

The Chancellor has confirmed that The Office for Budget Responsibility will publish its latest economic and fiscal outlook on **Tuesday 29 November 2011**, the same day as the Chancellor's Autumn Statement.

Domicile Restriction on IHT Spouse Relief



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Our current capital taxes regime continues to favour married couples and civil partners (referred to in this article as spouses) through the application of spousal exemption: that is the relief provided by section 18 Inheritance Tax Act 1984 which treats assets passing between spouses as exempt from Inheritance Tax ('IHT').

There is however an important exception to this exemption and this is where the spouse receiving the gift is not UK domiciled for IHT purposes. In this case the IHT exemption is limited to just £55,000 over and above the standard nil rate band.

Take for example a married couple where the husband (Bob) is UK domiciled and his wife (Martha) is domiciled in France.

If Bob gives Martha £800,000 in his Will, the first £325,000 will be covered by the nil rate band, £55,000 would be exempt (under the limited spouse exemption) and the balance of £420,000 would be taxed at 40%.

Martha's domicile could be changed to that of a UK domicile in 1 of 3 ways:

- If she married Bob before 1974 (the law was very different in those days)
- If she is resident here for 17 out of 20 income tax years - she then acquires an automatic deemed domicile of the UK, but only for IHT purposes

- She could exercise a domicile of choice by doing two things – living here and 'evidencing an intention permanently to reside here'. This is not easy, but it might be sensible planning

Here are some points to watch out for:

- Any lifetime gift can use up the £55,000 exemption and Bob will only be given the exemption once. For example, Bob gives Martha £100,000 cash. £55,000 is an exempt gift and Bob must survive the gift of the remaining £45,000 by seven years for it to fall off his IHT clock. The exemption of £55,000 is now used up and will not be available again, ever.
- Gifts from Martha to Bob are fine and qualify for the full IHT spouse exemption.
- If both parties to the marriage are either UK or non-UK domiciled, the spouse exemption applies in full.
- Purchases of new UK assets might be made by Martha in our example. This will keep assets out of Bob's name so that his estate passing to Martha on his death first is that much smaller. However, what if Bob has to fund the purchases – these could be a gift that Bob has to survive by 7 years.
- Anti avoidance provisions (the reservation of benefit rules) can mean that if Bob has access to assets he has given to Martha, the 7 years does not begin to run and they can remain in his estate for tax, whilst being in her estate as a matter of fact.
- If Martha has assets abroad she might need a Will in that country to deal with them.

Residence - the supreme court decision

Robert Gaines-Cooper's long running case against HM Revenue & Customs ('HMRC') seems to have reached the end of the road. The Supreme Court, on 19 October, dismissed his appeal for judicial review against the previous ruling that he was resident and ordinarily resident in the UK during the relevant tax years.

The Supreme Court considered Mr Gaines-Cooper's argument that HMRC's guidance notes on residency (IR20) set out that it was sufficient for an individual to live abroad for at least three years and to satisfy the day count provisions of spending no more than 90 days in the UK in order to be treated as non-resident for UK tax purposes.

On a majority decision, they disagreed with this analysis. Their

judgment confirmed that the proper construction of IR20 was to provide that these requirements are only relevant when the taxpayer has clearly left the UK: that is, he had made a distinct break from his country. This was not the case for Mr Gaines-Cooper whom they determined had kept strong links with the UK.

It was not all one way traffic for HMRC as the Supreme Court stated that HMRC's position on how to achieve non-residency 'should have been much clearer'.

It may not even be the end. Mr Gaines-Cooper commented after the case that he would now be consulting with his advisors about taking his case to the European Court. We now enter a period of greater uncertainty for resident but non-domiciled clients.

Barrett v Bem (2011)



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The recent case of Barrett v Bem (2011) revolved around a very short Will which consisted of four sentences and which was made around three hours before the testator died.

Martin Lavin's last Will set out that it cancelled all his other Wills and that he would like to leave everything to his sister Anne. He said that he would like Anne to deal with probate and that he wished to be buried in Ireland.

And that was it.

The ensuing litigation which followed turned on how the Will was signed.

Initially, Mr Lavin's Will was challenged by the beneficiaries who would have inherited on his intestacy on the basis that the Will was invalid as it was not signed by Mr Lavin. The judge found in their favour and declared the Will invalid.

This decision was then appealed. The witnesses to the Will, two nurses at the hospital, changed their evidence and stated that the signature of Mr Lavin was a guided signature. They told the court that Mr Lavin was shaking too much and that he needed someone to help him sign his Will. Although the handwriting expert said that this argument should be disregarded, the judge reached the conclusion that what Anne had done was to sign the

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Will but that she did it at her brother's direction.

This was vital because section 9(a) of Wills Act 1837 ('the Act') allows someone to sign on behalf of the testator provided the act of signing is "in his presence and by his direction".

Another issue then had to be addressed. Section 15 of the Act provides that a gift is void if an attesting witness is the recipient. Does this extend to the position where a beneficiary of the Will signs the Will at the direction of the testator? The judge said it did not, but added that it may well be desirable for legislation to be put in place preventing such an arrangement.

It is interesting to note that the Will, which was written at the hospital on the day Mr Lavin died, may have taken no more than an hour to prepare, but led to litigation that lasted from the date of Mr Lavin's death, 11 January 2004, and was not concluded until judgment was passed down in the Court of Appeal on 19 May 2011.

The moral of this story, once again, is not to leave Wills to the last minute.

If you would like to speak to Geoff regarding topics raised in this article, please contact him:

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Claims for family provision by adult children

The Inheritance (Provision for Family and Dependents) Act 1975 ('the Act') allows various classes of applicants to apply to the court for provision under a will or intestacy, provided they can show that they have not been left reasonable financial provision.

The Act sets out two differing standards for financial provision. There is the "surviving spouse standard", and "the maintenance standard" for all other classes.

A child of the deceased can make claims for reasonable provision under the maintenance standard. The courts have historically not favoured applications brought by an adult child as they have generally taken the view that a parent's financial duty to a child broadly ends as that child reaches 18.

Nevertheless this approach has been challenged. The recent case of *Ilott v Mitson* concerned the estate of Mrs Jackson, who died in July 2004, and which was worth around £500,000. She did not leave any of her estate to her adult daughter, from whom she had been estranged, and instead left her estate between three charities, The Blue Cross, The Royal Society for the Protection of Birds and The Royal Society for the Prevention of Cruelty to Animals.

The daughter made an application under the Act.

The court initially agreed with her, and the trial judge awarded the daughter the sum of £50,000. This sum reflected the poor financial circumstances in which the daughter found herself. She was dependant on state benefits and her husband could only work on a part-time basis.

The daughter then appealed this judgment as she considered that she was entitled to a larger sum. This appeal was dismissed. She subsequently appealed to the Court of Appeal, which found in her favour: which is where this case currently rests.

The Court of Appeal's decision, which essentially turned on the law relating to appeals, granted an insight into the thinking of the Court in this complicated area of law. One interesting point is that it was stressed that there was no evidence that Mrs Jackson had any connection with the charities that she had left sums to, or that, during her lifetime she had any particular love, or interest in, either animals or birds. Although legally irrelevant, this has led many commentators to advise that if a beneficiary is keen that their estate, for example, should pass to charities, and not to their adult children, they should at least develop some links with those charities during their lifetime!