

Estate Administration in the British Virgin Islands: the Relevant Factors for the Removal of an Administrator or Executor

英属维尔京群岛遗产管理—罢免遗产管理人或执行人的相关因素

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The holding company of many corporate groups trading in Asia is frequently incorporated in an offshore financial centre such as the British Virgin Islands ("BVI"). It is therefore common for high-net-worth individuals domiciled in Asia to hold shares in companies incorporated in the BVI, which in turn hold highly valuable operating subsidiaries in jurisdictions such as Hong Kong, Mainland China and Taiwan.

Where an individual dies holding shares in a BVI company, it is not possible to deal with those shares until an administrator or executor (referred to collectively as a "Personal Representative") is formally appointed by the BVI Court. A Personal Representative is appointed by way of a grant of representation, being either a grant of probate or letters of administration. The grant of representation formally recognises the Personal Representative as the legal representative of the deceased person's estate. All of the deceased's assets, including any shares held in companies incorporated in the BVI, therefore vest in the name of that Personal Representative who effectively steps into the Deceased person's shoes in respect of those companies, meaning the Personal Representative is able to exercise voting rights and effect share transfers.

The Personal Representative will often have discretion as to aspects of the management and administration of the estate. For example, the Personal Representative will typically have discretion as to the exercise of voting rights and may have scope to determine whether, and when, beneficiaries receive an *in specie* transfer of shares or an equivalent cash distribution. As such, a grant of representation can put a Personal Representative in a significant position of control in respect of a BVI company, the shares of which form part of a deceased estate.

众多于亚洲营运的企业集团控股公司均注册成立于英属维尔京群岛等离岸金融中心。因此，以亚洲为居住地的高净值人士普遍是透过持有于英属维尔京群岛注册成立公司的股份，而持有于香港、中国大陆及台湾等司法管辖权区营运的高价值附属公司。

如个人离世之时持有英属维尔京群岛公司的股份，直至英属维尔京群岛法院正式委任遗产管理人或执行人（统称“个人代表”）前，是不可能处理有关股份的。个人代表以授予遗产承办书（遗嘱认证书或申请遗产管理书）方式委任。授予遗产承办书正式确认个人代表为死者个人遗产代表。死者所有资产（包括于在英属维尔京群岛注册成立公司持有的任何股份）归属于个人代表名下。个人代表故有效地就英属维尔京群岛公司代入死者身分，并可行使投票权及转让该等股份。

个人代表普遍有遗产管理及行政的若干酌情权。例如，个人代表一般有酌情权行使投票权，并有空间厘定遗产受益人会否及何时收到实物股份转让或同等现金分派。是故，授予遗产承办书可让个人代表掌握英属维尔京群岛公司的重大控制权，而该公司的股份组成遗产的部分。

In light of this, beneficiaries may find themselves in a position where they disagree with the Personal Representative's administration of the estate and its underlying BVI companies such that they are compelled to consider available forms of relief. This article discusses the relevant duties that are owed by a Personal Representative to the beneficiaries and the required threshold for the replacement of a Personal Representative in the BVI.

The Role of Personal Representatives

The role of the Personal Representative is to collect the assets of the deceased, repay debts owed by the estate to creditors and subsequently distribute the assets of the estate to the beneficiaries according to their entitlements. In its capacity as a court of equity, the High Court of the BVI ("the Court") has an inherent jurisdiction to supervise and ensure the proper administration of trusts. The Court is vested with the power to appoint, substitute or remove a Personal Representative, depending upon the circumstances of the case. The overriding consideration is the proper administration of the estate and the welfare of the beneficiaries.¹

The Duties of a Personal Representative

An applicant seeking to remove a Personal Representative should seek to illustrate the inefficiency and unworkability of the Personal Representative's administration, and, in doing so, argue that a replacement is necessary to safeguard the welfare of the beneficiaries. A breach of one of the duties owed by a Personal Representative (outlined below) is a useful indicator to suggest that an estate is no longer being administered properly.

(a) Duty to Keep and Provide Proper Accounts

An important duty that is owed by a Personal Representative is to keep accurate accounting records and to provide those accounts upon a reasonable request by a beneficiary. A statutory provision in the BVI empowers a beneficiary to apply to the Court for an order that a Personal Representative supply proper accounts.² The standard expected of a Personal Representative in discharging this duty is to provide adequate receipts and accounting records that are capable of giving a satisfactory explanation of the assets held within the estate.³ If, for any reason, a Personal Representative is incapable of discharging this duty to a satisfactory standard on their own, it is incumbent on the Personal Representative to seek appropriate professional advice to assist them in discharging it.⁴

