



Hōhepa

every life fully lived

THE HŌHEPA FOUNDATION

**How to support Hōhepa and make financial
provision for your family member**

September 2022

Introduction by Hōhepa Foundation Trustees

This is a reprint of a booklet first issued in 1998 and then again in 2003 to all parents of a resident of The Hōhepa Homes. It sets out important matters which parents should consider, and measures that may be taken to protect the financial security of people with an intellectual disability.

The Handbook is not intended to replace the need for professional advice based on individual circumstances. It is, however, recognised that parents are often unaware of many of the potential difficulties and may often be confused by conflicting advice. It is also important that any professional adviser has a full understanding of the special needs of disabled people and options which are the most appropriate.

Although the guidance notes have been prepared specifically for parents of Hōhepa residents, they are relevant in many other cases where a family member has an intellectual or other disability. These guidance notes should not be regarded as a substitute to seeking competent advice in all cases where it is appropriate to do so.

The Hōhepa Foundation and Hōhepa Trustees Limited are an integral part of the broader Hōhepa Organisation.

Their purpose is to build a long-term sustainable capital base to support all things Hōhepa. There are two parts to this:

Firstly, by assisting parents to establish a Trust for their resident family member to support them throughout their lives. Residents often remain under Hōhepa's care beyond the lifetime of their parents. In many cases this may involve Hōhepa assuming additional responsibilities previously undertaken by parents and families, and this may involve the need for additional funding to cover additional costs or fees payable to other caregivers.

Examples have included funding travel, personal living needs not paid for by Government, special accommodation and transport needs and end of life care.

Secondly, by remembering Hōhepa as 'part of the family' and considering them as a beneficiary of your estate along with other family members by way of a bequest. Just as Hōhepa was gifted to us by previous generations, we can play a part in supporting future generations, contributing to the long-term security of Hōhepa, regardless of changes in Government policies.

This Handbook is being issued by The Hōhepa Foundation to parents and guardians of all residents. We urge the parents of all Hōhepa residents to read this Handbook and make appropriate provision to ensure the wellbeing of their resident family member and future generations.

Mark Houghton

Chair, Hōhepa Foundation

Enquiries may be directed to:

The Hōhepa Foundation
Hohepafoundation@outlook.com

Legal advice provided by:

Duncan Cotterill, Christchurch

Contents

Introduction by Hōhepa Foundation Trustees	2
Hōhepa Homes Trust Board	4
The Hōhepa Foundation	4
Hōhepa Trustees Limited	5
Important Matters Requiring Consideration	7
What Level of Financial Support is Needed?	10
Provisions by Way of Will	11
Establishing a Family or Individual Trust	12
Appointment of Executors and Trustees of Wills and Trusts	13
Establishing a Special Account with Hōhepa Trustees Limited	14
The Protection of Personal and Property Rights Act 1988	16
Gifts and Bequests to Hōhepa	18
Forms for Wills, Bequests, Special Trusts and Gifts	20
Sample Memorandum of Wishes	25
Where to From Here?	26

ONE

Hōhepa Homes Trust Board

The Hōhepa Homes Trust Board (The Trust Board) was established in 1956 to set up a residential community for people with intellectual disabilities in New Zealand.

The Trust Board oversees Hōhepa properties in regions, with the provision of services governed through Regional Boards. These Boards have family representatives and a mix of additional people with specific business skills such as Financial, Legal and Social Services backgrounds, to provide strong and informed governance.

The Trust Board is responsible for the effective governance of Hōhepa in accordance with its Trust Deed.

The Trust Board maintains a close relationship with the Ministry of Health and is acknowledged by the Ministry as a high-quality provider of services to its clients.

A subsidiary company, Hōhepa Services Ltd, holds contracts for service delivery with the Ministry of Health (Residential Services), Ministry of Social Development (Vocational and Community Participation Support Services) and Ministry of Education (Hōhepa Hawke's Bay School).

TWO

The Hōhepa Foundation

The Hōhepa Foundation was established as a charitable trust in 1990. Its charitable purpose is to apply its fund of assets for the benefit of people in New Zealand with intellectual disabilities. It can raise funds by any means and use those funds for its charitable purpose, including paying funds to the Hōhepa Homes Trust Board and regional Hōhepa entities. It operates to build up an endowment fund to support Hōhepa. The grants that The Foundation makes will assist Hōhepa to improve the quality of life for Hōhepa residents and support the operations of Hōhepa.

