



Post-Mortem Alterations?

When a person passed away (“the deceased”), the estate of the deceased will be succeeded by such person or persons stipulated in the deceased’s will or (if the deceased has not made any will) by the deceased’s descendants or next-of-kins according to the provisions of the Intestate’s Estate Ordinance (Cap. 73). Such incidences of succession may seem unalterable short of a change of the law or an order of the court. Nevertheless, given the requisite pre-conditions are present, the succession to the estate of a deceased may not necessarily follow the prescriptions of Cap. 73 or that of the deceased’s will. This could happen if a deed of family arrangement (DFA) is executed or a disclaimer is made by the beneficiary or beneficiaries of the deceased’s estate.

A DFA is a deed which is executed by all persons having the right to succeed to the deceased’s estate or any part thereof. The two basic pre-conditions for its validity are that (1) all beneficiaries of the deceased’s estate are parties; and (2) all such persons are of age and have full legal capacity. Disclaimer is a voluntary total refusal to accept a person’s entitlement to a deceased’s estate under a will or Cap. 73.

Let us take for illustration the case of a deceased who had 4 children and died intestate. According to the provisions of Cap. 73, the children are entitled to the deceased’s estate in equal shares. So each child is entitled to one-fourth of the estate. Now they desire that one of them should take the whole estate. This can be done if a DFA is executed to that effect by all the children. The same result can also be achieved if the three children disclaim all their shares in the estate.

How should one decide which of the two alternatives is preferable? In the Hong Kong context, a relevant consideration is the possible stamp duty implications. Coming back to our above illustration, if the other three children have disclaimed all their entitlements under Cap. 73, they would not be regarded as making a gift of their shares in the estate to the one who takes all. This is because the children who disclaimed have never taken any share in the estate and the deceased’s estate is transmitted by operation of law to the child who has not disclaimed. Stamp duty would, however, be payable on the transfer of any land or stocks if the three children

by DFA redirect their shares in the estate in favour of one as such redirection would constitute a gift which is subject to stamp duty.

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PLEASE NOTE

The law and procedure on this subject are very specialised. This article is a general explanation for your reference only and should not be relied on as legal advice for any specific case. If legal advice is needed, please contact our solicitors.

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