

BRIEF FOR LEGISLATIVE COUNCIL

Probate and Administration Ordinance (Cap. 10)

PROBATE AND ADMINISTRATION ORDINANCE

(AMENDMENT OF SCHEDULE 2) ORDER 2000

 A
At the meeting of the Executive Council on 11 April 2000, the Council ADVISED and the Chief Executive ORDERED that Probate and Administration Ordinance (Amendment of Schedule 2) Order 2000 (the Order) at Annex A should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

2. Under the Probate and Administration Ordinance (the Ordinance), a successor and a personal representative of the estate of a deceased person has to obtain a grant of probate or a letter of administration sealed by the court in the HKSAR before he could get hold of the property or administer the estate of the deceased. If the property situates in an overseas jurisdiction where a grant of probate or a letter of administration sealed by the HKSAR court is not recognised, the successor or the personal representative would need to apply for a grant or a letter of administration afresh in the jurisdiction concerned. This could be time-consuming, and the value of the estate may depreciate in the intervening period. To absolve the successors or personal representatives of the inconvenience, it is desirable for as many overseas courts to recognise and enforce the grants and letters of administration issued by the HKSAR court as possible.

Arrangement before the Reunification

3. Before 1 July 1997, under section 49 of the Ordinance, the grants of probate

or letters of administration by the court in a Commonwealth or British court were treated as if they were granted by the Hong Kong court. This treatment was not accorded to other countries.

4. Section 2A(2)(b) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that “provisions conferring privileges on the United Kingdom or other Commonwealth countries or territories, other than provisions giving effect to reciprocal arrangements between Hong Kong and the United Kingdom or other Commonwealth countries or territories shall have no further effect”. Under this principle, the arrangement prior to the reunification would amount to a privilege to the Commonwealth countries and Britain. A new mechanism was therefore needed for the recognition and enforcement of grants between the HKSAR and foreign countries on a reciprocal basis.

Subsequent Development

5. Against this background, section 49 of the Ordinance was amended by way of the Adaptation of Laws (No. 30) Ordinance in November 1999. The reference to “any part of the Commonwealth, or a British Court in a foreign country” in the section was deleted, so that the recognition of grants or letters of administration would no longer be confined to those granted by the courts in Commonwealth countries or British courts. Section 49A was added, which provides that the sealing of grants would be recognised on a reciprocal basis between overseas places or countries and the HKSAR. If an overseas jurisdiction agrees to the reciprocal arrangement, the Chief Executive in Council may, by order in the Gazette, add to Schedule 2 of the Ordinance the name of the country or place that could fulfill the conditions set out in section 49A(2).

6. Department of Justice has, since March 1998, been consulting overseas jurisdictions on whether they would recognise and enforce the grants of probate and letters of administration issued by the HKSAR court after 30 June 1997. Before the amendment of the Ordinance in 1999, six jurisdictions replied that they would continue to recognise and enforce the grants of probate and letters of administration issued in Hong Kong after 30 June 1997. These countries or places were subsequently included in Schedule 2 under the adaptation exercise to enable the reciprocal recognition of grants of probate and letters of administration. They are the Australian

States of Tasmania and Victoria and the Northern Territory of Australia, Singapore, Sri Lanka and the United Kingdom.

7. On 14 December 1999, South Australia confirmed that a grant of representation issued out of a court of the HKSAR could be resealed in the Supreme Court of South Australia if it corresponds to a probate or administration in that State in accordance with sections 17 and 19 of the Administration and Probate Act 1919 (S.A.). It confirmed that after 1 July 1997, grants issued by the HKSAR court could be resealed in South Australia. In fact, there has already been one such grant after 1 July 1997, which had been resealed there.

8. South Australia is not included in Schedule 2 of the Probate and Administration Ordinance. In order to enable the HKSAR court to recognise the grant of probates and letters of administration issued by South Australian courts, it is necessary to add South Australia as a designated place to Schedule 2 for the purposes of sections 48 and 49A of the Ordinance.

THE ORDER

9. The Order amends Schedule 2 to the Ordinance to provide for the inclusion of South Australia as a designated place for the purposes of sections 48 and 49A of the Ordinance. The existing Schedule 2 is at Annex B.

B

BASIC LAW IMPLICATIONS

10. Article 96 of the Basic Law provides that, with the assistance or authorisation of the Central People's Government, the Government of the HKSAR may make appropriate arrangements with foreign states for reciprocal juridical assistance. Since no action, either legal or administrative, has ever been taken by South Australia following our inquiries to enable grants issued by the HKSAR courts to be resealed in South Australia, the designation of South Australia in Schedule 2 under section 49A of the Ordinance is a unilateral act of the HKSAR, and not the making of an arrangement. Authorisation by the CPG is therefore not considered necessary.

HUMAN RIGHTS IMPLICATIONS

11. The Department of Justice advises that the proposed Order has no human rights implication.

BINDING EFFECT

12. The amendments do not affect the binding effect of the Probate and Administration Ordinance.

FINANCIAL AND STAFFING IMPLICATIONS

13. The proposed Order has no financial and staffing implications.

PUBLIC CONSULTATION

14. As this is a routine exercise, public consultation on the proposed Order is not considered necessary.

PUBLICITY

15. A spokesman will be available for answering media enquiries.

ENQUIRIES

16. For enquiries, please contact Mr Ryan Chiu, Assistant Secretary (Administration) at 2810 2783.

Chief Secretary for Administration's Office
Administration Wing
April 2000