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Private Trusts and Succession Planning for the Severely Disabled or Cognitively Impaired in Australia

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Private Trusts and Succession Planning for the Severely Disabled or Cognitively Impaired in Australia

Abstract

In Australia, as is true overseas, parents and carers of people with severe disabilities such as cognitive impairments—whether caused by developmental disability, acquired brain injury, chronic mental illness, or conditions such as dementia—frequently want to make plans for a future situation when they are no longer able to care. In an ageing population, demand for such services is rising. Meeting such needs touches on fundamental human rights.

Keywords

Special disability trusts, estate planning, disability, succession, cognitive disability, carers

PRIVATE TRUSTS AND SUCCESSION PLANNING FOR THE SEVERELY DISABLED OR COGNITIVELY IMPAIRED IN AUSTRALIA

TERRY CARNEY AND PATRICK KEYZER*

Introduction

In Australia, as is true overseas, parents and carers of people with severe disabilities such as cognitive impairments—whether caused by developmental disability, acquired brain injury, chronic mental illness, or conditions such as dementia—frequently want to make plans for a future situation when they are no longer able to care.¹ In an ageing population,² demand for such services is rising.³ Meeting such needs touches on fundamental human rights.⁴

Succession planning for people with disabilities which are associated with cognitive impairments or other high level care needs is difficult in Australia, despite publication of various planning aids for consumers.⁵ Equivalent planning in the US is facilitated by a broader set of social security and tax benefits which extend also to ‘pooled’ trusts and self-funded trusts,⁶ though similar narrow restrictions on ‘special disability trusts’ apply in

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- ¹ Terry Carney and Patrick Keyzer, ‘Planning for the Future: Arrangements for the Assistance of People Planning for the Future of People with Impaired Competence’ (The First Report of the Queensland Impaired Competence Planning Pilot Project, 2007).
- ² Australia Treasury, ‘Australia’s Demographic Challenges’ (Australian Department of Treasury, 2004).
- ³ AccessEconomics, ‘The Dementia Epidemic: Economic impact and positive solutions for Australia’ (Access Economics Pty Ltd, 2003).
- ⁴ Larry Gostin, ‘Human Rights of Persons with Mental Disabilities: The European Convention of Human Rights’ (2000) 23(2) *International Journal of Law and Psychiatry* 125-59, at 126. The conceptualization of mental health as a human right, and not simply a moral claim, suggests that states possess binding obligations to respect, defend, and promote that entitlement. Considerable disagreement, however, exists as to whether ‘mental health’ is a meaningful, identifiable, operational, and enforceable right, or whether it is merely aspirational or rhetorical ... international human rights bodies have not developed a clear definition that helps clarify state obligations, identify violations, and establish criteria and procedures for enforcement: *Ibid*, at 158.
- ⁵ Andrew Robson, ‘Thinking Ahead: For parents of children with a decision-making disability’ (OPA/Victoria Legal Aid Commission (4ed), 2002).
- ⁶ Jason D Lazarus, ‘Protect Public Benefits for your Special-needs Client: A special-needs trust can secure a disabled client’s future without jeopardizing public benefits. But don’t get tripped up by these common myths’ (2005) 41(6) *Trial* 44-49. For a brief discussion of the special disability trust restrictions for means tested benefits like Supplemental Security Income, see: Lawrence A Friedman, ‘Special Needs Trust Estate Planning To Preserve Disability Aid’ (2000) 162(8) *New Jersey Law Journal* 712-713.

respect of means tested health and social security payments.⁷ Australian research plainly indicates that there is significant unmet need for legal services for these people.⁸ There are growing numbers of people with a cognitive and other disabilities who are unable to count on the continuation of the informal care and in-kind economic benefits previously provided by their now ageing carers,⁹ and for whom explicit, or implicit extra-legal planning proves to be an insufficiently secure replacement.¹⁰

Various legal tools are available to facilitate replacement of the informal roles of carers and ease the transition which inevitably arises on the death or incapacity of carers. These may assist by providing (or preserving) needed income, assets or services (such as through private trusts, wills, enduring powers, or pension 'nominee' provisions¹¹); and/or by providing needed substitute decision-making authority or oversight of daily living (such as through private enduring powers of personal guardianship, adult guardianship orders, or well chosen trustees).

Family members may struggle to comprehend the complexity of these planning challenges,¹² so it is important that client groups and their advisors are well briefed to assist. The low asset base and reliance on social security on the part of most people with severe disabilities and/or cognitive impairments, and many of their ageing carers, put the implications of federal social security policies at the centre of most planning considerations. This article discusses the ramifications of federal reforms which immunise a narrowly framed group of 'special disability trusts' from being penalised by most social security rules. It will be argued that the new rules are a boon for the small number of people able to take advantage of this new planning tool, but that for most carers of people with severe disabilities it will be shown that preservation of social security will remain an overwhelmingly dominant consideration when crafting plans for the future.

⁷ To qualify, the trust must be established by a court or the disabled beneficiary's parent, grandparent, or legal guardian (see 42 U.S.C. § 1396p(d)(4)(A) &(C)(iii)). The disabled individual must be the only beneficiary of the trust, must be under age 65, and must be disabled under 42 U.S.C. § 1382c (§ 1396p(d)(4)(A) &(C)). Upon the death of the disabled beneficiary, the trust must reimburse the state benefits that were paid to him/her during life (§ 1396p(d)(4)(A) &(C)(iv)). Amounts received pursuant to this trust will not diminish the amount of SSI that the disabled person is eligible to receive.

⁸ People with impaired competence and their carers need better access to legal planning and related services; and services that are inexpensive, well-informed, independent, reliable and sensitive to their needs: Patrick Keyzer, Terry Carney and David Tait, 'I Hope He Dies Before Me': Caring for ageing children with intellectual disabilities' and 'Against the Odds: Parents with intellectual disability' (Cth of Australia/UTS, 1997).

⁹ A significant proportion of care is also provided by young people (26 or under), but this is not the focus of the present article. Young carers account for around 17% of all care, and nearly 18,000 are the 'primary carer' FaCSIA, 'Young Carers Research Project: Final Report' (Department of Families, Community Services & Indigenous Affairs, 2002).

¹⁰ Chris Bigby, *Moving on Without Parents: Planning, transitions and sources of support for middle-aged and older adults with intellectual disability* (2001) Sydney: MacLennan & Petty, at 71-72.

¹¹ *Social Security (Administration) Act 1999* (Cth), Part 3A, ss 123A-123S.

¹² Deborah Setterlund, Cheryl Tilse and Jill Wilson, 'Substitute Decisionmaking and Older People' (Australian Institute of Criminology, 1999); Cheryl Tilse et al, 'Older Peoples Assets: A Contested Site' (2005) 24 *Australasian Journal on Ageing* S51-S56; Cheryl Tilse, Jill Wilson and Deborah Setterlund, 'The Mismanagement of the Assets of Older People: The concerns and actions of aged care practitioners in Queensland' (2003) 22(1) *Australian Journal of Ageing* 9-14; Cheryl Tilse et al, 'Families, Asset Management and Care Giving: Developing issues in policy, research and practice' (Paper presented at the 8th Australian Institute of Family Studies Conference, Melbourne, 12-14 February 2003).

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The first section of the paper details some of the social and demographic features of the different pathways into disability or cognitive impairment, and the diverse needs and resources of their carers. Part B explains why Australian social security laws previously made it virtually impossible to use private trusts as a way of structuring succession plans to cater for the inability of carers to continue to care due to their own incapacity or death. The next section of the article details the nature of the reforms enacted from September 2006 to facilitate greater use of trusts as a private planning device, as is common overseas. Part D then provides a critical review of the main strands of the reforms, exposing their narrow ambit and at times rather perverse policy settings. The final section recapitulates the main argument to the effect that while the reforms are a welcome first step, they cater only to the succession planning needs of a very small number of very severely disabled people whose carers are fortunate enough to be comparatively wealthy and thus able to afford to settle substantial capital to found such trusts.

