GIFTING
&
REST HOME SUBSIDIES

(Riveting Stuff!)

DISCUSSION PAPER

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GIFTING & REST HOME SUBSIDIES

1. WARNING the following is pretty dry reading (i.e. there's no action until paragraph 14!)

2. The rules around eligibility for residential care subsidies are in a word, nuanced and that is putting it mildly. This topic has however, over recent times, had new life breathed into it. The reasons for this are:

   2.1. The abolition of gift duty;

   2.2. A court ruling that confirmed the Department of Social Welfare's assertion that the maximum gifting allowed threshold (before affecting eligibility for a residential care subsidy) is $27,000 per couple, not per individual. This is $27,000 per year, per couple.

   2.3. Changes in the Department of Social Welfare's policy concerning what it considers constitutes the divesting of assets.

3. The rules, as they are now understood to be in general terms, are:

   3.1. If you are a couple and one of you wants to apply for a rest home subsidy, then you will only be eligible for a full subsidy, if your joint assets either do not exceed in total $119,709 excluding:

   - Your house provided that it is the principal place of residence of the partner who is not in care, or a dependent child.
   - Your car
   - Your contents

   or if you don't own these things $218,598 and either way you have not "divested" yourself of assets (see hereunder) taking you over that threshold.

   3.2. If you are the second of a couple to apply, or alone, then the threshold is only $218,598, total per person if alone, or couple if together (yes it's the same if there is one or two of you!) with no exceptions or qualifications!

   3.3. Please note:

   3.3.1. That asset thresholds are adjusted at 1 July each year.

   3.3.2. Prepaid funerals (done before you apply!) with a value of up to $10,000 per person, are also exempt.

   3.3.3. Minor gifting is also excused. During the period prior to five years before one of you go into care the maximum you can gift as a couple without such gifting affecting your eligibility to receive a residential care subsidy is, as stated, $27,000 per year. However that maximum is reduced to $6,000 per year within the period of five years before you apply for a residential care subsidy (see hereunder).

3.3.4. This is an ongoing test and does not allow for any growth or appreciation, so:

(a) If you earn income on your assets, that income will be used to determine the amount if anything, (depending on whether it takes you up over the relevant threshold again), you must contribute towards your care costs.

(b) If your investment in say shares appreciates, the additional worth will have to be applied towards your care.

4. In assessing your worth and eligibility for a subsidy, whether or not you have “divested” yourself of any assets, will be assessed. Specifically if <u>at any time</u> prior to 5 years before you apply, you and/or your relationship partner gifted <u>in total</u> between you more than $27,000, then any surplus gifting above that amount will be added back into your deemed net wealth calculation. For the avoidance of doubt we should point out at this stage that although the old gift duty exemption was $54,000.00 (i.e. $27,000.00 per <u>person</u>) a court ruling has distinguished that from the Department of Social Welfare test, and said that is in fact only $27,000 per <u>couple</u>. The result is everybody who gifted off $54,000 per couple per year, will have $27,000.00 added back to their deemed wealth; when the Department of Social Welfare are calculating whether the assets of an applicant for a Residential Care Subsidy exceed the exempt $218,598 or $119,709 (exclusive of house and car).

5. Turning then to the issue of what can be done to try and protect as much of your accumulated wealth as you can for the benefit of your children and/or other beneficiaries under your Will (“your children”) against Department of Social Welfare means testing and the requirement that you pay for your own care, it is clear that the traditional mechanism of undertaking a gifting programme will only work if you stick with gifting a total of $27,000 per year as a couple; with such gifting being completed before 5 years of going into care. So although with enough planning ahead, small gains can be made, this can no longer be seen as the saviour it once was.

6. Better we suggest:

6.1. If you are a couple and one of you has to go into care, that you first tie up as much of your wealth as you can in your family home, house, contents and the car. This way so long as your spouse/relationship partner (“spouse”) continues to reside at home, those things will be exempt from being taken into account and the means testing applied against the first of you to go into care, will ignore those items and thus with any luck they will be available for passing to your children.

6.2. At the same time however, you need to be aware that if taking such a course of action, that this should ideally be a slow and progressive programme completed over a considerable period of time. By way of example we suggest that if you “rock up” asking for a government care subsidy the day after you purchased, to go between your porcelain ducks and the picture of the grandkids, the original Mona Lisa, you may be disappointed with the response to your application.

7. The above however is not a complete answer either. As although this gets us to the position that at least some of your assets will be disregarded when means testing is conducted, there is still the risk that the one who is not in care dies first and the house, contents and car fall back into the means testing regime and have to be liquidated to pay

for rest home care at the expense of your children’s inheritances (remembering again here that no matter what, the Government will allow you to keep $218,598).

