



# Family Provision Planning and Special Needs Funding

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Estate Planning and the provisioning for family security is of a major concern for most families. The preservation of the Estate to ensure enough wealth of the deceased is transferred to the family to be managed for their future Advancement, Maintenance and Education of family Beneficiaries can be difficult at the best of times. Nevertheless in circumstances of a disabled child the need to correctly fund, transfer and preserve entitlements become even more difficult.

In September 2006, the Federal government introduced Special Disability Trusts, to enable parents and immediate family members to gift money into Trust for the support of a disabled child without triggering social security deprivation rules. However, gifts are limited to a total of \$516,500 in 2008.

Nevertheless in some respects, complexity and rigid conditions have made the Special Disability Trust of limited utility. Hence the Federal Government has recently been provided with a report by a parliamentary standing committee containing recommendations for improvements.

What follows is an overview of Family Provision Planning for a child with a disability in the context of Estate Planning.

## **Special Disability Trusts - Overview**

By way of background to receive the special treatment; a Special Disability Trust must satisfy

specific rules regarding the following:

1. Disabled Beneficiary;
2. Trust Purpose;
3. Trust Deed and Trustee;
4. Trust Property;
5. Reporting and Audit; and
6. Residual Beneficiary.

## **Special Disability Trusts Estate Planning and Estate Liquidity**

Correctly structured Special Disability Trusts can prevent Estate Shrinkage by minimising the impact of taxation and maximising social security requirements.

In respect to Estate Planning, the gifting of assets during a person's lifetime to a correctly structured Special Disability Trust does not form part of a person's Estate. This may create peace of mind that the disabled child is provided for after death. During the person's lifetime the person transferring capital derives the benefit of protecting any social security entitlements for both themselves as well as the severely disabled family member.

A Special Disability Trust may also be beneficial for the surviving spouse who may be able to maximise social security entitlements as these assets will not be inherited.

Furthermore the use of a Special Disability Trust may be an important consideration if there



are other children who may contest the Will.

Consideration should also be given to the parent or family member gifting assets as it will not trigger deprivation (within the requirements). This may result in an increase in that person's social security entitlement.

From a taxation perspective consideration should be given to the costs of transferring assets into a Special Disability Trust which may trigger Capital Gains Tax or Stamp Duty.

Given the issues concerning Estate Shrinkage involving tax and social security, consideration should be given to providing funds to the Special Disability Trust through Life Insurance.

#### **Funding Special Disability Trusts**

Special Disability Trusts can be triggered to take effect on Death of a Donor - either inside the Estate or outside the Estate.

##### **Through Life Insurance**

If established outside the Estate Life Insurance; on the insured should be directed outside of the Estate; i.e. to the Trustee.

If established within the Estate Life Insurance; on the insured should be owned by the insured. The proceeds payable should not be directed to pay any debts or liabilities of the Estate. But note that such proceeds can be utilised to pay outstanding taxes and funeral expenses. Hence care should be taken to ensure that if payment is to be made through the Estate the Life Insurance proceeds are adequate for the Special Disability Trust and debts such as outstanding taxes and funeral expenses of the Estate.

##### **Through Superannuation**

Special Disability Trusts can also be funded on death through

Superannuation Death Proceeds - either inside the Estate or outside the Estate.

If established outside the Estate the nominated Beneficiary should be the Disabled Beneficiary. The Disabled Beneficiary should also meet the Dependant requirements for taxation purposes.

If payment of death proceeds is to be made from superannuation to the Estate care should be taken to ensure that the funds are adequate for meeting all liabilities of the Estate (not just funeral expenses and outstanding taxes).

#### **Special Disability Trusts and Social Security**

Special Disability Trusts should be considered from a social security perspective. What follows is an outline of the treatment of income and assets from a Special Disability Trust for the Principal Beneficiary, being a Disabled Beneficiary.

##### **Income test assessment**

Any income derived by a Special Disability Trust is not treated as income to the Principal Beneficiary for social security purposes.

Income distributed (i.e. received) by the Principal Beneficiary is also not income for social security purposes. Income is any amount from the Trust whether capital or income.

This concessional treatment applies to Trust Distributions only if the distribution is used solely for the care and accommodation of the Principal Beneficiary.

##### **Assets test assessment**

The assets of the Special Disability Trust are not assessable assets of the Principal Beneficiary up to the allowable threshold (\$516,500 until 1 July 2008) and is indexed to CPI. The value of assets above



the allowable threshold is an assessable asset to the Principal Beneficiary. However, if a Beneficiary's principal residence is held in the Special Disability Trust, the value of the residence is disregarded when determining the value of assets within the Special Disability Trust. The exclusion of the principal residence provides the same treatment if the house was held outside of the Trust.

### **Giftling Rules Exemptions Applying to Transfers to Special Disability Trusts**

Concessional treatment applies to gifts made to a Special Disability Trust.

