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Notes:

This chapter is not a full description of the law in relation to wills, but only an introduction. For a full understanding of the law, readers are advised to consult the text books on wills, in particular —

Parry and Kerridge, *The Law of Succession* (Sweet & Maxwell, 12th ed., 2009).

Andrew Borkowski, *Textbook on Succession* (Oxford University Press, 2nd ed., 2004).

1. THE LAW IN RELATION TO WILLS

Wills are governed by the common law and statutory law, in particular the Wills Ordinance (Cap.30) (WO). 1.001

2. WHAT IS A WILL?

(a) Definition

A will is defined by Jarman as “an instrument by which a person makes a disposition of his property to take effect after his decease and which is in its own nature ambulatory and revocable during his life”.¹ Simply put, it can be said that a will is a declaration of a person’s wishes intended to take effect only upon his death. 1.002

There is no definition of a will in the WO. Section 2 of the WO merely provides that a will includes a codicil and any other testamentary instrument. 1.003

A codicil is a testamentary document that alters or revokes terms of an earlier will. For the purpose of the WO, a will includes a codicil (see above). 1.004

A will is “ambulatory” in nature; that is, it has a “shifting” character. A competent person making a will (testator) may therefore alter or revoke his will at any time before his death. Until the testator’s death, a will confers potential rather than actual benefits in his estate. 1.005

(b) Characteristics

A will: 1.006

- (a) is usually a written document;
- (b) is “executed” in accordance with certain formalities, which are discussed below;
- (c) is “subject to probate”;²
- (d) usually contains statements regarding the disposition of the testator’s property on death;
- (e) takes effect only upon the death of the testator;
- (f) can be varied or revoked by the testator anytime before his death, and thus leaves the testator free to deal with his property in his lifetime; and
- (h) does not give a person named as a beneficiary any interest until the testator’s death.

¹ Jarman, *TA Treatise on Wills* (Sweet & Maxwell, 8th ed., 1951).

² Probate is a court process by which a will is proved valid or invalid. See Chapter 5 on Obtaining Grant of Representation.

3. ADVANTAGES OF MAKING A WILL

- 1.007** It is not compulsory to make a will, but there are advantages:
- 1.008** The testator can be sure that his wishes will be carried out.
- 1.009** If there is no will, the laws of intestacy apply. Even if a person dies partially intestate, the property undisposed of by the will passes according to the Intestates Estates Ordinance (Cap.73) (IEO). That might mean people who will inherit property, in other words "beneficiaries", may not be whom the testator wished to benefit.³ Entitlement under the IEO depends on a person's relationship to the deceased. In contrast, entitlement under a will does not necessarily depend on a beneficiary being able to prove any relationship to the deceased; for example, unmarried partners in a homosexual or heterosexual partnership can benefit under the will if provisions are made for them but they do not inherit under the IEO.
- 1.010** The intestacy rules set out in the IEO regarding the disposal of property may not meet the testator's wishes and do not in all cases provide for the needs of those closest to the intestate. For example, if the matrimonial home is jointly owned by a married couple, on the death of the husband the wife would inherit the matrimonial home and a share in the rest of the husband's estate. By contrast, if the husband owned the matrimonial home in his sole name, the widow's share in the estate would not necessarily be sufficient to enable her to elect to have the home appropriated in her favour. See Chapter 4 on the Intestates' Estates Ordinance (Cap.73).
- 1.011** A will gives certainty as to who will be the beneficiaries and who will administer and manage the deceased's estate (executor/s). This certainty means the administration of the estate may be simpler, faster and cheaper.
- 1.012** A will can fulfil other functions such as:
- (a) appoints the executor/s and trustee/s of property
- Executors take their authority from the will and, in theory, can act from date of death. If no executors are appointed, the court will appoint an administrator. Administrators can act only from the date of a grant of representation. Executors are not usually required to produce any surety when they apply for a grant of probate: see s.46 of the Probate and Administration Ordinance (Cap.10).
- (b) appoints testamentary guardian/s of infant children⁴
- Testamentary guardians can be appointed to act either jointly with the surviving parent or on the death of the surviving parent. The latter is more common. The father of an illegitimate child is not automatically the child's

³ Intestacies, where there is no enforceable will, are dealt with in Chapter 4.

