Title Research

Autumn 2024

Entitlement

The link between vulnerability and mental capacity

Plus:

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Welcome to the autumn 2024 edition of Entitlement

Anthony Allsopp, Head of Business
Title Research

Welcome to the autumn edition of Entitlement, our industry magazine for solicitors and legal practitioners. This quarter sees contributions from Heledd Wyn and Andrea Pierce.

Our thought-provoking lead article comes from Heledd, who takes us through the thorny issue of vulnerability and mental capacity. Looking at Lasting Power of Attorney and all it entails; Heledd sets out the expectation on both Attorneys and Solicitors.

Andrea provides insight into Taper Relief and the Nil-Rate Band, focusing on the seven year rule for gifts and Trusts. With the autumn Budget now disclosed, this is a timely subject that has a significant bearing on Inheritance Tax.

We also bring you three articles from Title Research. The first on intestacy and genealogy, sets out the parameters for inheritance when it is not a clear line of beneficiaries. Our second article follows on from our summer series on US assets and UK estates. This time we discuss Escheatment and the timings you should allow for, when registering the assets with US Transfer Agents. Our final article reflects on the changes that affect our industry as a result of the autumn budget statement.

I hope you enjoy this edition, and should you wish to contribute to any future editions, please do get in touch with us.

The link between vulnerability and mental capacity

How lawyers can assist in England and Wales

Heledd Wyn,
Industry Expert

Heledd Wyn specialises in private client and long-term care. Based in Bristol, Heledd has a great deal of experience across a range of future planning, private wealth, and Court of Protection work. In 2021, Heledd was awarded 'Lawyer of the Year', at the Bristol Law Society awards and has also been shortlisted for two further awards – STEP 'Trusted Adviser' and Today's Wills & Probate 'Industry Champion'.

Understanding vulnerability and mental capacity

In England and Wales, vulnerability and mental capacity are increasingly important concerns, particularly in the realm of private client law. Vulnerability refers to individuals who may be more susceptible to harm, exploitation, or undue influence due to factors such as age, illness, disability, or social circumstances. Mental capacity, on the other hand, is the legal and cognitive ability of an individual to make decisions for themselves.

Both play a central role in various aspects of legal decision-making, including Wills, Powers of Attorney, and financial management and should not be considered in isolation.

The Mental Capacity Act 2005 (MCA) is the key legislation governing mental capacity in England and Wales. It sets out a framework for assessing whether a person has the mental capacity to make decisions, and it provides a process for making decisions on behalf of those who lack capacity. Importantly, the Act operates on the principle that individuals should be presumed to have capacity unless proven otherwise, and any assessment of capacity must be decision-specific.

The link between vulnerability and mental capacity

Vulnerability and mental capacity are interconnected. Many vulnerable individuals may struggle with decision-making due to mental health issues, cognitive decline (e.g. dementia), learning disabilities, or even temporary conditions such as stress or trauma. However, vulnerability does not always mean a lack of mental capacity. A person may be vulnerable due to physical illness or age but still have the cognitive ability to make informed choices.

Conversely, some individuals with diminished mental capacity may not be overtly vulnerable but still require protection in legal matters. The complexity arises when individuals experience fluctuating or borderline capacity, which can complicate decision-making and leave them at risk of financial exploitation, undue influence, or other forms of harm. This is particularly concerning in private client matters, where individuals may need to make significant decisions about their finances, health, or legal affairs.

How lawyers can assist

Lawyers play a crucial role in safeguarding the interests of vulnerable individuals and those with reduced mental capacity. Their expertise helps ensure that legal decisions are made in the best interests of their clients, in accordance with both the law and ethical considerations. The most common areas where mental capacity and vulnerability may come into play are as follows:

Wills and estate planning

Creating a valid Will requires that the person making the Will (the Testator) has the mental capacity to understand the implications of their decisions. Lawyers are responsible for assessing whether their clients have testamentary capacity, ensuring that they fully comprehend the nature of their estate and the consequences of their choices. This process often includes obtaining medical opinions or conducting capacity assessments to protect vulnerable clients from making decisions they do not fully understand or that are influenced by undue pressure.

