

TABLE OF CONTENTS

<i>Preface</i>	vii
<i>Table of Cases</i>	xxiii
<i>Table of Legislation</i>	xxvii

CHAPTER 1 WILLS: THEIR CHARACTERISTICS AND THE UNDERLYING LAW

1. The Law in Relation to Wills	1.001
2. What is a Will?	1.002
(a) Definition	1.002
(b) Characteristics	1.006
3. Advantages of Making a Will	1.007
4. Other Means of Disposing of Property on Death	1.015
(a) Property owned as "joint tenants"	1.016
(b) <i>Donatio mortis causa</i>	1.019
(c) Nomination in certain life insurance policies	1.022
(d) Money payable under certain pension or superannuation schemes	1.023
(e) Money payable under a trust	1.024
5. Validity of a Will	1.026
6. Formalities of a Will	1.030
(a) Writing	1.033
(b) Signature	1.035
(c) Signing by a third party	1.039
(d) Position of signature	1.041
(e) Acknowledgement of signature	1.045
(f) Witnesses and witnessing	1.046
(g) Attestation clause	1.052
7. Intention to Make a Will	1.054
(a) Mistake	1.056
8. Knowledge and Approval	1.058
(a) Burden of proof	1.061
(b) Suspicious circumstances	1.062
9. Capacity to Make a Will	1.065
(a) Age	1.066
(b) Mental competence (testamentary capacity)	1.068

10. Informal Wills	1.084
(a) Substantial compliance	1.085
(b) Home-made wills	1.089
(c) Holograph wills	1.091
(d) Mutual wills	1.093
11. Revocation of Wills	1.096
(a) Marriage	1.098
(b) By another will	1.103
(c) By destruction	1.106
12. Alteration of Wills	1.114
13. Republication and Revival	1.121
14. Precautions in Drafting a Will	1.125
(a) Construing the will	1.126
(b) Admissibility of extrinsic evidence	1.130
(c) Rectification of wills	1.131
15. Incorporation by Reference	1.134
16. Codicil	1.137
17. Living Wills	1.139
18. Enduring Powers of Attorney	1.143
(a) Who can be an attorney?	1.147
(b) Duties and liabilities of an attorney	1.148
(c) Validity	1.149
(d) Effective date	1.153
(e) Registration of EPA	1.154
Sample Documents	
1.1 Advance Directive	29
1.2 Revocation of Advance Directive	34
1.3 Record of Oral Revocation of Advance Directive	37
1.4 Form of Enduring Power of Attorney (for appointment of only one attorney)	39
1.5 Form of Enduring Power of Attorney (for appointment of more than one attorney)	46

CHAPTER 2 WILL DRAFTING

1. Introduction	2.001
2. The Work of Professional Will Drafters	2.004
(a) Client's purpose in making a will	2.005
(b) Taking instructions	2.006
(c) Guidelines	2.008
3. Interviewing the Client	2.009
(a) The questions	2.014
(b) Testamentary capacity	2.017

(c) Note taking	2.019
(d) Changes in circumstances	2.020
(e) Basic enquiries of the client	2.022
(f) Other useful reminders	2.023
4. A Basic Will	2.024
(a) Sample 1	2.028
5. Domicile	2.032
6. Survivorship Clause	2.037
7. Concurrent Wills	2.041
8. Wills in Contemplation of Marriage	2.043
9. Appointment of Executors and Trustees	2.045
(a) Executors and trustees	2.047
(b) Age and number of executors	2.049
(c) Choice of executors and trustees	2.050
(d) Cost	2.055
(e) Charging clauses	2.056
10. Duty of Care of Executors and Trustees	2.061
(a) Statutory duty of care	2.065
11. Appointments of Guardians	2.066
12. Particular Beneficiaries	2.068
(a) Minors	2.069
(b) Children	2.070
(c) Spouses (and survivorship clauses)	2.071
(d) Executors	2.073
(e) Solicitors	2.074
(f) Employees	2.075
(g) Charities and unincorporated associations	2.076

