by using S.F. C1.2). Successive caveats may be entered by the same person provided such caveats have not ceased to be in force under r.44(11) or (12) (in which case, leave of the Registrar is required before a further caveat can be entered).

286. Once a caveat is entered, if an applicant for grant wishes to dispose of a caveat, he (the "person warning") may issue a warning (by using S.F. C1.3) requiring the caveator to give particulars of any contrary interest. By practice, a draft warning should be submitted for approval by the Probate Registry.

287. The caveat and the warning shall contain an address for service within the jurisdiction.

288. A caveator having a contrary interest may, within 8 days of service of the warning, enter an "Appearance" as per S.F. C1.4. This may be followed by a summons for directions issued under r.44(11) if probate action has been commenced.

289. On the other hand, if the caveator does not have a contrary interest, he may still enter an appearance and issue a summons for directions setting out the reasons as to why a grant should not be issued to the person warning.

290. Where the caveator to the warning does not take the steps stated above, the person warning may file an affidavit if the caveator has not entered an appearance and the person warning has not received a summons for directions. An affidavit of service from the process server is also required. The caveat will be treated as having ceased to be in force (r.44(11)).

291. No caveat can be withdrawn if appearance has been entered except by an order of the Court (r.44 (11)). Usually, it is done by the filing of a consent summons. If the caveator has died and the caveat is still in force, an order of the Registrar on summons is required to clear the caveat (see T & C, para 23.33).

292. Caveat proceedings are categorized under "HCCA" proceedings, and any application in connection with or arising from a caveat should be issued within "HCCA" proceedings, not "HCAG" proceedings. Practitioners should be cautious when issuing summons in caveat proceedings.

293. At the summons for directions hearing, if there is consent for the withdrawal of a caveat, a consent summons should be filed for leave to do so. The Court may also direct the commencement of probate action (Order 76 of the Rules of the High Court) to dispose of the disputes.

294. In some cases, a caveator may issue a summons for a s.36 PAO grant in the caveat proceedings by passing over an existing applicant in a grant application or a summons under NCPR, r.25 on the basis of the former having equal entitlement to the grant. Whenever a r.25 summons is filed, a caveat must be entered (r.25(4)), and no grant shall be issued until that summons is disposed of (r.25(5)).

PART 8 - MISCELLANEOUS

A. Documents regarding the applicant

A1. Release of documents before grant

295. From time to time, practitioners need to retrieve documents filed with the Registry for further compliance with the rules or requisitions raised, for example, to comply with r.8 for marking and/or amendment of the estate duty papers to be made by the estate duty office.

296. See Part IX of PD20.1 for the practice and procedure, in particular that the same must be done properly with a record kept by the Court. Practitioners or their clerks shall never make use of the pigeon box system to remove any document from the file or, worse still, to remove the whole file from the box without the knowledge of the Probate Registry. If this should happen, the matter will be referred to the Law Society for appropriate action to be taken. See also the Law Society's Circular 12-699(PA) dated 17 September 2012 for the new arrangement commencing from 3 October 2012.

A2. Return of originals or obtaining copy documents after grant

297. By practice, original marriage certificates, birth certificates and death certificates (other than that of the deceased) will be returned upon request after a period of six months from the date of the issue of the grant. Such request is usually allowed if:

(1) no complications arise within the period of six months;

(2) the applicant is willing to undertake to return the original documents to the Registry upon request; and

(3) a photocopy of the original documents is given by the applicant for court record.

298. After a grant is issued, subject to the above conditions, all documents having been filed form part of the court record and are usually not to be returned to the applicant. However, by virtue of s.74 and r.58(1), the applicant may apply for official photocopies upon payment of prescribed fees.

B. Inspection and discovery by persons other than the applicant

299. The Probate Registry adopts the practice of England in respect of an application for inspection and discovery of documents by a non-party.

(1) Before a grant is issued, inspection may usually be granted if consent of an applicant is obtained.

(2) After a grant is issued, inspection is governed by s.73 and r.58(2). All the documents having been filed are subject to the control of the Court and open for inspection. Usually, the grantee's consent or view on the matter is required before the Court makes a decision.

