

Family Trusts, Property Managers & Welfare Guardians

A kit to support parents whose son or
daughter has a disability

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Family Trusts

1. Introduction

Setting up a trust for your son or daughter with an intellectual disability can assist you and your son or daughter:

- it can help with the day to day the administration of their affairs – it gives you the legal authority to deal with their assets and income
- if you have some surplus capital it can be invested through the trust but in a way that the capital remains as a family asset. On your death your assets can be left to the trust but once again on your son or daughter's death, the assets can go to other members of your family
- it can be used to receive government benefits and donations from extended family members

All of the above could enhance the quality of life for your son or daughter while at the same time continuing to receive existing funding from the Government.

The sample documents attached, comprise a 'kit' to assist you with this. Discuss them with the people who are supporting you and make changes if you want so that they work for you.

It is up to you, your family, your son or daughters circle of friends/personal network, your support workers and service provider/s to organize and provide support and care for your child. A family trust for your son or daughter is designed to help you and/or your son or daughter with life long advocacy, and the administration of money and other assets as part of your overall support package.

A trust for your son or daughter will not in itself provide for them when you die (or become unable to look after him or her). A trust is a legal vehicle. It is one element of a total package that will hopefully ensure that your son or daughter is supported when you can't do this.

Just as you have done as a family, the most important thing to ensure your son or daughter's well-being is to surround him or her with people who will support and love him or her, hopefully with a large circle of friends/personal network. It is essential that you establish this support before you embark on setting up a family trust. You will find it so much easier to make various decisions about the trust and the people to be involved if you have established a circle of friends/personal network.

2. Getting Started – the Trust Deed

The basics of a trust are simple: you own assets for the benefit of others (which can include yourself). You are called a trustee, the person/s who receive the benefits of the assets are called the beneficiaries. The people who set up the trust are called the settlors because they generally settle the first amount of money on the trust. The assets are called the trust fund.

The kinds of benefits that the beneficiaries receive are set out in the trust deed – the trust purpose or the trust objects. So in the sample Trust Deed of the William Smith Trust, William gets the benefits from the Trust Fund during his lifetime, and when he dies whatever is left is divided between his siblings.

Two copies of the trust deed are usually signed. They are signed before a witness who signs their signature, then prints after their signature their full name, address and occupation. Signatories and witness/es initial at the bottom of previous pages.

3. Administration of the trust

It is your choice whether you want to be totally involved in the administration of your son or daughters affairs, or just involved in the major decisions. However this very much depends on who you can 'enlist' into the cause of supporting your son or daughter in the long term – developing a strong circle of friends/personal network. Some of the people involved will be volunteers while others might be paid administrators. The amount they are paid will obviously be relevant to their level of involvement.

It is good practice:

- to keep all papers of your trust in one place and a trust folder should be set up for this purpose. You or your administrator can do this.
- to record your decisions by way of trustee's resolutions (which are kept in the trust folder).
- keep the trust's affairs separate from your affairs. Think of the trust as a separate business to be run or a separate job that you have.

4. Opening a bank account

If you show a copy of the trust deed to a bank and ask them to open a bank account, they will do so. They will want to see an original copy and will keep a photocopy. The bank account will be in the name of the trust eg. The William Smith Trust. You will need to decide who signs cheques, which can include an administrator.

5. Running the trust fund - income

(a) Invalid benefit income

It is your and/or your son or daughter's decision as to which bank account/s their invalids benefit money should go into. The invalid's benefit your child receives belongs to them. However, there are practical problems in running this bank account if your son or daughter does not understand how to do this, or you are not appointed as a property manager. If this is the case the monies can go into the family trust bank account and paid out as the trustees and your son or daughter decides. So part of the moneys might be paid out for rent/board, part for food, part for clothing and some cash for your son or daughter to spend.

The other relevant issue about the benefit is that service providers usually require that a good portion of the benefit is paid to them as a contribution to rent, food, etc.

Work and Income New Zealand ('WINZ') will agree to pay the money into a bank account operated by a family trust. A sample letter to WINZ you can use is attached.