Checklist

Will Preparation	76
------------------------	----

Sample Documents

2.1 Will Instruction Form	77
2.2 Preparing the Will	88
2.3 Preparation for Signing	89
2.4 Signing Checklist	90
2.5 Sample Attestation Clauses	91
2.6 Changes in the Law (effected by the Wills (Amendment) Ordinance 1995)	92
2.7 Sample Will	95

CHAPTER 3 PLANNING GIFTS AND ADMINISTRATIVE PROVISIONS

1. Testamentary Non-Residuary Gifts	3.001
(a) Personal chattels	3.003
(b) Non-residuary specific gifts	3.007
(c) Gifts of property	3.015
(d) Option to purchase	3.019
(e) Compulsory acquisition of property	3.020
(f) Gifts of businesses	3.021
(g) Non-residuary general gifts	3.026
(h) Non-residuary demonstrative gifts	3.028
(i) Digital assets	3.031
(j) Digital executor	3.033
(k) Lapse or failure of gifts	3.035
(l) Substitute gifts	3.039
2. Debts and Expenses	3.046
3. Residuary Gifts	3.053
(a) Residuary gifts—division of residue into shares	3.056
(b) Class gift	3.058
(c) Gifts of residue to children—drafting examples	3.066
4. Vested and Contingent Gifts	3.069
5. Life Interest	3.077
6. Trust for Sale over Residue	3.078
7. Gifts to Grandchildren	3.086
8. Precatory Trust	3.088
9. Discretionary Trusts	3.091
10. Protective Trusts	3.096
11. Exemption and Indemnity Clauses	3.103
(a) Exemption clause	3.103
(b) Indemnity clause	3.104
(c) Section 41W of the TO	3.106
12. Charities' Receipt Clause	3.108
13. Administrative Provisions for Personal Representatives	3.110
(a) Powers required during the administration of an estate	3.110
(b) Powers of appropriation	3.111
(c) Rules of apportionment	3.113
(d) Power to carry on a business	3.116
(e) Power to delegate	3.118
(f) Power to insure	3.123
(g) Extension of statutory powers of investment, maintenance and advancement and insurance	3.124

14. Two Estate Duty Exemptions—Deaths before 11 February 2006	3.131
15. Complete Wills	3.133
Sample Document	
3.1 Basic Will	120
Sample Clauses	121
1 Concurrent Will	121
2 Will Made in Contemplation of Marriage	122
3 Appointment of Executors and Trustees	123
4 Appointment of Trust Corporation	124
5 Appointment of Partners in a Solicitors' Firm as Executors and Trustees	125
6 Professional Charges without Abatement	126
7 Appointment of Testamentary Guardians	127
8 Appointment of Testamentary Guardians by Surviving Parent	128
9 Specific Gifts	129
10 Specific Gift of Immovable Property	130
11 Specific Gift of Personal Chattels	131
12 Spouse's Option to Purchase Testator's Share in Property	132
13 Beneficiary to Receive Sale Proceeds on Sale of Property	133
14 Gift of a Small Business	134
15 Gift to Trustees of Business Upon Trust to Carry on for a Limited Period	135
16 Powers in Connection with the Carrying on of Business(es) by the Trustees	136
17 Provision for a Child to Carry on the Business on Payment	137
18 Pecuniary Legacy to Charity	138
19 Legacy to Minor with Provision for Payment to the Minor if Over 18 and Otherwise to his Parent or Guardian	139
20 Payment of Annuity to Wife During Widowhood	140
21 Annuity Payment to Mother During her Lifetime	141
22 General Indemnity Clause	142
23 Basic Will with Gifts to the Testator's Children	143
24 Will Leaving Contingent Gift of Residue	144
25 Will Leaving Life Interest	145
26 Will Leaving Residue in Unequal Shares	146
27 Administrative Provisions	147
28 Codicil	148
29 Mutual Wills	149
30 Declaration	150
31 Revival of a Will	151
32 Declarations Under the Inheritance (Provision for Family and Dependents) Ordinance (Cap.481)	152