A. The Dimensions of the Need

The rise in the number of ageing people with cognitive disabilities is a relatively recent trend. Many factors contribute to this. In part it is because of the significant increase in life expectancy over the last 50 years: more people with developmental impairments are living longer,¹³ and a higher proportion of previously unimpaired individuals are living to the more advanced ages¹⁴ where the population incidence of dementia begins to climb steeply.¹⁵ So far as the latter group is concerned, forecast future numbers are inevitably boosted by the demographic ageing (and sheer size) of the 'baby boom' generation. As a proportion of the population, people aged over 65 years grew from 8 per cent in 1971 to 13 per cent by 2002 (or 2.5 million) and doubles again to a projected 25 per cent (or 6.2 million) by 2042.¹⁶ For people in Australia aged 85 and over, the growth is even more rapid, from 300,000 in 2002 to 1.1 million in 2042.¹⁷ This rise in the number of 'old old' people redoubles the planning challenge: these people are more likely to develop cognitive disabilities and have more limited informal care networks.

In 2003, there were almost 2.6 million unpaid carers in the Australian community, the majority of whom were women,¹⁸ and approximately 18,000 of whom were primary carers aged under 25.¹⁹ However, the ageing population combined with the increasing workforce participation

¹³ Chris Bigby, 'Ageing with a Lifelong Disability: Challenges for the aged care and disability sectors' (2002) 24(4) *Journal of Intellectual & Developmental Disability* 231-241, at 231.

¹⁴ Life expectancy for males at birth was 68 years in 1960, has already risen to 78 years and by 2042 is expected to be 83 years: Australia Treasury, 'Australia's Demographic Challenges' (Australian Department of Treasury, 2004), at 20.

¹⁵ Access Economics, 'The Dementia Epidemic...' above n 4; Cheryl Tilse et al, 'Families, Asset Management and Care Giving: Developing issues in policy, research and practice' (Paper presented at the 8th Australian Institute of Family Studies Conference, Melbourne, 12-14 February 2003), at 2.

¹⁶ Australia Treasury, above n 3, at 18, 21; Terry Carney and Sonya Sceats, 'Retirement Security in Australia' (Paper presented at the 8th Asian Regional Conference of the International Society for Labour and Social Security Law, Taipei, Taiwan, 31 October-3 November 2005); Terry Carney, 'Ageing and the Law' in Alan Borowski, Sol Encel and Elizabeth Ozanne (eds), *Longevity and Social Change in Australia* (2007 UNSW Press, Kensington), in press.

¹⁷ Australia Treasury, above n 3 above, at 21.

¹⁸ ABS, 'Disability, Ageing and Carers, Australia' (Australian Bureau of Statistics, 2004), at 10-11.

¹⁹ FaCSIA, 'Young Carers Research Project: Final Report' (Department of Families, Community Services & Indigenous Affairs, 2002), para 4.2
<http://www.facsia.gov.au/internet/facsinternet.nsf/disabilities/carers-young_carers_report.htm> (accessed 12 February 2007). Indeed, one in ten young people between 15 and 25 exercise some level of carer responsibility (ibid, 5.1).

of women means a large discrepancy is likely to emerge between the number of people requiring care and the number of informal carers available to meet these needs.²⁰ Between 2001 and 2031, the number of aged persons likely to require care because of a severe or profound disability (a category likely to be coextensive with impaired competence as it is defined above) is projected to rise by 160 per cent, with the number of carers for this same period expected to increase by only 57 per cent.²¹ This anticipated shortfall is likely to increase reliance on formal community care and/or various forms of residential care.²² Pressure on the formal system is likely to create further pressure on informal systems, because of the neoliberal trend towards devolving former state responsibilities to the market and civil society,²³ in turn placing greater weight on private sector planning supports to organise matters previously the responsibility of state agencies. This poses special challenges for professional groups like lawyers and accountants, who currently lack the background knowledge of managing disabilities or meeting the differing planning needs of their carers.

Not only is there variation in the sources (and capacities) of informal carers,²⁴ but the economic resources accessible to the person needing care will also differ. Older people experiencing an onset of dementia are more likely to have accumulated some asset base (if only in the form of home equity)²⁵ and may have built up savings by virtue of having participated in the workforce. A person with an acquired brain injury may have suffered the injury at work or in a motor vehicle accident, such that a 'lump sum' compensation or damages award may have been obtained. People with life-long disabilities are generally much less fortunate.²⁶ A person with a developmental disability, for instance, is unlikely to have accumulated assets or savings, and may be exclusively reliant on a social security pension for income support. People with chronic mental illnesses may have built up assets or savings prior to the onset of the condition, but they too are likely to be more heavily reliant on social security transfers. All groups (and their carers) will be differentially affected by a wide variety of other factors, such as inheritances or informal transfers of in-kind support

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- ²⁰ Irish research found that such extensive reliance on informal family care of people with intellectual disability continued even in the face of great strides made in the UK in the provision of alternative housing options and support services, bearing out the international experience of a preference for extensive reliance on family care: Roy McConkey, 'Fair Shares? Supporting Families Caring for Adult Persons with Intellectual Disabilities' (2005) 49(8) *Journal of Intellectual Disability Research* 600-612, at 600.
- ²¹ NATSEM, 'Who's Going to Care? Informal care and an ageing population' (National Centre for Social and Economic Modelling, 2004), at 26, 28.
- ²² Productivity Commission, 'Economic Implications of an Ageing Australia' (Productivity Commission, 2004), at 7 of 7.7.
- ²³ Linda Hancock, 'The Care Crunch: Changing Work, Families and Welfare in Australia' (2002) 22(1) *Critical Social Policy* 119-140.
- ²⁴ Of course the combined impacts of other socio-economic and demographic trends need to be borne in mind as likely to *reduce* the capacity for informal care over time, with Australian families becoming increasingly mobile, increasingly likely to be single-parent families, families becoming smaller in size and more likely to have both parents in the workforce, and families becoming more geographically dispersed: see Hancock, above note 22.
- ²⁵ Cheryl Tilse et al, 'Families, Asset Management and Caring...' above n 13, at 2; Cheryl Tilse et al, 'Older Peoples Assets: A Contested Site' (2005) 24 *Australasian Journal on Ageing* S51-S56, at S51.
- ²⁶ As Chris Bigby and Susan Balandin observe: 'living with a cognitive impairment or severe physical disability may impact on the need for informal supports, the degree of community inclusion achieved during the individual's life, and the level of financial security available in old age': Chris Bigby and Susan Balandin, 'Another Minority Group: Use of Aged Care Programs and Community Leisure Services by Older People with Lifelong Disability' (2005) 24(1) *Australasian Journal on Ageing* 14-18, at 14.