8. We therefore suggest you may also wish to:

8.1. Make sure any property that is jointly owned does not automatically pass by survivorship to the surviving spouse and instead everything falls to be dealt with under Wills. Specifically most people hold their home as joint tenants, with the legal implication that the moment the first of the couple dies, the property automatically passes to the other registered owner outside of and separate from the deceased's Will. That then obviously has the implication that if the survivor is already in care, then suddenly the entire value of the house will be added to their deemed wealth, which is likely to again put them over the $218,598 threshold and again result in that asset having to be sold to pay for rest home care.

8.2. To avoid this implication, we suggest you change your Wills to ensure that only half of your property passes to your spouse and the other half passes to your children, but subject to a life interest, in your spouses favour. The effect of this is that if the spouse not in care dies first, then only half of their estate passes to the one who is in care and is vulnerable to means testing, but the other half goes instead to your children, subject to the right of the person in care to a life interest in those assets.

BUT BE AWARE the above will only usually work where your accumulated wealth is less than around $1.2 million (see our examples at the end of this document).

9. Note here, in our experience:

9.1. If you pass less than one half of your assets to your spouse, the Department of Social Welfare will probably force the survivor to challenge your Will.

9.2. Even your entry into a Property Relationship Agreement is no protection, as although binding as between the two of you, being the parties to the relationship, given the Department of Social Welfare is not a party to that agreement, it will just ignore it.

9.3. However if you give one half of your relationship assets (being their legal entitlement) to your spouse and the rest to your children with a life interest to your spouse, then although if your spouse in care lives long enough, that could be "wasted", on paying for his or her care until his or her asset level drops below the permitted retention, at least the other half will be safe from means testing and available to your children once you are dead.

10. Also note here a couple of other issues worth commenting on:

10.1. If your life interest is in any income generating asset, then that income will be taken into account in your assessment. However if your interest is in a non income earning asset, but perhaps one instead which appreciates in value, then it's less likely (we are not guaranteeing anything!) such will be taken into account.

10.2. The purpose of retaining a life interest in a non income earning asset is simply to provide a safety net whereby, if for instance the party in care needed something that couldn't be met from their own resources, then it would be open to the Trustees and Executors who are holding the assets that are ultimately to pass to your children, to be able to sell those assets and meet whatever expense and/or other need may arise.

10.3. This power of sale however must be entirely discretionary and your spouse can not have automatic rights to demand that happen. This has to be the position because if we give your spouse an automatic right to demand such payment, then the Department of Social Welfare will treat such as something that is available to your spouse and will insist upon that right being exercised. Better it be left at the discretion of your Trustees so that they can meet that expense, if and when they consider appropriate.

10.4. Insofar as claims against Wills are concerned, we are talking about relationship assets not separate property. At law a person has upon death of their spouse, an automatic right to 50% of all relationship property and it is this right the Department of Social Welfare will want to see enforced. However that right does not extend to separate property, so if the spouse who is not in care wants to leave their separate property to their children then they can do that. The danger however is that the one with the greater assets goes into care and all those assets are then factored into means testing! In these circumstances we would suggest that the parties would be better to enter into separate Property Relationship Agreement (some time earlier), recording that that separate property is in fact relationship property and as such half of it should pass to the party who is not in care.

10.5. However whether or not one or other considers their property to be separate property or not, will not effect the means testing thresholds. This distinction only becomes relevant after one of you dies.

11. Conclusion. Well in a nutshell:

11.1. If you are a couple assuming your accumulated wealth is “average”:

(a) Gifting above the permitted level is a bad idea and that under it barely worth it. But don’t discount gifting entirely, as some saving is better than none;

(b) Investing in your house, chattels and car is good;

(c) Splitting all joint assets into separate holdings is good;

(d) Leaving everything to your spouse is bad;

(e) Leaving half of your assets to your children with a life interest retained is good;

(f) So far as estate planning is concerned (note we do not presume to give financial advice) income earning assets are bad and appreciating ones are good;

(g) Separate property (once one of you dies) can be very good, but this is something that needs careful watching.

11.2. If you are alone, better off than most, or the survivor of a couple, then:

(a) Forget you’ve paid your taxes, it’s bad news all round. You are just going to have to hope your income from your investments is sufficient to cover a good portion of your care costs and you don’t eat into the capital (your children’s inheritance) too quickly.

11.3. If you are to manage things efficiently, then your position in this regard will need constant (i.e. at least annual) review and be planned for some years in advance.