CHAPTER 4 INTESTATES' ESTATES ORDINANCE (CAP.73)

1. Introduction	4.001
2. Intestacy	4.007
3. Statutory Trust for Sale	4.011
4. Order of Entitlement	4.017
(a) Table of intestate entitlement prior to the 1995 amendments	4.017
(b) Table of intestate entitlement as amended in 1995	4.017
5. The Surviving Spouse	4.020
(a) Valid marriage	4.022
(b) Customary marriage	4.023
(c) Decree absolute of divorce	4.027
(d) Judicially separated spouses	4.028
(e) Unmarried cohabitants	4.029
(f) Survival	4.030
(g) <i>Commorientes</i> provision	4.031
6. Entitlement of the Surviving Spouse	4.036
(a) The statutory legacy	4.036
(b) Personal chattels	4.038
(c) The matrimonial home	4.040
(d) Power of appropriation (s.68 of the PAO)	4.050
(e) Sections 8 and 8A of the IEO	4.052
7. Issue of the Intestate	4.053
8. Entitlement of Issue of the Intestate	4.057
(a) Section 5(1)(a) of the IEO—statutory trusts for the issue of an intestate (per stirpes distribution)	4.060
(b) Section 5(1)(b) of the IEO	4.061
(c) Section 5(1)(c) of the IEO—(hotchpot provisions)	4.062
9. Statutory Trusts and Brothers, Sisters, Uncles and Aunts of the Intestate	4.071
10. Foreign Intestacy	4.075
(a) Surviving spouse	4.075
(b) Beneficiaries other than the surviving spouse	4.076
11. Interests Acquired Under a Will When There is a Partial Intestacy	4.077
(a) Surviving spouse	4.077
(b) Issue	4.078

CHAPTER 5 OBTAINING GRANT OF REPRESENTATION

1. Introduction	5.001
2. Estate Duty Clearance and Opening of Safe Deposit Box	5.002
(a) Safe deposit box	5.007
3. Abolition of Estate Duty	5.009

4. Inspection of Safe Deposit Box and Removal of Items	5.010
(a) Inspection of safe deposit boxes	5.011
(b) Application	5.012
(c) Inspection	5.015
(d) Application for authorisation for removal of items from bank deposit box by the personal representative or surviving renter	5.019
(e) Funeral expenses and maintenance of dependents—releasing money from deceased's bank account	5.021
5. Applying for a Grant of Representation	5.027
6. Requisitions	5.033
7. Court Fees	5.035
8. Summary Administration	5.039
9. Administration of Small Estates	5.044
10. Common Types of Grant	5.049
(a) Grant of probate	5.049
(b) Grant of letters of administration with will annexed	5.051
(c) Grant of letters of administration	5.052
(d) Executors and administrators	5.053
11. Entitlement to the Grant	5.056
(a) Where the deceased left a valid will	5.056
(b) Where there is no valid will	5.060
12. Capacity and Number of Personal Representatives	5.067
(a) Capacity	5.067
(b) Number	5.069
13. Entitlement to the Grant in More Complex Cases	5.072
(a) Grant to an attorney of the person entitled	5.072
(b) Grant to a corporation	5.073
(c) Deceased domiciled outside Hong Kong	5.076
(d) Persons under 21 entitled	5.078
(e) Person with physical or mental incapacity	5.081
(f) Official administrator	5.082
14. Changes to the Grant	5.083
(a) Corrective affidavit	5.084
15. Renunciation of the Right to a Grant of Representation	5.087
16. Clearing off and Passing Over	5.091
17. Citation and Caveats	5.094
(a) Citation	5.094
(b) Caveat	5.097
18. Death of Personal Representative after Taking Out a Grant	5.099
(a) Chain of executorship	5.100
(b) <i>Grant de bonis non</i>	5.102
19. Other Grants of Representation	5.107