Lasting Powers of Attorney (LPAs)

For vulnerable individuals, creating an LPA is an essential tool for ensuring that their affairs are managed according to their wishes, even if they later become unable to make decisions for themselves.

Lawyers help by guiding vulnerable individuals and their families through the process of creating an LPA. This includes advising on the choice of Attorney, ensuring that the client has capacity at the time of creating the LPA, and ensuring that the document is properly executed and registered with the Office of the Public Guardian (OPG).

Understanding the power conferred by the LPA is an important component of the process as while it is possible to restrict the Power of Attorney whilst a Donor may not lack mental capacity, they may become simply unwilling to manage their affairs and are thus potentially vulnerable to the Power of Attorney being abused.

Managing financial affairs

For clients who may struggle to manage their finances but retain some capacity, lawyers can provide invaluable support. This may involve advising on Trusts, assisting with the management of assets, or even serving as Trustees or Attorneys in cases where clients require assistance in overseeing their financial affairs. This helps protect vulnerable individuals from financial abuse and ensures that their money is managed responsibly and in line with their needs and wishes.

Litigation in relation to capacity issues

Unfortunately, disputes sometimes arise over whether an individual had the capacity to make a decision, such as the execution of a Will or the appointment of an Attorney. Lawyers often represent clients in contentious probate or Court of Protection proceedings where capacity is in dispute. However, clients who are vulnerable may also potentially create documents such as Wills or Trusts that can be challenged – perhaps because they have been unduly influenced to sign them. In these cases, it is important to work closely with medical professionals and other experts to build a case that either supports or challenges the individual’s capacity and vulnerability at the relevant time.

Safeguarding and reporting concerns

Lawyers have a duty to act in their clients’ best interests, which includes being vigilant about safeguarding concerns. If a Solicitor suspects that a vulnerable client is at risk of abuse, whether financial, emotional, or physical, they have a responsibility to take appropriate action. This may involve raising concerns with relevant authorities, such as the OPG or social services, reporting the situation to the police or taking legal steps to protect the client’s welfare.

The importance of tailored advice and client protection

In dealing with vulnerable clients, lawyers must be mindful of both the legal framework and the personal circumstances of the individual. This includes taking extra care in communication, ensuring that the client understands their options, and adapting legal advice to the individual’s capacity and vulnerability. In some cases, this may mean involving family members or advocates in discussions, or working closely with healthcare professionals to monitor the client’s mental capacity over time.

Conclusion

The connection between vulnerability and mental capacity is a complex and evolving area of law. Lawyers in England and Wales are uniquely positioned to help vulnerable individuals and those with diminished capacity navigate important legal decisions. Whether through Wills, LPAs, estate management, or Court of Protection proceedings, lawyers play a vital role in protecting the rights and interests of those who may not always be able to advocate for themselves. By providing tailored advice, safeguarding against undue influence, and ensuring that decisions are made in the best interests of their clients, lawyers offer a lifeline to vulnerable individuals and their families.

Taper Relief

A case study illustrating the Taper Relief scale

Andrea Pierce is a qualified solicitor and Trust and Estate Practitioner (Society of Trust and Estate Practitioners).
Andrea previously worked as the Legal Services Director for a national business providing probate and estate administration and has over 18 years' experience of working in probate and estate administration.

Andrea Pierce, Owner
Andrea Pierce Probate Services

Potentially Exempt Transfers (PETS) and Taper Relief suffer from some common misconceptions, which I will address in this article.

PETS are also known as the seven year rule meaning there is no Inheritance Tax due on gifts that the Donor makes, providing they live for seven years after making the gift. The exemption to this is if the gift is made to a Trust which may be immediately chargeable to Inheritance Tax, which is a known as a Chargeable Lifetime Transfer.

In relation to PETS, if the Donor of the gift does not survive seven years, then the gift made may be taxable on death if either the gift itself or the cumulative effect of previous gifting exceeds the Nil-Rate Band allowance. The amount of Inheritance Tax (IHT) due on the gift(s) depends on when it was given.

