Tax-Efficient Care of Older Persons and Related Matters

Cian O'Sullivan *Senior Associate, Mason Hayes + Curran*

As life expectancy in Ireland increases, many of us will find ourselves caring for an elderly or incapacitated relative. A recent survey conducted by the Central Statistics Office found that the demographic age profile of the Irish population is changing.[1] In 2006 11% of the population, or 460,000 people, were aged over 65 years. It is projected that this will increase to between 1.3 and 1.4 million people by 2041. The number of people aged over 80 years is projected to increase from 110,000 in 2006 to 440,000 in 2041. The State will only be able to go so far in assisting private sector funding of care for the elderly or incapacitated. This article details many of the tax exemptions, reliefs and allowances that are available to those who care for elderly or incapacitated relatives and sets out several tax-planning suggestions. Where relevant, I have also discussed the recommendations of the Commission on Taxation and the changes proposed by the Finance Bill 2010.[2]

Capital Acquisitions Tax

Private dwelling relief

Section 86 of the Capital Acquisitions Tax Consolidation Act (CATCA) 2003 enables a disponer/donor to bequeath/gift property to a successor/donee without any CAT liability arising or any reduction in the recipient's relevant class threshold, provided that the successor/donee has continuously occupied the property as his/her principal private residence for a period of three years before the transfer of the property to the successor/donee.[3]

Section 116 of the Finance Act 2007 introduced two restrictions in the context of a gift. Firstly, in assessing the three-year occupancy condition, any period during which the donee occupied the property at the same time as the donor shall not be counted. Therefore, occupation must be to the exclusion of the donor. This condition does not

1. CSO, *Population and Labour Force Projections 2011–2041* (Dublin: The Stationery Office, 2008).
2. Published on 4 February 2010.
3. See generally *Tax Briefing*, Issue 40, June 2000; Form IT10; and *Danaher v The Revenue Commissioners* [2005] Circuit Court, No. 8RA.

apply in the case of a donor who is compelled, by reason of old age or infirmity, to depend on the services of the donee. Secondly, at the time of the gift, the property must have been owned by the donor during the three-year period. This prevents appointments under *inter vivos* trusts from qualifying for the exemption.[4]

Care should be taken that the provisions regarding the free use of property are addressed and that any deemed benefit is reduced by the imposition of maintenance and other obligations in respect of the property.

Any gift of real property will require a deed to effect the transfer of ownership. Stamp duty considerations will be relevant, although consanguinity relief or first-time buyer relief may apply. Also, the gift will constitute a disposal for CGT purposes, although principal private residence relief may apply. (Stamp duty and CGT would not apply in the context of an inheritance.) These reliefs are examined in more detail below.

Care should be taken that the provisions regarding the free use of property are addressed and that any deemed benefit is reduced by the imposition of maintenance and other obligations in respect of the property.[5]

Joint accounts

For convenience, an older person's bank account is often placed in the joint names of the person and a family member so that the family member can draw on the account to fund the lifestyle or care needs of the older person.

In *Lynch v Burke* an aunt opened a joint account with her niece and lodged sums to it.[6] The account mandate provided that the monies would be payable to the aunt only or her survivor. The aunt passed away, and the niece claimed title to the account proceeds. She was challenged by the aunt's executors. The niece claimed title pursuant to the principle of survivorship. (Generally, this provides that, when one joint owner of property dies, the other joint owner succeeds automatically to the deceased's interest in the property by operation of law and not under the deceased's will.)

The executors relied on the presumption of advancement and the principles of resulting trusts. Under the presumption of advancement, where an individual places property into the joint names of himself/herself and a closely related person, then upon the death of the former, the latter will succeed to the property by operation of the doctrine of survivorship. Traditionally, the categories of relationship that would raise a presumption of advancement were limited to parent to child and spouse to spouse, and not aunt to niece. The doctrine of a resulting trust provides that, where the presumption of advancement does not apply, the deceased's interest in jointly held property will automatically form part of the deceased's estate for distribution in accordance with the deceased's will or the laws of intestacy.

