

BUTTERWORTHS HONG KONG

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**Probate, Administration and Trustee**  
HANDBOOK

Sixth Edition



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# Probate, Administration and Trustee Handbook

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person of unsound mind, being a trustee, and by the trustee or trustee, under this section, unless leave has been granted, make the appointment'.

New subsections were subsequently added to the Trustee Act 1990 (s 36(6A)-(6D) by the Trustee Delegation Act 1999 (LN 26 of 1999) subsections confer limited power to the donee of an enduring power for the appointment of new trustees in prescribed circumstances.

[37.02] Enactment history

Section 37(1) was amended by the Age of Majority (Related Provisions) Act 1990 (32 of 1990), s 9, commencing 1 October 1990 (LN 26 of 1990) substituting 'a person under the age of 21 years' for 'an infant'.

Section 37(1) was also amended by the Trustee (Amendment) Ordinance 1993, commencing 14 January 1993, by substituting 'Hong Kong Colony'.

[37.03] Subsection (1): Trustee

The existence of a personal representative's power of appointment under a will cannot oust the court's power of appointment under s 61 (see *Fook Ho & Ors v Leong Fook Kong* [1995] 1 HKC 142, [1995] 2 HKC 142).

[37.04] Is dead

It will be noted that sub-s (8) above extends the section to a trustee who predeceases the testator.

[37.05] Remains out of Hong Kong

To enable the statutory power to be exercised on the ground of a trustee remaining out of Hong Kong for more than twelve months, the condition must be complied with, and the absence must have been continuous. It has been held to prevent the power coming into operation if either of the trustees should 'be abroad', was held to arise when a trustee went to reside in Normandy, coming occasionally to England on business. See *Re Earl of Stamford, Payne v Stamford* [1896] 1 Ch 288, [1896] 1 Ch 134; and see *Re Moravian Society* (1858) 26 Beav 101, (1850) 11 Beav 101; *Arbib and Class's Contract* [1891] 1 Ch 601, (1891) 60 LJ Ch 261.

A trustee who remains out of Hong Kong for more than twelve months removed against his will: see *Re Stoneham's Settlement Trusts*, [1953] Ch 59, [1952] 2 All ER 694.

There is no absolute bar on the appointment of a foreign resident as trustee of a Hong Kong trust: cf, *Re Whitehead's Will Trusts, Burke v Burke* [1971] 1 WLR 833.

Months

Refuses ... to act

*Hadley ex p Hadley* (1851) 5 De G & Sm 67, (1851) 21 LJ Ch 109, a power exercisable in the event, amongst others, of a trustee refusing or declining to act, was held to authorise the appointment of new trustees in the place of a disclaiming trustee: see also *Re Birchall, Birchall v Ashton* (1889) 60 LT 369 (CA, Eng); *Noble v Meymott* (1851) 14 Beav 612.

Unfit to act

As a general rule, bankruptcy renders a person unfit to be a trustee; and where the trust property consists of money and securities, a bankrupt will not be permitted to act as a trustee if the beneficiaries require him to be removed: see *Re Barleer's Trust* (1875) 1 Ch D 43, (1875) 45 LJ Ch 52; *Re Adams' Trust* (1879) 12 Ch D 48, (1879) 48 LJ Ch 613. An absconding trustee is also unfit for the office; see *Wheeler and De Rochow* [1896] 1 Ch 315, (1896) 65 LJ Ch 219, at 322; *Re Sichel's Settlements, Sichel v Sichel* [1916] 1 Ch 358, (1916) 85 LJ Ch 285.

Incapable of acting

Reference to personal incapacity; see *Re Watts's Settlement* (1851) 9 Hare 337, (1851) 20 LJ Ch 337. A person of unsound mind was held incapable of acting though not so found by inquisition in *Re East, Re Bellwood's Will Trusts* (1873) 8 Ch App 735, (1873) 42 LJ Ch 480; *Re Lemann's Trusts* (1883) 22 Ch D 187, (1883) 53 LJ Ch 173. But if the trustee suffers from mental disorder and is entitled to a beneficial interest, sub-s (9) above applies. An alien enemy has been held incapable of acting (*Re Sichel's Settlements, Sichel v Sichel* [1916] 1 Ch 358, (1916) 85 LJ Ch 285), but a trustee resident in an enemy occupied country is not necessarily incapable of acting: see *Re May's Will Trusts, May and Stanford* [1941] Ch 109, (1941) 110 LJ Ch 96. Probably, a trustee who is suffering from a serious illness, which is likely to last for a long time, and which renders him unfit to transact any business, is incapable within the meaning of this section: see *Re Weston's Trusts* (1898) 43 Sol Jo 29. As to a corporation, sub-s (3) above should be noted.

Persons nominated for the purpose of appointing new trustees

By the instrument creating the trust, the power is conferred in general terms without reference to any particular event or events, then the person or persons upon whom such power is conferred are 'the persons nominated by the instrument' within the meaning of sub-s (1)(a) above: see *Re Walker and Hughes' Contract* (1883) 24 Ch D 698, (1883) 53 LJ Ch 135. If, however, a person is the donee of a power to appoint new trustees in certain specified events, not including one of the

**[57.13] Subsection (2): Representation is revoked**  
See s 33 above and commentary thereto.

**[57.14] Payments and dispositions**  
See [57.07] above.

**[57.15] Made in good faith**  
See [57.08] above.

**[57.16] To a personal representative**

This makes clear that the section is concerned with payments made to personal representatives, possibly in settlement of a claim against them.