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which may or may not be accessible to them. For instance carers of the mentally ill face special challenges.²⁷

It is important to observe that not all of these people will be vulnerable. Gwynnyth Llewellyn and her colleagues remind us that there are older people with a disability in the workforce,²⁸ and given the varied causes of impaired competence noted before, some people with impaired competence may have some or even a strong degree of involvement in their planning. Respect for human rights makes us look for the least restrictive alternative. And not all carers will be vulnerable. Llewellyn and her colleagues have identified a *diverse* range of responses to the challenges that carers face in assisting people who need help with planning: some 'go it alone', others are 'reluctant users', some work as 'tandem partners' with services and others leave the services in charge.²⁹

However while not all of these people are vulnerable, many of them are, and all are likely to experience challenges to their capacity to plan for the future arising from their social context. Being a carer of itself is commonly a very demanding and draining task: one which leaves little time for forward planning. Carers are usually women,³⁰ and often single,³¹ and are likely to suffer health problems.³² Caring responsibilities impact on relationships both with the person cared for as well as time to maintain outside relationships. Carers often experience 'chronic physical tiredness and increasing emotional and psychological stress,' and can suffer social isolation, loneliness and depression.³³ Carers are likely to have lost or foregone paid employment³⁴ and leisure opportunities.³⁵

Personal responsibility for planning for the future is predicated on assumptions of competency. Formally, competency in this sense is a legal conception: a person who executes a power of attorney, a trust or a will must be legally competent to do so. Competency is required in planning, finalizing and conducting arrangements: in other words, both now and in the future. But competency can be impaired by a very diverse set of factors that can make planning complicated and difficult. Some of these factors are likely to have a present and ongoing impact on competency to plan, such as developmental disability. Some can impact after planning has been conducted, such as acquired brain injury or dementia. Chronic mental illness can eliminate competency, but 'lucid intervals' give rise to the prospects of increased involvement and personal management of legal and financial affairs. Because of the diverse

²⁷ Michelle Cleary et al, 'What Patients and Carers Want to Know: An exploration of information and resource needs in adult mental health services' (2005) 39(6) *Australian and New Zealand Journal of Psychiatry* 507-513.

²⁸ Gwynnyth Llewellyn et al, 'Options and Perspectives - Promoting Healthy, Productive Ageing: Early, Plan Well' (2004) 29(4) *Journal of Intellectual & Developmental Disability* 366-369, at 366.

²⁹ Gwynnyth Llewellyn et al, 'Older Parent Caregivers' Engagement with the Service System' (2004) 109(5) *American Journal on Mental Retardation* 379-396, at 393-394. See also Chris Bigby, above n 11, at 3 ('as a group, ageing parents are not well connected to formal service systems and receive little formal assistance with the tasks of caring').

³⁰ Joan Hailstone, 'Tender Loving Care' (1988) 2(4) *Interaction* 9-11.

³¹ *Ibid.*

³² Kate Barnett and Rhonda Shultz, 'Innovative Service Delivery Models Lessons Learned in Providing Care for Older People and People with Disabilities' (1990) 12(3) *Australian Journal on Ageing* 9-13, at 11; Jean Englehardt, Timothy Brubaker and Victoria Lutzer, 'Older Caregivers of Adults With Mental Retardation: Service Utilization' (1988) 26(4) *Mental Retardation* 191-195, at 191.

³³ Theresa Cluning, 'Ageing People Giving and Receiving Care' in Theresa Cluning (ed), *Ageing at Home: Practical Approaches to Community Care* (2001 Ausmed Publications, Melbourne) 95-111, at 100.

³⁴ *Ibid.*

³⁵ Jeanette Jennings, 'Elderly Parents as Caregivers for Their Adult Dependent Children' (1987) 32(5) *Social Work* 430-433, at 430.

ways in which competency can be diminished, a person who is competent today may not be so tomorrow.

In short, any person in Australian society is a person who may have or may develop impaired competence that can affect their capacity to make decisions, and lead to a need for their carers to make provision on their behalf, such as through funding the establishment of a trust.

B. Why are Special Rules Needed for Disability Trusts in Australia?

Until very recently, the main reason that private trusts were unattractive as a planning option for Australian parents wishing to provide security for an adult disabled son or daughter, was that the tight 'needs targeting' provisions of social security law³⁶ made these arrangements especially financially disadvantageous for many prospective users.

The social security implications made trusts unattractive both to family members contemplating transferring assets into a trust (because the transfer risked prejudicing the settlor's qualification for or rate of pension), while also jeopardising the pension status or the rate of social security payable to the disabled person sought to be benefited by the arrangement. This was a result of several provisions of the *Social Security Act 1991*, principally including those governing the widely inclusive character of the definitions of 'income' and 'assets' for the purposes of the operation of income and assets tests which calculate the rate of payment. Speaking of the social security treatment of 'income' for instance, the full Federal Court observed in *Rose v SecDSS*

Parliament chose to define 'income' ... in terms of considerable width to ensure that it brought within its net as wide a range of categories and sources of income as possible, thus giving full scope to the exclusionary provisions of the Act.³⁷

It was the width of that definition of income (and similar aspects of 'asset' definitions) that posed one of several special difficulties, because the listed statutory exemptions from their reach for social security purposes, found in section 8(8) of the *Social Security Act 1991* (Cth), did not include disability trusts.³⁸

1. Social Security Entitlements of Parents/Carers

Because of the widely inclusive character of the definitions of income and assets, amounts usually fell to be counted as an asset or income of the transferor at the time a parent or carer made the payment into the trust. While the capital sum could be transferred in advance of the time when a parent or carer qualified for social security, this too was problematic if the decision to establish the trust was made in the critical few years before establishing qualification for social security. This was because 'deprivation' rules brought such 'dispositions' back into account as an asset or income stream.³⁹ This significantly reduced the advantages to parents/carers of providing capital sum settlements to found a trust, or to use income contributions to 'top up' any trust deed.

As explained below, in 2002, any residual attraction of private trusts was further diminished by the introduction of legislative provisions which reach behind private trust (or private company) entities in order to 'attribute' ownership and control of income and assets to

³⁶ Terry Carney, *Social Security Law and Policy* (2006) Sydney: Federation Press, Chap 6.

³⁷ (1990) 92 ALR 521 at para 12.

³⁸ See for instance the omission of disability trusts from the listing in section 8(8) of the *Social Security Act 1991* (Cth) of a series of (generally very narrow) exemptions from inclusion in the definition of 'ordinary income', and the similar omission of such trusts from the list of 'disregarded property' for the purposes of the assets test: s 1118(1).

³⁹ Terry Carney, *Social Security Law and Policy* (2006) Sydney: Federation Press, at 117-118.

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settlers wherever some direct or indirect influence is shown to be retained, including by way of such things as personal relationship influence over a trustee, or the ability to appoint trustees.

2. Social Security Entitlements of People with Disabilities

The social security rules were also problematic for the person with the disability for a number of reasons.

The main reason was that any beneficial entitlement to property or income meant that these amounts were required to be counted for the purpose of the income and assets test governing disability support pension or other entitlements of the person in need of care. This always included any allocations and entitlements of a disabled beneficiary under trust instruments (including statutory or court trusts), and also included otherwise popular 'discretionary' trusts.

From 2002, the private trust and companies provisions reinforced the attribution of interests to such 'stakeholders'.⁴⁰ Even forms of assistance for a disabled person purchased by the trust in the form of 'services' remained highly problematic due to the width of the definitions of income in section 8 of the *Social Security Act 1991* (to include 'consideration' and other ancillary concepts).

The only possible avenue of relief available was to rely on the making of a Ministerial instrument (a 'determination') which specially exempted a specific trust or arrangement. This was occasionally done – for example, in 2004 an exemption was granted for 'income' paid under the Queensland Personal Care Support scheme.⁴¹

3. Compensation preclusion rules

The other difficulty faced in the case of establishment of trusts arose when the source of the funds originated in a compensation 'settlement' made in favour of the proposed beneficiary of any disability trust.

