THE LAW ON WILLS IN THE BRITISH VIRGIN ISLANDS

Advantages of making a Will

1. The drafting of your Will must be precise and undertaken with great care. This is of particular importance if you have assets in multiple jurisdictions, or you are resident in one jurisdiction, but have assets in another jurisdiction. The advantages of making a Will are:

   (a) You have the opportunity (barring forced heirship rules) to set out how your assets are to be distributed on your death - who gets what and in what proportion; and

   (b) You have the opportunity to decide and name someone who you think is responsible and who you can trust to administer the estate – collect the assets and distribute them to the beneficiaries of your estate;

Matters to consider before drafting a Will

2. Before drafting a Will, the lawyer responsible for its preparation must consider the following:

   i. Your domicile;
   ii. Essential validity of the Will;
   iii. Formal validity of the Will;
   iv. Capacity of the testator; and
   v. Where the assets are located.

Domicile

3. It is always necessary to establish your domicile before executing a Will which disposes of movable properties, for example, shares in a BVI company. This is essential as the validity of the Will and your capacity are determined by your domicile.

4. The law assigns a domicile of origin to every person at birth. A legitimate child’s domicile of origin would be that of his/her father and an illegitimate child's domicile of origin will be that of his/her mother. The domicile of origin prevails until a new domicile has been acquired. A person can change his domicile from that of his domicile of origin. To change domicile, the person must establish residence and an intention of permanent or indefinite residence.
Essential Validity & Governing Law

5. Essential validity is concerned with your ability to dispose of your assets by Will. The rules vary according to whether the property is movable (shares, money, jewelry, art etc.) or immovable (land and anything affixed to it).

6. Gifts of movable property are governed by the law of your domicile while those relating to immovable property are governed by the law of the location of the property.

7. The distinction is important when drafting the Will. For example, shares in a BVI company are located in the BVI. However, if the testator is domiciled in a foreign country, that country’s laws will determine the validity of a gift of the shares. This is particularly important if you are domiciled in a country that has forced heirship rules which mandate that a portion of your estate must be given to specified beneficiaries, usually the surviving spouse and children.

8. While BVI law has complete freedom of testamentary disposition, the lawyer drafting the Will must be mindful of the foreign element in disposing of the shares. If your Will includes gifts of BVI shares to a beneficiary who is not one of the designated beneficiaries under the laws of your domicile, or excludes a beneficiary who is a designated beneficiary under the laws of your domicile, the Will is not valid.

9. Similarly, a BVI Will disposing of land in a foreign country will have to comply with the laws of the place where the land is situated and any attempt to avoid those laws by Will, will also be in vain.

10. The guiding principle in relation to essential validity, as in all aspects of dealing with foreign assets, is that you should take and be guided by expert advice from lawyers in the jurisdiction of the governing law of each gift.

Formal Validity

11. The law governing the formal validity of a Will, no matter where executed, depends on the type of asset being disposed of. At common law the formal validity of a Will in relation to movables (personal property such as cash, jewelry, artwork etc.) is governed by the law of your domicile the time of making the Will or at the time of his death while, the formal validity of a Will disposing of real estate is governed by the law of the country where the real estate is located.

12. Obvious practical difficulties will inevitably arise where the testator has both personal property and real estate in different countries. The formal validity of the Will may have to be judged by the laws of different countries depending on where the various assets are located.

13. To be valid under BVI law the Will must be signed by you in the presence of two witnesses who must also sign the Will. The Will should be dated but does not need to be notarized. Additional formalities such as
notarization, may be required where the Will deals with property governed by the law of a country other than the BVI. Accordingly, great care must be taken by the lawyer drafting the Will to ensure that a Will disposing of foreign assets complies with the requirements for formal validity under the laws of all relevant countries.

14. Failure to comply with these basic rules can result in the gifts made under your Will failing and falling into your residuary estate or intestacy.

Capacity

15. Capacity to make a Will relating to movables is determined by the law of your domicile. There are no decided cases on the time when capacity is determined. The better view is that capacity is determined at the time of making the Will, not the date of death.

16. Capacity in relation to immovable (real estate and anything affixed to it) is determined by the law of the location of the asset being disposed of.

Location of Assets

17. You need to disclose the situs/location of all the assets which are to be disposed of by your Will to your lawyer. The location of both of movable and immovable property is determined by their physical location, but this is not conclusive. The position can be varied by statute. For example s. 245 of the BVI Business Companies Act stipulates that:

“For the purposes of determining matters relating to title and jurisdiction but not for purposes of taxation, the situs of the ownership of shares, debt obligations and securities of a (BVI) company is in the Virgin Islands.”

18. The BVI courts, unsurprisingly, have routinely treated this provision as giving the BVI courts authority to deal with issues relating to ownership of shares. As a consequence, a registered agent will only act on the basis of a grant of probate or administration issued by the BVI court. This should be clearly understood by any person preparing a Will disposing of shares in a BVI company.

19. The treatment of shares in a BVI company therefore requires special attention to ensure that your intentions are not defeated by, say, forced heirship rules under the place where you are domiciled or non-compliance with the foreign laws on issues of formal validity.

Marriage

20. Every Will made by a man or woman is revoked by his or her marriage. A subsequent marriage invalidate a previous Will.

MATTERS TO CONSIDER FOR PREPARATION OF THE WILL

Appointment of executors
21. An executor does not have to be a resident of the BVI. An executor can be an individual or a company. If a company is to be appointed as an executor, the company must be a trust corporation as defined by the BVI Trust Corporation (Probate and Administration) Act. A trust corporation must hold a class 1 trust licence. A trust corporation can apply for and obtain a grant of probate in its name. If a company, other than a trust corporation is appointed as executor, the court will not grant that company probate but rather will grant letters of administration with Will annexed to the company’s nominee.

Jointly held property

22. You must disclose full information on the ownership of jointly held property. If the property is held as joint tenants, the property will pass directly to the other joint tenant on the death of the testator. Any attempt to dispose of the property held as joint tenants might fail, unless there is sufficient evidence of an intention to sever the joint tenancy. On the other hand, if property is held jointly by you and another as tenants in common, you can dispose of his/her share of the property by his/her Will.

Partial Intestacy

23. You should ensure that all of your assets are disclosed to the lawyer drafting the Will, and specify which, if any, are covered by other instruments such as Trusts or foreign Wills — if an asset is not covered it falls to be distributed in accordance with the law of the place where you die domiciled and not by the terms of your Will.

Revocation

24. Care should be taken in relation to the revocation clause of the Will. A Will limited to BVI assets should revoke only previous Wills and codicils insofar as they relate to those assets. If you make a Will in another jurisdiction after you have made your BVI Will, that foreign Will should expressly state that all previous Wills and codicils except for your BVI Will (refer to it by date) are revoked.

Conclusion on Wills

25. In conclusion, great care must be taken in drafting wills with foreign elements. Where you have assets in multiple jurisdictions, or where local assets are subject to foreign laws you should make a Will or multiple Wills ensuring insofar as it is necessary that:

(a) The Will dispose of the foreign assets/BVI assets in accordance with the relevant governing law;
(b) All your assets are covered by your Will(s);
(c) Each Will is valid in accordance with the relevant governing law; and
(d) Subsequent Wills do not revoke prior Wills by operation of law.

The most important consideration is that you obtain expert legal advice in all relevant jurisdictions, and ensure that your advisers communicate with each other on all foreign law elements in your Will or Wills.

26. We recommend that a person who has assets in the BVI such as shares in a BVI company, or BVI real estate should make a Will and in particular a BVI Will. This will result in the process of applying for and obtaining a grant from the BVI Court simpler and easier.