



Australian Government  
Department of Social Services

# Special Disability Trusts Getting things sorted

Improving the lives of Australians

November 2014



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## Introduction

### What is this booklet about?

Families of people with disability, especially parents, often ask ‘What will happen when I can no longer provide care?’ It can be hard looking after the interests of a person with disability at any time, but making arrangements for the future can be even harder.

This booklet and the *Planning for the Future: People with Disability* booklet are intended to make things simpler by explaining the options. This booklet deals briefly with planning for the future taking account of disability issues generally and how families can use trusts to help look after family members with disability. It also explains how income support (social security and veterans’ entitlement) concessions for **Special Disability Trusts** can help in providing for family members with severe disability. **Note:** ‘Special’ refers to the social security and tax treatment of the trust and is not a reference to the beneficiary’s disability.

### Before using this booklet

Whether the information about income support in this booklet will apply to you, or to a person with disability, depends on eligibility for income support from the Department of Human Services or the Department of Veterans’ Affairs. Before establishing a Special Disability Trust, you should verify with the [Department of Human Services](#) or the [Department of Veterans’ Affairs](#) that the person for whom the trust is being established meets the definition of ‘severe disability’ under Section 1209M of the *Social Security Act 1991*. Where the person with disability does not meet the definition of ‘severe disability’, a Special Disability Trust cannot be established.

This booklet builds on the information in *Planning for the Future: People with Disability*. You should read this booklet first as it will:

- examine options in relation to estate planning and providing for the future of a person with high support needs, including how to begin the process of planning for the future and how to implement that plan;
- explore issues that may arise both for individuals and families when deciding how to put the plan into action, including how to get legal and financial advice;
- provide information on how guardianship, accommodation and care options affect what you can do; and
- identify supports and contacts for obtaining further information.

**This booklet only gives general information.** How this affects you depends on your own situation.

Which parts of it are most applicable or important will differ substantially from family to family. Every person with severe disability has different levels of ability which should be taken into account. The resources available, and the opinions of family members and of the person with the disability, will differ from case to case.

You should not copy the [Special Disability Trust, Model Trust Deed](#) without getting specialist legal, accounting or financial planning advice. The use of a Special Disability Trust should be part of a well-considered estate plan for the family, and particularly for the person with severe disability.

### Outline of this booklet

Section 1, **The who’s who and what’s what of trusts and wills**, looks at some of the expressions used when talking about trusts and wills, and what they mean. It also briefly looks at how a trust operates, from the point of view of the trustee and of the person with the disability, and some of the legal and accounting requirements, reporting obligations and tax issues connected to trusts.

Section 2, **Special Disability Trusts and social security**, deals with how the income test and the asset test (which apply where there are entitlements to social security or veterans’ entitlements payments) apply to trusts, and details the concessions arising from the Government’s initiative on [Special Disability Trusts](#).

### **Who should read this booklet?**

Because the issues discussed in this booklet are most often relevant to parents of a person with severe disability, the 'you' referred to in the booklet is primarily a parent. However, the same principles apply to other family members or friends considering providing benefits to a person with severe disability.

### **Questions and answers**

The questions asked in this book are the questions parents and other family members most often ask when talking about estate planning where one of the people involved is with disability. A comprehensive list of [Questions and Answers](#) regarding Special Disability Trusts can be found on the Department of Social Services website.

### **'Disability' and 'severe disability'**

Because the income support concessions relate to providing for people with severe disability as defined in this context (see page 15), this term occurs often in this booklet.

However, even where the disability is not **severe** in terms of the definition in legislation, a lot of the same issues have to be considered by parents or others considering setting up a trust, or a will, as estate planning methods.

Some people with disability are quite capable of handling their own financial affairs, care and accommodation without assistance, so there may not be any need to go into the things discussed in this booklet.

### **Income support, social security and veterans' entitlements**

When discussing the concessions, this booklet sometimes mentions 'income support'. The rules apply equally to benefits administered by the Department of Veterans' Affairs and by the Department of Human Services. However, to simplify the explanations, the booklet mainly talks about income support, using that expression to cover both social security administered by the Department of Human Services and veterans' entitlements administered by the Department of Veterans' Affairs.

### **'Property' and 'money' and 'assets'**

In this booklet, the property of people or trusts will be referred to as their 'assets' or 'property'. 'Property' used in this way does not mean only land or real estate, it includes money, shares or any other type of asset.

