

Deed of variation of Model Trust Deed for Special Disability Trusts (Revised Purpose Test)

THIS DEED OF VARIATION made the _____ day of _____ 20__.

PARTIES

1. [Name of trustee] of [address] (the 'Trustee').
2. [Name of Appointor] of [address] (the 'Appointor').

RECITALS

- A. By deed of settlement made [date of deed] between [name of settlor] as settlor and [name of trustee] as the trustee (the 'Trust Deed') a Special Disability Trust was established known as the [name of Special Disability Trust] Trust. (For testamentary trusts created by a will substitute the creation of the trust with the estate of the testator and date of death).
- B. The Trustee was appointed trustee of the [name of trust] by the Trust Deed and has continuously held such office up to and including the date of this deed. (For changes in trustees, document the resignation/death/removal and appointment over time and state the trustees currently holding office).
- C. Clause 9.2 of the Trust Deed permits the Trust to be amended and states:
 - a. Save as provided in this sub-clause the terms of these terms of trust shall not be capable of being revoked or 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.
- D. The Appointor has from the time of execution of the Trust Deed up to and including the date of this deed continuously held office as Appointor and has not done anything so as to prejudice or preclude the Appointor from exercising the Appointor's powers and authority contained in the Trust Deed. (For changes in Appointor, document the resignation/death/removal and new appointment over time and state the Appointor currently holding office).
- E. The parties desire to amend the terms of the Trust Deed in the manner set out in this deed.

THE PARTIES AGREE

Variation of Trust Deed

1. The Trustee declares that the Trust Deed is varied as follows:
 - a. Clause 2.1 of the Trust Deed is amended by deleting cl 2.1(a), (c), (d) & (e) and substituting the following clauses in its place:
 - a. Primary and Other Purposes of the Trust
 - (a) The Trustee must hold the Trust Fund and 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 primary purpose and for other purposes primarily for the benefit of the Principal Beneficiary, as defined in the remainder of this clause;
 - (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 to the primary purpose.
 - (d) For the purpose of this deed the 'primary 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 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
 - (iii) must be in accordance with any requirement or determination made by the Secretary from time to time;

(e) For the purpose of this deed ‘other purposes’ primarily for the benefit of the Principal Beneficiary means the purposes primarily for the benefit of the Principal Beneficiary as determined by the Trustee from time to time, but;

(i) shall not include expenditure which is primarily for the direct or indirect benefit of any other person; and

(ii) must be in accordance with any requirement or determination made by the Secretary from time to time.

b. The Trust Deed is amended by inserting the following cl 2.1 (f) after cl 2.1 (e):

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

c. clause 2.3 to the Trust Deed is amended by deleting cl 2.3 and substituting the following clause in its place:

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 primary purpose, other purposes primarily for the benefit of the Principal Beneficiary and ancillary purposes of the trust, and have regard to the priority of the Principal Beneficiary as set out in the preceding sub-clauses.

(If clause 2.3 was not included in the original Deed clause c. can be omitted)

d. clause 2.4 of the Trust Deed is amended by deleting cl 2.4 and substituting the following clause in its place:

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 primary purpose, other purposes primarily for the benefit of the Principal Beneficiary or ancillary purposes of the trust during that Accounting Period, as an addition to the Trust Fund.

- e. Clause 3.3 of the Trust Deed is amended by inserting the following cl 3.3 (c) after cl 3.3 (b):

3.3 (c) The total value of income and assets of the Trust which may be applied for the purposes of the Trust consisting or other purposes primarily for the benefit of the Principal Beneficiary must not exceed the value if any specified in a determination (if any) under subsection 1209RA(3) of the *Social Security Act*.

- f. The powers of the Trustee are amended by deleting para (a) of cl 6.1 and substituting the following in its place:

6.1 (a) The Trustee shall have such powers as are necessary to carry out their responsibilities under these terms of trust and to fulfil the primary purpose, and other purposes primarily for the benefit of the Principal Beneficiary 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;

- g. Clause 6.3 to the Trust Deed is amended by deleting cl 6.3 and substituting the following clause in its place:

6.3 Investment Strategy

The Trustee must formulate and give effect to an investment strategy, for the purpose of satisfying and fulfilling the primary purpose and other purposes primarily for the benefit of the Principal Beneficiary as defined in clause 2. Subject to those 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 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.

Consent of the Appointor

2. The Appointor consents to this variation of the Trust Deed.

Effective date of deed

- 3. The Trust Deed is varied and this deed becomes effective on the last day this deed is executed by all parties being the date of this deed.

Rest of Trust Deed unaltered

- 4. In all other respects the terms of the Trust Deed remain unaltered.

EXECUTED AS A DEED

EXECUTED by

[*name of trustee*])

[*Signature of Trustee*]

In the presence of)

.....

[*Signature of Witness*]

[*name of trustee*]

[*Signature of Trustee*]

In the presence of)

.....

[*Signature of Witness*]

SIGNED SEALED AND DELIVERED)

By [*name of Appointor*])

[*Signature of Appointor*]

In the presence of:)

.....

[*Signature of Witness*]