



Australian Government

**Department of Families, Community Services
and Indigenous Affairs**

Special Disability Trusts

Getting things sorted

Improving the lives of Australians

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Introduction

What is this booklet about?

Families of people with disability, especially parents, often ask ‘What will happen when I can no longer provide care?’ It can be hard looking after the interests of a person with disability at any time, but making arrangements for the future can be even harder.

This booklet and the *Planning for the Future – People with Disability* booklet are intended to make things simpler by explaining the options. This booklet deals briefly with planning for the future taking account of disability issues generally and how families can use trusts to help look after family members with disability. It also explains how new income support (social security and veterans’ entitlement) concessions for **special disability trusts** can help in providing for family members with severe disability.

Before using this booklet

Whether the information about income support in this booklet will apply to you, or to a person with disability, depends on eligibility for income support from Centrelink or the Department of Veterans’ Affairs (DVA). Before establishing a special disability trust, you must verify with Centrelink or DVA that the person for whom the trust is being established is ‘severely disabled’ as required by the special disability trust rules (see page 13). Where the person with disability does not meet the definition of ‘severely disabled’, the income support concessions will not be available.

This booklet builds on the information in *Planning for the Future – People with Disability*. You should read this booklet first as it will:

- ▶ examine options in relation to estate planning and providing for the future of a person with high support needs, including how to begin the process of planning for the future and how to implement that plan;
- ▶ explore issues that may arise both for individuals and families when deciding how to put the plan into action, including how to get legal and financial advice;
- ▶ provide information on how guardianship, accommodation and care options affect what you can do; and
- ▶ identify supports and contacts for obtaining further information.

This booklet only gives general information. How this affects you depends on your own situation.

Which parts of it are most applicable or important will differ substantially from family to family. Every person with severe disability has different levels of ability which should be taken into account. The resources available, and the opinions of family members and of the person with the disability, will differ from case to case.

You should not copy the sample ‘special disability trust deed’ in section 3 without getting specialist legal, accounting or financial planning advice. The use of a special disability trust should be part of a well-considered estate plan for the family, and particularly for the person with severe disability.

Contacts for obtaining specialist advice, and some other sources of information, are set out in *Planning for the Future – People with Disability*.

Outline of this booklet

Section 1, **The who’s who and what’s what of trusts and wills**, looks at some of the expressions used when talking about trusts and wills, and what they mean. It also briefly looks at how a trust operates, from the point of view of the trustee and of the person with the disability, and some of the legal and accounting requirements, reporting obligations and tax issues connected to trusts.

Section 2, **Special disability trusts and social security**, deals with how the income test and the asset test (which apply where there are entitlements to social security or veterans’ entitlements payments) apply to trusts, and details the concessions arising from the Australian Government’s initiative on **special disability trusts**.

Section 3, **The model special disability trust deed**, is a sample of a special disability trust deed that contains the clauses which are essential for the trust to comply with the requirements of the special disability trust legislation. It also contains notes explaining how the provisions work and how they relate to the issues covered in the other sections of this booklet.

Some points about how this booklet is written

Who should read this booklet?

Because the issues discussed in this booklet are most often relevant to parents of a person with severe disability, the ‘you’ referred to in the booklet is primarily a parent. However, the same principles apply to other family members or friends considering providing benefits to a person with severe disability.

Questions and answers

The questions asked in this book are the questions parents and other family members most often ask when talking about estate planning where one of the people involved is with disability.

‘Disability’ and ‘severe disability’

Because the income support concessions relate to providing for people with severe disability as defined in this context (see page 13), this term occurs often in this booklet.

However, even where the disability is not **severe** in terms of the definition in legislation, a lot of the same issues have to be considered by parents or others considering setting up a trust or a will as estate planning methods.

Some people with disability are quite capable of handling their own financial affairs, care and accommodation without assistance, so there may not be any need to go into the things discussed in this booklet.

Income support, social security and veterans' entitlements

When discussing the concessions which took effect on 20 September 2006, this booklet sometimes mentions 'income support'. The rules apply equally to benefits administered by the Department of Veterans' Affairs (DVA) and by Centrelink. However, to simplify the explanations, the booklet mainly talks about income support, using that expression to cover both social security administered by Centrelink and veterans' entitlements administered by DVA.

'Property' and 'money' and 'assets'

In this booklet, the property of people or trusts will be referred to as their 'assets' or 'property'. 'Property' used in this way does not mean only land or real estate. It includes money, shares or any other type of asset.

Trusts and wills: making arrangements while you are alive or after you die

This booklet focuses on trusts because the income support concessions work through a trust mechanism.

You can set up a trust while you are alive, or you can set up a trust through your will, to take effect after you die. The legal rules which apply, and the considerations you need to take into account, are the same whether the trust is set up while you are alive or through your will.

This is explained in more detail in the *Planning for the Future – People with Disability* booklet.

Section 1

The who's who and what's what of trusts and wills

A trust is a legal relationship between a **trustee**, who looks after or administers the trust, and a **beneficiary**, the person who benefits from the trust. The nature of a trust is a legal obligation on the trustee to look after the trust property, and invest it and use it wisely and carefully for the benefit of the beneficiary. The beneficiary has the right to receive benefits from the trust as required by the terms of the trust and some rights to information about the trust and how the trustee is operating it.

The terms of the sort of trust being discussed here would usually be set out in a document such as a **trust deed** or a **will**.

A **trust deed** may be simple or complex, depending on what is needed. It is a legal document which sets out:

- ▶ who is to be a trustee;
- ▶ the person or people who are to be the beneficiaries;
- ▶ when and how the trustee is to provide benefits to the beneficiary;
- ▶ what things the trustee is to take into account; and
- ▶ what other powers and duties the trustee has.

The person who sets up a trust by a deed is usually called the **settlor**. For tax reasons, the settlor is often an unrelated party or a more distant family member who will not be a beneficiary and who has nothing else to do with the trust.

In trusts for the benefit of a person with severe disability, that person may be called **the principal beneficiary** or **the special** or **prime beneficiary**. Other beneficiaries, who are entitled to share what is left after the person with severe disability has died or no longer needs help from the trust, are often called **the residuary beneficiaries**.

A trust deed may also name an **appointor**, a person who is separate from the trustee and who can appoint new trustees or beneficiaries, or make changes to the terms of the trust, and who therefore often has significant control over the trust. The appointor will often be a parent or other close relative of the person with severe disability, who has contributed property to the trust.

The property contributed to the trust is often called the **capital** and the trust earns **income** on that capital: rent on real estate, interest on money in the bank, dividends on shares, and so on.

A **discretionary trust** gives the trustee the power to decide to whom to pay a benefit out of a range of people, and how much to give to them, if anything.

A **testamentary trust** means any trust set up under a will. However, people often use this term to refer more specifically to particular types of trusts under wills which may have tax planning advantages.

The person making a will is called the **testator** (this covers men and women although a woman making a will is sometimes called the **testatrix**). A will appoints an **executor** (sometimes said to be an **executrix** if a woman), or a number of executors, to put the will into effect after the testator dies. If the will creates a trust, it will also appoint a trustee, who may be the same person as the executor, or may be different.

The property owned by the testator at the time of death is the testator's **estate**. The people who share in the estate under the will are called the **beneficiaries**.

What do the trustees have to do?

The essential relationship involved in a trust is the responsibility of the trustee to act in the interests of the beneficiary in accordance with the terms of the trust.

If the trust is discretionary, it is up to the trustee to decide whether to do anything and, if so, what to do, and it is not generally possible to compel the trustee to act in a particular way. You can control this to some extent through provisions in the trust deed or will (see page 15). Also see the *Planning for the Future – People with Disability* booklet.

In brief, the **duties of the trustee** are:

- ▶ to implement the trust in accordance with its terms;
- ▶ to consider whether to spend trust money or otherwise use the trust property for the benefit of the beneficiary, with reasonable frequency;
- ▶ to invest trust property prudently and in accordance with the directions contained in the trust;
- ▶ to avoid unnecessary expense or waste of trust property;
- ▶ to take professional advice (legal, financial, accounting, medical or other advice) if required (at the expense of the trust);
- ▶ to keep accounts of assets and liabilities and income and expenditure and be ready to account to the beneficiary if required; and
- ▶ if the trust is relevant to the income support entitlements of the beneficiary, to provide information to Centrelink or DVA as required.

What are the rights of the trustees?

