



WILLS AND ESTATES

Information on Special Disability Trusts

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WHAT IS A SPECIAL DISABILITY TRUST?

A special disability trust is a trust, established under legislation passed by the Federal Government in 1996 to assist families plan for the future care and accommodation needs of a family member with a severe disability. The trust can be established during the lifetime of the person contributing assets to the trust, or in that person's will. It is established by a document called a trust deed, or in a will, and must be in a specific form.

WHAT IS A TRUST?

A trust is a legal relationship between a trustee and a beneficiary. The trustee administers the trust and looks after trust property for the benefit of the beneficiary. The beneficiary may receive benefits, such as income and capital distributions, from the trust. The trust deed is a document that sets out the terms of the trust. The trust may also have an appointor, who is not responsible for the day to day operation of the trust, but can remove and appoint the trustee.

WHAT ARE THE SOCIAL SECURITY ADVANTAGES OF A SPECIAL DISABILITY TRUST?

Under the *Social Security Act*, a means test applies to the assets and income of an individual for the purposes of assessing their entitlement to social security benefits.

Assets owned by a special disability trust up to the specified limit (currently \$563,250.00 indexed annually) are disregarded for the

application of Centrelink or the Department of Veterans Affairs (DVA) assets test.

Also, trust income or the use of money from the trust to pay for the beneficiary's reasonable care and accommodation, will not be counted in the application of the income test.

Assets in excess of the specified limit, and income derived from these, will count towards the Centrelink and DVA assets and income tests.

In addition, immediate family members who are in receipt of a social security or service pension, and who have reached pension age, can take advantage of gifting concessions and are not caught by the ordinary gifting rules when gifting to a special disability trust. The gifting concession applies to gifts from immediate family members up to \$500,000. This amount is not indexed.

HOW DOES A TRUST QUALIFY AS A SPECIAL DISABILITY TRUST?

The trust deed must meet specified

requirements to be classified as a special disability trust. For the concessions to be available the trust must adhere strictly to the rules for special disability trusts, and be established for the sole purpose of providing care and accommodation for the principal beneficiary.

This includes things such as costs of accommodation, extra care costs arising from the disability and things that are necessary because of the disability. The special disability trust must not pay for things that would ordinarily be day to day expenses not connected with the disability, and cannot be used to pay immediate family members for providing care services.

WHO CAN BE A BENEFICIARY?

Before establishing a special disability trust Centrelink or the DVA must determine that the person for whom the trust is being established is “severely disabled” as required by the special disability trust rules. This is done by requesting a beneficiary assessment from Centrelink or the DVA.

A person with a “severe disability” is someone over 16 who:-

- Has an impairment which would entitle them to a Disability Support Pension (Social Security Act) or invalidity income support supplement (Veteran’s Entitlement Act); and
- Because of their disability is not working, and is not likely to work, at relevant minimum wages; and
- Either:-
 - Lives in an institution, hostel or group home that provides care for people with disabilities, and for which funding is provided

(wholly or partly) under an agreement between the Commonwealth and the States and the Territories; or

- Has a disability that would, if the person had a sole carer, qualify the carer to receive Carer Payment or Carer Allowance.

A person under 16 may be a person with a severe disability if the person is a “profoundly disabled child” under the Social Security Act.

A person is not automatically eligible if the person has a severe disability. Centrelink or the DVA must assess each individual. A disabled person may be ineligible for other qualification reasons.

Each severely disabled beneficiary (principal beneficiary) can only have one special disability trust, and each special disability trust can only have one principal beneficiary. The principal beneficiary can however be a beneficiary of other trusts, which are not special disability trusts, in addition to the special disability trust. For example, a testamentary will trust can be used to provide for other things outside the scope of care and accommodation. However, care needs to be taken in the drafting of the other trust deeds. There is a risk that Centrelink may deem the assets in the other trust to belong to the disabled beneficiary.

WHO CAN BE A TRUSTEE?

Anyone can be a trustee of a special disability trust, as long as they meet the legislative requirements. Where the trustee is not a professional trustee, two or more individuals must act together as trustee. The trustee must invest, look after and carefully apply trust property for the benefit of the beneficiary.

The trustee can obtain professional advice to assist in administering the trust (at the expense of the trust) and must keep accounts of trust income and expenditure.

ARE THERE ANY DISADVANTAGES?

Tax consequences can flow from the operation of a special disability trust, and these need to be taken into account.

If a property is transferred to a special disability trust, capital gains tax may be payable on that transfer. Furthermore, a special disability trust which owns the beneficiary’s principal place of residence incurs capital gains tax if that residence is sold, for example, to purchase alternative accommodation.

Also, income earned by a special disability trust that is not expended in a tax year, is taxed at the top marginal rate.

QUESTIONS

If you have any questions in relation to special disability trusts, Fleming Muntz Solicitors can provide specialist advice.

DISCLAIMER

This information is of a general nature only. It is not legal advice and should not be relied upon as such. You should get specific legal advice about your circumstances before creating a special disability trust, or incorporating a special disability trust in your Will.