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Basic Estate Planning Tools 遺產管理的基本方法 (Part B) (B 部)

(1) Trust Structure 信託結構

A trust is a legal scheme under which one person transfers the titles of specific properties to another legal person (commonly an individual trustee or a trust corporation), who owns, manages and distributes the trust properties for the benefit of the third person(s), which is legally referred to as beneficiaries of the trust.

The parties to a trust include the Grantor (創託人), who is the person who transfers his properties to and sets up the Trust. The Trustee (信託人), who is the person given the powers and duties to collect, own, administer, invest and distribute the trust properties to the beneficiaries in the ways as designated by the Trust.

The Trustee is usually a professional corporate trustee such as bank or an individual such as lawyer or accountant who has possessed the requisite professional knowledge and experience in performing the duties under the Trust.

The Trust is usually established by a trust instrument sometimes called a Trust Deed (信託書) which is executed by the Grantor when setting up the trust. Or, the Trust may take the form of a limited company (信託有限公司) and the trustees will become the directors of the trust corporation.

Depending on the terms of the trust instrument, a trust can either be revocable or irrevocable. Under a revocable trust, the Grantor has the powers to request the Trustee to revert and transfer the trust properties back into his sole ownership under certain circumstances. Under an irrevocable trust, the Grantor departs with the ownership and control of the trust properties. This usually involves an assignment of the properties to the trust.

A properly structured trust deed or scheme legally minimises the potential estate duty liabilities (if any), ensure the continuous and effective operations of the trust property, for example a family business. It is because of the relatively expensive formation costs and administration fees of a trust, trust is more commonly used in large and complex estates. If the estate is relatively small and the beneficial arrangements intended by a person are not complicated, a Will is usually sufficient.

(2) Will (遺囑)

A Will is a written legal instrument by which the testator provides directions for the management and distribution of his estate after death. A testator (立囑人) is the person who makes the Will. In Hong Kong, the legal requirements for creation of a Will are governed by Wills Ordinance (Cap. 30). Will is defined under Section 2 of the Wills Ordinance as a codicil and any other testamentary act or instrument for a person's disposition of his estate after death.

According to Section 5 of Wills Ordinance (Cap. 30), no will is valid unless

- (a) it is in writing;
- (b) that the testator who made the will has got the testamentary intention (立遺囑意願);
- (c) it is signed by the testator, or by some other person in his presence and by his direction in the presence of 2 or more witnesses present at the same time; and
- (d) each witness either signs the will or acknowledges his signature in the presence of the testator.

Testamentary intention means that the testator intends that the Will should be his last Will and the Will indicates the testator's desire to dispose his properties at death. As long as the Will fulfils the above requirements, there is no specific requirement as to the language used in creating the Will.

In Hong Kong, if a person dies without a Will, his estate will be passed and distributed by intestate succession according to the statutory provisions under the Intestates' Estates Ordinance (無遺囑者遺產條例) (Cap. 73).

According to Section 4 of the Intestates' Estates Ordinance, if the deceased dies without a Will and leaves a husband or wife and children, the surviving husband or wife will take all the personal chattels and effects of the deceased and a net sum of HK\$500,000.00. He or she will also take one half of the residuary estate of the deceased. The child will get and if more than a child, the children will share in equal shares the remaining half of the residuary estate.

Legally, a Will only takes effect at the time of death of the testator and cannot govern the disposition of his estate for any time before death. A Will however can be revoked (取替先前遺囑) by the testator by any last Will made by the testator before his death if he so wishes.

A Will can also be used to create the life interest (在生利益) for a beneficiary, for example, the interest in enjoying the possession of a flat or for receiving the rental incomes generated from it. Life interest only takes effect and lasts for the lifetime of the beneficiary whom we call the life tenant. It comes to an end at the death of the life tenant and the property will be vested unto the ultimate beneficiary as stated in the Will, that is the remainderman, for his use and benefit absolutely.

(3) Joint Tenancy 聯名物業俗稱“長命契”

Joint Tenancy is a common law form of ownership by two or more persons of the same property. The individuals, who are called joint tenants, share the ownership of the property equally and have the equal undivided right to keep or dispose of the property.

The property under joint tenancy will be passed automatically to the surviving joint tenant or tenants upon death of any joint tenant under the right of survivorship. The last surviving one enjoys the property finally and absolutely. Joint tenancy is thus a simple form of estate planning as it avoids the necessity of a Will for the disposition of a person's estate. It is commonly used for married couples or parents and children to hold the ownership of their home.

It is worth noting Section 9 of the Conveyancing and Property Ordinance (房產轉讓條例) (Cap. 219) provides that *“where a tenancy in the same estate or interest in land vests in 2 or more persons under an instrument or a will, it shall be presumed, unless the contrary intention is expressed on that instrument or will, that the tenancy vests in those persons as tenants in common (共管物業) rather than as joint tenants”*. It is therefore necessary to write down and specify in the assignments (樓契) for real properties the properties are held under joint tenancy. Otherwise, jointly owned real properties in Hong Kong will be presumed to be held by the owners as the tenants-in-common only.

For “jointly held bank accounts”, despite its popular name, it is commonly provided in the account opening mandate of the banks in Hong Kong that the monies in the bank accounts are to be held by account holders as the tenants-in-common instead of joint tenants.

(4) Life Insurance 人壽保險

Life insurance is a written contract entered into between the policy holder (保單持有人) and the insurer (保險公司) commonly known as a life insurance policy, whereby the insurer agrees to pay a certain amount of money to the beneficiary (保險受益人) stated in the policy upon the occurrence of the policy holder's death. The policy holder is normally required to pay a lump sum or the premium at regular intervals under the life insurance policy.

Depending on the terms of the life insurance policy, the monetary benefits under the insurance policy may be paid to the beneficiary or beneficiaries as a lump sum or an annuity upon the death of the insured. An annuity can be structured to be paid to the beneficiary as the regular instalments over a specified period or only for a beneficiary's lifetime so that the living needs of the beneficiary can be taken good care of.

Life insurance policy is a simple tool to ensure that the beneficiaries can obtain the proceeds directly and quickly from the insurer without going through the court probate. It is easy to set up and readily available in the market.

Life insurance policy was a common tool for reducing estate duty liabilities in Hong Kong during the past years when estate duty was still chargeable in Hong Kong (because the money paid upon death of the insured to the named beneficiaries will not be included in computation of the estate duty). It is still a common form of estate planning tool in some jurisdictions with the high level estate duty imposed upon death. In Hong Kong, structured investment products (結構投資組合產品) however are becoming more and more popular and discussion on better disposition of such assets will be done in another chapter.

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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