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NEWSLETTER

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Inside this edition

HOW THE RESIDENTIAL CARE SUBSIDY CAN AFFECT YOUR ASSET PLANNING – WHAT YOU NEED TO KNOW?

The Residential Care Subsidy ("Subsidy") is becoming increasingly topical as New Zealand's 65+ population is projected to increase from 15% in 2016 to over 25% by 2068. The growth in this population will increase the number of Subsidy applications for financial assistance for long-term residential care in a rest home or hospital ("Care'). Despite the predicted growth in applications, many New Zealanders are not aware that their current asset planning has the potential to affect the outcome of a Subsidy application significantly. In light of this, advice surrounding asset planning in consideration of a Subsidy application is essential.

The Ministry of Social Development ("MSD") determines Subsidy applications. When considering an application, they will conduct a financial means assessment to determine whether the applicant qualifies under the prescribed eligibility thresholds. This includes both an asset and an income assessment.

Before the applicant undertakes the income assessment, MSD will first assess whether they qualify under the asset assessment ("Assessment"). The asset thresholds for the Subsidy are as follows:

a) A single applicant or applicants that have a partner in Care: The total value of their assets must not exceed $224,654.00 including the value of the family home and vehicle;

b) Applicants who have a partner that is not in Care can elect to be assessed under either of the following thresholds:

   i) Their assets must not exceed $123,025.00 (not including the value of the family home and vehicle); or

   ii) The total value of all their assets (family home and vehicle included) must not exceed $224,654.00.

The Gifting Provisions

MSD implemented gifting thresholds to prevent the giving away of assets with the purpose of attempting to qualify under the asset thresholds for the Subsidy.

Gifting thresholds apply to gifting commonly, ie birthday gifts, and gifting undertaken to a Family Trust ("Trust"). Gifting to a Trust is when an individual ("Settlor"(s)") who owns assets such as houses, cash and shares, sells these assets into a Trust. In return, the Trust owes a debt back to the Settlor(s). The debts are then "forgiven" by the Settlor(s) through a process called gifting.

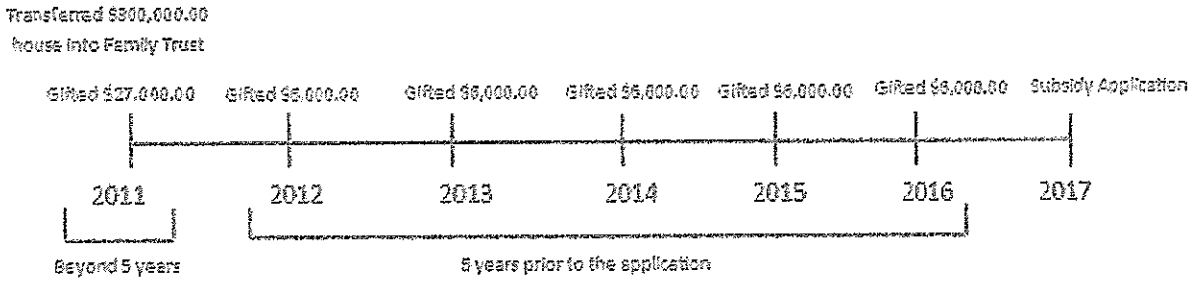
The MSD gifting thresholds are:

- Five years before applying for the Subsidy each person can gift up to $6,000.00 each annually. In this case, those in a qualifying relationship under the property (Relationship) Act 1976 ("relationship") may gift $6,000 each.
- Beyond five years before the Subsidy application, a couple or individual can gift up to $27,000.00 annually. In this case, those in a relationship may gift up to $12,500.00 each.

Gifting that falls under the prescribed gifting thresholds will not be considered in the Assessment. However, if an applicant has sold an asset into a Trust that exceeds the gifting threshold, MSD will consider the value of the asset that exceeds the gifting thresholds

as a personal asset. For example, an applicant sells their house valued $300,000.00 to their Trust in 2011 and gifts annually until 2016; they apply for the Subsidy in 2017. MSD will subtract the value of the prescribed gifting being $27,000.00 in 2011 and $6,000.00 annually until 2016. The remaining $243,000.00 will be considered a personal asset under the Assessment. The applicant would not qualify for the Subsidy in this instance.

Please see diagram below which offers a visual aid to the implementation of the MSD gifting thresholds:



If the same applicant had a partner who was not in Care, it may have been more beneficial for the applicant to hold the property as a personal asset. If the house was a personal asset, in this case, they could be considered under the eligibility threshold which excludes the value of the family home and vehicle if they chose. The applicant would qualify for the Subsidy in this instance.

Please note MSD will only consider gifting to a Trust that has been completed and will not take into account any entitled gifting that has not been completed.

Please note that this article only covers aspects of a Subsidy application. For more comprehensive advice, please seek legal counsel.

Recommendations:

1. Plan in advance. If a Subsidy application is likely, and you own a trust; implement a consistent gifting regime so that you can take advantage of MSD's prescribed gifting thresholds.
2. If you already have a trust or are considering forming a trust and may apply for the Subsidy, consider seeking legal advice on your position, including whether you could consider selling your home out of your Trust to meet the Assessment.

