

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2016-485-463
[2017] NZHC 1499**

BETWEEN

GWYNETH BROADBENT

Appellant

AND

**THE CHIEF EXECUTIVE OF THE
MINISTRY OF SOCIAL
DEVELOPMENT**

Respondent

Hearing: 7 December 2016

Counsel: S Broadbent as litigation guardian for the Appellant
O Upperton for the Respondent

Judgment: 30 June 2017

JUDGMENT OF KATZ J

*This judgment was delivered by me on 30 June 2017 at 3.30 pm
Pursuant to Rule 11.5 High Court Rules*

Registrar/Deputy Registrar

Solicitors: Crown Law, Wellington

Copy to: S Broadbent, Auckland

Introduction

[1] Gwyneth Broadbent appeals against a decision of the Social Security Appeal Authority (“Authority”) in which it upheld a decision of the Chief Executive of the Ministry of Social Development (“Ministry”) requiring her to contribute the maximum fortnightly contribution towards the cost of her rest home care.¹ Mrs Broadbent is represented in these proceedings by her son, Stephen Broadbent, who is her litigation guardian.

[2] Between 1990 and 2014 Mrs Broadbent sold various personal assets (including her share of the family home and a holiday home) to two family trusts for fair value, supported by a debt back. Mrs Broadbent then progressively forgave the debts owed to her by the trusts. In total Mrs Broadbent gifted \$328,750 to the trusts, in annual increments of \$27,000 or less. Due in large part to the property boom in recent years, and the trusts’ own investment activities (funded in part by bank borrowings), the value of the trusts’ assets now greatly exceeds the original sums gifted.

[3] The key issue in this appeal (which is essentially a test case) is how any gifting that falls within the gifting threshold of \$27,000 per annum permitted under the relevant social security legislation is to be treated when a person subsequently applies for a residential care subsidy. Eligibility for such subsidies is subject to a two stage means testing regime set out in the Social Security Act 1964 (“Act”).

[4] The Ministry accepts that people who have made gifts to third parties (including trusts) of \$27,000 or less per annum have not deprived themselves of *assets* for the purposes of the Act. Accordingly, as a result of their permitted gifting, their assets may fall below the threshold required to render them potentially eligible for a subsidy. The Ministry submits, however, that it is entitled to disregard any permissible gifting at the next stage of the means assessment process, which involves an assessment of an applicant’s income. The Ministry says that people who have not deprived themselves of assets (because their gifting was within the permitted statutory thresholds) have nevertheless deprived themselves of the *income* streams

¹ *An appeal against a decision of the Benefits Review Committee* [2015] NZSSAA 91 [Authority Decision].

associated with those assets. The Ministry asserts that it is entitled, in its absolute discretion, to attribute this “deprived income” back to the donor for income assessment purposes. Applying that approach in this case, the Ministry found that Mrs Broadbent was not eligible for a residential care subsidy because her income was above the required threshold.

[5] The appeal is by way of case stated from the Authority, on the following questions of law:

- (a) Did the Authority err in law in determining that the appellant and her late husband had deprived themselves of assets and income?
- (b) Did the Authority err in law in determining that the discretion in s 147A applies regardless of allowable gifting of assets permitted in relation to the asset assessment?
- (c) Did the Authority err in law in finding it was appropriate to base the financial means assessment for the first year on deprived income of \$45,395.89?

Eligibility for residential care subsidies - the statutory scheme

[6] The general purpose of the Act, which includes provisions relating to a wide range of social security benefits, is to provide financial support to people, taking into account that where appropriate they should use the resources available to them first.²

[7] The specific provisions relating to long-term residential care in a hospital or rest home are set out in Part 4 of the Act. The purpose of Part 4 is (in part) to specify the circumstances in which older people are required to pay for their long-term residential care.³ Part 4 provides for an eligible person to be assessed according to their means to determine the amount the person is liable to pay for the cost of his or her care.⁴

² Section 1A(c)(i).

