



Précis Paper

Disabilities and Will Making

A discussion of disabilities and will making, including drafting, special disability trusts, income tests and ongoing compliance requirements.

Discussion Includes

- Publications
- Putting off a will
- Drafting a will
- Trusts
- Accommodation options
- Critical issues when making a will
- Special disability trusts
- Eligibility requirements
- Income tests
- Benefits to contributors
- Inter-vivos trusts
- Ongoing compliance requirements
- Contributions from beneficiaries

Précis Paper

Disabilities and Will-Making

1. In this edition of BenchTV, Rosemary Carreras (Principal Lawyer, Coleman Greig) and Stephen Booth (Principal Lawyer, Coleman Greig) discuss disabilities and will making, including drafting, special disability trusts, income tests and ongoing compliance requirements.

Publications

2. At the request of the Federal Government, in 2006 (when special disability Trusts were introduced) Stephen Booth wrote plain language guides to estate planning and special disability trusts for people with disabilities and their families (Planning for the Future - People with Disability and Special disability trusts: getting things sorted) and these are available on the Department of Human Services website: <https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/special-disability-trusts-getting-things-sorted> and <https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/general/planning-for-the-future-people-with-disability-booklet>

Putting off a will

3. 50% of Australians do not have a will, and this includes many who have a particular family member that might require special planning. There are lots of difficult questions and things to think about. Once the process does start, it might take longer than it would for someone who does not have these special issues to think about.

Drafting a will

4. It needs to be considered in what areas the person with a disability will need assistance when drafting a will. There may need to be a structure in place in the form of a trust.

Trusts

5. The starting point can be a general protective trust that leaves a share of the estate to the nominated trustees with very broad powers to apply that money beneficially for the person with a disability.

6. Make sure you've got somebody in charge of the trust that you trust to do the right thing, and give them broad discretion as to how they apply the money for the benefit of the person with a disability.

Accommodation Options

7. Accommodation is often the hardest issue to grapple. Aging parents with a child with disabilities may have ideas about what will happen with regards to accommodation but it has not been properly set up.
8. Leaving a family home to a person with disability might be fine in circumstances where the disability is relatively mild, but that may not work for a person who is highly dependant, because then there will need to be services, which will need to be paid for.
9. As the family home is often the biggest asset in an estate, it might not be fair to the other siblings whose interests might have to be postponed.

Critical issues when making a will

10. The choice of trustee is the most critical decision, because they will be making the decisions.
11. Parents should give as much information as possible when the will is being drafted, as they will know more about the person with the disability than anyone else and there may be many points that are missed.
12. It is a good idea to write all of this information down in a separate document.

Special Disability Trusts

13. Special disability trusts have potential benefits for both the parents and the person with disabilities.
14. A person with a disability can have up to \$881,750 in a special disability trust, and if it complies with all of the rules that amount will be exempt from the assets test for social security.
15. For parents, up to \$500,000 donated to a special disability trust will no longer be treated as part of that person's assets for their assets test.

Eligibility requirements

16. To be eligible for a special disability trust, a person must have a severe disability. To be considered severe, there is a test with three parts.
17. Firstly, the person must be eligible for a disability support pension.

18. Secondly, the person must pass a work test and it must be shown that they are not able to work for more than 7 hours a week in open employment.
19. Thirdly, if they had a carer, the carer would be able to obtain a carer's allowance.

Income tests

20. Special disability trusts are quite prescriptive and there are strict rules around how the money in them can be spent.

Benefits for contributors

21. There are exemptions from stamp duty and capital gains tax on the transfer of property by a donor to a special disability trust.

Inter-vivos trusts

22. Unless there is a particular reason, it is not recommended that an inter-vivos trust is set up, because the parents of a person with a disability engaging with social security and the NDIS have enough paperwork and compliance to deal with as it is.

Ongoing compliance requirements

23. There must be two trustees for a special disability trust at any time. A trustee must be a fit and proper person. They must provide a statutory declaration that they have never committed any offenses that have prevented them from directing a company or being a trustee.
24. Trustees must account to Centrelink on an annual basis so that Centrelink can check that the trust is compliant with the rules.

Contributions from beneficiaries

25. The beneficiary can only contribute money to the trust if it has been received from an estate within the last 3 years, or from superannuation in the last 3 years, or from death benefits.
26. This restriction will also apply to the beneficiary's partner.

BIOGRAPHY

Rosemary Carreras

Principal Lawyer, Coleman Greig, Parramatta

Rosemary Carreras leads the Coleman Greig Estates and Succession team. With over 20 years of practical experience, Rosemary is a highly skilled practitioner, well-respected by her peers, clients and referrers.

Rosemary practices in the areas of estate planning, with a particular focus on complex estate planning and all aspects of estate administration, acting for both executors and beneficiaries. Clients that Rosemary acts for include individuals with blended families, those with vulnerable beneficiaries, the elderly, high net worth individuals and business owners. She is experienced in preparing wills, powers of attorney, appointments of enduring guardian, testamentary trusts and disability trusts, working collaboratively with clients' financial advisors and accountants to ensure her clients have a comprehensive, practical and tax effective estate plan. Rosemary has a particular interest in advising parents of children with special needs and is experienced in preparing wills and associated documents dealing with disability issues.

Stephen Booth

Principal Lawyer, Goleman Greig, Parramatta

Stephen Booth has been in practice for over 35 years and leads Coleman Greig's Employment Law Team. He has significantly developed the firm's practice in this area; advising and representing employer and employee clients across a wide range of areas including unfair dismissals, discrimination, legislative and award compliance – as well as workforce restructuring and redundancies.

Alongside his employment law practice, Stephen has particular expertise, and 35 years of experience, in legal issues surrounding intellectual disabilities. He has published articles in a range of professional journals, particularly concerning wills and trusts in the context of intellectual disability and mental illness, and has have also written on this subject for Lawyers Practice Manual (Thomson Reuters) – as well as a book, When I'm Gone; a plain English guide to will-making for parents of children with an intellectual disability. At the request of the Federal Government, in 2006 (when special disability Trusts were introduced) he wrote plain language guides to estate planning and special disability trusts for people with disabilities and their families (Planning for the Future - People with Disability and Special disability trusts: getting things sorted) and these are available on the Department of Human Services website: <https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/special-disability-trusts-getting-things-sorted>

and

<https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/general/planning-for-the-future-people-with-disability-booklet> .

BIBLIOGRAPHY

Legislation

Social Security Act 1991 (Cth)