The Supreme Court held that there was sufficient evidence to support a presumption of advancement, such that the principle of survivorship would operate in favour of the niece. The account mandate clearly showed that the aunt intended the niece to benefit on her death. In addition, the niece was party to the contract between the aunt and the bank. Consequently, the niece had acquired a legal interest in the account proceeds by virtue of the contract or because it constituted a gift subject to the contingency of the aunt's death.

On the aunt's death, the niece became beneficially entitled in possession to the account proceeds with a valuation date as at the date of the court's judgment.[7]

Trusts

The transfer of capital to trustees in a discretionary trust for the maintenance and care of an elderly or incapacitated individual is exempt from discretionary trust tax.[8] Appointments out of the trust may be exempt from CAT if the monies relate to medical care, including the cost of maintenance in connection with such medical care, in respect of an individual who is shown to the satisfaction of Revenue to be permanently incapacitated by reason of physical or mental infirmity.[9] Medical evidence in these circumstances is persuasive. Such appointments may relate to medical care, medication and the cost of nursing home care. Stamp duty and CGT considerations do not

4. With respect to *inter vivos* trusts constituted before 20 February 2007 that subsequently appointed a private dwelling to a heretofore qualifying beneficiary, the relief will no longer apply. However, the appointment will be exempt from stamp duty pursuant to s30(5)(d) of the Stamp Duty Consolidation Act (SDCA) 1999, and the trustees may qualify for CGT principal private residence relief if the conditions of s604(10) of the Taxes Consolidation Act (TCA) 1997 are satisfied. Discretionary trust tax does not arise in the context of an *inter vivos* settlement where the settlor is alive at the date of any appointment (s15(1) CATCA 2003).

5. Section 40 CATCA 2003. The result of s40 is that the occupant of the property will be deemed to take a gift during each year of occupation of such amount as the property would yield in annual rent if let on an arm's-length basis. Any taxable amounts will be reduced, firstly, by maintenance and other obligations, secondly, by the small-gift exemption (if available) and, thirdly, by part of the relevant group threshold (if available), depending on the value of the deemed benefit.

6. [1995] 2 IR 159. See also *Prendergast & Anor v Joyce & Ors* [2009] IEHC 199.

7. Where a deceased's estate is subject to litigation, the valuation date within the meaning of s30 CATCA 2003 is usually the date of the court order or judgment determining the issues in dispute, hence the importance of having any settlement ruled by the court. Section 29 ("Contingencies Affecting Gifts or Inheritances") and s39 ("Gift Subject to Power of Revocation") CATCA 2003 are not relevant to the tax analysis of the judgment.

8. Section 17(1)(d) CATCA 2003.

9. Section 84 CATCA 2003.

apply if the appointments are made in cash. The income tax considerations are discussed below.

Frequently, property is devised by one spouse to a surviving spouse for his/her life with remainder to another. The spousal inheritance is tax-neutral and results in an uplift in base value for CGT purposes *vis-à-vis* the surviving spouse.[10] Upon the death of the life tenant, the remainder person will be deemed to take an inheritance from the settlor spouse, but on the death of the surviving spouse and the usual CAT provisions apply.[11] No charge to CGT[12] or stamp duty[13] will arise on the death of the life tenant. If the property remains settled on the death of the life tenant, then a charge to CGT will arise – for example, to A for life, then to B for life, with remainder to C absolutely where A dies and B becomes beneficially entitled in possession for life.

Small-gift exemption

Consideration should always be given to maximising the use of the small-gift exemption, or multiples thereof, over time to supplement an elderly person's means. It is essential that any such gifts are paid from capital amounts and not from the donor's income. Small gifts are not deemed to be income in the hands of the donee.[14] The small-gift exemption is currently €3,000 per annum and can be received from any number of donors.

