



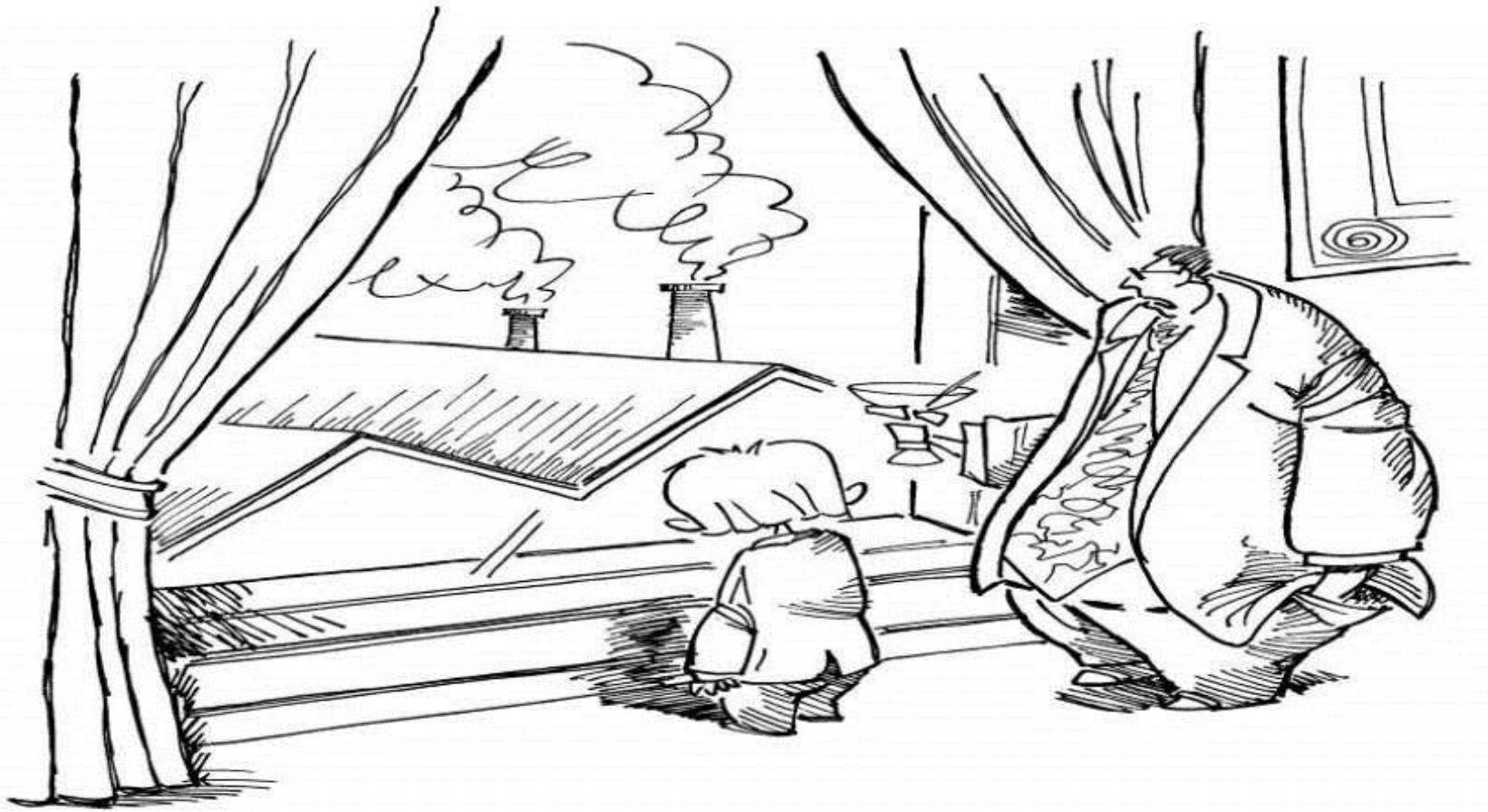
Responsible asset preservation divorce and succession planning

19 September 2016 IBA: Washington DC – Family Committee – Marcus Dearle



Setting the scene

- London divorce capital of Europe
- Hong Kong divorce capital of Asia
- But we will be looking at the risk of family discord generally: not just divorce
- We will be looking at succession planning generally
- Necessary to show the cartoon



"Someday, son, 50% of this will belong to your ex-wife."

Setting the scene

- A unique problem?
 - The Hong Kong "hook" of "substantial connection"
 - **Important:** need for advisers to ensure that Hong Kong recognised PNA's are in place for parties who are not residing or domiciled in Hong Kong

Setting the scene

- Responsible
- Cutting edge
- Divorce/forum shopping and...
- Succession planning strategies
- For example with the use of....

