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## Gifts – What Do I Need to Know?

The Government have recently enacted a change to the law which abolishes gift duty. This has opened up a great deal more flexibility for people when considering asset protection structures. While the ability to shift assets around in a timely fashion is certainly a big advantage, just because the tax laws will not, from 1 October 2011, require payment of gift duty, does not mean that large gifts will be acceptable in other areas.

The most important message that we can send to our clients is to be clear about the reasons for undertaking any asset protection structuring and from this to identify which risks will need to be managed when setting up your structure and completing gifting. While the tax department won't be collecting gift duty on gifts, other departments and indeed third parties are nevertheless still interested in whether or not you make a gift.

### WHO MIGHT BE INTERESTED IN GIFTS YOU MAKE?

- 1. Relationship Property:** Plainly the ability to shift assets quickly will become an issue when relationships are being formed and breaking up. The Courts under the Property Relationships Act 1976 and the Family Proceedings Act 1980 already have statutory powers to deal with scenarios involving family trusts and gifts. Careful planning is necessary when setting up a Trust and/or gifting assets to a Trust if relationship property protection is an important goal. On its own, the Trust and the gift of assets to the Trust may not be a complete protection.
- 2. Creditors/Insolvency:** Prior to this law change, creditors had already begun to more assertively chase gifts of assets to trusts where this left a shortfall for creditors. One of the most prominent decisions in this area was the Regal Castings Limited v Lightbody case in 2008, which permitted the Official Assignee to chase gifts of property made to a trust and recover them.

Creditors/The Official Assignee have the ability to chase and undo transactions where gifts are made within two years of a bankruptcy (Insolvency Act) or where made in such a way as to prejudice the rights of creditors (Property Law Act). How far the Courts are prepared to go in using these powers will only become clear as further cases make their way through the Court system. If creditor protection is important to you then you will need to talk to us very carefully about how to implement an asset protection structure and when to do so to give yourself the best chance of being able to defend any claim.

3. **Tax:** Most people will have seen the news reports about the Supreme Court decision in IRD v Penny and Hooper which upheld the IRD's claims of tax avoidance. The implications of that decision will be discussed and debated but again it is clear that if effective tax planning is one of your objectives, how you structure your affairs and what this means for gifting will need to be carefully thought through. It is quite clear however, that the removal of gift duty will not mean that you are entitled to rearrange your affairs with complete impunity if to do so would otherwise be seen as tax avoidance.
4. **Means Testing:** The most common form of means testing is the application process for a resthome subsidy.

If this means testing is an important consideration for you, then very special care will need to be taken to ensure any gifting complies with the requirements from time to time under the Social Security Act and the policies of the Ministry of Social Development.

If you intend to apply for a subsidy to meet resthome costs, then any gifting which you carry out will need to comply with at least the following criteria:

- 4.1. During the five years immediately prior to the application for the subsidy, only a gift of \$6,000.00 per annum will be approved.
- 4.2. Prior to that five year period, only gifts of \$27,000.00 per annum will be approved.
- 4.3. There is no end date on how far MSD can go back in investigating your gifting programme.

It is now clear any application for a subsidy where one partner/spouse goes into care and the other remains in the home, immediately halves the permitted gifting as the allowances for permitted gifts are treated as per application and not each and also take into account assets and gifts made by a spouse remaining at home when one spouse goes into care.

- 4.4. The present means test may favour retention of a home in personal names depending on your circumstances.
- 4.5. Age may also be a consideration as there is no ability to artificially smooth "lumpy" gifts. If you decide to make a lump sum gift in one go, MSD will not treat that as being evened out over a subsequent period of years even if a substantial amount of time passes and you therefore need to assess whether the convenience of a single gift is worth the risk of it being held to be a deprivation compared with the inconvenience of making more regular gifts but which are otherwise at a level which comply with the MSD criteria.

It is presently unclear whether other strategies which have been usefully employed from time to time (such as creating life interests in properties) will continue to be respected or will be seen as a deprivation.

As will be apparent from this brief introduction, there are a number of issues emerging which relate directly to the ability to gift or the wisdom of gifting and you will need to work with your lawyer to carefully evaluate your own situation and which objectives you are planning for. If more than one objective is important, then all criteria relating to those objectives will need to be complied with and in some situations there is an obvious inconsistency. For example, if you were to plan for both creditor protection and means testing, there is a clear conflict between the need to gift away assets quickly (for creditor protection) versus the need to undertake careful gifting at the much lower levels needed to comply with means testing as it presently stands.

Finally, it will be important in all of this to ensure that your planning and decisions are carefully coordinated with your accountants to ensure all parties are acting in a consistent manner.

If you have any questions regarding gifting and asset protection structuring please do not hesitate to contact us. Our Partners with specialist interest and experience in asset protection are:



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