
The British Virgin Islands

International Estate Planning Guide
Private Client Tax Committee

Contact:

Henry Mander

Harneys, Cayman Islands

henry.mander@harneys.com

Matthew Howson

Harneys, London

matthew.howson@harneys.com

Table of Contents

I. Wills and disability planning documents	3
A. Will formalities and enforceability of foreign wills	3
1. The form of last will and testaments	3
2. Codicils	3
3. Post-death variations	3
4. Execution of foreign wills	3
B. Will substitutes (trusts or joint tenancies).....	4
C. Powers of attorney, directives and similar disability documents	4
II. Estate administration	4
A. Overview of administration procedures	4
1. Administration of the estate	4
B. Intestate succession and forced heirship.....	5
1. Intestate succession	5
2. Forced heirship rights	6
C. Marital property	6
D. Tenancies, survivorship accounts and payable-on-death accounts.....	6
III. Trusts, foundations and other planning structures	6
A. Common techniques	6
1. Introduction	7
2. Purpose trusts	7
3. Virgin Islands Special Trusts Act	7
4. Trust firewall	7
B. Fiduciary duties.....	8
1. Trustees	8
2. Protectors.....	8
3. Enforcers.....	9
C. Treatment of foreign trusts and foundations	9
IV. Taxation	9
A. Domicile and residency	9
B. Gift, estate and inheritance taxes	9
C. Taxes on income and capital.....	9
D. Double taxation treaties	9

I. Wills and disability planning documents

A. *Will formalities and enforceability of foreign wills*

1. THE FORM OF LAST WILL AND TESTAMENTS

For persons dying domiciled in the British Virgin Islands (BVI), the BVI Wills Act (Cap 81) is based largely on the English Wills Act of 1837, but does not incorporate the various amendments to that statute that have been made in recent years. To be formally valid as a matter of BVI law, a will must be in writing and must generally be signed by the testator at the end of the will in the presence of two witnesses who must be present at the same time, and both of whom must attest and subscribe the will in the presence of the testator. Witnesses must be adult and independent of the testator: if a witness benefits under the will, the will remains valid, but the witness's legacy is void.

There is no provision for remote witnessing of wills. During the recent coronavirus pandemic, a common solution was for the witness to watch the testator at a safe distance, who would then back away while each witness signed.

BVI law follows English law in allowing full freedom of testamentary disposition.

For persons dying domiciled outside the BVI (ie, most shareholders of BVI companies), please see section I.A.4.

2. CODICILS

Wills can be amended by a codicil, which must follow the same formalities as a will.

3. POST-DEATH VARIATIONS

Under BVI law, a will cannot be amended after the testator's death. However, a beneficiary's entitlement may potentially vary depending on the succession law of the domicile (if the relevant assets are movables) or asset situs (if non-movables).

4. EXECUTION OF FOREIGN WILLS

Most shareholders of BVI companies (which tends to be where this question arises) are domiciled outside the BVI.

The estate administration process, required on the death of any holder of any BVI property (including shares in BVI companies) can be accessed (see section I.B) with a will governed by BVI law, a will governed by foreign law or no will at all. However, a BVI will is recommended because:

- a BVI will simplifies the process of calculating the correct executor and so on, so the documents are simpler;
- the BVI Probate Registry (the 'Registry') trusts and understands BVI wills, so will raise fewer questions and, in general, processes the application much more quickly; and
- the BVI probate process can be carried out simultaneously with processes in other jurisdictions. This is because the Registry requires the original will or a court-authenticated copy, which can be difficult to obtain in some jurisdictions. If there is

only a single overseas will, the probate process may have to be carried out there first and then the original will used here. Obviously, this can cause a great deal of delay, during which time the underlying assets may be in limbo.

That being said, whether a will is governed by BVI or foreign law, it should be valid both essentially and formally under the laws of the place where the testator died domiciled.

As to essential validity, this means aspects such as the validity of its provisions and legacies, and questions, such as forced heirship or Sharia law. That being said, it is important to appreciate that the BVI court will not consider such questions during the estate administration process, but instead expects the executor to transfer the BVI assets in accordance with such law. If he or she does not, the disappointed beneficiaries may, if they wish, approach the BVI court, which would then hear expert evidence on such law. If no one approaches the court, then there is no automatic consideration of inheritance matters.

