



**Boughton Peterson
Yang Anderson**
Solicitors, Agents For Trademarks
寶德楊律師行



中倫律師事務所
ZHONG LUN LAW FIRM

Careful What You Wish For Hong Kong Game-changer Case on Letter of Wishes

Clifford Ng
cliffordng@zhonglun.com
+852 9300 8430

In the recent case *PLTO v KLK*¹, the Hong Kong Court of Appeal upheld a lower court decision awarding the wife one-third of the assets of a discretionary trust (the “**Family Trust**”) in accordance with the letter of wishes of her husband, the Settlor. This would be the first case in Hong Kong to give this much weight to a letter of wishes. It may be a case of bad facts making bad law but it is critical to planning for families to understand what transpired in the court reaching this decision.

The case involves a long marriage where the parties married in 1968 and divorce proceedings initiated in 2009. The husband and wife have a grown daughter (the “**Only Child**”) with two other children (daughter and son) having passed away in 1995 and 2000. On the husband’s petition based on two year separation, a divorce decree nisi was pronounced on 26 May 2009 and made absolute on 1 September 2010.

On 14 May 2010, the husband made his fourth letter of wishes in relation to the Family Trust (the “**2010 LoW**”) in which he expressed his wish to have the Family Trust assets divided into three equal parts for the benefit of himself, his wife and the Only Child. The 2010 LoW also stated that “*In considering whether and how to exercise your powers and discretions, it is my wish that you should consult with me during my lifetime and thereafter with my daughter, [K]. I would also like you to consider any suggestions put to you by me or, after my death, by [K] and, if you consider them wise, to act upon such suggestions.*” The husband’s prior letters of wishes dated 6 November 2000 and repeated in 17 March 2005 state that “*in considering whether and how to exercise your [the Trustee’s] powers and discretions, it is my wish that you should consult with me during my lifetime and thereafter with my daughter... I would also like you to consider any suggestions put to you by me or, after my death, jointly by wife and my daughter (or by the survivor of them) and, if you consider them wise, to act upon such suggestions.*” The 2010 LoW, therefore, represented a significant change in the Settlor husband’s wishes in relation to the Family Trust fund.

At trial, the Court of First Instance regarded that each of the husband, wife and the Only Child notionally had a one-third interest in the Family Trust. In the Court of Appeal, the wife argued

¹ *PLTO v. KLK and another* [2012] 2 HKLRD 1089

that the whole of the Family Trust should be taken into account as a matrimonial asset and not just two-thirds of it, and that the 2010 LoW was a mere material and tactical change of position of the husband. She claimed that court documents filed by the husband (e.g. Form E dated 14 July 2009, his Answer dated 19 September 2009 and his evidence) showed that the husband regarded himself as the sole beneficiary of the Family Trust.

The Court of Appeal rejected the wife's contention and took the view that the husband accepted that the Family Trust should be taken into account but only in a way that would not adversely affect the Only Child's interest. The Court noted that it was natural for the husband to keep the Only Child's interest away from the matrimonial dispute as she is the couple's only surviving child and heir apparent to the husband's business. The Court of Appeal further stated that "*The husband's avowed wish that the Family Trust is for the benefit of himself, the wife and K is a matter that the Judge can take into account when he considered the extent of the resource that will likely be available.*" Although interests under the Family Trust are not fixed, the Court of Appeal found that the Trustee, in exercising its duty of safeguarding the interests of all beneficiaries, would not countenance any disposition which results in the Only Child's interest being diluted below one-third. Accordingly, the Court of Appeal upheld the judgment at Trial and held that only two-thirds of the assets of the Family Trust should be treated as distributable matrimonial assets.

In reaching its ruling, the Court of Appeal referred to s.7(1)(a) of the Matrimonial Proceedings and Property Ordinance (Cap 192) which requires the Court to take into account the "*financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future*". As the subject financial resources, i.e. the Family Trust assets, are owned by a third party (the Trustee), the Court of Appeal referred to two factual questions raised in the Hong Kong Court of Final Appeal's case of *KEWS v NCHC*²:

- (1) *What is the extent of the financial assistance provided by the third party to the husband or wife?*
- (2) *What is the likelihood of such financial assistance continuing in the foreseeable future?*

The Court of Appeal referred to the English Court of Appeal *Charman* case³ where the English Court considered whether all of the assets in a discretionary trust set up by the husband should be included as the parties' assets in divorce proceedings. In *Charman*, the Court noted that although the beneficiaries had no ownership interest in discretionary trust assets, the Court is entitled to take into account the resources in the discretionary trust. To that end, the English Court stated that the right question to ask is "*whether, if the husband*

² *KEWS v. NCHC* [2013] 2 HKLRD 314

³ *Charman v. Charman* [2006] 1 WLR 1053

were to request it [the trustees] to advance the whole (or part) of the capital of the trust to him, the trustee would be likely to do so.”

In *Charman*, after the breakdown of the marriage, the husband wrote a letter of wishes expressing his wish to “*have the fullest possible access to the capital and income of the Settlement*”. The English Court ruled the assets in the trust as the couple’s assets as, if so required by the husband, the trustee would be likely to advance all the assets of the trust to him.

In the present case, the Court of Appeal referred to the Trial Court statement “*I am disposed to hold that in 1995, vis-à-vis his wife and his three children, the husband’s motives were entirely straightforward. He wishes to provide for all of them in the most effective way that ensured their futures. Since the breakdown of the marriage, I do not believe that his motives have changed, certainly not if one considers his various letters of wishes to the trustee.*” The Trial Court further distinguished the present case from *Charman* by stating that “*Whilst, of course, there are similarities between Mr. Charman’s relationship to his Bermuda trust and the husband’s in this case, those similarities do not produce the same reality. Mr. Charman’s behavior was completely different to that of this husband who has always viewed his responsibilities to his wife (even after their divorce) and his children, now only [K], with the utmost concern for their best interests.*”

We understand that the wife is applying for leave to appeal to the Court of Final Appeal. The result could be that a strong (if not sole) basis in deciding on the entitlement of the wife is the non-binding letters of wishes of the Settlor. This Court of Appeal case should be carefully and, perhaps, narrowly considered. It had the benefit of having a trust that has run for many years and a series of letters of wishes that showed a clear change of the Settlor’s intentions. Reading this case narrowly, one can limit the precedent to assets available to divorcing spouses. On a broader view, the precedent can be applicable to creditors, beneficiaries, or other parties interested in the assets of the trust, the settlor, beneficiaries or even potential but unstated beneficiaries.

This decision shows the importance of careful drafting of trust documents including letters of wishes. However, the case sets a dangerous precedent that courts will take into account the wishes set out in letters of wishes or other documents intended to be non-binding. This underscores the importance of careful drafting of even non-binding trust documents and records.

This memorandum is intended to give a brief overview of the subject matter and to provide general guidance only. It is not intended to be and does not constitute legal advice. Legal advice should be sought before taking any action.

Boughton Peterson Yang Anderson and Zhong Lun Law Firm have over 800 lawyers throughout major centres in China and major global financial centres. Our tax and private practices are leaders among firms in Asia and our lawyers are recognized by Chambers and other institutions as the leaders in their profession. If you have any questions on the above, please contact:

Felicia Law
felicialaw@zhonglun.com
+852 2298 7662

Kevin Lee
kevinlee@zhonglun.com
+852 2298 7618

Clifford Ng
cliffordng@zhonglun.com
+852 2298 7603
+852 9300 8430

Dorothy Siron
dorothysiron@zhonglun.com
+852 2298 7620