Any gift made within the preceding three years before death may be taxed at the usual rate of 40%. For any gifts given three to seven years before death, they may be taxed on a sliding scale which is known as 'Taper Relief.'

Taper Relief scale

- Gifts made between three and four years before death: 80% of the IHT will be payable (rate of IHT on the gift is 32%)
- Gifts made between four and five years before death: 60% of the IHT will be payable (rate of IHT on the gift is 24%)
- Gifts made between five and six years before death: 40% of the IHT will be payable (rate of IHT on the gift is 16%)
- Gifts made between six and seven years before death: 20% of the IHT will be payable (rate of IHT on the gift is 8%)

A common misunderstanding is that Taper Relief is applicable on any size gift made in the preceding three to seven years before death. Unfortunately, this is incorrect because Taper Relief is only applicable if the Donor has given away more than £325,000 in this timeframe. A deceased individual may have gifted money within the timeframes for Taper Relief to be applicable, but the sum given away must exceed the Nil-Rate Band allowance as gifts made erode this first; in the order that they were gifted. That said, it will be necessary to ascertain if any gifting took place in the seven years prior to the oldest gift made, because if a gift was a Chargeable Lifetime Transfer, this may erode the availability of the Nil-Rate Band allowance (this is known as the 14-year rule) to the oldest PET within seven years, and thus, Taper Relief may indeed be applicable.

An illustration is as follows to demonstrate this:

James died on 1 April 2024.

He made the following gifts during his lifetime:

1. £50,000 to his son, Peter, nine years before his death

2. £50,000 to his son Paul, nine years before his death

3. £150,000 to a Discretionary Trust (Chargeable Lifetime Transfer), eight years before his death

4. £100,000 to Peter, six years and two months before his death

5. £100,000 to Paul, six years and one month before his death

6. £60,000 to Peter, one year before his death

Gifts 1 and 2: There's no Inheritance Tax to pay on these gifts as they were made more than seven years before James died.

Gift 3: Although this was made more than seven years before death, because it is a Chargeable Lifetime Transfer, this gift will be taken into account when calculating the availability of the Nil-Rate Band allowance for Gift 4.

Gift 4: Gift 3 will erode the available Nil-Rate Band allowance, but as this gift is still within the allowance there is no IHT payable on this gift. Calculation: £325,000 - £150,000 (Gift 3) - £100,000 (Gift 4) = £75,000, this being the Nil-Rate Band allowance available.

Gift 5: As only £75,000 is available from the Nil-Rate Band allowance, this means that £25,000 is taxable. It is possible to apply Taper Relief to this gift because it takes the totality of the gifts over the Nil-Rate Band allowance. This means £25,000 would be taxed at the reduced rate of 8% as it was made between six to seven years prior to death.

Gift 6: The Nil-Rate Band allowance has been used up by the prior gifting. As this gift was made a year before death, the tax payable is at 40%.

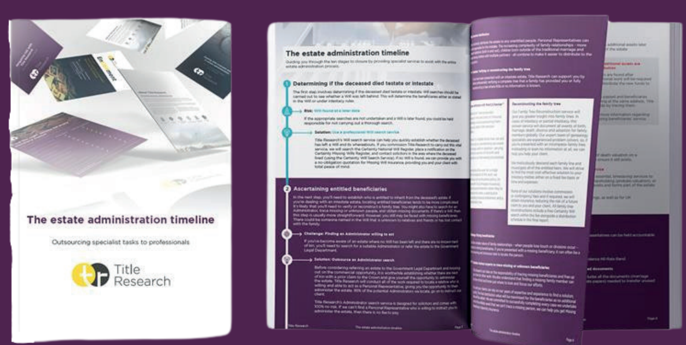
*Please note for the ease of the calculations, no annual allowance has been taken into account with the gifting.

From a best practice point of view, if your clients are making gifts then they should be encouraged to make a list that is readily available for their Personal Representative(s) for inclusion in the IHT400.

Useful guides

We regularly share our specialist industry knowledge through informative literature. They are an excellent resource to stay up to date with the latest industry insights.

To view all of our available guides, [visit our collection here.]



