

COMMORIENTES AND RELATED PROPERTY

Peter Vaines FCA, Barrister¹

In the dim and distant past, when Estate Duty was the charge imposed on death, the doctrine of Commorientes was the method of determining the order of multiple deaths for most purposes. Section 184 Law of Property Act 1925 provided the rule that where "two or more persons have died in circumstances rendering it uncertain which of them survived the other ... the younger shall be deemed to have survived the elder". Although the doctrine survives, a different rule applies to the charge to inheritance tax. Section 4 IHTA 1984 provides that "where it cannot be known which of two persons who have died survived the other, they shall be assumed to have died at the same instant".

In many ways this is an advantageous rule, designed to prevent a double charge arising on such a tragic occasion. Without this rule the whole of the estate could be chargeable on the death of the older party; it would pass to the younger, who would be deemed to die a moment later, and the estate would be charged to tax a second time. The application of quick succession relief would only reduce the charge on the second death but involves numerous complications which may restrict its effectiveness; may be available but of course this would not the spouse exemption does not apply unless the parties are married - and even if they are, the exemption may still be restricted if the younger spouse was not UK domiciled at the time of death.

It is possible to prevent the problem arising in the first place by the inclusion in the Will of a suitable survivorship clause or perhaps the situation could be repaired retrospectively by deed of variation within two years of the death. However, the purpose of this article is not to address these points, but to draw attention to the view apparently being taken by the Capital Taxes Office on the effect of the related property provisions to these circumstances on the valuation of property for inheritance tax. The point is shown with greatest clarity in a situation where a husband and wife are killed in some accident or disaster, leaving their respective estates to their children in equal shares absolutely. The major item in each estate might be a share in the private residence, or perhaps shares in a family company.

¹ Peter Vaines FCA, Barrister, Tax Partner, Brebner Allen & Trapp, 180 Wardour Street, London W1V 3AA. Tel (071) 734 2244 Fax (071) 287 5315
Author of *Tax Planning for Expatriates* and Managing Editor of this Review.

In the simplest case, one half of their private residence would pass to the children from the estate of each spouse. If each spouse only held a half interest in the property, they might reasonably claim a severance discount of at least 10% - although following the case of *Wight and Moss v CIR* (1982) 264 EG 935, it would be possible to negotiate a somewhat larger discount. The valuation of shares in a private company is an art all of its own, but even without any detailed excursion into the principles of share valuation, it is obvious that if the spouses each held 30% of the shares in their family company, each 30% holding would be worth much less than half a 60% shareholding.

It is this point that the related property rules are designed to cover. Section 161 IHTA 1984 provides that where the value of any property would be greater if it were valued jointly with property in the estate of the spouse, the property is valued as a proportionate part of the aggregate holding. Accordingly, taking the example where the husband and wife each own 30% of their family company, and leaving aside the question of simultaneous deaths for a moment, on the husband's death the value of his shares would be valued as one half of a 60% holding. On the subsequent death of the wife (assuming she did not inherit any shares from her deceased husband), her shares would not be valued in the same way, but merely as a 30% minority holding, because there would be no related property in existence at the date of her death.

However, a difficulty arises if the parties die in circumstances where it cannot be known which died first, because they are treated by section 4(2) for the purposes of the charge to tax on death as having died at the same instant. The view of the Capital Taxes Offices is that the related property provisions apply in respect of both estates. Taking each spouse separately, the husband must be charged to tax as if he had made a transfer of his estate immediately before his death, and the value transferred is the value at that time. Immediately before his death he was alive, and it follows that if the wife died at the same instant, immediately before her husband's death, she was also alive. Therefore, property comprised in the wife's estate is related property as far as the husband is concerned, and his shares would be valued as part of a majority holding. No severance discount nor any minority valuation would therefore be applicable. Exactly the same reasoning would apply to the wife, so there would be no severance discount nor minority valuation on her estate either.

Whilst the logic of the argument can be acknowledged, this interpretation seems inconsistent with the purpose of section 4(2), which is generally thought to be intended to avoid a double charge to tax on this very type of occasion by causing the property in one estate to bypass the other. The effect of the CTO view would be to cause section 4(2) to have the opposite effect than that which would appear from its terms. If the husband and wife are treated as having died at the same instant, they must both have been alive immediately before that instant - and in both cases it is immediately before the death that the transfer of value (and therefore the necessary valuation based thereon) is deemed to take place. Accordingly, the effect would be for the tax to be charged as if both were alive at the relevant instant, and far from preventing the other spouse inheriting the estate for the purposes of the charge to tax, this interpretation would ensure that they do so.

However, if the CTO argument is right, an interesting possibility arises. If the husband and wife have reciprocal Wills, and for the purpose of charging tax one adopts the same strict interpretation of section 4(2), each would be making a transfer to the other spouse immediately before the death. Accordingly, the spouse exemption would apply to both estates so that, although the assets in both estates would pass to the children as a matter of succession, no tax would arise on either death.

It is not known (at least to me) whether the CTO accept this particular point, but if they do, they may feel that the disadvantages arising from the valuation implications of related property which would apply in some circumstances, are a reasonable quid pro quo for the effective exemption which would apply in other cases.

This adds a new dimension to the judgment whether or not a Will should be drafted with a survivorship clause. If the spouses die separately, such a clause would be of great benefit, but if they were to die in circumstances where section 4(2) applies, the above arguments would be precluded - except perhaps by deed of variation. A survivorship clause only taking effect in circumstances where section 4(2) does not apply might be the best solution, although it would not help the related property argument.