### **Trusts and wills: making arrangements while you are alive or after you die**

This booklet focuses on trusts because the income support concessions work through a trust mechanism. You can set up a trust while you are alive, or you can set up a trust through your will, to take effect after you die. The legal rules which apply, and the considerations you need to take into account, are the same whether the trust is set up while you are alive or through your will.

This is explained in more detail in the [Planning for the Future: People with Disability](#) booklet.

## Section 1 – The who's who and what's what of trusts and wills

A trust is a legal relationship between a **trustee**, who looks after or administers the trust, and a **beneficiary**, the person who benefits from the trust. The nature of a trust is a legal obligation on the trustee to look after the trust property, and invest it and use it wisely and carefully for the benefit of the beneficiary. The beneficiary has the right to receive benefits from the trust as required by the terms of the trust and some rights to information about the trust and how the trustee is operating it.

The terms of the sort of trust being discussed here would usually be set out in a document such as a **trust deed** or a **will**.

A **trust deed** may be simple or complex, depending on what is needed. It is a legal document which sets out:

- who is to be a trustee;
- the person or people who are to be the beneficiaries;
- when and how the trustee is to provide benefits to the beneficiary;
- what things the trustee is to take into account; and
- what other powers and duties the trustee has.

The person who sets up a trust by a deed is usually called the **settlor**. For tax reasons, the settlor is often an unrelated party or a more distant family member who will not be a beneficiary and who has nothing else to do with the trust.

In trusts for the benefit of a person with severe disability, that person may be called **the principal beneficiary** or **the special** or **prime beneficiary** or **beneficiary**. Other beneficiaries, who are entitled to share what is left after the person with severe disability has died or no longer needs help from the trust, are often called **the residuary beneficiaries**.

A trust deed may also name an **appointor**, a person who is separate from the trustee and who can appoint new trustees or beneficiaries, or make changes to the terms of the trust, and who therefore often has significant control over the trust. The appointor will often be a parent or other close relative of the person with severe disability, who has contributed property to the trust.

The property contributed to the trust is often called the **capital** and the trust earns **income** on that capital: rent on real estate, interest on money in the bank, dividends on shares, and so on.

A **discretionary trust** gives the trustee the power to decide to whom to pay a benefit out of a range of people, and how much to give to them, if anything.

A **testamentary trust** means any trust set up under a will. However, people often use this term to refer more specifically to particular types of trusts under wills which may have tax planning advantages.

The person making a will is called the **testator** (this covers men and women although a woman making a will is sometimes called the **testatrix**). A will appoints an **executor** (sometimes said to be an **executrix** if a woman), or a number of executors, to put the will into effect after the testator dies. If the will creates a trust, it will also appoint a trustee, who may be the same person as the executor, or may be different.

The property owned by the testator at the time of death is the testator's **estate**. The people who share in the estate under the will are called the **beneficiaries**.

### What do the trustees have to do?

The essential relationship involved in a trust is the responsibility of the trustee to act in the interests of the beneficiary in accordance with the terms of the trust.

If the trust is discretionary, it is up to the trustee to decide whether to do anything and, if so, what to do, and it is not generally possible to compel the trustee to act in a particular way. You can control this to some extent through provisions in the trust deed or will. Also see the *Planning for the Future: People with Disability* booklet.

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 the Department of Human Services or the Department of Veterans' Affairs as required.

### What are the rights of the trustees?

Trustees have the right:

- to have their reasonable trust-related expenses paid from the trust;
- to ask the Supreme Court to give advice and directions, if they have a serious doubt as to what they are entitled to do: for example, if there is ambiguity in the way the trust deed is expressed, or if difficult choices arise which might result in a breach of trust, or if the trust seems to require something unusual or odd;
- to recompense from the trust for the work they do, if the trust deed or will provides for pay for the trustee (but not in a Special Disability Trust if the trustee is an immediate family member: see page 15). It may be very reasonable to provide for payment to trustees, because the trustees have a lot of responsibility and may have to spend a lot of time and effort deciding what to do in the best interests of the person with severe disability; and
- to appoint additional or replacement trustees to take over the role of trusteeship if the original trustees cannot continue.

Many of the rights and obligations of trustees are regulated by state-based legislation.

### 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 his or her wishes and ask the trustee for assistance but cannot compel a trustee to act in a particular way unless the trust deed or the will allows this.

Beneficiaries are entitled to require an accounting from the 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 the court for assistance (although this is always expensive and should be avoided wherever possible).

A beneficiary with disability may need help to do this.