This was because the law provides that half of any settlement (other than one specifically determined by the court), must be used for ongoing maintenance of the person.⁴² Until the period of time represented by this amount has been exhausted, an otherwise qualified person is 'precluded' from qualifying for payment of social security.⁴³ These provisions are untouched by the changes described below.⁴⁴

The combined effect of these features of social security law made private trusts an unattractive planning option both for the person with the cognitive impairment (imperilling any disability pension), and also for their carers (who risked their own aged pension or other social security entitlements by setting up a trust). These disincentives were recognised by Government on 13 October 2005, when it was announced that changes would be made to social security to permit some families to make private financial provisions into a trust

⁴⁰ Terry Carney, *Social Security Law and Policy* (2006) Sydney: Federation Press, at 107-109.

⁴¹ Social Security (Disability Services Queensland Personal Care Support) Determination No 1 2004 (Legislative Instrument - F2007B00120).

⁴² Terry Carney, *Social Security Law and Policy* (2006) Sydney: Federation Press, at 164-166.

⁴³ *Social Security Act 1991* (Cth) Part 3.14.

⁴⁴ FaCSIA, *Special Disability Trusts: Getting things sorted* (2006d) Department of Families, Community Services and Indigenous Affairs
<http://www.facsia.gov.au/internet/facsinternet.nsf/disabilities/carers-special_disability_trusts.htm>
at Tuesday 24 April , p 16.

account for the current or future accommodation and care of a severely disabled son or daughter.

Those changes, which relaxed certain social security rules became law with effect from 20 September 2006, following passage of amending legislation.⁴⁵ The next section outlines the changes made.

C. Conforming Private Trusts and Social Security after 20 September 2006

The rules eased by the September 2006 reforms were those concerned with means testing of the donors and beneficiary of any qualifying trust established for the care and accommodation of a person with a severe disability (a 'special disability trust'), as well as the associated gifting rules which otherwise bring monies back into account for the pensioner. Other rules which pose planning difficulties (such as those regarding compensation settlements), remain unchanged, however. Taxation is also unchanged, meaning that capital gains tax or stamp duty may be payable on the gift/settlement.⁴⁶

No doubt to minimise their cost to the Budget,⁴⁷ those changes are strictly confined in various ways.⁴⁸ For instance the dispensation from the gifting rules is limited to settlors (*or* any partner of the settlor) reaching *pension age* and being in *receipt* of Disability Support Pension, Carer Payment, or Age Pension or other qualifying payment;⁴⁹ or, if they are below that age and lack current pension status, by deeming any earlier gifting to 'crystallise' *only* at the point where the settlor/donor first meets *both* conditions.⁵⁰ This latter means that the assets will continue to be counted for the purpose of any 'working age' social security payment the settlor/donor may otherwise claim, such as a pre-retirement (or pre-disablement) claim for Newstart allowance. The concessions also apply only to trusts which are exclusively devoted to care needs of a comparatively narrow group of 'severely' disabled people (as defined);⁵¹ so special disability trusts will not be able to be used to cater for the needs of more marginally disabled people, or for those whose severe disability is episodic.

Once attracted, the concessions are realistically pitched to encourage investment of sums of money able to yield meaningful levels of financial returns for the disabled beneficiary of the special disability trust, in that they cover up to \$500,000 by way of assets (indexed annually) and the income generated from acceptable (i.e. 'secure') forms of investment of that sum. As explained below, the trust must comply with several other requirements, such as containing 'model' clauses (and not including precluded matter),⁵² and the meeting of purposes and accountability requirements.

⁴⁵ Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Act 2006, Schedule 7.

⁴⁶ FACSIA, *Special Disability Trusts--Questions and Answers* (2006c) FACSIA
<[http://www.facs.gov.au/internet/facsinternet.nsf/VIA/special_disability_trusts/\\$File/qnas_4aug.pdf](http://www.facs.gov.au/internet/facsinternet.nsf/VIA/special_disability_trusts/$File/qnas_4aug.pdf)>
at Thursday, 14 September 2006 [later replaced; copy on file with author], Item 38 of Q&A.

⁴⁷ The costs are estimated to be \$26.9m in 2006-07, \$76.7m in 2007-08 and \$113.5m in 2008-09.

⁴⁸ Ray Ward, 'Setting up Special Disability Trusts' (2006) 44(10) *Law Society Journal* 48-51, at 49.

⁴⁹ *Social Security Act 1991* (Cth), section 1209Z(1)(b).

⁵⁰ S 1209ZB(1).

⁵¹ FACSIA, *Future Planning for Sons and Daughters with Severe Disability* (2006b) Department of Families, Community Services and Indigenous Affairs
<http://www.facs.gov.au/internet/facsinternet.nsf/disabilities/carers-future_planning.htm> at
Tuesday 22 August 2006.

⁵² S 1209P(2). The legislation envisages that the required content, and any prescribed content, will be set out in a determination issued by the Secretary. That content is prescribed by the *Social Security (Special Disability Trust — Trust Deed, Reporting and Audit Requirements)* (FaCSIA) Determination 2006,

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No change at all is made to the treatment of trusts outside this category, and the compensation preclusion rule continues to apply to *all* trusts, including special disability trusts. This means that the *source* of funds to establish the trust cannot come from a damages or other compensation *settlement*.⁵³ Any compensation preclusion period operating to postpone entitlement of the disabled beneficiary also remains in place, but a settlor/donor can obtain *immediate* access to the exemption from the gifting/disposition rules.⁵⁴

The social security concessions, extended to special disability trusts, only assist those families who are able to establish a capital base sufficient to generate meaningful levels of future contributions towards the ongoing care and accommodation needs of the disabled person. Special disability trusts, then, are of no assistance at all to ageing parents who lack the means to take advantage of the concessions. For the poor, the question of 'who cares for my disabled son or daughter after I'm gone?' will continue to be answered by saying that this will be the responsibility of state or federal residential services for disabled people and the aged.⁵⁵ The only practical concession to this is that, because the rules apply equally to testamentary, as well as inter vivos trusts, their capital base is permitted to accrue at death.⁵⁶

The social security concessions only apply to a private trust which has certain defined characteristics,⁵⁷ namely that it meets 9 main tests, in that it:

- be 'protective' in nature;
- have only one principal beneficiary⁵⁸ (i.e. the person for whom the trust is established);
- the principal beneficiary must meet the eligibility criteria for a person with a 'severe disability';⁵⁹
- provide only for the accommodation and care needs of the principal beneficiary;⁶⁰

items 2.1-2.3. The text of the required 31 model clauses (see item 2.2(1)), is available at http://www.facsia.gov.au/internet/facsinternet.nsf/disabilities/carers-special_disability_trusts.htm (last accessed Thursday, 21 September 2006).

⁵³ Indeed the trust is *expressly* precluded from holding monies from such a source (as quite *widely* defined): *Social Security Act 1991* (Cth), section 1209R(2) 'The assets of the trust must not include any *compensation* received by or on behalf of the principal beneficiary' [emphasis added]. *Other* assets of the beneficiary (or their partner) can be transferred to the trust without attracting the 'disposition' rules which would bring the asset back into account against the beneficiary: s 1209ZC. This is in contrast to the US position, where such awards are routinely placed into special disability trusts: see Jason D Lazarus, 'Protect Public Benefits for your Special-needs Client: A special-needs trust can secure a disabled client's future without jeopardizing public benefits. But don't get tripped up by these common myths' (2005) 41(6) *Trial* 44-49, at 44. Also: Harold L Grodberg, 'Special-needs trusts can help preserve family wealth.(New Jersey; proposed rules on treatment of trusts for Medicaid-only applicants)' (2001) 164(9) *New Jersey Law Journal* 822-823 at 822 ('vital tools in settling personal injury cases').

