

Fleming Foster Solicitors

NEWSLETTER

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THE ABOLITION OF GIFT DUTY – FORGIVING TRUST DEBT

1. Parliament has enacted legislation abolishing gift duties with effect from 1 October 2011.
2. This will enable a one-off forgiveness of debt for the amount owed to someone by their trust.
3. It will also enable outright gifts of assets to a trust.
4. Whether or not a one-off gift to a trust is in someone's best interests depends on their individual circumstances.

5. In some cases a complete forgiveness of debt would be recommended. In other cases a more cautious approach should be taken. Advice will vary but should err on the side of caution.

No more annual gifting

1. If someone decides to make a one-off forgiveness of debt, they will no longer be required to complete annual gifts therefore doing away with the required paperwork each year in relation to that historic debt. The documentation involved for a one-off gift should be relatively straightforward.
2. Future transactions where a debt may arise or an asset is transferred by way of gift will still need to be documented.

Debt back – a way of influencing or controlling a Trust

1. One reason for not forgiving a debt is that it is an asset preserved in someone's name, and may be a significant tool by which they, as lender, influence or control a trust.
2. A debt is a means by which someone as creditor may have recourse to a trust without relying on the goodwill, or agreement, of the trustees. The debt may also provide someone with the comfort of being able to call up the debt from the trust, should they need to do so for cash flow purposes.
3. If a debt is forgiven completely, this significant tool will be eliminated. An effective means by which to influence or control the trust, as well as a potential source of funds, will be lost.
4. For example, if someone has loaned money to their child's trust, to assist with the purchase of a home, it may not be in their best interests to forgive the debt because they would most likely lose any say in the management of their child's trust.
5. Likewise, if a partner in a relationship has advanced separate property to a trust, for example money they have received by way of inheritance, they may wish to preserve the debt as their separate property.

Removing the asset from the estate

1. A compelling argument for not wanting to preserve a debt is that the debt, as an asset remaining in someone's name, may become vulnerable to attack after they have died.
2. It is easier for disappointed expectant beneficiaries to make a claim against an estate than against a trust. If the debt is not forgiven and so remains an asset under a will, people excluded from the will may be able to access the debt if they make a claim.
3. However, if the debt is forgiven before death, then the estate will own less in the way of assets which may be the subject of a claim by people excluded from the will.

Relationship Property Claims

A debt owed back to the main people from a trust is often focused on in claims under the Property (Relationships) Act 1976. If there is no debt back, relationship property claims against the trust are more difficult. As an aside, standard advice is that the best means by which to protect assets from a claim under the Act is to enter into an agreement contracting out of the 50/50 presumption under the Act.

Insolvency – the implications as regards creditors

1. If someone is involved in business or is self employed and has obligations to creditors, there are implications in making a one-off gift of any debt or an asset.
2. The abolition of gift duty may see a person's financial position change dramatically overnight. As a result, the act of forgiving debt and disposing of possibly a substantial asset may be scrutinised by creditors of that person and the Official Assignee with a view to clawing back that asset.
3. A declaration of solvency may be required, before any gift is made and/or debt forgiven, to show someone ("the donor") was solvent at that time. This is an issue which has attracted the attention of the Courts in recent times in relation to claims by creditors of the person forgiving debt.
4. While it is not unlawful to make a gift at a time of possible insolvency, there is a risk that the gift will be clawed back if the donor is deemed to be insolvent at the time the gift was made.

Residential Care Subsidies

1. Work and Income NZ ("WINZ") operates by a set of criteria for the purposes of assessing a persons entitlement to a rest home subsidy. Not everyone qualifies.
2. If Residential Care Subsidies and/or WINZ benefits are relevant, it may be appropriate for a donor to continue with a regular, or even reduced, gifting programme.
3. A person's treatment of a debt owed back to them by a trust, including a one off forgiveness of that debt, will be examined in any financial means assessment under an application for Residential Care Subsidies ("RCS").

4. The current amount of allowed gifting is \$6,000.00 per year for gifts made in the last five years before an application is made, and \$27,000.00 for any year outside the five years.
5. So far as WINZ is concerned, gifting over the allowed amounts is "excess gifting" and may be counted back into the financial means assessment at the time an application is made.
6. A one-off gift will therefore be counted in the assessment so, depending on the donor's circumstances, it would be advisable not to fully forgive the debt if they are considering making an RCS application in the foreseeable future.
7. If an RCS application is imminent, it would be advisable to consider making gifts of \$6000.00 per year.