(b) other income

Any other public or private income your son or daughter might receive can flow through the trust.

The amount of administration required will depend on the amount of income received and whether or not people are employed to provide support for your son or daughter (whether under an individualized funding contract or otherwise). On a day to day, week to week basis the following administration tasks might include:

- pay employees involved in your son or daughter's support, deduct PAYE, pay to IRD and make ACC payments

- pay for rent/board/mortgage payments where your son or daughter lives
- pay phone and power bills
- pay for you son or daughter's food, toiletries, clothing and similar needs
- pay for transport needs
- pay for recreation and holidays
- pay any therapy/medical needs
- meet GST and income tax requirements

An administrator might be an accountant in your community, or someone who has practical experience in doing such things (with maybe the support of an accountant in the background).

5. Running the trust fund – capital

You, like all parents, are concerned about what will happen to your son or daughter when you die, especially if you die unexpectedly. You can set up a simple will that provides two things:

- that all of your assets are given to the family trust for the benefit of your son or daughter
- appointing a testamentary guardian – a person, usually a close relation, who agrees to care for the son or daughter on a daily basis, and has the legal responsibility to do this. However this guardianship ends when they have their 18th birthday

Often parents take out insurance policies while their children are young to ensure that, when the parents die, there is enough money to care for them. This of course depends on the financial ability of the parents to pay the premiums.

For you, the parent of a son or daughter with a disability, the parenting role is likely to need greater involvement than that of other parents. That long term support might be provided by other family members, by whanau or by people in their circle of friends/personal network.

The other thing that no doubt concerns you on a regular basis is: how could I make things better for my son or daughter. Here are some examples in relation to capital:

- if you have assets additional to you needs, these can be put in the family trust now for the benefit of your son or daughter.
- you can put in place an insurance policy to provide additional money for the trust in the event of your death.
- you might take out a mortgage on your home now to purchase a home that your son or daughter can live in and call their own. While this is usually not put in to a family trust (because the interest, rates and insurance payments are not tax deductible against your personal income) this may not necessarily be the case.

The advantage of a family trust is that the trust's assets will remain in the family – they don't become owned by a provider organization or anyone else (unless you want this). So when your son or daughter with a disability dies, your other children can receive the benefit of the assets.

6. Statements of Wishes

What happens when you die has already been discussed above. There are other circumstances that might arise (such as old age, accident, etc.) which could result in you not being able to support your son or daughter as much as you have in the past. In all of these cases the people who will step into your shoes will want to know what you wish for your son or daughter, so that they have some guidance as to the kind of support they will provide. It is also important that the people involved in your son or daughters circle of friends/personal network know what your wishes are.

So, it is usual for you (as settlors of the family trust) to write, in your own language, a statement of wishes. This will provide the necessary guidance to those who follow or support you. A sample Statement of Wishes is attached. This is a sample only – it is important that it is written in your own way. It may include:

- your history in relation to your son or daughter
- your vision for your son or daughter
- roles of people involved in the trust
- relationships between those involved

Guardianship

7. Introduction

The Care of Children Act 2004 deals with the laws relating to guardianship.

The parents of a child have the rights and responsibilities of joint guardianship of the child, providing they were married, civil union partners or living together in de facto relationship during the time between when the child was conceived and born (there is a minor exception to this). If the parents were not in one of these relationships at that time, then the mother is the sole guardian.

Under the Act parent/s and the Family Court can appoint additional guardians, and the Court can remove guardians (either the parent/s or Court appointed guardians).

The rights and responsibilities of a guardian/s generally includes making decisions about the care and support of a child, including giving consent to medical procedures. There are exceptions to this in respect of people 16-18 years, those who are in a marriage/de facto/civil union relationship and in respect of abortions.

If there are two guardians, then on the death of one guardian then the survivor becomes the sole guardian. However the dying guardian can appoint a guardian under their will to replace themselves when they die. This person is usually referred to as a testamentary guardian because they are appointed under a will.

