

ESTATE PLANNING IN THE BRITISH VIRGIN ISLANDS

There are some facets of life which are certain and one is death. Although the fact of death is certain the timing of death is often uncertain. As we spend most of our lives amassing worldly possessions, it is important that on our death the goods left behind are dealt with in a manner of which we would have approved had we had the foresight to do so.

If you die without a will, your possessions will be dealt with according to the laws of intestacy, which in the BVI, is contained in the *Intestates Estates Act*, Cap. 34 of the Laws of the Virgin Islands (the “Intestates Act”). The Intestates Act is an attempt by the Government to dispose of your property in a manner which the Government assumes that you would have done if you had had the foresight to do so. Unfortunately, it is a one-size-fits-all mechanism.

Under the Intestates Act, your possessions will be divided into two categories namely personal chattels and residuary estate.

Personal chattels include motor cars and accessories (not used for business purposes), garden effects, domestic animals, linen, china, glass, books, pictures, prints, furniture, jewellery articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but does not include any chattels used for business purposes or money or securities for money.

Your residuary estate is everything that is not personal chattels which remains after the payment of your funeral and administration expenses, debts and other liabilities that are properly payable. The bulk of your estate would fall into your residuary estate and will include your land, businesses and money.

How are your Personal Chattels disposed of under the Intestates Act?

- (i) If you die leaving a surviving spouse your personal chattels will devolve to your surviving spouse absolutely.
- (ii) If you die not leaving a surviving spouse your property will devolve to your surviving children in equal shares absolutely.
- (iii) If you die not leaving surviving children, then your property will devolve to surviving members of your family in a designated order of priority that first starts with your parents and ends finally with your half brothers and half sisters.

- (iv) If you die leaving no surviving family members your property will go to the Crown as *bona vacantia*.

Disposal of your Residuary Estate:

- (i) If you die leaving a surviving spouse, whether you also die leaving children, in addition to your personal property your surviving spouse will be entitled to a charge over your residuary estate in the amount of US\$240 or a sum equal to 10% of the net value of the residuary estate, whichever is greater, and interest at the rate of 5% per annum on that sum so charged until the sum is paid;
- (ii) Subject to the deduction that has to be made from your residuary estate pursuant to (i) above, the remainder of your residuary estate will be held as follows:
 - a. if you die without leaving children, for the benefit of your surviving spouse but only for the length of his or her lifetime;
 - b. if you die leaving a surviving spouse and children:
 - i. $\frac{1}{2}$ for the benefit of the surviving spouse for life; and
 - ii. $\frac{1}{2}$ for the benefit of your surviving children in equal shares absolutely; and
 - iii. On the death of your surviving spouse the $\frac{1}{2}$ held by your surviving spouse for life devolves to your surviving children in equal shares
 - c. If you die leaving children but no surviving spouse the residuary estate will devolve to your children in equal shares;
 - d. If you die leaving no spouse and no children your estate will devolve to your nearest kin in a prescribed order of priority commencing with your surviving parents and ending with your half brothers and sisters;
 - e. If you die leaving absolutely no heirs, then your estate will devolve to the Crown as *bona vacantia*.

Practical issues with Intestacy laws:

- (i) The reality of BVI society is that married couples live estranged for many years without obtaining a divorce. However, under the *Intestates Act* an estranged surviving spouse will be able to inherit from your estate;
- (ii) BVI succession laws appear to discriminate between children born in and out of wedlock:

- a. Children born in marriage of a man or a woman will always share on the intestacy of the man or woman;
 - b. Children born out of marriage of a woman who only has illegitimate children will share equally in her estate by virtue of section 11 of the Legitimacy Act, Cap. 271;
 - c. Children born out of marriage to a man will not share in his estate on the intestacy;
- (iii) The children of a son or daughter who has predeceased you will not inherit as of right on the intestacy; and
 - (iv) An adopted child will not inherit from your estate under the intestacy rules.

Therefore, if you think that your estate should be dealt with differently than explained in the paragraphs above, you need to make a WILL.

A will or testament is your declaration on how your estate should be dealt with on or after your death. The will or testament must be in writing, witnessed by the appropriate number of witnesses and made by a testator who has the necessary mental capacity and is of the age of majority. The Wills Act, Cap 81 of the Laws of the Virgin Islands regulates, among other things, the formal requirements for the making and revocation of a will. Although a will can be homemade, or handwritten, because of the strict enforcement of the formalities for the creation of a will, prudence would dictate that your will be made by or under the supervision of an attorney.

WHY LEAVE A WILL?

1. You will gain peace of mind by knowing that you have taken responsibility to sort out your affairs;
2. It is important to ensure that your possessions are dealt with according to your wishes;
3. You are separated from a spouse but not yet divorced from that spouse;
4. You have out of wedlock children who will not benefit under the intestacy rules and you desire to make provision for them;
5. You have a mentally challenged adult child or relative and you would like to make provision for his care and maintenance on and after your death;
6. You would like to provide for the children of a son or daughter that predeceased you;
7. You have adopted a child and you would like that child to be able to share in your estate;

8. You live with a partner to whom you are not married and you would like to make provision for him or her should you die;
9. There are persons who are not members of your family to whom you would like to leave gifts;
10. You do not wish your children to share equally in your estate as they have various needs and abilities.

FURTHER INFORMATION

Please contact the following Harneys' lawyers if you require additional information on Trust, Wills & Estates Services.

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