SPECIAL DISABILITY TRUSTS

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The Estate Specialists

What is a Special Disability Trust?

A special disability trust is a trust established under legislation passed by the Federal Government in 2006 to assist families plan for the future care and accommodation needs of a family member with a severe disability ("beneficiary"). The trust can be established during the lifetime of the person contributing assets to the trust or in that person's Will.

What are the 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 payments.

Assets owned by a special disability trust up to the specified limit (currently $609,500 indexed annually plus the value of a home occupied by the principal beneficiary) are disregarded for the application of the Centrelink or Department of Veterans Affairs (DVA) assets test.

In addition, 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.

What will be reasonable in each case will depend on the level of disability and the needs of the person concerned. What is reasonable for one person with a severe disability will not necessarily be reasonable for another. The most important consideration is what the beneficiary with disability requires by way of accommodation, and by way of care because of the disability.

Furthermore, immediate family members who are in receipt of a social security or service pension and have reached pension age, can take advantage of gifting concessions and are not affected by the ordinary gifting rules when gifting to a special disability trust.

Trust deed requirements

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 those rules and be established for the sole purpose of providing care and accommodation for the principal beneficiary.

The special disability trust must not pay for things that would ordinarily be day to day expenses (unrelated to the disability) and cannot be used to pay immediate family members for providing services.

Who can be a beneficiary?

Before commencing the trust, Centrelink or the DVA must determine that the proposed beneficiary is "severely disabled" as required by the rules.

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 service pension 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, States and Territories; or
    - has a disability that would, if the person had a sole carer, qualify the carer to receive Carer Payment or Carer Allowance.

The principal beneficiary can be a beneficiary of other trusts, which are not special disability trusts, in addition to the special disability trust. For example, a testamentary trust can be used to provide for other things outside the scope of care and accommodation.

What rights does the beneficiary have?

Beneficiaries essentially have the right to have the trust administered in accordance with its terms and the right to call trustees to account. The beneficiary can express their wishes and ask the trustee for assistance but cannot compel a trustee to act in a particular way.

Beneficiaries are entitled to require an accounting from trustees, but are generally not entitled to an account of the trustees' reasons for making a decision in one way or another. If the beneficiary believes that the trust has not been properly implemented, the beneficiary can apply to Court for assistance (although this is expensive and should be avoided wherever possible).

Otherwise, the beneficiary can expect to benefit from the assets in the trust, but the trustee may well have to balance short and long term considerations, especially in a trust which may last for many years. It may not be a wise thing to spend all of the money of the trust on something now, even though it seems a good thing to do, if this will leave the trustee without any resources in the future.

Can a person with severe disabilities have more than one special disability trust?

No. There can only be one special disability trust for each person with a severe disability, so if a special disability trust already exists, any further trust will not qualify for the special disability trust concessions.

Who can be appointed as 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.

In brief, the duties of the trustee are:

- to implement the trust in accordance with its terms;
- to consider whether to spend trust money or otherwise use the trust property for the benefit of the beneficiary, with reasonable frequency;
- to invest trust property prudently and in accordance with the directions contained in the trust;
- to avoid unnecessary expense or waste of trust property;
- to take professional advice (legal, financial, accounting, medical or other advice) if required (at the expense of the trust);
- to keep accounts of assets and liabilities and income and expenditure and be ready to account to the beneficiary if required; and
- if the trust is relevant to the income support entitlements of the beneficiary, to provide information to Centrelink or DVA as required.

What are the disadvantages

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

There are significant Capital Gains Tax consequences when transferring or selling real estate property and income earned by a special disability trust that is not expended in a tax year is taxed at the top marginal rate.

Should I set up a special disability trust or not?

At a general level, consider if the person has a 'severe' disability. A special disability trust cannot be established if they do not meet certain minimum requirements, if neither you nor the person with a severe disability rely on (or are likely to rely on) income support. There may be no benefit in setting up a special disability trust or if you want funds to be available for the person with a severe disability more broadly than for just care and accommodation, a special disability trust will not be suitable or may be only part of the arrangements you need to establish.

However, if income support does matter to you or the person with a severe disability and your likely funds are large enough to affect the income support entitlements of that person then a special disability trust may help significantly in planning for the future of your family member with a severe disability.

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