The estate administration timeline

This guide explores what is involved in the key stages of the estate administration timeline, the risks that may present themselves, and what tasks can be outsourced to a specialist to make administering the estate easier.

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Eliminating risk on intestacy

Intestacy always makes the estate administration process more complicated but there are steps you can take to eliminate the risk to you and your client. Therefore, we have created this handy guide to highlight how you can protect the estate from misdistribution.

DOWNLOAD NOW

Dealing with overseas assets in estate administration

Dealing with overseas assets can be complex as each country has different rules, forms and processes to navigate. The guide shares how you can overcome the pitfalls and challenges.

DOWNLOAD NOW

Understanding intestacy and probate genealogy

Common myths explained

Navigating the complexities of genealogical research and intestacy can be challenging, with many common misconceptions about the laws, processes, and costs involved. In this blog, we debunk some widespread myths surrounding intestacy and probate genealogy, helping you understand the facts.

Misconceptions about intestacy

1. Adoption and fostering are treated equally in intestacy

One frequent misconception is that fostering and adoption are treated the same under intestacy laws. However, unless an individual was legally adopted into the family, they are not entitled to inherit from the estate. While informal fostering was common in the early 20th century, these individuals do not influence estate distribution. This issue often arises when tracing family trees that extend to aunts and uncles born in the late 19th or early 20th century, where documentation can be scarce.

Legal adoption was not recognised in England and Wales until 1927, and in Scotland, not until 1930. Proving legal adoption can be challenging, as finding all relevant certificates is often difficult. Conversely, proving that someone was adopted out of a family is somewhat easier since birth certificates are annotated to reflect the adoption.

2. Common law marriages grant inheritance rights

Another common myth is that unmarried partners, often referred to under the misnomer “common law marriages,” have a legal right to an intestate estate. This is not true. Common law marriages have no legal standing in England and Wales, regardless of how long the couple lived together. Unmarried partners can, however, make a claim under the Inheritance (Provision for Family and Dependants) Act 1975, provided they meet certain criteria.

When common law marriages are mentioned during our research, it signals to us that a marriage certificate might not exist, prompting us to explore other methods to identify potential heirs from the relationship.

3. Blended families, divorce and second cousins have automated claims

Blended families introduce additional complexities into estate distribution under intestacy. Many assume that stepchildren are entitled to inherit, but only biological or legally adopted children (including illegitimate children) qualify. Similarly, if the deceased's closest relatives are siblings, full siblings inherit first. Half-siblings only inherit if no full siblings exist.

Divorced spouses have no claim under intestacy rules, but separated spouses do unless a legal divorce (Decree Absolute) is finalised. This often leads to confusion and potential disputes.

Do second cousins inherit on intestacy? In England and Wales, second cousins are often mistaken for first cousins once removed. It's important to note that second cousins are not entitled under English and Welsh intestacy laws, but they may be under Scottish rules.

Misconceptions about genealogy

1. Documentation of events is unnecessary

Some believe that documenting events such as births, marriages, and deaths is unnecessary in genealogical research. However, thorough documentation is crucial to building an accurate family tree and avoiding the risk of estate misdistribution. Failing to document these events can leave the estate and Personal Representatives exposed to legal claims.

Our extensive research often uncovers additional information that could have been missed without proper documentation. For example, informants on death certificates might reveal previously unknown children, or marriage certificates might disclose earlier marriages and offspring that were not previously known.

In one case, we discovered that the deceased's father had a son from a previous marriage, who was still alive and entitled to the estate. Without proper documentation, the estate would have been distributed incorrectly.

The risk of Escheatment

Title Research

Anthony Allsopp,
Head of Business
Title Research

Over the course of the summer we've been discussing **US assets held in UK estates** both in terms of whether they are on the increase, as well as **the tax treaty in place between the two nations** and its application.

As we saw from the application of the tax treaty, not only are there inherent challenges to overcome in order to successfully tax-certify assets in the US so that they can be administered, the timescales to do so are not favourable – it currently takes two years to obtain a **Federal Transfer Certificate (Form 5173)**. With those timescales involved, practitioners in the UK need to be wary of potential Escheatment of US assets and its implication to the UK estate.