⁴ This can be important because, for example, the father of an illegitimate child is not automatically the guardian of the child on the mother's death.

guardian on the mother's death unless steps have been taken under the Guardianship of Minors Ordinance (Cap.13) to make the father the guardian of his illegitimate child. A child is illegitimate if the child's mother was not married to the child's father when the child was born.

- (c) make directions as to disposal of the body and funeral arrangements

Generally unless the testator offers or gives funeral instructions and directions regarding burial or cremation, the better practice is not to solicit for it. Note that if the instructions are given, they are not binding on the personal representatives.

A will can include detailed directions on the investment of assets or the management of a business thereby ensuring continuity with regard to those matters. A testator can also provide for beneficiaries to be maintained out of the estate. This might be important for beneficiaries who are minors or who are incapacitated. **1.013**

Without a will, these arrangements would need to be made in some other way. **1.014**

4. OTHER MEANS OF DISPOSING OF PROPERTY ON DEATH

A will is not the only means of disposing of property on death. The other ways are: **1.015**

(a) Property owned as "joint tenants"

Where two (or more) people own property jointly as joint tenants, when one dies the title passes to the survivor/s automatically, by "survivorship". For example, a husband and wife own a flat as joint tenants. On the death of the wife, the flat passes by survivorship to the husband. The husband's title is proved by producing evidence of the wife's death, for example, a death certificate. **1.016**

Property can also be owned as tenants in common. In that case, the share owned by the deceased will form part of his estate and will pass to the deceased's heirs according to his will or the laws of intestacy. **1.017**

A beneficial joint tenant can "convert" the joint tenancy into a tenancy in common by severing the joint tenancy. Severance is affected by the joint tenant disposing of his interest in a manner as to sever it or by a course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. Mutual agreement between the joint tenants to sever is also possible. **1.018**

(b) *Donatio mortis causa*

Also known as a "life-time gift", a *donatio mortis causa* is a gift made in contemplation of death and is conditional on death taking place. A gift of property made *donatio mortis causa* passes to the donee only on the death of the donor. **1.019**

1.020 In order to prove *donatio mortis causa*, the following 3 requirements must be established:⁵

- (a) The donor must have made the gift in contemplation though not necessarily in expectation of death.
- (b) He must have delivered the subject-matter of the gift to the donee or transferred to him the means or part of the means of getting at that subject-matter.
- (c) The circumstances must have been such as to establish that the gift was to be absolute and complete only on the donor's death so as to be revocable before then.

1.021 In order to succeed on the second requirement, it must be proved that the donor had parted with the dominion over the subject-matter.

(c) Nomination in certain life insurance policies

1.022 There can be a provision in a life insurance policy that the proceeds are paid, on the death of the person insured to specified beneficiaries.

(d) Money payable under certain pension or superannuation schemes

1.023 In many pension schemes, a beneficiary can be nominated to continue to receive the pension or superannuation after the death of the member. These pension schemes are often so drafted that money are only payable at the discretion of the trustees of the schemes. Therefore, benefits under these schemes do not form part of the deceased's estate. Money payable under these schemes cannot be disposed of by will.

(e) Money payable under a trust

1.024 An individual can create a trust during his lifetime. The trust can continue after his death, and the beneficiaries under the trust will continue to receive their entitlements.

1.025 Note that while all or some of these assets might notionally form part of an estate for "estate duty" purposes, estate duty is no longer payable in respect of the estate of a person dying on or after 11 February 2006.⁶

5. VALIDITY OF A WILL

1.026 For a will to be valid, it must comply with certain requirements:

- (a) compliance with the WO;
- (b) the testator must have the intention to make a will—*animus testandi*;⁷ and

⁵ *Official Administrator v Luk Hoi Tong Co Ltd* [2005] 3 HKC 615.

⁶ Revenue (Abolition of Estate Duty) Ordinance 2005.

⁷ *Re Jones (Deceased)* [1981] Fam 7, [1981] 1 All ER 1; *Re Estate of Knibbs* [1962] 1 WLR 852, [1962] 2 All ER 829 and *Re Stable* [1919] P 7.

