

September 29, 2020

## HONG KONG CASE UPDATE: NG HON LAM EDGAR V SECRETARY FOR JUSTICE

### *Exclusion of Spouses in Same-Sex Marriages from Certain Legal Entitlements and Benefits Relating to Intestacy and Inheritance Held Unconstitutional*

To Our Clients and Friends:

On 18 September 2020, the Court of First Instance (CFI) of the High Court of Hong Kong ruled in *Ng Hon Lam Edgar v Secretary for Justice* [2020] HKCFI 2412 (*Ng* case) that the exclusion of spouses in same-sex marriages from the legal entitlements and benefits that are accorded to spouses in opposite-sex marriages under the Intestates' Estates Ordinance (Cap 73) (IEO) and the Inheritance (Provision for Family and Dependents) Ordinance (Cap 481) (IPO) constitutes unlawful discrimination on the ground of sexual orientation.

The precise form of relief – being a declaration and remedial interpretation of the expressions “valid marriage”, “husband” and “wife” in the IEO and the IPO – remains to be seen.[1]

This CFI judgment (Judgment) may have potentially profound implications and ramifications on the inheritance, estate and succession planning for members of the LGBT community residing in Hong Kong. However, same-sex marriage remains not recognized under Hong Kong law and it appears that the Court is only prepared to consider granting appropriate relief (including an updated interpretation of any relevant legislation) upon consideration of the specific subject matter and in the relevant context. In this connection, please see our Client Alert “Hong Kong Case Update: *Sham Tsz Kit v Secretary for Justice*” concerning the CFI judgment also handed down on 18 September 2020 rejecting a judicial review application which sought, *inter alia*, a declaration that, in so far as the laws of Hong Kong do not recognize foreign same-sex marriage, they are unconstitutional.

### **BACKGROUND**

The Judgment was handed down in respect of the judicial review brought by Mr Edgar Ng challenging the definitions of “valid marriage”, “husband” and “wife” under ss 2 and 3 of the IEO and s 2 of the IPO (Marriage Provisions).

Mr Ng is a male Hong Kong permanent resident, who married another male Hong Kong permanent resident “H” in London in January 2017. Following their marriage in London, the couple had a blessing service at a church in Hong Kong.[2]

In April 2018, Mr Ng purchased a flat under the Home Ownership Scheme (HOS) to be used as the matrimonial home with H. However, since the same-sex marriage of Mr Ng and H is not recognised in

Hong Kong, H is unable to become a joint owner of the HOS flat with Mr Ng under the relevant HOS policy of the Housing Authority. Mr Ng is concerned that his properties, including the HOS flat, would not be passed to H under the IEO if he dies intestate.[3]

In June 2019, Mr Ng, through his solicitors, sought clarification from the Secretary for Justice as to whether same-sex marriages performed in accordance with the laws of foreign jurisdictions would be recognized by the Hong Kong government as marriages for the purpose of probate, inheritance and intestacy. The Secretary for Justice rejected the request on the basis that it was not a role of the Department of Justice to provide legal advice to private individuals or their solicitors.[4]

## **TWO-STAGE APPROACH – IS THERE UNLAWFUL DISCRIMINATION?**

In the *Ng* case, the CFI followed the decisions of the Court of Final Appeal (CFA) in *Leung Chun Kwong v Secretary for Civil Service* (2019) 22 HKCFAR 127 (*Leung* case) and *QT v Director of Immigration* (2018) 21 HKCFAR 324 (*QT* case) and adopted the following two-stage approach in determining whether there is unlawful discrimination.

- First, to determine whether there is differential treatment on a prohibited ground.
- Second, and only if differential treatment can be demonstrated, to examine whether differential treatment can be justified: it is not unlawful discrimination if the differential treatment can be justified; but if it cannot be justified, it constitutes unlawful discrimination.[5]

### **First stage - any differential treatment on a prohibited ground?**

To establish there is differential treatment, the complainant must show that:

- He or she has been treated less favourably than a person in a relevant comparator group.
- The reason for differential treatment is based on a prohibited ground, such as sexual orientation, race or religion.[6]

### **Second stage- is the differential treatment justified?**

Where differential treatment is established, the court then examines whether such differential treatment is justified by applying the “four-step justification test”,[7] which asks the following questions. If any of these questions is answered in the negative, the differential treatment cannot be justified.

