



ADLV LAW

FIERCELY ON YOUR SIDE

SPECIAL
DISABILITY
TRUSTS

**In this handbook
we outline
the structure,
use, eligibility
requirements and
benefits of Special
Disability Trusts.**



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Please note that
the information
in this booklet
is current as at
the 2024/2025
financial year.



01

WHAT IS A SPECIAL DISABILITY TRUST?

What is a Special Disability Trust?

A trust is a legal relationship between a **trustee** and a **beneficiary**. The nature of the legal obligation requires a trustee to look after trust property and funds for the benefit of another.

A Special Disability Trust (**SDT**) is a specialised type of trust that allows parents and immediate family members to plan for current and future needs of a person with severe disability. The trust can pay for reasonable **care, accommodation** and **other discretionary needs** of the beneficiary during their lifetime.

An SDT will often give families peace of mind that on-going financial support will be available for loved ones who require additional assistance.

If an immediate family member transfers assets into the SDT, generous concessions are available to benefit both the contributor and beneficiary. Tax and social security concessions are intended to encourage family members to make future arrangements for a beneficiary with a severe disability.

Whether or not an SDT is suitable for your purposes is a complex matter that involves consideration of your particular circumstances and those of the intended beneficiary. This booklet is intended to make things simpler by explaining the rules, requirements and purpose for establishing an SDT.

02

WHAT ARE THE
REQUIREMENTS OF A
SPECIAL DISABILITY TRUST?

What are the requirements of a Special Disability Trust?

An SDT must:

- Have only **one** principal beneficiary (the person for whom the trust is established), who must meet the eligibility criteria;
- Provide for the **accommodation and care needs** of the principal beneficiary;
- Have a **trust deed** that contains the clauses as set out in the model trust deed (e.g. Any trust will not qualify as a special disability trust);
- Have an **independent** trustee, or alternatively have more than one trustee;
- **Comply** with the **investment restrictions**;
- Provide annual **financial statements**; and
- Conduct **independent audits** when required.

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

03

WHAT CAN A SPECIAL DISABILITY TRUST PAY FOR?

What can a Special Disability Trust pay for?

An SDT can pay for all of the beneficiary's reasonable accommodation and reasonable care expenses.

'Reasonable accommodation expenses' may include:

- Payment of rent or purchase of the primary place of residence of the beneficiary, if the payment is not made to an immediate family member of the beneficiary;
- Modification to the beneficiary's place of residence arising from his or her disability;
- Maintenance of trust property assets to keep the property in comparable condition or a condition that is safe to use (excluding replacement); and
- Fees relating to the accommodation of the beneficiary residing in a residential care service.

The test for 'reasonable care expenses' is quite **strict**: the expense has to be closely tied to the beneficiary's disability. For example reasonable care expenses may include a modified vehicle, sleeping and sensory aids and specialised food. All medical and dental expenses (including private health fund membership, ambulance cover, medicines, surgery, and specialist and general practitioner services) are deemed to be reasonable care expenses.

In addition to these expenses, the SDT can fund **discretionary spending** up to the set limit. For the current financial year 2024/2025, the limit for discretionary spending is \$14,500. This figure is adjusted to CPI on 1 July in each year. 'Discretionary spending' includes things such as ordinary food, vehicle registration and petrol, toiletries, recreation and leisure activities, property insurances (including building, contents and vehicle), payment of utilities, and non-specialised clothing and footwear.

04

WHAT ARE THE ELIGIBILITY
CRITERIA OF THE
INTENDED BENEFICIARY?

What are the eligibility criteria of the intended beneficiary?

For a special disability trust to be established, the beneficiary must meet the definition of 'severe disability' which will be assessed by Services Australia (formerly Centrelink).

