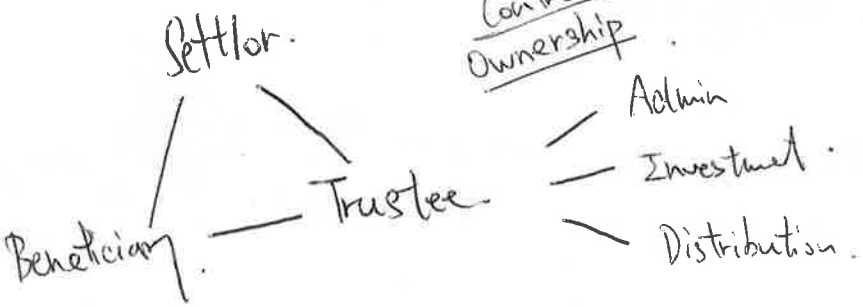
Jeff.

Name of CPD Activity Organizer	International Association of Registered Financial Consultants Hong Kong and Macau Centre Company Limited 國際認證財務顧問師協會港澳中心有限公司
Title of CPD Activity	Executive Certificate in Contemporary Financial Planning Program 當代財務策劃行政證書課程
CPD Reference No.	80/144/03

- Asset Protection
- Succession Planning



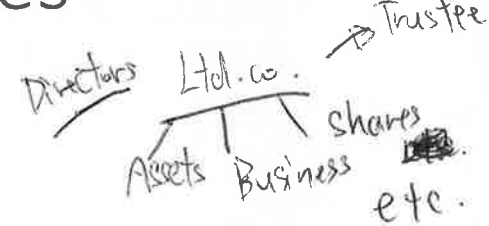
保留 Settlor Control..

1. Letter of wishes 意願書.
2. Protector 監護人.
3. Reserved Power Trust. → 保留投資管理權. Investment Management power only.
4. Company Structure
5. Private Trust Company

Trust and Other Estate Planning / Succession Vehicles

Company Structure.

Trust



Trustee. — Professional - Co. HSBC Trustee.
— Individual \ Lawyers, accountant.
— Private Trust Company.

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Other Vehicles and Strategies for Estate / Succession Planning

- Other commonly used tools than trusts and foundations
  - Holding companies within trust
  - Insurance
  - Wills
  - Pre-nuptial agreement
  - Gifts, and Loans
- Related to or compliment different type of trusts
- Distributions during lifetime

Estate Planning vs Succession Planning
(當下、一下就算完). (較長遠)

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Holding Companies Within Trust

- Holding company is commonly used in a trust structure
- **Trustees will hold the issued shares** as part of the trust fund (as shareholders of the holding company).
- The holding company is responsible for holding the assets, making investment and incurring liabilities which are indirectly those of the trust

Advantage of Corporate Limited Liability

法人.

- Trustee is **personally liable** for breaches of trust committed by him or with which he concurred or of which aware and does nothing to prevent.
- A company limited by shares protects the shareholders
- Most Trustees of trusts prefer to hold the shares of a company

Company Limited : 有限公司

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Uses of Limited Holding Company

- A Trustee is required to keep assets of a trust of which he/she is a Trustee **separate** from his/her own assets and from assets of any other trust
- Though not legally required, it is the best way
- Set up different Holding Companies of different trusts.
- Some special trusts may allow the director(s) of that holding company to manage and control the company (and its investment) without the Trustee being liable

Insurance

- Simple, easy and direct
  - Term insurance
  - Whole of life insurance
  - Joint life and second death insurance
- Provide benefits after death

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Uses of Insurance

- To provide **liquidity** (during probate, prevent sale of assets) and protection
- To provide a **fund** to pay future (inheritance) taxes liability
- To **fund** business buy-sell agreements, and fund retirement plans

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Estate Equalization

- Continuation of the **family business**
- Insurance is used to provide for **family members** who are not interested in taking part in and will not inherit any interest in the family company or business.
- Cash is provided to **equalize the family inheritance** between its members.

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Estate Equalization Example

- Mr. and Mrs. C has $170m wealth and two sons
  - Retirement spending $10m
  - Real estate $40m
  - Liquid assets $20m
  - Business $100m
- Wants to split between 2 children equally, however, one is capable, interested and active in the business and the other one is not
- Unbalanced payout (family business to one son and the remaining asset to the other son).