The Foundation is an independent charitable entity to the Trust Board and has its own Trust Deed and governance. The Trust Board is not involved in the governance of the Foundation. Both charitable entities work with the broader Hōhepa community, but there are no legal ties or co-governance arrangements between them and both operate independently for their own purposes. The Foundation is governed by five Trustees, one each selected by the four regional Families' Associations (Wellington, Hawke's Bay, Canterbury and Auckland) and one nominated and selected by those four Trustees.

The Trust Deed of the Foundation permits the establishment of any number of special funds for particular purposes or for general purposes. There are Regional Funds nominated for the benefit of each of the four regions and a General Fund which can support any region or general Trust Board projects. All funds held by the Foundation are professionally managed and are separated from the operational activities of the Trust Board. The Foundation Trustees have responsibilities to ensure that the funds are prudently invested taking into account the circumstances of each separate fund.

THREE

Hōhepa Trustees Limited

Grants from the Regional Funds are guided by advice from Regional Advisory Committees which receive such requests from their Regional Boards. Hawke's Bay and Canterbury have Regional Advisory Committees with their members appointed by their respective Families' Associations.

The General Fund and the Regional Funds have been built up by donations from family members, supporters and bequests from resident trusts (upon death) as well as investment gains.

Hōhepa Trustees Limited is a separate company established by Hōhepa in 2010 which operates for the benefit of residents of the Hōhepa community and acts to provide a facility for the holding of funds on behalf of individual residents. Hōhepa Trustees Limited is not a charitable entity and can act for the benefit of individual residents (which charities such as The Hōhepa Foundation and the Hōhepa Homes Trust Board cannot). The Trustees at any one time of the Foundation are the Directors of the Company. Although not a charity, the Directors of Hōhepa Trustees Limited when accepting funds agree to hold those funds for the benefit of the beneficiaries (the resident and normally the Foundation also) and they are bound by normal trust law duties, including fiduciary duties, to administer the funds they hold for those beneficiaries. The funds cannot be used for any purpose other than those described in the trust document (either Will or trust deed).

Hōhepa Trustees Limited is named as the trustee of a resident trust or Will trust in the example forms set out in the following sections of this Handbook.

The Directors of Hōhepa Trustees Limited hold responsibility for overseeing the investment of the resident trusts established for individual residents, ensuring the funds are professionally managed and legal obligations such as taxes are complied with. The Directors are charged with approving withdrawals / grants for the beneficiaries of the individual resident trusts held by Hōhepa Trustees Limited. Requests for withdrawals and grants from resident trusts are initiated by the appropriate Hōhepa management and/or family members of a resident. The Foundation's Administrator also provides administrative assistance to Hōhepa Trustees Limited and communication to the company can be made via the Foundation's Administrator.



Wildflowers, Denise Aiken

FOUR

Important Matters Requiring Consideration

There are many factors that must be considered to ensure that financial interests are fully protected and to ensure that people with an intellectual disability are able to take full advantage of opportunities and changing needs. The needs may differ according to age and the nature of the disability. Likewise, the ability of parents to make financial provision will differ according to individual family circumstances and the extent of understanding and ability that a specific intellectually disabled person has. There are, however, several common issues that should be considered in all cases.

LEGAL CAPACITY AND RIGHTS OF PEOPLE WITH AN INTELLECTUAL DISABILITY:

Although people with an intellectual disability will generally have the same legal rights as others, they are seldom able to exercise those rights without assistance, and in some cases may not be able to exercise their legal rights themselves even with assistance.

Until such as time as a child reaches 18 years of age and the legal guardianship of a child ends, parents and legal guardians can exercise a reasonably high degree of control over that child and their property and financial affairs, regardless of what ability that child might have themselves. A person under the age of 18 years is largely not legally entitled to receive inherited property (although trustees of a Will can provide for a child's living costs and education from the inherited property prior to that age) and does not generally have legal capacity to enter into contracts.

However, once a child's legal guardianship ends at the age of 18 (and even more once they pass the age of 20 years when every person is considered an adult at law), the rights of the parents as guardians would cease and a person would be free to make their own decisions, provided they were legally able to. This means after the age of 18 people with intellectual disabilities are free to make

decisions, enter into financial arrangements and are legally liable for their own debts, unless they do not have legal capacity to do that, or the ability to understand the nature and effects of the arrangements they were undertaking.