Firstly, **what is Escheatment?** State Governments in the US have certain rights to claim property that has become dormant and each State has varying rules around this. However, the general commonality is that **if property is flagged as dormant over a period of three to five years**, then the financial institution that maintains the property is mandated to release custody of it to the State in which the property was incorporated. In UK probate matters, **the common property that escheats is shareholdings that are maintained by a Transfer Agent** (or Share Registrar as we refer to them in the UK).

Inactivity on a shareholding account can include the following:

- No change of registered address
- No purchase of additional shares
- Issued dividends not being negotiated

All of the above are of course quite likely when the account holder is deceased. If a **UK estate is known to include US shareholdings** it is important to ensure that correspondence from the Transfer Agent is monitored. Warning letters will be sent to the account holder advising of potential Escheatment if no action is taken. Wherever possible, **dividends should be attended to**, although UK banks are becoming increasingly reluctant to deal with foreign currency. If the Personal Representative (PR) for the estate becomes aware of this risk, it is **possible to place a block on the process but only usually for a period of 180 days**; this can be of little use if tax clearance is required, which currently takes two years.

Flagged shareholdings

Once a **shareholding has been flagged as dormant**, the Transfer Agent will formally undergo an Escheatment process, which involves releasing custody of the holding to the relevant US State. Most commonly, this occurs in **Delaware** as most companies are incorporated there. Once in the custody of a State, the holding will usually be liquidated, and the resulting funds held on an unclaimed asset register. Whilst these **funds can be reclaimed by their rightful owner or descendants of the deceased for probate matters**, the holding ceases to be an asset that can either depreciate or appreciate in value.

The **value element is an important aspect for UK practitioners to consider** as it may impact valuations used for obtaining a Grant and for reporting to HMRC. As an example, if a deceased held shares in a US company that significantly increased in value (such as several pharmaceutical companies during the pandemic) and values were obtained on the basis of an intact holding, if it later transpires that the holding escheated prior to significant appreciation, then it may be the deciding factor in whether the estate was taxable. Notwithstanding, beneficiaries may be disappointed to discover that the estate is of lower value than anticipated.

If it transpires that a US shareholding has escheated, how can you determine its value? In short, not easily and the best-case scenario is by approximation. A **Transfer Agent can confirm when a shareholding escheated** as well as the number of shares that have escheated; it will not confirm the value. If dividends have also escheated, which is usually the case as they will generally escheat first, then the value of these will be confirmed as they have already been issued. Although a date for Escheatment can be determined, the point at which a State then liquidates the holding will remain unknown, but it will **usually be within six months**. On that basis, an approximate share value can be calculated but it is not an ideal scenario.

Reclaiming escheated funds

How are escheated funds reclaimed? Once a Transfer Agent has **established the State which escheated assets have passed to, a claim can be made with the state directly**. Whilst you do not need legal knowledge to undergo this process for probate purposes, and claims are all conducted online, it is a time-consuming process. A **State will request various evidence and forms of ID** to verify rightful ownership and often certain documents will need to be certified and resubmitted within a time limit. If these time limits are missed, then the process will begin again. We **generally advise to allow one year to process an Escheatment claim** but it can be longer and to an extent timely success will be reliant on third parties, such as Registry Offices, Notaries etc.

Key things to consider:

- If there are US assets held in a UK estate, it is advisable to start planning their administration as soon as possible as resolution timescales are not similar to the UK (e.g. if the assets exceed $60,000 at death then tax clearance will be required from the IRS, which can take two years)

- Monitor all correspondence from the relevant financial institution to ensure that there are not Escheatment warnings being issued

- If US assets are held within an investment portfolio, it is advisable to contact the investment company to enquire about Escheatment risks and how they might be prevented. Some investment companies will agree to transfer the funds into a beneficiary account should tax clearance be required

Autumn budget 2024

Summary for legal professionals

The autumn 2024 budget has introduced significant tax and regulatory changes, setting the stage for considerable impacts on estate administration. Following months of speculation, Chancellor Rachel Reeves has outlined new fiscal measures aimed at stabilising public finances and raising revenue. This article unpacks these changes and explores how they might affect estate administration and planning, with specific implications for probate genealogy and asset repatriation professionals.

