

# Passing Over the Reigns

## ***“Pass-over” Application under Section 36 of the Probate and Administration Ordinance, Cap. 10***

*By Alfred Ip, Partner, Hugill & Ip*

### **Role and Importance of Administrator and Executor**

An executor or an administrator is a person responsible for administration of a Deceased's person's Estate. This person is called an executor if he is named in a deceased person's Will. Where no executor is named or if a person dies without making a Will, the person taking up administration by way of his priority pursuant to the intestacy law is called an Administrator. The role of an executor/administrator is very important, and involves:

1. Taking the necessary steps to identify, protect, secure, and recover all assets of a deceased person's Estate;
2. Taking the necessary steps to identify, review, and settle the proved and outstanding debts and liabilities of the deceased person;
3. Keeping a just and true account of the administration of the Estate of the deceased person, including but not limited to the keeping of books and records and preparing receipts and payment accounts for the Estate;
4. Making the application for the grant of representation required for the administration of the Estate of the deceased;
5. Dealing with claims from creditors, beneficiaries, or third parties in relation to the Estate and, where necessary, taking out legal proceedings to recover or protect assets belonging to the estate; and
6. Distributing the assets of the Estate of the deceased person pursuant to the deceased person's Will and/or the relevant intestacy laws.

Clearly, executors/administrators are crucial to the handling of the affairs of a deceased person and beneficiaries rely on them to administer the Estate efficiently and fairly. Not only that, but depending on the size and complexity of a deceased person's estate, the duties of an executor/administrator can be extremely daunting.

What happens, then, when the Executor or Administrator is unfit for the job? The relevant matters in such a scenario would be, firstly, whether it is appropriate to remove or pass over the executor/administrator, and secondly, who to appoint in his/her place.

### **Passover Application**

Thankfully, section 36 of the Probate and Administration Ordinance, Cap. 10 (the “Ordinance”) provides a mechanism for the Court to exercise its discretion to appoint a qualified person to be the

administrator of a deceased's estate in the following situations:-

1. Where the deceased died wholly intestate;
2. Where the deceased left behind a Will but did not appoint an Executor who is willing or legally competent to take probate;
3. Where the Executor is resident out of Hong Kong at the time of death of the deceased person; or
4. Where it appears to the court that it is either necessary or convenient to appoint a person to be the Administrator of the Estate of the deceased person other than the person who is otherwise entitled to a grant of administration of the Estate.

Amongst these grounds, ground (4) is most commonly relied on for the person who would (if this Ordinance had not been passed) by law have been entitled to the administration of a deceased's Estate to be "passed over" for a more qualified person to be appointed administrator. This gives the Court wide discretion to determine whether, taking into account the facts of the case, it would be necessary or convenient to make an order to pass over the current executor/administrator in favor of another one ("Pass-over Order").

The case of *Re Estate of Loo Che Chin* [2013] HKEC 377 illustrates factors the court will take into consideration when determining whether it is "necessary or convenient" to make a Pass-over Order. In *Loo Che Chin*, the Deceased left behind a Will dividing his estate into 6 equal shares to be distributed to his 5 children and son-in-law. He also named his wife (who predeceased him) and one of his children as executors of his Will. Following the death of the wife, relationship between the beneficiaries began to break down and they eventually fell in two opposing camps with one side applying to pass over the surviving named executor. In making the pass-over order, the court considered the following matters:

1. If the person to be passed over is a named Executor under the Will, the Deceased's understanding of the named executor's characters, attitudes and relationship (of which the Court lacks) will be considered;
2. whether hostility between the beneficiary(ies) and the executor is mutual or merely induced by the beneficiary(ies) as a pretext to pass over the Executor;
3. whether the hostility impedes on the executor's ability to administer the estate fairly or efficiently;
4. whether the administration of the estate is a simple matter or not; and
5. whether the person to be passed over has caused delay in administration of the estate.