Under section 1209M of the Social Security Act 1991 (Cth), a person who has a 'severe disability' is:

- 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 (DVA) Invalidity Service Pension or DVA Invalidity Income Support Supplement;
 - » who has a disability that would, if the person had a sole carer, qualify the carer for Carer Payment or Carer Allowance; and
 - » who has a disability and is unable to work more than seven hours a week in the open labour market; or
- 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 DVA Invalidity Service Pension or DVA Invalidity Income Support Supplement;
 - » who is living in an institution, hostel or group home where care is provided for people with disabilities and funding is provided under an agreement between the Commonwealth, states and territories; and
 - » who has a disability and is unable to work more than seven hours a week in the open labour market; or

- A child **under 16 years of age**:
 - » who is a person with a severe disability or a severe medical condition;
 - » who has a carer who has been given a qualifying rating of 'intense' under the Disability Care Load Assessment (Child) Determination for caring for that person; and
 - » who has had a treating health professional certify in writing that, because of that disability or condition:
 - » the person will need personal care for six months or more; and
 - » the personal care is required to be provided by a specified number of persons.

A person is eligible to receive **Disability Support Pension** if they:


- Are over 16 years of age and under the aged pension age; and
- Meet residence requirements; and
- Are permanently blind or have been assessed as having a physical, intellectual, or psychiatric impairment of at least 20 points under the impairment tables; and
- Are:
 - » participating in the Supported Wage System; or
 - » unable to work or to be retained to work 15 hours or more per week at or above the relevant minimum wage within the next 2 years because of their impairment; and
- Have actively participated in a program of support (this is not required if they have a severe impairment); and
- Meet the income and assets tests for their situation.

To assess a person's eligibility for Disability Support Pension, Services Australia usually requires a report from the person's doctor or specialist about their disability, injury or illness. Services Australia may also require the person to undergo a Job Capacity Assessment (which aims to determine whether the person *can* work, *how much* work they can do, and how much *help* they need in order to find and keep a job).

A carer is eligible to receive **Carer Payment** if they:

- Personally provide constant care, in the home, to someone with a disability or medical condition, or who is frail aged;
- Meet the income and assets tests;
- Are living in Australia;
- Meet residence requirements; and
- If the care receiver (the person being cared for):
 - » requires care in their home or in hospital;
 - » meets an income and assets test unless they receive an eligible pension or benefit paid by the Department of Human Services or an eligible service pension or an income support supplement paid by the Department of Veterans Affairs;
 - » meets the residence requirements; and
 - » is an adult 16 years or over:
 - » with a medically assessed physical, intellectual or psychiatric disability, or is frail aged; or

- » with a medically assessed physical, intellectual or psychiatric disability, or frail aged, with a dependent child in their care. If the dependent child is aged 6 years or older, the care receiver must qualify for and receive Carer Allowance for that child.



Services Australia encourages people to contact the Special Disability Trust Assessment team to ascertain whether the intended beneficiary meets the eligibility requirements before setting up an SDT.

05

DO YOU NEED MEDICAL
REPORTS CONFIRMING THE
DISABILITY?

Do you need medical reports confirming the disability?

In short, if the beneficiary is not already receiving disability-related Services Australia payments, medical evidence will be required.

The Services Australia Special Disability Trust Assessment team will assess the beneficiary against the legislated criteria for medical impairment, care needs and work capacity. If Services Australia does not already have the relevant information (because the intended beneficiary is not receiving benefits from Services Australia), evidence needs to be supplied by their medical practitioner. Alternatively, Services Australia will arrange for a work capacity assessment to be carried out by Services Australia.

Services Australia encourages people who are interested in setting up an SDT to contact the Special Disability Trust Assessment team for advice on what information must be provided so that the beneficiary assessment can be conducted.

06

WHAT ARE THE
ADVANTAGES OF A SPECIAL
DISABILITY TRUST?

What are the advantages of a Special Disability Trust?

An understandably concerning question that families of people with disability often have is, "What will happen when I can no longer provide care?"