As to formal validity, this means aspects such as the manner of executing the will, the number of witnesses and so on. It is a debated question as to whether the United Kingdom extended the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (which contains a variety of jurisdictional laws under which a will may be considered formally valid) to its Overseas Territories, such as the BVI. This is likely to be resolved eventually in each territory through local legislation, but until then, the safest option is to execute the will in accordance with the laws of the place where the testator will (probably) die domiciled.

B. Will substitutes (trusts or joint tenancies)

Both are commonplace methods to manage succession and/or probate. Onshore regimes, such as forced heirship or Sharia law, will not generally apply to them. Trusts are discussed in section III. Joint tenancies are discussed in section II.D.

It is important to note that the estate administration process, and such forced heirship regimes, are not avoided by placing the assets in a bare trust or nomineehip. This is because the common law considers that a beneficial interest in a bare trust is an asset of the deceased and so part of his or her estate.

C. Powers of attorney, directives and similar disability documents

The principal legislation in this area is the Mental Health Act 2014.

Powers of attorney lapse on the loss of mental capacity: there is no provision in the act for lasting or enduring powers of attorney. However, a BVI court has wide powers, so may agree to recognise a foreign lasting or enduring power of attorney.

Alternatively, the court can appoint a receiver who has wide powers to manage the patient's property and financial affairs (and may well have regard to a foreign lasting or enduring power of attorney when doing so). There is no ability in BVI law to appoint someone to manage a patient's welfare or personal affairs, although a receiver would probably be able to use his or her powers to extend into that area de facto.

II. Estate administration

A. Overview of administration procedures

1. ADMINISTRATION OF THE ESTATE

An order from the BVI court (a Grant of Representation, more commonly called a Grant of Probate or Letters of Administration, depending on whether there is a will that appoints an executor) is required on the death of any shareholder in a BVI company. Registered agents cannot transfer the deceased's shares to the heirs without it, nor can the deceased's voting rights be used for processes like sales, distributions or liquidations, nor can dividends on the shares be collected.

The process essentially involves submitting a small bundle of relevant documents and affidavits to the Registry. The exact documents depend on the exact circumstances, but generally include, for example:

- an affidavit by the personal representative (PR) explaining the circumstances of the death;
- an affidavit, also by the PR, confirming the rough value of the estate (this can be a rough value because no inheritance tax is payable in the BVI);
- an affidavit from a witness to the will (if there is one); and
- if the deceased was domiciled outside the BVI, an affidavit by a lawyer in the deceased's jurisdiction of domicile explaining why the PR is entitled under the law of that jurisdiction to administer the estate. We noted in section I.A.4 that this is a slightly different question to who is entitled to inherit the estate.

As mentioned above, if a will (particularly a BVI will) is used, generally, these documents are simplified, the length of time the Registry takes to consider them is shortened and the follow-up questions the Registry will ask are reduced.

As an alternative to the above process, if the family has already obtained a grant in another country, grants from a small number of jurisdictions can be 'resealed' or confirmed in the BVI, which is a simpler (and hence, less expensive) process than the full process. Essentially, the process takes the same shape, but the required documents are fewer and simpler. The list of 'resealable' jurisdictions was expanded in 2021 and now includes most Commonwealth jurisdictions in addition to common law nations like the United States and Hong Kong.

The 'certificates of inheritance' issued by many civil law countries cannot be resealed in the BVI, nor can they be sent to registered agents as substitutes for a BVI grant. This is not least because they often concern themselves with who shall inherit the shares, whereas the BVI (like all common law jurisdictions) is concerned with who shall administer the estate.

B. Intestate succession and forced heirship

1. INTESTATE SUCCESSION

For persons dying domiciled in a non-BVI jurisdiction, the intestacy rules governing their BVI movable assets (including shares in BVI companies) are those of their jurisdiction of domicile.

For intestate persons dying domiciled in the BVI and/or holding immovable BVI assets, the relevant legislation is the Intestate Estates Act (Cap 34).

The surviving spouse takes:

- the personal chattels;
- \$240 or a sum equal to ten per cent of the net value of the estate, whichever is greater, with five per cent interest per year until payment; and
- half of the residue on trust for life (if issue) or the whole on trust for life (if none).

