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INSIDE THIS EDITION

STOP PRESS: REGARDING ESTATE PLANNING – RESIDENTIAL CARE SUBSIDIES

1. The Ministry of Social Development (MSD) in September this year was held to be correct by the Court of Appeal in interpreting s 147A of the Social Security Act to mean that the deprivation of assets by both the assessed person and his or her spouse are to be considered in carrying out a financial means assessment under part 4 of the Act.

2. MSD was also held to be correct in interpreting Reg 9B of the Social Security (Long-Term Residential Care) Regulations 2005 (the Regulations) to require the total assets of the appellant and her husband to be assessed, including the assets they have deprived themselves of less $27,000 per annum of allowable gifting in the period outside the "gifting period".

3. MSD was held not wrong in law in declining to accept that gifting by the appellant and her husband could be aggregated in the relevant period.

ESTATE PLANNING – RESIDENTIAL CARE LOANS

One of the most vexing questions that we face as we get older is how we will provide for ourselves into our retirement. This necessarily includes planning to ensure that we have sufficient funds to meet our costs in the event that we are placed into long-term residential care or a rest home. In order to determine how much we will have to contribute to the costs of long term residential care, we need to be aware of the maximum asset threshold, above which we will no longer be eligible for a residential care subsidy ('the Subsidy').

THE SUBSIDY

The threshold is reassessed on 1 July each year. From 1 July 2013 the threshold has been set at $215,132 for single people or for couples who are both in residential care. For a couple where only one of whom is in residential care the threshold is $117,811, when the value of the home and car is excluded, or where combined total assets exceed $215,132. Couples can only elect to have their assets excluded from the assessment where it is the principal residence of either a dependent child or the spouse or partner, who is not in residential care.

In assessing the eligibility for the Subsidy, Work and Income New Zealand ('WINZ') may include in your assets any gifts which you have made of more than $6,000 per annum over the preceding five years. WINZ may also include in your assets any one off gifts of over $27,000 per couple made prior to the five year period immediately preceding the application being made.

For those people who have assets above the maximum threshold and accordingly do not qualify for the Subsidy, WINZ offer a residential care loan scheme ('the Loan').

The Loan

The Loan is interest free and secured by a caveat registered over the borrower's home. This caveat prevents the property being sold until the debt owed to WINZ has been repaid in full.

You can apply for a reassessment of your eligibility for the Subsidy when your assets have decreased below that maximum threshold for the Subsidy.

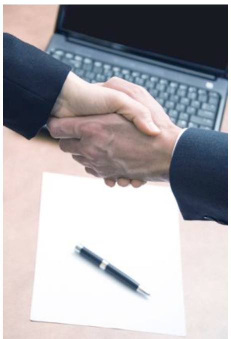
The Loan can be drawn down at the rate of the maximum contribution towards residential care costs. From 1 July 2013 the maximum contribution ranges from $819 to $900 per week depending on where you reside. This equates to between $42,588 and $46,800 for each 12 month period spent in residential care, while you remain ineligible for the Subsidy.

The Loan has to be repaid either within six months of the death of the borrower or when the home is sold, whichever comes first.

Given the modest threshold above which a person is not eligible for the Subsidy and the high weekly costs of the maximum contribution it is imperative that planning for retirement and asset protection begins as early as possible.

Going into Business - an Overview of Why You Need a Shareholders' Agreement

A Shareholders' Agreement is a contract between the shareholders of a company. While it is not compulsory, a Shareholders' Agreement is good way to provide some certainty in a business relationship, and can be as detailed or as simple as you would like. Without one, you risk a dispute at some point down the track when each shareholder has a different idea of who can do what, when they can do it and how it is done. Like a pre-nuptial agreement – you do not really need one, until you need one (at which time it is too late). Shareholders' Agreements are also popular because unlike a Constitution, they are not registered with the Companies Office, so they are not publicly available.