Tax implications

1. Although gift duty has gone, there are other considerations that should be taken into account when making a gift.
2. Where a gifting programme has been in place by way of reduction of debt, a distribution made from a trust to a beneficiary for whom the creditor does not have natural love and affection, can attract income under the accrual rules of the Income Tax Act thus triggering a tax liability. This might occur, for example, where a trust distributes income or capital to a company.
3. Whilst this article focuses on people who have trusts, the principle outlined in paragraph 2 applies to anyone who forgives a debt owed by someone (a person, a company etc) for whom the donor cannot have natural love and affection.
4. Specialist tax advice is recommended before gifts of any company shares or other income producing assets is made, or if the donor is GST registered, as there are important tax consequences which must be taken into account before a gift is completed.
5. Also, if someone is going to transfer assets to a trust, they would be urged to obtain a valuation for those assets, for accounting and tax purposes, and for the purposes of giving a clear picture of the financial position of the trust.

Other considerations

1. The impact of a gift on the donor should be considered. For instance, it may adversely affect a persons ability to raise finance, bearing in mind however that the trustees of a trust may be able to give a guarantee in support of someone's obligations if that is necessary.
2. If someone has been making loan repayments in reduction of a mortgage on behalf of the trust, those payments will need to be included when determining the amount of the trusts indebtedness and therefore the amount of any gift.

FRUSTRATED CONTRACTS

The common law 'doctrine of frustration' allows a contract to be discharged on the occurrence of certain events beyond the control of the parties which would make the performance of the contract impossible. As the doctrine is a departure from the traditional view that contractual promises are absolute, its application in law must satisfy strict legal tests in order to be successful. It requires an event to occur that is firstly unforeseen and one which significantly alters the relationship between the contracting parties.

CATEGORIES OF FRUSTRATION

Although not exhaustive, the following are five situations where the doctrine of frustration has been successfully applied.

1. **Where the subject matter of the contract ceases to exist:** In *Taylor v Caldwell (1863) 3 B & S 826*, a hall which was hired to host a series of concerts burnt down before the concerts could commence. Both parties were relieved of their obligations as the contract was held to be frustrated.
2. **Non-occurrence of events - the purpose of the contract has become impossible to attain:** In *Krell v Henry [1903] 2 KB 740* a flat was rented for the purposes of viewing the King's coronation procession. The procession was cancelled due to the King's illness and the contract was discharged as the sole purpose for which it was rented ceased to exist.
3. **Death or incapacity of a party where the contract involves obligations of a personal nature:** In *Robinson v Davison (1871) LR 6 Ex 269*, a contract by a pianist to perform on a specific day was held to be frustrated when the pianist became too ill to perform.
4. **Delay and obstruction of performance:** Where caused by external events, delay and/or obstruction may be held to be frustration if the delay is so long, or the obstruction so extreme that it would make the result of the contract fundamentally different from what had been contemplated.

5. **Performance is rendered illegal by legislation:** If a change in legislation that comes into effect after the creation of the contract renders its performance illegal, the contract is held to be discharged.

FRUSTRATED CONTRACTS ACT 1944 ('FCA')

The doctrine of frustration is supported in New Zealand by the FCA, which addresses the effect of the discharge of obligations on the areas of the contract already fulfilled. It confers three major benefits on parties that are supplementary to the common law doctrine.

1. It provides the right to a party to recover money paid in consideration of the contract despite payment being made before the date of frustration, and
2. It allows a party to claim compensation for work done and/or expenses incurred for the purposes of a contract up until the date of frustration, and
3. It permits the benefits received up to the date of frustration to be taken into account when determining the recovery of monies paid or expenses incurred.



The FCA can be contracted out of by including within the contract provisions addressing the event of frustration. In such instances, the provision will apply instead of the FCA.

The doctrine of frustration and FCA are examples of options or resolutions that may be available to a party following the breakdown of a contract. Legal advice may assist in identifying resolutions of a dispute or breakdown through remedies available outside the contract.

