

Abolition of Gift Duty

Where to from here?

Introduction

As you may be aware, the Government abolished gift duty legislation with effect from 1 October 2011. While the Government has abolished gift duty, it remains prudent to document evidence of a gift as trusts will inevitably come under closer scrutiny.

Existing laws

Existing laws surrounding gifts are very likely to gain more prominence. Before deciding to gift any balance owing to you by your trust there are therefore a number of issues to consider.

For example:

1. A forgiveness of debt can give rise to income in the hands of the recipient (under financial arrangements rules) unless the debt is forgiven in consideration of natural love and affection.
2. The Insolvency Act 2006 provides that the official assignee can set aside gifts made in the last 5 years if the gift was made when the donor was insolvent. For this reason it is recommended that the donor sign a solvency certificate before making a gift.
3. The Property Law Act 2007 provides for a claw back of gifts made with intent to prejudice creditors.
4. The Property (Relationships) Act 1976 provides that dispositions of property may be set aside if they were made in order to defeat the claim or rights of any person.
5. The Family Proceedings Act 1980 provides for the Courts to vary the terms of ante and post-nuptial settlements when the marriage (not de facto or civil union) of the parties comes to an end.
6. Trust busting has had more publicity lately and the Courts will inevitably be asked to unravel dispositions to “sham trusts” and “alter ego trusts”.
7. If you are a beneficiary, trustee or settlor of a trust and you have lent funds to that trust, you can usually demand repayment of the loan (subject to the loan terms). This enables you to have access to funds if your circumstances should change.

If the loan is forgiven then you will become beholden to the trustees for any future pay outs from the trust. Some consideration may therefore need to be given to whether or not you wish to keep the loan owing so you still have some control over the funds lent to the trust.
8. The Social Security Act 1964 provides for asset testing in order to determine whether a person in long term residential care qualifies for a residential care subsidy. Prior gifts are exposed to a claw back and gifting in excess of \$27,000 in any 12 month period may jeopardise a possible entitlement to subsidies.

We can provide you with advice specific to your circumstances if you wish to make a gift but do not want to affect your entitlement to residential care subsidies.

Important considerations

There is no “one size fits all” approach in deciding whether or not to forgive any balance owing to you by a trust. In order to formulate an appropriate strategy it is prudent to assess the personal circumstances and needs of both you and your family.

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Some questions to consider in making an assessment are:

1. Have you given personal guarantees to a bank, finance company, supplier or landlord?
2. Will you still be solvent if you make a gift?
3. Can you be the subject of a relationship property claim?
4. Are the assets to be gifted your own separate property or are they relationship property?
5. Are you considering applying for a government subsidy, such as a residential care subsidy, in the future?
6. Do you want to remain a creditor of the trust so that you have additional rights to the trust assets over and above the beneficiaries?
7. Are you subject to any current creditor or IRD claims?

In Summary

The ability to gift without being restricted to \$27,000.00 per year will be a welcome change to the law for many. You should take your time over the decision to gift and consider the implications carefully.

We invite you to meet with us to discuss your options and assist you to make the appropriate decision for your personal circumstances.

For More Information

Visit our website at www.gellertivanson.co.nz or call us on (09) 575 2330.