Inheritance of pension benefits

Frequently, an interest in a pension fund comprises a significant asset of a retired person. Generally, any benefit under any superannuation fund taken by a person other than the person in respect of whose service the benefit arises is subject to CAT, and the usual provisions apply.[15] The inheritance of an approved retirement fund (ARF) is more complicated. An inheritance is referred to as a "distribution" for pension purposes. Where an ARF is inherited by a surviving spouse and paid into an ARF beneficially owned by the surviving spouse, or if the distribution is for the sole benefit of any child of the deceased aged under 21 years, the usual CAT provisions apply but the distribution will be exempt from income tax.[16] If the distribution is made for the benefit of a child aged over 21 years (at the date of the disponer's death), a charge to income tax at the standard rate (currently 20%) will apply and be deducted at source by the fund administrator.[17] No charge to CAT (currently 25%) arises.[18] If the benefit is paid to any other party, a charge to income tax at the deceased's marginal rate will apply.[19] Consequently, the establishment of an ARF for the surviving spouse in the event of the death of a pensioner spouse should be considered if a deferral of the charge to tax is necessary. The ages of any children and the current rates of income tax and CAT are also relevant.

Efficient use of class thresholds

The class thresholds for the tax year 2010 are as follows.

Group	Relationship to disponer	Amount
A	Child/foster child/stepchild/minor child of a deceased child	€414,799
B	Lineal ancestor/descendant, child of sibling	€41,481
C	Others, e.g. cousin to cousin, nephew to uncle, grandchild to grandparent	€20,740

Sometimes practitioners come across unfortunate and challenging cases where parents are caring for a child with a short life expectancy. The legislature is conscious of the emotional difficulties associated with such situations. An absolute inheritance received by a parent from a child falls within Group A.[20] A parental inheritance from a child is exempt from inheritance tax and not reckoned for class threshold purposes where the child has received a gift of more than €3,000 from the parent less than five years before the child's death.[21] In appropriate circumstances this provision can be used to provide for parents and others in a tax-efficient manner.

Agricultural and business relief

This topic is discussed in detail elsewhere and is beyond the scope of this article.[22] However, it should be noted that the Commission on Taxation has recommended that the reliefs for family transfers be continued but amalgamated into one relief and that the rate of relief be reduced from 90% to 75%, with an overall monetary cap of €3,000,000 and tax chargeable as normal above that amount.[23] Section 138 of the Finance

10. Section 573(2)(a) TCA 1997.
11. Sections 3 and 10 CATCA 2003.
12. Section 577(2) TCA 1997. There is also an uplift in base value to the date of death of the life tenant.
13. Section 30(5)(d) SDCA 1999.
14. Section 69 CATCA 2003.
15. Section 80 CATCA 2003.
16. Section 784A(4)(b) TCA 1997.
17. Section 784A(4)(c) TCA 1997.
18. Section 85(2) CATCA 2003.
19. Section 784A(4)(a) TCA 1997.
20. Schedule 2, Part 1, para. 1(a) CATCA 2003.
21. Section 79 CATCA 2003.
22. See Brian Bohan and Fergus McCarthy, *Capital Acquisitions Tax* (Dublin: Tottel Publishing, 3rd ed., 2008).
23. See generally Part 10, Chapter 1 and Chapter 2 CATCA 2003.

Bill 2010 amends s89 of CATCA 2003 (agricultural relief) by imposing an additional clawback of relief where the proceeds from the sale of agricultural land are used to acquire agricultural property that has been transferred by the individual to his/her spouse. Such property will not qualify as "other agricultural property" within the meaning of the section, and the relief will be withdrawn. The amendment has effect from 4 February 2010.

Income Tax

Deeds of covenant

Section 792 of TCA 1997 enables a higher-rate taxpayer to obtain relief from income tax on payments made to an individual aged over 65 or in respect of an individual who is permanently incapacitated by reason of mental or physical infirmity.[24] The relief is capped at 5% of total income in respect of individuals aged over 65 but is unrestricted in the case of permanently incapacitated adults or minors who are not related to the covenantor.[25] Income means gross income less certain deductions such as Schedule E expenses and capital allowances.[26] The deed of covenant must be irrevocable and unconditional and last, or be capable of lasting, for a period of seven years if relief is to be obtained. In practice, tax at the standard rate is deducted by the covenantor from the gross payment and paid to Revenue, with the balance paid to the covenantee, who can apply to Revenue for a refund of the amount withheld if he/she is exempt from income tax.[27] The Commission on Taxation has recommended that this relief should continue.[28]

Consideration should be given to the source and amount of income in the hands of the covenantee (e.g. State Pension, other State benefits). Where possible, care should be taken not to expose the covenantee to tax at the standard or marginal rate or to prejudice the payment of any means-tested State benefits.[29] With respect to the income levy, the covenantor is not allowed any deduction, while the payment is subject to the levy in the hands of the covenantee. This is in contrast to the specific deduction allowed for qualifying maintenance payments made in accordance with s1025(3)(c) TCA 1997 resulting from the dissolution of a marriage or separation of the parties to a marriage.

