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Survivorship and commorientes

Synopsis: Special provisions where individuals die at the same time or within a short time of each other.

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Survivorship clauses

What is a survivorship clause?

This is where a clause is inserted into the Will stating that the spouse/civil partner of the person creating the Will has to survive a period (commonly 28 days) to benefit from the Will. The survivorship period should be short enough so as not to delay the administration of the estate and no longer than six months. In s92 of IHTA 1984, it sets the time limit at six months. Otherwise, the inheritance tax (IHT) spouse/civil partner exemption is lost.

Why are they used?

They are used out of concern that the spouse/civil partner may die soon after the first death and, therefore, their assets will be combined and may not end up in the right hands.

History

Prior to 9 October 2007, it was advisable for married couples/civil partners to make suitable provision to avoid the unnecessary aggregation of the spouses'/civil partners' estates (and consequently higher tax liabilities) if they were to die within a short period of each other. To this end, it could be provided in their Wills that the surviving spouse/civil partner will only benefit if they survive the other spouse/civil partner by a specified period. A common provision was a survivorship period of 28 days.

Provided the specified period was not more than six months, the assets would still pass to the surviving spouse/civil partner free of tax under the spouse/civil partner exemption (s92 IHTA 1984).

If the surviving spouse/civil partner died during the specified period, the assets left in the Will of the first spouse/civil partner to die would pass directly to the children and would not be aggregated with the estate of the second to die. This meant that both estates would be taxed separately and a lower amount of tax would usually be paid (in particular the nil-rate band would apply on both deaths).

The effect of a survivorship clause is best explained by an example...

Example

Andrew and Betty are married and have a joint estate of £600,000 owned in equal shares. None of the property is owned as joint tenants. Each had a Will providing

for their share to pass to the survivor. If there is no survivorship clause the following situation would arise.

Say Andrew dies on 1 September 2007 and Betty dies on 15 September 2007. Andrew's assets pass under his Will to Betty and on her death the estate of £600,000 will bear IHT of £120,000, i.e. on the aggregated (bunched) estate of £600,000, subject to only one nil-rate band. Remember the nil-rate band was £300,000 for the tax year 2007/08.

Had Andrew's Will included an appropriate survivorship clause and his estate of £300,000 had passed directly to the children, and likewise on Betty's death, no IHT would be payable at all and £120,000 tax would have been saved.

Position post transferable nil-rate bands

Of course, since 9 October 2007, it has been possible to transfer any unused part of a deceased spouse's/civil partner's nil-rate band to the estate of the survivor. Therefore, if Betty had died on 15 October 2007 rather than 15 September, her executors could have claimed Andrew's unused nil-rate band as well as Betty's own and no tax would have been payable.

Thus, from 9 October 2007, there is no longer any tax benefit to be gained in utilising a survivorship clause in a Will. Indeed, it could make matters worse – please see below.

The survivorship conditions are contained in s92 IHTA 1984. This section provides that where, under the terms of a Will or otherwise, property is held for any person on condition that they survive another for a specified period of not more than six months, the same IHT is payable where a beneficiary becomes entitled to property by reason of satisfying the survivorship condition as would have been payable if that beneficiary had taken the property direct, without the intervention of the survivorship condition.

Similarly, should a beneficiary not satisfy the survivorship condition, so another becomes entitled, that other beneficiary will be treated as inheriting at the date of death of the deceased. Effectively, that beneficiary is deemed to have become entitled from the beginning of the survivorship period.

Care should be exercised with the inclusion of survivorship clauses where one of the spouses/civil partners has made substantial lifetime transfers within the previous seven years which would be aggregable with the estate on death, and particularly when the estate of the other spouse/civil partner is relatively small.

In such a case, it would still be better (i.e. more tax efficient) for assets of the spouse/civil partner with the history of gifts to pass to the surviving spouse/civil partner without them having to survive for a specified period before inheriting, since in such a case even if the survivor dies soon after, the overall IHT liability on the joint estates may be lower.

As stated above, there is now no tax advantage to be gained from a survivorship clause. Indeed, in cases where one spouse/civil partner has insufficient assets to fully use their nil-rate band, from an IHT perspective it may be better not to have a survivorship clause. The following example explains the reasons...

Example

A and B are civil partners. A has an estate worth £400,000 and B has an estate worth £200,000. Neither has made any chargeable transfers. Each leaves everything to the other. A dies first, followed by B a week later.

Without a survivorship clause: A's property passes without IHT to B and B has a double nil-rate band available. Result: No IHT liability.

With a survivorship clause: A's property does not pass to B. Assuming it passes to a non- exempt beneficiary (i.e. say other than a charity) IHT will be payable on the portion in excess of the nil-rate band. Result: IHT liability and part of B's nil-rate band is wasted.

It should be noted that the problem described above will not arise if the deaths occur in the reverse order, i.e. B dies first.