⁵⁴ FACSIA, *Special Disability Trusts--Questions and Answers* (2006c) FACSIA <[http://www.facs.gov.au/internet/facsinternet.nsf/VIA/special_disability_trusts/\\$File/qnas_4aug.pdf](http://www.facs.gov.au/internet/facsinternet.nsf/VIA/special_disability_trusts/$File/qnas_4aug.pdf)> at Thursday, 14 September 2006, Item 14 of Q&A.

⁵⁵ Patrick Keyzer, Terry Carney and David Tait, 'I Hope He Dies Before Me': Caring for ageing children with intellectual disabilities' and 'Against the Odds: Parents with intellectual disability' (Cth of Australia/UTS, 1997).

⁵⁶ Ray Ward, 'Setting up Special Disability Trusts' (2006) 44(10) *Law Society Journal* 48-51, at 51.

⁵⁷ Ray Ward, 'Setting up Special Disability Trusts' (2006) 44(10) *Law Society Journal* 48-51, at 50.

⁵⁸ Ss 1209L(a), 1209M(1).

⁵⁹ Ss 1209L(a), 1209M(2).

⁶⁰ Ss 1209L(b), 1209N.

- have a trust deed that contains the clauses set out in the model trust deed;⁶¹
- have an independent trustee or more than one trustee;⁶²
- comply with the investment restrictions;⁶³
- provide annual financial statements;⁶⁴ and, finally,
- conduct independent audits when required.⁶⁵

Transitional arrangements allow opportunities for non-complying trusts to be upgraded to comply with the new regime. Provision is made for a Centrelink delegate to temporarily exempt a pre-existing trust which generally conforms to the requirements, to permit the

⁶¹ Ss 1209L(c), 1209P.

⁶² Ss 1209L(d), 1209Q. The main requirements include that the trustee (or in the case of a corporate trustee, each of its Directors), meet Australian resident qualifications, not have been convicted of any stipulated offences and not have been disqualified from managing corporations under the *Corporations Act 2001*: 1209Q(1), (2). FACSIA, *Special Disability Trusts--Questions and Answers* (2006c) FACSIA
<[http://www.facs.gov.au/internet/facsinternet.nsf/VIA/special_disablity_trusts/\\$File/qnas_4aug.pdf](http://www.facs.gov.au/internet/facsinternet.nsf/VIA/special_disablity_trusts/$File/qnas_4aug.pdf)> at Thursday, 14 September 2006, item 11 of Q&A.

⁶³ Ss 1209L(e), 1209R. These policies will restrict investment to sources which meet the *Superannuation Industry (Supervision) Act 1993* and associated regulations, but in addition will preclude the trust from investing in 'in-house' assets (other than those in the beneficiary's home), or own business property of a 'related party' (other than the beneficiary) FACSIA, *Special Disability Trusts--Questions and Answers* (2006c) FACSIA
<[http://www.facs.gov.au/internet/facsinternet.nsf/VIA/special_disablity_trusts/\\$File/qnas_4aug.pdf](http://www.facs.gov.au/internet/facsinternet.nsf/VIA/special_disablity_trusts/$File/qnas_4aug.pdf)> at Thursday, 14 September 2006, item 28 of Q&A.

⁶⁴ Ss 1209L(f), 1209S. Financial statements to the end of June must be supplied by the end of March of the following year (s 1209S(1)). The person preparing the statement must meet any stipulated requirements regarding their financial qualifications (ss 1209S(2), (4)). Where a determination has been made requiring inclusion of particular financial information, the financial statements must include that information (s 1209S(3)).

Item 3.1(a)(i) of *The Social Security (Special Disability Trust—Trust Deed, Reporting and Audit Requirements) (FaCSIA) Determination 2006*, requires that statements be independent of the family and be prepared by members of the CPA Australia, the Institute of Chartered Accountants, or the National Institute of Accountants, or, in the case of trustee companies, but 'an employee ... who is engaged by the trustee corporation as an accountant or financial planner': item 3.1(a)(ii).

⁶⁵ Ss 1209L(g), 1209T; Ray Ward, 'Setting up Special Disability Trusts' (2006) 44(10) *Law Society Journal* 48-51, at 50. An independent audit (s 1209T(1)) may be requested by the beneficiary, their 'immediate' family members (as defined), their legally appointed guardian/financial administrator, someone who has acted as their guardian on a long-term basis, or the Secretary: s 1209T(3). Once compiled and forwarded to the person who requested the audit, copies must also be furnished to any guardian and to the Secretary: s 1209T(4) [unless that person requested the audit]. The audit period is the previous financial year or such longer period prescribed by a determination: ss 1209T(2), (7). If a relevant audit already exists, the trustees may provide a copy of it rather than commission a fresh one: s 1209T(1)(b). The qualifications of auditors, and any required content of audits, may be specified by a determination: ss 1209T(5), (6), (7), and the policy requires that they be prepared by members of the CPA Australia, the Institute of Chartered Accountants, or the National Institute of Accountants FACSIA, *Special Disability Trusts--Questions and Answers* (2006c) FACSIA
<[http://www.facs.gov.au/internet/facsinternet.nsf/VIA/special_disablity_trusts/\\$File/qnas_4aug.pdf](http://www.facs.gov.au/internet/facsinternet.nsf/VIA/special_disablity_trusts/$File/qnas_4aug.pdf)> at Thursday, 14 September 2006, item 26 of Q&A;; see *Social Security (Special Disability Trust—Trust Deed, Reporting and Audit Requirements) (FaCSIA) Determination 2006*, item 4.2(a). They must not be the person who prepared the financial reports or have a family connection: 4.2(b), (c).

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trustees to bring it into full compliance.⁶⁶ Trusts created prior to 20 September 2006 may be exempted until not later than the end of June 2007.⁶⁷

A complying trust excludes amounts contributed to the trust by the settlor (or the family of the proposed beneficiary) from being caught by the gifting or disposition rules,⁶⁸ by providing an exemption from these rules for any and all *unconditional* transfers made to the trust in an amount of up to \$500,000 in total. This is so where the transfer is made by an 'immediate' family member (as defined),⁶⁹ or—in the very *limited* circumstances of recent bequests⁷⁰—those transfers permitted to be made by the beneficiary or their partner (expressly excluding compensation monies).⁷¹

Under the September 2006 reforms, complying trusts are taken out of the reach of the 'veil piercing' provisions of the private trust and private companies legislation (which otherwise would likely find that donors/settlors retained an 'interest' in the trust). This is done by way of amendments stipulating that the *only* attributable stakeholder in such trusts is the beneficiary,⁷² backed up by inclusion of specific provisions dealing with the (non)attribution of trust income or assets.⁷³

As far as the disabled person is concerned, the September 2006 reforms expressly remove trust income distributions from being counted among the beneficiary's 'income' for the purposes of the Act; *provided* that the distribution is not a gift to the person (but instead covers something like rent payments),⁷⁴ and make similar provision with regard to ignoring

⁶⁶ S 1209U(1). The waiver by the Secretary must be in writing, may stipulate compliance with conditions, and is for a defined period: s 1209U(2). If guidelines are promulgated by the Secretary, waiver decisions must be made in accordance with the guidelines: ss 1209U(3), (4). In the absence of guidelines, decisions are made in accordance with Departmental policy.

⁶⁷ Item one of the Transitional Arrangements in Item 14 of Schedule 7 of the *Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Act 2006*.