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Estate Equalization Example – with Life Insurance

- To divide their estate equally and fairly with life insurance death benefits which provide the additional compensation to the child not running the business
- Use $18m to buy a single premium policy with sum insured of $60m
- Real estate **$40m**
- Liquid assets $20m - $18m = $2m,
- Retirement spending $10m + 2m = **$12m**
- **$60m** cash proceeds
- Family business **$100m**

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Estate Equalization Example – with Life Insurance

- The son who runs the business gets $100m
- The son who chooses not to run the business gets $100m ($60m cash proceeds + $40m real estate)
- Mr. and Mrs. C can also enjoy better retirement life
- **Hence, compensating family members not inheriting family business, while the family business can continue without breaking up**

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Interplay of Insurance and Trust

- Should the policy be written in trust?
- insurance policy which **is written in a trust** or as **an asset of a trust** for others may be tax effective and provide much needed funds.
- **Tax advice** needed for jurisdiction of the insurance and the tax status of those concerned, and available tax exemptions

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Insurance Trust

- Designating the Trust as the beneficiary of your life insurance policy
- Insurance proceeds may be paid into a trust as the trust fund:
  - if the insured believes the surviving partner is **not able to manage** the finances after the insured's death
  - for the **education of children**
  - to **protect** the assets from spendthrift life insurance beneficiaries (using fixed interest entitlements or trustee's discretion over distribution)

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Benefits of Insurance Trust -- Capital Growth

- Instead of passing the death benefits as a lump sum to the son (beneficiary) from the insurer, the Trustee takes over the monetary compensation which becomes asset in the trust and can be managed by the Trustee for capital growth by various investments
- Accumulated profit generated from the investment over the next 10, 20 years and beyond will be distributed (lifetime income) to his son and grandsons according to the investment plan

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Benefits of Insurance Trust -- Separate Wealth & Asset Protection

- Mr. H has a successful business but fear that negative impact on the well-being of his family in case of failure of his business.
- The Trustee paid premium using the funding provided by Mr. H
- The assets in the trust (cash value) will not be used to serve repayment to creditors of his enterprise

Wills

- Governed by the law of that individual's domicile at the date of that individual's death, except that lex situs for immovable property entitlement
- Although some assets will be transferred into trusts etc, some assets **cannot be held** in those structures
- Not all the properties can be put in the trust, will deals with properties in the person's own name

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Wills

- Testamentary capacity
- Some jurisdictions provide for "forced heirship"
- **Separate Will** covering each jurisdiction where assets are held means that applying for Probate may be done concurrently across multiple jurisdictions (save time) -- global estate planning strategy

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Considerations When Drafting Will

- Choosing **Executor** – who will administer your estate
  - more than one Executor may be named
  - it may be appropriate to name professionals as Executors
  - professionals may be lawyers, accountants, trust companies
- Choosing **Guardian**
  - If there may be children who are minors at the death of the surviving spouse
- Choosing **Beneficiaries**

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Other Matters

- Consider tax implications
  - Are tax exemptions available for surviving spouse?
  - Are Beneficiaries tax exempt – charities?
- Who needs to know the content of the wills?
- Where should original wills be kept? Who should know where they are kept?
- Memorandum of assets to be kept with the Wills
  - Where are the assets? Can the records and title documents be accessed quickly?
- Electronic records and passwords for digital assets

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Periodic Review

- **It is important** to review one's will every two or three years and at pivotal moments (significant life changes) in life

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Comparison of Wills vs. Trusts

	Names Guardians for Minor Children	Probate	Can Be Revised	Private or Public Record	Tax Benefits	Creditor Protection
Trusts	No	No	Yes, if it is a revocable trust	Private	Yes, if it is an irrevocable trust	Yes, if it is an irrevocable trust
Wills	Yes	Yes	Yes	Public record	No	No

先還債 後再 Distribute

Trust (防火牆).

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Comparison of Wills vs. Trusts

	Preserved from Mismanagement of Assets	Effectiveness of Distribution	Extent of Wealth Inheritance	Dispute over Wealth Inheritance
Trusts	Yes	Yes, distributed as per trust deed (customized)	Multi-generational transfer is possible	More difficult to challenge
Wills	No	Distributed once for all	Need to set up testamentary trust	Can be challenged

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遺囑 T-Trust.

eg. 梅艷芳 Case.

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The Interplay of Trust and Will

- A trust does not negate the requirement for a will
- Separately or together, wills and trusts can serve effective estate planning
- Larger and more complex estates may benefit by using both arrangements.
- Depend on the nature and value of your assets, the age and capabilities of your heirs, tax planning considerations, and the complexity of your bequests.

