

## British Virgin Islands



# A cautionary tale: SME businesses and avoiding the gridlock of probate

Small businesses tend to gravitate to the BVI as the choice of jurisdiction for incorporation due to its ease and cost-effectiveness. However, very often such companies will be established with a sole individual director who is also the sole shareholder of the company. Problems arise if this individual then passes away, regardless of whether the individual had a will or not.

Under the BVI Business Companies Act (as amended), shares in a BVI company are regarded as assets located in the BVI. So, where a shareholder of a BVI company dies, his or her shares cannot validly be transmitted to heirs until:

- a grant of probate (where the deceased left a will covering the BVI assets) or
- a grant of letters of administration (where the deceased died without a will (intestate))

has been obtained from the BVI court or, alternatively, his foreign grant of probate or letters of administration has been re-sealed by the BVI Court (together the **Grants**).

Where a deceased has left a will covering the BVI assets, this would only work if it is effective under the law of the deceased's domicile (which is not necessarily the same as their nationality or residence). The general rule is that the will must be valid under the law of the deceased's domicile (in terms of capacity of the testator, its form and its substance). If it is not valid under the law of domicile, it will not be valid under the laws of the BVI. Accordingly, it is essential to ascertain the testator's domicile.

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This is most often determined in the main probate proceedings in the deceased's home jurisdiction in accordance with its laws on domicile.

Our cautionary tale crystallises around a set of circumstances where the BVI company's sole shareholder, who is also the sole director, dies leaving no shareholder to appoint a new director and no director to issue new shares and update the register of members. The company is effectively left rudderless without any functionaries with authority to run the company or deal with its assets.

Probate in the BVI is a very time-consuming and costly process, taking anywhere from three to six months (if not contested) and running as high as one to two percent of the value of the shares (or more if contested). During this time, the shares are paralysed, and cannot be voted, transferred or sold, nor can dividends be collected on those shares. This is why structuring the company so that probate can be avoided is so important.

Some commonly used mechanisms such as blank or undated share transfers, powers of attorney or nominee arrangements, unfortunately carry significant risks and are technically not viable considering all authority to deal fails on death.

## Solutions

Some solutions to consider may include the following.

### Reserve Director

Where a company has a sole director who is also the sole shareholder, one way to avoid leaving the company without a director upon the sole director's demise is to appoint a reserve director.

The appointment of such a reserve director will only take effect upon the demise of the sole director, and the reserve director will not have any duties or responsibilities prior to this time.

The appointment of a reserve director is a wise step to avoid delay, disruption and inconvenience to the day-to-day operations of the company, but does not bypass the requirement for Grants in respect of the shares of the deceased.

### Joint Tenancy

Shares may be held jointly by two or more shareholders as joint tenants with rights of survivorship. Upon the death of one joint owner, the shares will pass to the survivor(s) in equal portions (if more than one surviving joint owner) or absolutely (if one joint owner), as the deceased joint owner's interest does not form part of their estate for succession purposes, making the deceased's domicile irrelevant.

Joint tenancy bypasses the need for the requirements of Grants. However, joint owners have immediate rights in respect of the

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shares rather than rights which arise on death.

There are some other options relating to successor shares based on the same premise as joint tenancy.

## VISTA Trusts

Shares may be transferred to a VISTA trust which affords flexibility regarding control of the shares and allows the settlor to benefit from the shares during his lifetime, while still being able to avoid the procedures of probate upon his death. The settlor may choose for the shares to remain in trust upon his death, or to be passed to the beneficiaries outright. The VISTA trust can also deal with issues surrounding incapacitation of the settlor (which can also result in the shares becoming paralysed).

This option has ongoing administrative costs, but provides a complete solution.

## Conclusion

For small business owners who have incorporated in BVI, succession planning is key to avoid the prolonged, tedious and costly probate procedures.

For more information or advice on succession planning, for BVI companies and other jurisdictions, please contact one of our Marbury advisors.

## Disclaimer

This article provides a brief overview on succession planning and should not be read as legal advice. For legal advice / more information, please contact Marbury.