Key Inheritance Tax (IHT) reforms

With IHT reforms at the forefront, the Chancellor introduced a four-point plan focused on revenue generation, impacting estates in probate.

1. Freezing the Nil-Rate Band (NRB)

The NRB of £325,000 will remain unchanged until April 2030. Amid rising property values, this freeze means a greater proportion of estates, especially those with property, will be subject to IHT.

2. Closing the pension "loophole"

From April 2027, unused pension funds and death benefits will be included in an individual's estate for IHT calculations, a shift from the current exemption status. This could push many estates above the IHT threshold, requiring more careful asset allocation and early estate planning.

3. Reforming agricultural and business property reliefs

Effective from April 2026, reliefs for agricultural and business properties will change significantly. Estates will receive 100% relief only on the first £1 million of combined agricultural and business property; amounts beyond that will qualify for 50% relief. Similarly, shares listed on the Alternative Investment Market (AIM) will see a 50% reduction in relief, moving to an effective IHT rate of 20%.

Implications: *These changes are expected to increase IHT liabilities across estates with property, agricultural assets, and certain types of business interests. For legal professionals, this will likely mean a greater demand for comprehensive estate planning and probate services to identify all assets and determine optimal strategies for clients facing increased tax exposure.*

Revisions to non-domiciled taxation

Starting April 2025, the remittance basis for UK resident non-domiciled individuals will be replaced by a revised regime. Under this new structure, eligible UK tax residents will benefit from a four-year tax-free period on foreign income and gains, which they can remit to the UK without further tax.

Implications: *This shift will alter planning approaches for non-domiciled clients, particularly those who acquire UK residency but maintain significant overseas assets. For professionals assisting these clients, there will be a need to review long-term tax liabilities and the potential inclusion of foreign assets within the UK tax scope.*

Pension changes

In addition to estate inclusion, several pension-related changes have been announced.

1. Bringing pensions into IHT net

As of April 2027, unused pension funds will count as part of the estate for IHT, affecting the overall estate value and liabilities.

2. State pension increase

A 4.1% rise in state pension rates will occur in 2025-26, reflecting earnings growth. Meanwhile, the triple lock mechanism will remain in place for the current Parliament.

3. Revised rules for overseas pension transfers

From April 2025, the Government will extend the ‘Overseas Transfer Charge’ to all Qualifying Recognised Overseas Pension Schemes (QROPS), equalizing tax treatment for European Economic Area (EEA) and non-EEA schemes.