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.

### Example

David has a physical disability which is expected to become more severe as he gets older. He has a trust of which his brother Michael is the sole trustee. The trust owns the house in which David lives, and David wants to modernise part of the house.

Michael agrees modernising the house would be a good thing because it would make the house more attractive and comfortable. However, he is concerned that if money is spent on renovations now, there will not be sufficient money available later when they might need to modify the house substantially so David can continue living there.

Michael decides, as trustee, not to renovate, and this is within his powers as trustee as set out in the trust deed, and is consistent with the principle of acting in the best interests of the beneficiary.

### How are trusts taxed?

As a trust is treated as a separate legal structure for tax purposes, it has its own tax responsibilities. Trustees have an obligation to submit tax returns and pay tax as required. The trustee is entitled to pay tax from the trust assets. Sometimes it is the trust which will have to pay tax on income. Sometimes tax is payable by the beneficiary who receives income. **These issues are complex, and will not be covered here. If you need advice on taxation issues, seek professional advice.**

Trusts are not entitled to the tax-free threshold available to individuals, and higher rates of tax (the maximum personal tax rate) may apply to income retained by trusts (that is, income not distributed to or used for a beneficiary). However, a trust created by a will which is a '**genuine testamentary trust of a traditional kind**' may be subject to the ordinary personal rates of tax.

**This booklet does not go into the pros and cons of different structures for tax purposes. That is a matter for specialist legal and financial advice.**

Special Disability Trusts have beneficial taxation measures:

- the unexpended income of a Special Disability Trust is taxed at the beneficiary's personal income tax rate, rather than the highest marginal tax rate;
- provide a capital gains tax exemption for any asset donated to a Special Disability Trust;
- provide 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; and
- ensure equivalent taxation treatment amongst Special Disability Trusts established under different Acts.

Special Disability Trusts can also be set up through your will. This may involve costs, which you should consider carefully before setting up the trust.

### Are there other costs of maintaining a trust?

If the trustee uses an accountant to prepare accounts and tax returns, there will be fees for that work. If the trustee is a company, there will also be legal and accounting fees associated with setting up and maintaining the company.

These sorts of expenses, and the legal and other fees of setting up trusts, are something you should consider with your professional advisers before deciding whether to set up a trust now, or through your will, or at all; what assets to place in trust; and when to do so.

**Note:** A settlor cannot be a trustee or have anything to do with the trust.

Further detailed information on trusts is contained in the *[Planning for the Future: People with Disability](#)* booklet.



## Section 2 – Special Disability Trusts and social security: general rules and concessions

### General

Australia's social security system is based on need and is designed to be a safety net for people who are unable to support themselves. To ensure the system provides help where it is most needed, there is a means test which has two components: the income test and assets test.

The amount of income support payable to a recipient is calculated under both the income and assets tests. The test that results in the lower rate of income support is the one that is applied.

Under the means test, there are special rules for the treatment of gifts made to third parties and private trusts and companies.

**These rules can be complex, depending on your circumstances. You should get financial and legal advice about how the rules may affect you or any trust you have or intend to set up.**

For more information, including payment rates, please contact your nearest Centrelink Customer Service Centre or Department of Veterans' Affairs office. This information can also be found online at [Department of Human Services](#) and [Department of Veterans' Affairs](#).

### Concessions for Special Disability Trusts

Legislation concerning Special Disability Trusts is intended to reduce the impact of the rules applying to trusts and encourage families who wish to make their own arrangements for family members with severe disability. The general thrust of the Special Disability Trust legislation is to create exceptions to the ordinary means test rules applying to trusts for a person with severe disability.

These are potentially significant concessions where family members and people with severe disability rely (or may rely in the near future) on social security or veterans' affairs entitlements, or would potentially qualify for income support if they transferred funds to a Special Disability Trust.

However, for these concessions to be available, the trust **must** adhere strictly to the rules for Special Disability Trusts, and the rest of this section explains how those rules operate. Most importantly, the trust must be established for the primary and other purposes outlined in legislation which includes providing **care and accommodation** for a person with severe disability. The initial step should be to verify with the Department of Human Services or the Department of Veterans' Affairs that the person for whom the trust is being established meets the definition of 'severe disability' under section 1209M of the *Social Security Act 1991* before establishing a Special Disability Trust.

### Concessions for people with severe disability

#### Income test

- Income from the assets of a Special Disability Trust will not be counted for the application of the income test to the beneficiary of the trust.
- The use of money from the trust to pay for care, accommodation, maintenance of trust assets and discretionary spending for the person with severe disability will not be counted as that person's income for income support purposes.

