

# The use of special disability trusts

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Many families have a loved one who suffers from a disability. Usually with government assistance, families are able to provide care and maintenance for their disabled loved ones. For older family members who are the primary carers, they have to contemplate the fact that they will predecease their disabled loved one. One way of planning for the continued care and maintenance of the disabled family member is to establish a special disability trust.

However estate planning is not the only instance in which a special disability trust is invoked. In many cases, family members may wish to establish a special disability trust earlier in their lives to ensure that there is a sufficient pool of money that can provide for the necessary ongoing care.

## WHAT IS A SPECIAL DISABILITY TRUST?

A special disability trust is a special kind of trust which is established under the *Social Security Act 1991* to provide for a person with a severe disability. Being regulated by law, it has a number of prescriptive requirements.

There is only one beneficiary, being the disabled person. In order to qualify as a special disability trust, the beneficiary must have a "severe disability". A person with a severe disability is someone who falls under the following categories:

- a person who has reached 16 years of age:
  - whose level of impairment would qualify the person for Disability Support Pension or who is already receiving a Department of Veterans' Affairs (DVA) Invalidity Service Pension or DVA Invalidity Income Support Supplement;

- who has a disability that would, if the person had a sole carer, qualify the carer for Carer Payment or Carer Allowance; and
- who has a disability and is unable to work more than seven hours a week in the open labour market.
- a person who has reached 16 years of age:
  - whose level of impairment would qualify the person for Disability Support Pension or who is already receiving a DVA Invalidity Service Pension or DVA Invalidity Income Support Supplement;
  - who is living in an institution, hostel or group home where care is provided for people with disabilities and funding is provided under an agreement between the Commonwealth, states and territories; and
  - who has a disability and is unable to work more than seven hours a week in the open labour market.
- a child under 16 years of age:
  - who is a person with a severe disability or a severe medical condition;
  - who has a carer who has been given a qualifying rating of 'intense' under the Disability Care Load Assessment (Child) Determination for caring for that person; and
  - who has had a treating health professional certify in writing that, because of that disability or condition:
    - the person will need personal care for six months or more; and
    - the personal care is required to be provided by a specified number of persons.

## CONTRIBUTING TO THE TRUST

Anyone is able to contribute to a special disability trust. Any gift to the trust, whether it is from an immediate family member or any other person, must be unconditional and made without expectation of receiving any payment or benefit in return.

The principal beneficiary (being the disabled person) and his or her partner can only contribute to the trust if the gift is funded by:

- assets the principal beneficiary received under a will; or
- a superannuation death benefit received by the principal beneficiary; and the funds are transferred to the trust within three years of their receipt by the principal beneficiary.

It is in this instance where a special disability trust is used in estate planning to ensure that there is adequate provision for the continued care and maintenance after the death of the principal beneficiary's primary caregivers.

If the contributor is receiving Centrelink payments, the rate of a contributor's Centrelink payment may be affected if the contribution is worth more than the allowable concessional amount or if the contributor does not meet the required eligibility criteria. Gifts can affect Centrelink payments because they directly or indirectly reduce the assets available for personal use. However, in certain circumstances, a 'gifting concession' of \$500,000 applies to preserve Centrelink payment for eligible persons.

The gifting concession is only available to an immediate family member who:

- receives a social security pension and has reached pension age; or
  - receives a service pension and has reached the veterans' pension age; or
  - receives a veterans' income support supplement and has reached the qualifying age for the payment.
- "Immediate family members" of the principal beneficiary are:
- parents (including adoptive and step parents);
  - legal guardians of the person with a severe disability who is less than 18 years old, and people who were legal guardians when the person with a severe disability was less than 18 years old;
  - grandparents; and
  - brothers and sisters (including adoptive, step and half brothers and sisters).