While the above are all relevant factors to take into consideration in a passover application, the Court was minded to emphasize that the exercise of discretion under section 36 of the Ordinance is highly fact-sensitive and will therefore depend heavily on the circumstances and contextual background in each case. Factors that a court will take into consideration is therefore non-exhaustive. Some other examples of matters that courts in other cases have considered

when exercising their discretion include misappropriation of estate assets and failure to provide a just and true account or inventory of the estate.

### Who to Appoint?

Where it becomes necessary to make the Pass-over Order, the Court will usually appoint an independent professional to be administrator in the interest of fairness and efficacy. Parties to the Pass-over application may make nominations of their own volition or as requested by the Court, who will usually either be a professional Certified Public Accountant ("CPA") or a solicitor experienced in such matters. The Court will then exercise its discretion to appoint the person most appropriate to administer the estate.

So now we come down to the million-dollar question – who should you nominate to be the Administrator? As with all things, there are pros and cons to each option.

CPAs are, of course, going to be more number-savvy and will be able to navigate complex financial statements to identify missing funds and/or fiscal shenanigans. For particularly complex estates that involve businesses, it may be preferable to nominate a CPA, who will most likely be better equipped to prepare accounts and for auditing purposes.



Solicitors, on the other hand, are more geared towards dealing with matters with a contentious element to it. A solicitor's experience in handling disputes is also helpful for encouraging party settlement, and, where the former, is not possible, they will be in a better position to seek Court direction in the event of an impasse. Whether a CPA or a solicitor should be nominated is, therefore, largely going to depend on the nature of the Estate in question.

The Court has, on several occasions, explored the situations where a CPA would be best suited for the administration of an estate, and in which circumstances a solicitor would be more appropriate instead.

In the case of *Re Lai Suet Ching* [2015] HKCFI 2323, the Court elucidated the principles which the Court will take into consideration when making such an appointment. As previously discussed, the Court exercises its discretion under s.36 of the Ordinance in a factually sensitive manner, and the Court at paragraph 26 of the decision provided that the discretion *"is to be exercised in the best interests of the estate, including to effect an expeditious and economical administration according to law"*. The proposed fees of each nominee will of course be relevant in every instance with regard to the economical administration of the estate – to this end, the fees of the administrator should never significantly deplete the assets of the estate. Furthermore, whether a CPA or a solicitor will be appointed involves a balancing exercise - whether the legal aspect of administration is trickier to deal with than the numerical aspect.

Notwithstanding that the estate in question involved assets worth over HK\$22.3 million, the Court in *Lai Suet Ching* decided that a solicitor would be more suitable to act as administrator instead of a CPA because the estate involved a lot of issues which requires a solicitor's legal expertise. In particular, the administrator to be appointed would have to:



1. understand the family arrangement having agreed by the parties;
2. identify the estate of the deceased mother which was in dispute;
3. identify the un-administered estate of the deceased father which was part of the mother's estate; and
4. deal with an ongoing litigation.

*Ren Micky v Fung Kung Kuen and Others* [2022] HKCFI 2385 was another case where the Court had to decide between solicitors and CPAs for the administration of an estate. Ultimately, the Court exercised its discretion to appoint a solicitor over a CPA by reason that:

1. the estate in question was relatively simple and straightforward to administer; and
2. the contentious nature of the case and the ongoing litigation amongst the parties made it such that a solicitor administrator was more appropriate.

As the Court put it at paragraph 27 and 34 of the decision, *"Although a CPA may have more experience in preparing*

*accounts and in audit generally... [n]o doubt, an administrator who is a solicitor may have more experience of attending in person at a hearing before the Court"*.

On the other hand, a CPA's proficiency in analyzing, deciphering, and presenting numerical information is effective in the administration of estates involving multiple businesses and/or cashflow.

