



# Protective Testamentary Trusts

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A Client can establish a Protective Testamentary Trust for the Beneficiaries of an Estate. A Protective Testamentary Trust does not possess the flexibility of a Discretionary Family Testamentary Trust.

A Protective Testamentary Trust is a Trust that contains additional restrictions regarding the exercise of the Trustee's discretion to distribute income and capital. It is not as limited as a fixed Trust where the Trustee has no discretion.

A Protective Testamentary Trust is most commonly established where the Beneficiary has special needs.

What follows is an overview of Protective Testamentary Trusts in respect to vulnerable Beneficiaries, disabled Beneficiaries and special disability Beneficiaries.

## **Vulnerable Beneficiary**

A Client may establish a Protective Testamentary Trust where one of the intended Beneficiaries of the Estate has displayed an inability to appropriately manage money. Such a Beneficiary is often referred to as a "Vulnerable Beneficiary" or a "Spendthrift Beneficiary".

In this situation, the Client's fear is that a share of the Estate distributed directly to the Vulnerable or Spendthrift Beneficiary will be dissipated.

In this event, the Client may establish a Protective Testamentary Trust that allows a separate Trustee to manage the Beneficiaries entitlement. This ensures that the

Beneficiary does not have control over the entitlement and is therefore unable to waste the assets that form part of the Protective Testamentary Trust.

## **Disabled Beneficiary**

A Protective Testamentary Trust may also be established for a Beneficiary who does not have the capacity to administer a share of an Estate due to an intellectual disability or physical injury. It may therefore be unwise to put such a Beneficiary in control of the Estate proceeds. Not only would the Beneficiary be unable to make necessary decisions regarding investment and expenditure of the assets of the Protective Testamentary Trust, but the Beneficiary may also fall victim to pressure from other individuals who may seek to use a Protective Testamentary Trust assets for their own purposes.

## **Special Disability Beneficiary**

Protective Testamentary Trusts can be established for Special Disability Beneficiaries.

Amendments to the *Social Security Act 1991* contained in Pt 3.18A (The *Social Security Act*) and mirror amendments to division 11B of the *Veterans Entitlement Act 1986* came into effect on 20 September 2006. These amendments provide for the creation of a new form of Trust known as a "Special Disability Trust".

A Special Disability Trust is a Trust established solely for succession planning for the future care and accommodation needs of a person with a severe disability.



A Special Disability Trust can be created by Deed or by Will. However, only one Trust can be created for any one disabled Beneficiary.

A Special Disability Trust is distinguishable from other types of Protective Testamentary Trusts by the purpose to which the income and capital of the Trust can be applied.

### **Features of a Special Disability Trust**

A Trust is A Special Disability Trust must comply with Pt 3.18A of the *Social Security Act* are complied with. In summary the requirements are as follows.

#### **Beneficiary Requirements**

The Special Disability Trust must have only one principal Beneficiary. This Beneficiary must satisfy the impairment or disability conditions set out in the *Social Security Act*.

A person with a severe disability is someone aged 16 or over who:

- Has an impairment that would qualify a person for a disability support pension (under the *Social Security Act*) or an invalidity service pension or invalidity income support supplement under the *Veterans Entitlement Act*;
- As a result of the disability, the Beneficiary is not working and has no likelihood of working for a wage at or above the relevant minimum wage, and who
- Either:
  - Lives in an institution, hostel or group home in which care is provided for people with disabilities and for which funding is provided (wholly or partly) under an agreement between the Commonwealth, the States and Territories, or
  - Has a disability that would, if a person has a

sole carer for carer payment or carer allowance.

- If the Beneficiary is under the age of 16, the Beneficiary must qualify as a profoundly disabled child under the *Social Security Act*.

#### **Sole Purpose Requirement**

The sole purpose of a Special Disability Trust must be to meet the reasonable care and accommodation needs of the Beneficiary.

A Special Disability Trust can only pay for:

- The cost of accommodation for the person with a severe disability, and
- Extra care costs arising from the disability, and
- Incidental expenses such as fees for professional Trustees, investment and accounting expenses.

Apart from accommodation, the Special Disability Trust can only be used to pay for items that are necessary because of the disability. A Special Disability Trust cannot pay for things that a person without a disability would ordinarily buy or be used to meet ordinary day to day expenses.

Guidelines have been developed to assist in determining what is regarded as reasonable care and accommodation. Examples of what amounts to reasonable care needs may include:

- Professional care and case management;
- Therapy if approved;
- Specialised food specified by a doctor; and
- Mobility aids required.