## WHAT CANNOT BE CONTRIBUTED TO THE TRUST?

Two types of assets cannot be contributed to the trust:

- any asset transferred to the trust by the principal beneficiary or their partner unless:
  - the asset is all or part of a bequest, or a superannuation death benefit; and
  - the bequest or superannuation benefit was received not more than three years before the transfer;
- any compensation received by or on behalf of the principal beneficiary.

These rules are intended to preserve the existing treatment of compensation payments and prevent the person with severe disability from putting their own property into a special disability trust in order to qualify for income support, rather than using it directly for their own support.

## USE OF FUNDS

The funds are intended to meet the reasonable care and accommodation needs of the principal beneficiary.

A care need is a reasonable care need if:

- it arises as a result of the disability of the beneficiary; and
- is for the primary benefit of the beneficiary; and
- is met in Australia.

An accommodation need of the principal beneficiary is a reasonable accommodation need if:

- it arises as a result of the disability of the principal beneficiary; or
- the need to pay for property (whether purchased in part or full, or rented) is for the accommodation needs of the principal beneficiary and the property is acquired or rented from a person who is not an immediate family member of the principal beneficiary.

The need to pay rates and taxes on a property is also considered to be a reasonable accommodation need if the property:

- is owned by a Special Disability Trust; and/or

- is used for the accommodation of the beneficiary of the Special Disability Trust.

In addition, the trustee is able to:

- pay for the beneficiary's dental and medical expenses, including membership costs for private health funds;
- pay the maintenance expenses of the trust-property assets (maintenance of trust property assets means keeping the property in comparable condition and/or to a condition that it is safe for use. Maintenance does not mean replacement, unless it can be proven in writing by a specialist in the specific field that the item needs to be replaced as it cannot be fixed);
- spend up to \$11,500 in a financial year on discretionary items not related to the care and accommodation needs of the beneficiary. (This expenditure should remain compliant with the legislative requirements).

A family member is not entitled to payment for benefits provided to the trust.

## WHO CAN BE A TRUSTEE OF A SPECIAL DISABILITY TRUST?

Anyone, except the principal beneficiary, can be a trustee as long as they meet the legislative requirements. A trustee can either be an individual or a corporation, which includes accountants, solicitors, corporate trustees and state trustees. An individual, or a director of a trustee corporation, must:

- be an Australian resident;
- not have been disqualified at any time from managing corporations under the *Corporations Act 2001*;
- not have been convicted of an offence of dishonest conduct against a law of the Commonwealth, state, territory or foreign country; and
- not have been convicted of an offence under the *Social Security Act*.

It is quite common to have an accountant with expertise in managing protected estates to act as a trustee, solely or jointly with another person.

## TAXATION OF SPECIAL DISABILITY TRUSTS

From 2011/12, the income tax treatment of special disability trusts are as follows:

- unexpended income of a special disability trust is taxed at the beneficiary's personal income tax rate, rather than the highest marginal tax rate;
- a capital gains tax exemption applies for any asset donated into a special disability trust;
- a capital gains tax main residence exemption for special disability trusts;
- a capital gains tax exemption for the recipient of the beneficiary's main residence, if disposed of within two years of the beneficiary's death.

As from 18 June 2015, stamp duty does not apply to the declaration of the trust or to a transfer of interest in land to a special disability trust. An exemption application must be completed.

From the 2015/16 financial year, a special disability trust is eligible for an exemption from land tax if the land is occupied, or will be occupied within 12 months, as the principal place of residence of the principal beneficiary. An exemption declaration must also be completed.

## ESTABLISHING A SPECIAL DISABILITY TRUST

Any trust should be established in consultation with a financial planner and a solicitor. The financial planner ensures that the establishment of the trust will not compromise any Centrelink benefits received by the disabled person. Generally, all income from the trust is excluded from the income test and the trust can have over \$600,000 of assets excluded from the assets test.

The solicitor ensures that the trust complies with the requirements of the *Social Security Act 1991*. It is important to note that the trust deed must comply with the model trust deed available on the website of the Department of Social Services. **B**