

# Settling of Estates on Family Trusts by Court Order

When a beneficiary is due to receive under an estate, the assets can be settled on the beneficiary's Family Trust in the conventional way, however, this would create a long and expensive gifting programme.

Another way is by settling the estate assets on Family Trusts by Court Order under Section 6 of the Family Protection Act 1955. This option has two main advantages:

1. Generally it is not treated as a gift and therefore can save the need for a long and expensive gifting programme; and
2. For clients who have minor and dependent children, income tax savings.

## Not Treated as a Gift

The whole or part of an estate can be settled by Court Order on a Family Trust under Section 6 of the Family Protection Act 1955.

The Court simply orders that the assets shall henceforth be owned by the Family Trust. The assets are said to be "vested" in the Trust by Court Order.

Settling by Court Order is not considered to be a "gift" and therefore no gift duty is payable under the Estate and Gift Duties Act 1968 which eliminates the need for any gifting programme.

This has the advantage of being a very quick method of completing an estate plan, avoiding as it does, the need for a potentially long gifting programme extending over many years.

However, this is of course only available where the assets form part of a deceased estate.

Normally when settling assets on a Trust in the conventional way, the Settlor and Trustees would

sign a document acknowledging that the Trust owes the Settlor a sum equivalent to the value of the assets being settled on the Trust. The Settlor then reduces the debt in amounts of \$27,000 per year without incurring gift duty. Amounts over this sum will incur gift duty, which is calculated on a sliding scale.

## Tax Savings


Income arising from a Trust settled under Section 6 of the Family Protection Act 1955 for a minor beneficiary is taxable at the minor beneficiary's own tax rate which is currently 12.5% (up to \$14,000 pa) rather than at the trustees rate which is currently 33%.

This follows from the fact that a Trust under Section 6 of the Family Protection Act 1955 is settled by the Court which is neither a relative or guardian of the minor beneficiary and is not associated with the relative or legal guardian, and therefore by virtue of Sections CX 58, HC 35(4)(b)(i), (ii), HC 36 and HC 37 of the Income Tax Act 2007 the minor's share of the trust income is taxed at the minors own tax rate (currently 12.5% up to \$14,000 pa) and not the Trustees tax rate (currently 33%).

## Case Law

Section 6 of the Family Protection Act 1955 gives the Court power to make a class fund order. A class fund order was made in *Re Geddes [dec'd]* (2002) 21 FRNZ 565, where the Family Court ordered that the entire estate be held on trust as a class fund for the benefit of the deceased's two infant children.

The Court may impose any conditions and directions it deems appropriate, such as a direction that the share of any of the class shall vest at a specified age.



April 2010

Section 6 of the Family Protection Act 1955 empowers the Court to appoint a trustee. This power is vested not only in the High court, but also in the Family Court by virtue of its concurrent jurisdiction in proceedings under this Act. In *Re Geddes [dec'd]* (2002) 21 FRNZ 565, the Family court appointed an independent trustee company in place of the testamentary trustees to administer the class fund established by the Court under s 6 for the benefit of the deceased's two infant children.

#### Does this Constitute Tax Avoidance?

Although vesting assets in Trusts by Court Order can have income tax advantages as mentioned above, it would be unusual for the Court Order to constitute tax avoidance for the following two reasons:

- Firstly, it would nearly always be the case that the client wishes to create a family trust for bona fide estate planning and asset planning reasons, and if vesting the trust by way of Court Order results in a saving of income tax then such saving is a merely incidental effect or purpose of those bona fide estate planning or asset planning reasons.
- Secondly, the vesting of assets into a family trust by way of Court Order would usually come within

the purview of the following dictum of Justices Tipping, McGrath, and Gault in *Ben Nevis v CIR* [2009] 2 NZLR 289 (sc) at paragraph [109]:

*The ultimate question is whether the impugned arrangement, viewed in a commercially and economically realistic way, makes use of the specific provision in a manner that is consistent with Parliament's purpose".*

In our opinion, the answer to such question would generally be "yes" when considering a trust settled under Section 6 of the Family Protection Act 1955.

For the above reasons, we would argue that vesting assets in a family trust or trusts by way of Court Order would not generally constitute tax avoidance. Of course, in saying this, we presuppose that the client wished to form a family trust any way, for bona fide estate planning reasons, and simply chooses the most tax effective way of getting assets into the family trust.

#### Disclaimer:

This newsletter discusses its topic in general terms and should not be relied upon as legal advice.

Written by Debbie Masters, Registered Legal Executive (NZILE Fellow)  
tel 769 5328 email [debbie@denniskinglaw.com](mailto:debbie@denniskinglaw.com)



**dk** L dennis king Law

Level 5 Duncan Dovico House 62 Gill St NP tel 769 5328  
email [info@denniskinglaw.com](mailto:info@denniskinglaw.com) [www.denniskinglaw.com](http://www.denniskinglaw.com)