INABILITY TO MAKE A WILL:

Under the law anyone aged 18 years or older can make a Will. However, a Will maker must possess testamentary capacity at the time of making their Will (in addition to the usual requirements for a valid Will). Testamentary capacity requires the Will maker to understand the content and implications of their Will. If it can be shown that the Will maker did not have testamentary capacity at the time they were making their Will, the Will would likely be invalidated. It is for this reason that intellectually disabled persons are generally not able to make a Will to deal with their assets after death.

The main exception to this is that in some cases disabled people may make a Will under the supervision of the Court. This could be where an intellectually disabled person is subject to a property order under the Protection of Personal and Property Rights Act 1988, which Act allows a Court to authorise the making of a Will by that person, or direct someone else to execute a Will on that person's behalf.

Where someone does not complete a Will because they lack the capacity to do so and have not had the Court approve a Will being made for them, that will mean that if that person owns assets at the time of his or her death, their assets would be distributed to their next of kin according to the laws of intestacy.

FAMILY PROTECTION ACT CLAIMS AND PARENTS' MORAL DUTY:

The Family Protection Act 1955 provides that children and certain other relatives may contest a Will through the courts if inadequate provision for proper maintenance and support of that family member has not been made bearing in mind the moral duty of the Will maker.

When deciding whether adequate provision has been made for the proper support and maintenance of a person(s), the court will consider a wide range of factors, including, for example, the financial needs of the applicant, the strength of any competing claims and moral and ethical considerations.

The Family Protection Act provides that the administrator of an estate may in some cases have a duty to apply to the court for directions or to initiate an action on behalf of a person who is not of full mental capacity where they consider that the person has a clear case under the Act and, because of their disability or other capacity restriction (including being under adult age), the person has not made a claim themselves.

Parents should balance very carefully their moral duty to all of their children. Children should not be disinherited because of their disability, but on the other hand excessive provision at the expense of other siblings could equally give rise to potential claims to dispute a Will.

Proceedings under the Family Protection Act invariably result in delays in availability of estate funds and significant legal costs. Parents should therefore make sufficient provision for their children in light of their moral duty either by way of setting aside funds during their lifetime or by making suitable provision under their Wills.

ALTERNATIVE CARE:

Although Hōhepa will always endeavour to provide lifelong care of residents, it may not be able to provide intensive nursing and geriatric care. It is therefore important that arrangements are structured on a basis that provides a clear separation and transferability of funds in the event of a resident subsequently coming under the care of another organisation.

GOVERNMENT BENEFITS:

Government benefits can be payable to persons with long lasting disabilities. In some cases, those benefits may be subject to an asset test which could limit the amount of the benefit granted. Generally speaking, a primary benefit (as opposed to a top-up allowance) given to a person because they are permanently restricted in their ability to work, including by reason of intellectual disability, would not be subject to any asset test. That is the case for the Supported Living Payment which was previously known as the Invalid's Benefit. The Disability Allowance which is a top-up allowance available to persons with an intellectual disability is subject to income limits.

Hōhepa assists as required to confirm to the Government department involved the circumstances of a person on the Supported Living Payment and Disability Allowance (which makes sure the person is still entitled to the payments from the Government), a portion of which are credited to RIBA Accounts (resident individual bank accounts) and are used for personal expenditure, clothing, holidays and other costs on behalf of each resident. All amounts held directly for residents, whether these are controlled by parents or held through RIBA accounts, must be disclosed in the confirmation of circumstances declaration.

Although Hōhepa currently receives support through Ministry of Health and Ministry of Social Development subsidies, it is possible that policies about income and asset tests could change to a position where the funds received by Hōhepa are reduced if residents have access to other funds.

Hōhepa notes that benefits are granted at the discretion of Income Support Services and limits and policy rules may be changed at any time. Hōhepa recommends that assets held in the name of any resident, including any balances held in their RIBA accounts, should be kept at minimum levels and that parents (and other family members) wishing to provide benefits to a resident assess the impact of possible policy changes on the benefits they wish to provide for a resident, including considering alternative ways of benefiting a resident which may be less likely to be affected. There are, however, legal limitations on that recommendation (which we discuss further in this Handbook), and of course, Government policy can change at any time.

