
SPECIAL DISABILITY TRUST



Level 3, 104 Frome Street
ADELAIDE SA 5000
Tel: (08) 8415 5000
Fax (08) 8415 5099

SPECIAL DISABILITY TRUSTS

Legislation

Introduced into Federal Social Security Legislation in 2006.

Essential characteristics

- Must have only one beneficiary;
- The beneficiary must meet the definition of "severe disability" pursuant to section 1209M of the *Social Security Act 1991* ("the Act") and as determined by Centrelink;
- The primary purpose of the trust must be for the accommodation and care needs of the beneficiary;
- Must have an independent trustee (must have at least two trustees OR a professional trustee e.g. accountant or lawyer);
- Must have a trust deed that complies with the compulsory clauses found in the Model Trust Deed;
- Must meet the reporting requirements outlined in section 1209S of the Act;
- Must carry out independent audits when required pursuant to section 1209T of the Act.

Definition of "accommodation and care needs"

Income and capital of the Special Disability Trust can be used to meet the reasonable care and accommodation needs of the beneficiary. Some examples of reasonable care needs includes specialised food, mobility aids, sleeping aids, modifications to vehicles, transport requirements, daily care fees charged by an approved provider in relation to the beneficiary's care and accommodation in a residential care facility.

Some examples of reasonable accommodation needs include modification to the beneficiary's place of residence, payment for the purchase of the beneficiary's place of residence, rental payments for the beneficiary's place of residence or payment of an accommodation bond.

Pursuant to section 23(1) of the Act the trustee cannot pay any immediate family member or a partner for providing care to the beneficiary. Any paid care must be provided by an arms-length employee of the special disability trust, e.g. nurse, physiotherapist.

Who can be a trustee?

Anyone who meets the requirements of section 1209Q(1) of the Act can be a trustee. This means that parents, grandparents, siblings or friends of the beneficiary can be a trustee of the Special Disability Trust providing he or she meets the requirements of section 1209Q(1). Corporations, including accountants, solicitors, corporate trustees and state trustees can also be appointed as trustees.

Where there is an arm's length professional trustee, only one trustee is required. Otherwise at least two trustees are required.

Establishing a Special Disability Trust

A Special Disability Trust must have a trust deed or be established by a will and must comply with the Model Trust Deed provisions under the Act.

The Model Trust Deed contains clauses that are required for the trust to be classified as a Special Disability Trust by Centrelink. If a trust does not contain the compulsory clauses (and cannot be issued with a waiver), or it contains clauses that could override the relevant compulsory clauses, it will not be classed as a special disability trust for Centrelink purposes.

Establishing a Special Disability Trust in a Will

To establish a Special Disability Trust in a will the following are required:

- The will must provide the trustee with power to create a Special Disability Trust which complies with current legislative requirements;
- The Special Disability Trust must be for the benefit of a specified individual;
- The full text of the Model Trust Deed or similar clauses can be included in the will HOWEVER the will may need to be amended each time there is a change in the legislation to ensure the trust remains compliant;
- The will should clearly outline which assets are to be transferred into the Special Disability Trust when it is created.

Assessment

The following is excluded from the means test assessment for the beneficiary of a Special Disability Trust:

- All income of the trust (section 1209V); and
- Up to \$596,500 in trust assets (current at 11 July 2012 and indexed annually), plus any exempt asset (eg the beneficiary's principal place of residence.) (section 1209Y).

The value of assets owned by the Trust in excess of \$596,500 (excluding the beneficiary's principal place of residence) will be included in the assets of the beneficiary for Centrelink purposes.

The use of money from the trust to pay for care, accommodation, maintenance of trust assets and discretionary spending for the person with a severe disability will not be counted as that person's income for income support purposes

The trust is able to spend up to \$10,500 (indexed annually) in a financial year on discretionary items such as holidays, motor vehicle expenses etc.

Reporting Requirements

The legislation requires that each year Centrelink be provided with:

1. A certified copy of the tax return;
2. Financial statements prepared by a suitable qualified accountant; and
3. A statutory declaration from each trustee of the trust to confirm that the income only went to help in the maintenance and care of a disabled person.

Death of the Beneficiary

The Trust ceases to be a Special Disability Trust when the principal beneficiary dies. Therefore, the trust will only exist during the beneficiary's lifetime. On the death of the beneficiary the assets are distributed as stipulated in the Trust Deed.

Will clauses

It is evident that there are very strict guidelines that must be met for a Special Disability Trust to be compliant with Centrelink provisions. Whilst the Model Trust Deed or similar terms can be attached to the will, should there be an amendment to the legislation then the will must be amended to ensure the terms of the deed are still compliant. For instance there was a change to the legislation in 2011 which meant that deeds made prior to the amendment were no longer compliant with Centrelink provisions. A Deed of Variation of Model Trust Deed was released by FaHCSIA to be executed and attached to all existing Special Disability Trusts made prior to 2011.

To avoid the need to keep an eye on the trust terms to ensure it remains compliant I suggest that the following clause, or something similar, be included in wills to establish a Special Disability Trust:

To stand possessed of the balance then remaining UPON TRUST to invest the same and to hold the capital and the income arising therefrom to establish a Special Disability Trust as defined by the Social Security Act 1991 ("the said Act") (together called "..... Trust") pursuant to current legislative requirements at the time of my death to be used from the date of my death until the date of vesting for the purposes of meeting the accommodation and care needs as defined in the said Act of my said son/daughter..... and I DIRECT that my trustees shall adopt the compulsory clauses of the Model Trust Deed for Special Disability Trusts as is current at my date of death for the purposes of establishing the said Special Disability Trust AND I DIRECT that upon the date of vesting the capital and the income of the Trust shall be held by trustees UPON TRUST for

For the purposes of this clause the term "the date of vesting" shall mean:

- (a) the date of death of my said son/daughter;*
 - (b) the date of full expenditure of all assets held by the Trust; or*
 - (c) any earlier date as required by law,*
- whichever shall first occur.*

Bear in mind the need to consider an alternative gift in the Will in case there is no such concept of a Special Disability Trust at the time of death.

Consideration should be given to the non-compulsory clauses of the Model Trust Deed and if considered beneficial by the testator should be included in the will.