The key benefits of an SDT are:

- **Forward planning:** Legal planning can ensure that the ongoing needs of a beneficiary continue to be met, even in circumstances where family members or a primary carer can no longer provide assistance.
- **Control of assets:** A trustee has a legal obligation to safeguard and hold the assets for the benefit of the beneficiary.
- **Social security:**
 - » A **gifting concession** of up to \$500,000 (combined) is available for eligible immediate family members of the principal beneficiary; and
 - » An **assets test assessment exemption** of up to \$813,250 (current as at the 2024/2025 financial year and indexed each year on 1 July) is available to the principal beneficiary.
- **Taxation benefits and exemptions:**
 - » Net income on trust assets is taxed at a lower personal income tax rate; and
 - » Capital Gains Tax exemptions.

07

WHAT IS THE
EFFECT OF THE 'GIFTING
CONCESSION'?

What is the effect of the 'gifting concession'?

Any gift to an SDT must be unconditional and made without expectation of receiving any payment or benefit in return.

To prevent a beneficiary from putting their own property into an SDT, compensation received by or on behalf of the principal beneficiary cannot be contributed to the trust.

A 'gifting concession' can be claimed by certain contributors to the SDT. The effect of the gifting concession is that the gift is disregarded for the purposes of the contributor's social security means testing.

The gifting concession can be claimed by:

- **Immediate family members** of the beneficiary who are at, or over, age or service pension age and are **receiving a pension** (for example Age Pension, Carer Payment); and
- **Immediate family members** who are within 5 years of age pension age or over age service pension age and are **not on a pension** may still contribute to a Special Disability Trust and take advantage of the gifting concession later when reaching qualifying age, provided the gifting concession has not been fully used.

Immediate family members are:

- Parents of the beneficiary (including adoptive and step parents);
- Legal guardians of a minor beneficiary, or people who were legal guardians of the beneficiary when the beneficiary was a minor;
- Grandparents of the beneficiary; and

- Brothers and sisters of the beneficiary (including adoptive and step brothers and sisters and half brothers and sisters).

The total gifting concession per SDT is \$500,000, as opposed to an ordinary trust gifting concession of \$10,000. When the gifting concession has been fully used, any additional contributions by immediate family members will be assessed under the normal gifting rules. Where there is more than one contributor to the SDT, the available concession first applies to those eligible family members who are receiving an age pension or a service pension.

08

WHAT IS THE EFFECT
OF THE 'ASSETS TEST
ASSESSMENT EXEMPTION'?

What is the effect of the 'assets test assessment exemption'?

Under the *Social Security Act 1991* (Cth), a **means test applies** to the assets and income of an individual for the purposes of assessing their entitlement to social security payments.

The asset test exemption means that the beneficiary may have assets worth up to the set amount in an SDT as well as certain other exempt assets (such as the beneficiary's principal residence) before there are any implications on the beneficiary's Disability Support Pension or other relevant social security payment.

EXAMPLE:

A single adult receives a Disability Support Pension and is assessed by Services Australia as an eligible beneficiary under the SDT requirements. The parents of the beneficiary, who set up an SDT for the beneficiary, contribute a house and \$400,000 for their child's care and accommodation costs. The beneficiary of the SDT lives in the house.

In that scenario:

- The house is assessed as the beneficiary's principal residence and therefore, for the beneficiary, this is an exempt asset under the *Social Security Act 1991* (Cth) and not counted for assets test assessment purposes; and
- The trust's \$400,000 is under the Special Disability Trust beneficiary's concessional limit.

Therefore, there is no effect on the beneficiary's Disability Support Pension payments.

09

ARE THERE
BENEFICIAL
TAXATION
CONSEQUENCES?

Are there beneficial taxation consequences?

A trust is a separate legal structure in relation to taxation. Trustees have an obligation to submit tax returns for the SDT fund.

However, SDTs are **not** subject to the higher income tax rate which normally applies to trusts. Instead, an SDT's unexpended income is **taxed at the beneficiary's personal income tax rate** rather than at the highest marginal personal tax rate. For this reason, the beneficiary of an SDT is treated as though they are presently entitled to all of the net income of the trust.

If the principal beneficiary of the trust is required to lodge an income tax return, the amount of the net income of the special disability trust should also be included in their individual tax return. Any tax paid by the trustee of the special disability trust should be claimed as a credit on the individual tax return, which ensures there is no double taxation.