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The Interplay of Trust and Will

- If the settlor dies intestate, any assets outside the trust may not be disposed of as the testator would desire
- Not all assets can be put to a trust
- Assets covered by a will need to go through probate (12 months+)
- Assets under a will (outside a trust) may be subject to estate taxes
- Lose control over assets transferred to the trust

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Prenuptial Agreement

- Agreements made before marriage, to regulate a couple's financial (and other marital expectation) affairs during the marriage or to determine the division of property, in the event of divorce
- Clarify their financial rights and responsibilities during marriage or to protect the interest of children of a previous marriage

婚前協議在香港沒有法律承認.
but 可作 reference.

Prenuptial Agreement

- Couple with significant assets and debts
  - the division of both immovable or physical property as well as financial assets and interests
  - treatment of future earnings
  - spousal support in the event of divorce
  - payment for children
- may be designed to avoid the community property regimes and protect separate property in divorce

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Protection

- The agreement can protect an older and wealthier person who will be marrying someone much younger with much less wealth.
- Protection can also be provided to one intending spouse from the debts of the other spouse.
- Protection of an intending spouse who gives up a career and relies financially of the other intending spouse
- Protect interest in a family business or a family heirloom

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Enforceability

- In the case of Hong Kong, the enforceability of pre-nuptial agreement is unclear (no legislation, by case law only)
- Generally, it is **not** enforceable in Hong Kong but may be used in evidence
- In HK Court, pre-nuptial agreement is not considered as one of the factors in resolving family issues between divorcing spouses.
- The Court retains discretionary power to determine whether the pre-nuptial agreement should be enforced and/or whether a particular section should be excised.

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Enforceability

- Pre-nuptial agreements are now enforceable in China under Article 19 of the Marriage Law 2001.
- Enforceable in US, Australia, France, Canada
- Enforceability is extremely difficult with a truly international couple
  - the jurisdiction(s) where the family assets are located;
  - the jurisdictions to which they might relocate in the future; and
  - the jurisdiction to which one of them might relocate in the future.

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Notes to Drafting Prenuptial Agreement

- Seeking independent legal advice during the negotiation and drafting stages, to ensure that the parties agree to be freely bound, that they understand the implications and possibly prevent any undue pressures from the other spouse
- Ensure the parties have had sufficient time to make an informed decision
- Whether there has been full and frank disclosure of each other's financial positions

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Notes to Drafting Prenuptial Agreement

- Prenuptial agreements for international people based in Hong Kong may be tremendously useful but must be carefully drafted by legal counsel with international experience and knowledge

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Gifts

- An unconditional transfer of right, title and interest in a property to another person, given while the estate owner is still alive
- Estate owner can intervene if there is any quarrel among the beneficiaries about the bequest
- Once the gift is given, the estate owner loses all the rights to the property
- Gift-giving beyond a certain threshold is subject to taxation in some jurisdictions

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Gifts

- There is no gift tax and the estate duty in Hong Kong
- Gifts and transfer of property are subject to Hong Kong Stamp Duty
- For properties outside Hong Kong, those jurisdictions may impose estate duty
- The Bankruptcy Ordinance may require the restoration of the gift to the donor if the donor becomes bankrupt within certain years of making a gift

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Benefits of Gifts

- A parent may want to disburse certain items before they die so that a child can enjoy the items longer, rings, bracelets, and necklaces to each, perhaps as birthday or holiday gifts
- Making gifts before one dies helps lower the probate costs
- If the gift is revocable, then there will be no asset protection for the donor from his/her creditors with regard to the asset given. It will have tax consequences too.

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Valid Gifts

- A lifetime gift requires that there be a donor (the person who gives) and a donee (the person who receives). The gift needs to be properly evidenced
- A gift is legally effective for
  - an intention to make the gift
  - sufficient delivery of the asset
  - acceptance by the donee
- The donor should have the capacity to do so and not to make the gift under duress (voluntarily)

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Tax Consequences of a Gift in Different Jurisdictions

- Understanding the taxation benefits and costs involved in making the gift is extremely important
- Such taxes may include, Gifts Tax, Inheritance/Estate Tax, Capital Gains Tax and Stamp Duty
- The timing of and planning for gifts have to be carefully selected with practical situations, cost and taxation in mind

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Tax Considerations by Jurisdiction

(Source: EY 2020)