Setting the scene

- Pre-
- Post-
- Nuptial agreements
- Dynastic trust planning
- Corporate structuring
- Limiting the risks

Setting the scene

- Technical top tips
- But essential to ascertain what do clients/intermediaries want
- Trusted adviser role

Our speakers

- Joshua Rubenstein (New York)
- Anna Borring (Brazil)
- Olga Boltenko (Zurich/Russian Federation)

Overview

- Divorce was cheaper in the old days in England and Hong Kong: the recipient's 'reasonable requirements' capped his / her claims: usually a house, and a capitalised income fund: could be a small fraction of the wealth
- Hong Kong and England are now two of the world's most generous jurisdictions for the financially weaker spouse
- Important to plan and think internationally...

But it's also important to think outside the box internationally...not just on financial issues...

- A party might want to ensure that a divorce takes place in New York for financial reasons and succeeds....only to find the financially stronger wife (say) wishes to obtain leave to remove the children to England and finds she will not be allowed to do so...

Overview: Hong Kong divorce capital of Asia?

- Relevance of English cases?
- Hong Kong Courts tend to follow English decisions...
- *White v White (2000)* [England] ~ the new 'Yardstick of Equality': 'reasonable requirements' held to be discriminatory to homemakers (frequently women)
- *DD v LKW (2008)* [Hong Kong] effectively bringing *White* into Hong Kong case law: upheld by the Court of Final Appeal 2010 as *LKW v DD*
- The Hong Kong jurisdictional "hook" of substantial connection (need for families not based in Hong Kong to seek advice)

How can assets be protected?

- Not marrying
- Even if don't marry, keep assets separate and formally document percentage shares in any jointly owned property
- Cohabitation rights in some jurisdictions
- Use of cohabitation agreements

How can assets be protected?

- If a HNW or UHNW client is about to marry, he/she should follow these important rules:
 - Always have a proper pre- or post-nup
 - Consider “dynastic” trust planning
 - Choose the appropriate property regime (if they live, or marry, in a country where they have them)
 - It’s where they get divorced that counts
 - Avoid having unnecessary homes in jurisdictions where divorce is expensive
 - Discourage/prevent the other spouse from living a jet set life (the wealthier spouse should be cautious with expenditure); set a sensible household budget
 - GET ALL LEGAL PAPERWORK IN ORDER: RESPONSIBLE ASSET PRESERVATION ARRANGEMENTS. HAVE PAPERWORK.

How can assets be protected?

- Don't encourage a spouse to give up his / her career
- Formally document the percentage ownership of spouses' joint assets, if any are acquired
- Don't inadvertently 'nuptialise' trusts if you're a trustee
- Beware of trustees becoming 'puppets': need for professional trustees
- If things go wrong, take expert legal advice early, as time is frequently of the essence.

Pre-Nups

- They are always in the interests of the wealthier party
- They are almost never in the interests of the financially weaker party
- How and when to raise the difficult issue with children? Who should raise it? Do's and don't's..
- Cancellation of engagements?
- Doing it because Dad says so and the later secret cancellation of the pre-nup

Radmacher 2010

- 2 July 2010 Supreme Court [England]
- Significantly bolsters the effect of pre-nups in England
- Financial provision needs to be “fair”

SPH v SA - Court of Final Appeal Hong Kong

- *"In the view of this court the principles enunciated in Radmacher v Granatino should also be regarded as the law in Hong Kong"*
- *"The rule that agreements providing for the future separation of the parties to the marriage were contrary to public policy was obsolete and no longer applied"*

SPH v SA - Court of Final Appeal Hong Kong

- *"The court should give weight to an agreement, made between a couple prior to and contemplation of their marriage, as to the manner in which their financial affairs should be regulated in the event of their separation in circumstances where it was fair to do so; in appropriate circumstances the court could hold the parties to the agreement even when the result would be different from that which the court would otherwise have ordered"*
- *"On an application for ancillary relief the court should apply the same principles when considering ante-nuptial agreements as it applied post-nuptial agreements"*

SPH v SA - Court of Final Appeal Hong Kong June 2014

- *"In particular an agreement would carry full weight only if each party had entered into it of his own free will, without undue influence or pressure, having all the information material to his or her decision to enter into the agreement and intending that it should be effective to govern the financial consequences of the marriage coming to an end; and the court should give effect to an agreement which is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to the agreement."*

SPH v SA - Court of Final Appeal Hong Kong June 2014

- *"Enforcement of the agreement could be rendered unfair by the occurrence of contingencies unforeseen at the time of the agreement or where, in the circumstances prevailing at the time of separation, one partner would be left in a predicament of real need while the other enjoyed a sufficiency."*