In the case of issue but no spouse, the residue is held on statutory trusts for the surviving issue.

In the case of surviving parents but none of the above, the residue is held on trust for the surviving parent(s).

If none of the above applies, the residue is held on statutory trusts for the following in descending order:

- brothers and sisters of whole blood;
- half-brothers and half-sisters;
- grandparent or grandparents equally;
- uncles and aunts of whole blood; and
- uncles and aunts of half blood.

If none of the above applies, the residue is held absolutely for:

- the spouse (ie, absolutely rather than a trust for life); and
- the Crown.

‘Statutory trusts’ broadly means:

- a trust for sale for the relevant relatives and their issue in equal shares per stirpes when they attain 18 years;
- subject to statutory maintenance and accumulation provisions; and
- hotchpot provisions apply.

2. FORCED HEIRSHIP RIGHTS

The BVI has no forced heirship provisions, although foreign regimes may be a relevant factor if a person died domiciled in a jurisdiction with such (please see section I.A.4).

C. Marital property

The BVI does not have a concept of marital property regimes in the civil law sense.

D. Tenancies, survivorship accounts and payable-on-death accounts

Two individuals may declare that they own shares or other types of property as joint tenants. The effect of this will be that if one of them dies, the surviving joint owner will automatically inherit the deceased’s interest in the assets, regardless of any forced heirship rules and without the need for a grant of probate. However, the advantages of holding the assets as joint tenants are limited because this form of ownership does not offer the scope to plan for what will happen to the assets following the surviving joint owner’s death. Indeed, unless the surviving joint owner takes further succession planning steps he or she will die intestate. During the lifetime of both, both will have equal rights over, for example, voting, which may be undesired. Finally, many onshore jurisdictions treat joint tenancies unfavourably for tax purposes.

III. Trusts, foundations and other planning structures

A. Common techniques

1. INTRODUCTION

Although this is a very wide topic, in summary, all types of trust that are permissible under English law may be established under BVI law.

BVI trusts may be discretionary or fixed interest in nature. This means that the trust assets can either be held for a class of beneficiaries with distributions being made at the discretion of the trustee (discretionary trusts) or, alternatively, the trust deed can set out the specific beneficial interests of each beneficiary, such as a right to the income earned by the trust assets (fixed-interest trusts).

It is also possible to create reserved power trusts and both charitable and non-charitable purpose trusts.

Here follow introductions to a number of innovations specific to the BVI.

2. PURPOSE TRUSTS

Non-charitable purpose trusts may be established in the BVI, provided that the following conditions are met:

- the purpose is specific, reasonable and possible;
- the purpose is not immoral, contrary to BVI public policy or unlawful; and
- at least one trustee is a 'designated person' (which usually results in the trustee being a licensed BVI trust company or a BVI private trust company).

3. Virgin Islands Special Trusts Act (VISTA)

VISTA came into force in 2004 and was introduced in order to allow a shareholder to establish a BVI trust over a BVI company that disengages the trustee from administrative and managerial responsibility in relation to that BVI company. Although it is possible to enable this via bespoke trust deed drafting, many clients appreciate the legislative certainty that VISTA brings.

The principal effect of VISTA is to remove the duty of trustees to monitor and intervene in the conduct of the directors and in the running of the BVI company held in trust. Owing to the large number of companies incorporated in the BVI, VISTA was introduced:

- to offer a vehicle that would remove the need to obtain a grant of probate in the BVI (which would otherwise be a requirement on the death of the owner of BVI company shares) by implementing a trust structure; and
- to allow the owner to retain effective management and control of the company after having divested him or herself of its ownership.

The VISTA regime can apply to discretionary trusts, fixed-interest trusts, charitable trusts and purpose trusts, as long as certain conditions are satisfied.

VISTA legislation was amended in 2013 to fine-tune certain elements of the regime and introduce greater flexibility. As a result, it is likely to remain the most popular form of trust vehicle in the BVI.