³ Section 136AA(a).

⁴ Section 136AB(2)(b).

[8] A person assessed as requiring care must pay for their residential care.⁵ However, they only ever have to pay up to a specified maximum contribution.⁶ The remaining costs of their residential care are covered by the government. This is true regardless of their financial situation.⁷

Means assessment process

[9] When a person requires long-term residential care in a hospital or rest home, they can apply for a means assessment in accordance with sch 27 of the Act.⁸ The outcome of the means assessment determines whether the person can receive an additional subsidy to the general subsidy provided to all people assessed as requiring care.

[10] Mrs Broadbent was assessed as requiring long-term residential care⁹ and moved into a rest home on 1 October 2014. An application for a residential care subsidy (and the associated means assessment) was made on her behalf on 24 November 2014.

[11] If a person applies for a means assessment, the Ministry must first assess their assets. The Ministry assesses assets by assessing the value of the person's non-exempt assets as at the date of the person's application and then determining whether those assets are more than, equal to, or less than the applicable asset threshold.¹⁰ "Assets" includes the value of assets that have been gifted by the person or their partner within the last five years ("the gifting period"), excluding "allowable gifts".¹¹ "Allowable gifts" are gifts made within the last five years not exceeding a total value of \$6,000 each year.¹² These are not included in the sum of an applicant's assets.¹³

⁵ Section 139(1).

⁶ Section 139(2). The maximum contribution varies across regions, on the basis that not all residential care facilities share the same rest home contract price. The rates are usually updated annually by notice in the *Gazette*, as per s 152.

⁷ Sections 140(2) and 141(2).

⁸ Section 138(1)(c).

⁹ Pursuant to s 137.

¹⁰ Section 146(2). The applicable threshold is specified in cl 1 of sch 27.

¹¹ Schedule 27, cl 4(b). As to the gifting period, see reg 8 of the Social Security (Long-term Residential Care) Regulations 2005.

¹² Social Security (Long-term Residential Care) Regulations, reg 9(1)(b).

¹³ Schedule 27, cl 4(b).

[12] Mrs Broadbent's assets were assessed at \$66,492.18. Her assets were therefore less than the applicable asset threshold at the time.¹⁴ (Mrs Broadbent's means assessment for assets is not in dispute in this appeal).

[13] If a person's assets are less than or equal to the applicable asset threshold, the Ministry must then conduct a means assessment for income.¹⁵ The means assessment for income determines the amount of subsidy the applicant is entitled to, in addition to the general subsidy.

[14] The Ministry assesses income by assessing the annual income of the person as at the date of application for a means assessment. The person's annual income determines how much they must contribute on a weekly basis to the cost of their residential care (and in turn how much of a subsidy they are entitled to).¹⁶ Income is defined in the Act and has a wider meaning than just income in the conventional sense.¹⁷

[15] The government must pay the difference between the cost of the contracted care services and the person's contribution.¹⁸ Whether this is just the general subsidy, or an additional subsidy as well, depends on the person's means assessment for income. However, a person must pay at most the maximum contribution.¹⁹

Deprivation of assets and income

[16] If the Ministry is satisfied that a person who has applied for a means assessment, or the spouse or partner of that person, has directly or indirectly deprived themselves of income or property, the Ministry may in its discretion conduct the means assessment as if the deprivation had not occurred.²⁰ (It was common ground that “property”, as used in s 147A, refers to assets).

[17] Section 147A envisages a two-stage process:

¹⁴ Schedule 27, cl 1(2).

¹⁵ Section 147(2).

¹⁶ Section 147(3).

¹⁷ Section 3(1) and sch 27, cl 5.

¹⁸ Section 141(2).

¹⁹ Section 139(2).

²⁰ Section 147A(1).

- (a) first, the Ministry may determine whether a person or their partner has directly or indirectly deprived themselves of income or property; and
- (b) second, the Ministry has discretion over whether to conduct the means assessment as if the deprivation had not occurred.

