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The trusted solution in wealth structuring

The Nerine Executor Trust

Despite the clear estate planning benefits, for some the loss of control to the trustee is an insurmountable issue. This leaves them with the problem of what happens to shares in, say, their family business on death. Whilst they can use a will to deal with the shares, there are other concerns, not least of which being probate. This is where Nerine's Executor Trust comes in.

The executor trust is a specialised and refined version of the British Virgin Islands VISTA trust used solely as a will replacement vehicle. In creating the Executor Trust deed, Nerine retained BVI legal counsel with the mandate to create a trust structure able to substitute, and in our view improve, the functions of a will whilst being simple, cost effective, and utilising the benefits of the BVI VISTA legislation.

The executor trust has four basic principles:-

- That the Executor Trust must be able to dispense with the need for probate following the settlor's death in respect of assets held in the trust; ensuring
- The settlor is able to make financial provision for his family after his death; whilst
- Permitting the settlor to place BVI company shares ("Designated Shares") into the trust so that they remain in trust in the long term without interference from the trustee. Therefore the settlor may continue to manage a company held in this structure in the same fashion as he did before it was held in trust
Note that prior to this, shares in any family trading or other company can be transferred into the BVI company in exchange for shares in the BVI company; and
- In addition to any continuing control of the settlor over the company whose designated shares are in the trust, to enable the settlor to maintain significant control over any other trust assets, while maintaining the integrity of the trust

Benefits

The Executor Trust is typically used where there is a sole director/shareholder of a BVI company.

Instead of owning the shares in the BVI company in their own capacity, the sole director/shareholder settles the shares in an Executor Trust. This has certain advantages in regard to estate planning which we will come to later.

The trust is revocable by the settlor at anytime, unless incapacitated.

The VISTA trust component adds an extra benefit for the director of the company, as it removes the trustee's fiduciary duty to ensure the company operates as a prudent investor.

In effect this allows the director during his/her lifetime to operate and run the company, which is owned by the trust, however he/she wishes without trustee interference.

The Executor Trust, which is a short form version of a VISTA trust, uses this VISTA benefit and simply, on the death of the settlor, vests (winds up) and passes the trust fund, primarily the shares in a BVI company or companies, to the intended beneficiaries of the trust.

The estate planning benefits are evident when compared with what happens when a sole director owning shares in his/her own capacity dies. When this happens there are certain administration issues, being:-

- If the sole director has a will an application for probate needs to be filed. Probate needs to be sealed by the courts and there is typically a delay of six (6) months to ensure there are no competing claims and that all liabilities of the estate are recognised; or
- If there is no will then an application to the courts for a grant of letters of administration will need to be made. The letters of administration are court appointed directives as to the administration of the estate. In effect the courts appoint appropriate people to deal with the deceased estate under the intestacy rules

Both these courses take time, incur legal fees and allow claimants against the estate to advance their claims. Additional to the complexities of dealing with estates in multiple jurisdictions there are some jurisdictions which impose forced heirship issues on estates, whereby legislated ratios determine how an estate is distributed and to whom.

All of these obstacles (including any forced heirship issues) are overcome simply by the Executor Trust owning the shares. Simply put, the director no longer owns the shares, the trustees do, and as the shares no longer form part of the shareholder's estate they can simply be distributed by the trustees in accordance with the settlor's wishes on his/her death.

It is important to note the executor trust is a basic short form trust used solely as a will replacement vehicle simply holding the trust fund to be distributed (and the trust to terminate) on the death of the settlor. It is designed as a simple unalterable pro forma document, which allows the costs to be fixed but means it is only a will replacement vehicle and nothing else.

What the Executor Trust is not

The Executor Trust is not a tax planning vehicle and we recommend obtaining independent tax advice if you consider this necessary. Additionally it is not designed for multiple settlors, complex succession matters, nor any flexibility on the distributions after the settlor's death and no continuation of the trust.

These can be encompassed in other forms of trust structures such as a traditional VISTA trust which, whilst more expensive, can be specifically tailored to the settlors particular needs.

Please note this is not a comprehensive summary or a legal opinion on the Executor Trust but merely an information sheet designed to introduce the concept of an Executor Trust and point out some of the benefits of this form of trust.

Additionally if you require a legal opinion on the effectiveness of an Executor Trust we are happy to facilitate the production of such a legal opinion from the BVI legal counsel who drafted the deed.