

Gift Duty Abolition

Issues Arising:

- These issues are the subject of either a series of seminars being undertaken by Harris Tate, and form the agenda for a one to one interview with one of the Trust Team at Harris Tate.
- Any questions can be addressed in the first instance to larissa@harristate.co.nz who will arrange an appropriate response.

1. Abolishing Gift Duty

- 1.1 Abolished on 01.10.2011
- 1.2 Gifts still permitted – but without tax.
- 1.3 Gift duty administered by IRD.
- 1.4 Estate and Gift Duties Act still in place.
- 1.5 No other legislative change made on 01.10.2011.

2. Effect on Residential Care Subsidy Applicants

- 2.1 Residential Care Subsidy (RCS) rules change from time to time.
- 2.2 Last change – July 2011 – and from then applicants have been allowed gifts of \$6,000 per year per applicant over five year period preceding applications.
- 2.3 Historical benchmark – was \$5,000 per year per applicant for that 5 year period.
- 2.4 RCS administered by the Ministry of Social Development (MSD) not IRD.
- 2.5 MSD existing rules will claw back any “disposition” (including a gift) that has the effect of depriving an applicant of an asset.
- 2.6 A disposition claw back however is not time limited and so if you do make a gift that constitutes deprivation it will be clawed back without time limit. For instance, if you lump sum gifted tomorrow and then applied in 20 years they would take into account the gift made now in assessing the application.
- 2.7 That “Deprivation” applies not only to asset deprivation, but also if income (perhaps from a Trust) is diverted away from an applicant, or not made available to an applicant.
- 2.8 A Residential Care Subsidy is therefore means tested as to assets and income.
- 2.9 If an applicant has “given away” or “disposed of” assets by way of gift, this is treated as deprivation of the applicant’s assets (or income) and will be treated as not having happened for the purposes of the application.
- 2.10 This will invariably mean that the applicant is not eligible for a RCS until an equivalent amount has been expended by, or on behalf of, the applicant.
- 2.11 The situation is clouded by the MSD exemptions that need to be addressed on a case by case basis:
 - Single applicant needs not exceed \$210,000
 - If spouse or partner in care, assets less than \$210,000.

- Joint house and car plus \$115,000.
- Joint \$210,000 including value of house and car.

3. Effects on Creditors

- 3.1 Insolvency: Any gifts made within two years of bankruptcy can be cancelled.
- 3.2 Or within five years if the gift was made when the donor was insolvent.
- 3.3 The Property Law Act allows a court to set aside any gifts made at any time where one of the effects of that gift was to prejudice a creditor.
- 3.4 A creditor includes the circumstance of a contingent guarantee. Contingent means that the guarantee has not been called upon at the time of gift, but exists then, and is subsequently called up.
- 3.5 Relationship Property legislation has similar claw back issues.

4. Why do people transfer assets to a Trust?

- 4.1 Principally to protect those assets against creditor claims against the Settlor.
- 4.2 But also historically, to allow tax splitting.
- 4.3 Or to simplify or avoid a Probate application which may involve (in an estate) a challenge to a will by a beneficiary, or potential beneficiary.
- 4.4 To enable control of the assets after the death of the settlor. The trust survives and the trustees can, for instance, make measured payments to beneficiaries, or use the assets in a particular pathway identified by the settlor. Trust ownership can also assist in protecting the family assets from second generation Relationship Property claims.

5. Deprivation Rule – Friend or Foe?

- 5.1 In the circumstance of a house in a trust with an existing gifting programme with a balance over \$27,000.00, a lump sum gift will constitute Deprivation.
- 5.2 To not gift the balance will still leave the gifting balance as an asset in the hands of the settlor.
- 5.3 This is a case of “damned if you do and damned if you don’t”.
- 5.4 Don’t gift and the gifting balance will be treated as an asset.
- 5.5 Do gift and that gift may constitute deprivation.
- 5.6 I say may constitute deprivation. It will if it exceeds the allowable MSD limit of \$6,000 per person.
- 5.7 It won’t if it doesn’t.
- 5.8 For some families a reduced gifting programme (without duty) may be the answer.
- 5.9 There is no “one size fits all”.

6. Gifting Parameters

- 6.1 The gifting rules only allow gifting (now, without gift duty) between “persons linked by natural love and affection”.
- 6.2 Gifting between other entities not permitted:
 - Company to Trust.
 - Trust to Beneficiary where there is no natural love and affection.
- 6.3 IRD will treat a gift without natural love and affection as income to the recipient.
- 6.4 If you are involved with a “Look Through Company” – LTC – special rules may apply.

7. Documentation

- 7.1 If there is an existing gifting programme, Trustees have the obligation to record and retain a complete record of any pre 01.10.2011 gifting programmes dealt with post 01.10.2011.
- 7.2 If there are any post 01.10.2011 gifts then the trustees (and settlors) need to record those transactions, both for Government (MSD and IRD) but also for the trust and settlor integrity in case of questions later on.

8. The Future

- 8.1 'Look Through' concept in MSD applications. (The Centrelink experience in Australia).
- 8.2 Estate Duty and 'Look Through'. Re-introduction of Estate Duty coupled with 'Look Through' could see all assets of Trust ascribed to an MSD applicant.
- 8.3 New Trustee Act:
 - Codification (c.f. Companies Act).
 - Trustees obligations.
 - Beneficiaries rights.
 - Penalties.
 - Relationship Property connection?
 - Settlor's control of Trust.
 - Dispute resolution.

9. Retaining Gifting Balances

- 9.1 Control of Trust.
- 9.2 His, hers, our children.
- 9.3 MSD applications in some circumstances.
- 9.4 Some tax advantages? – Tax deductibility on investment purchases?
- 9.5 In the circumstances where there is a potential to call on a guarantee or other contingent liability.

10. Wildcards

- 10.1 Assignment of gift balances subsequently gifted by recipient to trust.
- 10.2 Trust reversals.
- 10.3 Satisfaction of gifting balance by distribution of house?

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