

Welcome changes to BVI trusts and probate legislation are on the way

Service area / [Trusts and Private Wealth, Dispute Resolution and Litigation](#)

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On 12 March 2021, and in the light of recommendations made by the Trust and Succession Law Review Committee of the local branch of the Society of Trust and Estate Practitioners (**STEP**), the British Virgin Islands (**BVI**) Government gazetted the Trustee (Amendment) Act 2021 and the Probates (Resealing Act)¹. Upon commencement in due course, both acts will introduce important reforms and enhancements to the BVI's trusts and probate legislation.

Trustee (Amendment) Act 2021

The Trustee (Amendment) Act 2021 amends the Trustee Act 1961 (the **Trustee Act**) in a number of interesting and helpful ways:

- It introduces important new statutory provisions regarding the variation of BVI trusts. Provided that the settlor or trustee “opts in” to the new provisions at the time of establishing a new trust, or in circumstances where the trustee is changing the governing law of an existing trust to BVI law, the provisions will apply to the trust and empower the High Court to vary the terms of the trust without the consent of adult beneficiaries. In doing so, the High Court must consider the variation to be “expedient in the circumstances”, with regard to factors such as the settlor’s wishes and the remoteness of the needs of the beneficiaries. Importantly, the variation may extend to the dispositive provisions of the trust deed. This provision will operate to allow for the interests of adult beneficiaries of full capacity to be varied

by the High Court without their consent, which will be helpful in circumstances in which adult beneficiaries are unable to provide their consent (for example, due to incapacity or because providing it may have other adverse consequences such as unintended taxation issues).

- It expands the firewall provisions in the Trustee Act, to protect BVI trusts from claims brought under forced heirship regimes or arising as a result of a personal relationship with a person internal to the trust relationship. The term “personal relationship” has now been defined to include step-relationships and children born by artificial fertilization and surrogacy, and relationships to beneficiaries (including objects of dispositive powers) are also covered by the revised definition.
- It also introduces new statutory Hastings Bass provisions (or, more accurately, gives statutory effect to the “old rule” in Hastings-Bass so that the position under English law prior to the English Supreme Court decisions in *Pitt v Holt* and *Futter v Futter*, will apply once again in the BVI). These provisions operate so that, subject to specified conditions, the High Court can set aside the flawed exercise of a fiduciary power in circumstances in which the trustee was relying on advice which later proved to be incorrect. It is not necessary to make or substantiate an allegation of breach of trust or duty for the section to apply. The new section does make it clear that it does not limit the court’s jurisdiction under the

¹ - Other new legislation introduced alongside these two important Acts includes the Virgin Islands Special Trusts (Amendment) Act, 2021, the Administration of Small Estates (Amendment) Act, 2021, and the Property (Miscellaneous Provisions) Act, 2021.

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doctrine of mistake, in which case the rulings on this front in the English decisions mentioned above will continue to apply: to set aside the transaction on the grounds of mistake, there must be a causative mistake of fact or law, which is integral to the very nature of the transaction, and which has grave ramifications.

- It includes updated provisions, which more comprehensively address and prescribe the circumstances in which powers can be reserved or granted to the settlor of the trust (or to other parties); and
- Finally, it imposes new record-keeping obligations on trustees. These are consistent with current international regulatory standards.

Probates (Resealing) Act 2021

The new probate legislation aims to expand the regime pursuant to which foreign grants of probate or letters of administration are resealed in the BVI by the High Court. Up until now, it has only been possible to reseat grants from a very limited number of jurisdictions. The Resealing Act now provides for more than sixty jurisdictions to be recognised for the purposes of resealing; the list includes all countries in the Commonwealth, the Crown Dependencies, and jurisdictions such as Hong Kong and various states in the United States of America. There is no requirement for reciprocity from these jurisdictions.

The new legislation will be of great assistance to the many shareholders of the large number of BVI companies in existence, and offers up a more simple procedure for the transfer of shares to heirs on death.

Summary

The reforms discussed above will introduce greater flexibility into, and significantly modernize, the trusts and probate laws in the BVI. They will undoubtedly be warmly welcomed by trustees and private clients alike, and well used in years to come.



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