

I Will Survive

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Survivorship clauses appear in most will precedents. The wording used does not vary wildly, ranging from: “My estate is to be divided as if any person who dies within one month of my death had predeceased me” to: “If my wife survives me by thirty clear days then...” and: “I give...to...absolutely but contingently upon his surviving me for one calendar month...”

It is, however, arguable that such a clause has never really been of great general benefit and, in view of the newly introduced transferable nil rate band (TNRB) for inheritance tax purposes in late 2007, it has now completely outlived its usefulness.

The survivorship clause concept

Under a ‘survivorship’ clause the relevant beneficiary only takes if he/she survives for the requisite period after the testator’s death.

Reasons often cited for the inclusion of a survivorship clause are the avoidance of property being subject to two estates in close succession; the avoidance of double inheritance tax charges; and the avoidance of the residuary beneficiaries of the surviving spouse inheriting against the other surviving spouse’s wishes.

This last point may particularly be an issue where the marriage of one (or both) of the spouses is their second (third, fourth etc.) marriage.

Where relevant, ‘quick succession relief’ may effectively relieve the ‘double’ inheritance tax issue and use of an immediate post-death interest (a so-called IPDI) deals with the residuary beneficiary concern.

The TNRB arises where the nil rate band (NRB) of the first spouse to die is, in whole or in part, unused; the percentage of the NRB unused may then be transferred and utilised by the surviving spouse on death (but not during lifetime). Transferability is applicable to inter-spouse transfers but only where at least one of the deaths occurs on or after 9 October 2007.

A new era

Before the introduction of the TNRB the nil rate band discretionary trust (NRBDT) was

the mechanism commonly adopted by spouses to ensure that each spouse made full use of their respective NRBs. While it seems certain that use of the NRBDT in this manner will now decline in view of the TNRB, it is still of value, for example, where the TNRB is inapplicable (e.g. as between co-habitees); if the anticipated growth of assets in the NRBDT is likely to be greater than the equivalent growth in the NRB itself; or as a possible mechanism offering protection from future claimants (e.g. in respect of care home fees or on divorce).

So how does the introduction of the TNRB interact with the survivorship clause?

Tables 1 and 2 below compare the relative inheritance tax liabilities on the death of both spouses under slightly different assumptions and varying estate sizes (all figures are in £).

Table 1: Death <i>not</i> within the survivorship period						
	Henry	Karen	No survivorship Clause: IHT		Survivorship Clause: IHT	
	Estate	Estate	Pre TNRB	Post TNRB	Pre TNRB	Post TNRB
Option 1	512,000	212,000	164,800	40,000	164,800	40,000
Option 2	512,000	412,000	244,800	120,000	244,800	120,000
Option 3	212,000	512,000	164,800	40,000	164,800	40,000
Option 4	412,000	512,000	244,800	120,000	244,800	120,000

Table 1: Death <i>within</i> the survivorship period						
	Henry	Karen	No survivorship Clause: IHT		Survivorship Clause: IHT	
	Estate	Estate	Pre TNRB	Post TNRB	Pre TNRB	Post TNRB
Option 1	512,000	212,000	164,800	40,000	80,000	80,000
Option 2	512,000	412,000	244,800	120,000	120,000	120,000
Option 3	212,000	512,000	164,800	40,000	80,000	40,000
Option 4	412,000	512,000	244,800	120,000	120,000	120,000

A comparison of Tables 1 and 2 reveals the following:

- (1) Table 1 confirms (not unsurprisingly) that where the surviving spouse survives any survivorship period (or where no such clause exists) the aggregate inheritance tax liabilities remain the same whether a survivorship clause is included or not; the post TNRB era, however, produces significantly lower inheritance tax liabilities in both cases.

- (2) Table 2 confirms that the inclusion of a survivorship clause (and assuming the second death within this period) in the pre- TNRB era always produces a smaller aggregate inheritance tax liability.
- (3) Table 2 confirms that the inclusion of a survivorship clause (and assuming the second death within this period) in the post TNRB era makes no difference except where the first spouse to die has an estate in excess of the NRB and the second spouse to die has an estate smaller than the NRB, in which case its inclusion precipitates a greater aggregate inheritance tax charge (see Option 1).

In the post TRNB era, if a survivorship clause is to be included in both wills then to avoid the possible adverse inheritance tax consequence identified under point (3), each spouse's estate must be of at least the size of the NRB.

It would therefore seem that from the inheritance tax perspective, in the post TNRB era, no inheritance tax advantage is achieved and possibly the tax position may be made worse where a survivorship clause is included.

