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RESIDENTIAL CARE SUBSIDIES - NOTIONAL INCOME

Broadbent v Ministry of Social Development [2017] NZHC 1499



When a person requires long-term residential care in their old age, an application can be made for a subsidy to assist in meeting the cost of such care – a residential care subsidy.

The general purpose of the legislation creating these subsidies is to provide financial support to individuals while taking into account that where appropriate, they should first use the resources available to them before turning to the state for assistance.

The application is a two-step process. The first step is a means assessment. If the applicant is below the relevant threshold, the second step is an income assessment. Income is defined very broadly for income assessment purposes.

The decision of the High Court in *Broadbent v Ministry of Social Development* [2017] NZHC 1499, which is essentially a test case, considers whether income derived from assets gifted out of the ownership of the applicant (often referred to as 'notional income') can be taken into consideration for income assessment purposes.

In *Broadbent*, the Ministry considered that Mrs Broadbent had deprived herself of income of over \$45,000 per year by transferring assets into a trust. This calculation was achieved by treating as Mrs Broadbent's income both the actual income derived from the assets, as well as the income that *could have been earned* had the trust not held non-income earning assets. As a result, Mrs Broadbent's income was assessed as being over the relevant threshold necessary to qualify for a subsidy.

Mrs Broadbent successfully challenged the Ministry's position on the grounds that once a gift is made, "that is the end of the matter."

The result was a finding that MSD has been wrong to assess notional income on assets that have been gifted to a trust.

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Trustees owe fiduciary obligations to beneficiaries. That is trustees must act with the highest loyalty towards beneficiaries. This is an important aspect of trust law that is generally well understood.

However, less well understood is the duties owed by people with the power to appoint and remove beneficiaries, often referred to as "Appointors".

In the recent case of *McLaren v McLaren*, the High Court had to decide what obligations an appointor owed beneficiaries.

The facts of the case were:

- There was a poorly drafted trust deed
- The trust owned a business that was previously owned by son (Bruce) and his parents
- The parents had made significant gifts to the trust
- The son and parents were beneficiaries
- The son removed the parents as beneficiaries

The court said:

"[57] Focusing first on Bruce's exercise of the power to remove his parents as discretionary beneficiaries, I find that the circumstances of this trust gave rise to a relationship of trust and confidence in his position as appointor. I also find that prior to the falling out between them, the parents and Bruce would have shared an expectation that the parents would continue to have an interest in the assets held by the BDM Trust, at least to the extent of the income that the business it operated was generating."

"[59] On any objective view, Bruce should have appreciated that his parents were vulnerable to complete exclusion and therefore had to trust him to exercise the power to exclude them as discretionary beneficiaries only after considering the matter in good faith in light of the purposes of the trust and the circumstances then pertaining. This is less than an obligation of even-handedness"

The court found that in the circumstances of the case fiduciary obligations were owed and the parents were reinstated as beneficiaries.

It might now be timely to review their trust deeds and the powers to add and remove beneficiaries and get advice as to whether these operate as expected or whether there are limits on how the appointor can add or remove beneficiaries.

Enduring Powers of Attorney and Removal of Trustees

While thinking about adding and removing beneficiaries, it is useful to consider adding and removing trustees.

The issue of incapacitated trustees continues to arise. It is not uncommon for many trustees not to retire when they can still elect to do so, so that the remaining trustees are faced with problems removing an incapacitated trustee and transferring the trust property.

It is generally accepted that the attorney under the Enduring Power of Attorney (EPA) cannot exercise the donor's trust powers. However, it is less well understood whether the attorney can retire a trustee or exercise that trustee's personal powers of appointment to remove an incapacitated trustee.

In the recent cases of *Marshall Family Trust* and *Godfrey v McCormick* the High Court has confirmed that an EPA does not give the attorney the power to carry out any trustee duties and does not allow the attorney to exercise any powers of appointment and removal.

In light of this, it is important that trustees turn their minds to their aging co-trustees and act pre-emptively in this respect. This invites discussions and thinking about when trustees should retire and who will be the trustees when they do. While these can be difficult discussions, they are an important aspect of long-term trust management.

When was your trust deed last reviewed?

Writing interesting stories about trusts can be hard work – and hard reading. To finish this newsletter a lighter hearted look at trust deeds. I

it is very important to read trust deeds before signing – and later to see if the passage of time means that amendments are necessary. Sometimes the reader might be rewarded to discover, perhaps surprisingly that the trustees must all be sea life. In the case of *Foote v Foote* the trust deed included a clause that said "If the Trustees are not *anemones* ..."

"In this case it is clear that neither Mr nor Mrs Foote are anemones. Nor plainly, in the circumstances, are they unanimous, which I think is the word intended by the draftsperson."

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