

WiNZ and Gifting - \$27,000 p.a.?

(updated December 2013)

Traditionally, individuals have been able to make gifts of up to \$27,000 per annum without incurring any gift duty. The same limit has been considered the 'safe' limit for individuals wanting to apply for residential care subsidies, subject to certain timeframes. However there has been a change in policy at the Ministry of Social Development (MSD or WiNZ), and more recently this has been tested in the courts.

Gift Duty

Duty was payable on gifts made by individuals based on a scaled rate. There was an exemption however, of up to \$27,000 per annum for gifts made to those for whom you had 'natural love and affection' for - basically family members. The Estate and Gift Duties Act 1968 has been repealed so no duty has been payable on gifts made since 1 October 2011. The removal of gift duty was justified on the basis that the cost for IRD to administer the system did not justify the revenue earned, and that other laws were in place to ensure people did not abuse the system. This includes laws to allow the effective reversal of gifts in circumstances where they have been made to avoid responsibilities (e.g. matrimonial, business, creditor, Government benefit). It is important to note that social security policy was not changed when gift duty was removed.

Gifting to a Trust

When a Trust is established, assets are usually sold by the individual(s) settling the Trust. In exchange, the Trust gives the settlor(s) an IOU. The result of this is no change in the value of assets held by the individual(s) as they have simply swapped their assets for an IOU from the Trust. The next step is for them to reduce the IOU over time by making annual gifts until the debt is fully forgiven. The 'standard' amount of gifts has been \$27,000 per person, per annum based on the gift duty exemption and WiNZ practice when considering residential care subsidy applications.

Residential Care Subsidy

This subsidy is in place to help with the cost of long-term residential care in a hospital or a rest home. There are asset and income thresholds that applicants must meet in order to qualify for a subsidy. The current asset thresholds (from 1 July 2013) are:

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| if you don't have a spouse / partner, or if your spouse / partner is in care too. | \$215,132 |
| if only one partner is moving into care | \$215,132, or \$117,811 plus house and car |

When calculating your assets, WiNZ takes into account any gifts you have made in the last five years (less an exempt gifts of \$6,000 per annum). They can also take into account gifts made over \$27,000 at any time, with no time limit!

So, what has changed?

WiNZ has historically allowed annual gifts of \$27,000 per person, or \$54,000 per annum for a couple. This 'per person' approach was consistent with gift duty exemptions, and with intentions expressed in certain parliamentary papers when the social security laws were first put in place. However, there has been a change in policy to allow total gifts of \$27,000 per annum - not per person! This is a major change in practice, and one which could have a significant effect on many family trusts. WiNZ are denying that there has been any change. However accountants and lawyers, who have implemented and run gifting programmes and dealt with WiNZ over many years, dispute this.

What is the position now?

In order to provide some certainty, WiNZ has been challenged through the NZ courts. (B v Chief Executive of the Ministry of Social Development [2012]). The case involves a lady (Mrs B) whose residential care subsidy application was denied based on the 'standard' gifts of \$27,000 per annum made by both her and her husband to a family trust going back to 1987. After internal reviews were unsuccessful, they challenged MSD's position in the High Court. This was heard in November 2012 and the case went against Mrs B, with the judge ruling that the limit of \$27,000 per annum (not per person) could stand.

This case was appealed to the Court of Appeal in August 2013 where Mrs B's lawyers re-argued their proposition that WiNZ have changed their policy, not simply continued with existing policy. They also argued that the rules could be viewed as discriminatory, with married couples being treated differently to de facto couples. The Court did not agree with these arguments and the Court of Appeal upheld the findings in the High Court – that WiNZ are within their powers to set the rate of gifts allowable and for this to apply to historical gifts.

Despite this win, we also understand that if WiNZ had lost the case they would have sought a change in the law to implement their interpretation of the rules. Their position is that residential care subsidies, or benefits of any kind, are not for people who have gifted assets into family trusts (or otherwise deprived themselves of assets, and income for that matter).

What is the impact of this case?

The outcome of this case was extremely important for all individuals who have established family trusts and made gifts, and who believe that they may need (or wish) to apply for a residential care subsidy.

It is precedent setting, providing clarity regarding what gifts individuals can safely make and still qualify for residential care subsidies (i.e. \$27,000 per couple, per annum). It also clarifies the power of WiNZ to set limits which can incorporate gifts made many years prior to the change in rules.

What does this mean for you?

If you have completed your gifting at \$27,000 each per annum, then there is nothing you can do in relation to historical gifting - they cannot be undone. The rules apply to applications for residential care subsidy now, and will take into gifts made before the regulation change.

If you have completed your gifting by making a large one-off gift following the removal of gift duty, then this policy change is unlikely to affect you.

If you still have debt outstanding that you have been gifting at \$27,000 per annum, and are married or in a relationship, then you may wish to consider changing now to make gifts of \$13,500 each (\$27,000 in total).

The above suggestions are general guidelines in the interim, however each situation is different and therefore a review of your personal positions is recommended. Please feel free to contact Michael or Steve if you would like to discuss this further.