4. TRUST FIREWALL

The BVI firewall protects trusts against attacks over succession, forced heirship, creditors (with some caveats) and divorce proceedings. Recently, it has been greatly strengthened and modernised. Now, 'claims and interests' (including beneficial interests) are protected and the defeated attacker may have a personal relationship with a beneficiary instead of the settler. The definition of 'personal relationship' itself has been expanded to include step-relationships and children born of surrogacy or artificial fertilisation. As well as that, the questions that should be decided under BVI law (rather than some foreign law more advantageous to the attacker) have been confirmed to be virtually every question applicable to a trust.

B. Fiduciary duties

1. TRUSTEES

As set out in Article 2 of the Hague Trusts Convention on the Law Applicable to Trusts and on their Recognition (1985), 'the trustee [of a trust] has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law'. In common law jurisdictions, like the BVI, this means that the trustee will have placed on it the fiduciary duties of acting honestly and in good faith in the best interests of the beneficiaries and in accordance with the terms of the trust. How these duties operate in practice will depend on the exact nature of the power in question.

As regards distributions among beneficiaries, the vast majority of BVI-governed trusts are discretionary, giving the trustee near or total freedom as to how and when to distribute the trust assets, subject to the above fiduciary duties but exercisable in the best interests of the beneficiaries as a whole rather than individually (in other words, it is not expected that distributions will be equal if one beneficiary has a greater need). It is possible for the settler of a trust to write a memorandum or letter of wishes to the trustee that expresses how they hope the trustee will exercise their discretion. This practice is permitted because, clearly a settler will usually know better the best interests of the beneficiaries than will an offshore trustee. However, such a letter of wishes is not binding on the trustee, which is able to, and indeed must, go against the wishes expressed therein if he or she thinks it in the best interests of the beneficiaries to do so.

Likewise, most trust deeds give strong powers to the trustee regarding the investment and management of the trust assets, often stated 'as if the trustees were the absolute beneficial owners thereof' or similar. Again, the trustee must, however, exercise these powers in the best interests of the beneficiaries and the good administration of the trust.

2. PROTECTORS

Some trusts appoint a protector. This is an optional role often filled by the settler, or a family member or associate, usually with the intention of reassuring the family that is giving its assets to a previously unknown trustee. A protector has the powers and duties prescribed by the trust deed. Some have veto rights over certain trustee powers (eg, the power to add/remove beneficiaries) and some have actual powers themselves (eg, the power to change trustees).

The role of the protector is debated internationally and there has been some case law in other common law jurisdictions suggesting that courts do not look favourably on over-powerful protectors. Although the BVI courts have not addressed this topic, and the BVI has specific legislation confirming the legitimacy of the role, generally, if a family is concerned about asset protection, it is sensible to limit the powers of the protector role. It is also sensible to specify that the role is fiduciary, that is, that the protector must act in the best interests of the beneficiaries rather than in their own selfish personal interests.

3. ENFORCERS

Purpose trusts (discussed in section III.A.2) are required by legislation to have an enforcer. Owing to the lack of beneficiaries in a purpose trust, the enforcer has the role of enforcing the trust if the trustee acts in breach. Otherwise, they can be given a similar range of powers as can a protector.

C. Treatment of foreign trusts and foundations

The aforementioned 1985 Hague Convention has been extended to the BVI, so if a foreign trust complies with the convention's requirements, it will be recognised by the BVI.

There is no BVI legislation recognising foundations, but it is possible for the specific document in question (eg, a trust deed) to do so.

IV. Taxation

A. Domicile and residency

Because the BVI does not have any form of income, corporate, capital gains, inheritance or gift taxes, there is no official tax year, and the concepts of residence and domicile are not applicable.

B. Gift, estate and inheritance taxes

The BVI levies no gift, estate or inheritance taxes.

C. Taxes on income and capital

The BVI levies no income or capital gains taxes.

Persons carrying on business in the BVI are subject to payroll tax that is payable by every self-employed person or employer. Payroll tax may go as high as 14 per cent of remuneration, eight per cent of which may be reclaimed from employees. The remaining six per cent is payable by the employer. No payroll tax deduction shall be made in respect of the first \$10,000 of actual remuneration paid to an employee in any financial year.

D. Double taxation treaties

Although beyond the scope of this guide, the BVI is a signatory to various double taxation agreements (including with the UK) and multinational reporting regimes, such as the Common Reporting Standard and Foreign Account Tax Compliance Act.