

NEWSLETTER

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Dear Clients

Welcome to our first newsletter of 2018.

We hope you all enjoyed the great weather we had over summer. It turned out to be New Zealand's hottest summer on record.

If you have recently moved home or changed your postal address, please ensure you update us with your current contact details.

As always, please do not hesitate to contact us with any of your legal requirements.

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Employees – What are we allowed?

When asking Kiwis what their entitlements are when it comes to annual leave, holidays and resignation, the responses are generally vague. Government statistics show that over 50% of working Kiwis have held their current employment position for less than 18 months, therefore, it is imperative for them to be familiar with employment law and employee rights.

Resigning

An Employment Agreement ("Agreement") generally allows for employees to resign at any point in employment given they provide notice of resignation ("Notice"). Notice can be given in the manner specified in the Agreement or in writing at a minimum.



When resigning there are various options available; however, for the purposes of this article, two options are discussed in detail: Gardening leave, or an Agreement.

Firstly, employees may take what is often known as Garden Leave. Garden Leave allows for employees to be bound by their employment obligations and be paid as normal, whilst not undertaking work for the remainder of their Notice.

Granting Garden Leave requires mutual agreement by the employee and employer, although this agreement may be given under the Agreement. Gardening Leave is often used where employers wish to restrict the departing employee's access to clients or confidential information.

Secondly, an Agreement can be reached between the employee and employer to terminate employment immediately rather than at the expiry of the Notice. If an employee does leave prior to the Notice period finishing, without the consent of the employer, the employer is entitled to seek damages or losses in the Employment Relations Authority or Employment Court. These damages may include the costs of hiring additional staff for the period of the Notice or the loss of work opportunities due to the lack of staff available.

In light of the potential repercussions outlined above, it is imperative that any agreement of this nature is documented in writing.

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Final Pay

An employee is entitled to request their final pay on the last day of work rather than the following payday.

The final pay must include:

- All hours worked since the last payday until the end of employment;
- Any annual holidays, public and alternative holidays accrued; and
- Any additional lump sum or other payments owing which may be included in the Agreement or negotiated as part of leaving.

If the final pay does not include the bulleted points above, employees are encouraged to, in the first instance, seek any entitlements in arrears from their employer. If a dispute arises, other options available include making a claim for a breach under the Agreement or the Employment Relations Act 2000. In the event of such a dispute, it is recommended to seek legal advice.

Holidays

Under the Holidays Act 2003, employees in New Zealand are entitled to a minimum of 4 weeks paid annual leave ("Leave") per year with the opportunity to take at least 2 of the 4 weeks Leave continuously. Unless otherwise agreed, leave entitlements are subject to the employee working 12 months for the same employer.

Leave pay must be the greater of the ordinary weekly pay or the average weekly earnings over a 12-month period,

prior to the Leave. The latter may be more relevant for employees who work on a commission basis or non-periodic schedules.

If an employee has worked for a 12-month period for the same employer, the employee may agree with their employer to either:

- Take all Leave accrued that year; or
- Take a portion of Leave accrued as soon as possible and carry over the remaining Leave into the next year; or
- Be compensated financially for up to one week of Leave.

On resignation, if an employee has not reached 12 months of employment; they are still entitled to payment for annual holidays being calculated at 8% of their gross earnings during employment.

Employees are entitled to request unpaid leave in addition to their leave entitlements.

Summary

It is recommended that before resigning from a position, the Agreement's terms and conditions are read and understood. Understanding your entitlements and the right to request or demand an act or information as an employee is tremendously beneficial. This knowledge provides protection and ensures employees are informed and treated fairly by their employer.

How the Residential Care Subsidy can affect your Asset Planning – What you need to know?