[18] Regulation 9B of the Social Security (Long-term Residential Care) Regulations 2005 (“Regulations”) sets out a non-exhaustive list of instances that constitute deprivation of property or income (discussed in further detail below at [34] to [37]). For present purposes the key provision is reg 9B(a), which essentially provides that deprivation will occur to the extent that gifting exceeds \$27,000 in any year prior to the gifting period. Any portion of a gift in excess of \$27,000 will therefore be a deprived asset that may be factored back into the Ministry’s asset assessment. Gifts of \$27,000 or less, however, must be allowed.

[19] The Ministry concluded that Mrs Broadbent had deprived herself of income to the value of \$45,395.89 a year by transferring assets into trust. On the Ministry’s analysis, the actual income derived from the assets held by the trusts, as well as the notional income that could have been earned had the trusts not held non-income-earning assets, should be treated as Mrs Broadbent’s income for the purposes of the income assessment process.

[20] The consequence of taking this “deprived” income into account was that Mrs Broadbent’s income was assessed as being above the income threshold necessary to qualify for a residential care subsidy. She was therefore required to contribute the maximum contribution of \$1,217.28 a fortnight towards the cost of her care.

Gifting limits

[21] Given that the focus of the present appeal is on the gifting limits in the Act and Regulations, and their legal effect, it is perhaps helpful to briefly summarise at this point the specific aspects of the statutory scheme (as outlined above) that relate to gifting.

[22] In prescribing the amount of gifting that is allowed each year, the Act and Regulations draw a distinction between:

- (a) the period of five years immediately prior to an application for a residential care subsidy (referred to as “the gifting period”); and
- (b) the years prior to the gifting period.

[23] Gifts of up to \$6,000 per annum are allowed during the gifting period. These are defined as “allowable gifts”. Such gifts are excluded from the definition of assets and cannot be taken into account in the asset assessment process. Any gifts during the gifting period in excess of \$6,000 per annum, however, are included in the definition of assets. They *must* therefore be taken into account in the asset assessment process under s 146 of the Act. The Ministry has no discretion on the issue. The rationale, presumably, is that people should plan prudently for their retirement and not give away significant assets in their later years that could otherwise have been used to fund the costs of their rest home care.

[24] The Ministry may also look back, indefinitely, to what has happened in the years prior to the gifting period. In those years a person is permitted to make larger gifts, up to \$27,000 per annum. (I refer to these as “permissible gifts”, in order to distinguish them from “allowable gifts”). If a person gifts more than \$27,000 per annum, however, then they have deprived themselves of any excess sum. In that event the Ministry *may* conduct the means assessment process as if that deprivation had not occurred, pursuant to s 147A of the Act. It is not required to do so, however.

[25] I now turn to consider the first question of law in the case stated.

Did the Authority err in law in determining that Mrs Broadbent and her late husband had deprived themselves of assets and income?

Did Mrs Broadbent and her late husband deprive themselves of assets?

[26] It is somewhat unclear whether the Authority intended to find that Mrs Broadbent and her late husband had deprived themselves of assets. The Authority stated that “the appellant and her late husband at various times have deprived

themselves of assets and the associated income”. The Authority then set out the various ways in which this is said to have occurred, including by “transferring their assets and any income associated with those assets to the Family Trust”.²¹ Earlier in its decision, however, the Authority observed that:²²

In this case, it has been accepted that the appellant’s assets fall within the applicable asset threshold and that although gifting has taken place, that gifting was permitted gifting and the deprivation provisions of the Act do not apply to the appellant’s assets.

[27] It is possible that when the Authority referred to Mrs Broadbent and her late husband having deprived themselves of assets it was using the term “deprived” in the layperson’s sense of the word. If, however, the Authority intended to find that Mrs Broadbent and her late husband had deprived themselves of assets in terms of s 147A, then that finding was in error. Mrs Broadbent did not make any gifts during the relevant period that exceeded the \$27,000 threshold provided for in reg 9B(a). The Ministry accepted this, which is why it based its asset assessment solely on the basis of Mrs Broadbent’s actual assets of \$66,492.18, disregarding any trust assets.

