

PRESS RELEASE

Court of Final Appeal ruled in favour of same-sex married couple equality rights in the context of public housing and inheritance laws

FACV 3/2024 – *Ng Hon Lam Edgar (Edgar) & Li Yik Ho (Henry) v Hong Kong Housing Authority*
FACV 4/2024 – *Ng Hon Lam Edgar (Edgar) & Li Yik Ho (Henry) v Secretary for Justice*

This morning, the Court of Final Appeal (“CFA”) handed down its judgments in the above cases, ruling in favour of same-sex married couples.

In 2019, Edgar commenced two judicial review applications challenging the discriminatory policy of Housing Authority (“HA”) and the statutory provisions in relation to intestacy inheritance laws in the hopes of protecting Henry’s interests as his spouse. Throughout the litigation, Edgar and Henry had welcomed victories, but they had also been put in some of the darkest moments in their lives. Edgar unfortunately passed away amidst the proceedings in December 2020, rendering the issues in these cases real and imminent. While suffering from the unimaginable pain of losing the love of his life, Henry took up Edgar’s fight for equality and continued the proceedings.

Today’s judgments are bittersweet. Notwithstanding that the judgments are in favour of Edgar and Henry, with the passing of Edgar, Edgar and Henry can no longer enjoy the equal rights derived from the judgments as a married couple. Owing to Edgar and Henry’s bravery, efforts and persistence, we have obtained the following positive rulings from the CFA:

FACV 3/2024

- (1) HA’s refusal to recognise same-sex spouses married overseas as “*spouse*” or other “*family members*” under the addition and transfer policies of the Home Ownership Scheme (“HOS”) is unconstitutional and amounts to unlawful discrimination on the basis of sexual orientation.
- (2) Article 36 of the Basic Law does not and cannot be used to protect the exclusivity of opposite-sex spouses in accessing the challenged housing benefits. There is no warrant to read a Basic Law guarantee on pre-existing social welfare rights as trumping the constitutional requirement of equality before the law under Article 25 of the Basic Law and non-discrimination under Article 22 of the Bill of Rights.
- (3) Article 37 of the Basic Law is not concerned with legal rights and obligations that are usually based on or associated with the status of marriage. It cannot be used to remove Government policies from purview of the equality provisions.
- (4) Same-sex married spouses share equivalent interdependent and interpersonal relationships as opposite-sex married spouses do and their marriages share the same characteristics of publicity and exclusivity. A same-sex couple’s “*inherent procreative potential*”, as posited by HA in their arguments, does not impact the HA’s housing policies, which, even as they currently stand, do not differentiate between heterosexual married couples in terms of whether they have children, or are planning to have children.
- (5) Justifications of an economic or social nature typically require evidential substantiation. The HA has not adduced any evidence at all to back its assertions that opposite-sex couples would be

impacted if its exclusionary policies were relaxed. HA cannot rely on speculative assertion alone to justify its policies.

- (6) The HA's incoherence argument cannot stand. If HA's argument that its addition and transfer policies cannot be disturbed as they form parts of a broader framework were correct, it would mean that an applicant cannot challenge any component of a policy unless he had standing and reason to challenge the policy as a whole, no matter the severity of its effects. This is not right. Maintaining administrative coherence within HA's own policies does not and cannot serve as a justification of the policy itself.

FACV 4/2024

- (1) The exclusion of same-sex spouses from the statutory definitions of "*valid marriage*", "*husband*" and "*wife*" under the Intestate's Estate Ordinance, Cap. 73 ("**IEO**") and the Inheritance (Provision for Family and Dependants) Ordinance, Cap. 481 ("**IPO**") is unconstitutional and amounts to unlawful discrimination on the basis of sexual orientation.
- (2) Same-sex married couples are comparable to opposite-sex married couples as they share the same readily identifiable characteristics of publicity and exclusivity. There is no reason to treat the status of marriage as determinative for the purposes of the IEO or IPO. With respect to the distribution of the deceased's residuary estate to his relatives, logic would dictate that a surviving same-sex spouse should be included as a beneficiary due to the close inter-personal relationship between a married same-sex couple. The relations of the deceased under IPO extend to those other than surviving spouses and do not depend on the relationship or status of marriage.
- (3) The Secretary for Justice ("**SJ**")'s coherence argument is inherently flawed and simply does not exist. The definitions of "*valid marriage*" in IEO and IPO differ from those in the Marriage Ordinance, Cap. 181, Marriage Reform Ordinance, Cap. 178 and the Matrimonial Causes Ordinance, Cap. 179. The definition of "*valid marriage*" under IEO includes foreign marriages and imposes no obligation on the deceased to maintain his or her married partner during their lifetime. Meanwhile, IPO includes "*good faith void marriages*". Further, IEO and IPO include classes of beneficiaries to whom the deceased owed no legal obligation to maintain, such as parents and siblings.
- (4) SJ's assumption that the coherence aim is accepted as a legitimate aim appears to be based on a faulty reading of the Court of Appeal's judgment. It has been accepted in certain contexts, that to achieve the statutory purposes in question, same-sex relationships should be recognized as indistinguishable from opposite-sex marriages. It follows that the differential treatment is not rationally connected with any established legitimate aim and SJ fails to justify the discrimination arising.

In light of these judgments, Henry has written a letter to his late husband, Edgar. With his consent, a copy of Henry's letter to Edgar is attached to this Press Release.

Our firm sincerely thank Edgar and Henry for taking up the battle for equal rights. No one should be discriminated on the basis of their sexual orientation. It is not the first time that the Court of Final Appeal has affirmed that the principle of equality before the law is enshrined in the Basic Law and

the Hong Kong Bill of Rights, and unlawful discrimination on the basis of sexual orientation is fundamentally unacceptable and unconstitutional. Victims of discriminatory policies, statutory provisions or acts should not have the harsh burden of bringing legal proceedings in order to receive equal rights. It is imperative that the Government and other public authorities fulfil their constitutional duty and take timely, proactive actions to ensure and respect everyone's fundamental right to freedom from discrimination regardless of their sexual orientation.

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By Daly & Associates
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翰林：

2019年，你提出司法覆核，原意是為了保護我，好讓我們可以堂堂正正地住在我們自己的家裡，亦免到有天我失去至親，還要流離失所。

5年多後的今天，你不在了。過往的日子，我活在傷痛中，但我沒有放棄過你追求平等的初衷，一直繼續努力經營我們的案件，努力捍衛我們由始至終都是一家人的事實。

沒有了你在旁，政府及房署在案件中的論調總是好像變得更加殘忍，令我感到更加難受。

走到今天，2024年11月26日，我們的案件終於劃上句號了。我感激法庭肯定你的苦，肯定你對同志平權的付出。

希望你還可以聽到大家對你的肯定。

希望我沒有辜負了你的心血。

貓貓同我一直在等與你同聚的一天。

常念

未亡人

李亦豪