12. WARNING: The content hereof;

12.1. Comprises generalisations. There are invariably exceptions and/or circumstances that alter most situations and often the advice we give.

12.2. Does NOT constitute the giving of legal advice. It is intended to do nothing more than raise awareness and to alert people to possible situations whereby they should seek legal advice. It should not and cannot be relied upon in whole or part as representing guidance on any issue.

12.3. Is to the best of the authors knowledge correct at the time of publication and no warranty is given as to the accuracy or even approximation to fact thereafter.

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13. If you would like to find out more please telephone the office to make an appointment time and we will be more than happy to discuss matters with you.

14. The end!

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Ring fencing examples

Example 1

1.1 Couple having a total accumulated wealth of $5 million and one of them has to go into care. The maths then is as follows:

Accumulated wealth	$5,000,000
Say exempt value of house, contents and car	- $1,000,000
Rounded up other assets exempt amount	- $120,000
Deemed available amount for paying own care before eligibility for Government Subsidy	= $3,880,000
Deemed rest home care costs (per annum)	÷ $52,000
Number of years that the couple will need to pay for the spouse in care before becoming eligible for a subsidy	= 74.6 years

1.2 If the one not in care dies and leaves everything to his or her spouse then the house, car and contents exemption is removed (but the exempt other assets total increases from $120,000 to $225,000) and is added into the deemed wealth of the spouse in care, increasing the number of years he/she needs to live before becoming eligible for care subsidy to 92 years!

1.3 If our alternative planning mechanism (see our booklet on the subject) is adopted, being the one not in care dies and leaves 50% to the spouse in care and 50% to their children (with a life interest to spouse) then the maths is:

$5,000,000 ÷ 2 =	$2,500,000
Meaning the new deemed wealth of the spouse in care is	$2,500,000
Less exemption (a rounded up sum) of	- $225,000
Plus entitlement to 50% of deceased spouse's share of the $2,500,000	+ $1,250,000
For a new total deemed wealth of the spouse in care of	= $3,525,000
With a protected "ring fenced" sum able to go to the kids of	$1,250,000

However this still leaves $3,525,000 vulnerable to means testing attack, which even at $52,000 per annum still means that the one in care would have to live in excess of 67.8 years before there is any risk that the ring fenced portion would be touched.

So in these circumstance you may as well save the legal fees and work on the premise that whatever you do, statistically speaking the ring fenced portion won't be touched and practically nothing can really be done to improve the position.

Example 2

1.1 Couple having a total accumulated wealth of $1 million and one of them has to go into care. The maths then is as follows:

Accumulated wealth	$1,000,000
Say exempt value of house, contents and car	- $500,000
Rounded up other assets exempt amount	- $120,000
Deemed available amount for paying own care before eligibility for Government Subsidy	= $380,000
Deemed rest home care costs (per annum)	÷ $52,000
Number of years that the couple will need to pay for the spouse in care before becoming eligible for a subsidy	= 7.3 years

1.2 If the one not in care dies and leaves everything to his or her spouse then the house, car and contents exemption is removed (but the exempt other assets total increases from $120,000 to $225,000) and is added into the deemed wealth of the spouse in care increasing the number of years he/she needs to live before becoming eligible for care subsidy to 15 years!

1.3 If our alternative planning mechanism (see our booklet on the subject) is adopted being the one not in care dies and leaves 50% to the spouse in care and 50% to their children (with a life interest to spouse) then the maths is:

$1,000,000 ÷ 2 =	$500,000
Meaning the new deemed wealth of the spouse in care is	$500,000
Less exemption (a rounded up sum) of	- $225,000
Plus entitlement to 50% of deceased spouse's share of the $500,000	+ $250,000
For a new total deemed wealth of the spouse in care of	= $525,000
With a protected "ring fenced" sum able to go to the kids of	$250,000

This still leaves $525,000 vulnerable to means testing attack, which even at $52,000 per annum still means that the one in care would have to live in excess of 10 years before the ring fenced portion would be touched. That however is more common than you may think and if that does happen then, if the above mechanisms are not put into place, the ring fenced $250,000 will also get potentially used up, (depending on how long the one in care lives), meaning your children will miss out!

Note:

- Figures approximate as at 13/8/15
- Some rounding up has been factored into exempt amounts
- All figures assume all property is relationship property
- Under all examples you must add to the net ring fenced amount the exempt portion of $225,000 (so under example 2 the amount available to your children would be $475,000).
- The examples are subject to the disclaimers appearing in our booklet
- These figures are examples only and should not be relied upon for any purpose. Independent financial advice is recommended.