#### Assets test

- If a person with severe disability is the beneficiary of a Special Disability Trust, the assessable assets of that trust up to \$626,000 (as at 1 July 2014 indexed annually) will be disregarded for the application of the assets test. This means that it will not affect the income support entitlements of the person with severe disability. For the meaning of 'assessable assets', see general assets test rules at the [Department of Human Services](#) and the [Department of Veterans' Affairs](#) or contact your nearest Centrelink Customer Service Centre or a Department of Veterans' Affairs office.

- As the principal home of the person with severe disability would also be disregarded, this means that the Special Disability Trust could have assessable assets of up to **\$626,000 (as at 1 July 2014) plus the home in which the person with severe disability lives** before the excess assets are included in the beneficiary's assessable assets.

#### Example

A Special Disability Trust has \$800,000 in assets plus a home for the beneficiary with severe disability Carol, as at 1 January 2014. The assets to which the assets test applies will be the 'excess' above the assets test concession (which is \$626,000 as at 1 July 2014): that is, \$174,000 after the home and \$626,000 assets test concession are disregarded. Carol is assessed as a single homeowner for the purposes of the means test. Depending on Carol's other assessable income and assets, Carol's income support payments may be reduced.

- The assets test concession for Special Disability Trusts, initially set at \$500,000 on 20 September 2006 and indexed annually, applies at any point in time, so if assets are spent and the trust is topped up, the concession still applies up to the limit. As at 1 July 2014 the asset test concession is \$626,000.
- As the assets test concession is indexed, the amount the trust can hold without affecting the income support payments of a person with severe disability will change annually.

#### Example

A Special Disability Trust has \$500,000 at 20 September 2006. On 1 July 2007, the assets test concession is increased by indexation to \$516,500. The trust has earned income of \$20,000 and spent \$15,000, so the assets held in the trust on 1 July 2007 are worth \$505,000. Because the assessable assets are less than the \$516,500 indexed limit, none of the trust's assets are assessed under the assets test.

### Concessions for immediate family members of a person with severe disability

#### Gifting concessions

- Anyone can give to the Special Disability Trust. However, the principal beneficiary that is the person with disability and their partner can only do so 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.

- 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 gifting concession is only available to an immediate family member 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.
- 'Immediate family members' of the person with severe disability are:
  - parents (including adoptive and step parents);
  - legal guardians of a person with severe disability who is less than 18 years old, and people who were legal guardians when the person with severe disability was less than 18 years old;
  - grandparents; and
  - brothers and sisters (including adoptive and step brothers and sisters and half brothers and sisters).

The gifting concession applies to gifts up to \$500,000 per trust (which is **not** subject to indexation).

- To use the concession, you must be an immediate family member who is receiving a qualifying payment and inform the Department of Human Services or the Department of Veterans' Affairs of your intention to use the concession. Where the concession has been fully used, additional contributions by immediate family members will be assessed under the normal gifting rules.
- Gifts from people who are not immediate family members, or gifts in excess of the gifting concession from immediate family members, are assessed under the normal gifting rules.

### **Example**

This concessional amount of \$500,000 can only be used once. For example, if an eligible contributor gifts to a Special Disability Trust and receives a concession, then dies, their concession amount cannot be accessed by any other immediate family member. Or if an eligible contributor is of pension age or receiving a pension and gifts \$400,000 and receives the gifting concession, then another eligible contributor who receives a pension or reaches pension age gifts \$200,000 they can only receive \$100,000 as a gifting concession.

### **Example**

David has a Special Disability Trust. His parents Paul and Lucy are both receiving the Age Pension. When the trust was established in 2006, they contributed \$300,000 to the trust. By 2012, most of the funds had been spent on care and accommodation, and Paul and Lucy contributed a further \$300,000 to the trust. The gifting concession will apply to the first contribution and to \$200,000 of the second contribution. Therefore, the normal gifting rules will apply to the excess of \$100,000.

An immediate family member who is not of qualifying age (and whose partner is not of qualifying age) can make contributions to a Special Disability Trust and take advantage of the concession later, when he or she reaches qualifying age, providing the gifting concession has not been fully used. This means that it is possible to put assets in the trust up to five years before claiming the Age Pension or relevant veterans' entitlement, and still have the assets disregarded for means test purposes when you receive income support. Where you are already receiving income support before reaching qualifying age, the gift will be counted under the normal gifting rules until you reach qualifying age.