Typically a Shareholders' Agreement is signed at the outset of a business arrangement, but it is never too late - they can be entered into at any time with the agreement of the shareholders. It will usually record (amongst other things):

- the nature of the business;
- how it will be run;
- decision making mechanisms;
- how many directors there will be and how they are appointed;
- the role, rights and responsibilities each shareholder has;
- how capital contributions or financing will be arranged & secured; and
- exit strategy - what happens if one shareholder wants to sell (or if some other change or event affects a shareholder).

Are you compatible with the other shareholders?

Perhaps the most important role of a Shareholders' Agreement is to ensure that the parties are on the same page from the outset. When preparing the agreement the parties will need to consider how the business will operate. Can you agree on the role each party will have, who will provide security for company finance or what should happen if one party does not meet its obligations? If you cannot agree now, you will find it hard to agree later.

What are my shares worth?

The Companies Act does not prescribe how shares should be valued if one party wants out, and it is not always as simple as you may think. It can be notoriously hard to agree on a timeframe, process, and the value of the shares when one party is exiting the company. Many Shareholders' Agreements will record the agreed process for when one party wants to sell their shares, reducing uncertainty and the risk of dispute.

How much control will each party have?

Shareholders own the company, while the directors manage the company. A Shareholders' Agreement can record who can appoint directors, and what decisions the directors can make without reference to the shareholders. You might agree for example that some decisions need the approval of all shareholders, while others need a majority of shareholders, or can be made unilaterally by just one director.

Removing a shareholder / director

Your Shareholders' Agreement might record different circumstances in which a shareholder or director can be removed. For example, if a shareholder or director has breached an essential term of the Shareholders' Agreement, acted dishonestly or in a way that is detrimental to the business, that person can be removed. This can be easier than relying on the provisions of the Companies Act, which can be limited.

THE EMPLOYMENT RELATIONS AMENDMENT BILL – AN OVERVIEW

On 26 April 2013, the National Government introduced amendments to New Zealand employment legislation by introduction of the Employment Relations Amendment Bill ('the Bill'). The changes generally follow those which National campaigned on before its re-election in 2011, with the notable inclusion of amendments to Employment Relations Authority ('the Authority') processes.

There are numerous proposed amendments in the Bill, some of which are outlined below.

TIMEFRAMES FOR AUTHORITY DETERMINATIONS

The Bill proposes to provide clearer guidance to the Authority, to give certainty and to speed up delivery of its determinations. The Bill provides that at the conclusion of a hearing, an oral determination will be required of the relevant Authority member, including the member's preliminary findings. A written record of the determination is to be provided within three months of the hearing, except in exceptional circumstances.

This change is presented as an opportunity for parties to consider their respective positions at the conclusion of a hearing, including whether or not the best solution to an issue would be for the parties to settle it amongst themselves.

REST AND MEAL BREAKS

At present, the Employment Relations Act 2000 ('ERA') outlines rigid guidelines for employers with regard to employees' rest and meal breaks. Depending on the nature and operation of a business, this can pose difficulties, as the current prescribed law may be impractical for some industries or businesses.

In an attempt to provide employers greater flexibility, the Bill would allow an employer to place restrictions on an employee's breaks where it is reasonable and necessary with regard to the nature of an employee's work, in return for reasonable employee compensation. For example, it is inconvenient for air traffic controllers to take regular breaks given the constant arrivals and departures of aircraft while they are on duty. Under the Bill, their breaks could be reduced, with compensation such as additional paid leave.

CHANGES TO PART 6A OF THE ERA

Part 6A of the ERA is aimed at protecting vulnerable employees such as workers in the cleaning and food catering sectors, by imposing additional obligations on their employers. These obligations can at times be costly and unclear. The Bill outlines amendments which seek to provide clarity and to alter the obligations of the employers when Part 6A of the ERA is applicable.

Currently, where a business is being restructured, vulnerable employees may elect to transfer to a new employer. Under the Bill an employee would need to notify the outgoing employer within five working days of the employee's desire to transfer to the new employer.

The process at present for incoming and outgoing employers with regard to accrued employment entitlements is not clear. The Bill recognises the need for negotiation between the outgoing employer and incoming employer as to who pays what. There is also the inclusion of practical requirements for the provision of information on transferring employees, such as records regarding wages and holidays.