20. Estate Duty Procedures	5.108
21. Probate Forms	5.111
22. Other Affidavits	5.113
23. Drafting Oath or Affirmations	5.114
24. Sureties	5.117
25. Assets Outside Hong Kong	5.120
Flowcharts	
A Arrangements for Removal of Items from Solely and Jointly-rented Safe Deposit Boxes	199
B Procedure for Application for Summary Administration or Grant of Representation where the deceased passed away BEFORE the commencement date of the Revenue (Abolition of Estate Duty) Ordinance 2005	200
C Procedure for Application for Summary Administration, Grant of Representation or Exemption for Small Estates where the deceased passed away ON OR AFTER the commencement date of the Revenue (Abolition of Estate Duty) Ordinance 2005	201
Sample Documents	
5.1 Application for Release of Money for Funeral Expenses from a Deceased Person's Bank Accounts (Form HAEU1)	202
5.2 Application for Release of Money for Maintenance from a Deceased Person's Bank Accounts (Form HAEU2)	207
5.3 Application for Inspection of a Deceased Person's Bank Deposit Box (Form HAEU3)	216
5.4 Application for Removal of Items by Surviving Renter from a Jointly Rented Bank Deposit Box with Survivorship Arrangement (Form HAEU4A)	224
5.5 Application for Removal of Documents from a Deceased Person's Bank Deposit Box (Rented in Sole Name or Jointly with Other Persons) (Form HAEU4B)	228
5.6 Application for Grant Checklist	236
5.7 Documents required to be presented to the Probate Registry for making applications in relation to the administration of estates	239
5.8 Application for a Confirmation Notice in respect of an Estate Wholly Made Up of Money and Not Exceeding \$50,000 in Value (Form HAEU5)	242
5.9 Guide to the Use of the Specified Forms	253
5.10 Affirmation or Affidavit by Administratrix (Wife's Application) (Form No. L1.2a)	259
5.11 Affirmation or Affidavit by Administratrix (Wife's Application) (Form No. L1.2b)	262
5.12 Affirmation or Affidavit by Executor (Executor's Application) (Form No. W1.1a)	265
5.13 Affirmation or Affidavit by Executor (Executor's Application) (Form No. W1.1b)	267
5.14 Affirmation or Affidavit by Administrator with Will (Sole Executor has Died or Renounced) (Form No. W1.3a)	269
5.15 Affirmation or Affidavit by Administrator with Will (Sole Executor has Died or Renounced) (Form No. W1.3b)	271
5.16 Affirmation or Affidavit of Identity (Form No. M2.1)	274
5.17 Nomination of a Co-administrator (Form No. L3.2)	275
5.18 Affirmation or Affidavit verifying the Schedule of Assets and Liabilities (For Grant) (Form No. N2.1)	276