⁶⁸ This is so even if the beneficiary meets the statutory test for 'blind pension' and thus is not covered by any asset or other form of means test FACSIA, *Special Disability Trusts--Questions and Answers (2006c) FACSIA*
<[http://www.facs.gov.au/internet/facsinternet.nsf/VIA/special_disablity_trusts/\\$File/qnas_4aug.pdf](http://www.facs.gov.au/internet/facsinternet.nsf/VIA/special_disablity_trusts/$File/qnas_4aug.pdf)>
at Thursday, 14 September 2006, item 37 of Q&A.

⁶⁹ S 23(1), definition of 'immediate family member'. This definition covers natural parents, adoptive or step-parents, persons who are legal guardians of the person (or were when the person was under 18 years of age), grandparents and 'siblings'. In its turn, s 23(1) defines a 'sibling' to include half-, adoptive and step-brothers and sisters of a person.

⁷⁰ S 1209R(1). As explained in the EM, no assets of the trust may come from the beneficiary or their partner: 'The only exception is if the transferred asset is all or part of a bequest, or a superannuation death benefit, and the transferor received the bequest less than three years before transferring the asset to the trust' FACSIA, *Explanatory Memorandum, Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Bill 2006 (2006a)*
<http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=2239&table=OLDEMS> ; FACSIA, *Special Disability Trusts--Questions and Answers (2006c) FACSIA*
<[http://www.facs.gov.au/internet/facsinternet.nsf/VIA/special_disablity_trusts/\\$File/qnas_4aug.pdf](http://www.facs.gov.au/internet/facsinternet.nsf/VIA/special_disablity_trusts/$File/qnas_4aug.pdf)>
at Thursday, 14 September 2006, item 8 of Q&A.

⁷¹ S 1209ZC(1).

⁷² S 1207X(2A).

⁷³ Ss 1209V, 1209Y. Subsection 1209V(2) provides that section 1209V has effect despite Division 7 of Part 3.18, which deals with attribution of income of controlled private companies and controlled private trusts, and any other provisions of the *Social Security Act*.

⁷⁴ S 1209X. The section insists on 'consideration' for the income amount distributed by the trust, such as a payment 'used to pay for rental accommodation for the principal beneficiary'. Because the 'consideration' of having rent paid by a third part would otherwise lead to its value being included

the value,⁷⁵ to the beneficiary of trust assets up to the allowed limit.⁷⁶ In calculating this allowable limit or 'cap', and in line with the policy of exempting the 'principal home' of social security clients from inclusion in means test calculations—provision is made to exempt the principal home of the disabled person/beneficiary, where the property forms part of the trust assets.⁷⁷

The various concessions are capped at \$500,000, but the full value of the concession is able to be claimed by any 'qualified' donor/settlor, even if ineligible donors further top the amount up well in excess of that cap. Any 'surplus donations' by qualified immediate family members, made in excess of the cap, will be treated in the usual way, with the excess being caught by gifting/disposition rules.⁷⁸

To allow for the working out of this rule the legislation applies a 'first come first served' rule. This accommodates the provision which allows people below age pension age, or above that age but not yet claiming a pension, to make a 'contingent' transfer which only takes effect when the age or payment conditions are met. The rule also allows qualified donors to absorb the remaining balance of the concessional amount in the *order* in which their particular transaction is legally enlivened.⁷⁹

D. Implications of the new rules for 'special disability trusts'

The September 2006 reforms are not beyond criticism; indeed, there are some possible trip wires which might bring undone bona fide attempts to take advantage of the (limited) relaxation of the rules. The 5 main limitations are as follows.

1. The restricted 'scope' of the group of disabled persons to be covered

Special disability trusts are confined to quite a narrow range of beneficiaries who meet a strict definition of being 'severely disabled', and who are also unable to work in an open, competitive workplace and earn at least the minimum wage.⁸⁰ The Explanatory memorandum is very explicit about this:

The purpose of subsection 1209M(2) is to ensure that this Part only applies in relation to people who have severe disabilities and who are not able to work in an open, competitive workplace because of their disability. For example, a blind person, who may qualify for disability support pension, or have a carer, would not meet subsection 1209M(2) if he or she were able to work at or above the minimum wage.⁸¹

as part of the beneficiary's 'ordinary income' [within paragraph (a) of the definition of 'income amount' in section 8(1)], the section overrides that result in the case of complying distributions, meaning that making those distributions will not lead to a reduction in the rate of pension received by the beneficiary.

⁷⁵ Value is defined as 'market value' at the time of the transfer: ss 1209Z(3), 1209ZA(4).

⁷⁶ S 1209Y.

⁷⁷ S 1209Y(4). This has effect despite Division 8 of Part 3.18 which otherwise would attribute assets of controlled private companies and controlled private trusts: s 1209Y(5).

⁷⁸ S 1209ZA(1), (2).

⁷⁹ S 1209ZB(2).

⁸⁰ Ray Ward, 'Setting up Special Disability Trusts' (2006) 44(10) *Law Society Journal* 48-51, at 49.

⁸¹ FACSIA, *Explanatory Memorandum, Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Bill 2006 (2006a)*
<http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=2239&table=OLDEMS> .

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The proposed beneficiary must already meet the medical 'impairment' conditions for full disability support pension (a 20 point impairment rating⁸²) and the disability must either be one which would qualify any hypothetical carer of the person to receive Carer payment or Carer allowance, or the proposed beneficiary must be someone who already resides in defined supported accommodation,⁸³ including accommodation funded under Commonwealth/State disability housing and services agreements.⁸⁴ The disability must also be such that it prevents the beneficiary from working, and remove any likelihood of the person working in the future at or above the minimum wage,⁸⁵ other than through a disability subsidy under Supported Wage Scheme.⁸⁶

A child who meets the section 197 definition of 'profoundly' disabled child for the purposes of Carer payment will also qualify as an eligible beneficiary of a trust,⁸⁷ but it appears that very few individuals will be in a position to satisfy the very high threshold of having at least 3 of the stipulated severe conditions: a 7 item list including tube feeding of all food and fluids, having a tracheotomy, using a ventilator at least 8 hrs a day, faecal incontinence day and night, being unable to stand without support, having a terminal condition for which only palliative care is appropriate, or needing personal care at least twice each night.⁸⁸ This high threshold of eligibility remains even though the definition of 'profoundly disabled child' was broadened from September 2006 by adding paragraph (d) to allow consideration to be given to any severe behavioural consequences of qualifying disabilities. Section 197(2AA) now reads as follows:

197(2AA) A child is a profoundly disabled child if:

(a) the child has either:

(i) a severe intellectual, psychiatric or behavioural disability; or

(ii) a severe intellectual, psychiatric or behavioural medical condition;
and

(b) the child, because of the disability or condition, needs continuous personal care for:

(i) 6 months or more; or

(ii) if the child's condition is terminal and the child's life expectancy is less than 6 months—the remainder of the child's life; and

(c) the child is at least 6, and under 16, years of age; and

(d) because of the child's disability or condition, the child does one or more of the following:

⁸² *Social Security Act, 1991* s 1209M(2)(a). Further Terry Carney, *Social Security Law and Policy* (2006) Sydney: Federation Press, Chapter 8.

⁸³ Ss 1209(2)(b)(i) & (ii) respectively.

⁸⁴ S 1209M(3).

⁸⁵ S 1209M(2)(c).

⁸⁶ FACSIA, *Special Disability Trusts--Questions and Answers* (2006c) FACSIA

<[http://www.facs.gov.au/internet/facsinternet.nsf/VIA/special_disability_trusts/\\$File/qnas_4aug.pdf](http://www.facs.gov.au/internet/facsinternet.nsf/VIA/special_disability_trusts/$File/qnas_4aug.pdf)> at Thursday, 14 September 2006, Item 5 of Q&A.

⁸⁷ S 1209M(4). Ray Ward, 'Setting up Special Disability Trusts' (2006) 44(10) *Law Society Journal* 48-51, at 49.