- Does the differential treatment pursue a legitimate aim?
- Is the differential treatment rationally connected to that legitimate aim?
- Is the differential treatment no more than necessary to accomplish the legitimate aim?
- Has a reasonable balance been struck between the societal benefits arising from the application of differential treatment and the interference with the individual’s equality rights?

## THE DECISION

### **“Yes” to the first question: is there differential treatment on a prohibited ground?**

Having undertaken the above analysis, the CFI held that it is clear that differential treatment is being accorded to parties to a same-sex marriage and parties to an opposite-sex marriage for the purposes of the IEO and the IPO on the prohibited ground of sexual orientation.[8]

The CFI has identified the differential treatment in three main aspects:

#### Under the IEO

- The surviving spouse in a same-sex marriage are not accorded any legal entitlements and benefits that are enjoyed by the surviving spouse in an opposite-sex marriage under the IEO,[9] because the definition of “valid marriage” under s 3 of the IEO only covers an opposite-sex marriage (but not a same-sex marriage) and hence the surviving spouse to a same-sex marriage is not qualified as a “husband” or “wife” of the deceased under the IEO to enjoy the legal entitlements and benefits provided for in it.[10]

#### Under the IPO

- The surviving “husband” or “wife” in an opposite-sex marriage is entitled *without more* to apply for an order under s 4 of the IPO for financial provision; whilst the surviving spouse in a same-sex marriage may only make such application if he or she was being maintained, either wholly or substantially, by his or her spouse immediately before the death of the deceased.[11]
- Under the IPO, the surviving “husband” or “wife” in an opposite-sex marriage is entitled under the IPO to “*such financial provision as it would be reasonable in all the circumstances of the case for such a person to receive, whether or not that provision is required for his or her maintenance*” (emphases added). However, the surviving spouse in a same-sex marriage is only entitled to “*such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance*” (emphases added).[12]

### **“Yes” to the 1<sup>st</sup> step of the second question: the Marriage Provisions serve legitimate aims**

The CFI is satisfied that the Marriage Provisions serve the three broad legitimate aims as identified by the Secretary for Justice, namely:

- The Marriage Aim – “To support and uphold the integrity of the traditional institution of marriage in Hong Kong.”
- The Family Aim – To encourage opposite-sex unmarried couples to marry with a view to ensuring their spouses will be accorded spousal status or priority under inheritance law.

- The Coherence Aim (which the CFI considers to be simply a variation of the Marriage aim) – “To maintain and optimize the overall coherence, consistency and workability of the extensive and interlocking schemes of Hong Kong legislation that rest upon or otherwise involve the institution of marriage as recognised under domestic law and [article 37 of the Basic Law]”.<sup>[13]</sup>

## **“No” to the 2<sup>nd</sup> step of the second question: no rational connection**

However, the CFI is not satisfied that the differential treatment is rationally connected to the legitimate aims identified by the Secretary of Justice. The CFI points out that the relevant question to ask is whether the denial of benefits under the IEO or IPO to same-sex couples would promote the three legitimate aims, which the CFI answers in the negative.<sup>[14]</sup>

## **“No” to the 3<sup>rd</sup> step and “debatable” re the 4<sup>th</sup> step of the second question**

Having answered the 2<sup>nd</sup> step of the justification test in the negative, it is unnecessary to consider the third and fourth steps of the justification test. However, the CFI offers its view that, if it had become necessary for it to do so, it would have found that the differential treatment cannot pass the 3<sup>rd</sup> step of the justification test, which asks whether the differential treatment is no more than necessary to accomplish the legitimate aim; whilst it is debatable as to whether it can pass the 4<sup>th</sup> step.<sup>[15]</sup>

