

IHT and the 'commorientes rule' (Lecture P1289 – 9.00 minutes)

Background

A non-tax law provision (the 'Presumption of survivorship') deals with situations involving the simultaneous deaths of two (or more) persons.

Another term used for the presumption of survivorship is the 'commorientes rule'.

Simultaneous deaths

The commorientes rule is contained in the Law of Property Act (LPA) 1925, s 184, which applies to England and Wales (but not Scotland or Northern Ireland). It broadly states that where two or more individuals have died in circumstances where it is uncertain which of them survived the other, those deaths are presumed for property law purposes to have occurred in the order of seniority. Consequently, the elder of those individuals is deemed to have died first, so the younger person is deemed to have survived the elder.

For example, in *Scarle James Deceased, the Estate of v Scarle Marjorie Deceased, the Estate of* [2019] EWHC 2224 (Ch), an elderly couple died of hypothermia in their home, but their bodies were not found until around a week later. The High Court concluded that it could not be inferred from the facts and evidence that one spouse had survived the other. Accordingly, the presumption of survivorship (in LPA 1925, s 184 applied). As Mr Scarle was the elder of the couple, Mrs Scarle was presumed to have survived him. The application of the presumption of continuity affected the devolution of their estates.

IHT implications

For IHT purposes, the operation of the commorientes rule could give rise to double or multiple IHT charges (albeit potentially subject 'quick succession relief' under IHTA 1984, s 141).

By contrast to the commorientes rule, the IHT legislation dealing with IHT on death (IHTA 1984, ss 4(2) and 54(4)) states that where it cannot be known which of the two survived the other, both individuals are assumed to have died at the same instant. This 'same instant' rule is generally of particular relevance to married couples or civil partners.

For example, in the case of a married couple with wills (with no survivorship clause – see below), where each spouse leaves their estate to the surviving spouse on the first death, the effect of this general IHT rule is that the elder spouse's death estate does not increase the estate of the younger spouse.

HMRC's guidance points out that the interaction of these provisions and the commorientes rule can result in the estate of the elder spouse escaping IHT on both deaths (see HMRC's Inheritance Tax manual at IHTM12197).

Transferable nil rate band

The facility to transfer unused nil rate bands between spouses or civil partners (IHTA 1984, ss 8A-8C) can potentially improve the IHT position further in commorientes circumstances.

HMRC's position on the transferable nil rate band (in England and Wales) is that where spouses died at the same time with wills and it is not possible to establish who died first, there is a presumption that the elder person died first. The couple's estates are treated for IHT purposes on this basis and where the terms of the will mean that there is unused nil rate band on the death of the first spouse (such as where their estate is left to the surviving spouse), it is generally available to be transferred to the estate of the surviving spouse. The IHT 'same instant' rule continues to operate on the death of the younger spouse to exclude the assets received from the elder spouse's estate.

Consequently, in effect the younger spouse's estate could benefit from a double IHT nil rate band and the assets accruing to their estate from the elder spouse are excluded (see IHTM43040).

Survivorship clauses

Double (or multiple) IHT charges can arise on successive deaths, i.e., where two or more people have died; not at the same time, but within a short time of each other.

However, where under the terms of a will (or otherwise) property is held for someone (X) on condition that they survive another person (Y) for a period of not more than six months, and Y becomes entitled to the property because it transpires that the six month survivorship condition has not been satisfied by X, the IHT position is the same as if Y (who actually received the property) had been entitled to it in the first place (IHTA 1984, s 92).

Many wills for married couples (or civil partnerships) include survivorship clauses, which typically provide for a survivorship period of (say) 30 days or three months.

If there is to be a survivorship clause in the wills of spouses or civil partners, it may be worth considering the addition of a condition in the will of the elder spouse or civil partner, excluding the operation of the survivorship clause in the event of simultaneous deaths.

Contributed by Mark McLaughlin