If an immediate family member transfers an asset to a Special Disability Trust this gift is not treated as a disposal under the gifting rules if:

- the person is an immediate family member of the Principal Beneficiary of the Trust, and
- the person (or person's partner) is
  - receiving a social security pension and has reached age pension age, or
  - receiving a service pension and has reached service pension age, or
  - is receiving income support supplement and has reached service pension age (regardless of whether the person is a veteran or not),
- the person receives no consideration and is not entitled to receive consideration,
- the transfer is unconditional,
- the value of the transfer does not exceed the concessional limit. If a previous exempt transfer has been made, the value of previous transfers and the current transfer

cannot exceed the concessional limit.

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

- receives a social security pension and has reached age 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.

If more than one immediate family member makes a gift to the Special Disability Trust, the concession first applies to those family members who are receiving a qualifying payment at the time of their gift.

### **Assessable Assets in a Deceased Estate**

A person's interest in a Deceased Estate is not assessable until they are entitled to their benefit. Once entitlement is established, the assets are assessable to the Beneficiary even if the assets have not yet been distributed. Entitlement can be determined once Probate has been granted, debts are paid and the Executor is in a position to distribute to Beneficiaries. The assessment for social security purposes is from the date of entitlement not the date received. A social security recipient should advise Centrelink if they are a Beneficiary of an Estate and then advise when they become entitled to an amount in the Estate.

Centrelink generally allows 12 months for the Executor to finalise the Estate. After 12 months, Centrelink will consider if there are any reasonable circumstances why a Beneficiary cannot receive their entitlement (i.e. is there an unnecessary



delay). Centrelink will consider each case on its own merits.

Assets and income of a Deceased Estate continue to be exempt until the Estate can be finalised (i.e. once a person's entitlement is established). If an Estate can be finalised but the Executor continues to manage the Estate (i.e. does not pay entitlements to Beneficiaries), the Estate will be subject to the control test. This could mean a social security recipient has all assets in the Estate attributed to them rather than just their entitlement.

### **Special Disability Trusts and Taxation**

Ordinary taxation rules apply to Special Disability Trusts. Specific consideration must be given to:

- cost of transferring assets into the Trust (e.g. Stamp Duty and Capital Gains Tax)
- the taxation of distributions received by the Principal Beneficiary, and
- the taxation of retaining distributions within the Trust.

### **Beneficiary of a Special Disability Trust**

The Trust must have a single Principal Beneficiary who is the severely disabled family member. The Trust may have residual Beneficiaries who have entitlement upon the death of the Principal Beneficiary.

As there can only be a single Principal Beneficiary, separate Trusts must be established for each severely disabled family member. This will ensure the concessional treatment will apply to the Trust (if all requirements are satisfied). That is only one Special Disability Trust can be established for an individual.

A Trust ceases to be a Special Disability Trust upon the death of the Principal Beneficiary.

The Principal Beneficiary must have impairment or disability conditions as specified in the legislation to allow the Special Disability Trust and transfers (gifts) to receive concessional treatment. The impairment or disability of the Principal Beneficiary depends on whether that person is 16 years of age or older, or under age 16.

### **Principal Beneficiary is 16 years or older**

If the Principal Beneficiary is 16 years of age or older, the Beneficiary must:

- have an impairment that would qualify the person for disability support pension, OR
- be receiving an invalidity service pension from DVA, OR
- be receiving income support supplement granted under section 45A(1)(b)(iii) of the *Veterans Entitlement Act 1986* (i.e. permanently incapacitated),

AND

- have a disability that would qualify a carer to receive carer payment or carer allowance, OR
- be living in an institution, hostel or group home in which care is provided for people with disabilities. This facility must have funding provided (wholly or partly) under an agreement with the Commonwealth, States or Territories, nominated by the Secretary,

AND

- have a disability as a result of which he or she is not working and there is no likelihood of working for a wage that is at or above the relevant minimum wage.



### **Beneficiary is under 16 years of age**

If the Principal Beneficiary is under 16 years of age, the Beneficiary must be a “profoundly disabled child” as defined under s 197 of the *Social Security Act 1991*.

The Principal Beneficiary must satisfy residency requirements at the time the Trust is established for the concessions to be received. The portability rules would apply once the Trust is deemed a Special Disability Trust.

### **Purpose of a Special Disability Trust**

A Special Disability Trust must be established for the sole purpose of providing for the current and future care and accommodation needs of that Principal Beneficiary. This purpose must apply during the lifetime of the Principal Beneficiary. FaCSIA has released guidelines (*Social Security (Special Disability Trust) (FaCSIA) Guidelines 2006 (dated 18 September 2006)*) which specify what is considered reasonable care and accommodation.

