

Survivorship Clauses in Wills

This month's CPD will focus on the purpose of survivorship clauses in wills, why we use them, and when they should be avoided. We will also discuss the commorientes rules and the inheritance tax (IHT) problems that survivorship clauses can cause if misapplied.

Please note that references in this paper to spouses also include civil partners.

WHAT IS A SURVIVORSHIP CLAUSE?

A survivorship clause is exactly what it sounds like; a clause in a will that makes a gift to a beneficiary conditional upon them surviving the testator by a set period of time.

The survivorship period is commonly construed as 28 days, 30 days, or one calendar month, though any period not exceeding 6 months is acceptable. If a survivorship period exceeds 6 months, then this has the effect of creating a settlement for IHT purposes. This is due to the operation of section 92 of the Inheritance Tax Act 1984 (IHTA 1984). During the survivorship period the assets are held on trust, but as long as the gift takes effect within 6 months the trust is ignored, and the gift is treated as though it had taken effect immediately.

If a beneficiary survives the testator but dies within the time limit set out in the survivorship clause then the gift to them will fail and will pass as though they had predeceased, so the beneficiary dying within the survivorship period never takes a vested interest.

Survivorship clauses are usually specific to particular gifts, commonly the gift of residue. More general clauses imposing a survivorship condition on all beneficiaries are also possible though, for example:

"Every person who would benefit under this Will but who fails to survive me by 30 days shall be treated for the purposes of the devolution of my estate as having predeceased me."

WHY ARE THEY USED?

There are two main reasons that survivorship clauses are used today:

1. To avoid the first to die's estate passing in quick succession through the estate of the other.

Avoiding the assets passing through probate twice in quick succession may save time when it comes to administering the estate and may also save on administrative costs.

Prior to the introduction of the transferable NRB in October 2007 survivorship clauses were often used to avoid an unnecessary IHT problem arising if the couple died in quick succession. Since the TNRB was introduced any such benefit for spouses is gone, but unmarried couples may still benefit.

By way of example, imagine an unmarried couple have an estate of £325,000 each with wills leaving their estate to each other on first death and then on to their nieces and nephews on second death. With

no survivorship condition, on first death the survivor would immediately inherit the deceased's estate. If that survivor then dies shortly afterwards, they would pass their estate, now comprising what they have just inherited, to their children. As they were unmarried and there is no TNRB they will pay IHT at 40% on everything above their personal NRB of £325,000, so there will be an IHT liability.

If we take the same example but now include a survivorship clause the IHT liability can be reduced to nil. This time the first partner dies, but instead of the survivor inheriting immediately they must survive by 30 days. They fail to do so, so the first person's estate now passes directly to the children with no IHT payable. The second person's estate also passes to the children, again with no IHT payable.

2. To give greater control over the eventual destination of assets.

A survivorship clause will prevent assets passing to a beneficiary's estate and then out immediately to their own beneficiaries under their will or intestacy should they die with the testator or shortly after. This will prevent assets passing to people who the testator may not necessarily have wanted to inherit from him.

This reason is less compelling. At an absolute maximum it is giving the testator an additional 6-month period where they have retained some control over where the assets will pass if the beneficiary fails to survive. If the beneficiary dies within the survivorship period, then the gift to them fails and it will pass to a substitute beneficiary named in the testator's will rather than to the originally named beneficiary's own heirs. However, if the beneficiary meets the survivorship condition they will inherit and control over where the assets pass next falls to them, even if they themselves die only a day or a week after meeting the survivorship condition.

For the greatest possible control over the ultimate destination of assets a testator is likely better off considering using a trust of some kind as this offers much longer-term control. If they want a beneficiary to have the use of their estate for their life but want to ensure it passes to their children or other beneficiaries eventually then an Immediate Post Death Interest Trust (IPDI) should be discussed.

WHY SHOULD THEY BE AVOIDED?