The Estate in the case of *Chan Yu Hong v Chan Kam Hong and Others* [2017] HKCFI 1275 involved, among other things, a metal wares manufacturing business run by the deceased by sole proprietorship. Shortly before and after the death of the Deceased, to facilitate transition of the deceased's business, some beneficiaries set up various entities, firstly a partnership, then a new sole proprietorship, and afterward a limited company. There was no formal transfer of the business from deceased's sole proprietorship to the new businesses. But it was raised that the deceased's wife had transferred substantial portion of the deceased's estate to the new businesses and/or other entities. Accordingly, when the other beneficiaries applied to remove the surviving administrator, the Court made an order for a CPA to



be administrator, citing, in particular, the original administrator's inability to render complete accounts of the Estate. The Court also requires an administrator to render accurate valuation of the deceased's business taking into account its goodwill, inventory, and receivables/payables. To this end, the skillset of a CPA will no doubt be invaluable.

### Conclusion

At the end of the day, an administrator owes a duty to the estate and to all the beneficiaries entitled to the same. It is therefore important to find one with the correct skillset to best suit your needs. While it is always possible to nominate a CPA and a solicitor to act jointly in the administration of an Estate, it is always important to be mindful of the fees that will be incurred in such case. Most of the

times, it is better to appoint one based on whether the Estate requires more legal know-how or fiscal fact-finding. Notwithstanding that an Estate might involve elements of both, it is always possible for a professional administrator to engage a solicitor or a CPA in certain matters only in order to best deal with the situation at hand in a cost-efficient manner. Below is a summary of the (non-exhaustive) benefits that each can bring to the table:

CPA	Solicitor
<ul style="list-style-type: none"> <li>• Use of forensic accounting to trace and identify missing/misappropriated assets</li> <li>• Calculate value of missing/misappropriated assets</li> <li>• Keep accurate accounts and records for complex estate, in particular those involving businesses</li> <li>• Navigate companies' financial statements, understand auditing obligations</li> </ul>	<ul style="list-style-type: none"> <li>• Deal with ongoing or potential litigation</li> <li>• Deal with estates which involve legal agreements (e.g. settlement agreements, family arrangements, etc.)</li> <li>• Handle legal complexities in estate administrations, such as application for grants involving complications and identifying estate assets</li> <li>• Handle trust assets</li> <li>• Take out and represent the estate in court proceedings where appropriate</li> <li>• Experience in dealing with and selling landed properties ■</li> </ul>





# 改朝換代

## 根據《遺囑認證及遺產管理條例》（第10章）第36條提出的「替代」申請

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### 遺產管理人及遺囑執行人的角色及重要性

遺囑執行人或遺產管理人是負責管理死者遺產的人。死者遺囑中指定的人，稱為遺囑執行人。若遺囑沒有指定遺囑執行人或死者沒有訂立遺囑，該人士根據無遺囑繼承法律的優先次序成為管理遺產者，則稱為遺產管理人。遺囑執行人／遺產管理人的角色非常重要，包括：

1. 採取必要步驟以識別、保障、獲得和收回死者的所有資產；
2. 採取必要措施以識別、審查和清償已證明而未清償的死者債務和責任；
3. 如實記錄死者遺產的管理情況，包括但不限於保存遺產的賬簿、記錄和編制收支賬目；
4. 申請承辦管理死者遺產所需的授予；
5. 處理債權人、受益人或第三方對遺產的申索，必要時採取法律程序追回或保護屬於遺產的資產；
6. 根據死者遺囑及／或相關無遺囑繼承法律，分配死者的遺產。

遺囑執行人／遺產管理人顯然對處理死者的事務至關重要，而受益人亦指望他們有效、公平地管理遺產。視乎遺產的規模和複雜程度而言，遺囑執行人／遺產管理人的職責可能非常艱鉅。