Did Mrs Broadbent and her late husband deprive themselves of income?

[28] The more contentious issue, and the key issue in this appeal, is whether the Authority erred in concluding that Mrs Broadbent had deprived herself of income.

[29] The Authority upheld the Ministry’s finding that Mrs Broadbent and her husband had deprived themselves of income, and that the Ministry was therefore entitled to assess Mrs Broadbent’s income as though that deprivation had not occurred. In its reasoning the Authority focussed on allowable gifting,²³ rather than what I have referred to as “permissible gifting”.²⁴ Due to the timing of the relevant gifts, however, only \$12,000 of the total sum gifted (\$328,750) falls to be considered under reg 9 (which relates only to allowable gifts). Regulation 9B, which relates to

²¹ Authority Decision, above n 1, at [28].

²² At [18].

²³ As stated above at [23], allowable gifts are those that fall within the \$6,000 threshold during the five-year gifting period referred to in reg 8 of the Regulations. As to the threshold, see reg 9(1).

²⁴ As stated above at [24], permissible gifts are those that fall within the \$27,000 threshold referred to in reg 9B(a) of the Regulations.

permissible gifting for the purposes of assessing whether deprivation has occurred, applies to the remaining balance.

[30] The Authority noted that allowable gifting pursuant to reg 9 is specifically referred to in the definition of “assets” in sch 27 of the Act, but not in the definition of “income”. It further noted that the provisions for the means assessment as to assets and the means assessment as to income are contained in separate provisions of the Act. Finally, the Authority referred to reg 11, which makes provision for exempt income (such as payments to prisoners of war or victims of persecution). It observed that that provision does not say that income associated with gifted assets should also be exempt.

[31] In my view, however, reg 11 does not assist the interpretation exercise. Regulations 10 and 11 relate to “exempt” assets and income respectively. Neither provision makes any reference to either permissible gifts or allowable gifts, which are dealt with elsewhere in the statutory scheme.

[32] Ultimately, the Authority was satisfied that the Chief Executive was correct to exercise his discretion to conduct the means assessment as to income as if deprivation had not occurred.²⁵ In other words, it was satisfied that the Ministry was correct in its view that although people who have made gifts to third parties of \$27,000 or less per annum have not deprived themselves of *assets*, they have nevertheless deprived themselves of the *income* streams associated with those assets.

[33] On appeal, Mr Upperton submitted that the Authority was correct in this conclusion. He summarised the Ministry’s argument as follows:

When a person gifts something worth \$27,000.00 or less, they do not deprive themselves of that asset. However, when a person makes a gift of an asset of *any value*, they deprive themselves of any *income* associated with that asset, and the Ministry has discretion whether to conduct the person’s income assessment as if the deprivation had not occurred.

(Emphasis added).

²⁵ Authority Decision, above n 1, at [50].

[34] As I have noted above, s 147A of the Act provides that if a person has “deprived” themselves of either property or income then the Ministry may conduct the means assessment as if the deprivation had not occurred. Regulation 9B provides the following guidance as to what constitutes deprivation:

9B Deprivation of property and income

For the purposes of section 147A of the Act, instances of deprivation of property or income include, but are not limited to, the following:

- (a) gifts that are gifted in the 12-month period prior to the commencement of the gifting period, or in any 12-month period preceding that period, to the extent that the total value of the gifts in each such period exceeds \$27,000:

Example

In the year before the commencement of the gifting period the person being means assessed and that person’s spouse jointly make gifts having a total value of \$100,000.

The person being means assessed and his or her spouse may be treated as having deprived themselves of \$73,000 in respect of the gifts.

- (b) a disposition of property at any time before the commencement of the gifting period for no consideration, or for a consideration less than the market value of the property at the time of disposition, may be treated as a gift for the purposes of paragraph (a):

...