## **Conclusion**

In light of the above, the CFI allowed the judicial review sought by Mr Ng and ordered that a declaration and remedial interpretation of the expressions “valid marriage”, “husband” and “wife” in the IEO and IPO be granted as the remedy. The form of such declaration and remedial interpretation remains to be seen as they are to be formulated by the parties for the court’s approval.<sup>[16]</sup>

## **COMMENT**

The Judgment may have important ramifications and implications on the inheritance, estate and succession planning for members of the LGBT community residing in Hong Kong, and will need to be taken into account in any dispute concerning the probate and inheritance of a deceased individual who was in a same-sex marriage immediately before his or her passing.

Alongside recent decisions of the Hong Kong court concerning rights of same-sex married couples, including the recent CFA decisions in the *Leung* case (9 June 2019) and the *QT* case (4 July 2018), and the CFI decision in *Infinger, Nick v The Hong Kong Housing Authority* [2020] 1 HKLRD 1188 (4 March 2020), the Judgment made in the *Ng* case is no doubt a significant decision in Hong Kong in advancing equality of rights for couples in same-sex marriages. However, it is apparent that the Hong Kong court is not prepared to grant a wholesale declaration that non-recognition of same-sex marriages is unconstitutional, and prefers to limit its analysis to the specific context that is before it. Please see our Client Alert “Hong Kong Case Update: *Sham Tsz Kit v Secretary for Justice*”.

The Judgment also provides important takeaway for prospective judicial review applicants – that one should consider carefully his/her standing and limit any declaratory relief sought accordingly. Mr Ng

suffered costs consequences as he has sought as part of his declaratory relief to cover also persons in civil partnership or civil union, which he has no standing to do so as he has not entered into any such civil partnership or union.<sup>[17]</sup> Mr Ng is awarded only 90% of his costs to reflect the fact that he has failed to challenge the Marriage Provisions in so far as they concern civil partnerships and civil unions.<sup>[18]</sup>

The Honourable Mr Justice Chow also remarks that, in future judicial review applications, legal advisers to applicants should carefully consider and concentrate on the real grounds of judicial review, rather than putting in as many grounds of review that simply do not add any substance, with a view to avoiding unnecessary time and costs being spent.<sup>[19]</sup>

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[1] The CFI directed the parties to submit an agreed form of order for the court's approval within 21 days from the date of judgment, failing which a combined draft order with differences between the parties clearly indicated shall be submitted within 28 days of the Judgment (see § 53, the Judgment). The Judgment may also be subject to appeal.

[2] §§ 3 and 4, the Judgment

[3] §§ 6 and 7, the Judgment

[4] § 8, the Judgment.

[5] § 32, the Judgment.

[6] §§ 34 and 35, the Judgment.

[7] § 39 of the Judgment, which cites the explanation of the four-step justification test given by the CFA in the *Leung* case.

[8] §§ 15, 25, 33 and 38, the Judgment. The CFI also rejected the arguments put forward on behalf of the Secretary for Justice that same-sex married couples and opposite-sex married couples are not in a comparable position for the purposes of IEO and the IPO (see §37 of the Judgment).

[9] These include the right of a surviving spouse in an opposite-sex marriage to acquire the premises in which he or she was residing at the time of the intestate's death (see § 13 of the Judgment), and to take the deceased's "personal chattels" (as defined in the IEO) and the whole or part of the residuary estate of the deceased depending on the circumstances (see § 12 of the Judgment).

[10] §§ 12 to 15, the Judgment.

[11] § 24(1), the Judgment.

[12] § 24(2), the Judgment.

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[13] §§ 40 and 41, the Judgment.

[14] §§ 42 to 44, the Judgment.

[15] §§ 46 and 47, the Judgment.

[16] §§ 52 and 53, the Judgment.

[17] §§ 51 and 53, the Judgment.

[18] §§ 51 and 54, the Judgment.

[19] § 50, the Judgment.



*Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, or the authors and the following lawyers in the Litigation Practice Group of the firm in Hong Kong:*

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