It is usual to appoint a testamentary guardian under your will if at the time you make your will you have infant children. If you are the sole guardian, then you would usually ask a family member or close friend if they will be happy to be appointed as a testamentary guardian. If the sole guardian dies without appointing a testamentary guardian, then it is up to someone, usually a family member or close friend, to volunteer to act as a guardian and take responsibility for the care of the child. If they wish to be appointed as a legal guardian, then they have to apply to the Family Court to be so appointed.

Guardianship ends on the 18th birthday of a child. So when your son or daughter with a disability turns 18, you no longer have the legal right to make decisions about their care and support and to give consents. Curiously, at that same age your legal responsibility to care for your child with a disability also ends.

This presents a legal problem for parents whose 18 year old son/daughter has an intellectual disability of such a nature that they can't exercise their full rights nor take full responsibility for themselves. To resolve this most parents consider being appointed as welfare guardians and property managers, which is discussed next.

8. Welfare guardians and property managers

A person with an intellectual disability of such a nature that they don't have legal capacity can't appoint another person to be their attorney in respect of their property affairs, nor in respect of their personal welfare.

Setting up a family trust can resolve most, if not all, of the problems concerning the administration of your son/daughter's property affairs. As discussed above, the trust can receive income, pay out money for your son/daughter's benefit, and own a house, household effects and car for their use and benefit. However a family trust cannot make decisions about your son/daughter's personal welfare.

So the only solution is to apply to the Family Court for orders under the Protection of Personal and Property Rights Act 1988. If you don't have a family trust, then you will want to be appointed as both property manager and welfare guardian. If you have a family trust, then you may only want to apply to be appointed a welfare guardian. As an alternative you could apply to the Family Court to make personal orders under Part 1 of the Act, which can relate to the property, care and welfare of your son or daughter.

9. Application to the Family Court to be appointed as a welfare guardian

Usually an application is made by a family member, relative or friend, and the Court appoints an independent lawyer to represent your son or daughter (at no cost to you or them). The appointment will only be made if person with a disability does not have the legal capacity to make their own decisions or has the capacity, but wholly lacks the capacity to communicate their decisions.

So if you are appointed as the welfare guardian you can generally make decisions about the care and welfare of your son or daughter, in particular as stated in Section 18 of the Protection of Personal and Property Rights Act 1988:

... the first and paramount consideration of a welfare guardian shall be the promotion and protection of the welfare and best interests of the person for whom the welfare guardian is acting, while seeking at all times to encourage that person to develop and exercise such capacity as that person has to understand the nature and foresee the consequences of decisions relating to the personal care and welfare of that person, and to communicate such decisions ... and to

Encourage the person for whom the welfare guardian is acting to act on his or her own behalf to the greatest extent possible; and

Seek to facilitate the integration of the person for whom the welfare guardian is acting into the community to the greatest extent possible; and

Consult, so far as may be practicable,—

- *The person for whom the welfare guardian is acting; and*
- *Such other persons, as are, in the opinion of the welfare guardian, interested in the welfare of the person and competent to advise the welfare guardian in relation to the personal care and welfare of that person; and*
- *a representative of any group that is engaged...in the provision of services and facilities for the ... the person*

A welfare guardian can't make any decision on behalf of your son or daughter:

- to get married or enter into a civil union, or to end the same
- relating to adoption

- to refuse consent to any standard medical treatment or procedure intended to save the person's life or to prevent serious damage to the person's health
- to consent to administering electro-convulsive treatment
- to consent surgery or other treatment designed to destroy any part of the brain or brain function for the purpose of changing behaviour; or
- to consent to taking part in any medical experiment other than one to saving the person's life or of preventing serious damage to the person's health.

The appointment lasts for three years upon which you have to apply to the Family Court to have it reviewed and renewed.

10. Application to the Family Court to be appointed as a property manager

This application is similar to that for appointment as a welfare guardian. You can apply for appointment of both welfare guardian and property manager at the same time.

Following appointment, you are required to file a statement of assets and liabilities and income and expenditure with the Public Trust, and to do so each year of your appointment. The cost in 2009 is about \$250 each time you file the statements. The role of the Public Trust is to generally audit your statements to give some assurance that you are properly administering the property affairs of your son/daughter properly.

