

## Estate Administration in the British Virgin Islands: the Relevant Factors for the Removal of an Administrator or Executor

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The holding company of many corporate groups trading in Asia is frequently incorporated in an offshore financial centre such as the British Virgin Islands ("BVI"). It is therefore common for high-net-worth individuals domiciled in Asia to hold shares in companies incorporated in the BVI, which in turn hold highly valuable operating subsidiaries in jurisdictions such as Hong Kong, Mainland China and Taiwan.

Where an individual dies holding shares in a BVI company, it is not possible to deal with those shares until an administrator or executor (referred to collectively as a "Personal Representative") is formally appointed by the BVI Court. A Personal Representative is appointed by way of a grant of representation, being either a grant of probate or letters of administration. The grant of representation formally recognises the Personal Representative as the legal representative of the deceased person's estate. All of the deceased's assets, including any shares held in companies incorporated in the BVI, therefore vest in the name of that Personal Representative who effectively steps into the Deceased person's shoes in respect of those companies, meaning the Personal Representative is able to exercise voting rights and effect share transfers.

The Personal Representative will often have discretion as to aspects of the management and administration of the estate. For example, the Personal Representative will typically have discretion as to the exercise of voting rights and may have scope to determine whether, and when, beneficiaries receive an *in specie* transfer of shares or an equivalent cash distribution. As such, a grant of representation can put a Personal Representative in a significant position of control in respect of a BVI company, the shares of which form part of a deceased estate.

In light of this, beneficiaries may find themselves in a position where they disagree with the Personal Representative's administration of the estate and its underlying BVI companies such that they are compelled to consider available forms of relief. This article discusses the relevant duties that are owed by a Personal Representative to the beneficiaries and the required threshold for the replacement of a Personal Representative in the BVI.

### The Role of Personal Representatives

The role of the Personal Representative is to collect the assets of the deceased, repay debts owed by the estate to creditors and subsequently distribute the assets of the estate to the beneficiaries according to their entitlements. In its capacity as a court of equity, the High Court of the BVI ("the Court") has an inherent jurisdiction to supervise and ensure the proper administration of trusts. The Court is vested with the power to appoint, substitute or remove a Personal Representative, depending upon the circumstances of the case. The overriding consideration is the proper administration of the estate and the welfare of the beneficiaries.<sup>1</sup>

### The Duties of a Personal Representative

An applicant seeking to remove a Personal Representative should seek to illustrate the inefficiency and unworkability of the Personal Representative's administration, and, in doing so, argue that a replacement is necessary to safeguard the welfare of the beneficiaries. A breach of one of the duties owed by a Personal Representative (outlined below) is a useful indicator to suggest that an estate is no longer being administered properly.

#### (a) Duty to Keep and Provide Proper Accounts

An important duty that is owed by a Personal Representative is to keep accurate accounting records and to provide those accounts upon a reasonable request by a beneficiary. A statutory provision in the BVI empowers a beneficiary to apply to the Court for an order

<sup>1</sup> Eileen Papone & Lourie Anthony v James Anthony [Eastern Caribbean Supreme Court] [2011] 7 JBVIC 2801, paragraph 50.

that a Personal Representative supply proper accounts.<sup>2</sup> The standard expected of a Personal Representative in discharging this duty is to provide adequate receipts and accounting records that are capable of giving a satisfactory explanation of the assets held within the estate.<sup>3</sup> If, for any reason, a Personal Representative is incapable of discharging this duty to a satisfactory standard on their own, it is incumbent on the Personal Representative to seek appropriate professional advice to assist them in discharging it.<sup>4</sup>

#### (b) Duty to Consult

Closely linked to the duty to report and account is a Personal Representative's duty to consult with the beneficiaries of the estate. Unless a particular decision or action is expressly sanctioned by an order of the court, a Personal Representative should inform and if possible, consult with the beneficiaries when taking decisions on behalf of the estate.<sup>5</sup>