有时，受益人可能反对个人代表的遗产管理行为，甚或针对其寻求其他方式的救济。本文讨论个人代表对受益人承担的相关责任，以及英属维尔京群岛个人代表替任人的所须门槛。

个人代表的角色

个人代表须收回死者资产、向债权人偿还遗产欠付债务，以及其后根据受益人权利向其分派遗产中的资产。英属维尔京群岛高等法院（“法院”）作为衡平法法院，对监督及确保信托获恰当管理具有司法管辖权。法院有权力委任、替代或罢免个人代表，惟须视乎案件情况而定。首要考虑因素是遗产获恰当管理及受益人的福祉。¹

个人代表的责任

寻求罢免个人代表的申请人应阐明个人代表得管理方式低效及难以实行，由此争辩取缔个人代表对保障受益人福祉有其必要。个人代表有否违反任何一项责任（见下文所述）为遗产并无获妥善管理的有用指标。

(a) 妥善保存及提供账目纪录的责任

个人代表承担的其中一项重要责任为保存准确会计纪录，并按受益人的合理要求提供有关账目。英属维尔京群岛的法定条文赋权受益人向法院申请，命令个人代表提供合适账目纪录。²对个人代表履行责任的预期标准为提供充足收据及会计纪录，而足以就遗产内持有的资产作令人满意的解释。³如个人代表因任何理由未能自行按令人满意的标准履行此责任，个人代表有义务寻求合适的专业建议，协助其履行有关责任。⁴

¹ Eileen Papone & Lourie Anthony v James Anthony [Eastern Caribbean Supreme Court] [2011] 7 JBVIC 2801, paragraph 50.

Eileen Papone 及 Lourie Anthony 诉 James Anthony [东加勒比最高法院] [2011] 7 JBVIC 2801, 第 50 段。

² BVI Civil Procedure Rule 67.5(2).

《英属维尔京群岛民事程序规则》第 67.5(2) 条。

³ See generally Section 2 BVI Trustee Act 2020.

一般见《2020 年英属维尔京群岛受托人法》第 2 条。

⁴ *Wroe v Seed* (1863) 66 ER 773.

Wroe 诉 Seed (1863) 66 ER 773。

(b) Duty to Consult

Closely linked to the duty to report and account is a Personal Representative's duty to consult with the beneficiaries of the estate. Unless a particular decision or action is expressly sanctioned by an order of the court, a Personal Representative should inform and if possible, consult with the beneficiaries when taking decisions on behalf of the estate.⁵

(c) Duty to Preserve and Distribute the Estate

Personal Representatives are under a duty to realise, preserve and distribute the assets of the estate to the beneficiaries. If a Personal Representative fails to distribute the assets of the estate within a reasonable time period after receiving a grant of representation, this may constitute a *prima facie* breach of duty.⁶

(d) Other Fiduciary Duties

Although a beneficiary does not have any direct equitable or legal ownership of the assets forming part of the estate, a Personal Representative owes fiduciary duties to the estate and the beneficiaries as a collective.⁷ These duties include the duty to act with due care and skill, the duty to act in good faith and the duty to avoid conflicts of interest.⁸

Important Considerations for the Court

(a) Breakdown of Relations between a Beneficiary and a Personal Representative

It is possible for the breakdown of relations between Personal Representative and beneficiary to be a significant factor in a Personal Representative's removal. However, the Court's primary concern is whether the estate can continue to be administered effectively.⁹ A breakdown of relations on its own will not be sufficient for an application to remove a Personal Representative. Poor relations between the parties must be shown to have the possibility of preventing or substantially impeding the administration of the estate.¹⁰ An applicant should focus on the effect that the animosity has or will have on the administration rather than seek to prove that one party is morally at 'fault' for the hostility that exists in the first place. The prospect of continued, prolonged litigation surrounding the estate would be highly relevant here.

(b) 咨询责任

报告及说明责任与个人代表咨询遗产受益人的责任有密切关联。除法院命令明确认可的指定决策或行动外，个人代表应于代表遗产决策时，通知及（如可能）咨询受益人。⁵

(c) 保留及分发遗产的责任

个人代表有责任实现、保留及分发遗产资产予受益人，如个人代表于收到授予遗产承办书后的合理时间内未能分发遗产资产，或构成表面成立的责任违反。⁶

(d) 其他受信责任

尽管受益人对组成遗产部分的资产并无直接衡平或法定拥有权，个人代表对遗产及受益人（作为整体）负有受信责任。⁷ 该等责任包括以应有的谨慎及技巧行事之责任、真诚善意行事的责任，以及避免利益冲突的责任。⁸

法院的重要考虑因素

(a) 受益人与个人代表的关系破裂

个人代表与受益人关系破裂可能为罢免个人代表的重要因素。然而，法院的主要考虑为，遗产可否继续获有效管理。⁹ 关系破裂本身不足以成为申请罢免个人代表的理据，必须证明当事人之间的不良关系可能阻止或严重妨碍遗产管理。¹⁰ 申请人应专注于有关敌意已或将遗产管理构成的影响，而非就既有存在的敌对状态，寻求证明一方当事人犯下道德“错误”。这将成为遗产诉讼会否旷日持久的关键。

⁵ *Freeman v Freeman and Freeman* [2006] ECSC J1219-1, paragraph 11.