### **Example**

Greg has severe disability and his father John, aged 58, established a Special Disability Trust for him. On 1 October 2006, John gave \$500,000 to the trust. John could not apply to Centrelink for the gifting concession as he was below Age Pension age.

On 1 June 2011, John gave another \$500,000 to the trust. The trust has not received any other contributions since John's initial contribution in 2006.

In 2013, John turned 65 and applied for Age Pension. John's gift in 2006 is disregarded because it was more than five years prior to his claim for Age Pension. His gift in 2011 is within five years of his claim, and as he is an immediate family member his gift is eligible for the gifting concession. Therefore his gift in 2011 is disregarded for social security means test purposes.

### **Example**

A variation of the above example: in 2012, Greg's grandmother Marie puts \$200,000 into Greg's trust. Marie is currently receiving the Age Pension. As Marie is an immediate family member, her gift is eligible for the gifting concession. Marie receives the gifting concession.

In 2013, John turned 65 and applied for Age Pension. When he applied for the Age Pension, the available gifting concession was \$300,000. John's gift in 2011 of \$500,000 would be partially eligible for the gifting concession. The remaining \$200,000 of his 2011 gift will be assessed under the normal gifting rules.

### **Example**

A further variation of the example above: if the contribution in 2012 was from Paul, a close family friend (rather than Greg's grandmother), his gift would not qualify for the gifting concession as Paul is not an immediate family member. John would get the benefit of the full concession.

- The gifting concession is applied to each Special Disability Trust. Where there are two children who are eligible within one family, immediate family members of qualifying age can use the gifting concession of up to \$500,000 for each Special Disability Trust.

### The rules for Special Disability Trusts in more detail

The Special Disability Trust legislation implements the Government's objective of encouraging families who wish to make provision themselves for family members with severe disability. Some of the rules may seem restrictive. However, they are intended to prevent people from using the trust for purposes other than supporting the person with severe disability, and to discourage use of the concessions for the primary purpose of obtaining income support, rather than to provide additional resources for a person with severe disability.

The questions and answers below cover some of the issues you need to consider before deciding whether a Special Disability Trust is appropriate for you and your family's circumstances. A comprehensive list of [Questions and Answers](#) can be found on the Department of Social Services website.

For further information on issues to be considered, please refer to the [Guide to Social Security Law](#) or contact your nearest Centrelink Customer Service Centre or telephone 13 2717.

### Who is a person with 'severe disability'?

To be eligible to be a beneficiary, the disabled person must meet the definition of 'severe disability' under section 1209M of the *Social Security Act 1991*:

- (a) 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 Invalidity Service Pension or Department of Veterans' Affairs Invalidity Income Support Supplement, and
  - who has a disability that would, if the person had a sole carer, qualify the carer for Carer Payment or Carer Allowance, or
  - who is living in an institution, hostel or group home in which care is provided for people with disabilities and for which funding is provided under an agreement between the Commonwealth, states and territories, and
  - who has a disability as a result of which he or she is not working and/or who has no likelihood of working for more than seven hours per week at or above the relevant minimum wage.
- or
- a person under 16 years of age who is a profoundly disabled child as defined in *Social Security Act* section 197(1) who was a principal beneficiary immediately before 1 July 2009,
- or
- (b) a child under 16 years of age:
- who is a person with a severe disability or a severe medical condition, and
    - another person (the carer) has been given a qualifying rating of intense under the Disability Care Load Assessment (Child) Determination for caring for the child under 16 years of age, and
    - a treating health professional has certified in writing that, because of that disability or condition:
      - the child will need personal care for 6 months or more, and
      - the child care is required to be provided by a specified number of persons.

The initial step should be to verify with the Department of Human Services or the Department of Veterans' Affairs that the person for whom the trust is being established meets the definition of 'severe disability' before establishing a Special Disability Trust.

For more information on what these tests mean:

- for Department of Human Services payments, please contact 13 10 21 to make an appointment or contact your nearest Centrelink Customer Service Centre or contact the Special Disability Trust team on 1800 734 750.
- for Department of Veterans' Affairs payments, please contact your nearest Department of Veterans' Affairs office or by post at PO Box 21, Woden ACT 2606.

### How many trusts can a beneficiary have?

Each beneficiary can only have one Special Disability Trust established on their behalf. The beneficiary can have other types of trusts in addition to the Special Disability Trust but any further trusts will not qualify for the generous Special Disability Trust asset and gifting concessions.