- (c) the testator must have mental competence when he gives instructions for the will to be prepared and when the will is executed.

Both *animus testandi* and mental competence, that is, the intention and the ability to make a will, are necessary. 1.027

It is also important that the testator understands, knows and approves the contents of the will. Knowledge and approval is a general requirement resulting from the necessity for *animus testandi*. *D'Eye v Avery*⁸ states that the capacity was the general ability to do something, whereas knowledge and approval required an awareness and appreciation of a specific instrument. 1.028

These requirements should be kept in mind when arrangements are made for executing the will or when you are considering whether a will is valid. 1.029

6. FORMALITIES OF A WILL

The basic requirements with regard to the formalities that must be followed when a will is made are set out in s.5 of the WO.⁹ 1.030

Section 5(1) says that no will shall be valid unless: 1.031

- (a) it is in writing, and signed by the testator or by some other person in his presence and by his direction;
- (b) it appears that the testator intended by his signature to give effect to the will;
- (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
- (d) each witness either:
 - (i) attests and signs the will; or
 - (ii) acknowledges his signature;
 in the presence of the testator (but not necessarily in the presence of the other witness), but no form of attestation shall be necessary.

Although s.5(1) expressly says no form of attestation is necessary, it is prudent for an appropriate clause to be inserted. An attestation clause which states that the proper formalities have been complied with raises a presumption of due execution. 1.032

(a) Writing

The writing is usually typewritten, but it can be handwritten (by the testator or by another person) or any form of printing. The writing can be in ink or pencil but, where a combination of the two is used, there is a rebuttable presumption that the words 1.033

⁸ [2001] WTLR 227.

⁹ Note that the WO was amended in 1995. The amended s.5 applies to wills of persons who die on or after 3 November 1995 regardless of when the will is made.

CHAPTER 5

OBTAINING GRANT OF REPRESENTATION

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1. INTRODUCTION

- 5.001 This chapter considers the administration of the estate of a deceased. The administration involves obtaining clearance from estate duty (in cases where the deceased died before 11 February 2006 from the Estate Duty Office (ED Office) of the Inland Revenue Department), filing with the Probate Registry a verifying affirmation or affidavit exhibiting a schedule of assets and liabilities of the deceased if the death occurs on or after 11 February 2006, obtaining a grant of representation, collecting in the deceased's assets and paying debts and expenses and distributing the estate to the beneficiaries entitled.

2. ESTATE DUTY CLEARANCE AND OPENING OF SAFE DEPOSIT BOX

- 5.002 The following apply in respect of the estate of a person who died *before 11 February 2006* whereby estate duty clearance must be obtained.
- 5.003 Funeral expenses of up to HK\$50,000 (for deaths since 1994) and for debts and incumbrances can be claimed as a deductible expense for estate duty purposes. See s.13 of the Estate Duty Ordinance (Cap.111) (EDO).
- 5.004 It is not usually possible to deal with the deceased's assets without a grant of representation. In addition, there are penalties for taking possession of or administering the estate including the income from the estate without first delivering estate duty accounts as required under s.14 of the EDO unless exempted in writing by the Commissioner of Estate Duty (the Commissioner) under s.14A of the EDO. Further, s.23 of the EDO requires a schedule of property or the certificate of exemption by the Commissioner to be attached to the grant and forbids dealing by any unauthorised person with unscheduled assets. There are also penalties for intermeddling the estate without delivering the account required by s.14 of the EDO.
- 5.005 The executor or the person who is entitled to obtain a grant of representation has to complete and submit the estate duty papers to the ED Office, eg Form IRED1 and Form IRED30 (if the estate consists of realty) for clearance of the estate duty and Form IRED12 if there is a matrimonial home owned by the deceased devised or passes on his death to the spouse as such matrimonial home is not chargeable with estate duty under s.10A of the EDO.
- 5.006 The ED Office will assess the value of the deceased and if the amount does not exceed the exempted amount specified in Schedule 1 to the EDO, a certificate of exemption from estate duty and a schedule of property in duplicate will be issued by the ED Office. If the value exceeds the exempted amount, the estate duty charged must be paid in which event a certificate of paid estate duty together with a schedule of property will be issued by the ED Office. Separate sets of certificate and schedule of property are issued for (i) properties owned by the deceased beneficially, (ii) properties held by the deceased as trustee and (iii) properties owned by the deceased jointly with other(s).