- (c) a disposition of property during the gifting period for no consideration, or for a consideration less than the market value of the property at the time of disposition:

...

- (d) a failure at any time to receive any entitlement or payment:

...

- (e) a waiver of a right at any time to receive any entitlement or payment:

...

- (f) an investment at any time in non-income-earning assets:

(Examples of (b) to (f) omitted).

[35] Mr Upperton submitted that the sub-clauses in reg 9B can be split into two categories: those relating to “deprivation of assets” and those relating to “deprivation of income”. Sub-clauses (a), (b) and (c) are said to relate to deprivation of assets. Sub-clauses (d), (e) and (f), on the other hand, relate to deprivation of income. It is apparent from the Authority’s decision that it agreed with this submission.²⁶

[36] Mr Upperton further noted that reg 9B(a) specifically refers to “the value of the gifts” and does not make any reference to any income that might be generated from those gifts. He submitted that this supports the view that reg 9B(a) relates to the deprivation of assets only, and not the associated income. He also relied on an earlier decision of the Authority as supporting the Ministry’s approach.²⁷ In that case the Authority summarised its interpretation of reg 9B as follows:

[47] It is clear that the instances of deprivation set out are not intended to be a comprehensive code. They are simply instances of deprivation. None of the instances of deprivation specifically deals with the situation of how income should be calculated where property has been transferred to a trust and a gifting regime commenced.

[48] There is no indication in reg 9B that income should be assessed only after “allowable gifting” has been deducted.

[49] ... the means assessment as to assets and the means assessment as to income are in separate provisions of the Act. There is no suggestion that one is dependent on the other.

[50] ... In the absence of any express provision in the Regulations the discretion in s 147A applies.

[37] Mr Broadbent, on the other hand, submitted that the distinction that the Ministry seeks to draw is entirely artificial. He submitted that, properly construed, reg 9B(a) relates to both assets *and* income. As such, once a gift is transferred, that is the end of the matter. The income associated with that asset cannot be factored back in when calculating an applicant’s income. The logic is simple: when one gifts an asset they gift any income associated with that asset, because they no longer hold it. Mr Broadbent submitted that if reg 9B(a) was intended only to apply to the asset assessment process then the words “or income” would have been left out of the first sentence of reg 9B.

²⁶ Above n 1, at [22].

²⁷ *An appeal against a decision of the Benefits Review Committee* [2013] NZSSAA 70.

Discussion

[38] It is common ground that gifts of up to \$27,000 per year²⁸ are permissible and do not constitute deprivation of assets under the Act. But what does it mean to “gift” something? What are the ordinary legal consequences of making a gift?

[39] A gift is a voluntary transfer of property to another without compensation.²⁹ The High Court of Australia described gifting in the following terms:³⁰

But, it is, I think, clear that to constitute a “gift”, it must appear that the property transferred was transferred voluntarily and not as a result of a contractual obligation to transfer it and that no advantage of a material character was received by the transferor by way of return.

[40] The distinguishing feature of a gift is the absence of valuable consideration. As Lord Radcliffe expressed it, in ordinary usage a “gift” is “a present made without return of any kind”.³¹ The author of *Garrow & Fenton’s Law of Personal Property in New Zealand* identifies three essential ingredients for a gift:³² an intention to transfer the immediate ownership of the property,³³ an act or acts adequate to give complete effect to that intention,³⁴ and acceptance of the gift by the donee. (Acceptance will be presumed, so long as the donee does not expressly reject the gift).³⁵

[41] Gifts may be either unconditional (sometimes described as “outright” or “absolute” gifts) or conditional. If a gift is made subject to conditions, those conditions may be either subsequent or precedent.³⁶ If the condition must be met before the donee can take the gift, then it is a condition precedent.³⁷ If the donee may take the gift subject to it later being divested, the condition is subsequent.³⁸

²⁸ Prior to the commencement of the five-year gifting period.