### What are reasonable care needs?

A care need is a reasonable care need if:

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

The following are some examples of reasonable care needs (please note, these are only some of the examples and should not be regarded as a definitive list):

- specialised food specified by a medical practitioner as essential for the beneficiary's health;
- mobility aids, prostheses and positioning aids required for, or because of, the beneficiary's disability;
- sleeping and sensory aids required for, or because of, the beneficiary's disability;
- personal care aids required for, or because of, the beneficiary's disability;
- pressure care aids required for, or because of, the beneficiary's disability;
- continence aids required for, or because of, the beneficiary's disability;
- communication devices (including computers) that are essential, or that have been modified, because of the beneficiary's disability;
- modified vehicle, if required for, or because of, the beneficiary's disability;
- modification to vehicle, if required for, or because of, the beneficiary's disability;
- transport required for, or because of, the beneficiary's disability;
- training for transitional or independent living skills of the beneficiary;
- the daily care fee and any additional itemised fees charged by an approved provider in relation to the beneficiary's care and accommodation in a residential care service; and
- medical related and dental costs of the beneficiary, including but not limited to: health insurance and ambulance cover, medicines, surgery, specialist and general practitioner services.

### What are reasonable accommodation needs?

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

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

The need to pay rates and taxes on a property is 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.

The following are examples of reasonable accommodation needs (please note, these are only some of the examples and should not be regarded as a definitive list):

- modification to the beneficiary's place of residence arising from his or her disability;
- payment for the purchase of the beneficiary's place of residence if the payment is **not** made to an immediate family member of the beneficiary;
- payment of rental for the beneficiary's place of residence if the payment is **not** made to an immediate family member of the beneficiary;
- payment of accommodation bond for the beneficiary if the payment is **not** made to an immediate family member of the beneficiary;
- any itemised fees which specifically relate to the accommodation of the beneficiary residing in a residential care service. **Note:** The standard daily care fee charged by an accredited residential aged care facility is an approved expense;
- from 1 January 2011, the trust can pay for the maintenance of trust property if there is a reasonable need and if the payment is **not** made to an immediate family member of the beneficiary.

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.

Example: the heating system malfunctions and due to the age of the system, a part cannot be obtained to return it to working order, therefore a new comparable heating system needs to be installed, ie ducted heating replacing ducted heating, a wall heater cannot be replaced under maintenance for ducted heating, but can be replaced from the \$11,000 (as at 1 July 2014) a year discretionary spending money.

Examples of maintenance include, but are not limited to:

- having a leaking roof fixed by replacing several tiles, or getting the ridge capping re-capped;
- having a leaking pipe fixed or tap washers replaced;
- having faulty part/s replaced on heating/air-conditioning units that are malfunctioning;
- servicing of heating/air-conditioning units;
- painting of exterior of house once every 10-12 years;
- painting of interior of house once every 8-10 years;
- monthly garden maintenance eg lawn mowing, pruning (if required);
- adjustment of internal/external doors due to house movement;
- yearly steam cleaning of floor coverings eg carpets/tiles; and
- yearly cleaning of gutters (if required).

The scope of reasonable accommodation and care needs is included in the [Guide to Social Security Law](#).

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 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.**

**For further information regarding reasonable care and accommodation costs, refer to the [Guide to Social Security Law](#).** These guidelines will develop over time. The trustee will need to be aware of the rules and keep up to date with them to understand what a Special Disability Trust for a particular person can, and cannot, do.

### Can a beneficiary's medical needs be met by the trust?

From 1 January 2011, a Special Disability Trust is able to pay for the beneficiary's medical expenses including private health fund membership and dental treatment.

## What else can the trust pay for?

From 1 January 2011, a Special Disability Trust can undertake a level of discretionary spending that is not directly related to care and accommodation needs of the beneficiary as long as the expense complies with legislative requirements. The discretionary spending amount from 1 July 2014 is \$11,000 (indexed annually on 1 July). This allows Special Disability Trusts greater flexibility to meet additional costs relating to the beneficiary's health, wellbeing, recreation, independence and social inclusion.