(a) Safe deposit box

In particular, note that opening a safe deposit box may render the bank and the person opening the box liable to penalties under s.24 of the EDO. In practice, a safe deposit box should be opened by the executors or the persons entitled to a grant and their solicitor by arrangement with the ED Office and the bank in the presence of officers (usually in pair) of the ED Office who will make an inventory of the contents. A will can be removed from a safe deposit box under the authority of the Commissioner. 5.007

Title to jointly owned property, which passes by survivorship, can be proved by the production of a death certificate. However, such jointly owned property is chargeable with estate duty and the personal representative and the person to whom the beneficiaries' interest so passes or accrues shall be accountable for the estate duty and shall deliver to the Commissioner an appropriate account under s.14(1) of the EDO. See ss.23 and 24. 5.008

Point to Note:

1. The EDO effectively prevents dealing with jointly owned assets, including a joint bank account, until estate duty clearance has been obtained.

3. ABOLITION OF ESTATE DUTY

Estate duty was abolished by the Revenue (Abolition of Estate Duty) Ordinance in 2005. The Ordinance which commences operation on 11 February 2006 provides that estate of persons dying *on 11 February 2006 and after* will not be subjected to estate duty. While the EDO is for the protection of revenue, the 2005 Ordinance provides measures to protect the beneficiaries and persons who deal with or are in possession of the deceased's properties. 5.009

4. INSPECTION OF SAFE DEPOSIT BOX AND REMOVAL OF ITEMS

The following describes the procedures for inspection of safe deposit box and removal of items *since 11 February 2006* introduced by the Revenue (Abolition of Estate Duty) Ordinance. 5.010

(a) Inspection of safe deposit boxes

The following rules and procedure monitored by the Department of Home Affairs not the ED Office are applicable to the deceased who kept a solely rented safe deposit box or a jointly rented safe deposit box at a bank immediately before his death. 5.011

(b) Application

The application is made for a Certificate for Necessity of Inspection of Bank Deposit Box (to the Director of Home Affairs) s.60C(1) of the Probate and Administration Ordinance (Cap.10) (PAO) (using Form HAEU3—Application for Inspection of a Deceased Person's Bank Deposit Box; see Sample Document 5.3). 5.012

5.013 It must be made by:

- (a) an executor or one of the executors of the deceased person;
- (b) a person who is entitled in priority to administer the estate; or
- (c) the surviving renters if the safe deposit box is jointly rented by the deceased person with other person.

5.014 Supporting documents required—copies of:

- (a) the identity card/passport of the deceased person;
- (b) the death certificate of the deceased person;
- (c) the identity card/passport of the applicant;
- (d) the last will of the deceased person, if the applicant is in the capacity of the executor;
- (e) if the applicant is not the executor to the deceased estate, then any document evidencing the relationship between the deceased person and the applicant, such as marriage or birth certificate; and
- (f) any document evidencing the existence of the safe deposit box eg the lease agreement of the box or confirmation letter from the bank(s).

(c) Inspection

5.015 On the issue of the Certificate for Necessity of Inspection, the holder shall make an appointment with the Director of the Home Affairs and the bank for inspection with public officers authorised by the Secretary of Home Affairs.

5.016 The inspection should take place in the presence of:

- (a) the holder of certificate;
- (b) bank staff;
- (c) authorised public officer (in pair);
- (d) holder's solicitor or his clerk; and
- (e) in the case of a jointly owned rented box, the certificate will normally require the presence of the other party ie the executors or person entitled in priority to administer the estate or the surviving renter as the case may be.

5.017 Where there is no will inside the box or a will is found naming the holder as executor or the holder is the surviving renter in a jointly rented box, the holder will make an inventory of the contents in the box. The original inventory is kept by the holder of the certificate with copies given to the other parties present. The bank and the public officers should keep the copy of the inventory for 6 years. See s.60D(9) of the PAO.

