



## Welcome

Welcome to Issue 22 of **Private Client Briefing**, our periodical aimed at keeping you informed of current issues and news.

For further information on any issues raised in **Private Client Briefing** or individual legal advice generally please email [tom.hewitt@burges-salmon.com](mailto:tom.hewitt@burges-salmon.com).

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## Residential Nil Rate Band



As from 18th November 2015 the Government's plans to introduce a new Residential Nil Rate Band ("RNRB") to apply as an additional inheritance tax relief, available alongside the existing £325,000 nil rate band for all individuals, became law. This does not include the provisions relating to downsizing which are still being considered. The practical application of the new rules throws up some interesting issues.

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## How will the relief work?

The RNRB will apply on a person's death on or after 6 April 2017 when that person leaves residential property to their "close descendants", such as children, grandchildren or children-in-law. The relief will initially be set at £100,000, increasing annually to £175,000 in 2020. Following that, it will increase with inflation.

As with the normal nil rate band, the RNRB will not be used up when property passes free of inheritance tax to a surviving spouse. However, the unused RNRB can be transferred and used on the surviving spouse's death, provided the property is left to close descendants.

## Will it apply to me?

The RNRB is available to everyone, but there are some important points and limitations to note.

Firstly, it can only be set against *residential* property, so land or business properties cannot qualify. There is an exception proposed for people who have downsized or sold their houses without buying a replacement (e.g. to move into care). In those circumstances, the RNRB can be set against other assets up to the value of the residential property when it was sold.

Secondly, it is not yet entirely clear how the relief will apply when residential properties are left to trusts created in a person's Will. Leaving a property on trust for the benefit of your spouse on your death which then provides for it to pass outright to close descendants on their death appears to qualify. However, leaving a property to a discretionary trust on your death for the long term may mean the relief is lost, although if it is transferred to close descendants within two years, it is possible that the relief will apply.

Finally, where an estate is over £2 million at the date of death, the available amount of RNRB is reduced so that there will be no RNRB available at all once an estate is valued over £2.2 million.

## Estates over £2million

The estate is valued at the date of death, but the value is not reduced by inheritance tax reliefs such as agricultural or business property relief. The threshold will increase with inflation from April 2021.

A quirk of the legislation means that any gifts made before death which might be brought back into account for inheritance tax purposes do not count towards the £2million threshold. This might lead to gifts by people with large estates – even on their death beds – to bring their estates below £2 million and qualify for a full RNRB.

## Example

Mrs Cole dies in 2017 with £2.2 million of assets in her own name, leaving all her assets to Mr Cole whose own estate is worth £1 million. Six months later, Mr Cole dies leaving all his assets (including residential property) to their children.

There will be no RNRB or transferable RNRB available. No RNRB could be transferred on the first death because Mrs Cole's estate was worth over £2.2 million. Mr Cole's estate was swelled by his inheritance from Mrs Cole to £3.2 million, so his estate would not qualify for the relief either.

Had Mr Cole died first and made a gift of his residential property to his children rather than Mrs Cole, the relief could have been claimed.

## What should I do, if anything?

For those with estates of less than £2.2m, it would be sensible to check whether your residential property passes to “close descendants” under your Will. For those who have discretionary trusts in their Wills there may need to be an amendment once the detailed rules on the RNRB are clear.

Where there is a risk that your estate will be too large for the RNRB to apply, there are a couple of options that you may wish to start considering. For married couples who hold their assets unevenly, it may be sensible to think about whether you can redistribute your assets so each estate is worth less than £2m. Individuals with assets valued over the £2 million limit may also consider making lifetime gifts so as to bring their estates within the limit: however the gifts may trigger a capital gains tax charge which outweighs the benefits of the RNRB.

## Non-Dom Planning opportunities with UK Trusts?

### Damned if you're deemed (UK domiciled)

HM Treasury recently published a consultation on the proposed changes to the rules for non-domiciled persons. As part of the consultation they have given some, disappointingly brief, guidance on the changes they intend to make to the tax treatment of offshore trusts for “deemed” UK domiciled individuals. From 6 April 2017 a person becomes deemed UK domiciled if they have been tax resident in the UK for 15 out of the last 20 tax years, and is treated for inheritance tax, income tax and capital gains tax in broadly the same way as regular UK domiciled people: they will pay IHT on their worldwide estate, as well as paying income tax and CGT on their worldwide assets.

At present, offshore trustees are required to keep a record of trust income and gains which has not been taxed in the UK. The income and gains are then matched to benefits provided by the trust to beneficiaries in the UK, and they then pay tax on the pooled income or gains.