As with a welfare guardian, it only lasts three years before it has to be reviewed and renewed.

11. Problems with appointment as welfare guardian and property manager, and with personal orders

The first problem is that lawyers fees might range from about \$1,500 to \$2,500 (as at 2009) to complete an application to the Family Court for appointment. You can resolve this problem by completing your own application. If you contact your nearest Family Court, then they will send you out a pack containing the documents that need to be completed. You fill them in and take them to the Court office. Some parents in New Zealand have grouped together to support each other in completing the Court application and to develop a relationship with Court staff to assist them in this process.

The second problem is that welfare guardian has to apply to the Court every three years for a review and renewal of the appointment. If you engaged a lawyer the cost would be less than the original application, but still a burden. Once again, you could do this yourself, including with group assistance/support.

The third problem is that, as stated above, each year the Public Trust reviews/audits a property manager's activities at a cost of about \$250. If you are properly administering your son or daughter's property affairs, why should you have to pay someone to confirm that?

For those parents who have cared and supported their son or daughter from birth through to age 18 years, and wish to continue to do this in the future, they might ask 'what does the Family Court and Public Trust contribute to the welfare of my son or daughter?'. The answer may well be 'nothing' and it just incurs unnecessary time and cost. Many believe that the greatest protection your son or daughter can have is to have a large circle of friends/personal network, who both support and encourage them and act as guardians against possible harm.

Certainly it is essential that the Family Court has the power to intervene where harm is being caused, and to appoint people to remedy the situation. Also, there is probably a need for the Family Court to initially appoint property managers and/or welfare guardians. But in the case of disability there should be no need to file returns with the Public Trust nor to obtain 3 yearly

renewals of appointment. Appointments should continue until the manager/guardian dies, resigns, or the Court considers that they are no longer competent to do the job.

However that is not the law at present. If you think you need to have the legal authority of a property manager and/or welfare guardian, or to obtain personal orders from the Court, then do so. If your son or daughter has a good circle of friends/personal network and their family trust is working well, then maybe you son or daughter might be able to live an ordinary life without having a property manager or welfare guardian.

Trust Deed of the William Smith Trust

THIS DEED is made this 1st day of May 2009

BETWEEN: John Smith and Jane Smith ('the Settlers')

AND: John Smith, Jane Smith and Belinda Jones ('the Trustees')

INTRODUCTION:

The Settlers wish to establish a trust for the benefit of their son William Smith ('William').

THE TRUSTEES state as follows:

1. THE name of the trust is the William Smith Trust.

2. THE Trust Fund comprises:

- (a) any gifts made to the Trust Fund by the Settlers, or anyone else;
- (b) any money or other property obtained or received for William's benefit;

3. THE beneficiaries of the Trust Fund are:

- (a) William;
- (b) William's sisters Carol Smith and Henry Smith.

4. THE trust objects are:

- (a) During William's lifetime, to use the Trust Fund for William's support and benefit as the Trustees in their opinion decide will be in his best interests. The Trustees do not have to consider William's siblings Carol Smith and Henry Smith in anything they decide.
- (b) On William's death to pay whatever is in the Trust Fund equally to Carol Smith and Henry Smith.

5. THE Trustees have all the powers of a natural person so long as they exercise them honestly and for William's benefit. This includes the power to borrow money. In all matters the Trustees must act unanimously.

6. THE power to remove any trustee and appoint a new trustee, and to exercise the powers on Clauses 7 and 8, belongs to:

- (a) the Settlers;
- (b) on the death of one of the Settlers, then the surviving Settlor.
- (c) on the death of both Settlers, then the executors named in the will of the Settlor who dies last.

.../2

7. AT any time the Settlers can increase or decrease the number of trustees, provided there are not less than two.

8. THE Settlers may change anything in this Deed provided it is for William's benefit. This can be done by the Settlers signing an amending deed.

9. THE liability of the Trustees is limited to the amount of the Trust Fund, providing that so long as they act honestly and for William's benefit.