**[57.17] Under the representation**

This must mean under, in the sense of under, the grant of representation could be either of probate or of administration, since the section

**[57.18] Before the revocation thereof**

This limits the operation of the subsection to cases where the grant was revoked: see s 33 above and commentary thereto. In contrast, the subsection which is not so limited.

**[57.19] Are a valid discharge**

This protects the person making the payment or disposition in good faith; see [57.08] above. It is a necessary provision otherwise third parties would be reluctant to deal with personal representatives even with a grant, if there was a danger that any payments made would not be recognised.

**[57.20] Personal representative who acted under representation**

The personal representative must act in his representative capacity. Note that there is no specific requirement of good faith in connection, although that was no doubt intended and perhaps could be made to apply. This provision applies where the grant was made (see s 33 above) which will mean that a fresh grant will have to be made, perhaps, to a newly discovered will or to a different personal representative in administration. In such circumstances it is possible that a personal representative made, either to a creditor, where the new will might contain

provisions for the payment of debts, or to a beneficiary. If such payment is challenged under the terms of a newly discovered will for example, then the personal representatives can invoke the protection of the subsection.

**[57.21] Retain and reimburse himself**

This phrase can be contrasted with that in the previous subsection 'indemnified and protected'. The circumstances when it will be justifiable for the personal representative to retain and reimburse himself out of estate assets are limited, and seem to pre-suppose that the payment was made out of the personal representatives' personal resources, since if made out of the estate assets then there will be no such need.

**[57.22] Payments and dispositions made by him**

The second part of this subsection expressly applies to payments by a personal representative in contrast to the first part which relates to payment to a personal representative. This provision can be contrasted with sub-s (1).

**[57.23] Might have properly made**

This is an important qualification. A personal representative can only invoke the protection of the section in respect of such payments or dispositions as could be properly made by the persons who ultimately obtain the grant—which is a completely unknown hypothesis at the time the payment is made. Payments made in respect of debts and expenses would no doubt be covered but dispositions to beneficiaries clearly may not. If the grant is revoked solely on the ground that it was made to the wrong person, then the beneficiaries are likely to be the same. But if the grant is revoked on the ground that a later valid will is discovered, then clearly the beneficiaries will be different and any disposition made to them could not have been properly made by the new personal representatives. The wording follows the English corresponding section, which doesn't appear to have caused problems, but it is suggested that the subsection would have been better drafted to refer to 'payments or dispositions made in good faith by the personal representative'. The section covers written receipt by the administrator acknowledging payment of compensation by the Director of Lands: *Ho Sum Keung v Director of Lands* [2008] 6 HKC 93, [2009] 1 HKLRD 220 (CFI); also see *Chan Sai Fu, Leong Lai Wai v Lee Wai Kwong Johnny* [2001] HKCU 240 (unreported, HCMP 5879/2000, 21 March 2001) (CFI).

**[57.24] Subsection (3)**

This subsection reproduces (with some change of wording) the Administration of Estates Act 1925 (UK), s 37(1) which explains its purpose in the heading, 'Validity of conveyance not affected by revocation of representation'. The English legislation refers to, 'All conveyances of any interest in real or personal estate ...'; this subsection refers to, 'All transfers and conveyances of any interest in property ...'. The difference in wording is significant. The English wording confines the operation of the subsection to 'conveyances' which are restricted to written

instruments of transfer, usually of real property; whereas the inclusion in this subsection extends the operation of the provision to any form of instrument including those effected without written instrument. Neither 'transfer' nor 'purchaser' is defined in the Probate and Administration Ordinance but the former term is defined in s 55(1)(iii) of the Administration of Estates Act 1925 as, 'includes a mortgage, charge by way of legal mortgage, gift, vesting, declaration, vesting instrument, disclaimer, release and assurance of property or of an interest therein by any instrument, except a will'.

The provision was prompted by the case of *Hewson v Shelley* [1914] 2 Ch 13 (Eng), where letters of administration were revoked after a will was found, eleven years later. The administrators who had properly administered the estate on the basis of an intestacy had conveyed a piece of real property to a purchaser; it was held that notwithstanding the revocation, the purchaser held good title. The provision in s 37(1) (English Act, applying to conveyances) to transfers and conveyances) confirms that position. The provision is intended since otherwise purchasers would be reluctant to take a title from personal representatives for fear that, if the grant was subsequently shown to be wrong and revoked, their title would be impeached: see also *Re Bridgett and Hayes' Contract* [1928] Ch 163, [1927] All ER Rep 191 on the general principle of the Law of Property Act 1925 (UK), s 204(1) an order of the court (which has no effect in a grant of probate or of administration) is conclusive in favour of a purchaser.

**[57.25] All transfers and conveyances**

See the comment in the previous paragraph. Interests in land can only be transferred by written assent: see s 66 below. Interests in some forms of personal property can be transferred by simple delivery or by assent, which may or may not be in writing (depending on the form of property) be in writing. It is thought that all transfers of property would be covered by the subsection.

