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CHARITABLE TRUST 慈善信託基金 (Part I)

In an affluent society like Hong Kong, quite a number of generous citizens wish to donate their money towards charity and other related purposes. The common way to set up a vehicle of operating donation monies for charitable causes is by way of a Charitable Trust (慈善信託基金). This article will examine some of the salient features of a Charitable Trust.

Charitable Trust and Trust Deed (慈善信託基金及信託基金契約)

In Hong Kong, one may set up a company limited by guarantee (保證責任有限公司) to operate a charitable trust. We shall examine the legal structure of such a Charitable Trust in another article. For the present article, we shall place our focus on establishing a Charitable Trust by way of drawing up a Charitable Trust Deed (慈善信託基金契約).

Charitable Trust should have certain “public character”, that is, it must be for the benefit of the public or some section of the public in the legal sense in order to meet the requirements of the Inland Revenue Department.

Definition of Trust Deed (基金契約的定義)

Such a trust, if created by a written document (usually a deed), is an express trust. It can be recorded by way of a Deed or Declaration of Trust. A Charitable Trust is an assertion by a person (or a group of persons) that he or she holds the property or estate for the benefit of the public or certain section of the public, and for the particular designated objectives which, are charitable in nature.

Parties to Trust Deed (基金契約的契約人)

In modern terms, a trust involves three parties: the settlor (創託人), the trustee (信託人) and the beneficiary or *cestui que trust* (受益人).

The settlor is the one who settles or conveys his property to the trustees, who hold the property for the benefit of the beneficiaries.

Any person who can hold property is capable of being a trustee of it, although he may be displaced by the court if unfit (when he is lack of the mental capacity to exercise functions as a trustee, or permanently resident abroad, or become bankrupt etc). There are statutory disqualifications in relation to trustees.

A trustee occupies a fiduciary position i.e. he must act in the best interests of the beneficiary and must not allow himself to profit from the trust property without the beneficiary's informed consent, save for the proper remunerations received for management of the trust in his role as a trustee. The legal title or estate of any trust property is vested in the trustee. In a Charitable Trust, the trustees are usually professionals like lawyers, bankers, professional trustees and accountants; or in some case, the prominent community leaders and figures.

The beneficiary has a right to the benefits arising from the trust property (usually donations). In a Charitable Trust, the beneficiaries are likely the victims or unfortunate people that the Trust desires to help.

The right of a beneficiary was once thought to be a right in *personam* (合約權) against the trustee for proper administration of the trust and not a right in *rem* (業權) against the trust property, but the popular view now is that he should have a right in *rem* instead of a mere right in *personam*.

Trustees 信託人

In respect of a Charitable Trust, there may be 2 types of trustees appointed under a Charitable Trust, they are the managing trustees (管理信託人) and custodian trustees (善款信託人).

The main duties of the custodian trustees were envisaged to be holding the legal estate of the trust property (e.g. money donations) and executing documents in their capacity as custodian trustees for the release of the donation monies requested by managing trustees

pursuant to the terms of the Trust Deed.

The powers of managing trustees, who are responsible for the day-to-day management of the donation funds, include the power to acquire leaseholds or any property for the objects of the trust, solicit and accept donations, keep and maintain the trust property, distribute the donations and manage the general affairs including dissolution of the trust.

The managing trustees must ensure that all investments belonging to or held in trust for the Charitable Trust must be transferred to the name of the custodian trustee.

The firm's participation in Charitable Trust (本律師事務所參與慈善信託基金工作)

In the past years, our Senior Partner Mr. Maurice Lee assisted in the setting up of a number of charitable trusts such as “Project Blossom 茁壯行動” (for SARS victims in 2003), “Crossing Borders Fund Raising Show 愛心無國界演藝界大匯演 ”(for the victims of South Asia Tsunami in 2005), and “Artistes 512 Fund Raising Campaign 演藝界 512 關愛行動” (for the victims of Sichuan Earthquake in 2008). Mr. Lee also acted as one of the trustees in such charitable trusts on a pro bono basis.

Nothing shall constitute legal advice to any person by Messrs. Maurice WM Lee Solicitors (Tel: (852) 2537 5833) (Website: www.wmleehk.com)

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