A key component of the Part 6A amendments is the proposed exemption for small businesses from some aspects of Part 6A – significantly, businesses employing 19 or fewer employees will not be required to employ employees affected by the restructuring, eliminating those employees' current right to elect to transfer.

The submissions on the Bill have displayed a diverse range of reactions to its proposals, and the Select Committee report, due by 5 December 2013, will be keenly anticipated.

RELOCATION OUTSIDE OF NEW ZEALAND AND HAGUE CONVENTION

The father and mother of a child are usually joint guardians of the child under Section 17 of the Care of Children Act 2004 ('the Act'). Parents who have separated have a duty under Section 16 of the Act to consult with the other parent of the child about important guardianship matters. One of these guardianship matters is the child's place of residence, including relocating outside of New Zealand.

Under Section 16 of the Act, parents have a responsibility to:

- provide care for the child;

- contribute to the child's intellectual, emotional, physical, social, cultural, and other personal development; and
- determine for the child, or help the child to determine, matters of importance.

Parents must consult with one another and make these decisions in accordance with what is in the best interests of the child.

If both parents mutually agree to a child relocating to a place outside of New Zealand, they can record this in a parenting agreement. The parenting agreement will record the child's living arrangements that the parents have jointly agreed upon. Parenting agreements are often less time consuming and less costly in comparison with having the matter dealt with by the Family Court. Parents can also elect to have their parenting agreement made into a formal court order by making an application to the Family Court.

If the parent remaining in New Zealand does not consent to the child relocating to another country, that parent can make a Border Alert (CAPPS) listing with Interpol alerting Customs and the New Zealand Police in order to prevent the child from leaving the country.

An urgent application can also be filed in the Family Court for an Order Preventing Removal of the child from New Zealand and this Order, if granted, will remain in place until the child is 16, or until a further Order is made by the Court.

When parents cannot come to an agreement, the parent wishing to relocate the child to another country can apply to the Family Court for permission. The threshold is high because relocation overseas is likely to affect the child's relationship with the parent remaining in New Zealand. Under Section 4 of the Act, the welfare and best interests of the child must be the first and paramount consideration when making decisions for the child.

If the child leaves New Zealand without the prior consent of both parents, the child may be returned under the Hague Convention on the Civil Aspects of International Child Abduction ('Hague Convention'). There are 89 countries and entities which are signatories to the Hague Convention, including New Zealand. The Hague Convention will return the child to New Zealand so that the dispute can be heard in New Zealand.

SNIPPETS

IS YOUR WILL VALID? DON'T GET CAUGHT OUT

The Wills Act 2007 sets out what you need to do to make a valid Will. The requirements are not complicated, but they are strict. Amongst other things, your Will must be dated, and be signed by the will-maker in the presence of two witnesses, who must also sign the Will. Each party must initial each page. Your witnesses must not benefit from the Will.

What many people do not realise is that a perfectly valid Will is rendered invalid if you get married or enter into a civil union, unless the Will specifically states that it is made in contemplation of that marriage or civil union (Section 16, Wills Act 2007). Similarly, if a Will is made during a marriage or civil union and then the relationship is legally dissolved, some parts of your Will may then be invalid (Section19, Wills Act 2007).

ROYAL PARDON

In New Zealand, a person, who has been convicted of a crime and used all of that person's rights of appeal, has one last avenue of relief. The Royal Prerogative of Mercy ('RPM') is considered an important constitutional safeguard in the criminal justice system which allows the Governor-General as the representative of the Queen to grant a royal pardon, reduce a sentence, or refer a case back to the courts for reconsideration.

While applications reported in the media are for serious crimes such as Scott Watson's murder conviction, the avenue is not limited to such serious convictions.

The RPM is aimed at preventing miscarriages of justice, particularly when all appeals are exhausted. A key requirement when applying for a Royal Pardon (or other act of mercy) is that there is some new information or evidence that has not been before the courts and is significant enough to raise serious doubts about a conviction or sentence.

If you have any questions about the newsletter items, please contact us, we are here to help.