

**Intestates Act Ready for Reform:  
Survivor Takes \$240 or 10 Percent, Whichever is Greater!**

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The British Virgin Islands has lagged behind in many areas of law reform and the Intestates Estates Act, Cap 34 of the revised laws of the Virgin Islands, 1991 is certainly a statute which needs updating. The Act came into force in the British Virgin Islands in 1945 and governs the distribution of estates of persons who have died without leaving wills, or who have died leaving wills which do not dispose of all their property. These persons are known as "intestates" and subsequently in this article I shall refer to the Intestates Estates Act as "the Act".

**Background**

In order for lay readers to get a proper appreciation of the subject matter of this article, certain matters must be dispensed with early. First and foremost, the concept of "community property", a regime which applies in other systems of law, whereby upon dissolution of marriage (whether by divorce, death or otherwise) each spouse is entitled to half the estate, does not apply under the English system of law.

Under English law, unless property is held as "joint tenants", property ownership is directly proportionate to contribution, and where the surviving spouse cannot establish that he or she has contributed to property, then he or she will fail to prove outright ownership of any portion of the property which is held in the name of the deceased spouse. The person in whose name the property is registered is the person who would generally be presumed to own the property

outright and if he or she dies without leaving a will it will pass under the Act.

Secondly, it is crucial to understand that words such as "child", "children" or "issue" when referred to in any statute in the British Virgin Islands will for most purposes (but subject to a few exceptions which are beyond the scope of this article) be construed as meaning legitimate or legitimated children or descendants (born within a marriage or whose parents or relevant antecedents married each other subsequent to their birth). However, persons who have been legally adopted are treated as the children of those who have so adopted them. Similar considerations apply to references, such as those in the Act, to other relationships, such as those to brothers, sisters, nephews, nieces, uncles, aunts, grandparents, and cousins: in general if those concerned are related other than via marital unions, BVI statutes will in general completely disregard the relationships, so that those concerned will be treated no better than complete strangers.

### **Consequences of the Act**

As we have seen, if a person dies without a will, the Act will determine who will inherit his or her property. The Act provides, amongst other things, that upon the death of a spouse the surviving spouse will receive all the personal chattels outright and he or she is entitled to these personal chattels whether there are children or not. Personal chattels are defined in the Act to include such assets as motor cars, furniture, domestic animals, linen, china, glass, books, pictures, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus. Personal chattels do not however include any chattels used at the death of the intestate for business purposes; nor do they include money or "securities for money" such as shares, stocks, bonds, or certificates of deposit or other marketable securities of this nature.

In addition to the personal chattels the surviving wife or husband is also entitled to either \$240 or a sum equal to 10% of the net value of the estate, whichever is the greater. The surviving spouse, in addition, gets a "life interest" in half of the remaining property which the first spouse to die leaves. This remaining property (i.e. all the property which the deceased spouse leaves, other than the personal chattels and other than the greater of \$240 and 10% of the estate) is called the "residuary estate" and on the surviving spouse's death it passes outright to the deceased's children or issue (or if he or she left none to those set out in an order of priority specified the Act).

It is instructive to point out that a "life interest" in property means that a person has the right to enjoy the property during his or her lifetime. However, the person's interest in the property abates at the end of his or her lifetime and does not form part of his or her estate at death. Enjoyment includes obtaining rental income from the property or living in it. On the other hand, a life interest in money in a bank account or investments means entitlement only to the interest accrued on the money in the account or to the dividends received - and not an entitlement to the capital (i.e. the actual amount in the bank account itself). Moreover, the personal representatives of a deceased person have a duty to ensure that his or her estate is invested in such a way as to ensure a fair balance between income production for the person who has the life interest and capital appreciation for those entitled on that person's death. This means that it would be improper (and the personal representative could find himself or herself personally liable) for investing the assets of the estate in investments such as certificates of deposit which only accrues interest but enjoy no capital appreciation.

The other half of the residuary estate (i.e. the half to which the surviving spouse is not entitled to a life interest in) will pass to any children (or issue) of the

deceased and, if there are no issues, then it will be held in accordance with the order of priority stipulated in the Act.

The respective entitlements of the surviving spouse and issue are set out below:

*Entitlements under the Intestate Estates Act where the deceased leaves a surviving spouse and issue*

#### Surviving spouse

1. Personal chattels outright
2. \$240 or 10% of the remaining estate (whichever is the greater)
3. Life interest in half of the residuary estate (income/right to enjoy only and only during lifetime)

#### Issue

1. Half of the residuary estate immediately
2. The other half of the residuary estate following the death of the surviving spouse

### **The UK Comparison**

Before I go on to address the inadequacy of the provision which the Act makes for the surviving spouse, it may be instructive to provide the background to its enactment. In the mid 1940s when the statute was enacted \$240 was worth much more than it now is and would have given the surviving husband or wife reasonable purchasing power in the property market. That is clearly not the case today. As a result other countries such as the UK which have equivalent legislation periodically increase the fixed sum which the surviving spouse receives where the deceased has not left a will to reflect increases in the cost of living.

In the UK, for example, in 1925 when the UK's equivalent statute, the Administration of Estates Act, came into force the provision for a surviving husband in circumstances where the deceased spouse died intestate was 1,000 pounds. However, by 1952, the amount was increased to 5,000 pounds and then to 8,750 pounds (where the intestate left issue) and to a sum of 20,000 pounds (where the intestate left close relatives but no issue).

By 1972, the amount provided where the deceased left issue approximately doubled to 15,000 pounds. The amount increased in 1977, and then in 1981, and then again in 1987, and, with the 1993 amendment, the amount provided for a surviving spouse where the deceased died intestate was 125,000 pounds (where there is issue) and 200,000 pounds (ie approximately \$380,000) (where there is no issue). In the Cayman Islands, the figure for the surviving spouse is \$20,000, or a sum equal to 50% of the net value of the estate (whichever is greater): that is almost one hundred times as much as in the BVI.

