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## *Succession planning for your shares in a BVI company*

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*The BVI offers a number of effective succession planning options for shareholders in a BVI companies.*

*Death and taxes, despite our best laid plans, are still with us. While trying to legally reduce your tax liability has become politically unacceptable and unfortunately, there is still not much we can do about death, there are however many options that you should consider in order to properly deal with your assets when you are no longer here. As uncomfortable as this may be everyone who owns shares in a British Virgin Islands (BVI) company should consider what they want to happen to those shares when they are no longer around or if they become unable to look after matters for themselves.*

This is particularly important as many BVI companies have individual shareholders and more often than not, there is only a single shareholder. We should plan while time is on our side so the gift that we intended to leave for those who come after us does not turn into a burden.

In this article we will take a brief look at succession to shares in a BVI business company held by an individual shareholder and some planning options for the future.

### **Succession Basics**

First let us look at the process which applies in the event a succession plan has not been made.

As a matter of BVI law, shares in a BVI company are BVI “situs” assets or are deemed to be located in the BVI. Where a shareholder of a BVI company dies, her shares cannot be validly transmitted to her heirs until a grant of probate or grant of letters of administration has been obtained from the BVI court or alternatively, her foreign grant of probate or letters of administration has been re-sealed by the BVI court (together referred to as “**Grants**”).

While a foreign court may decide on the question of beneficial entitlement, a Grant from the BVI court will be needed in order to effect the formal transfer of the share into the intended beneficiary's name. A grant of probate from the BVI court is needed for a deceased who left a will covering BVI assets while a grant of letters of administration from the BVI court will be required where a deceased died intestate, i.e. without a will.

Things get a bit more complicated where there is an application for letters of administration, as this is governed by the laws of the domicile of the deceased at the time of her death as rules of priority on intestacy will determine who is entitled to make the application. This complicates things even further as domicile is not the same as nationality or residence but is decided under general law, which means it must be interpreted according to previous rulings of the courts of that particular place. Re-sealing of foreign grant of probate or letters of administration by the BVI court is needed where a foreign grant of probate or letters of administration was obtained by the estate of the deceased shareholder. Grants from foreign courts will only be re-sealed in the BVI in very limited circumstances and include grants from British courts and the courts of other British dependent territories. Where re-sealing is not an option, an application for a fresh grant of probate or letters of administration will have to be made to the BVI courts.

### **Delay and Cost**

The process of obtaining a grant from the BVI court typically takes three to six months but may be longer where the estate is contested. Additionally, an application for a grant may be quite costly and may run as high as 1 per cent to 2 per cent of the value of the shares and more again for contested estates. The BVI court itself is fairly efficient and grant applications are usually handled in about six to eight weeks. Delays usually arise where the applicant has to collect all the necessary supporting documents and will become more time consuming where documents have to be translated or where the deceased died in a jurisdiction which has a different legal system, such as a civil law or Islamic jurisdiction where requirements of the BVI court may not translate exactly. Having to deal with such lengthy delays is not good news for the day to day operations of the company as the shares essential go into a state of suspend animation, as they cannot be voted, transferred or sold, nor can anyone legally collect dividends paid on those shares. In fact anyone who deals with or assists in the dealing of the shares without a grant runs the risk of becoming personally liable for their actions when the grant is eventually finalised.

### **Loss of Privacy**

Making an application for a grant does not automatically make the will a public document (if there is a will), but the circumstances where it can become accessible are more relaxed and anyone who can show that they have a "legitimate interest" can have access to it. In any event because of the public nature of the grant process there is a high probability of the loss of confidentiality, as there may be disclosure of ownership of the shares concerned, including the identities of those who will ultimately inherit them.

### **Failing to plan or worse, plans that fail**

It should come as no surprise that shareholders, if given the chance, will want to bypass BVI grant procedures. This may lead them to try routes such as undated share transfers, power of attorneys and nominee arrangements which may at first appear to be viable options but on closer examination will at best not work and at worse expose those involved to personal liability. These options do not work for the simple reason that any authority given to third parties will cease on the death of the person giving such authority. In other words any action taken by a third party based on previous instruction from someone, who is now deceased, will be invalid. If the third party chooses to proceed they are likely to be held personally liable for any losses to the estate when the BVI court names a personal representative under a grant.