A **Capital Gains Tax exemption** applies for all CGT assets (property contributions) voluntarily transferred into a special disability trust for no value.

A CGT exemption also applies to the intended recipient of the principal beneficiary's main residence after their death, where the intended recipient's ownership interest ends within two years of the principal beneficiary's death. This exemption requires that at the time of the principal beneficiary's death the dwelling was the deceased's main residence, the dwelling was not used to produce assessable income and the trust was an SDT.

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WHAT ARE THE
ADMINISTRATIVE
REQUIREMENTS OF A
SPECIAL DISABILITY TRUST?

What are the administrative requirements of a Special Disability Trust?

If the eligibility requirements have been satisfied, how might you proceed to establish the trust?

You only have one chance to set up an SDT for a particular beneficiary so it is important to ensure that the trust is set up correctly the first time. All relevant documentation must be approved by Services Australia.

There are usually **four key roles** in creating an SDT: the Settlor, the Appointor, the Trustee and the Beneficiary.

- **The Settlor:**
 - » The Settlor is the person or company who establishes the trust by contributing an initial amount into the trust (known as the “settlement sum”) and executing a trust deed. After the trust is set up, assets or cash to purchase assets can then be transferred into the trust.
 - » A Settlor **cannot** be a beneficiary, contributor or trustee of the trust. To make sure of this, the Settlor has no further involvement with the SDT.
- **The Appointor:** The Appointor has ultimate control of the SDT because they can appoint and remove the Trustee. An Appointor can be any person or corporation who is not the Settlor or the Beneficiary.
- **The Trustee:**
 - » The Trustee manages the day to day running of the SDT, and makes decisions affecting the day to day operations and investments of the SDT.

- » Anyone except the Beneficiary can be the Trustee as long as they meet the legislative requirements. The Trustee can either be an individual or a corporation.
- » 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* (Cth);
 - » 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* (Cth), the *Social Security (Administration) Act 1999* (Cth) or the *Veterans' Entitlements Act 1986* (Cth).
- The **Beneficiary**: The Beneficiary is the person who benefits from the SDT. The Trustee determines what the Beneficiary receives from the SDT.

Services Australia may also review the documents of the trust each year to decide whether the trustee has used the money in the trust for the care and accommodation of the person with the severe disability. If a trustee or trust deed is found to be non-compliant with the SDT requirements all gifts will lose their concessional treatment.

The SDT will end on the earliest of either the death of the beneficiary, when the assets are fully expended on the beneficiary, or at any earlier date as required by law.

11

ARE THERE ANY
INVESTMENT RESTRICTIONS
ON A SPECIAL DISABILITY
TRUST?

Are there any investment restrictions on a Special Disability Trust?

Once an SDT has been established, anyone can make a contribution into the SDT subject to a number of **exceptions**.

A **beneficiary** or the **beneficiary's partner cannot** transfer any assets into an SDT, including any compensation received by or on behalf of the principal beneficiary (for example, damages received from a personal injury claim). The reason behind this restriction is that SDTs are not intended to allow a beneficiary to move their assets into a non-assessable environment for social security purposes.

This investment restriction mirrors the restriction on superannuation funds from intentionally acquiring an asset from a related party to the fund (i.e. a member).

The 'blanket ban' against beneficiary contributions for SDTs does not apply to the following assets:

- All or part of a **bequest** (gifts received by Will); and
- **Superannuation death benefits**,

provided that the beneficiary transfers the assets into the SDT within **3 years** of receipt of the bequest or superannuation death benefit.

For example, John's mother set up a SDT for him in 2015. John's grandfather died on 30 April 2017 leaving John \$50,000 in his will. John can transfer the money into his SDT provided he does so by 30 April 2020.

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WHAT ARE THE ONGOING OBLIGATIONS OF A SPECIAL DISABILITY TRUST?

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What are the ongoing obligations of a Special Disability Trust?

FINANCIAL STATEMENTS

The trustee of an SDT must provide **compulsory annual financial statements** to Services Australia.

These financial statements must be handed in **on or before 31 March** each year, and relate to the financial year ending on 30 June in the previous year.

The financial statements must be **prepared** by a person who is either:

- A member of CPA Australia; or
- An employee engaged by the trustee of the SDT as an accountant or financial planner.

The financial statements must include the following **information**:

- A **profit and loss statement**;
- A **balance sheet** with applicable notes for the relevant financial year; and
- A **schedule** for each **class of assets**, where applicable.

In addition to providing annual financial statements, the trustee of the SDT must sign a statutory declaration document to confirm that the expenditure for the relevant year was spent on care and accommodation costs related to the principal beneficiary.

The financial statements must be accompanied by a copy of the trust's **income tax return** for the relevant financial year, if a return was lodged.

TAX RETURNS

The general rule is that a trustee is required to lodge a **tax return** for an SDT each financial year (or part thereof) that it is in existence.

However, if an SDT has **not** derived assessable income above the tax-free threshold (currently \$18,200), a tax return is not required. If a tax return is not required to be lodged by the trustee, the principal beneficiary will still need to include any **net income** of the trust in the beneficiary's individual tax return.

Audits

Once established, an SDT may be **audited** to ensure that the trust utilises its funds for the primary purpose of the beneficiary's care and accommodation.

Legislation governing SDTs states that the following persons **may request an audit** at any time:

- The principal beneficiary;
- An immediate family member of the beneficiary;
- A legal guardian or financial administrator of the beneficiary;
- A person acting as a the beneficiary's guardian on a long term basis; and
- The Secretary of the Human Services Department (Services Australia).

If an audit is not requested by one of the eligible people, the SDT does not have to be audited. Accordingly, it may be the case for some SDTs that they are never subjected to an audit.

After an audit has been requested, the trustee of the SDT is under an obligation to cause an audit to be conducted within a **reasonable timeframe**. However, if an audit has already been carried out for the same 12 month period, the trustee may instead

supply a copy of the existing audit report to the person making the request.

If an audit is requested, the **audit period** must relate to the financial year ending on the last 30 June preceding the request, and must be for at least a whole financial year and up to a maximum period of 5 financial years (depending on the terms of the request).

The **person preparing** the audit must be a member of:

- CPA Australia;
- the Institute of Chartered Accountants in Australia; or
- the National Institute of Accountants.

In light of **conflict of interest** considerations, the person preparing the audit must **not** have prepared any of the SDT's financial statements, nor be an immediate family member of the beneficiary or trustee.

An audit report must contain a statement that the SDT's financial statements give a **'true and fair'** view of the trust's financial position. Copies of the audit must be provided to the person that requested it, as well as the beneficiary's legal guardian/financial administrator and the Secretary of Human Services (Services Australia).

COSTS

Beneficiaries and their family should be aware of the **ongoing** nature of costs of maintaining an SDT.

The **costs** of administering an SDT, including preparation of financial statements, tax returns and audit reports, are to be met from the trust fund itself. This means that the value of the trust fund should be significant enough to warrant the extra costs - a minimum amount of \$100,000 is a good general guideline.

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SUMMARY

What next?

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Summary

SDTs are subject to complex rules and limitations, but they do have the potential to provide real benefit in certain situations. SDTs are not a 'one size fits all' solution, and accordingly whether an SDT is right for you will depend entirely on your unique circumstances.

However, if you say 'yes' to the following questions, then an SDT may be a good solution for you:

- Does the proposed beneficiary have a severe disability that has been confirmed by Services Australia?
- Do you (or other immediate family members) have a level of assets that will make a difference to the care and accommodation arrangements for the proposed beneficiary?
- Are you looking for a tax-effective way to gift assets for the benefit of the proposed beneficiary?

WHAT NEXT?

If you think an SDT may be a good option for you, please contact us to discuss your situation and the assistance we can provide in establishing an SDT for you. Call us on 1300 654 590 or email us at wehelp@adlvlaw.com.au to get started.

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THE TEAM THAT CAN HELP

The team that can help

Call ADLV Law on **1300 654 590** or email us at wehelp@adlvlaw.com.au to see how we can help.

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