Survivorship clauses are generally not recommended for spouses unless their joint estates are below the NRB, or they each have assets in excess of the NRB, or they have different substitute beneficiaries and don't want to utilise a trust. For spouses, the inclusion of a survivorship clause will either be IHT neutral or cause an IHT problem. There is no real IHT advantage, only potential disadvantages.

If the spouses both have an estate in excess of the NRB then there is no difference if a survivorship clause is included or not (apart from in a commorientes example):

Example 1A: Susan and Marcus are married and have wills leaving everything to each other subject to a 30-day survivorship clause. Both have an estate worth £700,000. On second death their estates pass to their children. They both die within a week of each other in June 2019, with Marcus dying first. Assume they each have a full NRB and RNRB available.

On Marcus's estate the IHT payable will be £90,000. The IHT bill on Susan's estate will also be £90,000 as they will each be taxed on their £700,000 estates.

Example 1B: Same facts as above, but with no survivorship clause. On Marcus's death there is no IHT payable as his estate passes to Susan free of IHT due to the spouse exemption. His NRB and RNRB is unused.

On Susan's death she will have an estate of £1.4m. However, she will have her NRB and RNRB available, as well as the unused allowances from Marcus. This leaves her with an IHT bill of £180,000. Ultimately the same amount of IHT has been paid as would have been paid if there had been a survivorship clause.

So, in what circumstances should we avoid survivorship clause? There are two main reasons to avoid survivorship clauses for spouses:

1. To avoid adverse IHT consequences and wasting the NRB

If both spouses have the same substitute beneficiaries and both have a full NRB available, then there is no advantage to including a survivorship clause due to the availability of the TNRB (and now also the Residence NRB).

At worst, the inclusion of a survivorship clause can cause an IHT issue in certain circumstances. Where one spouse has an estate in excess of the NRB and the other has an estate below the NRB the survivorship condition can be a problem. Ideally, we would want the larger estate to pass to the other spouse and benefit from the spouse exemption.

Example 2: Helen and Wendy are married and have wills leaving everything to each other. The substitute beneficiaries are their children. Helen's estate is worth £600,000 and Wendy's £300,000. They have full NRB and RNRBs available. They are involved in an accident in May 2019 and Helen dies first, followed by Wendy 5 days later.

If they had a 30-day survivorship clause, Helen's estate will pass to their children and she will pay £50,000 IHT. Wendy's estate will also pass to the children and there will be no IHT.

If they didn't have a survivorship condition, then the situation would have been better for them. Helen's estate would have passed to Wendy IHT free. Wendy would then pass £900,000 worth of assets to the children, but would have had her full NRB, RNRB, and both transferable allowances available so would have paid no IHT.

1. To avoid overriding commorientes

A survivorship clause will override the commorientes rule, which will result in a loss of the IHT savings that can be made in the admittedly rare circumstances where a couple die together. This is examined in more detail below.

PROBLEMS WITH COMMORIENTES RULE

The commorientes rule relates to the law that determines survivorship where two or more people die together, in circumstances where it can't be known who died first. This rule applies only to succession by will or the doctrine of survivorship.

For succession purposes people cannot die simultaneously. Under section 184 of the Law of Property Act 1925 the law presumes that the elder died first. So, in a situation where a husband and wife were to die

in the same accident it would be presumed that the older spouse died first, so the younger will have survived to have inherited from him if the terms of his will allowed for it.

The IHT legislation treats people dying together slightly differently. For IHT purposes people *can* die simultaneously, thanks to section 4(2) of the IHTA 1984:

'...where it cannot be known which of two or more persons who have died survived the other or others they shall be assumed to have died at the same instant.'

This creates an interesting result for spouses who die together with wills that leave everything to each other and no survivorship clause. For succession purposes the elder is presumed to have died first, passing their estate to the younger. For IHT purposes they died simultaneously, so the older spouse's estate does not actually increase the value of the younger's. This leads to the older spouse's estate escaping IHT.