GIFTS AND BEQUESTS BY OTHER RELATIVES:

It is quite common for persons other than the parents to make gifts or provide bequests for Hōhepa residents. Often grandparents or other relatives may wish to provide a legacy or set aside funds without understanding some of the implications of doing so. If gifts have already been made or a legacy received by a resident, the parents should take steps to ensure that the resulting ownership of assets will not result in the problems as set out above. If parents are aware that other relatives intend to make gifts or bequests, they should wherever possible encourage them to do so in a form that is consistent with the suggestions set out in the following sections of this Handbook.

FIVE

What Level of Financial Support is Needed?

This is one of the most common questions asked by parents, and often one of the most difficult to answer.

Government policies have traditionally provided a safety net to cover a significant part of the total costs of care of people with intellectual disabilities. These benefits may not always be sufficient to cover more than the bare essentials, and wherever possible parents should endeavour to provide additional funds to ensure that residents are able to enjoy the highest quality of life. The amount required will depend on many factors including the nature and degree of disability, the ability to participate in community activities such as travel etc., and any special needs such as medical aids or attention. Providing arrangements are properly structured, a comparatively modest amount may be quite sufficient to provide an acceptable level of security.

Provision may be made by parents setting aside funds during their lifetimes, by making special provisions under their Wills, or a combination of lifetime gifts and bequests. The various options are set out in latter sections of this Handbook and the method to be adopted will depend on individual family and financial circumstances.

Irrespective of whether funds are set aside during the lifetime of parents or through their Wills, Hōhepa recommends that the arrangements are structured on a basis that takes into account:

- a) The need for assets to be held "on trust" on a basis which does not result in absolute ownership or control by a person with an intellectual disability.
- b) The need for assets to be held by a suitable trustee and invested on a basis which considers the immediate and likely future needs of the person with an intellectual disability. The arrangements should generally provide that both the income and the capital can be used for the benefit of the resident during his or her lifetime and that any funds remaining then pass to other named beneficiaries.
- c) The requirement that funds can be made available without delay, and that there are proper procedures in place allowing Hōhepa or any other organisation which may be providing care and services to be able to access funds to meet any special needs.
- d) The need to ensure those funds are available to meet any funeral costs or burial costs of the person with an intellectual disability.

Provisions by Way of Will

Provision could be made for an intellectually disabled person by or under a person's Will.

Everyone should make a Will to ensure that on death their property or assets pass to the intended beneficiaries. A majority of parents would leave their estates to their children in equal shares. Circumstances of course differ from family to family and in some cases, children may not be benefited equally. To that extent there are provisions under the Family Protection Act where a Will can be challenged in Court if there is considered to be inadequate provision for the proper maintenance and support of a person that should have been provided for, such as a child. This Handbook comments on this above.

Although home-made Wills are sometimes sufficient, this is not recommended in cases where complicated situations apply. It is particularly important that appropriate provisions are made in cases where any of the beneficiaries have a disability.

The form of the Will and the particular provisions to apply for disabled beneficiaries will depend on the circumstances in each case. It is important that expert advice is obtained, and that the Will is properly drawn up by a person with the necessary skills.

Hōhepa considers that it is important that Wills are drawn up on a basis that does not result in any share of an estate passing absolutely to an intellectually disabled beneficiary. The main reason for that is that the intellectually disabled beneficiary may not be capable of financially managing the inheritance that would be left to them and may need assistance. In addition, assets left to an intellectually disabled person may result in abatement of Government benefits for that person which could negatively affect them.

Hōhepa considers that leaving a share of an estate in a way it can benefit an intellectually disabled beneficiary, without being absolutely owned by them, means that the person can receive all the advantages of having funds available to provide for their quality of life (above the level the Government might provide) without the risks or concerns of how they may have otherwise needed to manage those finances themselves.

In addition to the important decision regarding the amount or share of the estate to be left for the benefit of a disabled family member, it is very important to consider how and by whom the funds are to be administered. The appointment of a suitable trustee is very important, and this is covered further below.

As some professional advisers may not appreciate some of the special requirements or be aware of some of the options including the special facilities available through the Hōhepa Foundation, some suggested form of Will clauses are included in this Handbook. Where appropriate these should be referred to the person who is to draw up the Will.