### **Inadequacy of the Act**

Against this backdrop, I think it would be remiss of me if I hesitated to put forward the proposition that \$240 or 10% of the value of the estate is a grossly inadequate amount for BVI legislation to continue to provide as regards the surviving spouse's entitlement from the estate.

The failure of parliament to update this legislation to reflect inflation demonstrates the dire need for BVI domiciliaries (and those owning property in the BVI) to ensure that their estates are in order during their lifetimes and, more importantly, to make wills to govern the distribution of their property upon death.

The situation becomes more acute where spouses have pooled moneys together for either the purchase or maintenance of property, but the property is conveyed into one spouse's name and not into joint names: a predicament which many BVI Islanders somehow find themselves in. Whilst in certain cases the law might impose a "resulting trust" over the property so that the interests of the other spouse are protected, any attempt to invoke this doctrine will invariably give rise to a great deal of trouble and expense - and, more often than not, to court proceedings. Therefore, it is far better for the parties to be proactive in these areas as the reactive approach is not only uncertain but can be quite costly and frustrating.

It is quite easy for some to read this article and decide that the surviving spouse should have protected himself or herself while the deceased was alive by ensuring that property was held jointly or in common or that wills were made in order to prevent hardship being caused on the surviving spouse.

However, in practice, it is not quite that simple. The making of wills is not commonplace in the BVI. Moreover, persons only find their way to a lawyer's office in order to cure a problem which has occurred, instead of seeking advice at the initial stage to prevent the occurrence of such problems. Hence they are ignorant as to such concepts as joint tenancy and tenancy in common and the distinctions between the same when they are emptying their bank accounts or acquiring debt in order to purchase property. Unfortunately, ignorance transposes into every thing but bliss in these circumstances.

### **The Plot thickens: Lack of Maintenance Provisions**

Most other jurisdictions give further protection to surviving spouses: in the UK and elsewhere statutes such as the Inheritance (Provision for Family and Dependents) Act enable a surviving spouse who is insufficiently provided for

under a will or on an intestacy to apply to the court for additional financial provision. However, there is no statutory equivalent to these statutes in the BVI. Having said that, there are, albeit fairly limited, provisions in the Matrimonial Proceedings and Property Act, 1995 (No. 6 of 1995) which, inter alia, enable various orders for financial provision (but only in relation to the matrimonial home) to be varied, revoked or made following the death of one of the parties to a marriage who is domiciled and or resident here. In the BVI, therefore, the entitlements of the surviving spouse are virtually wholly governed either by the deceased's will (if he or she left one) or by the antiquated and inadequate Intestates Estates Act.

### **The Real World**

There is a plethora of cases in which surviving spouses only learn of their rights or lack thereof after the deaths of their spouses, when they make the journey to the lawyer's office seeking advice on how to apply for letters of administration. Some of these spouses, especially women, have depended on their husbands all their lives to take care of them. These women have resided in matrimonial homes (which are often not registered in the joint names of both spouses) for most of their lives and have become accustomed to certain standards of living.

In most cases, these homes are mortgaged to financial institutions. At the time of death of the husband, some of these women have either minor children, or children in college, who under the Act are entitled to half of the residuary estate immediately following the death of the first spouse to die and to the rest outright upon the death of the surviving spouse and, as a consequence, such children should be jointly responsible with the surviving spouse for the mortgage payments.

Clearly, however, minor or relatively young children, such as those still at

university or at school, are in the vast majority of cases not in a position to meet mortgage payments unless the family home is rented or is as a last resort sold, which in either of these cases, the surviving spouse will have to leave the family home. Hence, if the surviving spouse wishes to continue to reside there, he or she alone will have to make the mortgage payments. Of course, one can see the potential injustice, since extrapolated to its most logical limits, this is tantamount to the surviving spouse paying rent for the remainder of his or her life or the term of the mortgage, whichever ends earlier, in order to remain in the matrimonial home, while the children (who may be or include children from the deceased spouse's earlier marriages) will obtain the property free of encumbrances upon the eventual death of the surviving spouse.

It is therefore not a pleasant experience either for the lawyer or for the surviving spouse when the former informs the latter (who may only be in his/or her fifties or sixties) that, with the exception of personal chattels, he or she is only absolutely entitled to \$240 or 10% of the estate. Hence, if the estate is only worth \$2,400, then \$240 is what the surviving spouse is entitled to. If, on the other hand, the estate is worth \$600,000, then the surviving spouse is entitled to \$60,000. One can clearly see that even if the estate is worth \$1,000,000, then the surviving spouse's entitlement of \$100,000 cannot purchase a small house on today's market, especially in light of the rapidly increasing costs of construction in the BVI coupled with the very high interest rates which we must pay to the banks in order to inhabit these houses.

## **Conclusion**

The Act is simply out of step with modern day economic conditions. Inflation has increased exponentially since 1945 when the Act came into force, but there have been no amendments to the Act in order to keep it in step with inflation. The defect falls to be corrected by the legislature, so as to cajole this piece of legislation into the 21st century with the rest of us . In the meantime those

BVI Islanders or others owning property in the BVI who are astute will ensure that they are familiar with their rights and entitlements and will appreciate how important it is to ensure that wills are made and executed so that they themselves, rather than the long dead draftsmen of an antiquated colonial statute, determine who receives assets when they die. The alternative of course is for married couples to work diligently and pray fervently that the first to die's estate is valued at at least \$4,000,000 at the time of death, so that the surviving spouse's entitlement under the Act (which will be at least \$400,000) will enable him or her to afford a home.