5.19 Corrective Affirmation or Affidavit verifying the Additional Schedule of Assets and Liabilities (Before Grant) (Form No. N2.2)	277
5.20 Corrective Affirmation or Affidavit verifying the Additional Schedule of Assets and Liabilities (After Grant) (Form No. N2.3)	278
5.21 Form No. N4.1	279
5.22 Form No. N4.2	283
5.23 Renunciation of Probate (Form No. W2.1)	285
5.24 Renunciation of Administration with Will (Form No. W2.2)	286
5.25 Renunciation of Administration (Form No. L2.1)	287
5.26 Caveat (Form No. C1.1)	288
5.27 Citation to Accept or Refuse Administration (Form No. C2.1)	289
5.28 Citation to Accept or Refuse Probate (Form No. C2.2)	291
5.29 Affirmation or Affidavit by Administrator (For Grant De Bonis Non) (Form No. S3.1a)	292
5.30 Affirmation or Affidavit by Administrator (For Grant De Bonis Non) (Form No. S3.1b)	295
5.31 Affirmation or Affidavit by Administrator with Will (For Grant De Bonis Non) (Form No. S3.2a)	298
5.32 Affirmation or Affidavit by Administrator with Will (For Grant De Bonis Non) (Form No. S3.2b)	300
5.33 Affirmation or Affidavit of Due Execution of the Will (Form No. W3.1)	302
5.34 Affirmation or Affidavit of Handwriting and Signature (Form No. W3.2)	303
5.35 Affirmation or Affidavit of Plight and Condition of Will (Form No. W3.3)	304
5.36 Affirmation or Affidavit as to Alterations in Will (Form No. W3.4)	305
5.37 Common Requisitions	306
5.38 Practice Direction 20.1 (Non-Contentious Probate Practice)	325
5.39 Practice Direction 20.2 (Probate and Administration of Estate Proceedings (Other than Applications under the Non-Contentious Probate Rules (Cap.10A)))	329

CHAPTER 6 ADMINISTERING THE ESTATE

1. What to do When a Person Dies	6.001
(a) Register the death	6.001
(b) Funeral arrangements	6.002
2. Administering the Estate	6.005
3. Assets — Collecting in, Securing and Selling	6.008
(a) Register the grant	6.008
(b) Property constituting assets	6.009
(c) Particular assets	6.011
(d) Duty to collect in assets	6.012
(e) Secure assets	6.014
(f) Power to manage	6.018
(g) Carrying on the deceased's business	6.019
(h) Business assets	6.023
(i) Power to sell assets	6.024
(j) What assets to sell	6.027
(k) Power of personal representatives to dispose of property	6.028

(l) Best price	6.029
(m) Purchaser protected	6.030
4. Funeral, Testamentary, Administration Expenses and Debts	6.031
(a) Funeral expenses	6.032
(b) Testamentary and administration expenses	6.034
(c) Debts and income tax	6.035
5. Protection of Personal Representatives	6.038
(a) Protection against unknown creditors: ascertaining the debts	6.038
(b) Order under NCPR r.60A	6.039
(c) Protection of personal representatives in respect of future claims against the estate	6.041
(d) Specific debts	6.042
(e) Claims under the Inheritance (Provision for Family and Dependents) Ordinance (Cap.481)	6.046
6. Payment of Debts	6.047
(a) Insolvent estates	6.047
(b) Solvent estates	6.050
(c) Marshalling	6.054
7. Matters Relating to Distribution	6.055
(a) Beneficiaries	6.056
(b) The gift	6.062
(c) Income and interest	6.076
(d) Outgoings and other expenses of administering the estate	6.090
(e) Costs	6.091
8. Management Pending Distribution	6.092
(a) Duties of personal representatives and trustees	6.095
(b) Power of personal representatives and trustees	6.098
9. The Distribution	6.101
(a) Appropriation — s.68 of the PAO	6.101
(b) Consents	6.102
(c) Valuation	6.103
(d) Third parties	6.105
(e) Settled property	6.106
(f) Power in the will	6.107
(g) Assent	6.108
(h) Land	6.110
(i) Assent to pure personality	6.112
(j) Protection of personal representative	6.115
10. Liability	6.117
(a) Liability of a personal representative	6.117
(b) Vicarious liability	6.119
(c) Liability to account	6.120
(d) Relief from liability	6.121

11. Rights of Wrongfully Deprived Beneficiaries in Capital	6.122
(a) Refund	6.122
(b) Tracing	6.123

CHAPTER 7 Inheritance (Provision for Family and Dependents) Ordinance (Cap.481)