Jurisdictions	Inheritance Tax	Estate Tax	Gift Tax	Other Taxes
Japan	Up to 55%		Up to 55%	Real estate transfer tax
South Korea	At least 10% to up to 50% based on the value of inherited property	N/A	Rates are at least 10% to up to 50%	Transfers of immovable property and shares are subject to a capital gain tax. Rates are at least 6% to up to 70%
France	Up to 60%	N/A	Up to 60%	real estate wealth tax, capital gains derived from properties
UK	chargeable in excess of the £325,000, Rates: 0% - 40%			Transfers of land and buildings. UK residents are subject to Capital Gains Tax

Source: https://www.aia.com.hk/content/dam/hk/en/pdf/Thought_Leadership_20200618_final_EN.pdf

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Tax Considerations by Jurisdiction

(Source: EY 2020)

Jurisdictions	Inheritance Tax	Estate Tax	Gift Tax	Other Taxes
USA	None at the federal level. Some states at rates ranging up to 16%	imposed on the transfer of taxable estate at death. Rates up to 40%	applies to the fair market value of the transferred assets. Rates up to 40%	Capital gain tax, stamp duty land tax
Taiwan	Taxed at the progressive tax rates of 10%, 15% and 20%			
Australia	N/A	N/A	N/A	Real estate transfer tax

Source: https://www.aia.com.hk/content/dam/hk/en/pdf/Thought_Leadership_20200618_final_EN.pdf

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Tax Considerations by Jurisdiction

(Source: EY 2020)

Jurisdictions	Inheritance Tax	Estate Tax	Gift Tax	Other Taxes
Singapore	N/A	N/A	N/A	Transfers of immovable property and shares are subject to stamp duty and real estate transfer tax
China	N/A	N/A	N/A	Transfers of real estate may be subject to taxes
Canada	N/A	N/A	N/A	Real estate transfer tax

Source: https://www.aia.com.hk/content/dam/hk/en/pdf/Thought_Leadership_20200618_final_EN.pdf

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Loans

- Where a gift would be inappropriate for practical or tax purposes
- Intrafamily loans remain an effective way to shift wealth to the next generation while avoiding estate and income tax consequences
- Including the transfer of a closely-held family business
- Assist children with a major purchase

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How It Works

- There is a hypothetical **family business** which the Owner wants to pass a portion of it to Son
- Owner sells a portion (25%) of the business (whole worth $100m) to Son, then provides a loan to Son for $25m with payment at market interest rate
- Son uses the income from the business to pay back the principal and interest on the loan
- After the loan term ends, the value of the business interest has appreciated, the loan is repaid in full
- The size of Owner's taxable estate is substantially lower without depleting his gift and estate exemption

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Matters to Consider

- Loan is secured on the correct asset
- Liquidity needed to provide cash
- Is the loan at interest? Can that interest be set off against income before tax?
- A debt is an asset of the creditor; what is the situs of that asset?
- Always seek professional advisors' advice (tax, financial, and legal)

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Comparison of Other Succession / Estate Planning Vehicles With Trusts

	Confidentiality	Probate Management	Succession Planning	Protection against Creditors
Will	No	No	Not Certain	No
Life Insurance	Yes	Yes	Yes	Yes
Holding Companies within Trust	Yes	Yes	Yes	Not Certain
Trust	Yes	Yes	Yes	Yes

Trust Protection Issues

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Trust Protection Issues

- Creditor claims
- Marriage breakdown
- Protecting assets (accrued benefits) from a company's creditors – use of EBT and MFP

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Creditor Claims

- The general rule for asset protection with trust is that the Settlor (財產授予人) has to transfer assets to trustee **sufficiently in advance** of a cause of action arising by a creditor
  - Period of time varies from jurisdiction to jurisdiction.
  - In HK, it is 2 years and 5 years subject to conditions

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Non-Enforcement of Foreign Judgments

- Many jurisdictions provide for non-enforcement of foreign judgments
- Foreign judgments can be enforced in Hong Kong either
  - through the statutory registration scheme under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319) (the FJREO) and the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) (the MJREO); or (645).
  - under common law

內地民商事判決(相互)

- The FJREO applies to judgments from 15 jurisdictions; namely, Australia, Austria, Belgium, Bermuda, Brunei, France, Germany, India, Israel, Italy, Malaysia, the Netherlands, New Zealand, Singapore and Sri Lanka