The Residential Care Subsidy ("Subsidy") is becoming increasingly topical as New Zealand's 65+ population is projected to increase from 15% in 2016 to over 25% by 2068. The growth in this population will increase the number of Subsidy applications for financial assistance for long-term residential care in a rest home or hospital ("Care"). Despite the predicted growth in applications, many New Zealanders are not aware that their current asset planning has the potential to affect the outcome of a Subsidy application significantly. In light of this, advice surrounding asset planning in consideration of a Subsidy application is essential.

The Ministry of Social Development ("MSD") determines Subsidy applications. When considering an application, they will conduct a financial means assessment to determine whether the applicant qualifies under the prescribed eligibility thresholds. This includes both an asset and an income assessment.

Before the applicant undertakes the income assessment, MSD will first assess whether they qualify under the asset assessment ("Assessment"). The asset thresholds for the Subsidy are as follows:

- a) A single applicant or applicants that have a partner in Care: The total value of their assets must not exceed \$224,654.00 including the value of the family home and vehicle;
- b) Applicants who have a partner that is not in Care can elect to be assessed under either of the following thresholds:
 - i. Their assets must not exceed \$123,025.00 (not including the value of the family home and vehicle); or

- ii. The total value of all their assets (family home and vehicle included) must not exceed \$224,654.00.

The Gifting Provisions

MSD implemented gifting thresholds to prevent the giving away of assets with the purpose of attempting to qualify under the asset thresholds for the Subsidy.

Gifting thresholds apply to gifting commonly, i.e. birthday gifts, and gifting undertaken to a Family Trust ("Trust"). Gifting to a Trust is when an individual ("Settlor(s)") who owns assets such as houses, cash and shares, sells these assets into a Trust. In return, the Trust owes a debt back to the Settlor(s). The debts are then "forgiven" by the Settlor(s) through a process called gifting.

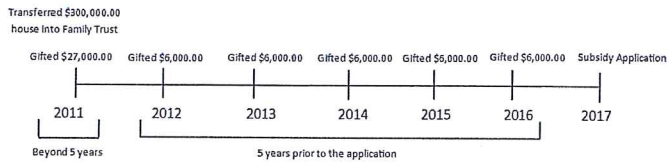
The MSD gifting thresholds are:

- Five years before applying for the Subsidy each person can gift up to \$6,000.00 each annually. In this case, those in a qualifying relationship under the Property (Relationship) Act 1976 ("relationship") may gift \$6,000.00 each.
- Beyond five years before the Subsidy application, a couple or individual can gift up to \$27,000.00 annually. In this case, those in a relationship may gift up to \$12,500.00 each.

Gifting that falls under the prescribed gifting thresholds will not be considered in the Assessment. However, if an applicant has sold an asset into a Trust that exceeds the gifting threshold, MSD will consider the value of the asset that exceeds the gifting thresholds as a personal asset. For example, an applicant sells their house valued at \$300,000.00 to their Trust in 2011 and gifts annually until 2016; they apply for the Subsidy in 2017. MSD will subtract the value of the prescribed gifting being

\$27,000.00 in 2011 and \$6,000 annually until 2016. The remaining \$243,000.00 will be considered a personal asset under the Assessment. The applicant would not qualify for the Subsidy in this instance.

Please see diagram below which offers a visual aid to the implementation of the MSD gifting thresholds:



If the same applicant had a partner who was not in Care, it may have been more beneficial for the applicant to hold the property as a personal asset. If the house was a personal asset, in this case, they could be considered under the eligibility threshold which excludes the value of

the family home and vehicle if they chose. The applicant would qualify for the Subsidy in this instance.

Please note MSD will only consider gifting to a Trust that has been completed and will not take into account any entitled gifting that has not been completed.

Recommendations:

1. Plan in advance. If a Subsidy application is likely, and you own a trust; implement a consistent gifting regime so that you can take advantage of MSD's prescribed gifting thresholds.
2. If you already have a trust or are considering forming a trust and may apply for the Subsidy, consider seeking legal advice on your position, including whether you could consider selling your home out of your Trust to meet the Assessment.