There is another situation where a survivorship clause might produce a worse tax position than would otherwise have been the case. This is where the couple die in circumstances where it is impossible to establish who died first (referred to as commorientes - or simultaneous deaths).

Again, as with survivorship clauses, the problem arises particularly where there is an imbalance in the value of the respective estates of the couple. This is because of the statutory provisions which apply specifically to such situations as described below.

Commorientes

What is commorientes?

This occurs when two people die at the same time and it is impossible to tell who died first, sometimes referred to as simultaneous deaths - the legal term for such a situation is "commorientes".

There are two important factors to look at when this happens, firstly we need to look at the legal position of who inherits the assets.

Legal position

The rule, for the purposes of succession, is set out in s184 Law of Property Act 1925 which provides that *"where...two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths, shall...for all purposes affecting the title to property, be presumed to have occurred in order of seniority and accordingly the younger shall be deemed to have survived the elder".*

IHT

Next, we need to ascertain the IHT position for simultaneous deaths. Strictly, operation of this rule could give a rise to a double or multiple charge to IHT on such deaths.

However, the operation of this rule is avoided for the purposes of IHT because of s4(2) IHTA 1984. This section provides that where it is not known which of two or more persons who have died survived each other or others, they shall be presumed to have died at the same instant and therefore the estate of the younger person is not increased by the assets deemed to pass from the older person.

The fairness of this provision is best illustrated in a situation where a father and a son die simultaneously. If the father leaves his estate to his son, then the father would be presumed to have predeceased his son and the tax would be charged on the father's estate accordingly. The property would then be treated as having passed to the son and would then devolve in accordance with the son's Will or intestacy.

Save for the provision in s4(2) (and the application of quick succession relief), the tax would be charged twice, first on the assets passing originally from the father to the son and then from the son to his beneficiary. As it is, thanks to s4(2), tax is only levied once on those assets, (namely on the transfer from the father to the son) and for the purpose of calculating IHT on the son's estate, the assets transferred from the father are ignored.

In practice, the simultaneous deaths provision would be relevant mostly in cases of married couples/registered civil partners.

The effect of the interaction of s4(2) IHTA 1984 and s184 of the Law of Property Act 1925 is that, provided **no survivorship clause applies**, no IHT is payable at all in respect of the assets of the elder spouse/civil partner passing to the younger spouse/civil partner - the spouse/civil partner exemption will apply on this transfer, and, for the purpose of calculating IHT on the estate of the younger spouse/civil partner, these assets will be ignored.

[Clearly, if for other reasons a survivorship clause is recommended, there should be a proviso that it should only apply if one spouse/civil partner dies before the other, i.e. not in the case of simultaneous deaths.]

Alternatively, it may be possible to remove the survivorship clause from a Will by means of a deed of variation. However, this may be difficult if, for example, some of the beneficiaries are minors.

If a survivorship clause is desired in a Will, then consideration should be given to a proviso that it will not apply where the order of death is unknown.

The application of the above rule is best explained by an example...

Example

Adam - aged 40 - estate £400,000.

Eve - aged 35 - estate £400,000.

Both have Wills providing for everything to pass to each other, then to their children (no survivorship clause). Both die in a car crash and it cannot be determined who died first.

Legally, Adam is deemed to have died first. His estate passes to Eve – the spouse/civil partner exemption applies - no IHT is payable.

Eve's estate £400,000 + £400,000 = £800,000 - passes to the children.

For IHT purposes – they are deemed to have died together – so, the transfer from Adam to Eve is ignored – i.e. Eve's estate for IHT is £400,000.

This means that Eve can not only use her own nil-rate band of £325,000, but her executors can claim the unused transferable nil-rate band from Adam giving an additional £325,000.

There will therefore be no tax to pay on their combined estate which passes to their children.

If a survivorship clause had been included in their Wills, both estates would pass directly to the children – with an IHT charge of £30,000 payable on each estate.

NOTE...

The position is different in Scotland. S31(1)(b), Succession Act 1964 provides that...

'where two persons have died in circumstances indicating they died simultaneously, or rendering it uncertain which of them survived the other, then for all purposes affecting title or succession to property or claims to legal and prior rights the younger person is presumed to have survived the elder.'

There are two exceptions to the general rule. These are...

- Where the two persons were married or civil partners (IHTM11032) there is a presumption that neither survived the other, so that, for example, the husband will not qualify as a beneficiary in his wife's estate and vice versa (s31(1)(a)). (This is subject to actual survivorship that would rebut the legal presumptions for simultaneous deaths), and...

- Where the elder person has left a testamentary provision containing a provision in favour of the younger, whom failing a third person, then if the younger person has died intestate the effect of the survivorship clause is preserved, and, for the purpose of that provision, the elder is presumed to have survived the younger and the property then passes to the third person to the exclusion of the younger person's relatives.

In the light of the above, the pre 9 October 2007 IHT saving opportunity never applied to deaths regulated by Scots law.

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