

BVI estate planning

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Joint Ownership of BVI Shares: A Trick and a Trap

With the large number of BVI companies in existence and the general ageing population, succession issues surrounding ownership of shares in a BVI company have become quite prevalent. Many options and solutions are available, such as trusts, wills and joint ownership. Each with their own advantages and disadvantages.

This article will examine the issues that can arise in relation to putting in place joint ownership of shares in a BVI company.

What is Joint Ownership?

Joint ownership is a type of co-ownership or concurrent estate in which co-owners have a right of survivorship. In the eyes of the law, joint owners do not own any portion or individual share in the property but each owner has an undivided interest in the whole of the property.

The feature of this type of ownership which provides an aspect of succession planning is the right of survivorship. Effectively, the survivor automatically becomes the owner of the whole property on the other person's death. The title passes as a matter of law and not as part of the deceased estate so probate is not required.

Estate Planning – The Trick

As a matter of BVI law, shares in a BVI company are deemed to be located in the BVI. Where a shareholder of a BVI company dies, shares generally cannot be transmitted to the heirs until a grant of probate or letters of administration has been obtained from the BVI court or alternatively, a foreign grant of probate or letters of administration has been re-sealed by the BVI court (each a "Grant"). A joint ownership arrangement avoids the need to obtain a Grant as the deceased joint owner's interest ceases on death and therefore does not form part of their estate for succession purposes. No Grant with respect to the deceased's shares is required – the property passes automatically by operation of law to the survivor. The survivor will however have to consider the succession issues relating to the ownership of shares on his or her death

Formalities of Joint Ownership.

Joint ownership exists at common law and is recognised in the BVI. There does not appear to be any maximum number of joint owners. In order to create a joint ownership the four unities must be present.

Unity of time

Interest must be acquired by the joint owners at the same time.

Unity of title

The interests held by the joint owners must arise out of the same instrument.

Unity of interest

Both owners must have the same interest in the property.

Unity of possession

Both owners must have the right to possess the whole property.

Creating Joint Ownership - The Trap

If any of the four unities is not present, the joint ownership is either not created or is broken and the ownership reverts to an ownership in common. Creating the formalities of the four unities on a subscription for shares is generally quite straight forward. Transferring an existing shareholding to joint ownership is a more complicated. Where an existing shareholder wants to create joint ownership over existing shares that the shareholder owns, the shareholder will need to transfer the relevant shares to himself and the joint owner as joint owners with the right of survivorship. If the shareholder were to simply transfer one half interest in the shares or add the person's name to the share register and share certificate as a joint owner, the unity of time and title would be broken and the joint ownership would be ineffective. In this case, it is likely that one-half interest in the shares would remain with each joint owner (as an owner in common) and probate would be needed in the BVI to deal with the one-half interest that the deceased held.

Another way, and perhaps a more straightforward way, to achieve joint ownership is to transfer the shares to a third person (straw person) who would then effect the transfer into joint ownership.

Evidencing Title

The Memorandum & Articles of Association of a company may or may not include wording in relation to the joint ownership of shares. If not there are default provisions in the BVI Business Companies Act, 2004 dealing with the voting of jointly owned shares. The practice is for language to be included in the Register of Members of the BVI Business Company and also the Share Certificates, if any, to the effect that the share(s) is/are jointly held. A statement such as "X and Y as joint owners with right of survivorship" is sufficient to evidence the joint ownership. We have seen the acronym JTWROS used, and while relatively common, it is better to include the full statement.

Conclusion

Joint ownership with the right of survivorship is common between spouses and between parent and child and in any other situation where parties want ownership to pass immediately and automatically to the survivor.

Where one of the owners is a child care must be taken to ensure that the child is not a minor as that can create additional issues. In the appropriate situation, joint ownership with the right of survivorship is a useful tool for dealing with succession in the event of death. It is comparatively less expensive when compared to a last will and probate, and the transfer of title is

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automatic on death. As noted care must be taken when creating the joint ownership or the benefits may not be realized. One further difficulty with this approach is that the entitlement of each joint owner vests immediately giving ongoing rights to the shares during their lifetimes and not just on death of one of the parties.