Care of incapacitated individuals

Section 467 of TCA 1997 enables individuals to obtain relief from income tax at their marginal rate in respect of costs incurred by them in employing another person to take care of them, or their spouse (if jointly assessed), or a relative who is totally incapacitated by reason of physical or mental infirmity.[30] The deduction from annual income is restricted to the lower of the actual cost of the care or €50,000 in respect of each incapacitated person. For the first year of incapacity, relief is available by reference to the number of months during that year when the individual was totally incapacitated. Where two individuals contribute to the care for one incapacitated individual, the deduction is apportioned in proportion to the amount ultimately borne by each payer in employing the carer. The Commission on Taxation Report has recommended the continuation of this relief but restricted to the standard rate of tax.

The income levy

Practitioners are well aware of the application and operation of the income levy with effect from 1 January 2009.[31] Section 188 of TCA 1997 provides that, where at any time during a year of assessment an individual or his/her spouse was aged 65 years or over, the first €40,000 of income is exempt from income tax.[32] Marginal relief is available where yearly income exceeds the specified limit but is less than twice the specified limit. Marginal relief restricts the tax payable to 40% of the income that exceeds the specified limit. In practice, where a jointly or separately assessed married individual (or his/her spouse) is aged 65 or over, has annual income below €40,000 and has suffered the income levy, an application can be made to Revenue at the end of the year of assessment for a refund of the amount of the levy paid or deducted. With effect from 1 January 2010, such an individual can complete a declaration of exemption from income tax in the specified form and furnish it to his/her employer/pension provider, whereupon no further deductions will be made at source.

Private pensions in payment

The income tax treatment options on retirement are discussed in detail elsewhere and are beyond the scope of this article.[33] I will deal with the income tax situation post-retirement where an individual has transferred benefits to an ARF after 5 April 2000. Section 784A(2) of TCA 1997 provides that income or gains accruing to the ARF are exempt from income tax and capital gains tax. However, any amounts that are withdrawn from the ARF are taxed

24. Section 1 TCA 1997 defines "incapacitated person" as "any minor or person of unsound mind". In practice Revenue interprets "permanently incapacitated" reasonably broadly and is open to suggestion grounded on appropriate medical evidence.
25. A person is a minor if aged under 18 years and unmarried (s2(1) Age of Majority Act 1985).
26. See *Tax Briefing*, Issue 17, January 1995.
27. See Form IT7, which details the procedure for claiming relief.
28. *Commission on Taxation Report* (Dublin: Government Publications, 2009).
29. Please see paragraph below regarding exemption limits for individuals aged over 65.
30. "Relative" includes a relation by marriage (s467(1) TCA 1997).
31. Section 2 Finance (No. 2) Act 2008 inserted a new Part 18A into TCA 1997.
32. The definition of "income" includes foreign-source income even if not remitted by a non-ordinarily resident/domiciled individual (remittance basis restricted to non-domiciliaries only after s8 Finance Bill 2010). Also, to claim the relief, a return needs to be made.
33. William McAteer, George Reddin and Gearóid Deegan, *Income Tax* (Dublin: Irish Taxation Institute, 22nd ed., 2009).

as Schedule E emoluments, and the usual charging provisions apply.[34] Such withdrawals are called "distributions". Distributions can be actual or deemed. Section 784A(1B) details the situations where a distribution will be deemed to have taken place and includes, for example, the use of the ARF as security for personal borrowings of the pensioner and the use of ARF funds to acquire property from the pensioner. Tax is charged on the monetary value of the deemed distribution. In addition, for the year of assessment 2009 and subsequent years, a deemed distribution of 3% of the value of the ARF will apply automatically and be taxed accordingly. The Commission on Taxation has made several recommendations in relation to the manner in which income tax relief is given for pension contributions and the maximum amounts that qualify for relief on retirement but has not commented on the post-retirement situation. Section 15 of Finance Bill 2010 restates the formula used to calculate the annual 3% deemed distribution from ARFs.