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Fraudulent Intent 欺詐意圖

- Under Hong Kong law a trust can be set aside if made with fraudulent intent or if was made with the intention of creating a fraudulent preference
- Conveyance and Property Ordinance 《物業轉易及財產條例》
- Bankruptcy Ordinance 《破產條例》

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Conveyance and Property Ordinance

- An arrangement with the intent of defrauding creditors is voidable at the instance of any person who is prejudiced

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Bankruptcy Ordinance

- Any transfer of property to a trust shall be void against a Trustee in bankruptcy if an order is made against the Settlor within 2 years after the date of the transfer.
- If order in bankruptcy was made within 5 years, then can be set aside unless it can be shown that, at the time of transfer, the Settlor was able to meet his debts without recourse to the transferred property.
- Do not apply in consideration of marriage or a bona fide purchase for value.

2) 婚姻 > 債权

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Divorce

婚姻财产

- Generally, trust assets are separate property of the beneficiary spouse and not subject to equitable distribution on divorce
- Exception is marital property or **matrimonial assets** ie assets that spouse have accumulated together during the marriage
- Some jurisdictions provide for the non-enforcement of foreign judgments with respect to consequences of marriage
  - Cayman Court directing the Trustees not to comply with a foreign Court order

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Attack on Trust

- Asset protection of trust may fail when there is allegation (attack the trust) that the trust is
  - Invalid
  - A sham
  - A nominee arrangement
  - A nuptial settlement
  - A financial resource

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Validity of Trust

- lack one of the 3 important certainties elements
  - Words (intention)
  - Subject matter
  - Object

楊律師角

Sham Trust

- Bilateral deceit on both the Settlor and the Trustee
- **No intention** to transfer assets ownership and control to the Trustee or beneficial ownership remains solely with the Settlor rather than with the beneficiaries
- There is no trust. The trust is void and invalid.
- Trust assets will revert to the Settlor's ownership

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Nominee Arrangement

- Settlor retained **too much power and control**
- Trustees take **no independent decisions** especially with respect to trust asset distribution
- Illusionary trust/bare trust

Trustee 只是代理人.

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Nuptial Settlement

因婚姻而成立的Trust.

- Determined by case law, the Court makes the decision
- The key is if there is **sufficient connection** between the transfer of assets to the trust and the marriage.
  - Trust created in contemplation of marriage (family connection)
  - Trust holds the matrimonial home
  - Trust be varied to be in favour of the spouse beneficiary

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Nuptial Settlement

- A private pension fund or some form of continuing provision for both or either of the spouse and a family company are nuptial settlement
  - properties held belonged to the companies and not to the husband
  - company holdings as nominee for one spouse
- Depend on the time the trust was made, and the intentions expressed in any Letter of Wishes

Defense Against Nuptial Settlement

世代相傳

- Trust to be dynastic, including a wide class of beneficiaries (and future generations), not associated with any particular marriage/not to include spouse or prospective spouse of beneficiary
- Complicated area of law, legal advice to be sought

Financial Resource

(家庭財富來源) ~ 婚姻財產

- If the trust asset is likely to be paid (made available) to a spouse as beneficiary considering the Letter of Wishes and history of distributions
- Did the **Trustee** of the trust help the beneficiary spouse financially should the beneficiary spouse **request** so?

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Defense Against Financial Resource

- Defense: trust is truly dynastic
- Well documented that the Trustee exercise discretion freely without influence from the spouse beneficiary
- Already guarantee an assignment of a portion of the trust fund for the spouse beneficiary, so the remainder are free from claim being financial resource

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Protecting Assets From Company's Creditors

Use of an Employees Benefit Trust ("EBT")

- Where an employer has properly transferred assets to the Trustees of the EBT eg company shares and stock options, those assets and accrued benefits should be protected from creditors of the employer. However, value of shares may be affected.
- Vested assets held for an employee are considered the Employee's estate and therefore available to the Employee's creditors

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HK MPF Protection Mechanism

I. Approved trustees managing the scheme is required
   - Qualified and regulated custodian

II. Ongoing monitoring of trustees
   - Financial soundness of trustee
   - Internal control standards

III. Trustees to have appropriate professional indemnity insurance

IV. MPF levy Compensation Fund Scheme

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How MFP is Protected

https://www.mpfa.org.hk/en/mpf-system/background/how-is-mpf-protected

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The Breakdown of Trust

- *Kan Lai Kwan v Poon Lok To Otto* [2014] case
- The Court of Final Appeal ruling that the court has power to consider assets held in trust as part of **matrimonial estate** and to presume **equal division of assets**