⁸⁸ S 197(2)(c)(i)-(vi).

(i) repeatedly engages in dangerous behaviour that is, or that gives rise to, a significant risk (whether immediate or long-term) to the child's health or safety and that, without carer intervention, would result in the child suffering sustained tissue or bodily damage, or death;

(ii) repeatedly engages in aggressive or violent behaviour that is, or that gives rise to, a significant risk to the health or safety of others, or that results in significant property damage, as a result of which the child is regularly or permanently excluded from community programs, activities, services or facilities;

(iii) repeatedly engages in severe sexually deviant or sexually inappropriate behaviour, as a result of which the child is regularly or permanently excluded from community programs, activities, services or facilities.

The threshold for qualification remains a high one because, in addition to meeting the definition of a profoundly disabled child, the carer of the child is also obliged to show that they provide 'continuous personal care for the child' (as defined) and demonstrate that the provision of that care to the child 'severely restricts' their capacity to 'undertake paid employment'.⁸⁹

2. The confining of the benefits to 'immediate' rather than extended family/friends of the disabled person

By confining the dispensations to immediate family members of the settlor/beneficiary, the reforms fail to address the deterrent effect of social security rules on members of the *extended* family of the disabled person, by continuing to discourage more remote blood relatives from contributing to the trust (for fear of being caught by disposition/gifting rules on their future pensions).

Likewise the law leaves these barriers in place against possible contributions made by well-intentioned friends, employers or others who may wish to help out a deserving, but more impoverished family otherwise unable to find sufficient funds of their own with which to make a special disability trust an economically viable proposition.

3. The 'approved purpose' test

Under the new provisions, a complying trust must be solely devoted to meeting the 'reasonable care and accommodation needs', of the proposed beneficiary over their lifetime.⁹⁰ The trust will not pay for things that the beneficiary would have bought if s/he was not disabled. Accordingly, the *test* is that 'the beneficiary must require the accommodation and the items of care because of the disability'.

Centrelink appears to have been empowered by Parliament to exercise some discretion about the purposes which a complying trust may seek to advance on behalf of a disabled person, being directed to determine the 'reasonableness' of the need for care or accommodation

⁸⁹ S 198(1)(b).

⁹⁰ S 1209N(1). The Department originally indicated that reasonableness is to be judged by reference to 'all the circumstances, and, in particular, the ... needs that are necessary because of their disability, and the trust's total assets' FACSIA, *Special Disability Trusts--Questions and Answers* (2006c) FACSIA <[http://www.facs.gov.au/internet/facsinternet.nsf/VIA/special_disablity_trusts/\\$File/qnas_4aug.pdf](http://www.facs.gov.au/internet/facsinternet.nsf/VIA/special_disablity_trusts/$File/qnas_4aug.pdf)> at Thursday, 14 September 2006, item 20 of Q&A. However the guidelines set out in the *Social Security (Special Disability Trust) (FaCSIA) Guidelines* 2006 (Cth), are stricter than this [equivalent instruments have been promulgated for those social security payments for people of workforce age, which are administered by DEWR rather than FaCSIA].

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needs. Indeed, as elaborated in the Explanatory Memorandum, subsection 1209N(3) provides that reasonableness, 'must be decided in accordance with any guidelines under subsection 1209N(4)'. However it goes on to say that

[i]f no guidelines exist under subsection 1209N(4), then the principal beneficiary's 'reasonable care and accommodation needs' will be determined in accordance with the policy of the relevant department.⁹¹

Despite the apparently wider language of the legislation, the statutory policy 'guidelines' adopt a very narrow or strict reading of reasonable care needs. Generally, in order to qualify it must be a need which 'arises as a *direct* result of the disability of the principal beneficiary, provide assistance which is of *primary* benefit of that person, and be provided within Australia.⁹² A non exhaustive list of examples of reasonable care is set out in item 2.2(2) of the relevant guideline instrument. A need shared with a *non-disabled* person does not count as a 'reasonable care need' for this purpose.⁹³ So items such as food (other than that certified by a doctor as essential for the health of the beneficiary), toiletries, or medical needs not associated with the disability—all appear on the list of expenditures which would not qualify as reasonable care needs.⁹⁴

A similar rationale about the 'direct' consequences of disability underpins the guidelines about what is a reasonable accommodation need.⁹⁵ Often, meeting reasonable accommodation needs may involve acquiring title to (or 'a right or interest in'—such as through rental of), the property in which the disabled person is to reside.⁹⁶ In the Guidelines, rent is expressly stated to be a reasonable need, along with payment of rates and taxes on a property the trust holds for the disabled person.⁹⁷ But there are tight limits. Because sub-section 2.7(1)(b) of the Guidelines authorises purposes 'ancillary' to those care and accommodation needs, there is no legal difficulty in the trust undertaking necessary structural adaptations of a property in order to meet the physical or other care needs of the person.⁹⁸ However undertaking routine maintenance on the property, or paying utility bills, are listed as *not* being a reasonable accommodation expense.⁹⁹

The legislative policy certainly does envisage endorsing the purchase by the trust of professional services such as investment advice or reimbursement of the costs of engaging a professional trustee, observing that

⁹¹ FACSIA, *Explanatory Memorandum, Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Bill 2006* (2006a)

<http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=2239&table=OLDEMS> .

⁹² Social Security (Special Disability Trust) (FaCSIA) Guidelines 2006 (Cth), item 2.2(1)(a)-(c).

⁹³ Item 2.3(1)(a). Nor does it normally qualify if provided outside Australia (2.3(1)(b)). Further, Ray Ward, 'Setting up Special Disability Trusts' (2006) 44(10) *Law Society Journal* 48-51, at 50.

⁹⁴ Item 2.3(2).

⁹⁵ Item 2.7(1)(a).

⁹⁶ FACSIA, *Explanatory Memorandum, Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Bill 2006* (2006a)

<http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=2239&table=OLDEMS>

⁹⁷ *Social Security (Special Disability Trust) (FaCSIA) Guidelines* 2006 (Cth), items 2.7(2), (3) respectively. Where the accommodation need is purchased, acquired or rented from an immediate family member, however, it will be necessary to establish a connection between the accommodation need and the needs of the principal beneficiary as a result of his or her specific disability: item 2.8.

⁹⁸ The guideline expressly lists this as a reasonable accommodation need: item 2.7(4)[item 1 of table].

⁹⁹ Items 2.8(1)[general policy], 2.8(3)[item 1 and 2 respectively, of the table of non qualifying items].

This might, for example, allow money to be spent on such things as investing money gifted to the trust, or paying for a professional trustee to administer the trust.¹⁰⁰

Presumably the power will prove flexible enough to permit the trust to acquire a 'right or interest in' premises for *group accommodation* of the beneficiary of the special disability trust and other disabled residents. This would enable the beneficiary to reside in premises where the costs of care or monitoring for risk can be pooled, such as by the trust contributing the pro rata cost of having a 24 hour presence, or other means of providing personal security for residents prone to wander or be disruptive.

However in light of the strictness of guidelines set in other areas, it cannot be presumed that a generous reading will necessarily be given to arrangements which appeal to the disability community.¹⁰¹

4. The excessive purity of the 'anti-cronyism/evasion' protections

The drafters of the reforms were no doubt mindful of the wiles of tax avoidance lawyers in finding ways to turn a special disability trust into a vehicle for benefiting the non-disabled family members, instead of serving to look after the interests of the disabled beneficiary.