C. Documents used in a different file

300. Under Part VI of PD20.1, the photocopy of a document may be filed and practitioners should inform the court in writing the number of the file in which the original can be located. However, practitioners should not expect the staff of the Probate Registry to know the whereabouts of the original. They should retrieve the original themselves.

D. Documents expunged

301. Sometimes practitioners or the applicant himself will file irregular or irrelevant documents with the Registry. As a computer entry as well as a folio number will be assigned to each and every document that is filed with the Court, Probate Masters may, for the purpose of tidying up the proper record, order the irregular or irrelevant documents to be expunged from the court file. In such circumstances, the following steps will be taken:

(1) The irrelevant folio number(s) on the front of the inside fold of the file jacket will be marked with "Expunged pursuant to the order of Master _____ dated _____";

(2) The irrelevant documents will be removed from the file and kept in a separate envelope marked "Expunged Documents"; and

(3) The envelope is to be kept at the back of the file jacket.

302. Practitioners or any of their staff must never remove the envelope or any documents thereof without approval by the Court.

E. Appeal

303. If an applicant is not satisfied with the decision of the Registrar or the Probate Master, he may appeal by summons to a Judge (r.62(1)) within 14 days of the decision.

304. The Probate Master should reduce his decision into writing if the solicitor's submission is rejected[99]. Further, there must be a primary, fully-reasoned decision by the Master after a hearing, before a Judge can properly entertain an appeal under r.62(1). In one case[100], a solicitor entered into correspondence with the Probate Master regarding requisitions. The latter disagreed with the former and informed him by letter. The solicitor then took out an appeal. The Judge refused to entertain it for want of a primary, fully-reasoned decision by the Master after a hearing. The matter was therefore remitted to the Master for hearing.

305. Although the rules do not go on to state whether the decision of the Judge is to be appealable or final, by practice, the Court of Appeal is prepared to take up the matter as if it is a usual appeal against a decision of a Judge in the High Court[101].

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99 *Re Kwan Ying Man* [1996] 2 HKLR 4.

100 *Chung Ching Wan*, *supra*.

101 See, for example, *Re Yip Ho* (CA), *supra*.

F. Remitting court fees

306. The Registrar may reduce, remit or defer payment of the relevant court fees in probate matters (see High Court Fees Rules (Cap.4D), r.2(2)).

307. In practice, in certain circumstances, as set out below, where fees have been mistakenly paid but the applicant is not at fault, the Court takes the view that such fees should be remitted or reduced:

(1) Where a mistake necessitating amendment is caused by the Probate Registry, the estate duty office or any other government department;

(2) Where excessive court fee has been paid in an application for grant; and/or

(3) Any other special circumstances which the Registrar considers that he should exercise his discretion.

308. If the filing fees have been franked on a document which requires no filing fee and the mistake is caused by an applicant or any person other than those mentioned in para 307(1) above, a sum of $100 is to be deducted towards payment of administrative costs irrespective of the amount to be remitted.

G. Minor discrepancy in the application

309. Minor discrepancies and clerical mistakes are not uncommon in an application for grant. To save time and costs of amending the documents, unless they are to be amended for other matters in any event, the Probate Registry has established a practice of waiving such errors which do not affect the application in substance, including the following:

(1) There is a few years' difference in respect of the age of the applicant and/or the deceased stated in the marriage certificate as compared with their identity documents.

(2) The word "truly" appears in the phrase "solemnly and sincerely affirm" in the originating paragraph.

(3) The jurat starts on a fresh page.

(4) The name of the interpreter under the interpreter's affirmation and/or the date is/are missing.

310. No confirmation from the handling solicitor is necessary in relation to any minor amendments made by the processing officer in the prayer of an application. In the case of the prayer of an *ex-parte* application, the same will be submitted to the Probate Master to endorse "Order in terms as amended" without confirmation from the handling solicitor in relation to any minor amendments made in pencil.