**[57.26] Of any interest in property**

This is wide enough to cover all forms of property, although as noted the reference to 'conveyances' in the Administration of Estates Act 1925 (UK) tends to limit that provision to interests in land.

**[57.27] To a purchaser**

This is not defined in the present Probate and Administration Ordinance but the Administration of Estates Act 1925 (UK), s 55(1)(xviii) defines it as follows: 'means a lessee, mortgagee, or other person who in good faith acquires an interest in property for valuable consideration, also an intending purchaser of an interest in property for valuable consideration, but does not include a transferee of an interest in property by marriage ... but does not include a transferee of an interest in property by marriage ...'. This definition can, it is suggested, be applied to this provision. The reference to 'good faith' (see [57.08] above) can be applied since the subsection does not in terms state this although the tenor of the subsection surely requires it. The requirement of consideration (although technically not

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'purchaser' means a person taking by words of purchase and does not necessarily import consideration) includes a creditor or assignee who buys, but excludes a beneficiary taking as a volunteer under a will or intestacy. Such a beneficiary does not acquire an inviolate title and the property so received can be traced or followed against him: see s 67 below.

**[57.28] By a person ... been granted**

The subsection covers transfers or conveyances by personal representatives who have a grant.

**[57.29] Are valid**

Transfers or conveyances made by personal representatives acting as such are not voidable at the instance of persons subsequently showing that the persons acting as personal representatives were not entitled to the grant.

**[57.30] Notwithstanding any subsequent revocation or variation**

As to the circumstances in which a grant can be revoked, see s 33 above and commentary thereto: see *Hewson v Shelley* [1914] 2 Ch 13 (CA, Eng) and *Re Bridgett and Hayes' Contract* [1928] Ch 163, [1927] All ER Rep 191. An example of a variation might be where the grant was originally made as a limited grant but is subsequently made general.

**[57.31] Subsection (4)**

This subsection is largely self-explanatory. The reference to 'any order of the court' includes grants of probate and letters of administration: see s 3 above; and the subsection applies whether the grant was made before or after the commencement of the Probate and Administration Ordinance (Cap 10) on 7 October 1971. Likewise, the date of death of the deceased whether testate or intestate, is immaterial.

**[57.32] Definitions**

For 'administration', 'court', 'personal representative', 'probate', 'property' and 'representation', see s 2 above. Some other terms are defined in the corresponding Administration of Estates Act 1925 (UK) as noted above.

**58. Liability of a person fraudulently obtaining or retaining estate of deceased**

If any person, to the defrauding of creditors or without full valuable consideration, obtains, receives or holds any movable or immovable property of a deceased person or effects the release of any debt or liability due to the estate of the deceased, he shall be charged as executor in his own wrong to the extent of the property received or

**[58.06] Obtains, receives or holds**

The acts covered by this first head are limited to those relating to the estate. All involve taking possession, custody or control over the property. Acts that do not amount to any of the three activities specified, such as merely negotiating settlements, are not covered. Getting into contracts to sell property where no possession is actually taken of the property, would be covered.

**[58.07] Any movable or immovable property**

See [54.05] and [56.07] above.

**[58.08] Effects the release of any debt or liability due to the deceased**

This second head of liability requires an executed act, merely negotiating a release, compromise or settlement of a debt or liability would not suffice. See *Anderson v Anderson* [1984] QB 704, [1984] 2 All ER 538 (QB) (father without authority settling insurance claim) and *Caudle v LD Law Ltd* [2009] WLR 1540, [2009] 2 All ER 1020 (QB). The liability due to the deceased must arise in tort, contract or equity.

**[58.09] Charged as executor in his own wrong**

For the meaning of 'executor in his own wrong' or 'executor *de son tort*', see [58.02] above. This provision, as noted above, does not constitute the personal representative, but creates liability analogous to that of a personal representative; thus an executor taking possession of the deceased's leasehold property does not become personally liable under covenants in the lease: see *Morgan v Ash* and *Burgesses of Stratford-upon-Avon v Parker* sub nom *Stratford-upon-Avon Corp v Parker* [1914] 2 KB 562, [1914-1915] All ER Rep 275 (KB). The liability is not at large. The person only becomes liable to the extent of the property received or coming into his hands, under the first head of liability 'the debt or liability released' under the second head.

**[58.10] Paragraph (a): After deducting**

There are stated rights of set off or deduction. The first relates to debts due to the person charged as *executor de son tort*, but only those for valuable consideration (note the absence of 'full' as in the earlier reference) and, what are stated as 'without fraud'; it is difficult to know why this qualification was thought necessary. A phrase such as 'lawfully and properly due to him' would seem preferable.

**[58.11] Paragraph (b)**

This is self-explanatory and is a useful limitation on the scope of the second head. It ties in with the earlier references to 'the defrauding of creditors and without valuable consideration' and emphasises the characteristics of wrongdoing which result in a reduction of value of the estate which under lie the liability imposed by the section.

A person who assumes the position of an executor without appointment, or of an administrator without a grant, and administers the estate in the way that a properly appointed personal administrator would, has little to fear from the section.

**[58.12] Definitions**

For 'estate', 'executor', 'personal representative' and 'property', see s 2 above. For 'immovable property' and 'movable property', see the Interpretation and General Clauses Ordinance (Cap 1), s 3.