REFORMS IN TRUST LAW – WHAT IT MEANS FOR YOUR TRUST

Family trusts are a practical structure for holding assets, particularly in New Zealand where there are approximately 300,000 to 500,000 trusts operating today. Currently, the Trustee Act 1956 and the Perpetuities Act 1964 contain provisions which need to be read in conjunction with case law regarding their operation, and do not keep up with present-day trust practices. Therefore, the updates regarding trust law under the current Trusts Bill ("Bill") are long overdue, being the first significant reform for at least 60 years. The Bill will replace these Acts, clarify core trust concepts and create more practical trust legislation.

Overview of proposed changes

The underlying principles of the Bill are largely derived from the Law Commission's views in 2013 which recommended that the existing law should be more comprehensible rather than introducing substantial changes. The Bill aims to facilitate the progression of trust law through the courts while also providing:

- A description of the rights and obligations under an express trust e.g. family trusts;
- Clarity regarding compulsory and default trustee duties (derived from existing legal principles) and the exercise of flexible trustee powers (including trustee agents and delegates) when managing trust property;
- Requirements for managing trust information and disclosing information to beneficiaries (where applicable) so they are aware of their position;
- Transparency around establishing, varying and terminating trusts to achieve cost-effective administration of trusts;
- Alternative dispute resolution mechanisms to pragmatically resolve internal and external trust-related disputes;
- A description of some of the court's powers and avenues available for court assistance; and
- The circumstances in which trustees must or may be removed or appointed outside of court.

Trusts subject to the Bill

The Bill will apply to all (including existing) express trusts; however, it can also apply to trusts that are created under an enactment that is consistent with the Bill or as the courts direct.

Trust duration and distribution

Currently, the vesting date for trust property of 80 years is provided under the complex Perpetuities Act 1964 and case law. The Bill proposes to remove the existing rule against perpetuities and provides that an express trust can exist for a maximum of 125 years or a shorter duration as specified in the trust deed. This is aimed to provide certainty in trust dealing, avoid indefinite trusts and allow settlors to distribute property as they choose.

- Upon expiry of a trust, all property must be distributed in accordance with the trust deed or, if the deed is silent about how property is to be distributed, in a way that is consistent with the objectives of the trust. Where there are surviving beneficiaries and it is not possible to determine how to distribute property in accordance with the trust deed, the property must be distributed to the beneficiaries in equal shares.

Trustees' duties and powers

The Bill provides for five mandatory trustee duties that cannot be excluded from a trust deed. These include the duty to act in accordance with the terms of the trust and to act in good faith. The 10 remaining default duties, including the duty to act impartially, can be amended or excluded by the terms of the trust deed.

There is a presumption that trustees must provide basic information to the beneficiaries such as notifying beneficiaries of their position and the right for beneficiaries to request trust information and the contact details of the trustees. Trustees must consider certain factors, such as the age and circumstances of the beneficiary or the effect on those involved with giving the requested information, before deciding whether this presumption applies. If the trustees reasonably consider that information should not be given after reviewing the mandatory factors; the trustees may refuse the information request. The Bill sets out the procedure for trustees when deciding to withhold information.

Summary

The Bill is currently in its first reading. Once enacted, there will be an 18-month transition period to allow anyone involved in trusts to consider the application of the Bill to their trust. This long-awaited Bill aims to be a flexible tool to accommodate the wide use and effective management of trusts for the benefit of our society's future asset planning.

PERSONAL LENDING GUARANTEES - ENFORCEABILITY

A Guarantor is a person who gives a promise to repay the debt of a borrower. By agreeing to pay a debt the Guarantor has made a guarantee to the institution or person lending the funds ("lender"). Frequently when someone gives a guarantee they are also giving an indemnity. An indemnity is a contractual promise to accept liability for any loss by the lender that is accumulated in the process of the recovery of a debt.

There are different types of guarantees: unlimited, limited, unsecured or secured. An unlimited guarantee generally gives the lender an ability to demand the Guarantor repays all monies owing, whereas a limited guarantee has an agreed amount payable by the Guarantor. An unsecured guarantee is not attached to any particular asset of the Guarantor. In contrast, a secured guarantee grants security over a specific asset owned by the Guarantor, e.g., their house.

Personal guarantees are becoming more common in the parent-child scenario. However, the parents sometimes underestimate the extent of the risk they assume when signing a guarantee. Regularly, the guaranteed loan represents a large portion of the parents' assets and therefore may have significant consequences on the parents' current and future living standards if the lender demands payment of the debt. It is important to note that a personal guarantee is not for a specific timeframe. Therefore, the Guarantor may be liable for any current loans, future financing or credit card debts.

Guarantees are legally binding documents and are enforceable through the Courts. Extinguishing the obligations under a guarantee can be difficult as the parties must adhere to the terms and conditions of the guarantee. Guarantors may request the lender to release them from their liability under the guarantee; however, it is the lenders' decision to release a Guarantor from their obligations under the guarantee.

In the case *Tait-Jamieson v Cardrona*, Mr Tait gave a personal guarantee for the debt owed by a local organisation to Cardrona Ski Resort ("Cardrona"), however, he did not sign the written guarantee prepared.