Recent case law on Pre-Nups from England

- *W v W* (High Court 10 June 2015) Fair to hold the husband to the parties' agreement unless needs should dictate a different outcome
- *Hopkins v Hopkins* (High Court 26 March 2015) Fair to hold the wife to the terms of the post-nup

The safeguards for a Pre-Nup to have a chance of working

- Independent legal advice for both parties in **all** relevant jurisdictions
- Financial disclosure to be provided by both parties (still sensible to provide: but note changes in England: “Qualifying Nuptial Arrangements”)
- No duress or other pressure on either party
- Timing: Best practice - pre-nup should be signed at least 21 days before the wedding
- Terms must be fair (note contrast with some US states, where no need for a pre-nups terms to be reasonable)

Pre-Nups in Singapore?

- *TX v TR (2009)* [Singapore] Enforcement of a Netherlands pre-nuptial contract
- *Surindar v Sita Jaswant Kaur* (July 2014) – post-nup given 'significant weight'

Trusts: the court's armoury

- **Variation** of 'Ante' or 'Post' nuptial trusts, to include potentially:
 - Change proper law of trust
 - Adding or removal of beneficiaries
 - Alteration of terms of trust
- Even 'non-nuptial' trusts can be treated as a divorcing party's **financial resource**
- Tailored documents preferable
- Trusts can be very **effective asset protection vehicles**

Poon

Court of Final Appeal Hong Kong: HSBC Trustee

- 23 and 24 June 2014
- Jersey Trust: value HK\$1.56 billion (US\$200 million)
- Issue: *"What should be the proper approach in dealing with discretionary trusts and nuptial settlements...."*
- A resource case..although there were variation issues..there was no need to go to variation...resource arguments were more than sufficient

Court of Final Appeal Hong Kong: HSBC Trustee

- 2 KEY ISSUES:
- In future the trustee in a divorce and trust case will need to offer an answer to the Charman test rather than wait to be asked: Charman test *"if H were to request the trustee to advance the whole or part of the capital or income of the trust to him, the trustee, acting in accordance with its duties, would on the balance of probabilities, be likely to accede to that request."*
- Cannot argue a beneficiary (say a daughter) has a notional interest: argument worked at 1st Instance and in the Court of Appeal – if *"the trust deed expressly authorises the trustee in its absolute discretion to appoint capital and income to any one member of the class of eligible objects to **the exclusion of others.**"*

Management and administration

- Independent consideration of requests for funds: Professional trustees
- Proper trustee records - record motives
- Avoid 'rubber stamping'
- Commonly sought information and documentation from trustees in a trust and divorce case: letters of wishes, trust deeds, deeds of variation, trust accounts: possibly correspondence between settlor and trustees and beneficiaries and trustees

Avoiding Nuptial Settlements?

- Omit spouses from potential class of beneficiaries
- Avoid the potential for variations to add spouses

Recent case law on trusts from England

- *KG v LG* (High Court 8 July 2015) 2 trusts for the benefit of husband and children not disclosed: disclosure "woeful"
- *Joy v Joy-Morancho* (High Court 28 August 2015): husband's position and that of the trustee an "elaborate charade". Deed executed excluding husband as beneficiary
- *P v P* (High Court 6 May 2015) court varied the trust (last resort)

Jurisdiction / Forum shopping

- Preferable: Foreign law (Cayman, Bahamas, Bermuda, BVI, Isle of Man)
- Preferable: Foreign trustees
- Preferable: Foreign Assets
- *ML v YJ (2009)*: Hong Kong v PRC 17 June 2009..the classic forum shopping case – Hong Kong v PRC – HK\$400 million (US\$51 million) saved
- Recent case: *JEK v LCYP (2015)*: 13 August 2015 Hong Kong v New Jersey USA – Use of stays - Habitual Residence - Court of Appeal Hong Kong

Corporate Structures

- *Prest v Petrodel Resources Limited and others [2013] UKSC 34*
- Good news for the controlling shareholder of companies
- Piercing the corporate veil?
- Resulting trusts: former matrimonial home