Point to Note:

1. No document or article (save and except a will) should be removed from the box at inspection.

If the will is found in the box naming the holder of the certificate as the executor, the holder can remove the will after placing a copy of the will in the box. If not, the bank staff should make a copy of the will, put the original back into the box, close the box and hand the copy to the public officer: s.60D(4) of the PAO.

5.018

(d) Application for authorisation for removal of items from bank deposit box by the personal representative or surviving renter

The procedure for removal of items from the safe deposit box (Form HAEU4A—Application for Removal of Items from the Deceased Person's Safe Deposit Box (rented either solely or jointly; Sample Document 5.4) varies according to whether the personal representative is also the surviving renter of the safe deposit box (where the safe deposit box is rented jointly with the deceased):

5.019

- (a) Where personal representative is also the surviving renter and provided that an inventory of the contents of the box has been prepared, the personal representative must:
 - (i) apply for an authorisation for removal to the Commissioner on Form HAEU4A (authorisation for removal may be restricted to items or documents (Form HAEU4B) belonging to surviving renter and documents required for application of grant); and
 - (ii) file an affidavit declaring items to be removed belong to the personal representative.
- (b) Where the lease agreement of the jointly rented box provides for survivorship arrangement and the surviving renter is not personal representative but wishes to remove items within 12 months of deceased death, the surviving renter must:
 - (i) obtain written consent from the personal representative as well as his presence at the removal process; and
 - (ii) obtain authorisation for removal of items on Form HAEU4A from the Commissioner.

Items are normally removed in the presence of the personal representative.

- (c) Where in the case of jointly rented safe box with survivorship arrangement, upon expiry of 12 months, surviving renter can have access to the safe deposit box without authorisation provided: (a) the bank is satisfied that deceased has died more than 12 months and (b) an inventory to the contents of the box had been prepared. There is no need to apply for an authorisation for removal of items.

Note that the bank and its staff are exempted from criminal liability for intermeddling so long as they have acted in good faith and have exercised care in accordance with

5.020

beneficiary, the court can impound all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee. See s.61 of the TO.

11. RIGHTS OF WRONGFULLY DEPRIVED BENEFICIARIES IN CAPITAL

(a) Refund

6.122 The beneficiary may claim a refund against the recipient if the personal representative made a wrong payment and the beneficiary has exhausted all his remedies against the personal representative due to:

- (a) the personal representative being declared insolvent;
- (b) having complied with s.29 of the TO advertisement requirements; or
- (c) obtaining a *Benjamin* order before distribution.

(b) Tracing

6.123 A beneficiary may try to trace the money or property wrongfully paid over.

CHAPTER 7

INHERITANCE (PROVISION FOR FAMILY AND DEPENDANTS) ORDINANCE (CAP.481)

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1. PRINCIPLE OF TESTAMENTARY FREEDOM

The freedom of the testator to make a will as he wishes (principle of testamentary freedom) is to a limited extent eroded by the Inheritance (Provision for Family and Dependents) Ordinance (Cap.481) (IPFDO). The IPFDO empowers the court to order financial provision to be made from the net estate of a deceased person for the benefit of certain categories of applicant. Applications can be made where a person dies testate, intestate or partially intestate. 7.001

The IPFDO replaces the Deceased's Family Maintenance Ordinance (Cap.129). The terms should be considered in relation to will drafting, probate and divorce practice. 7.002

To be successful under the IPFDO, an applicant must: 7.003

- (a) satisfy certain preliminary requirements;
- (b) apply within the time limit;
- (c) be within one of the categories of applicant; and
- (d) show that the will or the intestacy rules or a combination of the two has not made reasonable financial provision for the applicant.

See the English Inheritance (Provision for Family and Dependents) Act 1975 on which the IPFDO is based. 7.004

2. PRELIMINARY REQUIREMENTS

The IPFDO applies to a person: 7.005

- (a) who dies on or after 3 November 1995; and
- (b) was domiciled in Hong Kong; or
- (c) was ordinarily resident in Hong Kong at any time in the 3 years immediately preceding death — s.3(1) of the IPFDO.