311. If in doubt, practitioners should seek directions from the Probate Master as soon as possible.

H. Priority to process application

312. When a grant is urgently needed, the Probate Registry may accord priority in the process of the grant.

313. To request priority, practitioners should write to the Probate Registry, setting out the grounds for the application. Usually, priority will be given in the following cases:

(1) The applicant is aged 78 or above;

(2) The application is for a limited grant for the purpose of preservation of property (ACB grant), including completion of a pending sale of landed property, assets that need to be realized within a stipulated time (e.g. share warrants) or a grant to institute urgent applications;

(3) The application is for a (limited) grant for the purpose of instituting, carrying on or defending litigation, such as a Personal Injuries action; or

(4) The applicant is leaving Hong Kong very shortly.

ATTACHMENT "A"

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

_____

In the matter of Non-Contentious Probate Application

and

In the matter of Estate of [name of the deceased] deceased

NOTICE OF APPOINTMENT

TAKE NOTICE that the above application will be heard before in Chambers, open to the public, at the High Court of the Hong Kong Special Administrative Region sitting at Court No.____ on the ___ day of _____20__ at ___ o'clock in the fore/afternoon in respect of the following requisitions:[state the number].

Annexed herewith is a copy of the requisition letter dated _____ from the Probate Registry.

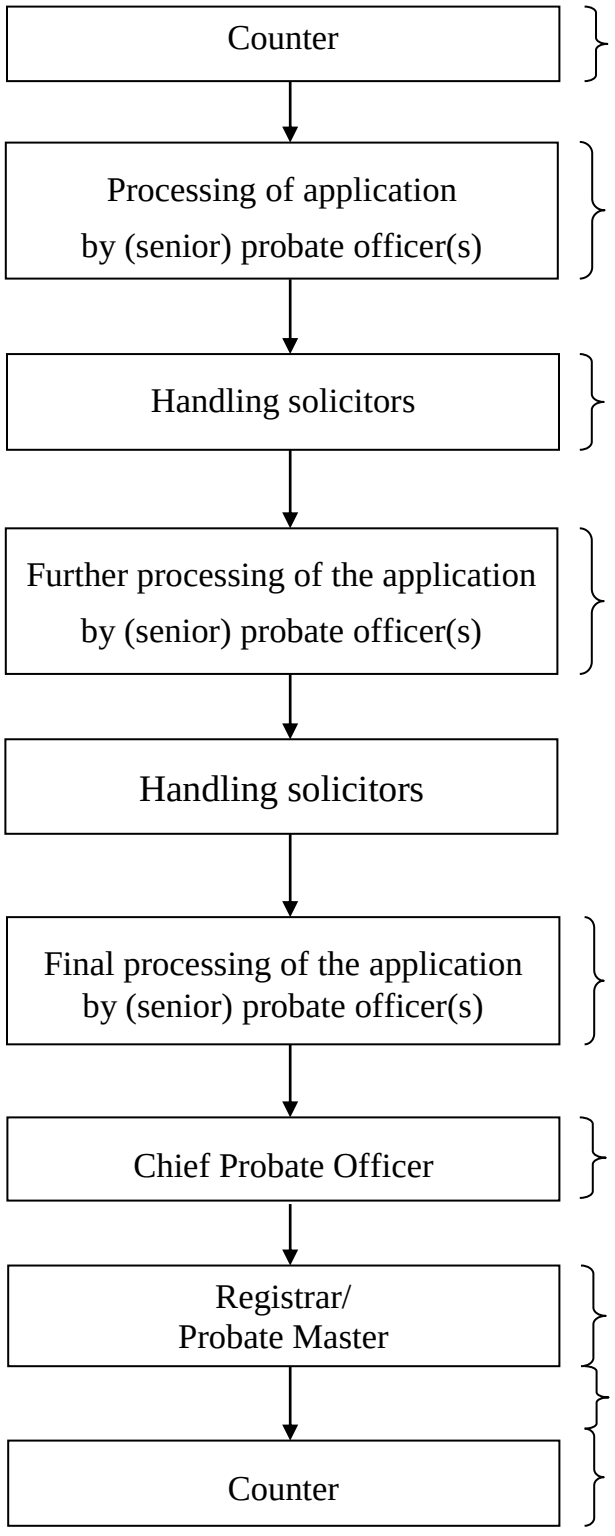
Dated the ___ day of _____ 20__.