Freeman 诉 Freeman 及 Freeman [2006] ECSC J1219-1, 第 11 段。

⁶ *Hiddingh (Heirs) v De Villiers Denysen and Ors* (1887) 12 App Cas 624 at 631.

Hiddingh (承继者) 诉 De Villiers Denysen 及其他人 (1887) 12 App Cas 624, 第 631 页。

⁷ *Commissioner of Stamp Duties (Queensland) v Livingston* [1964] 3 All ER 692.

印花税总监（昆士兰）诉 *Livingston* [1964] 3 All ER 692。

⁸ *Liao Hwang Hsiang v Liao Chen Toh* [Civil] Claim no BVIHCV 2011/222. Ellis J noted there would be a *prima facie* conflict of interest where a widow maintained a claim for spousal entitlement against an estate, notwithstanding her position as the administrator of the estate.

Liao Hwang Hsiang 诉 Liao Chen Toh [民事] 申索编号 BVIHCV 2011/222。Ellis 法官指出，即使遗孀担任遗产管理人，如她就配偶权利对遗产提出申索，利益冲突表面成立。

⁹ See generally *Kershaw v Michlethwaite & Others* [2010] EWHC 506; *Agnes (and Thomas) Carvel Foundation v Carvel* [2007] EWHC 1314 (Ch).

一般见 *Kershaw 诉 Michlethwaite 及其他人* [2010] EWHC 506; *Agnes (and Thomas) Carvel Foundation 诉 Carvel* [2007] EWHC 1314 (Ch)。

¹⁰ *Kershaw v Michlethwaite & Others* [2010] EWHC 506, paragraph 28.

Kershaw 诉 Michlethwaite 及其他人 [2010] EWHC 506, 第 28 段。

(b) The Intended Replacement

The extent to which a proposed replacement is familiar with the assets of the deceased is another important factor. Where a Personal Representative attains office by virtue of having been expressly selected as an executor in the will, the Court will be slower to substitute the choice of the deceased with its own. The deceased is considered to have been in a better position than the Court to decide who should be a Personal Representative over their estate.¹¹

Equally, a Court will also be wary of the expense and time that the installation of a replacement would cost the estate. If an applicant seeks to appoint an independent professional administrator, the fees of the proposed administrator are an important factor to take into account. The smaller the size of the estate, the less likely the court will be willing to appoint an independent professional replacement.¹² The converse will be true if the estate is large and complex.

Conclusion

The office of Personal Representative will confer on an individual legal ownership of the assets comprised within a deceased's estate. The administration of an estate is not always straightforward and it is important for parties on both sides (whether a Personal Representative or beneficiary) to obtain advice as to their rights and duties. An applicant seeking the removal of a Personal Representative should aim to show that an estate cannot be administered properly and, as a consequence, the collective interests of the beneficiaries necessitate the removal of the Personal Representative.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information. The Chinese translation of this article has been adapted from the English original, please refer to the original in case of ambiguity.

(b) 拟定替任人

建议替任人对死者资产的熟悉程度为另一重要因素。如遗嘱明确指定个人代表担任遗产执行人，法院取缔死者选择的机会较低。相对法院而言，死者被视为较适合决定选择其遗产个人代表者。¹¹

同样地，法院亦会担心替代遗产管理人会让遗产耗费开支及时间。如申请人寻求委任独立专业遗产管理人，建议遗产管理人的费用将为重要考虑因素。遗产规模越小，法院委任替代独立专业遗产管理人的机会越低。¹²如遗产规模大且复杂，则反之亦然。

总结

个人代表身分将赋予个人对组成死者遗产的资产之法定拥有权。遗产管理并不总是直截了当，就权利及责任取得建议对个人代表或受益人而言均为重要。寻求罢免个人代表的申请人应证明遗产欠妥善管理，故为受益人的集体利益起见，须罢免个人代表。

本文的内容并非详尽无遗，旨在提供简要概述和一般资料，而不应用于替代法律建议或法律意见。中文译本仅供参考，如有歧义，请以英文原文为准。

¹¹ Ibid, paragraph 14.

同上，第 14 段。

¹² *Liao Hwang Hsiang v Liao Chen Toh* [Civil] Claim no BVIHCV 2011/222. *Liao Hwang Hsiang 诉 Liao Chen Toh* [民事] 申索编号 BVIHCV 2011/222。

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