Point to Note:

1. The requirement of ordinarily resident in Hong Kong is a much wider requirement since it does not require ordinary residence for the last 3 years but rather ordinary residence at any time within the last 3 years.

3. TIME LIMITS

An application must be made before the "end of the period of 6 months from the date on which a grant of representation to the estate of the deceased is first taken out". See s.6 of the IPFDO. 7.006

- 7.007 In the case of a limited grant, for example, a grant *ad litem*, time was held to run from the date of a full grant.¹
- 7.008 Where there is no representation of the deceased's estate being taken out, the application will not be time barred.²

Point to Note:

1. An application can be made before a grant of representation is taken out. See *Ye Hong Ying v Chan Lup Ying* [1996] 1 HKLR 255, [1996] 3 HKC 426.

(a) Extension of time

- 7.009 Section 6 does not provide the circumstances under which an application can be made out of time. While the merits of the application are a relevant factor, the principles set out in *Re Salmon*³ below should be noted. Generally, the court has discretion to extend the time limit.⁴
- 7.010 The principles in *Re Salmon* are:
- The court's discretion is wide and unfettered to be exercised with what is just and proper.
 - The plaintiff must show sufficient grounds for taking the matter out of the time limit — this is a substantive provision not a mere procedural time limit. The time limit will not be extended lightly.
 - The onus lies with the applicant to establish sufficient grounds for granting the permission and depriving those who are protected by it of its benefits.
 - It is material to consider how promptly and in what circumstances the applicant has sought the permission of the court after the expiry of the time limit.
 - It is material whether negotiations have commenced within the time limit.
 - The court will consider whether the estate has been distributed.
 - The court will consider whether the applicant has a claim against a third party if refused leave to bring proceedings out of time (eg the applicant's solicitor).

The list above is not exhaustive.

Points to Note:

1. It would also be material to consider whether in the event of the court extending time, the application for financial provision is likely to succeed.

¹ See *Re Johnson (Paul Anthony)* [1987] CLY 3882.

² See *Kwok Lok Yin v Woo Bik Wah* [2010] HKFLR 213.

³ [1981] Ch 167, [1980] 3 All ER 532.

⁴ *Re Dennis* [1981] 2 All ER 140.

2. In *Re C (Deceased: Leave to Apply for Provision)* [1995] 2 FLR 24 where the applicant was a very young child whose mother had failed to take any steps on his behalf against the father's estate, the application made 18 months after the grant was issued was allowed.

4. TIME LIMIT AND DISTRIBUTION OF THE ESTATE

The time limit affects the distribution of the deceased's estate. Personal representatives are not liable to claimants (if successful) if they distribute more than 6 months after a grant of representation is first issued — see s.22. 7.011

For distribution within the 6 months period, note: 7.012

- An order is made against the deceased's net estate — see s.2 for the definition of "net estate". Therefore, debts can be paid.
- The personal representatives might decide to pay a legacy to a beneficiary who is a potential applicant.
- The personal representatives might decide to pay a legacy which is small in relation to the whole estate.
- It might be safe for the personal representatives to distribute assets to a beneficiary with a strong moral claim, particularly if there is an urgent need.

5. CATEGORIES OF APPLICANTS

(a) Section 3(1)

- (i) The spouse of the deceased — a husband or wife by a valid marriage. Section 2 provides the definition of a valid marriage. The definition is different from that of the Intestates, Estates Ordinance (Cap.73). 7.013

Under the IPFDO, the definition includes not only a husband and wife under a valid marriage but also a person who entered into a void marriage in good faith unless the marriage was dissolved or annulled during the deceased's lifetime. The dissolution or annulment must be one that is recognised under Hong Kong law or the person had during the deceased's lifetime entered into a later marriage.

The category includes a judicially separated spouse, but see s.17. In *Re Lee Sai Wai (Deceased)* [2002] 4 HKC 517, no provision whatsoever was made in the will for the wife. The court allowed some provision to be made for the wife out of the net estate of the residential property.

