COLLAS CRILL

Death of shareholder: BVI shares

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Why do I need to probate the will?

As a matter of BVI law, shares in a BVI company are BVI "situs" assets and are deemed to be located in the BVI. Generally, shares of a deceased shareholder cannot effectively be transmitted to his or her heirs until a grant of probate or letters of administration has been obtained from the BVI court.

Title to a deceased's property is determined by the last will and testament and not the grant. Given that position, some have argued that a grant is not strictly necessary to effect a transmission of the shares to the beneficiaries. While this may be the technical legal position, as a practical matter directors of a BVI company and registered agents have consistently required that grants be obtained prior effecting the transfer of the shares to the beneficiaries. Failure to obtain a grant could render anyone dealing with the shares personally liable for any loss as an *executor de son tort* or for intermeddling. Where the registered agents are usually involved in updating the share registers and assisting with the transfer, they tend to be very reluctant to cooperate in the absence of a grant. The purpose of the grant is to prove the legal validity of the will of a deceased, and once the court issues the grant anyone acting pursuant to its terms would be afforded protection from liability.

What if there is no will?

Where a person dies without a will (intestate), and is the registered shareholder of shares in a BVI company, the laws of the domicile of the deceased will decide the question of beneficial entitlement to the property of the deceased. For instance, if a person domiciled in Hong Kong died owning shares in a BVI company, the laws of Hong Kong would decide who was entitled to those shares. However, a BVI grant would be needed in order to effect the formal transfer of the shares but the law that determines who is entitled to those shares would be the law of Hong Kong.

What if there is a foreign will?

Certain foreign grants can be re-sealed by the BVI court and these are generally grants from the United Kingdom, UK dependent and overseas territories and certain Commonwealth countries. Where re-sealing is not an option, an application for a fresh grant will have to be made to the BVI Court. The BVI Court expects that a grant should be obtained within three years from the date of death of the shareholder and if the application is made outside that period, an affidavit explaining the delay is needed to support the application. In the case of a foreign will an affidavit of foreign law is required.

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What if there is a BVI will?

A BVI law governed will permits a testator to set out the intentions for his or her shares in a BVI company after death. It is important to note that the will must be effective under the law of the deceased's domicile at the time of death. In other words the will must be valid under that foreign law if it is to be valid under BVI law. Applications for a grant for a BVI will, where the deceased died domiciled outside the BVI, must also be accompanied by an affidavit of foreign law confirming that the will is valid under the foreign law.

Who can obtain the grant?

In the case of a will, the application will be made by the executor or executrix named in the will.

In the case of an application for letters of administration, the laws of the domicile of the deceased at the time of death determines who is entitled to make the application and generally, this will be spouse, children, parents, siblings (in that order). An affidavit of foreign law from a law firm based in the domicile of the deceased is required to support these applications and should set out who is entitled to make the application for the letters of administration and who is entitled to the assets under the laws of the foreign country.

Documents required

In addition to the will, the following are required:

- An affidavit in standard form to support the application and undertaking to administer the estate
- An affidavit as to execution of the will
- Certificate of death
- Affidavit that no other applications for probate exist
- Affidavit of foreign law (if required)
- Affidavit of delay (if required)
- Copies of advertising
- Declaration of value - please note no estate duty is payable
- A draft order and grant

Certain other documents may be required depending on the nature of the application. For instance, in the case of intestacy, it is often necessary to get those who are entitled to make an application for letters of administration to renounce their right.

How long will it take?

From the time a completed application is filed with the BVI probate court registry it can take 3-6 months for the Grant to be issued although it may be longer where the estate is contested.

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