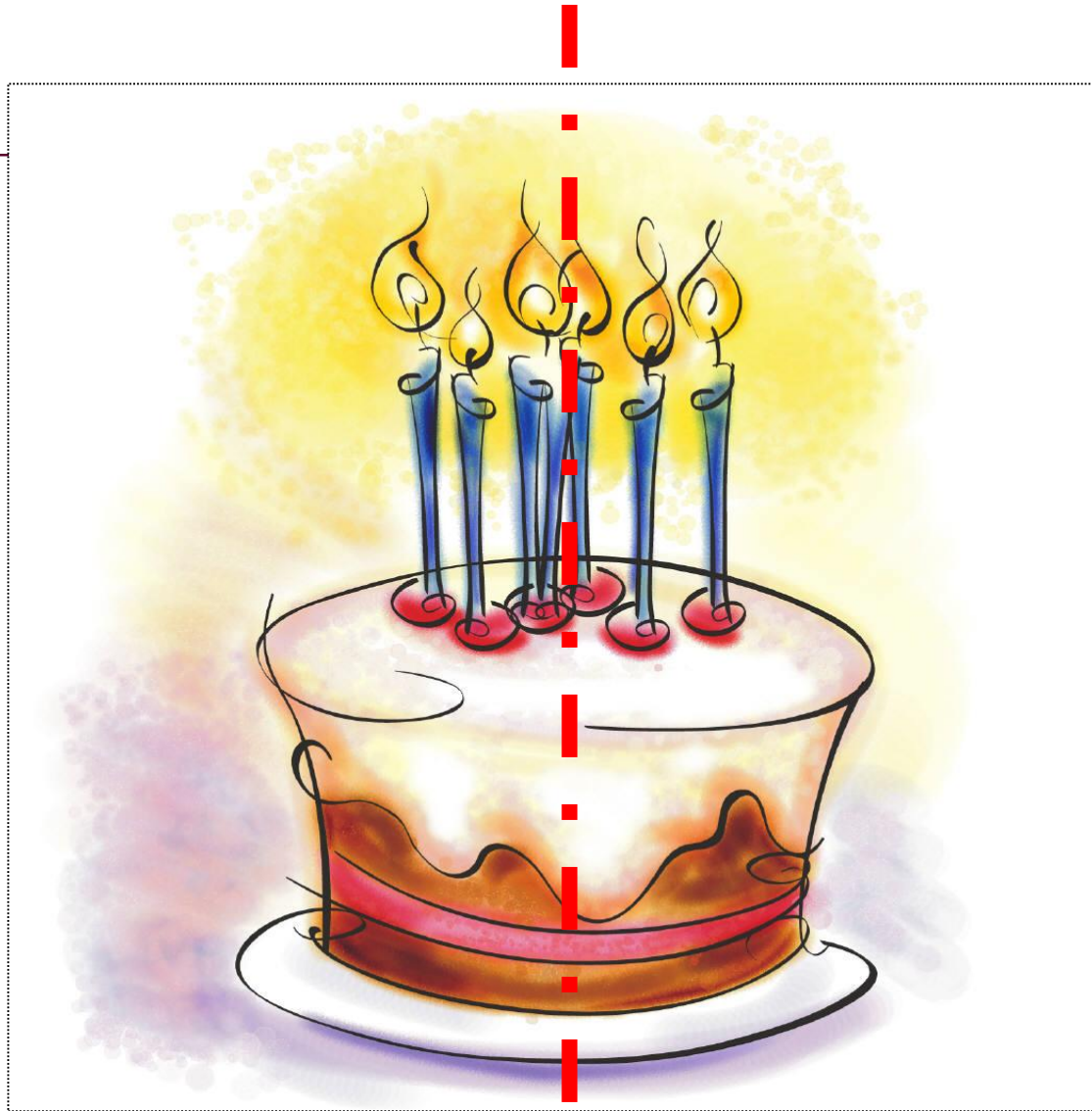
Convertible loan agreements

- A new asset protection vehicle?
- The "*Framework Agreement*" in Florence Tsang case

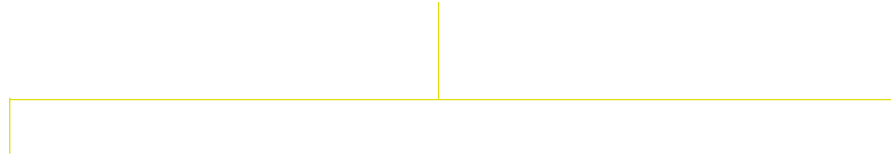
Consider putting a proportion of the assets into
'Dynastic' Trust(s)

IN TANDEM with pre-nuptial agreements

- Non self-settled trusts



Family Wealth (Say) US\$100 Million



50% in 'Dynastic' Trust

50% NOT in Trust

Hong Kong divorce risk: 50/50 division

∴ 25% of wealth, rather than
50%, at risk

1. Non self-settled
[Settlor is NOT a beneficiary]
2. With a carefully crafted letter of wishes – confirming restriction of distributions - to benefit future generations only – so it is genuinely dynastic in nature
3. More likely to be ring-fenced from the matrimonial pot for division in a Hong Kong divorce

Brexit

- End of Brussels Regulations?
- End of first past the post
- Forum Non Conveniens



This document provides a general summary only and is not intended to be comprehensive. Specific legal advice should always be sought in relation to the particular facts of a given situation.

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