SIGNED by the Settlers John Smith and Jane)
Smith in the presence of:) *John Smith*
Jane Smith

B.Brown
Bill Raston Brown, 15 Lane St., Hamilton
Manager

SIGNED by the Trustees John Smith and Jane)
Smith in the presence of:) *John Smith*
Jane Smith

B.Brown
Bill Raston Brown, 15 Lane St., Hamilton
Manager

SIGNED by the Trustee Belinda Jones)
in the presence of:) *Belinda Jones*

B.Brown
Bill Raston Brown, 15 Lane St., Hamilton
Manager

Date: 1 May 2009

Settlers: J.Smith & J.Smith

Trustees: J.Smith, J.Smith & B.Jones

The William Smith Trust

Tony Banks, Solicitor
Hamilton ph 07 856 8525

Statement of wishes – Jane Smith

Having my first child Henry was a breeze, and so with Carol. But as soon as Will was born I knew something was wrong. I held him close to me and welcomed him into the world. But the looks of the people with me confirmed my feelings.

I had Will checked out the next day by a paediatrician. They did a whole lot of tests and said that Will had an intellectual disability. I knew nothing about this and asked if treatment could cure what he had. They said they would do some more tests to confirm what the problem was and to see what could be done. I hoped that Will's disability could be cured. The doctors were a big part of my life for the first couple of months of Will's life but as soon as the diagnosis was confirmed they said they could do nothing more for Will. They gave me little advice as to what I should do next.

Will also had a club foot. While this was quite severe, doctors advised that with surgery and physio, over time it could be improved.

So started my journey of self learning. I talked to everyone about the problem and ended up contacting some support groups. These were of great help. However during the early period I was dealing with my own grief and doubts. Why wasn't I able to give birth to a perfect baby like my first child? How was I going to care for Will? Why wasn't there a cure for Will? And amongst all of this was Will – growing physically but most of the time not responding to me emotionally like my first two children. I found it hard to bond with Will and that made me feel guilty, then questioning why my baby wasn't perfect, then determined to work my way through this thing, and round and round and round in my head.

Most of the time Will was full on, as well as the need to devote a good amount of time to my first other children. I found out that I could get some respite care, so was able to have small amounts of time off on a regular basis. However for the first while respite care was difficult because the providers wouldn't listen to me and often Will came home from his respite care very upset – often it took a few days to get things back to normal. Often I felt guilty about leaving Will because I didn't feel confident that he would be looked after as well as when he was with me. But mostly I was so tired I just knew I had to have a break.

When Will got to 6 years old I found out through my support group that he could be involved in mainstream education. So I enrolled him at the local school. They were sensitive but had little experience in working with children with disabilities. They made little effort to provide the additional support Will needed. I had to find out from the Ministry what was available and how the school could access it.

I found my support groups invaluable. The members all had a child with a disability so they could not provide much practical support. Meanwhile John's work was making demands on his time and he found it very difficult to balance his work demands and the demands on him as a father, as well as being a father of a child with additional needs. So often our relationship was put on the back burner. Our circle of friends reduced partly because we didn't have time for friends and partly because Will was rather difficult to take out socially.

So we struggled on until Will hit puberty – he was about 13. His behaviours changed and on a regular basis did things that were not socially acceptable. We didn't know how to deal with them. In desperation we contacted a new provider in town and they got us a referral to a psychologist working with them. That provider was a lifesaver – for Will, for John's and my relationship, for Henry and Carol. For two years they gave us some pretty intense support. The result was not only that we were able to resolve Will's problems but they gave us hope for the future that Will might, with support, be able to grow up and have a reasonably independent life. For the first time since Will was born I felt I might have the opportunity in a number in the future to have time to do some things I wanted to do. I had hope for the future and realized how hard things had been since Will was born.

The secondary school Will goes to has been supportive, but I regularly have arguments with them. Will's club foot is an ongoing issue and I have regular arguments with the public hospital staff about treatment.

Things have got better and I have managed to start working again part time in the career I started before having children.

Yes, the struggle had been difficult but I had developed some things that other people didn't have. I knew how strong I was – I had been pushed beyond what I thought I could deal with, and came out the other side. I had come to see Will as an individual – not an inferior being but different and of worth. I had moved past wishing this had never happened to me, to seeing the wonderful and positive things that Will had brought me and the love and support I had given him.