那麼，當遺囑執行人或遺產管理人不適宜擔任該崗位時，會怎麼辦？在這



種情況下，首先要考慮是否適宜免去或替代遺囑執行人／遺產管理人，其次是委任何人取而代之。

### 替代申請

《遺囑認證及遺產管理條例》（第10章）（《條例》）第36條提供了機制，讓法院在以下情況下酌情委任合資格人士擔任遺產管理人：

1. 死者未就其任何遺產立遺囑；
2. 死者雖留有遺囑，但卻未委任一名願意並有足夠能力領取遺囑認證的人作為遺囑執行人；
3. 遺囑執行人於死者去世時在香港以外地方居住；或
4. 法院覺得需要或方便委任某人為死者的遺產管理人，而該人士並非於無遺囑繼承法律下所指定的遺產管理人。

在這些理由當中，第(4)項最常被依照法律有權就該遺產獲授予遺產管理之人士引用，其目的為委任更有資格的人成為遺產管理人。它賦予了法院更大酌情權，在考慮到案件事實的情況後，確定是否有需要或方便下令將現任遺囑執行人／遺產管理人的崗位轉移給另一人（「替代令」）。

*Re Estate of Loo Che Chin* [2013] HKEC 377 案說明了法院在決定是否「需要或方便」發出替代令時的考慮因素。在 *Loo Che Chin* 案中，死者留下遺囑指示把遺產分成六份，分配予其五名子女和一名女婿。他亦指定了其妻子（先於他去世）和其中一名子女作為遺囑執行人。在其妻子去世後，受益人之間的關係開始破裂，最終陷入了兩個對立的陣營，其中一方申請替代指定的遺囑執行人。在作出替代令時，法院考慮了以下事項：

1. 如果被替代的人是遺囑指定的遺囑執行人，法院會考慮死者對指定遺囑執行人的性格、態度和關係（法院缺乏）的了解；



2. 受益人與執行人之間的敵意，是雙向或其敵意僅由受益人引起，以作為申請替代遺囑執行人的藉口；
3. 敵意有否妨礙遺囑執行人公平或有效地管理遺產的能力；
4. 遺產管理是否簡單；及
5. 被替代的人士有否曾造成遺產管理延誤。

雖然上述因素均在替代申請中會被考慮，但法院強調，根據《條例》第36條行使酌情權時，很大程度上視乎每宗案性的情況和背景。因此，法院會考慮的因素不僅限於上述數項。在其他案件中，法院在行使酌情權時，考慮的一些其他事項包括：有沒有挪用遺產資產、是否能提供公正和真實的遺產賬目或清單等。

### 委任誰？

在有需要發出替代令的情況下，為了公平有效起見，法院通常會委任一名獨立的專業人士擔任遺產管理人。替代令的申請人可自行或根據法院的要求提名遺產管理人，通常是專業註冊會計師或對這方面經驗豐富的律師。然後，法院將酌情委任最合適的人選管理遺產。

現在最重要的問題是：應該提名誰擔任遺產管理人？正如所有事情一樣，每個選項都有優點和缺點。

註冊會計師當然更加精通數字，能夠瀏覽複雜的財務報表以識別缺失的資金及／或財務欺詐。對於因涉及業務而特別複雜的遺產，最好提名註冊會計師管理，因為他們更有擬備賬目和進行審計的能力。

另一方面，律師更熟習處理具有爭議性的事項。律師在處理爭議方面的經驗，也有助鼓勵當事人和解。即使在出現僵局或在不可能和解的情況下，他們也能更有效地尋求法院指示。因此，提名註冊會計師或律師擔任遺產管理人，很大程度上取決於相關遺產的性質。

法院曾多次探討在那些情況下註冊會計師最適合管理遺產，在那些情況下律師則更為合適。

在 *Re Lai Suet Ching* [2015] HKCFI 2323 案中，法院闡明了在作出此類委任時將考慮的原則。如前所述，法院很大程度上視乎事實，並根據《條例》第36條行使酌情權。法院在判決的第26段指出，酌情權「應以遺產的最佳利益為重，包括依法落實快捷而合乎經濟原則的管理」。被提名人的建議收費，當然與遺產管理是否合乎經濟原則有關。因此，遺產管理人的收費不應嚴重消耗遺產。此外，委任註冊會計師或律師擔任遺產管理人亦需權衡利弊——在遺產管理上，究竟法律方面或數字方面更難處理？