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Hong Kong

HK$766m divorce payout for ex-wife of leading engineer Otto Poon

Leading engineer must split whole of family trust fund after divorce, top-court judges rule after hearing of couple's tragic past

JULIE CHU + FOLLOW

Published: 5:15am, 18 Jul, 2014

Why you can trust SCMP

Source: https://www.scmp.com/news/hong-kong/article/1555849/hk766-m-divorce-payout-ex-wife-leading-engineer-otto-poon

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Background

- The husband (Poon) and his wife (Kan) married in 1968. In 1977, Poon started an engineering business which later became successful. In 1995, a holding company was incorporated to hold all the operating companies of the husband's business. The shares of the Company were settled on a discretionary family trust based in Jersey with a professional trustee (HSBC International Trustee Ltd). In particular, the trust assets consisted solely of 84.63% of the issued shares in the Company and a matrimonial home.

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- In February 2009, Poon presented a divorce petition based on two years' separation. Kan did not defend the proceedings.
- The issue was whether, and if so the extent to which, the Trust Assets form part of the **Financial Resources** of the husband.

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Poon's argument:

- In 2008, the trust has 3 potential beneficiaries: Poon, Kan and Karen.
- The trust assets should be divided into 3 parts. only 2/3 of the trust was matrimonial asset

Kan's argument:

- Separation occurred in 2001. Kan should be awarded a share of the profits of the business accruing after 2001 to some time in 2008 when separation actually occurred
- Poon has high level of influence over access to the trust fund implied that the whole amount was matrimonial asset for the purpose of the divorce

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The Court's Divorce Ruling

- 2011 the Court judged that 2/3 of the trust assets was matrimonial asset, valued $1b. Due to liquidity, separation from 2001, Kan was awarded $370 m (less than 50%).
- 2014 the Court of Final Appeal confirmed separation in 2007 and upheld equal sharing principle, Kan was awarded 50% of the whole trust assets worth $766 m

- In 1995, when Poon set up the discretionary trust, his purpose was recorded in the trust deed:

  "the principal purpose of establishing the trust is to provide for continuity in the ownership of the Analogue group of companies for the benefit of you and your family, to avoid a requirement for probate in respect of your interests in the Analogue group following your death and to relieve your estate of the liability to estate duty that would arise in respect of your shareholdings in the Analogue group"

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- In 2008, Poon moved out of the Twin Bay Villas home and divorce Kan.
- *The Trustee, at Poon's request, transferred to Kan ownership of the Twin Bay Villas house*

- 2014, Court of Final Appeal:
- *"the profits accruing to the Analogue Group during the post-separation period arose out of the business which had been built up in the course of the marriage, in respect of which Kan can legitimately assert an unascertained share."*
- *"If Poon asked the trustee to advance to Poon the whole part of the capital and/or income of the trust the trustee would, having regard to all the relevant circumstances, be likely to do so."*

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Key Takeaways

- Not suggesting the trust is a sham
- A settlor of a discretionary trust who is also in the class of possible beneficiaries under that trust is subject to a test of whether or not he **had "access" to the funds** (not necessarily **control of the funds**)
- The settlor's **control over** the trust and/or the trustee means that the assets in the trust are "matrimonial assets"
- The husband was appointed as a **protector** with **the power** to remove the trustee and the beneficiaries of the family trust were the husband, his wife and their children

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Key Takeaways

- There is also likelihood of **asset advancement**: the whole or part of the capital or income of the trust is accessible to the husband if so requested. The trustee was given the power "to appoint capital and to distribute income to any eligible object of its discretion to the exclusion of the others".
- The trustee also had the power to remove beneficiaries at its discretion with the consent of Poon as protector.
- Poon had also written "letters of wishes" to the trustee, which revealed that the trustee had accorded Poon's wishes great weight and implemented them in a timely manner.

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Key Takeaways

- Thus, trust assets shall therefore be regarded as the **Financial Resources** of the husband and hence as matrimonial property for the purpose of the divorce.
- The asset protection benefits can fall away if the settlor has **too much influence** over the trust and/or the trustee.
  - Poon's access to or control over the resources, not his ownership thereof.

Key Takeaways

- Do not commingle trust assets with personal marital assets
- Make specialized arrangements for spouses, possibly in a separate trust
- Trust objects should clearly state that the trust assets are for family succession and bloodline descendants