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Public Consultation
Inland Revenue Department
P O Box 2198
WELLINGTON 6140

By email: public.consultation@ird.govt.nz

PUB00225: Income tax, Working for Families tax credits – Principal caregiver – Primary responsibility for day-to-day care – Meaning of “temporary basis”

Introduction

The New Zealand Law Society (Law Society) appreciates the opportunity to comment on draft Question We've Been Asked *PUB00225: Income tax, Working for Families tax credits – Principal caregiver – Primary responsibility for day-to-day care – Meaning of “temporary basis”* (draft QWBA). All legislative references are to the Income Tax Act 2007 unless otherwise stated.

Comments

Overseas exchange students

The Law Society considers the position taken in the draft QWBA in relation to an overseas exchange student staying with a family in New Zealand would benefit from a greater degree of flexibility. While it is likely in most cases that the New Zealand host family will not be primarily responsible for the child's care (as the child's parents/guardians will still have the primary responsibility for ensuring the child's care needs are met), and the host family will thus not be entitled to Working for Families Tax Credits (WfFTC), it is possible in some cases that primary responsibility *is* passed on to the host family for the duration of the stay in New Zealand with that family. If that is the case and the other statutory criteria are satisfied (including the dependent child and residency requirements) then the host family should be entitled to WfFTC.

Definition of “temporary basis”

A person is not entitled to WfFTC if they have primary responsibility for the day-to-day care of a dependent child only on a temporary basis. The term “temporary basis” is not defined by the Act. The Commissioner considers that primary responsibility for the day-to-day care of a dependent child would be on a temporary basis if:

- it was for a relatively short period of time, **and**
- the duration for which the person has the responsibility for day-to-day care is either defined in advance or related to the fulfilment of a specific, passing purpose.

The draft QWBA then goes on to state that 3 to 4 months is the timeframe which the CIR considers would meet the threshold of not being on a “temporary basis”. So, if a person has the primary responsibility for the day-to-day care of a child for a shorter period than 3 to 4 months, there is a risk that the Commissioner may conclude that they are not entitled to WffTC. The draft QWBA does not explain why 3 to 4 months has been chosen as a threshold period, nor how the two stage “temporary basis” definition has been determined.

The Law Society notes that under the shared care provisions (section MC 10 (2)) a person who shares the care of a child with another parent/guardian may still be a “principal caregiver” for a child if they live apart from someone else who qualifies for WffTC and they have the child in their exclusive custody care for at least **a third of a 4 month period**, tax year etc. This demonstrates that for shared care purposes a period shorter than 3 months can be sufficient. The inconsistency in time frames is not explained in the draft QWBA.

It appears that paragraph 41 should refer to section MC 10 (2) as well as section MC 10 (1).

Conclusion

This submission was prepared with assistance from the Law Society’s Tax Law Committee. If you wish to discuss this further, please do not hesitate to contact the committee’s convenor Neil Russ, through the committee secretary Jo Holland (04 463 2967 / jo.holland@lawsociety.org.nz).

Yours sincerely

A handwritten signature in black ink, consisting of a stylized, cursive 'C' followed by a horizontal line extending to the right.

Chris Moore
President