

Bills Committee on Revenue (Abolition of Estate Duty) Bill 2005

This paper sets out the Administration's response to Members' comments at the Bills Committee meetings held on 6 and 7 June in respect of the schedule of property.

CONSULTATION

2. The Administration is in dialogue with the Judiciary and the Law Society of Hong Kong on the proposal of requiring an inventory of assets and liabilities to be attached to an application for grant of representation.

Consultation with the Judiciary

3. The Judiciary Administrator has separately issued a paper to the Bills Committee, setting out the Judiciary's position on matters related to the schedule of property, including the latest proposal of the requirement of an inventory of assets and liabilities. At the time of issue of this paper, we are considering the questions raised by the Judiciary.

Consultation with the Department of Justice

4. The Department of Justice (D of J) has previously been consulted on the proposal not to require the filing of a schedule of property. It confirmed that since the schedule of property was primarily for the purpose of collection of estate duty, with the abolition of estate duty, it would not be absolutely essential for such requirement to be retained. D of J noted that the Law Society of Hong Kong would be consulted on this issue.

5. We are also consulting D of J on the Bills Committee's proposal regarding an inventory of assets and liabilities in the light of the questions raised by the Judiciary Administrator.

LAND REGISTRY

6. A grant without schedule of property would not pose difficulty on land registration whether it is under the Land Registration Ordinance or the Land Titles Ordinance. A grant of representation issued by the Probate Registry may be registered against a property if the name of the deceased stated in the grant matches with that of the registered owner of the property.

7. If there is any suspicion of different persons with the same name, the Land Registrar may always ask for more information about the deceased and his ownership before effecting the registration.

APPEALS

8. We have consulted within the Administration on whether the exercise of powers to authorize release of money for funeral expenses and for maintenance as well as to authorize the inspection of safe deposit box should be included under the purview of the Administrative Appeals Board (AAB).

9. We envisage that appeals against decisions made by the Secretary for Home Affairs (SHA) under the proposed sections 60B and 60C would likely arise from applications for release of money for maintenance of former dependants. For instance, if the amount applied by the dependant exceeds his/her interests in the estate of the deceased, or the dependant does not have any interests in the estate of the deceased, the application would be rejected. In case of rejection, the applicant will be advised that he/she may apply for a court order under section 3 of the Inheritance (Provision for Family and Dependants) Ordinance (Cap. 481), as in current practice.

10. The average waiting time for appeals to be heard by the AAB is about four months. Further lead time should also be allowed for parties concerned to obtain further particulars of the case. The release of money for funeral expenses and maintenance are intended to provide emergency relief to the family and dependants of the deceased. Therefore, the AAB does not seem to be a suitable appeal channel.

LEGISLATIVE MEASURES TO PROTECT ESTATE BENEFICIARIES

11. Existing provisions in the Probate and Administration Ordinance (Cap. 10) that might serve to protect the interest of beneficiaries are as follows –

- Section 7 – power of court to order production of testamentary writings;
- Section 8 – power of court to summon executor to prove or renounce probate of will;
- Section 13 – offence for unlawfully removing property of the deceased from Hong Kong;
- Section 55 – voiding of purchase by personal representatives of the deceased's property;
- Section 56 – duty of personal representative to file true and perfect inventory;
- Section 58 – liability of person fraudulently obtaining or retaining estate of the deceased; and
- Section 59 – liability of estate of personal representative in relation to waste and conversion.

12. There are other offence provisions available, e.g. under sections 32 and 36 of the Crimes Ordinance (Cap. 200) to deal with false statement/false declaration.

13. In the event that an inventory of assets and liabilities of the deceased is required to be attached to an application for grant of representation, we will also consider adopting a similar penalty provision as the existing section 23 of the Estate Duty Ordinance (Cap. 111) (EDO) to guard against false statement and fraud in relation to the inventory of assets and liabilities of the deceased. At the moment, the level of penalty in the said section of the EDO for dealing with any property of an estate which is not set out in the schedule of property is set at level 3 plus three times the amount of estate duty payable upon the estate so dealt with. In view of the abolition of estate duty, the second limb of the penalty would not be appropriate and there may be a need to increase the penalty to achieve a deterrent effect.

OVERSEAS PRACTICES REGARDING SCHEDULE OF PROPERTY

14. The Inland Revenue Department has looked into the practice in overseas jurisdictions which do not have estate duty.

15. In Australia, the probate practices vary with states: New South Wales, Victoria, South Australia and Northern Territory require the personal representative to file an affidavit of assets and liabilities with the Supreme Court, whereas there is no such requirement in Queensland.

16. Similarly, probate practices in Canada vary with provinces: British Columbia, Newfoundland and Labrador, New Brunswick, Saskatchewan, Prince Edward Island, Nova Scotia, Manitoba and Alberta require the applicants to file an affidavit of assets and liabilities or statement of property with the Probate Court, but Ontario has dispensed with such requirement. Quebec does not require an inventory of property for application for grant, but requires the person who administers the succession to prepare an inventory of property of the succession after obtaining the grant.

17. In New Zealand, the application for grant does not require any affidavit of assets and liabilities.

18. At **Annex** is a list of the practices in application for grant of representation in New South Wales, Victoria, Southern Australia and Queensland of Australia.

*Home Affairs Bureau
8 June 2005*

Practice in Application for Grant of Representation in Australia

Annex

State	New South Wales	Victoria	Southern Australia	Queensland
Court	Supreme Court	Supreme Court	Supreme Court	Supreme Court
Department	Probate Office	Probate Office	Probate Office	Probate Office
Law governing application	(a) Wills, Probate and Administration Act 1898 [WPAA] (b) Supreme Court Rules 1970 – Part 78 [SCRs]	(a) Administration and Probate Act 1958 (b) The Supreme Court (Administration and Probate) Rules 1994 [SCAPRs]	(a) Administration and Probate Act 1919 [APA] (b) The Probate Rules 2004 [PRs]	(a) Succession Act 1981 (b) Uniform Civil Procedure Rules 1909 – Chapter 15 [UCPRs]
Affidavit in support of an application	Yes – section 78.24 to 26A of SCRs	Yes – O2.r.2.04, O.4.r.4.04 of SCAPRs	Yes – Rule 11 of PRs	Yes – Rule 602 of UCPRs
An inventory of assets and liabilities in support of the application	Yes [Form 96] – section 81A of WPAA	Yes – O.2.r.2.04(2)(d) O.4.r.4.04(2)(d) of SCAPRs	Yes [Forms 67 and 68] – Section 121A of APA and Rule 8.01 of PRs Court issues a certificate of disclosure [Form 70] – Rule 9.01 of PRs	No
Value to be stated in the inventory	Yes	Yes, estimation only but no evidence of value and amount is required	Yes	No
Further affidavit to disclose any assets omitted	Yes [Form 106A] – section 81A(2) of WPAA and section 78.28A of SCRs	No	Yes [Form 69] – Rule 8.02 of PRs	No

State	New South Wales	Victoria	Southern Australia	Queensland
Inventory to be annexed to the Grant	No	No	No	No
Executor/administrator to file administration account after grant	(a) Certain classes of executors/administrators – creditors, guardians, etc. within 12 months after grant/resealing – section 85(1AA) of WPAA and section 78.71 of SCRs (b) Others as demanded by court – section 85(1B) of WPAA	On demand by the Court or the Registrar – O.6.r.6.03 of SCAPRs	Administrator to file accounts within six months of administration at the office of Public Trustee [Form 78] – Section 56 of APA	No, but the beneficiary may apply to court