#### (c) Duty to Preserve and Distribute the Estate

Personal Representatives are under a duty to realise, preserve and distribute the assets of the estate to the beneficiaries. If a Personal Representative fails to distribute the assets of the estate within a reasonable time period after receiving a grant of representation, this may constitute a *prima facie* breach of duty.<sup>6</sup>

#### (d) Other Fiduciary Duties

Although a beneficiary does not have any direct equitable or legal ownership of the assets forming part of the estate, a Personal Representative owes fiduciary duties to the estate and the beneficiaries as a collective.<sup>7</sup> These duties include the duty to act with due care and skill, the duty to act in good faith and the duty to avoid conflicts of interest.<sup>8</sup>

### Important Considerations for the Court

#### (a) Breakdown of Relations between a Beneficiary and a Personal Representative

It is possible for the breakdown of relations between Personal Representative and beneficiary to be a significant factor in a Personal Representative's removal. However, the Court's primary concern is whether the estate can continue to be administered effectively.<sup>9</sup> A breakdown of relations on its own will not be sufficient for an application to remove a Personal Representative. Poor relations between the parties must be shown to have the possibility of preventing or substantially impeding the administration of the estate.<sup>10</sup> An applicant should focus on the effect that the animosity has or will have on the administration rather than seek to prove that one party is morally at 'fault' for the hostility that exists in the first place. The prospect of continued, prolonged litigation surrounding the estate would be highly relevant here.

#### (b) The Intended Replacement

The extent to which a proposed replacement is familiar with the assets of the deceased is another important factor. Where a Personal Representative attains office by virtue of having been expressly selected as an executor in the will, the Court will be slower to substitute the choice of the deceased with its own. The deceased is considered to have been in a better position than the Court to decide who should be a Personal Representative over their estate.<sup>11</sup>

Equally, a Court will also be wary of the expense and time that the installation of a replacement would cost the estate. If an applicant seeks to appoint an independent professional administrator, the fees of the proposed administrator are an important factor to take into account. The smaller the size of the estate, the less likely the court will be willing to appoint an independent professional replacement.<sup>12</sup> The converse will be true if the estate is large and complex.

### Conclusion

The office of Personal Representative will confer on an individual legal ownership of the assets comprised within a deceased's estate. The administration of an estate is not always straightforward and it is important for parties on both sides (whether a Personal Representative or beneficiary) to obtain advice as to their rights and duties. An applicant seeking the removal of a Personal Representative should aim to show that an estate cannot be administered properly and, as a consequence, the collective interests of the beneficiaries necessitate the removal of the Personal Representative.

<sup>2</sup> BVI Civil Procedure Rule 67.5(2).

<sup>3</sup> See generally Section 2 BVI Trustee Act 2020.

<sup>4</sup> *Wroe v Seed* (1863) 66 ER 773.

<sup>5</sup> *Freeman v Freeman and Freeman* [2006] ECSC J1219-1, paragraph 11.

<sup>6</sup> *Hiddingh (Heirs) v De Villiers Denysen and Ors* (1887) 12 App Cas 624 at 631.

<sup>7</sup> *Commissioner of Stamp Duties (Queensland) v Livingston* [1964] 3 All ER 692.

<sup>8</sup> *Liao Hwang Hsiang v Liao Chen Toh* [Civil] Claim no BVIHCV 2011/222. Ellis J noted there would be a *prima facie* conflict of interest where a widow maintained a claim for spousal entitlement against an estate, notwithstanding her position as the administrator of the estate.

<sup>9</sup> See generally *Kershaw v Michlethwaite & Others* [2010] EWHC 506; *Agnes (and Thomas) Carvel Foundation v Carvel* [2007] EWHC 1314 (Ch).

<sup>10</sup> *Kershaw v Michlethwaite & Others* [2010] EWHC 506, paragraph 28.

<sup>11</sup> *Ibid*, paragraph 14.

<sup>12</sup> *Liao Hwang Hsiang v Liao Chen Toh* [Civil] Claim no BVIHCV 2011/222.

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