Comments

How, if at all, are the above comments affected in the event of simultaneous spouse deaths (i.e. where both spouses die in circumstances where it is not possible to identify who died first)?

In the event of simultaneous deaths, s.184 of the Law of Property Act 1925 (LPA') deems the elder of the two to have died first; however, this is of no application for inheritance tax purposes. Here, it is assumed that both spouses died at the same time (s.4(2) of the Inheritance Tax Act 1984).

On the figures in Example 2, the inclusion of a survivorship clause has produced a materially worse inheritance tax position.

However, if the above scenario had occurred in the pre TNRB era, while the existence of a survivorship clause would have produced the same inheritance tax figure of £560,000 the lack of any such clause would have produced an inheritance figure of 40 per cent of £500,000 i.e. £200,000; still better than including a survivorship clause but materially worse than in the post TNRB era.

It would thus appear that if, for whatever reason, a survivorship clause is to be included in a will it may still be preferable to specifically preclude its use where both spouses die in circumstances where it is not possible to ascertain who died first. This would seem to be particularly appropriate in the post TBRB era, but it applies to the pre-TNRB era.

Deeds of Variation (DoV)

It may be suggested that the inclusion of a survivorship clause is not problematic as any adverse inheritance tax consequences arising may be effectively reversed by use of a DoV. While this may be the case, the relevant conditions with respect to DoV execution must be satisfied including the need for all adversely affected beneficiaries to agree and sign the DoV; such agreement cannot always be relied upon and where minors are involved the process becomes even more complex.

However, the possible role of the DoV should not be overlooked.

For co-habitees, the inability to take advantage of the TNRB may affect the above conclusions, and for such individuals the survivorship clause may still have a role to play.

The survivorship clause which for so long has had a key role to play in most wills has arguable had its day given the introduction of the TNRB in the Finance Act 2008. Even prior to the introduction of TNRB, inheritance tax on death was often mitigated by excluding survivorship clauses where spouse deaths were simultaneous - a point sometimes overlooked by non-lawyers.

Example 1

Henry and Karen are married with two children. Neither has made lifetime transfers and survivorship clauses are not included in either of their wills.

Henry's will leaves all his estate to Karen and Karen's will leaves all her estate to Henry.

Henry dies in July 2007 leaving his estate (worth £312,000 plus £312,000 of her own estate) to the children.

None of Henry's NRB has been used on his death. Thus, 100 per cent of the NRB applicable on Karen's death is available to Karen in addition to her own entitlement i.e. on Karen's death her NRB of £312,000 is doubled to £624,000.

Result: no inheritance tax payable on the estates of Henry or Karen (pre the TNRB). Inheritance tax would have been charged at 40 per cent on [£624,000 - £312,000]).

Example 2

X and his wife, Y, have two children. Neither has made any lifetime gifts.

They have each made a will leaving their estate to each other with substitution gifts to their two children in equal shares.

Their aggregate estates amount to £2,024,000. X's estate is £1,212,000. Y's estate is £812,000.

In May 2008 X and Y are killed simultaneously. X was aged 52 and Y 48.

For LPA purposes X is assumed to have died first and, as a consequence, his estate passes to his wife Y. Y's estate which now includes that of X, passes to the children (as X having been deemed to have died first cannot take under Y's will).

For the purposes of inheritance tax, both are assumed to have died at the same time. Although as a matter of the law of property X's estate passes to Y, for inheritance tax purposes Y cannot be treated as inheriting X's estate as Y did not for this purpose survive him.

Thus, Y's estate for inheritance tax comprises only her own estate (i.e. £812,000). X's estate (i.e. £1,212,000) is therefore not included as part of Y's estate for inheritance tax purposes but does pass to the children under Y's will because under the LPA Y does actually inherit X's estate.

No inheritance tax is levied on X's estate of £1,212,000 as it passes to Y as an inter-spouse exempt transfer and then to the children without forming part of Y's estate for inheritance tax purposes. A 40 per cent charge does, however, in principle arise on Y's estate of £812,000, albeit subject to a reduction for Y's own NRB increased by 100 per cent producing an inheritance tax charge of 40 per cent of £188,000 i.e. £75,200. Total inheritance tax charge = £75,200.

As Y did not survive for the survivorship period contained in X's will the children would inherit and inheritance; tax would be chargeable thereon (i.e. 40 per cent £900,000, i.e. £360,000).

Similarly, under Y's will, X did not survive the survivorship period and the children again would inherit and thus inheritance tax would be chargeable thereon (i.e. 40 per cent x £500,000, i.e. £200,000). Total inheritance tax charge = £560,000.

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