The regulations also provide examples of what does not amount to reasonable care needs. The examples include:

- Food other than food specified by a doctor as



essential for the principal Beneficiary's health;

- Day to day toiletries such as toothpaste, soap and shampoo;
- Recreation and leisure activities;
- Medical needs that are not required for, or because of, the principal Beneficiary's disability.

The regulations also set out guidelines for what amounts to reasonable accommodation needs. Accommodation needs must arise as a direct result of the disability.

#### **Trust Property Requirements**

There are prohibitions on what assets can be transferred into a specified Disability Trust. They are:

- Assets contributed by the principal Beneficiary of the Trust or the principal Beneficiary's partner unless the asset is all or part of a Bequest or a Superannuation Death Benefit that has received no more than three years before the transfer to the Trust occurs.
- Compensation proceeds received by or on behalf of the principal Beneficiary.

#### **Income of Special Disability Trust**

In relation to the income generated by the Trust, it is not attributed to any individual under the *Social Security Act* and any amount that the principal Beneficiary receives is not income of the Beneficiary for the purposes of the *Social Security Act*.

#### **Assets of a Special Disability trust**

For the purposes of the *Social Security Act*, the assets of the principal Beneficiary of the Trust up to the assets value limit of the Trust.

The limit from 1 July, 2007 is \$516,500.00.

For the purposes of determining the asset value limit, the

value of any right or interest of the Trust is a principal home of the principal Beneficiary is disregarded.

#### **Transfers and Deprivation Rule**

The *Social Security Act* contains provisions that modify the normal deprivation rules on a disposal of assets by an aged pensioner. What this means is that a family member of a principal Beneficiary can gift up to \$516,500 to a Special Disability Trust and the amount gifted is not included in the value of the assets on which the family member is assessed for Centrelink purposes.

The *Social Security Act* also sets out other matters including the following:

- The treatment of the Trust at cessation;
- Trustee requirements including recording and auditing expectations;
- Trustee qualifications and appointment

#### **Control of Protective Testamentary Trust**

The control of a Protective Testamentary Trust is a matter to which the Client must give careful consideration.

The Trustee of the Protective Testamentary Trust should be someone who is sympathetic to the needs of the Beneficiary of the Trust. The Trustee has onerous responsibilities, including making all decisions regarding the investment and expenditure of the fund. Such expenditure must be undertaken for the ongoing maintenance and benefit of the Beneficiary.

#### **Selecting the Trustee**

In selecting the Trustee, the Client should exercise care to ensure that a conflict of interest does not occur. This typically arises where another Beneficiary of the Estate is placed in control of the funds. If the Trustee is a person who can share in the income of the



Trust Fund upon the death of the Beneficiary, then the Trustee may be reluctant to expend the money on the Beneficiary in an attempt to ensure a healthy balance in the Trust Fund when the Beneficiary dies.

In such circumstances the Client should consider appointing a committee of Trustees or an independent Trustee to manage the Protective Testamentary Trust.

#### **Application of Trust Fund**

Guidance on how a Protective Testamentary Trust Fund is to be administered should be included in the Will. For example, the Will may provide for the income of the fund to be applied for:

- The provision of suitable accommodation for the Beneficiary, or
- The maintenance, support, education or advancement of the Beneficiary.

The Will should also deal with any surplus income not expended in any given year in respect to a Protective Testamentary Trust. Such income should either be:

- Allocated directly to the Beneficiary;
- Accumulated as an addition to the fund; or
- Allocated to the other Beneficiaries of the Trust.

Where the surplus income is to be paid to the other Beneficiaries under the Will,

the terms of the Protective Testamentary Trust should make it clear that the interests of the special needs Beneficiary should take precedence over any other interest or expectancy as to income from the Trust Fund.

As well Beneficiary's entitlement to a means tested disability support pension should be considered when drafting a Protective Testamentary Trust.

#### **Death of Beneficiary**

If a Trust is established for the benefit of a Special Needs Beneficiary, the Trust Fund may not form part of the Beneficiary's personal Estate in which case it cannot be Willed by him/her. In such situations the Client must make provisions for the distribution of income and capital upon the fund upon the death of a Beneficiary. This requires careful planning.

If a Special Needs Beneficiary is likely to have children of his/her own, then it would be unusual to provide for such children. If it is unlikely that there will be any children, an alternative distribution should be included.

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