The proposal is that rather than matching benefits to pooled gains or income, from 6 April 2017 deemed domiciled settlors will simply be taxed on the taxable value of benefits they receive, without looking at the trust pools. As all deemed domiciled individuals will be taxed on worldwide income and gains, settlors will be subject to UK tax on such benefits regardless of where the benefit is received.

The change is significant as it would mean a charge on benefits received, not just on growth. For example, if an offshore trust contains £6 million of assets, £1m of which represents growth, previously only the £1m of growth would have been taxed if a UK beneficiary had received the whole trust fund. Under the proposed rules there would be a charge on the whole £6 million if the beneficiary was deemed domiciled. This would be in addition to any inheritance tax exit charge (if applicable). The rate of tax has not been confirmed, however.

### What does this mean for deemed doms?

Depending on how the legislation is drafted, it may become more beneficial where deemed domiciled people are involved to use UK resident trusts rather than offshore trusts. This would mean that the trustees pay UK tax on the income and gains, rather than the beneficiaries being charged to “benefit” tax on a distribution.

Current offshore trusts could be brought to the UK by appointing UK resident trustees. Such UK resident trusts would still be excluded property trusts for inheritance tax purposes, provided the settlor was non-UK domiciled when the trust began, and the trust fund is made up of non-UK assets.



### What to do

We only have a consultation document at present and so the exact scope of the new provisions is still unclear. Representations have been made to HM Treasury by a number of professional bodies and it is expected that the provisions will differ from the proposals set out in the consultation document. However, trustees and individuals should ensure that they stay abreast of the 2017 changes as action may be required soon to avoid unnecessary tax charges. Burges Salmon will be publishing updates as the scope of these changes becomes clearer.

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# The truth, the whole truth and nothing but the truth: financial settlements on divorce

The highly publicised Supreme Court decisions in *Sharland v Sharland* and *Gohil v Gohil* act as cautionary tales for any party who fails to disclose or underplays their assets on divorce.

In each case the court ruled that the financial settlements should be re-examined by the High Court in light of information which both husbands failed to disclose in the initial proceedings.

## The whole truth?

Mr Sharland claimed that he had no plans to float his already valuable company on the stock exchange, and proceedings settled on that basis. In fact he was planning the floatation, which could have caused a leap in value of his shares.

In the event the floatation did not go ahead and there was no change in the value of his shares. However, the Court stated that a settlement will be set aside when there has been fraud, mistake or material non-disclosure. The only defence for the non-disclosing party would be to show that the non-disclosure would not have influenced a reasonable person to agree to it and the same order would have been made regardless.

In the second case Mrs Gohil agreed a divorce settlement in which Mr Gohil would pay a lump sum of £270,000 and transfer a car to her: Mr Gohil was subsequently convicted of money laundering in relation to £25m of Nigerian assets. Mrs Gohil appealed for a new settlement.

An appeal requires new evidence, and Mr Gohil argued that his wife had no new information, other than inadmissible evidence from the Crown Prosecution Service.

The Court found that an application to set aside a settlement based on material non-disclosure was not an appeal, but a separate action and so did not require new evidence: there was sufficient admissible evidence to allow the appeal.

## Where now?

It has been widely speculated that these decisions will “open the floodgates” for renegotiation of past settlements, but as most divorcing couples disclose their assets honestly a deluge of new cases seems unlikely. It is worth noting, however, that there is no time limit for seeking to set aside an agreement in these circumstances if new information comes to light.

In both *Sharland* and *Gohil* the husbands had intentionally misled the court, and the outcome may have been different had the misrepresentations been unintentional. However, full and frank disclosure is always advised, along with cooperation with court proceedings. The court has shown over the last few years that it will deal with non-disclosure and non-cooperation seriously, issuing costs orders and even imprisonment.



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# Employment Issues: The National Living Wage

One of the most widely publicised employment changes announced as part of the July 2015 budget was the introduction of the National Living Wage (NLW). The NLW is a premium paid on top of the existing National Minimum Wage in respect of workers aged 25 and over.

The minimum wage will continue to operate in its current manner but, with effect from April 2016, a premium of 50p per hour will be added for those aged 25 or over. This will make the first NLW £7.20 per hour, aimed to rise to £9.00 by 2020. The initial premium has been set by the Government, but the Low Pay Commission will make recommendations going forward.