Please note that this article only covers aspects of a Subsidy application. For more comprehensive advice, please seek legal counsel.

An introduction to shareholders' agreement - Why are they important?

A shareholders' agreement ("Agreement") records the arrangements between the shareholders and directors of a company regarding the ownership, government and management of the company. Companies are not required to implement an Agreement by law. However, implementing an Agreement is recommended as it is designed to address areas regarding governance and control of business activities, whether external or internal, which a company constitution or the Companies Act 1993 may not specifically address.

For example, the Companies Act 1993 may not provide specific guidance regarding the process for shareholders exiting a company. This is where an Agreement can be used by shareholders to outline the process and minimise any potential disputes and associated costs between exiting and continuing shareholders.

Generally, an Agreement sets out matters including, but not limited to:

- How initial and continued shareholder funding is made and minimising shareholders exposure to capital risk;
- The procedure for board meetings;
- How the profits are distributed to shareholders;
- The appointment and removal of directors and shareholders;
- The transfer or sale of shares, i.e. offering shares to existing shareholders, how shares are valued and the number of shares permitted to be transferred in order to safeguard tax benefits;
- Shares which are issued to employees of the company, i.e. employee shares, and how these are transferred when employment ends;
- Shareholder voting rights and the number of shares in the company;
- What decisions may be made by directors, what decisions require shareholder approval, and if shareholder approval is required, whether this is by majority, special resolution or unanimity; and
- How disputes are resolved.

An Agreement provides a number of benefits for different types of companies. Companies with more than one shareholder are encouraged to at least consider the advantages of an Agreement. Companies with only one

shareholder may consider that while there is only one shareholder it is not necessary to have an agreement.

An Agreement seeks to remove the ambiguity amongst the shareholders and directors and provides direction to manage unforeseen circumstances as well as providing guidance for the day-to-day operation of a company.

Agreements are especially useful when there is no majority shareholding, commonly seen in smaller companies, as there is an increased risk of shareholder disagreements. Therefore, to ensure the maintenance of functional shareholder relationships, it is equally important for smaller as well as larger companies to have an Agreement.

The Agreement can include specific and sensitive details (unlike a company constitution which is available to the public) regarding the rights and obligations of the parties involved in the company and/or the rights attached to shares. This protects the interests of the shareholders and directors. Furthermore, under section 32 of the Companies Act 1993, amending a company constitution only requires a special resolution of the shareholders (which is generally 75% of the shareholders entitled to vote). An Agreement may provide that it can only be varied by unanimous agreement amongst the shareholders and accordingly, minority shareholders are further protected.

A constitution can only be implemented once a company is incorporated; however, an Agreement may be executed beforehand. This can be very beneficial where a company must meet specific deadlines for a transaction from the outset of the formation of a company.

An Agreement can provide stability to not only the existing parties involved but also to other external parties such as potential shareholders and creditors.

An Agreement can provide customised administration and protection for shareholders and directors which a constitution may not have the capacity to provide. It can be easy to delay the execution of an Agreement when a new business relationship is formed; however, it is during this initial stage of forming a company, that an Agreement should be put in place. This ensures that all parties involved understand the governance and ownership of the company from the outset. An Agreement aims to reduce additional costs, time and stress resulting from potential shareholder disputes and accordingly, it is an invaluable document which all companies should consider, if not implement.

Whether you are looking at starting a company or wish to provide more clarity among directors and shareholders within

an existing company, it is best to seek legal advice to discuss an Agreement suitable for your needs.

Reforms in Trust Law – what it means for your trust

Family trusts are a practical structure for holding assets, particularly in New Zealand where there are approximately 300,000 to 500,000 trusts operating today. Currently, the Trustee Act 1956 and the Perpetuities Act 1964 contain provisions which need to be read in conjunction with case law regarding their operation, and do not keep up with present-day trust practices. Therefore, the updates regarding trust law under the current Trusts Bill ("Bill") are long overdue, being the first significant reform for at least 60 years. The Bill will replace these Acts, clarify core trust concepts and create more practical trust legislation.