But section 1209R(3) and (4) of the *Social Security Act 1991* (Cth) appear to go too far in insisting on 'free labour' from immediate family members of the trust, when it insists

1209R(3) The trust must not be used to pay an immediate family member, or a child, of the principal beneficiary for the provision to the beneficiary of:

(a) care services; or

(b) services for the repair or maintenance of the beneficiary's accommodation.

(4) The trust must not be used to purchase or lease property from an immediate family member, or a child, of the principal beneficiary, even if the property is to be used for the beneficiary's accommodation.

The Explanatory Memorandum spells out the intent of section 1209R(3),(4) this way:

Subsection 1209R(3) provides that the trust must not be used to pay an immediate family member or child of the beneficiary for the provision of care services to the beneficiary or for the repair or maintenance of the principal beneficiary's accommodation.

Subsection 1209R(4) provides that the trustees must not use the trust to purchase or lease property from an immediate family member or child of the beneficiary, even if the property is to be used for the accommodation of the beneficiary. The terms 'child' and 'property' are defined by subsection 1209R(5). 'Property' includes the right to accommodation for life in a residence and a life interest in a residence. This definition is intended to cover property such as granny flats or other accommodation that is part of another home.

However, the boundary between acceptable and unacceptable levels of assistance by the trust, to encourage close family members to remain involved in the life of a disabled person

¹⁰⁰ FACCSIA, *Explanatory Memorandum, Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Bill 2006* (2006a)
<http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=2239&table=OLDEMS> .

¹⁰¹ Indeed the Departmental information booklet advises that such needs be addressed separately under a will or general trust: FaCSIA, *Special Disability Trusts: Getting things sorted* (2006d) Department of Families, Community Services and Indigenous Affairs
<http://www.facsia.gov.au/internet/facsinternet.nsf/disabilities/carers-special_disability_trusts.htm>
at Tuesday 24 April , p 14.

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after the death of parental carers, appears to have been set too tightly by these provisions. They appear to risk alienating (and losing) the support of relatives otherwise prepared to provide a disabled relative with services or support at well below market rates. This will leave the trust in the unenviable position of spending more on the purchase of arms length ('market') services at the expense of not being able to meet other needs due to lack of sufficient trust income to do so.

5. The need for separate trusts for each child

Finally, because a complying trust must have only one principal beneficiary (apart from residual beneficiaries on its expiry),¹⁰² a family with more than one disabled adult child must establish separate trusts for each child:

If a family has more than one severely disabled family member, separate complying special disability trusts may be set up for each severely disabled person to enable the family members who transfer assets to the trust to obtain the beneficial means test concession treatment for each family member.¹⁰³

While this is not a major impediment, it may add to the frustration felt by parents with more than one disabled child to make provision for.

This is a factor which may have disproportionate effect on the all-important test of the 'social' impact, and levels of understanding and acceptance of the reforms by the audience of aging parents of disabled people at whom it is pitched.

Conclusion

Succession planning to meet the future financial needs of people with cognitive impairment has been especially difficult in Australia, mainly due to the pitfalls created by social security rules.

With the passage of the 'special disability trust' amendments in September 2006, some of these difficulties have been eased. However, significant trip wires remain for the unwary consumer or legal advisor. As Ward rightly points out

The establishment of a special disability trust is not appropriate for all disabled persons, and care should be taken to ensure that the requirements of the Act and the circumstances of the disabled person are fully taken into consideration by the solicitor with the assistance and advice of the disabled person's accountant.¹⁰⁴

The circumstances in which a special disability trust will not necessarily be advisable include situations where the close family has too few assets to make the trust viable, and situations where the source of support is to be drawn from extended family members who fall outside the scope of the special dispensations provided for these trusts. A person whose cognitive impairment does not meet the high threshold of 'severe disability' set by the law would also not be advantaged by these changes to federal social security law. In summary, the dispensations are very narrowly cast.

Some of the problematic features of the new special disability trust laws are perhaps unavoidable given the strong priority accorded to preservation of the integrity of social security means-testing policies, and concern not to allow loopholes for possible avoidance.

¹⁰² Ss 1209L(a), 1209M(1).

¹⁰³ FACSLIA, *Explanatory Memorandum, Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Bill 2006* (2006a)
<http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=2239&table=OLDEMS> .

¹⁰⁴ Ray Ward, 'Setting up Special Disability Trusts' (2006) 44(10) *Law Society Journal* 48-51, at 51.

While special disability trusts are more widely used in North America both for community¹⁰⁵ and residential care,¹⁰⁶ similar difficulties arise in that country in picking one's way around pitfalls which could prejudice ongoing qualification for medicaid and other benefits.¹⁰⁷ However in the US, those difficulties are more readily soluble with careful drafting,¹⁰⁸ including ensuring the absolute independence of the trustee and care to preserve its discretionary character.¹⁰⁹ Moreover US law offers a wider array of planning vehicles (including self-funded and 'pooled' trusts),¹¹⁰ and provides more extensive tax and other planning benefits.¹¹¹

By contrast, the Australian special disability trust reforms are more narrowly cast, and advantage only a small pool of close family carers with significant disposable savings/assets. Practitioners will therefore need to carefully assess family resources and inform themselves of disability services issues so any trust meets all model clause and statutory requirements, while accommodating other permissible needs of the severely disabled person either in that instrument,¹¹² or in a separate standard trust.¹¹³

While these legislative reforms are no doubt welcomed in the sector, it is difficult not to conclude that Parliament has laboured mightily only to give birth to a gnat.

¹⁰⁵ Gail Eichstadt, 'Using Trusts to Provide for the Needs of an Adult Child with a Disability: An introduction to family concerns for lawyers and a prime on trusts for parents' (2000) 45(3) *South Dakota Law Review* 622-639.

¹⁰⁶ Joel S Welber, 'The Use of Trusts to Compliment Essential Governmental Benefits in Residential-life care Planning.' (1996) 75(5) *Michigan Bar Journal* 402-405.

¹⁰⁷ Joel Welber, Marsha Katz and Robert Goudeseune, 'But What Will Happen to my Child? (trust beneficiaries with developmental disabilities)' (1992) 131(6) *Trusts & Estates* 55-61.

¹⁰⁸ David J Correira, 'Disability Trusts that Allow a Client to Qualify for Medicaid ' (2003) 30(5) *Estate Planning* 233- 240; John Payne, 'Handle with Care; A special needs trust must be meticulously crafted to meet the requirements mandated by government health care benefits.' (1996) 19(1) *Los Angeles Lawyer* 32-37.

¹⁰⁹ Joseph Pozzuolo and Audrey Mittleman, 'Special Needs Trust: An estate planning tool for the disabled' (1995) 49(5) *Journal of the American Society of CLU & ChFC* 64-70.

¹¹⁰ Jason D Lazarus, 'Protect Public Benefits for your Special-needs Client: A special-needs trust can secure a disabled client's future without jeopardizing public benefits. But don't get tripped up by these common myths' (2005) 41(6) *Trial* 44-49, at 45.

¹¹¹ Dennis M Sandoval, 'Tax-efficient Funding of a Lifetime Special Needs Trust' (2005) 32(10) *Estate Planning* 32-38. For a shorter overview, see: Sarah Lepak, *Special Needs Trusts: Providing for Adult Children with Developmental Disabilities* (2004) <<http://www.law.ku.edu/library/elrp/Lepak.htm>> at Tuesday 24 April 2007.

¹¹² Ward, note 105 above.

¹¹³ See FaCSIA, *Special Disability Trusts: Getting things sorted* (2006d) Department of Families, Community Services and Indigenous Affairs <http://www.facsia.gov.au/internet/facsinternet.nsf/disabilities/carers-special_disability_trusts.htm> at Tuesday 24 April , p 14.