Trusts for permanently incapacitated individuals

Section 189A of TCA 1997 provides an exemption from income tax and capital gains tax for trusts established with funds raised by public subscription that are applied for the benefit of permanently incapacitated individuals. Public subscriptions cannot exceed €381,000 or, if greater than this amount, no single subscription by an individual can exceed 30% of the total amount of all subscriptions. Income accruing to the trust, which would otherwise be chargeable under Schedule C, Cases III–V of Schedule D or Schedule F, is exempt from income tax. Similarly, income paid to a beneficiary is exempt in the hands of the beneficiary if the amount of the appointment exceeds 50% of the total income accruing to that beneficiary in the year of assessment. Income paid to the beneficiary is also exempt from the income levy. Any DIRT suffered by the trustees can be refunded on foot of an application in the prescribed format. The normal rules regarding returns of income apply, notwithstanding the exemption.

Relief for health expenses

Section 469 of TCA 1997 allows relief at the standard rate to an individual who, in a year of assessment, has incurred certain health expenses as detailed in the section. Section 5 of the Finance Bill 2010 extends the scope of s469 by allowing relief where the costs are necessarily incurred arising out of the services of a registered medical practitioner. Nursing home fees will now qualify for relief if the on-site nursing care is provided on a 24-hour basis. Costs paid by an individual for the upkeep and maintenance of an individual subject to the Fair Deal Scheme will also qualify.[35]

Capital Gains Tax

Principal private residence relief

On first principles, an individual can have only one principal private residence at any one time, to which relief under s604 TCA 1997 may apply. However, this is modified in the case of an individual who cares for a dependent relative.[36] "Dependent relative" means an individual's relative who is incapacitated by reason of old age or infirmity from maintaining himself/herself and includes the widowed parent of the individual or of the individual's spouse, whether incapacitated or not. Where the individual realises a gain on the disposal of a private residence that during the individual's period of ownership was occupied by a dependent relative as his/her only or main residence and was provided rent-free, then on a claim being made, the individual can obtain an exemption from CGT, notwithstanding that the property may not be the individual's principal private residence. This relief for a "second property" is available only once. The section enables a child to provide accommodation for an incapacitated parent without suffering CGT on the disposal thereof. Depending on the individual's personal circumstances, this may be more appropriate than the parent residing in the family home with the child or than transferring a property into the parent's name.

Retirement relief[37]

While this topic is discussed in detail elsewhere,[38] it should be noted that the Commission on Taxation has recommended that the relief for family transfers should be continued but should be restricted to transfers of assets with a market value of less than €3,000,000. CGT would be chargeable in the normal way on asset values exceeding €3,000,000. Section 54 of the Finance Bill 2010 amends s598 TCA 1997 by providing that any amount received by an individual as a result of a buy-back or redemption of shares that is not treated as a distribution by virtue of s176 TCA 1997 will serve to reduce the lifetime limit of €750,000 available to that individual. The amendment applies with effect from 4 February 2010.

Stamp Duty

First-time buyer relief[39]

There is an exemption from stamp duty in respect of trusts established for incapacitated persons (within the meaning of s189A TCA 1997) where the trustees purchase, or receive a gift of, second-hand residential property that is intended for the benefit of the beneficiary of the trust. The exemption applies to as many purchases/gifts as there are beneficiaries.

In practice, if there is difficulty in complying with the "public subscription" requirements, a child has the option of purchasing a qualifying

34. Section 784A(3). The income levy also applies and may bring the pensioner within the self-assessment system.
35. See generally the Nursing Homes Support Scheme Act 2009.
36. Section 604(11) TCA 1997.
37. Sections 598 and 599 TCA 1997.
38. Tony Appleby and Finola O'Hanlon, *The Taxation of Capital Gains* (Dublin: Irish Taxation Institute, 20th ed., 2008).
39. See generally s92B(7) SDCA 1999.

new build and allowing the elderly parent to occupy the property on his/her behalf. No stamp duty would be payable if the property were so occupied for two years rent-free.[40] However, for gift tax purposes, the free use or benefit of property rules should be considered.[41] Alternatively, gifts and/or loans can be made to an elderly parent, who can purchase in his or her own name. In particular circumstances, the parent may qualify for first-time buyer relief on the purchase (or gift) of a second-hand property.