Trustees have the right:

- ▶ to have their reasonable trust-related expenses paid from the trust;
- ▶ to ask the Supreme Court to give advice and directions, if they have a serious doubt as to what they are entitled to do: for example, if there is ambiguity in the way the trust deed is expressed, or if difficult choices arise which might result in a breach of trust, or if the trust seems to require something unusual or odd;

- ▶ to recompense from the trust for the work they do, if the trust deed or will provides for pay for the trustee (but not in a special disability trust if the trustee is an immediate family member: see page 14). It may be very reasonable thing to provide for payment to trustees, because the trustees have a lot of responsibility and may have to spend a lot of time and effort deciding what to do in the best interests of the person with severe disability; and
- ▶ to appoint additional or replacement trustees to take over the role of trusteeship if the original trustees cannot continue.

Many of the rights and obligations of trustees are regulated by state-based legislation.

What rights does the beneficiary have?

Beneficiaries essentially have the right to have the trust administered in accordance with its terms and the right to call trustees to account.

The beneficiary can express his or her wishes and ask the trustee for assistance but cannot compel a trustee to act in a particular way unless the trust deed or the will allows this.

Beneficiaries are entitled to require an accounting from the trustees, but are generally not entitled to an account of the trustees' reasons for making a decision in one way or another. If the beneficiary believes that the trust has not been properly implemented, the beneficiary can apply to the court for assistance (although this is always expensive and should be avoided wherever possible). A beneficiary with disability may need help to do this.

Otherwise, the beneficiary can expect to benefit from the assets in the trust, but the trustee may well have to balance short and long term considerations, especially in a trust which may last for many years. It may not be a wise thing to spend all of the money of the trust on something now, even though it seems a good thing to do, if this will leave the trustee without any resources in the future.

Example

David has a physical disability which is expected to become more severe as he gets older. He has a trust of which his brother Michael is the sole trustee. The trust owns the house in which David lives, and David wants to modernise part of the house.

Michael agrees modernising the house would be a good thing because it would make the house more attractive and comfortable. However, he is concerned that if money is spent on renovations now, there will not be sufficient money available later when they might need to modify the house substantially so David can continue living there.

Michael decides, as trustee, not to renovate, and this is within his powers as trustee as set out in the trust deed, and is consistent with the principle of acting in the best interests of the beneficiary.

How are trusts taxed?

As a trust is treated as a separate legal structure for tax purposes, it has its own tax responsibilities. Trustees have an obligation to submit tax returns and pay tax as required. The trustee is entitled to pay tax from the trust assets. Sometimes it is the trust which will have to pay tax on income. Sometimes tax is payable by the beneficiary who receives income. **These issues are complex, and will not be covered here. If you need advice on taxation issues, seek professional advice.**

Trusts are not entitled to the tax-free threshold available to individuals, and higher rates of tax (the maximum personal tax rate) may apply to income retained by trusts (that is, income not distributed to or used for a beneficiary). However, a trust created by a will which is a **'genuine testamentary trust of a traditional kind'** may be subject to the ordinary personal rates of tax.

This booklet does not go into the pros and cons of different structures for tax purposes. That is a matter for specialist legal and financial advice.

If a special disability trust is set up during your life, you may be able to address tax issues by keeping only a small amount of assets in the trust during your life, with the intention that substantial assets will be contributed after your death through your will. This may involve other costs, which you should consider carefully before setting up the trust.

Are there other costs of maintaining a trust?

If the trustee uses an accountant to prepare accounts and tax returns, there will be fees for that work. If the trustee is a company, there will also be legal and accounting fees associated with setting up and maintaining the company.

These sorts of expenses, and the legal and other fees of setting up trusts, are something you should consider with your professional advisers before deciding whether to set up a trust now, or through your will, or at all; what assets to place in trust; and when to do so.

Further detailed information on trusts is contained in the *Planning for the Future – People with Disability* booklet.

Section 2

Special disability trusts and social security: the general rules and concessions for special disability trusts

General

Australia's social security system is based on need and is designed to be a safety net for people who are unable to support themselves. To ensure the system provides help where it is most needed, there is a means test which has two components: the income test and assets test.

The amount of income support payable to a recipient is calculated under both the income and assets tests. The test that results in the lower rate of income support is the one that is applied.

Under the means test, there are special rules for the treatment of gifts made to third parties and private trusts and companies.

These rules can be complex, depending on your circumstances. You should get financial and legal advice about how the rules may affect you or any trust you have or intend to set up.

For more information, including payment rates, please contact your nearest Centrelink Customer Service Centre or DVA office. This information can also be found online at www.centrelink.gov.au and www.dva.gov.au

Concessions for special disability trusts

The new legislation concerning special disability trusts is intended to reduce the impact of the rules applying to trusts and encourage families who wish to make their own arrangements for family members with severe disability. The general thrust of the special disability trust legislation is to create exceptions to the ordinary means test rules applying to trusts for a person with severe disability.

These are potentially significant concessions where family members and people with severe disability rely (or may rely in the near future) on social security or veterans' affairs entitlements, or would potentially qualify for income support if they transferred funds to a special disability trust.

However, for these concessions to be available, the trust **must** adhere strictly to the rules for special disability trusts, and the rest of this section explains how those rules operate. Most importantly, the trust must be established for the **sole purpose** of providing **care and accommodation** for a person with severe disability. The initial step should be to verify with Centrelink or DVA that the person for

whom the trust is being established is 'severely disabled' as required by the special disability trust rules (see page 13) before establishing a special disability trust.

Concessions for people with severe disability

Income test

- ▶ Income from the assets of a special disability trust **will not be counted for the application of the income test to the beneficiary of the trust.**
- ▶ The use of money from the trust to pay for accommodation or care for the person with severe disability will not be counted as that person's income for income support purposes.

Assets test

- ▶ If a person with severe disability is the beneficiary of a special disability trust, the assessable assets of that trust up to \$500,000 (to be indexed annually) will be disregarded for the application of the assets test. This means that it will not affect the income support entitlements of the person with severe disability. For the meaning of 'assessable assets', see general assets test rules at www.centrelink.gov.au and www.dva.gov.au or contact your nearest Centrelink Customer Service Centre or DVA office.
- ▶ As the principal home of the person with severe disability would also be disregarded, this means that the special disability trust could have assessable assets of up to **\$500,000 plus the home in which the person with severe disability lives** before the excess assets are included in the principal beneficiary's assessable assets.

Example

A special disability trust has \$700,000 in assets plus a home for the beneficiary with severe disability Carol, as at 1 January 2007. The assets to which the assets test applies will be the 'excess' above the assets test concession (which is \$500,000 as at 20 September 2006): that is, \$200,000 after the home and \$500,000 assets test concession are disregarded. Carol is assessed as a single homeowner for the purposes of the means test. Depending on Carol's other assessable income and assets, Carol's income support payments may be reduced.

- ▶ The assets test concession for special disability trusts, initially set at \$500,000 on 20 September 2006 and indexed annually, applies at any point in time, so if assets are spent and the trust is topped up, the concession still applies up to the limit.
- ▶ As the assets test concession is indexed, the amount the trust can hold without affecting the income support payments of a person with severe disability will change annually.

Example

A special disability trust has \$500,000 at 20 September 2006. On 1 July 2007, the assets test concession is increased by indexation to \$510,000. The trust has earned income of \$20,000 and spent \$15,000, so the assets held in the trust on 1 July 2007 are worth \$505,000. Because the assessable assets are less than the \$510,000 indexed limit, none of the trust's assets are assessed under the assets test.

Concessions for immediate family members of a person with severe disability

Gifting concessions

- ▶ Anyone can give to the special disability trust. However, the principal beneficiary that is the person with disability and their partner can only do so if the gift is funded by:
 - assets the principal beneficiary received under a will; or
 - a superannuation death benefit received by the primary beneficiary;and the funds are transferred to the trust within three years of their receipt by the principal beneficiary.
- ▶ Any gift to the trust, whether it is from an immediate family member or any other person, must be unconditional and made without expectation of receiving any payment or benefit in return.
- ▶ The gifting concession is only available to an immediate family member who:
 - receives a social security pension and has reached age pension age; or
 - receives a service pension and has reached the veterans' pension age; or
 - receives a veterans' income support supplement and has reached the qualifying age for the payment.
- ▶ 'Immediate family members' of the person with severe disability are:
 - parents (including adoptive and step parents);
 - legal guardians of a person with severe disability who is less than 18 years old, and people who were legal guardians when the person with severe disability was less than 18 years old;
 - grandparents; and
 - brothers and sisters (including adoptive and step brothers and sisters and half brothers and sisters).
- ▶ The gifting concession applies to gifts up to \$500,000 (which is **not** subject to indexation). To use the concession, you must be an immediate family member who is receiving a qualifying payment and inform Centrelink or DVA of your intention to use the concession. Where the concession has been fully used, additional contributions by immediate family members will be assessed under the normal gifting rules.
- ▶ Gifts from people who are not immediate family members, or gifts in excess of the gifting concession from immediate family members, are assessed under the normal gifting rules.

Example

David has a special disability trust. His parents Paul, aged 65, and Lucy, aged 63, are both receiving the age pension. When the trust was established in 2006, they contributed \$300,000 to the trust. By 2012, most of the funds had been spent on care and accommodation, and Paul and Lucy contribute a further \$300,000 to the trust. The gifting concession will apply to the first contribution and to \$200,000 of the second contribution. Therefore, the normal gifting rules will apply to the excess of \$100,000.

- ▶ An immediate family member who is not of qualifying age (and whose partner is not of qualifying age) can make contributions to a special disability trust and take advantage of the concession later, when he or she reaches qualifying age, providing the gifting concession has not been fully used. This means that it is possible to put assets in the trust up to five years before claiming the age pension or relevant veterans' entitlement, and still have the assets disregarded for means test purposes when you receive income support. Where you are already receiving income support before reaching qualifying age, the gift will be counted under the normal gifting rules until you reach qualifying age.

Example

Greg has severe disability and his father John, aged 58, has established a special disability trust for him. On 1 October 2006, John gave \$500,000 to the trust. John cannot apply to Centrelink for the gifting concession as he is below age pension age.

On 1 June 2011, John gives another \$500,000 to the trust. The trust has not received any other contributions since John's initial contribution in 2006.

In 2013, John turns 65 and applies for age pension. John's gift in 2006 is disregarded because it was more than five years prior to his claim for age pension. His gift in 2011 is within five years of his claim, and as he is an immediate family member his gift is eligible for the gifting concession. Therefore his gift in 2011 will be disregarded for social security means test purposes.

Example

A variation of the above example: in 2012, Greg's grandmother Marie puts \$200,000 into Greg's trust. Marie is currently receiving the age pension. As Marie is an immediate family member, her gift is eligible for the gifting concession. Marie receives the gifting concession.

In 2013, John turns 65 and applies for age pension. When he applies for the age pension, the available gifting concession is \$300,000. John's gift in 2011 of \$500,000 would be partially eligible for the gifting concession. The remaining \$200,000 of his 2011 gift will be assessed under the normal gifting rules.

Example

A further variation of the example above: if the contribution in 2012 was from Paul, a close family friend (rather than Greg's grandmother), his gift would not qualify for the gifting concession as Paul is not an immediate family member. John would get the benefit of the full concession.

- ▶ The gifting concession is applied to each special disability trust. Where there are two children who are eligible within one family, immediate family members of qualifying age can use the gifting concession of up to \$500,000 for each special disability trust.

The rules for special disability trusts in more detail

The special disability trust legislation implements the Government's objective of encouraging families who wish to make provision themselves for family members with severe disability. Some of the rules may seem restrictive. However, they are intended to prevent people from using the trust for purposes other than supporting the person with severe disability, and to discourage use of the concessions for the primary purpose of obtaining income support, rather than to provide additional resources for a person with severe disability.

The questions and answers below cover some of the issues you need to consider before deciding whether a special disability trust is appropriate for you and your family's circumstances. For further information on issues to be considered, please refer to *The Guide to Social Security Law* (http://www.facsia.gov.au/guides_acts/ssg/ssg-rn.html), or contact your nearest Centrelink Customer Service Centre.

Who is a person with 'severe disability'?

A **person with severe disability** is someone over 16 who:

- ▶ has an impairment which would entitle them to Disability Support Pension (*Social Security Act*) or invalidity service pension or invalidity income support supplement (*Veterans' Entitlement Act*);
- ▶ because of their disability, is not working, and is not likely to work, at relevant minimum wages;
- ▶ and either:
 - lives in an institution, hostel or group home that provides care for people with disability and for which funding is provided (wholly or partly) under an agreement between the Commonwealth, the States and the Territories; or
 - has disability that would, if the person had a sole carer, qualify the carer to receive Carer Payment or Carer Allowance.

A person under 16 may be a **person with severe disability** if they are a 'profoundly disabled child' under the *Social Security Act*.

The initial step should be to verify with Centrelink or DVA that the person for whom the trust is being established is 'severely disabled' as required by the special disability trust rules before establishing a special disability trust.

For more information on what these tests mean:

- ▶ for Centrelink payments, please contact 13 10 21 to make an appointment or contact your nearest Centrelink Customer Service Centre;
- ▶ for DVA payments, please contact the Trusts & Companies Team on 1800 550 462, via email at Trusts&Companies@dva.gov.au, or via post at PO Box 21, Woden ACT 2606.

Can a person with severe disabilities have more than one special disability trust?

No. There can only be one special disability trust for each person with severe disability, so if a special disability trust already exists, any further trust will not qualify for the special disability trust concessions.

What are 'reasonable accommodation and care needs'?

The sole purpose of a special disability trust has to be to meet the reasonable accommodation and care needs of the person with severe disability.

The scope of reasonable accommodation and care needs will be included in the *Guide to Social Security Law*. The guiding principle is that a special disability trust can only pay for:

- ▶ the cost of accommodation for the person with severe disability; and

- ▶ extra care costs arising from the disability; and
- ▶ incidental expenses such as fees for professional trustees, and investment and accounting expenses.

Apart from accommodation:

- ▶ the trust can only be used for things which are necessary because of the disability; and
- ▶ the special disability trust cannot pay for things that a person without disability would ordinarily buy or ordinary day-to-day expenses. The person's income support payments or other assets or income should pay for those things.

What will be reasonable in each case will depend on the level of disability and the needs of the person concerned. What is reasonable for one person with severe disability will not necessarily be reasonable for another. **The most important consideration is what the beneficiary with disability requires by way of accommodation, and by way of care because of the disability.**

For further information regarding reasonable care and accommodation costs, refer to the *Guide to Social Security Law*. These guidelines will develop over time. The trustee will need to be aware of the rules and keep up to date with them to understand what a special disability trust for a particular person can, and cannot, do.

Can the trust pay family members for providing services?

No. The trust **cannot** be used to pay immediate family members for providing care and accommodation:

- ▶ the trust cannot spend money to pay an immediate family member or child of the beneficiary for providing care for the beneficiary;
- ▶ the trust cannot spend money to pay an immediate family member or child of the beneficiary for providing maintenance services for the beneficiary's accommodation;
- ▶ the trust cannot spend money to buy or lease property from an immediate family member or child of the beneficiary, including 'granny flats'.

(For definition of 'immediate family members' see page 11.)

How can I provide for things other than care and accommodation?

If you want to provide for a person with severe disability to have resources for things outside the scope of 'accommodation and care', such as holidays, a TV, a CD player, clothes or ordinary furniture (not necessary only because of the disability), you will need to make separate provision for this. These things cannot be paid for from a special disability trust.

You could set up separate trusts: that is, a special disability trust through a trust deed or will to meet care and accommodation costs and another more general form of trust to meet other costs.

Alternatively, you could set up a general trust without having a special disability trust. You will need to consider how important the various considerations are and how to balance or prioritise them. These considerations include:

- ▶ income support entitlements;

- ▶ need for the trustees to provide a broad range of benefits beyond ‘reasonable care and accommodation’;
- ▶ the extent to which you have arranged future housing and care;
- ▶ how much money might be needed to fund those arrangements in future;
- ▶ how much property you have to deal with; and
- ▶ the cost and complexity of the arrangements with which the trustees will have to deal.

Will any trust qualify as a special disability trust?

No. The legislation requires that the trust must meet the specified requirements. So it is essential that the terms of the trust meet those requirements and do not contradict them in any material way: ‘any trust’ will not do.

However, this doesn’t mean that the trust can’t have its own individual provisions, so long as they are consistent with the specified requirements. The ‘model trust deed’ (see Section 3) is just that: a model, not a compulsory form of document. You and your advisers do not have to follow all of its terms exactly. You can make changes to suit you personally, so long as the trust is still consistent with the legislative requirements. The model special disability trust deed contained in Section 3 has been marked up to show which provisions are compulsory (non-shaded) and which are optional (shaded).

Some provisions of the model disability trust deed are compulsory if the trust is to qualify as a special disability trust, so you cannot ‘water down’ those provisions and can only change them to make the provisions of the trust more specific.

For example, you might not want to make the trust assets available for accommodation and care generally; you might want to be more specific about how the trust assets can be used. So you might say in the trust deed that it can only pay for accommodation in the form of a place in a group home. Such a trust could still be a special disability trust, as the purpose of the trust is still to meet reasonable care or accommodation needs.

There are other trust provisions which are not specifically required by the rules for special disability trusts. For example, clause 2.2 of the model special disability trust deed says whom the trustee should consult: the trustee must **‘review the needs of the Principal Beneficiary at least annually and consult with the Principal Beneficiary’s immediate caregiver and the Principal Beneficiary (if possible)’**. This clause could also mention consulting other members of the family and other people involved in the life of the person with severe disability generally (for example, any significant service providers) or specifically (for example, a named friend or medical adviser), or it could be omitted altogether (though omitting it altogether would make it more difficult to ensure that the trustee considers what is in the best interest of the person with severe disability).

Who can be a trustee of a special disability trust?

Anyone can be a trustee as long as they meet the legislative requirements (which are included in the model trust deed in clause 5.1: see page 29). This includes parents, immediate family members, accountants, solicitors, corporate trustees and state trustees. The legislative requirements are set out in the *Guide to Social Security Law*. There are also state-based laws that govern trustee responsibilities.

Are there any restrictions on what can be gifted to a special disability trust?

Yes. Two types of assets cannot be contributed to the trust:

- ▶ compensation money received by the beneficiary (for example, damages from a motor vehicle accident claim);
- ▶ property contributed by the beneficiary himself or herself (or his or her partner), unless it was received under a will or from a superannuation death benefit within the three years before it was transferred to the trust.

These rules are intended to preserve the existing treatment of compensation payments and prevent the person with severe disability from putting their own property into a special disability trust in order to qualify for income support, rather than using it directly for their own support.

What happens if someone fails to comply with the rules?

If there is a failure to comply within the rules, the trust may cease to be a special disability trust and the principal beneficiary may lose income support concessions. You should also note that there may be an impact on a donor's income support entitlement.

However, Centrelink / DVA have the discretion to disregard some contraventions. This will depend on how serious, deliberate and prolonged the contravention was, which provisions were contravened, and how the contravention or waiver of the contravention may affect the interests of the person with severe disability.

What happens if a special disability trust ceases to be such a trust?

The trust will cease to be a special disability trust when the beneficiary with severe disability dies. It may also cease to be a special disability trust because of infringements of the rules.

The provisions of the trust should specify what should then happen to any property remaining in the trust. For example, see clause 4 in the model special disability trust deed (page 28).

If the trust deed allows, the people who have contributed funds to the trust can specify what they want to happen to any surplus property derived from their contribution. For example, it could be returned to them (if they are still alive) or to their executors to be dealt with under their will. Or they could nominate their children, other family members or a charity to receive their share.

The assets may return to the people who contributed them, in which case they will then have these assets for means test purposes, which may affect their income support entitlements.

If the trust comes to an end or ceases to be a special disability trust within five years of property being transferred to the trust, that property may be subject to the gifting rules and may affect the income support entitlements of the person who gave the property to the trust.

Well, I've considered all these rules. Should I set up a special disability trust or not?

The answer to that depends entirely on your own circumstances and the specialised professional advice you obtain. However, at a general level, consider these matters:

- ▶ if the person with disability does not have 'severe' disability (see page 13), then a 'special disability trust' cannot be established;
- ▶ if neither you nor the person with severe disability rely on (or are likely to rely on) income support, there may be no benefit in setting up a special disability trust;
- ▶ if you or the person with severe disability do, or may, rely on income support, but the level of assets you are likely to provide for care and accommodation will not have any effect on entitlements, then there may be no benefit in setting up a special disability trust. This might be because you do not have enough money to provide for care and accommodation or because you have already made arrangements which do not require further extensive funding;
- ▶ if the need for money for care and accommodation is only a possibility rather than a likelihood, it may not be appropriate to tie up a lot of money in a special disability trust where it cannot be used for other things and where there will be tax consequences (for example, if income accumulates rather than being spent) and ongoing accounting expenses;
- ▶ if you want funds to be available for the person with severe disability more broadly than for just care and accommodation, a special disability trust will not be suitable or may be only part of the arrangements you need to establish.

However, if:

- ▶ **income support does matter to you or the person with severe disability;**
- ▶ **the disability is severe and eligibility is confirmed by Centrelink or DVA;**
- ▶ **you have funds available which will make a difference to care and accommodation arrangements for the person with severe disability, now or after you are gone;**
- ▶ **those funds are large enough to affect the income support entitlements of the person with severe disability or your entitlements (through the gifting rules);**

then a special disability trust may help significantly in planning for the future of your family member with severe disability.

In that case, obtain professional advice, and consider working such a trust into your vision and plan for the future.

Section 3

The model special disability trust deed

The trust deed on the following pages contains the clauses which are essential for the trust to comply with the requirements of the special disability trust legislation.

This deed can stand alone as a trust deed or be attached to a will which refers to this as the terms of the trust created by the general provisions of the will, or with some modifications (indicated generally in the following pages) it can be included in your will.

It is not necessary to adopt this trust deed in its precise terms. You may want to vary particular provisions. That will not create problems for application of the special disability trust rules if the essential features are retained (see also pages 13–16). The model special disability trust deed in the following section has been marked up to show which provisions are compulsory (non-shaded) and which are optional (shaded).

It is therefore very important to have professional legal or financial advice from advisers familiar with the special disability trust rules when preparing such a trust and when considering changing the model trust deed.

The trust deed may seem complicated if you are not familiar with trusts and legal documents, even though it has been drafted in ‘plain English’ as far as possible. The key to understanding the deed is to read it carefully and slowly, clause by clause, and to check the definitions (clause 9.3 on pages 35–36) when necessary. If the trust deed is still not clear, you may need to discuss it with your solicitor or financial adviser.

Model trust deed for special disability trusts

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THIS DEED OF TRUST is made on [date] *

PARTIES: *

1. [Settlor Name and address to be advised] ('the settlor').
2. [Name and address to be advised] ('the Trustee').

INTRODUCTION: *

[Commentary: This section and clauses 1 and 2 set the scene for the formal creation of the trust and its basic provisions. If you set up the trust by a Will, these things will be covered in the Will. Definitions of some of the expressions used in the trust are set out in clause 9.3 (page 35).]

- A. The settlor has decided to create a Trust Fund for the purpose of making provision for the care and accommodation of the Principal Beneficiary of the trust, as described in these terms of trust.

[Commentary: For a trust to exist, it must hold property. The Settlor contributes an initial amount (typically \$10 –see sub-clause D) so that a trust can be established. The Settlor is someone independent of the other parties such as the trustees and/or appointer.]

- B. The intention of the settlor is to establish a Trust Fund that qualifies as a special disability trust, within the meaning of the Social Security Act 1991 or the Veterans' Entitlement Act 1986, whichever is applicable to any Donor and/or the Principal Beneficiary.

- C. The settlor has decided to appoint the Trustee as Trustee of this trust, and the Trustee has consented to become the first Trustee upon the trusts and with and subject to the powers and provisions contained in these terms of trust.

[Commentary: A trustee is a person or corporation who operates the trust. The terms of the trust deed will determine how the trustee will administer the funds held in the trust. The trustee has a duty to act honestly and in the best interests of the beneficiary. The trustee must comply with the terms of the trust deed and relevant state or territory legislation that applies to trustees.]

- D. The settlor has paid or will pay the sum of \$10.00 to commence the trust ('the settled sum').
- E. The parties anticipate that further Contributions will be paid to the Trustee in respect of the trust for the benefit of the Principal Beneficiary.

* Omit if trust established under a Will

PROVISIONS

1 Establishment of Trust

1.1 The Principal Beneficiary

The Principal Beneficiary of the trust is [name and address to be advised] ('the Principal Beneficiary').

[Commentary: The principal beneficiary is the severely disabled person as defined on page 13.]

1.2 Declaration of Trust

The Trustee HEREBY DECLARES that in respect of the trust the Trustee will hold the Trust Fund and the income arising therefrom upon trust during the lifetime of the Principal Beneficiary solely for the benefit of the Principal Beneficiary and with and subject to the powers and obligations contained in the remainder of these terms of trust.

1.3 Name of Trust

The trust shall be known as [Name of Trust] Trust.

1.4 Application of Operative Provisions

Unless the context requires otherwise, the operative provisions set out in the remainder of these terms of trust will apply in respect of the trust established pursuant to these terms of trust.

1.5 Duration of Trust

The trust will end on the earlier of:

- (a) the date of death of the Principal Beneficiary;
- (b) if assets are fully expended on the Principal Beneficiary, the date of such full expenditure; or
- (c) any earlier date as required by law ('the end date').

[Commentary: For example: State law sets out the number of years that a trust may exist.]

1.6 The Appointor

[Commentary: An Appointor can be any person or corporation who is not the Principal Beneficiary or Settlor. An appointor is not responsible for the day-to-day operation of the trust. See the explanation of the role of the appointor on pages 5, 32–33.]

- (a) The initial Appointor[s] of the trust [is/are] [Name and address to be advised] ('the Appointor');
- (b) An Appointor shall have the power to nominate any person or persons or entity to act together with or in his, her or its place and may place such conditions or restrictions on such nomination (and may make such nomination revocable or irrevocable) by any notice in writing to the trustee, or by Will, save that where there is more than one Appointor, an Appointor must obtain from all of the other Appointors the prior written consent to all of the terms of any nomination pursuant to this subclause;

- (c) A successive Appointor, if the nomination is otherwise silent, shall also have the power to nominate a successor or alternate Appointor as if they were the initial Appointor;
- (d) The Appointor shall exercise their power in accordance with clause 7 and any power of the Appointor may be exercised by the Trustee in the absence of the Appointor at any time.

1.7 Exclusion of Settlers *

[Commentary: The intention of this provision is to prevent the person who formally sets up the trust from still being seen as the owner of the trust assets and income for tax purposes. To ensure this, the settlor has nothing further to do with the trust. The settlor will often be a more distant family member, who will not have an ongoing role in the operation of the trust.]

Notwithstanding anything express or implied in these terms of trust:

- (a) The trust will be possessed and enjoyed to the entire exclusion of the settlor and of any benefit to the settlor by contract or otherwise, and any resulting trust in favour of the settlor is expressly negated;
- (b) No part of the trust will be paid, lent to, or applied for either the direct or indirect benefit of the settlor in any manner or in any circumstances;
- (c) No power in these terms of trust, or appointment made pursuant to these terms of trust or conferred by law upon the Trustee will be capable of being exercised in such manner that the settlor will or may become entitled, either directly or indirectly, to any benefit in any manner or in any circumstances whatsoever.

2 Administration of the Trust

[Commentary: This clause expresses some of the major points required of special disability trusts: the restriction to care and accommodation, payments not to be made to immediate family for care and repairs and maintenance, and the paramount importance of the person with the disability as the focus of the trust.]

2.1 Sole Purpose of Trust

- (a) The Trustee must hold the Trust Fund and the income derived in each accounting period on trust and pay or apply all or any part of the income and all or any part of the Trust Fund for the sole purpose, as defined in the remainder of this clause;
- (b) No part of the income or the Trust Fund may be used for any payment of Immediate Family Members or a Child of the Principal Beneficiary including:
 - (i) the provision of care services; or
 - (ii) repair and maintenance of accommodation for the Principal Beneficiary;
- (c) The operation of sub-clause (a) does not preclude the Trustee from applying any part of the income or the Trust Fund for an ancillary purpose.

* Omit if trust established under a Will

- (d) For the purpose of this deed the ‘sole purpose’ means the reasonable care and accommodation of the Principal Beneficiary as determined by the Trustee from time to time but:
- (i) shall not include such daily living costs or expenses of the Principal Beneficiary that do not relate to reasonable care and accommodation needs;
 - (ii) shall not include expenditure which is primarily for the direct or indirect benefit of any other person; and

[Commentary: This sub-paragraph does not include situations where the residence of the principal beneficiary provides an incidental benefit to their partner.]

- (iii) must be in accordance with any requirement or determination made by the Secretary from time to time;

- (e) For the purpose of these terms of trust, ‘ancillary purpose’ means a purpose that is necessary or desirable to achieve the sole purpose of the trust.

2.2 Priority of Principal Beneficiary

[Commentary: This clause is intended to ensure that the trustee considers what is in the best interest of the person with a severe disability.]

In carrying out their responsibilities under this clause, the Trustee is required:

- (a) to have regard to the nature and severity of the Principal Beneficiary’s condition as well as the current and future care needs of the Principal Beneficiary;
- (b) to ensure the interests of the Principal Beneficiary are to take precedence over any interest or expectancy as to net income or capital of any Donor or Specified Beneficiary; and
- (c) to review the needs of the Principal Beneficiary at least annually and wherever possible, consult with the Principal Beneficiary’s immediate caregiver and the Principal Beneficiary.

[Commentary: A more frequent consultation period may be preferable.]

2.3 Right of Occupation

With respect to all real property contributed to the Trust Fund by a Donor or acquired by the Trustee, in which the Principal Beneficiary lives (‘the Residence’):

- (a) the Principal Beneficiary shall have a personal right of occupation in respect of the Residence for as long as they wish for their lifetime; and
- (b) the Residence may be sold and the proceeds used to acquire a substituted Residence to which the provisions of this sub-clause may apply, provided that in exercising their power pursuant to this paragraph, the Trustee shall act to achieve the sole and ancillary purposes of the trust, and have regard to the priority of the Principal Beneficiary as set out in the preceding sub-clauses.

2.4 Power to Accumulate Income

The Trustee may, in any Accounting Period, accumulate and retain as much of the income of the Trust Fund, if any, as is required to achieve the sole or ancillary purposes of the trust during that Accounting Period, as an addition to the Trust Fund.

[Commentary: This clause allows the trustee to decide to save some of the income each year rather than having to distribute it all. This gives the trustee flexibility in administering the trust assets and income. There may be tax issues relating to accumulation of income so the trustee should get professional advice before making a decision.

Paying income from a special disability trust for the care and accommodation needs of the principal beneficiary with a severe disability will not affect that person's income support entitlements.]

3 Trust Property Requirements

3.1 Contributions

The Trustee may accept Contributions from anyone who is eligible to be a Donor.

[Commentary: These provisions regulate the sources of the funds of the trust, consistent with Social Security and DVA rules. In particular, they prevent the person with a severe disability from providing funds to their 'own' trust except in limited circumstances.]

3.2 Non-acceptable Contributions

The Trustee shall not accept any of the following:

- (a) Contributions made by the Settlor other than the settled sum *;
- (b) conditional Contributions by any Donor;

[Commentary: This means that a donor cannot control how their gift is used. For example, if a person gives a property to the trust they cannot demand that the trust not sell the property. Once a gift has been made to the trust, it is the trustee who will decide how to use the trust assets for the care and accommodation needs of the beneficiary. This does not, however, stop the donor nominating to whom their proportion of the trust assets should be distributed when the trust comes to an end. See clause 4.2.]

- (c) any asset transferred to the trust by the Principal Beneficiary or the Principal Beneficiary's Partner unless:
 - (i) the asset is all or part of a bequest, or a superannuation death benefit; and
 - (ii) the bequest or superannuation death benefit was received not more than three years before the transfer;
- (d) any Compensation received by or on behalf of the Principal Beneficiary; or
- (e) any Contribution that would cause the Trustee to be in breach of the specific requirements set out in these terms of trust.

[Commentary: Clauses 3.3, 3.4 and 3.5 are intended to prevent the trust channelling assets back to the family, or undertaking other transactions with closely related parties, which might take the focus of the trust away from providing care or accommodation for the person with a severe disability and which would infringe the special disability trust rules.]

* Omit if trust established under a Will

3.3 Restrictions on Use of Trust Funds

- (a) The Trust Fund or any of the income of the Trust Fund cannot be used to purchase or lease property from an Immediate Family Member or a Child of the Principal Beneficiary, even if that property is to be used for the Principal Beneficiary's accommodation;

[Commentary: For example, the trust could not buy the property from an immediate family member. However, the immediate family member could give the property to the trust.]

- (b) For the purpose of this sub-clause, 'property' includes:
 - (i) a right to accommodation for life in a residence; and
 - (ii) a life interest in a residence.

3.4 Prohibition on Borrowing

The trustee must not borrow money, whether from a related or non-related party.

3.5 Further Prohibitions with regard to Related Parties

[Commentary: The objective of the trust fund is to pay for the principal beneficiary's care and accommodation costs. Lending funds to the related parties is not consistent with this objective.]

- (a) The Trustee must not;
 - (i) lend from or give any other financial assistance using the Trust Fund or the income of the Trust Fund to; or
 - (ii) intentionally acquire, except by way of a Contribution, property (other than a listed security acquired at market value) from; or
 - (iii) employ, engage or pay any agent, contractor or professional person for any services in relation to the trust fund or the Principal Beneficiary who is; or
 - (iv) enter into an uncommercial transaction with any person who is;

a related party;

- (b) For the purposes of this clause, 'related party' means:
 - (i) the Settlor *;
 - (ii) the Trustee, other than a Professional Trustee for the purposes of paragraph 5.1(a)(iii);
 - (iii) a Donor;
 - (iv) the Principal Beneficiary;
 - (v) the Appointor;
 - (vi) an Immediate Family Member;
 - (vii) a parent or a sibling of anyone in any of the preceding sub-paragraphs of this paragraph;
 - (viii) a descendant of anyone in any of the preceding sub-paragraphs of this paragraph;
 - (ix) a Partner of anyone in any of the preceding sub-paragraphs of this paragraph; or
 - (x) any entity (other than widely held entities) of which anyone in the any of the preceding sub-paragraphs of this paragraph is a director, shareholder, trustee or holds the power to appoint a director or trustee.

* Omit if trust established under a Will

3.6 Prohibition on Lending to Principal Beneficiary

[Commentary: The objective of the trust fund is to pay for the principal beneficiary's care and accommodation costs. Lending funds to the principal beneficiary or their partner is not consistent with this objective.]

The Trustee must not lend any of the Trust Fund or any of the income of the Trust Fund to the Principal Beneficiary or the Principal Beneficiary's Partner.

3.7 Donor Register

[Commentary: Keeping a record of the donors is important for establishing who receives the assets of the trust when it comes to an end. It can also be used to advise Centrelink of the contributions made to the trust.]

The Trustee must maintain a register of all Donors to the Trust Fund in accordance with Schedule A.

4 End of Trust

[Commentary: This provision regulates the winding up of the trust when it is no longer required or otherwise comes to an end. It allows the people who contribute assets to receive back their contributions, on a proportional basis, or to nominate someone else to whom the assets should be transferred. A parent of the beneficiary with a severe disability could nominate their other children or their grandchildren, for example. There may be issues under the gifting rules for someone who contributed assets if the trust comes to an end within 5 years of the contribution. In that case, you may need to obtain advice. This may also be a consideration in deciding whom to nominate to receive any assets, which become available at the end of the trust.]

4.1 Balance of Trust at the End Date

- (a) If, at the end date, after the payment of all taxes and expenses, the Trust Fund has not been fully expended on the purposes of the trust, or the income has not been fully allocated, the property of the Trust Fund and any unallocated income ('the balance of the Trust') shall be dealt with in accordance with the remainder of this clause;
- (b) If there is more than one Donor to the Trust Fund, the trustee shall identify each Donor's Contributions to the Trust Fund;
 - (i) calculate the percentage of each Donor's Contributions to the overall Contributions to the Trust Fund; and
 - (ii) apply the percentage to the balance of the Trust to determine the balance of each Donor's Contribution ('the Donor's Contribution Balance');
- (c) On the end date, the settled sum shall be deemed a Contribution made:
 - (i) If only one Donor, by the Donor; or
 - (ii) If more than one Donor, by the Donor who made the largest Contribution; or
 - (iii) If more than one made the equal largest Contribution, equally between those Donors.

4.2 Distribution of Trust Property at the End Date

- (a) The Trustee anticipates that a Donor may make a nomination at the time of contribution regarding the distribution of all or part of his, her or its Contribution Balance at the end date;
- (b) During the term of the trust:
 - (i) a Donor who is an individual may alter his or her nomination by making a subsequent valid nomination during the Donor's lifetime; and
 - (ii) a Donor that is an entity (such as the trustee of a deceased estate, the trustee of any other trust or a corporation) may alter its nomination by making a subsequent valid nomination for as long as the entity exists;

and the Trustee shall only have regard to the last valid nomination made by the Donor;

- (c) For any such nomination or subsequent nomination to be valid, the nomination must be:
 - (i) in the form set out in Schedule B;
 - (ii) submitted in writing to the Trustee; and
 - (iii) formally accepted by the Trustee in writing, and an endorsement by the Trustee on the form is sufficient for this purpose;
- (d) The Trustee may in its absolute discretion, refuse to accept a nomination or a subsequent nomination;
- (e) Where a Donor has nominated his or her estate, or where a Donor's Contribution Balance is to be dealt with under the terms of the Donor's last Will, an individual Donor is not required to notify the Trustee of any change to his or her last Will;

[Commentary: Note: alteration of a nomination once the trust is established may have state duty, capital gains tax and other tax consequences for the trust.]

- (f) At the end date, the Trustee shall distribute the Donor's Contribution Balance to the Specified Beneficiary in accordance with the Donor's last valid nomination in Schedule B;
- (g) If, with regard to all or any part of the Donor's Contribution Balance, the Donor has not made a valid nomination, or if any Specified Beneficiary cannot receive a distribution, the Trustee shall distribute that part of the Donor's Contribution Balance to the Donor, if living at the end date, or if not living, to the legal personal representative of the Principal Beneficiary.

5 The Trustee

5.1 Qualifications of the Trustee

[Commentary: The requirement for at least two trustees is aimed at protecting the principal beneficiary.]

- (a) The Trustee must:
 - (i) in relation to an individual:

- (1) be an Australian resident;
 - (2) not have been convicted of an offence against or arising out of a law of the Commonwealth, a State, Territory or a foreign country, being an offence of dishonest conduct;
 - (3) not have been convicted of an offence against or arising out of the Social Security Act, the Administration Act or the Veterans' Entitlement Act; and
 - (4) not have been disqualified at any time from managing corporations under the Corporations Act 2001;
- (ii) in relation to a corporation, be a corporation with two or more directors who comply with the requirements of sub-paragraph 5.1(a)(i); or
 - (iii) be a Professional Trustee who complies with the requirements of sub-paragraphs 5.1(a)(i) or 5.1(a)(ii);
- (b) If at any time the Trustee is not a corporation or a Professional Trustee, there must be two or more individuals acting jointly as Trustee.

5.2 Resignation of Trustee

Any Trustee may resign office by notice in writing given to the other Trustees and the Appointor (if any) and such resignation shall take effect upon such notice being given.

5.3 Trustee's remuneration

- (a) Any Trustee who is a Trustee Corporation shall be entitled to make all such usual and proper charges for both professional and other services in the administration of this Trust Fund and for the trustee's time and trouble as the trustee would have been entitled to make if not a Trustee and so employed;
- (b) Any trustee who is a Professional Trustee other than a Trustee Corporation, will be entitled to charge and be paid all professional or other charges for any business or act done by him or her, or his or her firm, in connection with the special disability fund hereof including acts which a trustee could have done personally as if he or she were not such a trustee.

[Commentary: You can make broader provisions about remuneration to trustees if you wish, subject to the limitations on payments to immediate family members and having regard to the sole purpose of the trust.]

5.4 Delegation of Powers

The Trustee may in writing delegate the exercise of all or any of the powers or discretion hereby conferred on the trustee to any other person or persons and may execute any powers of attorney or other instrument necessary to give effect to such purpose, however the Trustee (including the delegate) must at all times satisfy the requirements in sub-clause 5.1 regarding the qualifications of the Trustee.

[Commentary: The power of delegation operates in situations where the trustee is unable to act – for example, where the trustee has gone away for a time, or has been hospitalised for a short time but decisions need to be made about the operation of the trust. This clause should be used where the trustee does not want to resign, or should not be forced to resign, but is unable to exercise their duties for a definite period of time.]

5.5 Extent of Trustee Responsibility

No Trustee shall be responsible for any loss or damage occasioned by the exercise of any discretion or power hereby or by law conferred on the Trustee or by failure to exercise any such discretion or power where the Trustee has acted honestly and reasonably.

[Commentary: This clause limits the trustees' liability for mistakes or action which cause loss to the trust. The trustees will only be liable for acting knowingly and deliberately wrongly. This gives the trustees protection from many possible complaints, and confirms the trustees' freedom of action. However, if you want the trustees to be subject to stricter control, you can alter this clause to suit your requirements.]

5.6 Liability and Indemnity

[Commentary: This gives the trustees the right to be covered by the trust for any expenses or liabilities they incur from acting as trustees.]

Provided the Trustee has acted honestly and reasonably, the Trustee shall be entitled:

- (a) to be reimbursed and indemnified for all costs and expenses (including legal costs and state duty) incurred in relation to establishing, operating, administering, amending, terminating and winding up the Trust Fund; and
- (b) to be indemnified out of the assets for the time being comprising the Trust Fund against liabilities incurred by it in the execution or attempted execution or as a consequence of the failure to exercise any of the trusts authorities powers and discretions hereof or by virtue of being the Trustee of the trust;

but shall have no recourse against the Principal Beneficiary or any of the Donors or Specified Beneficiaries to meet such indemnity.

6 Management of Trust Funds

[Commentary: These provisions require the trustee to act prudently in managing the trust assets and investments.]

6.1 Powers of Trustee

- (a) The Trustee shall have such powers as are necessary to carry out their responsibilities under these terms of trust and to fulfil the sole and ancillary purposes, and may nominate any specific powers that they may require, save that the Trustees must at all times administer the fund in accordance with the relevant Act governing Trustees, the Social Security Act, the Administration Act and the Veterans' Entitlements Act, and these terms of trust;
- (b) Without limiting the generality of the above sub-clause, the Trustee shall have the specific power to open an account with a financial institution.

6.2 Standard of Care

The Trustee must, in managing the Trust Fund and the income generated from the Trust Fund (including exercising a power of investment):

- (a) if the Trustee's profession, business or employment is or includes acting as a Trustee or investing money on behalf of other persons, exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons; or
- (b) if the Trustee is not engaged in such a profession, business or employment, exercise the care, diligence and skill that a prudent person would exercise in managing the affairs of other persons.

6.3 Investment Strategy

The Trustee must formulate and give effect to an investment strategy, for the purpose of satisfying and fulfilling the sole purpose as defined in clause 2. Subject to these needs, the investment strategy must have regard to:

- (a) the risk involved in making, holding and realising, and the likely return from, the Trust Fund's investments having regard to its objectives and its expected cash flow requirements;
- (b) the composition of the Trust Fund's investments as a whole including the extent to which the investments are diverse or involve the Trust in being exposed to risks from inadequate diversification;
- (c) the effect of the proposed investment in relation to the tax liability of the trust;
- (d) the liquidity of the Trust Fund's investments having regard to its expected cash flow requirements; and
- (e) the ability of the Trust Fund to discharge its existing and prospective liabilities.

7 Appointment and Removal of Trustee

[Commentary: This clause shows the role of the appointor to control future changes of trustee. It also provides the means to resolve any deadlocks between the trustees, avoiding the need for court proceedings. You may adopt other means of dealing with any disputes.]

- (a) Subject to sub-clause 5.1, the Appointor may at any time by writing:
 - (i) remove from office any Trustee (other than a Trustee appointed by the Court);
 - (ii) appoint a new or additional Trustee; or
 - (iii) appoint a replacement Trustee for any Trustee who resigns as Trustee or ceases to be Trustee under any provision of these terms of trustor law;
- (b) If any Trustee forms the opinion that a deadlock exists in relation to the administration of the trust, the Trustees shall then be deemed to have resigned from their office and the Appointor, or if no Appointor, the resigning Trustees shall appoint a Professional Trustee (who is not a resigning Trustee) in accordance with this clause.

8 Reporting & Audit Requirements

8.1 Keep Accounts

The Trustee must keep or cause to be kept proper accounts in respect of all receipts and payments on account of the Trust Fund and all dealings connected with the Trust Fund.

8.2 Financial Statements & Reporting

[Commentary: The financial statements make up a financial report, which details the assets and liabilities, and income and expenditure of the trust.]

- (a) As soon as practicable after the end of each Accounting Period, the Trustee must prepare or cause to be prepared written financial statements showing the financial position of the trust at the end of that Accounting Period;
- (b) The financial statements must:
 - (i) where the Trustee is or includes a Trustee Corporation, be prepared in accordance with all regulatory and legislative requirements applying to a Trustee Corporation; or
 - (ii) otherwise, be prepared by a member of the Institute of Chartered Accountants in Australia, CPA Australia or the National Institute of Accountants, who is not an Immediate Family Member of the Principal Beneficiary;
- (c) The Trustee must, on or before 31 March each year, forward to the Secretary the financial statements in relation to the previous financial year.

8.3 Audit Requirements

[Commentary: An audit is a formal examination of the trust's accounts and financial position by an independent party. It may also check on compliance with applicable laws, regulations and Centrelink and DVA requirements.]

- (a) An audit of the trust may be requested for the previous financial year ended on 30 June or other period as determined by legislative instrument pursuant to the Social Security Act or the Veterans' Entitlements Act by:
 - (i) the Principal Beneficiary;
 - (ii) an Immediate Family Member;
 - (iii) a legal guardian or financial administrator of the Principal Beneficiary (under Commonwealth, State or Territory law);
 - (iv) a person acting as guardian for the Principal Beneficiary on a long-term basis; or
 - (v) the Secretary;
- (b) If an audit request is received, the Trustee must within a reasonable time:
 - (i) cause an audit of the trust to be carried out unless already carried out for the relevant time period; and
 - (ii) provide a copy of the audit report to the person requesting the audit, to any guardian or administrator and to the Secretary;

- (c) The audit must be in accordance with the requirements of any legislative instrument made pursuant to 1209T(7) of the Social Security Act or 52ZZWG(7) of the Veterans' Entitlements Act;
 - (i) where the Trustee is or includes a Trustee Corporation, be carried out in accordance with all regulatory and legislative requirements applying to a Trustee Corporation; or
 - (ii) otherwise, be carried out by a member of the Institute of Chartered Accountants in Australia, CPA Australia or the National Institute of Accountants, who is not an Immediate Family Member of the Principal Beneficiary or the person who prepared the Financial Statements.

9 Miscellaneous

9.1 Waiver of Contravention

[Commentary: This sub-clause gives the trustees the power to seek approval from Centrelink or DVA for the trust to continue as a special disability trust if the rules for special disability trusts have been infringed in some way.]

The Trustee shall have the power to:

- (a) seek a waiver of contravention from the Secretary in relation to contravention of any requirement of the Social Security Act or the Veterans' Entitlements Act by the trust which would disqualify the trust from being a special disability trust under the Social Security Act or the Veterans' Entitlements Act, if not for the contravention; and
- (b) take the necessary steps to comply with any conditions imposed by the Secretary by way of a waiver notice under section 1209U of the Social Security Act or section 52AAAWH of the Veterans' Entitlements Act and any related legislative instrument made pursuant to these sections.

9.2 Amending the Trust

[Commentary: Another important role for the appointor.]

- (a) Save as provided in this sub-clause the terms of these terms of trust shall not be capable of being revoked added to or varied;
- (b) If there is for the time being an Appointor, the Trustee with the consent in writing of the Appointor, may at any time and from time to time by Deed amend the provisions whether of these terms of trust or of any Deed executed pursuant to this sub-clause but so that such amendment:
 - (i) shall be made only if it would not cause the trust to become non-compliant with the requirements of Part 3.18A of the Social Security Act or Division 11B of the Veterans' Entitlements Act in relation to special disability trusts; and
 - (ii) does not infringe any law against perpetuities; and
 - (iii) shall be made only if it is not made in favour of or for the benefit of or so as to result in any benefit to the settlor; and

- (iv) does not affect the beneficial entitlement to any amount allocated for or otherwise vested in the Principal Beneficiary prior to the date of the amendment.
- (c) The operation of this sub-clause shall not prevent:
 - (i) the Trustee accepting a nomination in accordance with subsection 4.2; and
 - (ii) the Trustee exercising its powers of nomination in accordance with sub-clause 6.1.

9.3 Definitions

In these terms of trust unless the context otherwise requires the following expressions shall have the following meanings:

‘accounting period’ means such period as the Trustee may from time to time determine to be an accounting period and subject to any contrary determination by it means such period of twelve months ending on the 30th day of June in each year PROVIDED firstly that the period commencing on the date of these terms of trust and ending on the 30th day of June next shall be an accounting period and secondly that the period commencing on the first day of July prior to the end date and ending on the end date shall be an accounting period.

‘the Administration Act’ means the Social Security (Administration) Act 1999 (Cth).

‘the Appointor’ means the person or persons named in these terms of trust, subject to any appointment to the contrary made in accordance with sub-clause 1.6.

‘Child’ in relation to a Principal Beneficiary has the meaning given to it by section 1209R of the Social Security Act and section 5ZZZWE(5) of the Veterans’ Entitlements Act.

‘Compensation’ has the meaning given to it under Part 1.2 of the Social Security Act and under Division 5A of the Veterans’ Entitlements Act.

‘Contributions’ are money, investments and other assets, donations, gifts, endowments, trust distributions and other forms of financial assistance paid or transferred by a Donor on an unconditional basis and accepted by the Trustee as additions to the Trust.

‘Donor’ means any person who makes a Contribution to the Trust Fund, but who is not the Settlor.

‘Immediate family member’ has the meaning given by section 23 (1) of the Social Security Act and section 5Q(1) of the Veterans’ Entitlements Act.

‘Invest’ means employ funds in a manner permitted by these terms of trust and ‘investment’ shall have a corresponding meaning.

‘Partner’ has the meaning given by section 4(1) of the Social Security Act and section 5E(1) of the Veterans’ Entitlements Act, whichever is applicable.

‘Professional Trustee’ means:

- (a) a Trustee Corporation; or
- (b) an Australian Legal Practitioner within the meaning of the (NSW) Legal Profession Act 2004 or the equivalent within its legislative equivalent in other Australian States or Territories.

‘the Principal Beneficiary’ means the person named in these terms of trust as the principal beneficiary and who fulfils the requirements set out in section 1209M of the Social Security Act or 52ZZWA of the Veterans’ Entitlements Act.