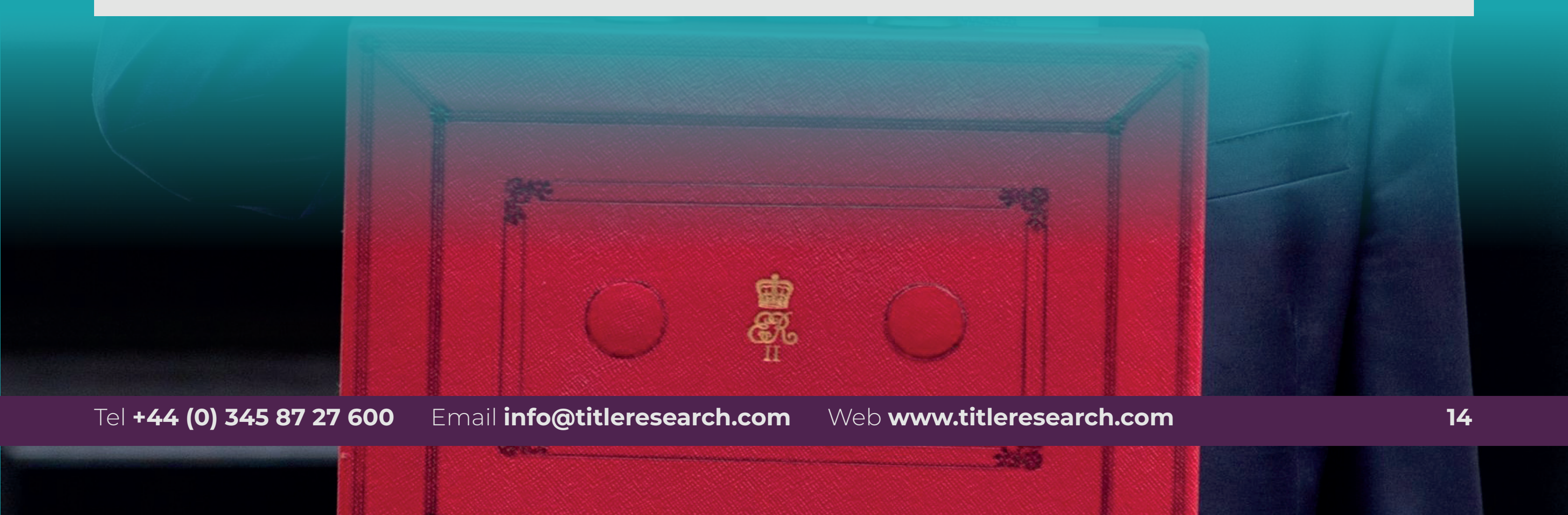
Implications: *Estate administrators may need to take a closer look at pension benefits and consult with clients about the effects of pension funds on Inheritance Tax obligations, particularly as pension values fluctuate with ongoing market changes.*

Corporate tax and business reliefs

The autumn Statement also included business-focused measures, notably targeting National Insurance (NI) contributions and corporate tax structures.

- **Increase in employer NI contributions:** Employer NI has been raised to 15%, with a threshold drop to £5,000, which will impact larger companies most significantly
- **Maintaining Corporation Tax rate:** The Corporation Tax rate remains at 25%, with promises of a new Corporation Tax roadmap to provide clearer guidance on future rates

Implications for estates with business assets: *For legal professionals managing estates that include business assets, these changes necessitate a more strategic approach to planning around corporate tax, NI obligations, and the use of investment incentives. Additionally, the increased NI contributions may lead to decreased asset liquidity for some businesses, affecting the overall value of estates.*



Wage and National Insurance adjustments

The budget increases the National Living Wage to £12.21 per hour, benefiting nearly two million workers. Furthermore, both Income Tax and NI thresholds will rise with inflation starting in 2028. For NI, there is a notable 1.2% increase for businesses, while employees remain unaffected.

Implications for estate valuation and planning: *Rising wages and NI contributions may influence estate planning discussions, particularly in cases where family-owned businesses need to account for higher labour costs in their long-term planning.*

Practical considerations for legal professionals

The recent changes signify increased complexity in estate administration and higher IHT liabilities. Here are a few ways legal professionals might address these shifts:

1. **Probate genealogy services:** Comprehensive probate genealogy can help ensure that all heirs and claimants are accurately identified, streamlining the estate distribution process.

2. **Asset repatriation:** For estates with international holdings, the revisions in non-domiciled taxation and overseas pensions make timely repatriation and valuation services crucial.

3. **Collaboration for detailed estate planning:** Legal professionals may find value in collaborating with Tax Advisers to ensure that estates are managed with the new IHT and business relief restrictions in mind.

Conclusion

The autumn 2024 Budget introduces complex tax and regulatory changes that will influence estate administration and probate processes in the years ahead. With adjustments to Inheritance Tax bands, pension rules, and business reliefs, estates of varying asset compositions could see increased tax exposure and a need for more strategic planning. These new rules underscore the importance of precise estate administration, particularly as they affect the distribution, valuation, and potential tax obligations on assets.

As these changes take effect, it's essential to seek professional support for efficient estate administration. Whether navigating IHT thresholds, handling assets with unique reliefs, or assessing overseas holdings, probate services and genealogy expertise are more critical than ever to meet the needs of beneficiaries and Executors accurately and fairly.

At Title Research, our probate genealogy and asset repatriation services can provide valuable insights and assistance with these intricate estate matters.

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