## Planning Options

There are however a number of succession planning options which are effective and which avoid many of the pitfalls of the grant process.

### *Reserve Director*

A very common set-up structure with BVI companies is to have a company which has only one shareholder who is an individual and that shareholder is also the sole director of the company. This is obviously not a good way to position a business, as on death of the sole shareholder/director there is no one left who can deal with the day to day affairs of the business. The BVI has a unique option which can avoid this outcome by allowing the sole director/shareholder, during the course of her life time to nominate another person as a reserve director of the company. This reserve director is only able to act in the place of the sole shareholder/director in the event of her death. While this in itself does not directly deal with succession to the shares of the deceased shareholder, it does allow for the smooth continuation of the business until the issue of inheritance is resolved which will hopefully help to preserve the value of the company.

### *Joint Tenancy*

Another simple option is for the shares to be held by more than one person as joint tenants with rights of survivorship. This is a type of ownership in which all joint owners have equal portions of ownership that are immediately allocated to remaining owners if one owner dies. Here several persons can own shares together and as a person dies his interest in those shares pass on to the survivors who owned the shares with him. The last survivor automatically becomes the absolute owner of the shares. Property that is held jointly may not form part of the deceased estate for succession purposes. One difficulty (or benefit, depending on your perspective) with this approach is that each of the joint owners has immediate and ongoing rights to the shares during their lifetimes and not just on death of one of the parties.

### *BVI Will*

Even with the difficulties in obtaining a BVI grant as discussed, a BVI will does provide some measure of comfort for future planning as it allows the grantor the ability to firmly and specifically set out the intentions for his property after his death. However it must be stressed that the will must be effective under the law of the deceased's domicile if that person is not domiciled in the BVI. In other words the will must be valid in terms of capacity, form and substance under that foreign law if it is to be valid under BVI law. While drafting your will may be a highly personal and intimate exercise you should seek legal guidance before you start to ensure that you can legally achieve your intentions.

### *Share Trusts*

The BVI Share Trust is a specific option that that can be used only in respect of shares in a BVI company. Here the shareholder of a BVI company can transfer his shares into a trust based on specialised trust legislation called the Virgin Islands Special Trusts Act, 2003 ("VISTA"). VISTA allows ownership of the shares to be passed to a trustee but the shareholder or "settlor" and trustee will simultaneously enter into a rights deed, which governs the way in which the shares will be dealt with during the settlor's lifetime. In this way the settlor can continue to have control and to benefit from the shares during his lifetime while avoiding the probate procedures on his death.

Under VISTA it is also possible for the settlor to terminate the trust at any time and have the shares transferred back to him should circumstance change. In the event of the settlor's death or incapacity, the trustee will distribute the shares to the beneficiaries as previously set out in the rights deed. The settlor can also initiate

more forward-looking estate planning by setting out that the shares should remain in the trust after his death rather than being distributed to the beneficiaries.

Other advantages include a high degree of confidentiality as there is no register of trusts and the trust instrument remains private but it should be noted that the service provider must comply with anti-money laundering legislation and KYC obligations. Use of this vehicle may also allow the shareholder to avoid forced heirship rules. These are rules in certain jurisdictions that restrict the ability of a testator to decide how his assets should be distributed after his death. They vary from country to country and are, generally, a Civil/Islamic law concept. While ongoing trustee fees could be seen as a deterrent (although with increased expertise flowing into this area, fees have come down substantially), the share trust still remains the most desirable viable option given the uncertainty and cost associated with some of the other planning choices.

## Conclusion

BVI law offers a number of options that prevents succession planning from becoming a high cost nightmare and changes it into simply the next step in your life plan. The options of reserve directors, joint tenancies and Share Trusts give a shareholder the option of unprecedented freedom and flexibility to determine succession to shares in their BVI companies. With these options one is able to achieve the desired results without the need for substantial amendments to company constitutional documents, with minimal disruption to practical management, and while still controlling the business and enjoying the profits of a well-executed plan.

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