I tell you my story in the hope that you will become involved in Will's life in the long term, especially when I can no longer be involved in support. Some things you will find challenging and difficult and sometimes you will question why you ever chose to become involved. But I guarantee that if you get involved in Will's life you will grow as a human being in ways you never imagined.

As you will see from the Trust Deed, the Trust has been formed for Will's support and benefit, so I want you to exercise your discretions for that purpose. After he dies, whatever is left in the Trust Fund is to be divided between Henry and Tracey.

To help you with exercising your discretions, I want to let you know what my wishes for Will are for his future. Also, before making any decisions I would like you to talk to Henry and Carol. Apart from John and I, they know Will the best. My wishes are not binding on you because you will have to respond to Will's changing needs, but I hope they will be of some guidance to you as these are the things I am working on:

- I want Will to experience similar things that other people of his age and stage experience
- I want Will to have a meaningful job like other people, with appropriate support. That job should include training/education so that he can grow in the job at his own pace
- I would like Will to have some real friends of his own age – so he can go to parties and other social occasions
- I would like Will to get involved in sport and recreation for health reasons, but also to enjoy the act of physical movement
- I would like Will to go to the pictures, to music shows and concerts and other social occasions. He has a great love of listening to classical guitar.
- I would like Will to live independently. I know that with support that this can happen. One of the main objectives of this Trust is to acquire a home for Will so that he will have the long term security of living in his own home, and if the Trust has not already achieved this, then I want you to make this a priority
- I would like Will to love a woman and enter into a long term relationship with her, and enjoy the relationship in the fullest way. I don't know yet if Will can be a father, but I would like him experience the joy of being involved with children of all ages.
- As yet Will does not understand about the money and I doubt he ever will. So I would like this money affairs to be always handled by you
- I want Will to continue to be involved with his sisters and his cousins, and for him to always attend family occasions, especially birthdays, weddings and funerals

John and I have been involved in creating the above vision by involving ourselves in the disability sector. From that involvement we have also started to enlarge Will's circle of friends. I want you to continue on with that process – the greater the number of people in Will's life, the greater he will be protected and the greater the opportunities to realize his true potential.

If you have any money to invest on Will's behalf I would ask that you spread investments between cash, property and shares. This may include you continuing with the kinds of investments that I have made in my lifetime. I encourage you to obtain investment advice, but in all cases please make your own decisions and don't uncritically accept any investment advice.

In all things, I would like you to act with love and respect for Will, as you would for any other human.

Jane Smith (Jane Smith) 1 September 2007

Date:

To: The Bank

Dear Madam/Sir,

RE: THE WILLIAM SMITH TRUST

We have established a Trust with the above name. We are the Trustees. Could you please open a cheque account in the name of the Trust. Cheques, and other banks documents can be signed by any two trustees.

Bank statements and other bank documents should be posted to:

We enclose a copy of the Trust Deed.

REGARDS,

*John Smith
Jane Smith
Belinda Jones*

John Smith & Jane Smith

Address:

Phone:

Belinda Jones:

Address:

Phone:

Date:

Work and Income New Zealand

Dear Madam/Sir,

RE: WILLIAM SMITH

We are the parents of William Smith. William has an intellectual disability to the extent that he can't administer his own financial affairs.

To help us administer William's affairs we have set up a Trust for him – the William Smith Trust. William is the sole beneficiary under the Trust during his lifetime – any moneys received by the Trust can only be used for his benefit. We are the Trustees together with Belinda Jones of River Road, Hamilton. I attach a copy of the Trust Deed.

To assist us with administration of William's affairs, as from the date of this letter could you please pay any benefits that he is entitled to directly into the Trust's bank account which is:

The William Smith Trust, ANZ, Hamilton a/c 02034-25689-00

Also, could you please treat the Trust as William's agent in any matters relating to the benefits he is entitled to.

REGARDS,

(John Smith, Jane Smith)

Address:

Phone: