

Wednesday, June 11, 2008

The Secretary  
Senate Community Affairs Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Sir/Madam,

**SUBJECT: INQUIRY INTO SPECIAL DISABILITY TRUSTS**

I am grateful to the Senate Community Affairs Committee for providing the opportunity for me to make a submission in relation to Special Disability Trusts.

I would like to approach my submission by referring to my own experiences in relation to establishing a trust for my disabled son.

My eldest son was born in 1979 and at six years of age was diagnosed with Charcot Marie Tooth Type 4E disorder. This is a very rare neuropathy which resulted in incomplete myelination of his nerve fibres and as a result he has been in an electric wheel chair since the age of twelve.

In 1990, when my son was eleven years of age, I established a beneficiary trust with my wife and me as trustees. I wanted to do this because I believe that, if at all possible, we should work towards being independent of Government funding.

My intention was to accumulate funds so that, by the time my son reached adulthood, the accumulated funds could be used to supplement his income and/or the costs of his care. My intent was never realised and the strategy was not successful – for a number of reasons.

At this juncture, I wish to focus upon one of the reasons, namely: the Family Law Act 1975.

Four years ago my wife requested that I leave the family home and as a result we have been separated ever since.

At the completion of the property settlement, the Family Court Order transferred all bank accounts, assets and rights in the family trust to my wife. She subsequently transferred the trust account balance to her personal bank account and caused the family trust to be settled.

The point I wish to make is that, irrespective of the original documented intent that the family trust was for the benefit of our disabled son, the proceeds of our family trust were included as assets to be considered in the property settlement in accordance with the Family Law Act 1975. Furthermore, once effect had been given to the court order, there was no impediment preventing my wife from transferring the trust assets to her own benefit.

From correspondence between the various lawyers, the transfer of proceeds was pursuant to Section 90AC. This section of the Family Law Act 1975 relates to the alteration of property interests and states that a court order issued by the Family Court *has effect despite anything to the contrary in any of the following:*

- (a) *any other law (whether written or unwritten) of the Commonwealth, a State or Territory;*
- (b) *anything in a trust deed or other instrument.*

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The effect of Section 90AC of the Family Law Act 1975 is to make a trust deed null and void in the event that it is considered in relation to a property settlement between the parties in a marriage. My understanding is that a Special Disability Trust would not be exempt from a similar treatment under the Family Law Act 1975 and, because of Section 90AC, the Family Court Order overrides any Commonwealth, State or Territory law protecting such a Special Disability Trust.

I welcomed the inclusion in 2006 of Part 3.18A – *Private financial provision for certain people with disabilities* – to the Social Security Act 1991 and, at the time, considered establishing such an instrument for the benefit of my disabled son. However, my experiences with the Family Law Act 1975 only served to convince me not to proceed.

In addition, if I were to establish a Special Disability Trust and my wife decided that she was entitled to a substantial portion of the accumulated assets, then she could reopen proceedings through the Family Court to sequester those assets. The threat of such an action effectively excludes me from establishing a Special Disability Trust for my son's benefit and removes my natural right as a father to support my adult disabled son.

In my opinion, because a very high percentage of marriages in which there is a disabled child breakdown, Section 90AC of the Family Law Act 1975 as it currently stands is a barrier to the establishment of Special Disability Trusts. For the record, it is also a barrier to establishing any other altruistic instrument which could, in the mind of a disaffected party to a marriage, be considered as an asset of the marriage.

In contrast, Section 90ACA of the Family Law Act 1975 specifically excludes from the application of Section 90AC eligible annuities as defined in Section 10 of the Superannuation Industry (Supervision) Act 1993.

Therefore, in relation to the barrier presented by Section 90AC of the Family Law Act 1975, I would recommend that Section 90ACA be extended to include Special Disability Trusts. This would effectively quarantine a Special Disability Trust from potential nefarious intent via application of the Family Law Act 1975.

When assessing the establishment of a Special Disability Trust I estimated the minimum level of funds necessary to support my disabled son in an independent situation. It transpired that the Special Disability Trust would need somewhere between \$1.5 million and \$2 million invested to earn sufficient income to pay for the 24 hour care required by my disabled son. Clearly, the current exempt amount of \$500,000 is insufficient. Therefore there is no real financial incentive to establish a Special Disability Trust over and above that of establishing any other sort of trust.

My recommendation is that the exempt amount be increased to \$2 million for eligible family members of the beneficiary.

The current arrangements are suited to a family with substantial financial resources. However, for the majority of people who happen to have a disabled child, a Special Disability Trust is not an available option.

It occurs to me that we should be examining an approach similar to superannuation where a person can contribute a portion of his or her salary to a pooled trust specifically designated for the benefit of disabled family members. However, unlike superannuation and because the funds would be for the benefit of beneficiaries other than the contributor, the accumulated funds in such a pooled trust should be quarantined from such applications as that mentioned above. Such a fund should also be tax effective to provide incentive for a contributor.

I wish now to turn to another less well-defined, but nonetheless significant, motivator which mitigates against establishing a Special Disability Trust.

My wife holds the view that we (including our disabled son) should at all times minimise our assets so as to maximize Centrelink benefits. While I cannot condone this approach, I can understand how it has evolved as I have encountered this welfare attitude in a number of people receiving Centrelink benefits. I can only conclude that the Centrelink process encourages a subculture of people who believe that the Government should provide them with financial support without themselves taking on any financial responsibility.

Notwithstanding the reasons for a person developing such a welfare attitude, it works against any strategy aimed at accumulating assets which may ultimately be means tested as part of the Centrelink process. The obvious response to this issue is to remove the means testing of Centrelink payments for disabled people; however, I believe this is too glib a response.

While I understand the underlying intent of means testing, I think that there is something fundamentally awry in a society which develops mechanisms which encourage a welfare mentality in its citizens, particularly if those mechanisms work against the benefit of its disabled members.

Finally, I believe we should be developing innovative approaches to support not only those people who provide direct day-to-day care for disabled people but also for those people who are prepared to shoulder responsibility for providing indirect support by way of such facilities as Special Disability Trusts.

Thank you for allowing me the privilege of making a submission.

Yours Faithfully,

Russell J. Marks

A handwritten signature in cursive script, appearing to read "Russell J. Marks".

RJM