Consanguinity relief[42]

This relief is always relevant where any inter-family transfers are contemplated. The relief provides for a reduction of 50% in the amount of stamp duty payable with respect to transfers between certain relations, which include lineal descendants (bloodline), parents, grandparents, siblings, children of siblings or siblings of parents. The deed of transfer must contain a consanguinity certificate so as to secure the relief. Where insufficient or no consideration passes, s30 SDCA 1999 will operate to impose market value, and the relief will be calculated accordingly. The relief is conditional on adjudication, and care should be taken in relation to the values returned.[43]

Transfer of a site to a child

A parent may consider the transfer of a site to a child as a means of funding general or medical expenses. The relief provides an exemption from stamp duty[44] and CGT[45] for transfers of property between a parent and a child where the site does not exceed €500,000 in value or 0.4047 of a hectare (1 acre) in area, excluding the footprint of the house intended to be built. A child can obtain the relief in respect of only one site. While the legislation provides for an exemption from stamp duty and CGT, no relief is available in respect of CAT, and the usual provisions regarding reliefs, available class thresholds and the small-gift exemption will apply.

Enduring Power of Attorney

Enduring power of attorney (EPA) allows an individual (called a donor), when mentally competent, to nominate a person (called an attorney) to look after his/her personal and financial affairs in the event that the donor becomes mentally incapable of doing so.[46] The EPA system is an alternative to the ward of court system, which can be expensive and sometimes traumatic for families. If mental incapacity subsequently occurs, the EPA can be registered by the attorney in the High Court to be effective. The attorney becomes a fiduciary for the donor and must make all decisions in the best interests of the donor. The attorney must avoid any conflicts of interests, keep the donor's property separate from his/her own and maintain financial records. Once an EPA is registered, assets in the name of the donor can be transferred to the attorney if necessary. However, the beneficial interest in the donor's assets will remain with the donor. Consequently, such registration is tax-neutral.[47]

The donor may need full-time specialist care in an appropriate care facility. An attorney can sell the donor's main residence if necessary and permitted by the EPA. Consideration should be given to whether CGT principal private residence will apply where the donor has not occupied the property throughout his/her period of ownership. Section 604 of TCA 1997 provides that the donor need not have occupied the property for the last 12 months of ownership to qualify for relief. According to the Revenue Staff Instructions, any period of absence during which a "claimant" was receiving care in a hospital or nursing home and that person's private residence remained unoccupied should be treated as a period of occupation. The Instructions permit the private residence to be occupied rent-free during the period of care by a relative of the "claimant" for the purpose of securing or maintaining it. Therefore, should the private residence need to be sold to fund specialist care, the donor, through his/her attorney, can dispose of the property and not suffer any reduction in the relief by virtue of residence in a hospital or nursing home.

Conclusion

The Irish demographic profile is changing. As a population, we are ageing. Thirty years from now it is expected that more than one in five of us will be over 65. Funding care for older persons will become paramount to increasing numbers of us and to our clients. It is essential that a structured and timely approach is taken that is sympathetic to the needs of elderly relations and is as tax-efficient as possible. In this article I have set out the principal reliefs and means that can be used by practitioners to achieve both of these aims.

The author would like to thank Sarah O'Sullivan, Solicitor, for her assistance in the preparation of this article.

---

40. Section 91A(4)(b) SDCA 1999.
41. Section 40 CATCA 2003; see above.
42. Para. 15, Schedule 1 SDCA 1999.
43. Section 15 SDCA 1999 provides that, where the value submitted is between 15% and 30% below market value, a surcharge of 25% of the total duty will apply; where it is between 31% and 50%, a surcharge of 50% will apply; and where it is greater than 50%, a surcharge of 100% will apply.
44. Section 83A SDCA 1999.
45. Section 603A TCA 1997.
46. See Enduring Powers of Attorney Act 1996.
47. See ss15(1)(b) and 83(2) CATCA 2003, s30(5)(c) SDCA 1999 and s12 TCA 1997.