‘Secretary’ has the meaning given by section 23 of the Social Security Act and section 5Q of the Veterans’ Entitlements Act.

‘the Social Security Act’ means the Social Security Act 1991 (Cth).

‘Specified Beneficiary’ means a person or entity nominated to receive a residuary benefit in accordance with the procedures set out in clause 4 and Schedule B.

‘the Trustee’ means the Trustee or Trustees for the time being of this Trust (as named in these terms of trust) whether original, additional or substituted.

‘the Trust Fund’ means:

- (a) the settled sum;
- (b) all moneys and other property of any description whatsoever paid or transferred to and accepted by the Trustee as additions to the Trust Fund;
- (c) the accumulation of net income as provided for in sub-clause 2.4;
- (d) all accretions to the Trust Fund;
- (e) the investments and property from time to time representing the moneys property accumulations accretions and additions or any part or parts thereof respectively.

‘Trustee Corporation’ means:

- (a) a corporate body authorised by and regulated under the (NSW) Trustee Companies Act 1964 or its equivalent in other Australian States or Territories to carry on business as a trustee company; and
- (b) the Public Trustee created by the (NSW) Public Trustee Act 1913 or its equivalent in other Australian States or Territories.

‘Uncommercial Transaction’ means the provision of a financial or other benefit on terms which:

- (a) would not be reasonable in the circumstances if the benefit were provided under an agreement arrangement between independent parties dealing at an arm’s length with each other in relation to the transaction; or
- (b) are more favourable to the party to the transaction (not being the Trustee) than the terms referred to in paragraph (a) of this definition;

and which a reasonable person in the position of the Trustee would not have entered into having regard to all relevant circumstances.

‘Veterans’ Entitlement Act’ means the Veterans’ Entitlements Act 1986 (Cth).

9.4 Interpretation

In these terms of trust:

- (a) The singular includes the plural and vice versa, each gender includes the other genders and references to persons include corporations and other legal persons;

- (b) References to any statute shall include any statutory amendment or re-enactment thereof or statutory provisions substituted therefore;
- (c) Headings are inserted for ease of reference and do not form part of these terms of trust and shall not affect the construction of these terms of trust;
- (d) If by reason of the inclusion of any word, description or provision in these terms of trust, all or any part of these terms of trust would be invalid, then these terms of trust is to be construed as if the word, description or provision were not included in these terms of trust.

9.5 Applicable Law

These terms of trust are governed by the laws of [State/Territory to be inserted].

SAMPLE

[Commentary: Note: these execution clauses are not required if the trust is established by Will. A will must be executed in accordance with the formalities in the relevant law governing Wills.]

EXECUTED AS A DEED

SIGNED SEALED AND DELIVERED by]
[SETTLOR]]
in [State] in the presence of:]

.....

Witness

EXECUTED by [TRUSTEE CO] PTY LTD

(ACN [number]) in accordance with the Corporations Act:

..... **Director**

..... Director/Secretary

SIGNED SEALED AND DELIVERED by]
[TRUSTEE]]
in [State] in the presence of:]

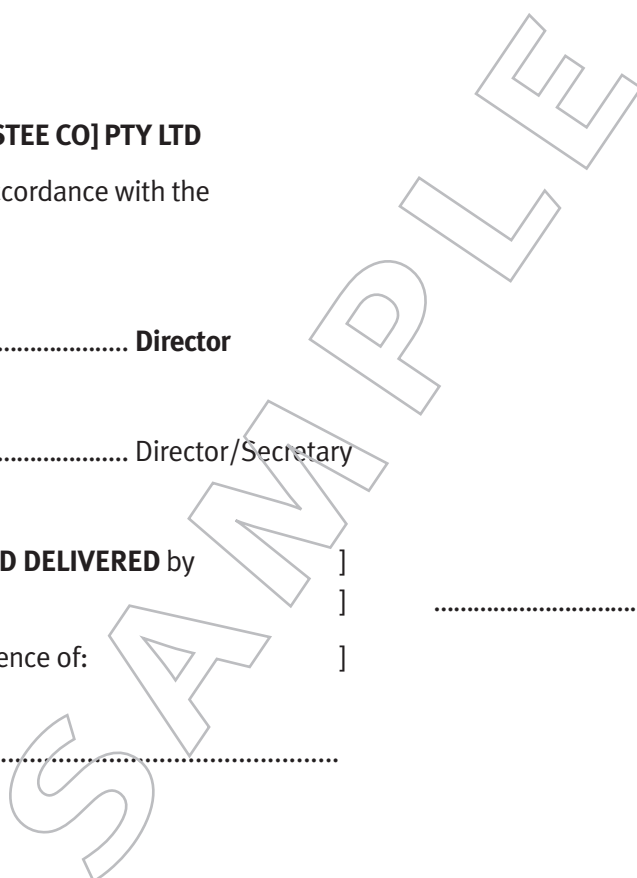
.....

Witness

SIGNED SEALED AND DELIVERED by]
[TRUSTEE]]
in [State] in the presence of:]

.....

Witness



Schedule A

Special Disability Trust Asset Register

Donor One

Full Name:		
Address:		
Contribution description	Market value of Contribution at time of transfer	Date of Contribution

Donor Two

Full Name:		
Address:		
Contribution description	Market value of Contribution at time of transfer	Date of Contribution

Schedule B

Nomination of Specified Beneficiary Form

[If a Donor wishes to make a nomination, this form is to be completed when the Donor makes their initial contribution. This nomination will apply to subsequent contributions made by the same Donor]

Donor Name:.....

Address:

To the trustee:

Upon the end of the trust, I nominate the following person or persons to receive my Donor's Contribution balance: [Note: Repeat the alternatives below as required]

Specified Beneficiary	% Contribution Balance
<input type="checkbox"/> Myself, or if I am deceased, then my legal personal representative. [Note: the Will of the donor, or the intestacy laws as they apply to the donor's estate, will govern the distribution in this case.] %
<input type="checkbox"/> The legal personal representative of the Principal Beneficiary. [Note: the Will of the Principal Beneficiary, or the intestacy laws as they apply to the Principal Beneficiary's estate, will govern the distribution in this case.] %
<input type="checkbox"/> a) My [husband/wife/partner/child/niece/nephew/friend] [full name] of [address]. %
b) If on the end date, [name] is not surviving, then the children of [name] who are surviving, and if more than one as tenants in common in equal shares.	
c) If on the end date, no person specified in two preceding paragraphs is surviving, then the legal personal representative of [name]. %
<input type="checkbox"/> In accordance with any directions I may leave in my last Will that are specific as to the distribution of my Donor's contribution balance of this trust. [Note: If no directions are included in the Will, the default provisions as set out in subclause 4.2 will apply.] %

[Full name of charity, and if applicable, ACN or ARBN] of [address of charity] %

[Note: Always include if there are any gifts to charities] **With respect to any distribution to a charitable organisation pursuant to this nomination:**

a) if the organisation cannot receive a gift, then that gift shall be made to the charitable organisation in Australia that the trustees consider most nearly fulfils the objects I intend to benefit; and

b) the receipt of the authorised officer for the time being, of the organisation benefiting under this clause shall be sufficient discharge to the trustees.

Other %

Signed:

[Donor]

[Witness]

Dated:

Dated:

SAMPLE

Section 4

Final words

Think carefully about what you want for your son or daughter or other family member with disability.

Work out your vision and start to plan how to set it up.

Get advice and carefully consider the implications in your situation.

Look at tax and income support issues in the overall context of what is good estate planning for your son or daughter or other family member with disability.

Consider whether a special disability trust will be useful in your situation, or not.

Make decisions and implement them.

About the authors

Stephen Booth

Stephen Booth is a partner in law firm Coleman & Greig. He has over 20 years experience in advising parents of people with disability, particularly intellectual disabilities, about estate planning and wills, and on other legal issues relating to disabilities. He has spoken to many parents' groups and disability organisations and has been involved with the Intellectual Disability Rights Service (NSW) and citizen advocacy organisations.

Stephen has also authored a guide to will-making for parents of people with intellectual disabilities, and has written chapters for a lawyers manual giving guidance to lawyers on this area of legal practice.

Allan Swan

In his professional life, Allan divides his time between being:

- ▶ a principal in law firm Moores Legal, practising in the areas of estate
- ▶ planning and structuring;
- ▶ a presenter for professional organisations, professional practices and
- ▶ community groups; and
- ▶ an author and lecturer in estate planning, trusts and related subjects.

His interest in estate planning initially arose out of family experience (including family farms) and his personal involvement with families with intellectually disabled children - Allan's late sister, Janice was born with severe physical and intellectual disabilities and his sister-in-law, Heather has a series of hurdles to contend with throughout her life, including very low vision and relatively severe autism.