²⁹ Bryan A Garner (ed) *Black’s Law Dictionary* (10th ed, Thomson Reuters, St Paul (Minnesota), 2014) at 803.

³⁰ *Federal Commissioner of Taxation v McPhail* (1968) 117 CLR 111 at 116.

³¹ *Inland Revenue Commissioners v Rennell* [1964] AC 173 (HL) at 193.

³² Roger Fenton *Garrow & Fenton’s Law of Personal Property in New Zealand* (7th ed, LexisNexis, Wellington, 2010) vol 1 at [4.3].

³³ *Williams v Williams* [1956] NZLR 970 (SC) at 972.

³⁴ A valid gift has as its pre-requisite an act of immediate disposition. A promise to gift is ineffective: *Strong v Bird* (1874) 18 LR Eq 315 (Ch) at 318.

³⁵ *Irvin v Brookes* [1937] NZLR 73 (SC) at 74.

³⁶ See Roger Fenton, above n 32, at [4.22].

³⁷ See, for example, *Davies v Messner* (1975) 12 SASR 333 (SC).

³⁸ *Egerton v Earl Brownlow* (1853) 4 HLC 1 at 157, 10 ER 359 at 422; *Re Beard* [1908] 1 Ch 383

Where, after an alleged gift, dominion over its subject matter is restored by the donee to the donor, the gift is at an end.³⁹

[42] The absolute or unconditional gift of an asset to another person necessarily includes all the rights, benefits and entitlements associated with that asset, including any right or entitlement to future income. Hence, as Mr Broadbent noted, on a normal property conveyance the parties' lawyers will apportion the rents between the vendor and the purchaser, based on who owns the property when the rents are derived. As soon as the property has been sold, the vendor is no longer entitled to receive income from it. The vendor has not, however, "deprived" themselves of income by selling the property. They have simply realised capital, which they may reinvest elsewhere, or simply spend. The income from the property is linked absolutely to ownership of the property.

[43] It would be possible, of course, to gift an asset to a donee subject to an express requirement that future income streams from the asset are to be paid to the donor. In that event, however, the gift would be a conditional one.

[44] The statutory scheme (including reg 9B(a)) must be interpreted consistently with these longstanding principles of the common law. There is nothing to suggest that Parliament envisaged that either allowable gifting (in the sum of \$6,000 per annum) or permissible gifting (in the sum of \$27,000 per annum) were intended to be conditional in nature. In the absence of some clear indication to the contrary, such gifting must be considered to be unconditional. As I have outlined, the unconditional gift of an asset necessarily involves the relinquishment of all future income streams from that asset. Included within the gift of an asset is a gift of all the rights, benefits and entitlements associated with that asset.

[45] It follows that, if the \$27,000 permissible gifting threshold is exceeded, then the Ministry may conduct the assets assessment as if the donor still retained that portion of the gift in excess of \$27,000. Similarly, when conducting the income assessment, the Ministry is entitled to take into account the actual or notional income

³⁹ at 386; and *Re Wilson* [1947] NZLR 847 (SC) at 856.
James v James (1869) 19 LT 809 at 811.

on the excessive portion of the gift. It may not, however, conduct the income assessment as if there had been no gift at all.

[46] I do not accept the Ministry's submission that such an interpretation is inconsistent with the purposes of the Act, which include that, where appropriate, people should use the resources available to them before seeking financial support from the state. The specific purposes of Part 4 are also relevant here. They include that the purpose of Part 4 is to specify the circumstances in which older people are required to pay for their long-term residential care.⁴⁰ Part 4 provides specific guidance as to those circumstances, including provisions that determine precisely what resources should be considered as being properly available to a person to fund their own care. Part 4 excludes from consideration gifts of up to \$6,000 per annum during the gifting period and gifts of up to \$27,000 per annum in any year prior to that. As the Court of Appeal observed in *B v Chief Executive of the Ministry of Social Development*, people are not allowed to preserve their resources for the use of their families or themselves by gifting *beyond* a permitted limit.⁴¹ In this case that "permitted limit" has not been exceeded.