儘管 *Lai Suet Ching* 案涉及價值超過



呈現數字信息，更適合管理涉及多個業務及 / 或現金流的遺產。

*Chan Yu Hong v Chan Kam Hong and Others* [2017] HKCFI 1275 一案的遺產涉及死者獨資經營的業務。案件其中一名受益人希望繼續經營該業務。為達成該目標，相關人士需以合夥企業，或新的獨資企業，或成立有限公司的方式進行。死者的獨資企業則無法轉移至新的業務公司。當其他受益人申請替代尚存的遺囑執行人時，法院下令委任一名註冊會計師擔任遺產管理人，理由是原有的遺囑執行人無法提供遺產的完整賬目及相關準確的文件。法院亦指出遺產管理人的責任為考慮其業務的商譽、庫存和應收 / 應付賬目後，對死者的業務進行準確估值。在這方面，註冊會計師的技能無疑是非常寶貴。

### 總結

歸根結底，遺產管理人對遺產和所有遺產受益人負有責任。因此，找到擁有配合案件所需技能的人選是非常重要的。雖然當事人可以同時提名註冊會計師和律師共同管理遺產，但務必注意此決定會產生的費用。在大多數情況下，最好視乎遺產需要更多法律知識或財務事實調查，以決定委相關人士。儘管遺產可能在兩方面均有涉及，專業遺產管理人可聘請律師或註冊會計師只處理某些事務，以便更具成本效益地處理遺產。以下是註冊會計師及律師各自的部分優點：

2,230 萬港元的遺產，法院裁定由律師擔任遺產管理人比註冊會計師更合適，因為該筆遺產牽涉很多問題，並需要律師的法律專業知識。因此，被委任的遺產管理人必須：

1. 了解當事人約定的家庭安排；
2. 確定已故母親具有爭議的遺產；
3. 確定已故父親的尚未管理的遺產，而該筆遺產屬於母親遺產的一部分；及
4. 處理正在進行的訴訟。

*Ren Micky v Fung Kung Kuen and Others* [2022] HKCFI 2385 一案中，法院也

必須決定委任律師或註冊會計師來管理遺產。最終，法院行使酌情權委任了律師而非註冊會計師，原因是：

1. 有關遺產的管理相對簡單直接；及
2. 案件具有爭議性，且當事人正在進行訴訟，故由律師擔任遺產管理人更為合適。

正如法院在判決的第 27 和 34 段所說，「雖然註冊會計師可能在擬備賬目和一般審計方面更有經驗……毫無疑問，擔任遺產管理人的律師擁有更多親自上庭出席聆訊的經驗」。

相反，註冊會計師熟悉分析、理解和

註冊會計師	律師
<ul style="list-style-type: none"> <li>• 透過法務會計來追蹤和識別缺失 / 被挪用的資產</li> <li>• 計算缺失 / 被挪用資產的價值</li> <li>• 為複雜的財產備存準確的賬目和記錄，尤其是涉及事務的財產</li> </ul>	<ul style="list-style-type: none"> <li>• 處理正在進行或潛在的訴訟</li> <li>• 處理涉及法律協議的遺產（例如和解協議、家庭安排等）</li> <li>• 處理遺產管理中的複雜法律問題，如牽涉複雜問題的授予書申請和確定遺產資產</li> <li>• 處理信託資產</li> <li>• 在不損害雙方利益的前設下，指引雙方進行討論和調解</li> <li>• 適當時在法庭訴訟中承辦及代表遺產</li> <li>• 有處理和出售地房產的經驗</li> </ul>