SEVEN

Establishing a Family or Individual Trust

Provision may also be made for an intellectually disabled person by way of trust.

A trust sees assets or property held by a trustee or trustees for and on behalf of other people as beneficiaries. This means that the trust can be set up for the benefit of the entire family or exclusively for the benefit of a person, such as an intellectually disabled person (subject to conditions that mean it is a trust relationship rather than anything else).

Under a typical discretionary trust, the beneficiaries do not have any absolute interest in the trust assets or property, however, the trustee(s) may, in their discretion, pay or apply part or all of the trust fund for the benefit or any one or more of the beneficiaries. In that way, an intellectually disabled person could be a beneficiary of a trust, under which the trustees could use some or all of the trust fund for their benefit, but without the intellectually disabled person being an absolute owner of the trust fund assets.

The trustees would have the obligation to look after the trust fund assets for the benefit of the beneficiaries, and those trustees would have the financial capability to manage those assets on behalf of the beneficiaries. Careful consideration should be given to the selection of trustees as they are subject to detailed obligations and duties, including the duty to invest the trust fund prudently and act in an impartial manner.

The maximum 'lifetime' of a trust under New Zealand law is 125 years, however, they can usually end whenever the trustees wish to wind the trust up prior to that point.

It is important to specify what is to happen to anything which remains in the trust at the time when it is to finish. For example, it may be specified that the remaining trust fund is to be distributed when the trust ends, to children, grandchildren, or a charity such as Hōhepa.

Where there is an intellectually disabled family member, his or her interest should be limited only to amounts paid at the discretion of the trustee, and he or she should not be included as one of the final beneficiaries which will receive an absolute share of the trust when it is wound up. This is for the same reason as this Handbook already discusses about gifts being made under Wills absolutely to an intellectually disabled person (in that they may not be financially capable to manage it, and it may impact on the Government assistance that person could receive).

Although there may be many advantages in forming a family trust, the establishment and ongoing costs can be reasonably high, and engagement of a solicitor would be required. The form of the trust will generally require a comprehensive analysis considering all family circumstances, the overall value of family assets, taxation considerations and the personal wishes for distribution of assets within the family. *In many cases the circumstances may not warrant the cost of setting up a family trust, and the simple option of establishing a personal resident trust fund under the umbrella of Hōhepa Trustees Limited may be considered as discussed further in this Handbook.*

EIGHT

Appointment of Executors and Trustees of Wills and Trusts

An executor is a person appointed under a Will who has the responsibility of administering an estate and carrying out the terms of a Will of a deceased person. The executor becomes authorised to deal with estate assets after making application to the court and getting the grant of the court's authority to complete the administration (known as 'probate'). A trustee is the person appointed to hold assets on behalf of and for the benefit of a beneficiary. Trustees may be appointed under a Will or by a deed or declaration of trust.

Executors and trustees are required to follow the terms of the Will or trust deed and are subject to strict legal obligations and duties, including the duty to act in the best interests of the beneficiaries. Trustees and executors do not have guardianship or any other rights over the beneficiaries, they simply hold the estate or trust assets for and on behalf of the beneficiaries and carry out the terms of the trust or Will.

The appointment of executors and trustees is not simply an honour to be bestowed on a friend or relative. The duties can be onerous and there are special factors that need to be carefully considered when funds are to be held for a beneficiary with any form of intellectual disability.

Although parents will often expect that their other children will maintain an ongoing interest in the welfare of an intellectually disabled brother or sister, it may be unwise to place on them the additional burden of financial responsibility as trustees of assets set aside

for an intellectually disabled sibling. People with intellectual disabilities will often achieve a near to normal life expectancy and it is critical that the appointed trustees are available at all times. Other children may not have the necessary experience to act as trustee and they may by virtue of their own personal circumstances, business commitments and locality of residence, not be available when they are really needed.

It can be sometimes more appropriate to appoint an independent person or company as trustee and to provide for the involvement of other family members by appointing them as a 'special trust advisor'. Special trust advisors may advise the trustee(s) on any matter relating to the trust, but they are not a trustee of the trust and do not have the powers nor the duties of a trustee. In some cases, this independence and continuity of administration may be obtained by appointing a trustee corporation or The Public Trust to act as executor of a Will and or trustee of ongoing trusts.