### **Reasonable Care**

Care is considered Reasonable Care if:

1. the need arises as a direct result of the disability of the Principal Beneficiary, and
2. the need is for the primary benefit of the Principal Beneficiary, and
3. the need is met in Australia.

FaCSIA indicates examples of reasonable care as follows:

- professional care and case management required for, or because of, the Principal Beneficiary’s disability,
- therapy (including alternative therapy) that is approved in

writing, by a medical practitioner as required for, or because of, the Principal Beneficiary’s disability,

- specialised food specified by a doctor as essential for the Principal Beneficiary’s health,
- mobility aids, prostheses and positioning aids required for, or because of, the Principal Beneficiary’s disability,
- sleeping and sensory aids required for, or because of, the Principal Beneficiary’s disability,
- personal care aids required for, or because of, the Principal Beneficiary’s disability,
- pressure care aids required for, or because of, the Principal Beneficiary’s disability,
- continence aids required for, or because of, the Principal Beneficiary’s disability,
- communication devices (including computers) that are essential, or that have been modified, because of the Principal Beneficiary’s disability.

Further examples of what is and what is not reasonable care can be found in the Guidelines on the FaCSIA website.

### **Reasonable accommodation**

Accommodation is considered reasonable if:

- the need arises as a direct result of the disability of the Principal Beneficiary, or
- the need is to pay for a property or interest in a property (either acquired or rented) for the accommodation of the Principal Beneficiary; however, it cannot be acquired or rented from an immediate family member, or



- the need is to pay for rates and taxes on a property that is owned by the Special Disability Trust and is used for the accommodation of the Principal Beneficiary of the Special Disability Trust.

FaCSIA indicates examples of reasonable accommodation as follows:

- modification to the Principal Beneficiary's place of residence arising from his or her disability,
- maintenance of the Principal Beneficiary's place of residence that would not have been required if the Principal Beneficiary did not have the disability,
- payment for the purchase of the Principal Beneficiary's place of residence if the payment is not made to an immediate family member of the Principal Beneficiary,
- payment of rental for the Principal Beneficiary's place of residence if the payment is not made to an immediate family member of the Principal Beneficiary,
- payment of accommodation bond for the Principal Beneficiary if the payment is not made to an immediate family member of the Principal Beneficiary.

Further examples of what is and what is not reasonable accommodation can be found in the Guidelines on the FaCSIA website.

#### **Trust Deed and Trustee Requirements of a Special Disability Trust**

The legislation allows determinations to be made relating to the Trust Deed of a Special Disability Trust. This can include:

- the form of the Trust Deed,
- provisions to be included in the Trust Deed,

- provisions which cannot be included in the Trust Deed.

FaCSIA has released Social Security (*Special Disability Trust – Trust Deed, Reporting and Audit Requirements*) (FaCSIA) *Determination 2006*; which provides further details on these requirements.

#### **Trustee of a Special Disability Trust**

The Trustee of the Special Disability Trust must be an Australian resident and:

- not have been convicted for:
  - an offence of dishonest conduct against a law of the Commonwealth, State, Territory or a foreign country,
  - an offence arising under the *Social Security Administration Act* or *Veterans' Entitlement Act*,
- not have been disqualified at any time from managing a Corporation under the *Corporations Act 2001*.

The Trust can have a corporate Trustee (however, all directors must satisfy the above criteria) or at least two individual Trustees.

The Trust must be established in Australia.

#### **Trust Property Requirements of a Special Disability Trust**

Requirements relating to the source and use of capital have to be met in order to receive the concessions extended to Special Disability Trusts.

The Principal Beneficiary or their partner cannot transfer assets (including compensation payments made to or on behalf of the disabled person) to a Special Disability Trust unless:



- the transferred asset is all or part of a Bequest or a Superannuation Death Benefit, and
- the Bequest or Superannuation Death Benefit was received within the last three years prior to the transfer.

The Trust cannot pay an immediate family member, or child, of the Principal Beneficiary for care services or services for the repair or maintenance of the Beneficiary's accommodation. Any paid care must be provided by an arm's-length employee of the Trust.

The Trust cannot purchase or lease property from an immediate family member, or a child of the Principal Beneficiary, even if the property is used for the Beneficiary's accommodation.

#### **Reporting and Audit Requirements of a Special Disability Trust**

The Trustees of a Special Disability Trust must provide ongoing reporting to Centrelink (or DVA). The Trustees must provide financial statements on

or before 31 March each year outlining details of the Trust ending June 30 the previous year. A Trustee may receive a request to conduct an audit. This request must be undertaken within a reasonable time and the audit carried out by an independent auditor. The request for an audit can be made by the Beneficiary, an immediate family member, legal guardian of the Beneficiary or Centrelink/DVA.

#### **Conclusion**

For more information about how ili can assist you to adopt skills and implementation tools in respect to Estate Preservation Planning and Business Succession Strategies please visit our website [www.ili.com.au](http://www.ili.com.au).

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