The following are some examples of what the trust can pay for from the discretionary amount (they are not considered reasonable care needs):

- food other than food specified by a medical practitioner as essential for the beneficiary's health;
- toiletries such as toothpaste, toilet paper, soap, shampoo, sanitary pads and tampons;
- vehicle maintenance and vehicle related expenses other than those required for, or because of, the beneficiary's disability;
- vehicle registration and insurance;
- petrol for vehicle;
- recreation and leisure activities;
- computer, except if the computer is essential for communication because of the beneficiary's disability (as this can be paid for out of other trust monies);
- communication devices unless modified because of the beneficiary's disability;
- therapy that is not required for, or because of, the beneficiary's disability or that is not approved in writing by a medical practitioner;
- building and contents insurance;
- payment of utilities charges in connection with the principal beneficiary's place of residence;
- household cleaning services;
- clothing and footwear that is not required for, or because of, the principal beneficiary's disability; and
- life skills and social inclusion workshops.

## Can the trust pay family members for providing services?

- **No.** The trust **cannot** be used to pay immediate family members for providing any type of care, accommodation, maintenance services etc.
- The trust cannot spend money to pay an immediate family member or child of the beneficiary for providing care for the beneficiary.
- The trust cannot spend money to pay an immediate family member or child of the beneficiary for providing maintenance services for the beneficiary's accommodation.
- The trust cannot spend money to buy or lease property from an immediate family member or child of the beneficiary, including 'granny flats'.

(For definition of 'immediate family members' see page 10.)

## Can a third party benefit from Special Disability Trust expenditure?

A third party can only benefit from expenditure for the care and accommodation of the beneficiary where the benefit is 'incidental'.

An 'incidental' benefit is where another party receives a benefit from expenditure that is incurred for the beneficiary. The expenditure is allowable where the other party's benefit was of a non-cash nature, minor and provided on a basis that is infrequent and irregular.

## Will any trust qualify as a Special Disability Trust?

No. A trust will not be a Special Disability Trust unless the legislative requirements are met. For example, a trust deed must include the compulsory clauses of the '[Model Trust Deed](#)'. These are provisions that cannot be watered down if the trust is to qualify as a Special Disability Trust. However a Special Disability Trust can have its own individual provisions, so long as they are consistent with the specified requirements.

For example, you might not want to make the trust assets available for accommodation and care generally; you might want to be more specific about how the trust assets can be used. So you might say in the trust deed that it can only pay for accommodation in the form of a place in a group home. Such a trust could still be a Special Disability Trust, as the purpose of the trust is still to meet reasonable care or accommodation needs.

There are other trust provisions which are not specifically required by the rules for Special Disability Trusts. For example, clause 2.2 of the Special Disability Trust, [Model Trust Deed](#) says the trustee should consider what is in the best interests of the principal beneficiary. The trustee is required to have regard to the nature and severity of the principal beneficiary's condition as well as the current and future needs of the principal beneficiary; these needs should be reviewed at least annually and wherever possible the principal beneficiary's immediate caregiver and the principal beneficiary should be consulted. This clause could also mention consulting other members of the family and other people involved in the life of the person with severe disability generally (for example, any significant service providers) or specifically (for example, a named friend or medical adviser).

## Who can be a trustee of a Special Disability Trust?

Anyone, except the 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 1991* or the *Social Security (Administration) Act 1999* or the *Veterans' Entitlement Act 1986*.

**Note:** There are also state-based laws that govern trustee responsibilities.

## Are there any restrictions on what can be gifted to a Special Disability Trust?

Yes, there are restrictions on what a principal beneficiary or their partner can gift to a Special Disability 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.



## What happens if someone fails to comply with the rules?

If there is a failure to comply within the rules, the trust may cease to be a Special Disability Trust and the beneficiary may lose income support concessions. You should also note that there may be an impact on a donor's income support entitlement.

However, the Department of Human Services/Department of Veterans' Affairs have the discretion to disregard some contraventions. This will depend on how serious, deliberate and prolonged the contravention was, which provisions were contravened, and how the contravention or waiver of the contravention may affect the interests of the person with severe disability.

## What are the taxation requirements of a Special Disability Trust?

Changes to the way a Special Disability Trust is taxed were announced in the 2009/10 and 2011/12 Budgets.

Taxation measures include:

- 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 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; and
- equivalent taxation treatment amongst Special Disability Trusts established under different Acts.

\* Prior to this change, unexpended income of a Special Disability Trust was taxed at the highest marginal tax rate.

## How is a Special Disability Trust and/or an individual beneficiary's tax return completed?

- Unexpended income of a Special Disability Trust is taxed at the beneficiary's personal income tax rate, rather than the highest marginal tax rate.
- The changes to taxation of unexpended income require consideration of how to complete tax returns for both a trustee of a Special Disability Trust and the trust's beneficiary.

