Out with the old – BVI probate rules

Publication - 04/09/2018

Key Points

What is the issue?
Shares in a British Virgin Islands (BVI) company, held personally or via a nominee arrangement, will be effectively frozen on the passing away of the individual shareholders. A BVI grant is required to transfer the deceased shareholder’s shares.

What does it mean for me?
The BVI has entirely revoked its old probate rules, which had been used for more than 30 years, and the new rules, the Eastern Caribbean Supreme Court (Non-Contentious Probate and Administration of Estates) Rules 2017, came into effect on 1 November 2017.

What can I take away?
There are no fundamental changes to the BVI probate process – but there are numerous important changes to a range of the documents and steps involved, and clarification on a number of significant issues.

The Eastern Caribbean Supreme Court (Non-Contentious Probate and Administration of Estates) Rules 2017 (New Rules) apply to all pending applications on the effective date, and to all new applications made on or after the effective date, irrespective of the date of death.

For a deceased not domiciled in the British Virgin Islands (BVI) who died with BVI shares, the key relevant changes are:

- Order of grant entitlement;
- Declaration of estate value;
- Statutory forms;
- Filing an estate account;
- Form of advertisement; and
- Filing fee schedule.

Order of grant entitlement

The order of grant entitlement was not addressed under the old rules, but now is provided for expressly under rule 28 of the New Rules.

For a non-BVI-domiciled deceased who died leaving a will, probate may be granted to the person named as executor in the will according to the rule 28(2) if the will is in the English language and admissible to proof. For wills in languages other than English, rule 28(2) is not applicable, even if an English translation of the will can be provided. For such non-English wills, whether probate may be granted to a person named in a will to administer the estate depends on the actual wording used in the will. If the wording describing the duties of the person is
sufficient to constitute him executor, probate may be granted to such person under to rule 28(3). Otherwise, letters of administration with a will annexed should be applied for.

For a deceased who died without leaving a valid will, the order of grant entitlement is pursuant to rule 28(5). The person entrusted with or entitled to the administration of the estate by the country in which the deceased was last domiciled has the first priority to apply for a grant. This rule, however, cannot be invoked for applicants relying on a non-domiciled grant.

For example, a Hong Kong grant is obtained for a deceased who died domiciled outside of Hong Kong. The personal representative of the Hong Kong grant cannot rely on the Hong Kong grant to apply for a grant in the BVI. Where there is no personal so entrusted, persons who are entitled to benefit from the deceased’s estate under the law of the country in which the deceased was last domiciled have the second priority to make a grant application. Is there is more than one person so entitled, then a grant to any of them the court may direct. If an applicant does not fall into these categories, they must be appointed by the court.

For a deceased who died leaving a will covering their estate in the BVI, and where a probate has been granted by the court in a country where the deceased died domiciled, the applicability of rules 28(2) and (3) should be considered before rule 28(5). In a similar situation where probate has been granted in the deceased’s last domiciled court, but the will does not cover the estate in the BVI, the executor may apply for a grant in the BVI under rule 28(5)(a). However, the court would likely be cautious about such an application. The court would consider whether there is any other person who may be entitled to a grant – e.g. a person who is beneficially entitles to the estate may apply under rule 28(5)(b). Proof, by way of supporting documents, must be provided to show that either there is no eligible applicant or all eligible applicants have given their consent to the executor being the sole applicant.

Declaration of estate value

The value of the BVI estate (not the deceased's worldwide estate) is important in determining the fees payable to the BVI court as part of the grant process.

There was no specific rule on the declaration of BVI estate value under the old rules. It is now explicitly required under rule 29 to set out the gross value of the BVI estate to be covered by the grant. Gross value means the valuation range of the BVI estate without deduction of debts, encumbrances, funeral expenses or death duties. The BVI estate value is categorised into several valuation brackets ranging from under USD50,000 to over USD5 million.

While there is no requirement under the New Rules to provide supporting documents to prove the estate value, the applicants should satisfy themselves that the value is declared is justifiable.

New statutory forms

The New Rules have expanded the statutory forms, which helps streamline the probate application process. In the old days, there were very few statutory forms, and these forms were relatively simple: practitioners had to drafts many documents using their own style and experience. In the past, there were a number of documents that needed to be filed for every applications, such as declaration and account of estate, and advertisement of application for grant, but there was no relevant statutory form for these. Now they are provided in the New Rules.

Filing an estate account
Under the old rules, the applicant undertook to file within 12 calendar months from the date of the grant a statement and account of the administration of the deceased’s estate. In practice, save for exceptional circumstances, such filing was rarely enforced. This practice is now reflected in the New Rules. The new statutory form provides that the applicant will render a just and true account of the estate administration whenever required by law to do so.

Form of advertisement

The applicant is required to advertise the application on no less than two occasions for two weeks in a local BVI newspaper. While this requirement is the same as under the old rules, the form of such advertisement is now standardised. The information to be included in such advert is rather limited: only the name, address and date of death of the deceased; and the name and address of the applicant. No other personal information is required to be made public. Notably, no disclosure is required in respect of information regarding the nature, value or description of the BVI estate or assets, or the recipient beneficiaries.

New filing fee schedule

The is a new fee schedule provided in the Eastern Caribbean Supreme Court (Court Proceedings Fees) (Virgin Islands) Rules, 2017; the amount has increased, and the categories of fees have been expanded too. Save for the filing fee for the declaration as to value of the estate, the filing fee for other documents is a fixed fee. For example, the filing fee for every affidavit is USD100, every exhibit is USD20, a grant is USD100, etc.

The filing fee for the declaration of estate value depends on the value of the BVI estate, with a maximum fee of USD5,000 for an estate with a value of over USD5 million.

Beneficial ownership register

A grant in respect of shares in a BVI company may require notification and updating in respect of the beneficial ownership register of the relevant BVI company.

If a deceased shareholder is a beneficial owner of a BVI company for the purpose of the Beneficial Ownership Secure Search System Act, 2017, the natural person acting as a personal representative of the deceased’s estate will become the succeeding beneficial owner. The company is required to notify its BVI registered agent within 15 days of becoming aware of a change of any beneficial ownership information, and the registered agent has a further 15 days to update its database. If the company fails to comply with the requirement without reasonable cause, it is liable to a maximum fine of USD10,000.

Conclusion

If you wish to obtain a grant in respect of BVI company shares or other BVI assets as quickly and cheaply as possible, it is critical to understand the New Rules so that the necessary documents are prepared in the correct form and filed with the necessary supporting evidence.

The grant application process can take just a few months to more than a year, depending on whether the application (and the will) is well prepared. Since the will is an essential document for a grant application, it is crucial that the will is drafted properly so that it is absolutely beyond doubt that the intended executor is entitled to apply for a grant.

If the applications does not address all potential issues in advance, the Registry will send
defective notices to ask for additional information and documents. The Registry will not issue a grant unless and until all of its enquiries have been answered satisfactorily.

This article was first published in the August/September STEP Journal.

About Ogier

Ogier provides practical advice on BVI, Cayman Islands, Guernsey, Jersey and Luxembourg law through its global network of offices. Ours is the only firm to advise on these five laws. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found at www.ogier.com

ogier.com
Key Contacts

Marcus Leese
Partner
Guernsey
marcus.leese@ogier.com
T+44 1481 737152
M+44 7797 819856

Wisdom Hon 韩伟庭
Senior Associate
Hong Kong
wisdom.hon@ogier.com
T+852 3656 6078

Related services

Probate and Estates