When Mr Tait realised that he had not signed the guarantee he conveyed to Cardrona in verbal and written form that regardless of him not signing the guarantee he would underwrite the debt. Cardrona subsequently demanded payment of the debt from the Guarantors. Mr Tait stated that the guarantee was not enforceable against him as he did not sign the written guarantee. However, the Court held that Mr Tait had adequately expressed his intention to be contractually bound by the guarantee by his previous verbal and written correspondence and therefore must honour his obligations under the guarantee.

Tait-Jamieson v Cardrona demonstrates that once a person sufficiently expresses an intention to be bound by a guarantee, the guarantee is likely to be enforceable. However, in New Zealand, lenders who offer guarantees must also adhere to the responsible lending laws of the Credit Contracts and Consumer Finance Act 2003. These state that lenders must ensure a borrower, or Guarantor, is likely to be able to make repayments towards the debt without suffering substantial hardship. This legislation was applied to the case of a pensioner who agreed to guarantee his son's loan of $2,000.00. His son defaulted on the weekly payments immediately. The lender demanded the repayments from the pensioner which would have left a residue of $25.25 of his pension payment per week. The case was heard by Financial Services Complaints Limited which found that the pensioner was not a suitable Guarantor and that the lender had breached their duties under the responsible lending laws. The judgement resulted in the lender discharging the pensioner's liability under the guarantee.

Below are some considerations to contemplate before becoming a Guarantor:

1) Receive independent legal advice;
2) Make sure you understand the wording of the written guarantee.
3) Be aware that the lender does not have to pursue the borrower "to the ends of the earth" before turning to the Guarantor for repayment of the debt; and
4) If possible, engage in a limited guarantee to try and minimise any potential risk.

HOW IT CAN HELP YOU – MEDIATION IN EMPLOYMENT DISPUTES

Alternative Dispute Resolution ("ADR") methods are alternatives to going directly to court. Using ADR methods instead of pursuing the matter in court is usually more cost effective for all the parties involved, takes less time to resolve the dispute, and also relieves the court of cases they believe can be resolved between the parties without court assistance. This particular article will focus on mediation in the context of employment law and form a part of our ADR article series which will include articles on formal/informal negotiation and arbitration over the next two newsletters.

Mediation is essentially a voluntary process where an independent person (a "mediator") assists the parties attending the mediation. This typically involves an employee and employer in an employment dispute, working through legal and emotional issues and developing solutions together to repair the employment relationship problems in a semi-formal and confidential environment.

Attending mediation is not like attending court as you are not under oath and are not cross-examined. Mediation requires the employee and employer ("the parties") to attend the mediation, or it cannot proceed. Each party is entitled to bring representation and a support person to the mediation. At the beginning of the mediation, the mediator will outline the process of the mediation and ask the parties if they have any questions about the process. During the mediation, the mediator will ask each party questions to identify and refine the issues. The mediator will give each party the opportunity to speak; interruptions are not permitted. If the parties are not able to adhere to this rule, the mediator may put each party in separate rooms and talk to each party individually to attempt to reach a resolution.

Anything said during mediation and all documents prepared for the mediation, including the terms of the resolution, if one occurs, are confidential. Because of this, what happens in mediation may not be able to be used as evidence in the Employment Relations Authority ("ERA") or Employment Court. Confidentiality encourages the parties to be honest and forthcoming with their information to increase the chances of reaching a resolution.

When preparing for mediation, the parties are encouraged to prepare written statements, accounts of events, and collate any evidence and documents such as texts or emails to support their position. To get the most out of mediation parties are encouraged to:

1. Listen to the other parties' point of view, even if they do not agree;
2. Acknowledge anything they may have done differently or better;
3. Be honest and open;
4. Have an open mind for resolutions; and
5. Be willing to bend a little to reach an agreement.

Even if a resolution is not reached between the parties, they can request the mediator to recommend a non-binding solution under section 149A of the Act that the parties can consider. The mediator will make a written recommendation. The recommendation will include a date when the recommendation will become binding; the parties may consider accepting or rejecting the recommendation. Please note that if either party does not reject the recommendation before the specified date, it will become a full and final settlement and enforceable.

The parties also have the option of requesting a binding recommendation under section 150 of the Act.

Some advantages of resolving the dispute at mediation are:

1. The cost is significantly less than hearing the dispute in court; and
2. Mediation lets the parties have a degree of control over the agreement reached.

The disadvantages of mediation are that it may not result in a resolution, in which case the process will add to the legal costs.

Where the mediator feels that mediation is unlikely to produce a resolution, the mediator will usually conclude the mediation. The parties' options at this point are to refer the matter to arbitration or the ERA or to stop pursuing the matter altogether.

If you are an employer or an employee and facing this situation, it is best to seek legal advice. Watch this space for our article on Arbitration in our next newsletter.

We wish to advise that our offices will close for the Christmas period on Friday 22 December 2017 and will reopen on Monday 15 January 2018

We wish you a merry Christmas and a very happy New Year

Bruce Wyber

Please give me a call if you have any queries about any of the newsletter items