For more information refer to the [Australian Tax Office](#) website to assist with completion of tax returns.

## What happens if a Special Disability Trust ceases to be such a trust?

The trust will cease to be a Special Disability Trust when the beneficiary with severe disability dies. It may also cease to be a Special Disability Trust because of infringements of the rules.

The provisions of the trust should specify what should then happen to any property remaining in the trust. For example, see clause 4 in the Special Disability Trust, [Model Trust Deed](#).

If the trust deed allows, the people who have contributed funds to the trust can specify what they want to happen to any surplus property derived from their contribution. For example, it could be returned to them (if they are still alive) or to their executors to be dealt with under their will. Or they could nominate their children, other family members or a charity to receive their share.

The assets may return to the people who contributed them, in which case they will then have these assets for means test purposes, which may affect their income support entitlements.

If the trust comes to an end or ceases to be a Special Disability Trust within five years of property being transferred to the trust, that property may be subject to the gifting rules and may affect the income support entitlements of the person who gave the property to the trust.

Well, I've considered all these rules, should I set up a Special Disability Trust or not?

The answer to that depends entirely on your own circumstances and the specialised professional advice you obtain. However, at a general level, consider these matters:

- if the person with disability does not meet the definition of 'severe disability' under section 1209M of the *Social Security Act 1991*, then a 'Special Disability Trust' cannot be established;
- if neither you nor the person with severe disability rely on (or are likely to rely on) income support, there may be no benefit in setting up a Special Disability Trust;
- if you or the person with severe disability do, or may, rely on income support, but the level of assets you are likely to provide for care and accommodation will not have any effect on entitlements, then there may be no benefit in setting up a Special Disability Trust. This might be because you do not have enough money to provide for care and accommodation or because you have already made arrangements which do not require further extensive funding;
- if the need for money for care and accommodation is only a possibility rather than a likelihood, it may not be appropriate to tie up a lot of money in a Special Disability Trust where there will be ongoing accounting expenses.

**However, if:**

- income support does matter to you or the person with severe disability;
- the disability is severe and eligibility is confirmed by the Department of Human Services or the Department of Veterans' Affairs;
- you have funds available which will make a difference to care and accommodation arrangements for the person with severe disability, now or after you are gone;
- those funds are large enough to have a positive effect on your entitlements (through the gifting rules) and not affect the income support entitlements of the person with severe disability.

**Then a Special Disability Trust may help significantly in planning for the future of your family member with severe disability.**

You may wish to look at the Special Disability Trust, [Model Trust Deed](#) which can be found on the Department of Social Services website. Obtain professional advice, and consider having such a trust in your vision and plan for the future.

## Section 3 – Final words

Think carefully about what you want for your son or daughter or other family member with disability.

Work out your vision and start to plan how to set it up.

Get advice and carefully consider the implications in your situation.

Look at tax and income support issues in the overall context of what is good estate planning for your son or daughter or other family member with disability.

Consider whether a Special Disability Trust will be useful in your situation, or not.

Make decisions and implement them.

### About the authors

**Special Disability Trusts — Getting things sorted booklet** originally produced by Stephen Booth and Allan Swan in 2006. The booklet was updated in 2011 by the Department of Families, Housing, Community Services and Indigenous Affairs and in 2014 by the Department of Social Services.

#### Stephen Booth

Stephen Booth is a partner in law firm Coleman & Greig. He has over 20 years experience in advising parents of people with disability, particularly intellectual disabilities, about estate planning and wills, and on other legal issues relating to disabilities. He has spoken to many parents' groups and disability organisations and has been involved with the Intellectual Disability Rights Service (NSW) and citizen advocacy organisations.

Stephen has also authored a guide to will-making for parents of people with intellectual disabilities, and has written chapters for a lawyers' manual giving guidance to lawyers on this area of legal practice.

#### Allan Swan

In his professional life, Allan divides his time between being:

- a principal in law firm Moores Legal, practising in the areas of estate planning and structuring;
- a presenter for professional organisations, professional practices and community groups; and
- an author and lecturer in estate planning, trusts and related subjects.

His interest in estate planning initially arose out of family experience (including family farms) and his personal involvement with families with intellectually disabled children - Allan's late sister, Janice was born with severe physical and intellectual disabilities and his sister-in-law, Heather has a series of hurdles to contend with throughout her life, including very low vision and relatively severe autism.