[47] There are obvious practical or policy reasons why Parliament would choose to specify permissible gifting thresholds, rather than simply leave the matter entirely to the discretion of the Ministry. As Mr Broadbent put it in his submissions:

According to the Ministry's contention and the Authority's decision any gift no matter how small constitutes deprivation of income. This means that to apply a fair welfare system every New Zealander needs to be asked about every gift they've ever made and be assessed on the income they have deprived themselves of, by doing so.

So let's start with my gifts to my daughter. There's a barbie doll when she was 2, an Iphone when she was 10, a car when she was 16, a 21st Birthday, New Years in Times Square at 21, a wedding at 24 and an Auckland house deposit. There needs to be clarity as to what gifts can be ignored and which ones can't. In a recent survey NZ ranked 3rd in the world as highest "givers", gifting a total of \$2.8 billion to charity last year. That's a lot of information to analyse if gifts of less than \$27000 constitute [income] deprivation.

⁴⁰ Section 136AA(a).

⁴¹ *B v Chief Executive of the Ministry of Social Development* [2013] NZCA 410, [2013] NZAR 1309 at [17].

[48] As Mr Upperton noted, the Ministry's particular concern is with gifts to family trusts, rather than the types of gifts referred to by Mr Broadbent. The Act does not draw a distinction, however, based on the identity of the donee of a gift. Rather, Parliament chose to simply specify an acceptable quantum of gifting, with the permissible threshold being drastically reduced in the five-year period immediately prior to an application being made for a subsidy (when people can reasonably be expected to be planning for their future care). Gifts within the specified thresholds are permitted, however, on a "no questions asked" basis.

[49] There are obvious downsides to the present statutory scheme. It is possible for people to gift significant sums (whether to trusts or not) over the course of their lives that are not then available to them to meet the costs of their rest home care. It is perhaps not surprising that this is a matter of particular concern to the Ministry. Indeed I note that the increasing prevalence of applicants for residential care subsidies having trusts prompted a change in the Ministry's operational policy in November 2007 (following the introduction of s 147A of the Act), to look at gifting prior to the five-year gifting period as a matter of course.⁴²

[50] On the other hand, the current regime, with its permissible gifting thresholds (regardless of the identity of the donee) promotes certainty, consistency, and the efficient use of the Ministry's resources (because the Ministry only has to focus on gifting in excess of the permitted thresholds when undertaking the means assessment process).

[51] Whether the current regime is unduly generous or not is ultimately a matter for Parliament. I have found that the interpretation advanced by the Ministry, while it may meet the Ministry's policy objectives, does not accord with the statutory scheme, properly construed.

[52] For the purposes of comparison it is interesting to note the approach taken in the comparable Australian legislation. Under the Australian deprivation rules a person may dispose of \$10,000 per financial year, up to a maximum of \$30,000

⁴² Theresa Donnelly "Residential Care Subsidies – Problem and Puzzles: Commentary" (paper presented to the New Zealand Law Society: Trusts – best practice in 2013, June 2013) 159 at 162.

across five years. Any amounts over these limits are considered “deprived assets” and are assessed as part of the person’s assets for the following five years.⁴³ So for example, a person who has gifted \$20,000 will for the next five years be considered to have deprived themselves of \$10,000 of assets.

[53] The Australian scheme then provides for the “deeming” of income in relation to deprived assets.⁴⁴ Such assets will be deemed to be earning income for the next five years regardless of the income they actually earn. However, the \$10,000 threshold is applied and any gifts below that amount are excluded from this deeming process. This deemed income is then considered to have been deprived as a result of the disposal of the underlying asset. Accordingly, where a gifted asset is not considered in relation to the assessment of assets, it is also not considered in relation to income. But when the gift *does* exceed the gifting threshold, the extent by which it exceeds that threshold is deemed to be earning income at a stipulated rate.