BUYING AND SELLING A UNIT TITLE PROPERTY

Unit Title properties are becoming more common in New Zealand and the ownership structures of these properties are becoming increasingly complex. It is therefore more important than ever that buyers understand the rights, obligations and benefits associated with owning a Unit Title property prior to becoming committed as a buyer under an Agreement for Sale and Purchase.

The Unit Titles Act 2010 ('the Act') came into effect on 20 June 2011 and addresses some of the concerns traditionally associated with Unit Title property ownership. The Act provides for more information to be available to buyers so they can make better and more informed decisions regarding their purchase of Unit Title Properties.

When a Unit Title is sold the seller must now provide the buyer with pre-contract and pre-settlement disclosure

regarding the Unit Title property. The purchaser will also be entitled to request additional disclosure at their own expense.

PRE-CONTRACT DISCLOSURE

Under the Act a pre-contract disclosure statement must be prepared and provided by the seller to any prospective buyer of a Unit Title property before the parties enter into any Agreement.

Pre-contract disclosure must advise the buyer on:

- body corporate charges,
- proposed future maintenance, including how the costs will be met,
- the balance of any fund or bank accounts of the body corporate as at the date of the last financial statements,

- whether or not the unit or common property is or has been subject to a claim under the Weathertight Homes Resolution Services Act 2006 or any other similar civil proceeding,
- and explain matters such as unit title property ownership, body corporate operation rules, unit plans, ownership and utility interests together with other matters to ensure the information provided is meaningful to the buyer.

The requirement to provide pre-contract disclosure cannot be contracted out of by the parties. All sellers must comply.

PRE-SETTLEMENT DISCLOSURE

After the buyer and seller have entered into an agreement for sale and purchase the seller must provide the buyer with a second disclosure statement with further information, including a certificate from the body corporate, no later than the fifth working day prior to the settlement date.

ADDITIONAL DISCLOSURE

The buyer of a Unit Title may request additional disclosure

SNIPPETS

THE “GIFT OF LIFE”

A total of 11 hearts, nine lungs, 35 livers, three pancreases, and 50 kidneys were included in transplants from deceased people in New Zealand last year. These donations were given by a total of 41 organ donors.



The donation of organs and tissue in New Zealand is governed by the Human Tissues Act 2008 (‘the Act’). The Act prescribes who may give consent or raise objections to donation of organs and tissue from deceased persons.

Indicating on your drivers licence that you wish to be an organ donor does not constitute consent to the donation of organs; as the decision to donate ultimately rests with your family. It is therefore important to discuss your wishes with them. Where any “close available relative” reasonably objects to the donation of your organs, any consent given could be overridden and the donation will not proceed.

The Act provides that the decision to donate should take into account the family’s cultural and spiritual needs together with their values and beliefs. For further information, please refer to www.givelife.org.nz and www.donor.co.nz.

from the seller. Any request for an additional disclosure statement must be made by the earlier of either:

- five working days after the date of the agreement, or
- the tenth working day before the settlement date.

If a request for additional disclosure is made, the seller must provide the additional disclosure to the buyer no later than five working days after the request was made. The seller is entitled to recover any reasonable costs they incur in providing the additional disclosure.

The additional disclosure may be of great assistance to a buyer, and serious consideration should be given to requesting information even though it may incur additional costs.

There are consequences if the correct disclosures are not made within the appropriate timeframes. These can include the buyer being able to postpone settlement or cancel the agreement altogether.

WHEN IS RELATIONSHIP PROPERTY VALUED FOLLOWING SEPARATION?

The date upon which relationship property is valued for division of asset purposes varies depending on whether the parties or the court decide the division of assets. The Property (Relationships) Act 1976 (‘the Act’) applies to de-facto relationships, civil unions and marriages. The Act provides rules for the division of property for relationships of over three years in duration.

Where the parties agree, they can document their agreement in a Separation and Relationship Property Agreement, and include the values as at the date of separation.

Where agreement cannot be reached, application can be made to the Family Court, where the value of relationship property is determined at the date of hearing, unless the Court exercises the overriding discretion it has to depart from a hearing date valuation.

Be aware of the impact timing can have when disputing the split of relationship property assets following separation. For some people, a quick resolution at the earlier asset value may be a better result than getting a greater share when asset values have fallen.



CHRISTMAS GREETING

We wish you and your families all the best for the festive season and the coming year.

*Our offices will close on **23 December 2011** and re-open on **16 January 2012**.*

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