**59. Liability of estate of personal representative**

Where a person as personal representative of a deceased person (including an executor in his own wrong) wastes or converts to his own use any part of the property of the deceased, and dies, his personal representative shall, to the extent of the available assets of the defaulter, be liable and chargeable in respect of such waste or conversion, in the same manner as the defaulter would have been if living.

[cf. 1925 c. 23 s. 29 U.K.]

**[59.01] England**

The corresponding provision in England is the Administration of Estates Act 1925 (UK), s 29 which is in substantially the same terms.

**[59.02] General note**

This section implicitly imposes liability on a personal representative who wastes, or converts to his own use, property of the deceased. It explicitly imposes liability on the personal representative of such a person who dies, ie, the liability devolves, which is a narrow and specific point which will not be frequently encountered in practice. It includes an executor in his own wrong and where such a person is involved, it should be read in conjunction with s 58 above.

**[59.03] Commencement**

As to meaning, see [1.03] above.

**[59.04] As personal representative**

The acts complained of must have been done in the representative not personal capacity.

**[59.05] Executor in his own wrong**

For the meaning of this, often called 'an executor de son tort', see [59.06].

**[59.06] Wastes**

Personal representatives are liable generally for a *devastavit*, which is 'wasting' the assets and includes acting in a way that reduces the value of the estate or causes loss to the persons entitled as creditors or beneficiaries. A classic illustration can be found in the case of *Marsden v Regan* [1954] 1 All ER 475, [1954] 2 All ER 423 (CA, Eng), where an executrix gave away the deceased's furniture. The illustrations and discussion can be found in Parry and Kerridge, *The Law of Succession* (13th edn, Sweet & Maxwell, 2016 Reissue), at chapter 25. The personal representative's own acts in directly dealing with the property are thought that a *devastavit* could occur through the acts of a third party who is attributable to the fault of the personal representative. Failing to adequately safeguard the assets by, for example, allowing a person to take, destroy or dispose of the deceased's property could amount to a wasting. But if property is disposed of lawfully to a creditor or a beneficiary, or if full valuable consideration is obtained, it is thought that it would not amount to a wasting. This section is without prejudice to, and supplemental to, the common law principles of liability and provides for the particular circumstance noted above.

**[59.07] Or converts to his own use**

Quite apart from the liability for breach of duty as a personal representative under this section and the general common law, such acts could constitute the personal representative personally liable for the tort of conversion or criminally liable if dishonesty is involved. It can be noted that the liability is stated in absolute terms, with no reference to 'unlawfully' or 'without lawful authority' or 'improperly', and with no reference to the accompanying state of mind, such as 'intentionally' or 'knowingly'.

**[59.08] Any part of the property of the deceased**

This general phrase will embrace all the assets of the estate.

**[59.09] And dies**

The section is concerned with the situation where the defaulting personal representative dies before recompense can be obtained from him, which is a relatively rare circumstance.

**[59.10] His personal representative**

If there is potential liability arising in this way on the death of the defaulting personal representative, that will act as a disincentive to take out a grant and encourage a person entitled to renounce: see ss 29–32 above.

**[59.11] To the extent of the available assets**

The liability is so limited to the extent and value of the estate of the deceased personal representative, which vests in his representative. This provides some protection to the new personal representative but he will have to be careful not to distribute any part of the defaulting representative's estate until any liability arising under the section has been fully satisfied.

**[59.12] Be liable and chargeable**

The personal representative is liable (as limited by the previous phrase) and perhaps, the estate is chargeable to the same extent.

**[59.13] Such waste or conversion**

As to the meaning of these terms, see [59.06] and [59.07] above. It will be noted that the word used here is 'conversion' which seems to imply that the concept in this context, is the same, or at least analogous to, the tort of conversion and no doubt reference can be made to authorities in that area for guidance.

**[59.14] As if the defaulter would have been if living**

This limits the liability of the new personal representative to a sort of vicarious liability for that of the defaulter and no new or additional liability on his part is incurred.

**[59.15] Definitions**

For 'executor', 'personal representative' and 'property', see s 2 above.

**60. Allowance of remuneration to executor, administrator or attorney**

- (1) Subject to subsection (2), the court may allow to any executor or administrator, including an administrator appointed *pendente lite* under section 40 (or to a person acting under a power of attorney as attorney for an executor or administrator in the matter of the sealing of a probate or administration under Part IV or in the matter of the realization and administration of an estate under a probate or administration so sealed) such remuneration out of the estate of the deceased person as the court thinks fit.
- (2)
  - (a) No allowance shall be made to any executor or administrator or attorney who neglects to pass his accounts at such time, or to dispose of any moneys, goods, chattels, or securities with which he is

- (b) the holder of the certificate—
- (i) presents the certificate to the bank and
  - (ii) produces sufficient proof of his identity to the bank,

the bank shall allow the holder of the certificate to take possession of the contents of the safe deposit box, subject to the condition attached to the certificate under section 60G(1) (if any) and in the presence of such public officers as the Secretary may authorize and an employee of the bank, all items contained in the box only for any of the purposes prescribed in subsection (2).

- (2) The prescribed purposes referred to in subsection (1) are—
- (a) ascertaining whether there is any will of the deceased or similar instrument in the safe deposit box;
  - (b) preparing an inventory under subsection (3).
- (3) After a safe deposit box has been inspected pursuant to subsection (1) by the holder of a certificate for inspection, the holder shall, where—
- (a) the safe deposit box is a jointly rented safe deposit box of which he is a surviving renter;
  - (b) no will of the deceased concerned or similar instrument is found in the safe deposit box;
  - (c) a will of the deceased or similar instrument is found in the safe deposit box and he is named in the will or instrument as the executor or one of the executors of the deceased concerned is found in the safe deposit box; or
  - (d) the Secretary includes in the certificate a statement that he has been satisfied by the holder that a will of the deceased or similar instrument has been found in the safe deposit box and that—
    - (i) the will or instrument is not valid; or
    - (ii) no executor is named in the will or instrument or that the executor or all executors named in the will or instrument—
      - (A) cannot be located;
      - (B) refuse to act as executor;
      - (C) have died; or
      - (D) are otherwise not capable of acting as executor,

the holder shall, in the presence of the public officers and an employee of the bank, an inventory of the articles and documents contained in the safe deposit box.

- (4) If—
- (a) a will of the deceased concerned or similar instrument is found in a safe deposit box upon an inspection made pursuant to a certificate for inspection;
  - (b) (i) the holder of the certificate is not a surviving renter of the safe deposit box; and  
(ii) (A) the holder of the certificate is not the person or one of the persons named in the will or instrument as the executor or executors of the deceased concerned; or  
(B) no executor is named in the will or instrument; and
  - (c) the certificate does not contain a statement of the Secretary referred to in subsection (3)(d),
- the employee of the bank shall immediately—
- (d) make a copy of the will or instrument;
  - (e) put the will or instrument back into the safe deposit box;
  - (f) close or seal the box; and
  - (g) hand over the copy of the will or instrument to the public officers present.
- (5) A copy of a will or similar instrument made under subsection (4)(d) shall be kept—
- (a) by the Secretary for a period of 6 years after it is made; and
  - (b) either—
    - (i) in a legible form; or
    - (ii) in a non-legible form capable of being reproduced in a legible form.
- (6) Where—
- (a) a will of the deceased concerned or similar instrument is found in a safe deposit box inspected pursuant to subsection (1); and
  - (b) the holder of the relevant certificate for inspection is named in the will or instrument as the executor or one of the executors of the deceased concerned,

the bank shall allow the holder of the certificate to, subject to the condition attached to the certificate under section 60G(1) (if any), take possession of the will or instrument after placing a copy of it in the safe deposit box.

an assent to personal property can take any form including conduct, see *Kerridge, The Law of Succession* (13th edn, Sweet & Maxwell, 2010) para 24.37, citing *Doe dem Sturges and James Batten v Tatchell* (1832) 110 ER 246. In practice if the asset is significant it is usually in writing and worded so as to also constitute a receipt. In practice an assent to immovable property is frequently executed as a deed since the document is a part of the title deeds to the property in question.

It can be noted that an assent is required in all cases to pass legal title to personal property, including cases where the personal representative is passing the property to himself as beneficiary: see *Re King's Will Trusts* [1964] Ch 542, [1964] All ER 833 and *Re Edward's Will Trusts* [1982] Ch 30 (CA, Eng). Similarly, in *Kleinwort Benson (Hong Kong) Trustees Ltd v Wong Foon Hang & Ors* [1993] 1 HKC 649 (CFI), a conveyance is used in this section to refer to the sale of property to a third person who is not a beneficiary. See also, *Wong Mei Sin (黃美仙) v Ng Wai Kin (吳偉建) & Anor* [2011] 5 HKC 41, [2011] 4 HKLRD 109 (CFI), where it was held that a written assent was required to effect the passing of legal estate even where the personal representative and the beneficiary were the same person. Thus a written assent was necessary to vest the legal title of the property in the present case.

### [66.03] Commencement

As to meaning, see [1.03] above.

### [66.04] Subsection (1): May assent

The section is expressed as a power but it is more in the nature of a duty. An assent can be executed in favour of any person entitled to property under the will by any of the following ways; by devise (gift by will of real property), bequest (ditto personal property), devolution (the meaning in this context is obscure), appropriation (see s 68 below and commentary thereto) 'or otherwise', for example as residuary legatee. Such a person can be entitled either beneficially (the usual case) or as trustee (holding on trust under the will) or as personal representative (where the beneficiary has died after the deceased). The property is confined to this subsection to 'immovable property' (although not so confined in the other subsections) which is curious, since an assent is needed for movable property if it is done informally. The section applies to both testate and intestate property although usually it is more relevant to the former since on intestacy the trustee's sale (see s 62 above) will apply; it is possible to appropriate the matrimonial home (under the Sch 2 to the Intestates' Estates Ordinance (Cap 73) or other immovable property (under the power in s 68 below) on intestacy and the appropriation can be effected by an assent under this provision.

The final two requirements of the section are that the testator was entitled to the property (or over which he had a general power of appointment — which will be encountered in practice) and that the property devolved on the personal representatives.

When the administration of the deceased's estate is completed, executors hold the property in 'autre droit' and the proprietary interest could only be passed by way of an assent: *Chung Wing On (鍾榮安) v Chung Wing Piu (鍾榮培)* [2006] 3 HKC 306 (CFI).

### [66.05] Subsection (2)

The assent passes the title previously held by the deceased which vested on death in the personal representatives, to the beneficiary assuming that he has been given the whole interest; no greater title than that enjoyed by the deceased can be passed by assent. A lesser title can be given in which case the assent should state the title passing. An assent once made relates back to the death of the deceased since it is a confirmation of entitlement which arose out of the will or intestacy: see *Atkinson (George) & Son v Solomon* [1913] AC 76, [1911–1913] All ER Rep 85 (HL). The consequence of this is that all the benefits (such as income or accretions) and liabilities (such as storage and insurance charges) which have attached to the property since death accrue to, or have to be discharged by, the beneficiary: see *Re West* [1909] 2 Ch 180. It is said that this consequence only applies to specific gifts and cannot apply to residue since residue does not exist at the death: see *Bernardo's Homes v Special Income Tax Comrs* [1921] 2 AC 1 (HL).

### [66.06] Subsection (3): Legal estate

This is an important subsection since it states the formalities necessary to pass a legal estate in (presumably, although the section does not expressly specify) immovable property. A legal estate can be contrasted with an equitable estate; see the Conveyancing and Property Ordinance (Cap 219), ss 4 and 5. A licence to occupy a roof was only a bare right in the nature of a licence or permission and was not a legal estate in the property which should be included in an assent: *Chan Kar Man Carmen & Anor v China Step Corp Ltd* [2007] 5 HKC 463, [2008] 1 HKLRD 493 (CFI). The official receiver need not be a party to a confirmatory assent: *Wong Mei Sin (黃美仙) v Ng Wai Kin (吳偉建) & Anor* [2011] 5 HKC 41, [2011] 4 HKLRD 109 (CFI). In that Ordinance an assent is expressly excepted from the usual rule that a deed is needed to pass a legal estate, an assent in writing by a personal representative will suffice: see s 4(2)(a). As to the effect where there is no written assent, see *Kleinwort Benson (Hong Kong) Trustees Ltd v Wong Foon Hang & Ors* [1993] 1 HKC 649 (CFI). It is trite that a written assent is required to effect the passing of a legal estate, even if personal representative and the beneficiary are the same person: *Wong Mei Sin (黃美仙) v Ng Wai Kin (吳偉建) & Anor* [2011] 5 HKC 41, [2011] 4 HKLRD 109 (CFI); *Wong Suet Foon Shirley v Collector of Stamp Revenue* [2019] 2 HKLRD 227, [2019] HKCU 751, [2019] HKDC 268.

### [66.07] In writing, signed ... and shall name the person

This states the formalities. Although only writing signed and not witnessed is required, in practice a deed formally executed with a solicitor witness is usually used in Hong Kong. If the assent is not in writing or not expressed to be in favour of a particular person, the legal estate will not pass, although no doubt it could take effect in equity. As to the importance of properly executing an assent even

**convey and conveyance** (轉易) as applied to land, includes the execution by that person of every deed, writing, or instrument, including an assent, for the purpose of assigning, appointing, surrendering, or otherwise transferring or disposing of land whereof he is or was possessed, or wherein he is entitled to a common-law estate, either for his whole estate or for any less estate, with the performance of all formalities required by law for the validity of the conveyance;

**income** (收益) includes rents and profits;

**instrument** (文書) includes enactment;

**land** (土地) includes land of any tenure, and minerals, whether or not severed from the surface, and any part of buildings, whether the division is horizontal or vertical or made in any other way, and other incorporeal hereditaments; also a rent and other incorporeal hereditaments, and an easement, right, privilege, or power, in, over, or derived from land, or an undivided share in, and in this definition *mines and minerals* (礦及礦石) includes any strata or seam of minerals or substances under any land, and powers of working and disposing of the same, and an undivided share thereof;

**lunatic** (精神病人) means any person who has been found by due course of law to be of unsound mind and incapable of managing his affairs;

**mortgage** (按揭) and **mortgagee** (承按人) include a mortgage to every estate and interest regarded in equity as mortgaged, security for money, and every person deriving title under the original mortgage;

**pay and payment** (繳存) as applied in relation to stocks, securities and in connexion with the expression "to pay" include the deposit or transfer of the same in or into any account;

**person of unsound mind** (精神不健全的人) means a person, not a minor, who not having been found to be a lunatic is incapable from infirmity of mind of managing his own affairs;

**personal representative** (遺產代理人) means the executor, administrator, or administrator for the benefit of the estate, original or by representation, of a deceased person;

**possession** (管有) includes receipt of rents and profits or the right to receive the same, if any; and **possessed** (管有)

applies to receipt of income of and to any vested estate less than a life interest in possession or in expectancy in any land;

**property** (財產) includes movable and immovable property, and any estate, share and interest in any property, movable or immovable, and any debt, and any thing in action, and any other right or interest, whether in possession or not;

**rights** (權利) includes estates and interests;

**sale** (售賣) includes an exchange;

**securities** (證券) includes stocks, funds and shares, and so far as relates to payments into court has the same meaning as in the enactments relating to funds in court and **securities payable to bearer** (須付款予持有人的證券) includes securities transferable by delivery or by delivery and endorsement;

**statutory duty of care** (法定謹慎責任), in relation to a trustee, means the duty of care required to be exercised by the trustee under section 3A as read with Schedule 3; (Added 13 of 2013 s. 3)

**stock** (股票) includes fully paid up shares, and, so far as relates to vesting orders made by the court under this Ordinance, includes any fund, annuity, or security transferable in books kept by any corporation, company or society, or by instrument of transfer either alone or accompanied by other formalities, and any share or interest therein;

**transfer** (轉讓、轉歸), in relation to stock or securities, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee;

**trust** (信託) does not include the duties incident to an estate conveyed by way of mortgage, but with this exception the expression **trust** (信託) and **trustee** (受託人) extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property, and to the duties incident to the office of a personal representative, and **trustee** (受託人) where the context admits includes a personal representative, and **new trustee** (新受託人) includes an additional trustee;

**trust corporation** (信託法團) means a corporation appointed by the court in any particular case to be a trustee (if

[3.13]

In Hong Kong, the court will apply the above principles and question whether the failure by the deceased to make any provision for the applicant was unreasonable. *Kwan Chi Pun in his personal capacity and the executor of the estate of Kwan Sui Lin, deceased v Lai Hoi Yee and anor* [2016] 4 HKLRD 6, [2016] HKCU 184 (CFI). It has been held in the case of an adult child without incapacity, the court would ask why he or she needs to be provided for by another, see *Tang Tim Chau v Tang Ka Hung Robert & Anor* [2012] HKCU 1221 (unreported, HCM 2506/2009, 7 June 2012) (CFI).

**[3.13] Subsection (1)(vii): Child of the family**

This provision corresponds with the English 1975 Act, s 1(1), para (d). The maintenance standard as specified in s 5(4) applies, with the additional requirement of being maintained, either wholly or partly, by the deceased as for applicants in the previous two categories relating to children: see commentary [3.21] and [5.08] below.

A person falling into this category is typically a stepchild, ie the child of the deceased's partner to a marriage which is not the deceased's child. A useful case is *Re Leach (dec'd), Leach v Lindeman* [1986] Ch 226, [1985] 2 All ER 754 (CA, Eng) where an adult stepdaughter brought a successful action against the stepmother's estate, largely because the stepmother's estate consisted largely of the property of the applicant's father. It was decided that in order to 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: see also *Re Callaghan (dec'd)* [1985] Fam 1, [1984] 3 All ER 790 (F). A grandchild may also fall into this category: *Re A (child of the family)* [1998] 1 FLR 347 (CA, Eng).

**[3.14] Subsection (1)(viii): Brother or sister**

This has no corresponding provision in England. Siblings have to apply under the English 1975 Act under s 1(1)(e) and the maintenance standard applies: see *Re Wilkinson (dec'd), Neale v Newell* [1978] 1 All ER 221, [1978] Fam 22 (F). In order to qualify under this heading, in addition to proving the relationship, the applicant must show that immediately before the death the applicant was being maintained by the deceased either wholly or substantially.

**[3.15] Subsection (1)(ix): Any person being maintained**

This is a residual, catch-all category. It is expressed generally without need for proof of any relationship and potentially has a wide embrace including unrelated 'dependants'. It corresponds with s 1(1)(e) in the English 1975 Act but with the main difference being that the threshold of maintenance. The Ordinance stipulates that an applicant claiming under this section must establish that the deceased was maintaining the applicant 'wholly or substantially' rather than the 'wholly or partly' standard of the English 1975 Act. Note, in particular, the assumption of responsibility point and the qualification that maintenance was to be 'in money or money's worth' 'otherwise than for full valuable consideration' set out in s 3(3): see commentary [3.21] below for discussion on this below.

number of reported cases of successful applications under s 1(1)(ba) in England have been provided with a new specific heading. The first reported case in England on this point is *Re Watson* [1999] 1 FLR 878, [1999] 1 FCR 595 (Ch).

and prove that he or she was 'wholly or substantially' maintained immediately before death'. The additional layer of financial responsibilities in both types of relationship are

successful application in England under s 1(1)(e) include: *Re Neale v Newell* [1978] 1 All ER 221, [1978] Fam 22 (F) (sister); *Jelley v Iliffe* [1981] Fam 128, [1981] 2 All ER 29 (CA, Eng); *Re Beaumont (dec'd), Martin v Midland Bank* [1980] Ch 444, [1980] 1 All ER 266 (Ch); *Harrington v Gill* (1983) 1 All ER 502 (CA, Eng) (common law spouse); *Bishop v Plumley* [1991] 1 All ER 517 (CA, Eng) (common law wife); *Rees v Newbery and the Research* [1998] 1 FLR 1041 (Ch) (friend). Unsuccessful applications include *Kourkey v Lusher* (1982) 12 Fam Law 86, [1983] 4 FLR 65 (CA, Eng) (god-mother). A most interesting and unusual case is *dec'd, sub nom Bouette v Rose* [2000] Ch 662, [2000] 1 All ER 183 (CA, Eng) where a mother successfully claimed against the estate of her daughter. The daughter had been born disabled and had been unable to work. The mother used this to claim both her and her daughters' expenses of living.

immediately before the death of the deceased' should not be construed with reference to the settled state of affairs during the deceased's lifetime. See *Jelley v Iliffe* [1981] Fam 128, [1981] 2 All ER 29 (CA, Eng); *Re Martin v Midland Bank Trust Co Ltd* [1980] Ch 444, [1980] 1 All ER 266 (Ch); *Gully v Dix* [2004] EWCA Civ 139, [2004] 1 WLR 1399, [2004] 1 All ER 517 (CA, Eng); *Kotke v Saffarini* [2005] EWCA Civ 221, [2005] 1 FCR 517 (CA, Eng); *Baynes v Hedger and Ors* [2009] FLR 183 (CA, Eng).

'maintained' is only necessary to show 'partly' maintained whereas the threshold in Hong Kong is higher where the applicant must show that he or she was 'wholly or substantially' maintained. In considering what will amount to 'being maintained' many of the English cases centered on the provision of accommodation for the applicant since typically the deceased (whether the male or female partner) owned the house or flat in which the deceased and the applicant lived and on death this accommodation was left or passed elsewhere.

[11.03]

*Butterworths Hong Kong Probate, Administration and Trustee Handbook*  
*v Kwok Yau Ki Jesse (郭幼琪) and Anor* [2019] HKCU 639, [2019] HKCFI 428, at [16]–[17].

However, one important consideration that the court would bear in mind is the exercise of the powers under s 11(1) is prima facie an interference with the donor's prior decision as to the person to whom he or she entrusted an unfettered power to manage or administer his or her property: *FNG v BCJ* (above), at [30] and *FNG v BCJ* [2022] HKCU 1038, [2022] HKCFI 654, at [29].

Costs would not be ordered on a trustee basis in an application under s 11(1), where the attorney does not participate in the proceeding as a trustee or personal representative: *FNG v BCJ* [2021] HKCU 1405, [2021] HKCA 451, at [9]–[10].

### [11.03] Application

A child of a donor is considered to be an interested party. In *Kwok Chi Yin (郭子賢) v Kwok Yau Ki Jesse (郭幼琪) and Anor* [2019] HKCU 639, [2019] HKCFI 428, the attorney, being the youngest son and child of the donor, made use of an enduring power of attorney to execute an assignment of the donor's interest in property to himself. On an application by the plaintiff, being the third of the children and oldest son of the donor, under s 11(1) of the Enduring Powers of Attorney Ordinance (Cap 501), the court ordered that the attorney should produce records and accounts in relation to the various transfers he had made in relation to the donor's estate.

### [11.04] Revocation after order under section 11 is made

An order under s 11(1) will be stayed if the donor died before the compliance of the order, thus revoking the enduring power of attorney: *FNG v BCJ* [2020] 3 HKC 26, [2020] 1 HKLRD 796, [2020] HKCFI 3089, affirmed on appeal in *FNG v BCJ* [2021] 3 HKC 335, [2021] 1 HKLRD 1099, [2021] HKCA 160. The rationale is that upon the demise of the donor, the investigation of potential breaches of duty by the attorney is primarily a matter for the personal representatives, as the court would usually defer such investigation to interested party under s 11. Concerns over personal representatives' inability over the investigation can be resolved in administration proceeding of the deceased donor's estate. Remuneration for auditor would also pose a problem, as the attorney can no longer engage an auditor on behalf of the donor's estate: at [35]–[36].

The Court of Appeal also confirmed that even after the death of the donor, the court retains the jurisdiction to make an order for account under s 11, such as where a personal representative is investigating into, and seeking redress for, potential breaches of duties by the attorney during the donor's lifetime. While a legal representative can also rely on the common law, but not necessarily s 11, the court retains the jurisdiction to order accounts under s 11 if necessary, for example, where the attorney seeks to rely on s 11(3) for relief: at [42]–[44].

'donor' and 'enduring power', see s 2(1) above.

### Attorney's duties and liabilities

Attorney's duties towards the donor of an enduring power of attorney: *FNG v BCJ* [2022] HKCU 1038, [2022] HKCFI 654, at [29].

Attorney's fiduciary nature.

Limiting the generality of subsection (1), the attorney to exercise his powers honestly and with due diligence—

- to exercise his powers honestly and with due diligence;
- to keep proper accounts and records;
- not to enter into any transaction where a conflict of interest would arise with the donor; and
- not to mix the property of the donor with other property.

### Enactment history

Section 11 was originally enacted as s 12 of the Enduring Powers of Attorney Ordinance (Cap 501), commencing 27 June 1997 (LN 365 of 1997).

### Standard of diligence

Standard of diligence in *Shorter Oxford English Dictionary* (6th edn, Oxford University Press, 2003) (Reissue) as 'reasonable steps taken by a person to avoid committing a mistake, especially in buying and selling of something'. Under the provisions of the Ordinance, the attorney's duties in Hong Kong seem to be less onerous than in England. An enduring power of attorney was revoked because of the attorney's inactivity, neglect and delegation of his decision-making responsibilities within the donor's family (including the attorney, who is one of the children of the donor): *Re RG* [2015] EWCOP 66, [2015] All ER (D) 143 (Oct).

### Fiduciary duties

Fiduciary duties of a fiduciary apply to an attorney. One of the most important duties of a fiduciary is to account for his dealing with the donor's assets: *Re RG* [2015] EWCOP 66, [2015] All ER (D) 143 (Oct); *Libertarian Investments Ltd v Hall Thomas Alexej* [2014] 1 HKC 368, [2013] 16 HKCFAR 100, at [167]. This duty is reinforced under s 12.