[54] This is consistent with the conclusion I have reached as to the correct interpretation of the statutory scheme in this jurisdiction. Although the wording of the New Zealand and Australian legislation differs, the underlying policy considerations are no doubt broadly the same.

[55] For the reasons outlined, I find that the Authority did err in law in determining that Mrs Broadbent and her late husband had deprived themselves of income.

Did the Authority err in law in determining that the discretion in s 147A applies regardless of allowable gifting of assets permitted in relation to the asset assessment?

[56] The second question of law in the case stated is:

Did the Authority err in law in determining that the discretion in s 147A applies regardless of allowable gifting of assets permitted in relation to the asset assessment?

⁴³ Social Security Act 1991 (Cth), ss 1123-1127A.

⁴⁴ Sections 1076-1084A.

[57] The wording of this question is based on the following passage of the Authority's decision:⁴⁵

[35] We are satisfied that in the absence of any express provision in the Act or Regulations, the discretion in s 147A applies, regardless of allowable gifting of assets permitted in relation to the asset assessment.

[58] The reference to "allowable gifts" is somewhat puzzling in this context, given that allowable gifts are not relevant to the analysis of deprivation under s 147A. The Authority was possibly intending to refer to what I have described as "permissible gifts". In any event, the finding the Authority intended to encapsulate in this passage, as I understand it, is repeated at the end of the Authority's decision in the following terms:⁴⁶

[50] We are satisfied that the Chief Executive was correct to exercise his discretion to conduct the means assessment as to income as if deprivation had not occurred. ...

[59] This question therefore covers essentially the same ground as Question (a), and I have already answered it. The answer to the second question in the case stated is accordingly "yes".

Did the Authority err in law in finding that it was appropriate to base the financial means assessment for the first year on deprived income of \$45,395.89?

[60] The third question I have been asked to consider is whether the Authority erred in law in finding that it was appropriate to base the financial means assessment for the first year on deprived income of \$45,395.89.

[61] It necessarily follows from my conclusion that the Authority erred in determining that Mrs Broadbent had deprived herself of income at all, that the answer to this question must be "yes".

Conclusion

[62] The Authority's case stated raised the following three questions of law:

⁴⁵ Above n 1.

⁴⁶ Above n 1.

- (a) Did the Authority err in law in determining that Mrs Broadbent and her late husband had deprived themselves of assets and income?
- (b) Did the Authority err in law in determining that the discretion in s 147A applies regardless of allowable gifting of assets permitted in relation to the asset assessment?
- (c) Did the Authority err in law in finding it was appropriate to base the financial means assessment for the first year on deprived income of \$45,395.89?

[63] The answer to Question (a) is “yes”, for the reasons outlined at [26] to [27] and [38] to [55] above. The Authority erred in finding that although people who have made gifts within the permitted statutory thresholds have not deprived themselves of *assets* for means assessment purposes, they have nevertheless deprived themselves of the *income* associated with those assets. The absolute or unconditional gift of an asset to another person necessarily includes all the rights, benefits and entitlements associated with that asset, including any right or entitlement to future income. Accordingly, the allowable or permissible gifting of assets necessarily includes the gifting of any associated actual or potential income streams from those assets. Such income cannot therefore be factored back into the means assessment process when assessing a person’s eligibility for a residential care subsidy.

[64] Question (b) covers the same ground as Question (a) and the answer to it is therefore also “yes”. Finally, it necessarily follows from my conclusion that the Authority erred in determining that Mrs Broadbent had deprived herself of income, that the answer to Question (c) is also “yes”.

Result

[65] The appeal is allowed and the three questions of law are answered “yes”.

[66] Mrs Broadbent was not legally represented (Mr Broadbent is not a lawyer). I therefore assume she has not incurred any legal costs. As the successful party she is,

however, entitled to recover her reasonable disbursements from the Ministry. In the event that there are any outstanding costs issues, leave is reserved to file memoranda by 14 July 2017.

Katz J