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## THE RESIDENTIAL CARE SUBSIDY AND TRUSTS—AN UPDATE

As outlined in our newsletter in July of this year, if a person goes into a rest home then they may be eligible to receive the residential care subsidy to assist with the cost of their care. In order to determine if an applicant is eligible for the residential care subsidy, the Ministry of Social Development carries out means assessments of the person's circumstances. This involves an asset assessment and an income assessment.

The Ministry's income assessments where a Trust was involved were challenged in the Court of Appeal case of *Ministry of Social Development v Broadbent*. The Court's decision impacts people who apply for the residential care subsidy and have a Trust, which we will summarise below.

### Deprived Income

Prior to May 2019, the Ministry's policy had been that if assets were transferred to a family trust and these assets earned an income or were capable of earning an income then the applicant had deprived themselves of income. The Ministry would then add this deprived income onto the applicant's actual income. For example, in *Broadbent* when the Ministry assessed Mrs Broadbent's income it determined that:

- (a) the assets in the Trust were earning an annual income of \$81,093.50;
- (b) Mrs Broadbent had deprived herself of this annual income by transferring the assets to the Trust;
- (c) if she had not transferred those assets to the Trust then she would have been earning that income herself therefore the Trust income could be considered her income;
- (d) this income when added to her other income was greater than the income threshold; and
- (e) she was not eligible for the residential care subsidy.

The Court of Appeal overturned the Ministry's decision and held that if assets are validly gifted (ie at \$27,000.00 per year) then the Ministry cannot treat the income from those assets as being the income of the applicant.

### Assistance from Trust

The other important point from the *Broadbent* decision is that the Court stated that:

*"a trustee of the Family Trust is empowered to make distributions of trust income to Mrs Broadbent. It does not matter that Mrs Broadbent is merely a discretionary beneficiary. She has a right to request payment from the Family Trust. In a closely held family trust with a history of payment to her, trust income must be assumed to be available unless there are particular circumstances that demonstrate it is not."*

As a result the Ministry now considers it reasonable for an applicant's Family Trust to support them if the applicant is a beneficiary of the Trust. For all future applications involving a Trust an applicant must either:

- (a) explain why they have not chosen to ask their Family Trust for financial support in respect of their care costs; or
- (b) have the Trustees of the Trust provide in writing an explanation as to why they will not financially support the applicant.

As the *Broadbent* decision was only in May of this year, it is currently unknown how the Ministry will deal with cases where a Trust will not provide funds to an applicant for the cost of their care. For example whether this will affect the amount an applicant is to receive. Until such time as any recent decisions are released, we cannot say how this new policy is going to affect applications involving trusts.

Trusts in New Zealand are discretionary. Although a beneficiary can ask for funds from the Trust, the Trustees do not have to provide funds to the beneficiary. The Trustees are under an obligation to consider the needs of all beneficiaries before making a distribution. So even if the applicant requests funds, the Trustees could decline the request once they have considered the needs of the other beneficiaries.

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