Solicitors for the Applicant

Estimated time: ___ minutes/hour(s).

Attachment "B"

Solicitors' Application Section : Flow Chart



File opened, folio marked on documents and file jacket

Requisition(s) raised on compliance of the specified form(s), sufficiency of the supporting document(s), etc. within 28 working days by e-fax

Requisitions compiled with by amending affidavit(s), filing (supplemental) affidavit(s) and/or documents as well as submissions by letter(s)

Application referred to Registrar/Probate Master for directions/appointment under Non-Contentious Probate List, further requisition(s) raised by e-fax

Further requisition(s) complied with and/or ticked off, as decided by Registrar/Probate Master after consideration or appointment

File found in order and court fees paid
(grant will be issued within 28 working days)

Vetting

Application approved and grant signed

Will/estate duty papers/N4.1 attached to the grant and collection letter issued

Grant issued and collected by the solicitors

ATTACHMENT "C"

(1) Whilst *Tsing* law governs succession, a grant of administration shall be required in respect of a deceased's estate in Hong Kong[102].

(2) Only male descendants are entitled to a deceased's estate. Generally, the eldest son or the eldest son from the principal wife is the heir of his father[103].

(3) An adopted son adopted from within the family of the adopting parent has the same right of inheritance as a natural legitimate son. If he was adopted from outside the family, he could not inherit[104].

(4) The females including the surviving principal wife and concubine, if any, and unmarried daughter are entitled to maintenance only[105]. A widow is entitled to maintenance for life until her death or re-marriage. During the widow's lifetime, her sons cannot insist on dividing up the property of their late father without her consent, given her prior claim to maintenance for life[106].

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102 *Wong Yu Shi v Wong Ying Kuen* [1957] HKLR 420 at 443.

103 *Liu Ying Lan* (CFI), *supra*, at para 28.

104 *Wong Yu Shi*, *supra*, at 428.

105 *Wong Yu Shi*, *supra*, at 432.

106 *Liu Ying Lan* (CFI), *supra*, at para 28.

(5) The relevant *Tsing* Code (Reg.78[107]of the *Li* (例)) shall be observed in respect of the selection of a male to be the heir of an heirless estate. Basically, one starts with the paternal nephews of the sonless person and moves outwards within the same kindred or lineage until the right person who and whose family are agreeable to the adoption can be found[108]. An open ceremony of adoption is required[109].

(6) A surviving widow has the right to appoint a successor to succeed an heirless estate and administer a deceased's estate until any son of the marriage reaches maturity[110].

(7) Unmarried daughters in addition to the entitlement to maintenance until marriage also have a claim for dowry upon marriage[111].

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107 "When any person is without male children of his own, one of the same kindred (*Tsung* 宗) of the next generation may be appointed to continue the succession, beginning with his nephews as being descended from the nearest common ancestors, and then taking collaterals, one, two, and three degrees further removed in order, according to the table of the five degrees of mourning.".

108 *Liu Ying Lan* (CFI), *supra*, at para 30.

109 *Yeung Chi Ding v Yeung Tse Chun alias Yeung Tse Ching* [1986] HKLR 131 at 138C-E (para 23), Liu J.

110 *Yau Tin Sung v Yau Wan Loi* [1984] HKLR 15 at 21B quoting McAleavy's expert opinion.

111 *Wong Pun Ying v Wing Ting Hong* [1963] HKLR 37 at 40-42, the court held that as to how much dowry a daughter is entitled, "this was a matter to be agreed by the family, and that on the family failing to do so, it should be a reasonable amount to be fixed by the court." In this case, the Judge awarded 1/10 of the estate to the daughter of a deceased having two sons and one daughter.

Disclaimer

This Practice Guide is for general guidance on Non-Contentious Probate Practice only and is not legal advice. It is not intended to serve as an authority on the subject and should not be cited as such.

It is not a substitute for the relevant statutes and case law. Users of this Guide are solely responsible for determining the applicability of any information contained in this Guide to their situation and are strongly advised to keep themselves up-to-date with the current procedures when preparing applications for grant.

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