Overview of proposed changes

The underlying principles of the Bill are largely derived from the Law Commission's views in 2013 which recommended that the existing law should be more comprehensible rather than introducing substantial changes. The Bill aims to facilitate the progression of trust law through the courts while also providing:

- A description of the rights and obligations under an express trust e.g. family trusts;
- Clarity regarding compulsory and default trustee duties (derived from existing legal principles) and the exercise of flexible trustee powers (including trustee agents and delegates) when managing trust property;
- Requirements for managing trust information and disclosing information to beneficiaries (where applicable) so they are aware of their position;
- Transparency around establishing, varying and terminating trusts to achieve cost-effective administration of trusts;
- Alternative dispute resolution mechanisms to pragmatically resolve internal and external trust-related disputes;
- A description of some of the court's powers and avenues available for court assistance; and
- The circumstances in which trustees must or may be removed or appointed outside of court.

Trusts subject to the Bill

The Bill will apply to all (including existing) express trusts; however, it can also apply to trusts that are created under an enactment that is consistent with the Bill or as the courts direct.



Trust duration and distribution

Currently, the vesting date for trust property of 80 years is provided under the complex Perpetuities Act 1964 and case law. The Bill proposes to remove the existing rule against perpetuities and provides that an express trust can exist for a maximum of 125 years or a shorter duration as specified in the trust deed. This is aimed to provide certainty in trust dealing, avoid indefinite trusts and allow settlors to distribute property as they choose.

Upon expiry of a trust, all property must be distributed in accordance with the trust deed or, if the deed is silent about how property is to be distributed, in a way that is consistent with the objectives of the trust. Where there are surviving beneficiaries and it is not possible to determine how to distribute property in accordance with the trust deed, the property must be distributed to the beneficiaries in equal shares.

Trustees' duties and powers

The Bill provides for five mandatory trustee duties that cannot be excluded from a trust deed. These include the duty to act in accordance with the terms of the trust and to act in good faith. The 10 remaining default duties, including the duty to act impartially, can be amended or excluded by the terms of the trust deed.

There is a presumption that trustees must provide basic information to the beneficiaries such as notifying beneficiaries of their position and the right for beneficiaries to request trust information and the contact details of the trustees. Trustees must consider certain factors, such as the age and circumstances of the beneficiary or the effect on those involved with giving the requested information, before deciding whether this presumption applies. If the trustees reasonably consider that information should not be given after reviewing the mandatory factors; the trustees may refuse the information request. The Bill sets out the procedure for trustees when deciding to withhold information.

Summary

The Bill is currently in its first reading. Once enacted, there will be an 18-month transition period to allow anyone involved in trusts to consider the application of the Bill to their trust. This long-awaited Bill aims to be a flexible tool to accommodate the wide use and effective management of trusts for the benefit of our society's future asset planning.

Snippets

Who Pays the Rates? – Selling a Property

Property Rates are due throughout each respective council's prescribed rating periods. Payment may be made six monthly, four monthly, three monthly or annually. When selling your property, you are required, at settlement, to pay the rates up to and including the settlement date. In practice, the Vendor will pay the rates to the end of the current rating period and the Purchaser's share of the rates will be apportioned in the settlement statement and paid to the Vendor by the Purchaser.



For example: If the second instalment is from 1 October 2017 – 31 December 2017 and settlement is on 10 November 2017, the Vendor will commonly pay the rates up until 31 December 2017 prior to or on settlement. As the Purchaser will have possession of the property from the settlement date onwards, they are required to reimburse the Vendor for the rates from 11 November 2017 – 31 December 2017. This will be reflected in the Vendor's settlement statement which is given to the Purchaser prior to settlement.

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