Example 3: John and Judy are married and have wills leaving everything to each other with no survivorship clause. Everything passes to their nieces and nephews in default. They have an estate of £600,000 each.

They die in a car accident and it can't be known who died first. John is the eldest so under s184 it is presumed that he died first, and his estate therefore passes to Judy. There is no IHT on his estate as the spouse exemption is available. Judy's estate passes directly to the children as John has predeceased her. For IHT purposes her and John are deemed to have died simultaneously so her estate excludes the value of John's estate. Judy has her own NRB available as well as the transferable allowances from John's estate. This means that £1.2m of assets have passed to their beneficiaries IHT free.

If in the above example there had been a survivorship clause this tremendous IHT saving would not have been possible. Instead John's estate would have passed to his nieces and nephews and there would have been an IHT bill of £110,000. The same would have happened on Judy's death, so they would suffer a combined IHT bill of £220,000.

If you do opt to include a survivorship clause for spouses, you should consider attaching an additional condition to it in the will of the older spouse. This condition can exclude the survivorship clause in the event that the couple die together, so the more IHT favourable commorientes rule can be applied instead. This could be construed as:

"...subject to him surviving me by 30 days unless it cannot be ascertained which of us survived the other in which case this survivorship condition shall not take effect."

Note that the commorientes rule does not apply on intestacy. Under the intestacy rules there is a statutory 28-day survivorship condition, provided for by section 46(2A) of the Administration of Estates Act 1925. If an intestate and their spouse die together the commorientes rule does not apply so the spouse is treated as having failed to survive them.

THE IMPACT OF CARELESS APPLICATION – CASE EXAMPLE

Survivorship clauses are often used with no proper regard for why or what effect they will have on an estate, often because 'this is the precedent we've always used'. As survivorship clauses were used in almost all cases for many years prior to the introduction of the TNRB perhaps this is unsurprising. The

recent case of *Jump v Lister* [2016] EWHC 2160 is a good example of how the careless application of a survivorship clause can cause a huge problem for an estate.

This case involved a married couple, Mr and Mrs Winson, who had made mirror wills gifting their estates to each other. If this failed, then each will made pecuniary legacies totaling £214,500 to named people and charities and then gifted the residue to their nieces. Their wills included a general 28-day survivorship clause for 'any person' to inherit.

Sadly, Mr and Mrs Winson were both found dead in their home and it could not be established who had died first so the commorientes rule applied. It was presumed that Mrs Winson had died first, being the elder. As there was a survivorship clause Mr Winson did not inherit from her as he had failed to survive her by the survivorship period. The result was that the pecuniary legacies were paid twice as they were paid under both wills, diminishing the residue that passed to the nieces. While the nieces (who were also the executors) argued that the money gifts should be paid twice, the solicitors who drafted the wills argued that it was clearly not the intention of the testators for these gifts to be paid twice and that the survivorship clause should not have applied.

One of the points that was argued was whether the general survivorship clause (construed as 'any person who fails to survive me') applied to the spouse, or if by context it excluded the spouse. Ultimately it was decided that there was nothing in the drafting of the will to prevent the clause applying to a surviving spouse, or to disapply it if the couple died together. The will was unambiguous, and if the solicitor who prepared it genuinely believed that this wasn't the testator's intention then it's fair to say it was also poorly drafted. They had failed to properly consider what effect the survivorship clause would have.

CONCLUSION

Survivorship clauses definitely still have their place in will writing but should not be blindly included in every will. Before including such a clause, the will drafter should carefully consider what impact it will have on the distribution of the client's estate in all potential circumstances, how it will interact with the other clauses of the will, and certainly whether it is likely to cause a problem like what was seen in *Jump v Lister*. If the client's goal with the survivorship clause is to exert control, then consider whether this can be better achieved with an IPDI.

Important Reminder:

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