## Impact for Employers

There is considerable debate as to the impact the NLW will have on the job market, but employers will need to assess their staff costs and factor the NLW into salary reviews and packages offered to employees. It is worth remembering benefits in kind do not count towards the minimum wage and there is only a very limited offset where employees are given accommodation by their employer.

To ensure that employers comply, new measures will be put into place including a penalty of 200% of the amount of underpayment (capped at £20,000 per worker) and an increased budget for a new HMRC team dedicated to the enforcement of the minimum wage and the NLW.

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# The Perils of Deathbed Gifts

The case of *King v Chiltern Dog Rescue* in the Court of Appeal earlier this year explored the ancient concept of the *donatio mortis causa*, or gifts made in contemplation of death. The court's decision emphasises the need to give careful thought to estate planning through gifts and Wills.

## Donatio Mortis Causa

A DMC falls somewhere between a lifetime gift, in that it is made by a person while still living, and a gift made by Will, as it only has effect on death. If they live, they take the gifted property back again. If they die the property falls outside the donor's estate (except for tax purposes), bypassing their Will or intestacy, and passes straight to the recipient on death.

A valid DMC requires that the person making the gift does so in contemplation of their impending death, with the intention that the gift will only be effective on their death, and in doing so passes over control of the property to be gifted to the intended recipient. There is no need for anything to be written down.

## Mrs Fairbrother's house

The case concerned a claimed DMC from Mrs June Fairbrother to her nephew, Kenneth King. Mr King claimed that his 81 year old aunt had made a DMC of her house when she said "this will be yours when I go" and gave him the title deeds, which he then kept in his wardrobe until Mrs Fairbrother's death six months later.

The judge's decision centred on whether Mrs Fairbrother made the gift in *contemplation of her impending death*. He concluded that she did not. Though she was 81, she was not fatally ill and the judge determined that if she had wanted to leave her house to Mr King "the obvious thing for her to do was to go to her solicitors and make a new will", not to make a DMC.

She also attempted to make three subsequent wills, all of which were invalid: this was seen as evidence that handing over the deeds showed her intention to make a new Will, and not to make a DMC.

Mrs Fairbrother's last valid Will was upheld, and her estate, including her house, passed to the charities she had named.

## Where does that leave us?

DMCs are unusual, and this case makes it clear that reliance on a DMC to make a gift is no substitute for making a proper Will. The court was rightly reluctant to endorse the doctrine any further than necessary, seeing it as an opportunity for "unscrupulous treasure hunters".

The Appeal Court judges were at pains to emphasise that the "courts should require strict proof of compliance" with the requirements of a DMC. While it did not decide the case, Mr King's previous convictions for a number of dishonesty offences appears to have assisted the court in setting the evidential bar very high.

Deathbed Wills and gifts are possible (provided the person has capacity to make them): if an independent advisor is involved in preparing these, the donor's wishes are more likely to be given effect to, and less likely to be challenged at a later date.

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## Burges Salmon news

### Burges Salmon named Legal Team of the Year at STEP Private Client Awards

The Private Client team has been named 'Legal Team of the Year – Large Firm' at the STEP Private Client Awards 2015/16.



The STEP Private Client Awards are one

of the most prestigious in the private wealth sector and are highly sought after. This year they attracted over 200 entries from 17 jurisdictions and there is a rigorous independent judging process. Now in their 10th year, the awards recognise outstanding and complex work by lawyers, accountants, trust managers and financial advisers across the private wealth sector.

John Barnett partner in the Private Client team said: "Having been shortlisted on a number of occasions for this award, we are thrilled to have been successful this time. Our submission focused on the strength-in-depth of our private client team and the way in which we are able to draw in specialists from across the firm's Corporate, Real Estate and Disputes and Litigation

teams to provide a seamless service to our clients. The award was won by the whole team and I was delighted to accept it on their behalf."

### Private Client lawyers named in Citywealth Future Leaders List

Michael Westbrook and Emma Heelis-Adams team have been named in the inaugural Citywealth Future Leaders List.

The Citywealth Leaders List brings together the leading individuals in the private wealth and private client advisory sector.

Catherine Hallam, head of the Private Client team, said: "Citywealth is a key barometer for the private wealth industry, so it is great to have it recognise the talents and potential of our private client lawyers."

### Tax credits

Under the new Universal Credit system, which is being phased in and will replace Child and Working Tax Credits, recipients who receive spousal maintenance (not child maintenance) will face a pound for pound reduction in their Universal Credit entitlement, or they may no longer be entitled to receive any at all. If you think you may be affected, you should contact HM Revenue & Customs for further information as it is your responsibility to notify them if you may no longer qualify.

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