- (ii) A former spouse (a person whose marriage with the deceased was during the deceased's lifetime dissolved or annulled) who has not remarried and was

being wholly or substantially maintained by the deceased immediately before his/her death.⁵

Points to Note:

1. The court under s.16 can treat an applicant as if the decree of divorce or nullity of marriage had not been made absolute and the decree of judicial separation had not been granted where a party to the marriage dies after the divorce or nullity of marriage had been made absolute or the judicial separation granted where either an application under s.4 of the Matrimonial Proceedings and Property Ordinance (Cap.192) for financial provision had not been made or if made, had not been determined before the deceased's death.
2. Under s.17 on the grant of a decree of divorce, nullity or judicial separation, the court can order that the applicant's spouse cannot make an application under the IPFDO.
 - (iii) A *tsip* or male partner of the deceased by a union of concubinage.
 - (iv) A parent of the deceased.
 - (v) An infant child of the deceased, or a child of the deceased who by reason of mental or physical disability is incapable of maintaining himself.
 - (vi) An adult child of the deceased.
 - (vii) Any person who in the case of a marriage to which the deceased was at any time a party was treated by the deceased as a child of the family in relation to that marriage.
 - (viii) A brother or sister of the deceased of the whole or half blood.

In categories (iv)–(viii) inclusive, the applicant must have been wholly or substantially maintained by the deceased immediately before his death.
 - (ix) Any other person who was being wholly or substantially maintained by the deceased immediately before his death.

(b) Children

7.014 There is no age restriction: all children of the deceased, whatever their age, are entitled to apply. However, it is necessary to treat applications from children with discretion. In *Re Coventry* [1980] Ch 461, [1979] 3 All ER 815, "applications (...) by able bodied and comparatively young men in employment and able to maintain themselves must be approached (...) with a degree of circumspection".

(i) Child of the family

7.015 This is not the deceased's natural child but a person who was treated by the deceased as a child of the deceased's family. If treated as a child of the deceased's family, a step-child can fall under this category.

⁵ See *Re Fullard* [1982] Fam 42, [1981] 2 All ER 796.

In treating a child as a child of the family, it is not sufficient to merely display affection, kindness or hospitality towards the child. What is required is an assumption of responsibilities and privileges of a parent towards that child. **7.016**

For the purpose of deciding whether the person should be treated as a child of the marriage, it is not necessary that the child should be a minor; an adult child can be so treated.⁶ **7.017**

(c) The meaning of "maintained"

Except the categories for spouse of the deceased, a *tsip* or male partner of the deceased by a union of concubinage and dependent child (ie an infant child or one who is incapable of maintaining himself by reason of his mental or physical disability), applicants in all other categories must prove they have been maintained by the deceased wholly or substantially by the deceased immediately before his death. **7.018**

Section 3(3) provides that a person is wholly or substantially maintained by the deceased if "the deceased, otherwise than for full valuable consideration was making a substantial contribution in money or money's worth towards the reasonable needs of that person".⁷ **7.019**

Useful questions include: **7.020**

(a) Was there a substantial contribution?

In this case, the substantiality of the contribution will depend on the reasonable needs of the applicant. In *Ottey v Grundy* [2003] WTLR 1253, the provision of a car for the applicant was held to be insufficient contribution for this purpose.

(b) Was the contribution made for full valuable consideration?

It is necessary for the applicant to show dependency on the deceased ie that the applicant did not give full valuable consideration for what he received from the deceased.

(c) What consideration is given to the provision of care, support and companionship?

In *Bishop v Plumley* [1991] 1 WLR 582, [1991] 1 All ER 236, the court stated that the care and support given by the applicant to the deceased in the years prior to the death of the deceased should not be balanced against the financial support provided by the deceased. The court held that by providing the applicant with a secure rent-free home, the deceased had made a substantial contribution in moneys or money's worth towards the applicant's needs, and the conduct of the applicant did not amount to full valuable consideration for this provision.

⁶ See *Re Callaghan* [1985] Fam 1, [1984] 3 All ER 790, where the court held there must be evidence of some behaviour of a parental nature by the deceased towards the applicant.

⁷ See *Jelley v Iliffe* [1981] Fam 128, [1981] 2 All ER 29, and *Re Beaumont* [1980] Ch 444, [1980] 1 All ER 266.