1. Principle of Testamentary Freedom	7.001
2. Preliminary Requirements	7.005
3. Time Limits	7.006
(a) Extension of time	7.009
4. Time Limit and Distribution of the Estate	7.011
5. Categories of Applicants	7.013
(a) Section 3(1)	7.013
(b) Children	7.014
(c) The meaning of "maintained"	7.018
(d) The meaning of "immediately before death"	7.023
6. Reasonable Financial Provision	7.025
(a) The surviving spouse standard	7.027
(b) The ordinary/maintenance standard	7.030
(c) The objective standard	7.037
7. Court has a Discretion as to Whether or not to Make an Order	7.038
(a) General guidelines	7.038
(b) Specific guidelines	7.039
8. Types of Order	7.040
9. Interim Orders	7.041
10. Variation and Discharge of Orders	7.044
11. Property Available for Financial Provision	7.045
12. Anti-Avoidance Provisions	7.047
<i>Appendix Guide to Non-Contentious Probate Practice</i>	381
<i>Index</i>	453

s.4(2).....	1.067
s.5.....	1.030, 1.035, 1.091
s.5(1).....	1.031, 1.032, 1.044, 1.084, 1.085, 1.088, 1.134
s.5(1)(b).....	1.042, 1.133
s.5(1)(c).....	1.045
s.5(2).....	1.086, 1.088, 1.119
s.6.....	1.066
s.10.....	1.122, 2.023, 3.037, 3.057, 5.057, 6.068
s.10(1).....	1.048, 1.050
s.10(3).....	1.048
s.12.....	1.049
s.13.....	1.096
s.13(1)(b).....	1.103
s.13(1)(c).....	1.103
s.13(1)(d).....	1.106
s.14.....	2.043
s.14(3).....	1.098, 1.099
s.14(4).....	1.101
s.15.....	1.102, 3.037, 6.069
s.16.....	1.096, 1.114
s.17.....	1.124
s.19.....	3.010
s.23.....	3.037, 3.041, 3.042, 3.043, 3.086, 4.008, 6.065
s.23A.....	1.131, 1.132
s.23B.....	1.130

Australia

Wills Act 1936 (South Australia)

s.12(2).....	1.087, 1.088, 1.119
--------------	---------------------

United Kingdom

Non-Contentious Probate Rules 1987

r.55.....	1.133
-----------	-------

Wills Act 1837

s.9.....	1.044
s.9(1)(b).....	1.133
s.33.....	3.043

CHAPTER 1

**WILLS: THEIR CHARACTERISTICS AND
THE UNDERLYING LAW**

	PARA.
1. The Law in Relation to Wills.....	1.001
2. What is a Will?.....	1.002
(a) Definition.....	1.002
(b) Characteristics.....	1.006
3. Advantages of Making a Will.....	1.007
4. Other Means of Disposing of Property on Death.....	1.015
(a) Property owned as "joint tenants".....	1.016
(b) <i>Donatio mortis causa</i>	1.019
(c) Nomination in certain life insurance policies.....	1.022
(d) Money payable under certain pension or superannuation schemes.....	1.023
(e) Money payable under a trust.....	1.024
5. Validity of a Will.....	1.026
6. Formalities of a Will.....	1.030
(a) Writing.....	1.033
(b) Signature.....	1.035
(c) Signing by a third party.....	1.039
(d) Position of signature.....	1.041
(e) Acknowledgement of signature.....	1.045
(f) Witnesses and witnessing.....	1.046
(g) Attestation clause.....	1.052
7. Intention to Make a Will.....	1.054
(a) Mistake.....	1.056
8. Knowledge and Approval.....	1.058
(a) Burden of proof.....	1.061
(b) Suspicious circumstances.....	1.062
9. Capacity to Make a Will.....	1.065
(a) Age.....	1.066
(b) Mental competence (testamentary capacity).....	1.068
(i) Test for testamentary capacity.....	1.069
(ii) Time for satisfying the test.....	1.071
(iii) Presumption of testamentary capacity.....	1.074
(iv) Factors affecting mental capacity.....	1.077
A. Insanity and delusion.....	1.077
B. Undue influence and fraud.....	1.081