If the ongoing trusteeship is to apply only to those funds or assets that are to be held for the disabled family member, consideration should be given to using the special facilities that are available through Hōhepa Trustees Limited as outlined in this Handbook.

NINE

Establishing a Special Account with Hōhepa Trustees Limited

Often parents may wish to put money or investments aside for their family member with intellectual disabilities. But sometimes the value may not warrant the cost of forming a family trust. In such cases parents may consider using the unique facilities that are available to establish a special trust fund under the umbrella of Hōhepa Trustees Limited.

The main advantage of creating a trust fund under Hōhepa Trustees Limited is that there is an existing well-defined structure and mechanisms covering trusteeship, investment, attendance to accounting and taxation formalities and the application of funds to the resident or to Hōhepa on the most advantageous basis.

The form of the special trust may be modified to suit individual circumstances. The most common arrangement is, however, for the parents to establish the trust fund by completing a simple deed as shown in Section 12.4. The trust fund may be started by transferring funds and may be added to at any time by way of gifts of further funds, or by way of a bequest under the Wills of the parents.

One of the main advantages of establishing a special trust with Hōhepa Trustees Limited is that any person is able to add to this at any time by way of gifts or bequests. The minimum required to start a fund is \$5,000, a special arrangement Hōhepa Trustees Limited has with Milford Asset Management. In some cases, it is possible that surplus RIBA funds may be applied to the resident trust. The special trust can also be used to hold funds that have been set aside by way of a beneficiary under the Wills of other relatives.

Alternatively, a special trust with Hōhepa Trustees Limited can be set up by way of a bequest under the Wills of parents. This can be done quite simply by providing under the Will that the entitlement or share in the estate which is to be available for the family member with an intellectual disability, is to be paid to Hōhepa Trustees Limited by the executors of the estate and thereafter administered through Hōhepa Trustees Limited for the resident (refer sample clause in Section 12.2).



TEN

The Protection of Personal and Property Rights Act 1988

This Act allows the Court to make 'property orders' where a 'Welfare Guardian' and/or a 'Property Manager' is appointed to assist or act for a person in relation to certain matters.

A welfare guardian has the power to make and implement decisions relating to the personal care and welfare of the person who is subject to the order. A welfare guardian must always act in the best interests of the person who is subject to the order. There are some limitations to the powers of a welfare guardian. For example, a welfare guardian cannot cause the person subject to the order to enter into a marriage or civil union or undergo certain medical procedures.

A property manager is delegated with the responsibility of managing the property affairs of the person who is subject to the order. The property manager may act in relation to all or only a specified part of the person's property and can be subject to further orders made by the Court that dictate how the property is to be dealt with. That a property manager has been appointed does not preclude the person subject to the order from making a Will, rather they can do so with the leave of the Court.

The Act requires that where there is an appointment of both a welfare guardian and a property manager, that they are each required to confer in respect of decisions.

Hōhepa will support the process for families to set up guardianship and guardians can provide a clear path for consultation on both welfare and management of property.

Hōhepa recognises and supports the role of property managers and guardians acting on behalf of residents. Hōhepa Trustees Limited, in administering any funds held under a resident trust, will support the role of a property manager and guardian in conjunction with the terms of the resident's trust and any memorandum of wishes recorded for the trust, although the ultimate discretion and decision making will remain with the Directors as trustees of the resident trust.

APPOINTMENTS BY THE FAMILY COURT:

The legal process for the appointment of a guardian or manager, is that an eligible person such as a family member, medical practitioner or a social worker, must make an application to the Court seeking an order for the appointment of a welfare guardian or property manager or both. Normally the Court will require that an independent solicitor be appointed to ensure that the proposed order is in the best interests of the person for whom it is being sought. Orders are generally made for a limited period and can be subject to review by the Court. Orders made in respect of the appointment of a property manager cease (among other reasons) when the person subject to the order dies or when the Court discharges the order.

While in special circumstances it may be desirable to seek orders under the Act, it is generally recommended that parents plan their financial affairs on the basis that will provide the essential protection without having to go through the cumbersome legal process of a court order.

ENDURING POWERS OF ATTORNEY:

The Protection of Personal and Property Rights Act also provides for the appointment of an 'enduring power of attorney' whereby one person grants another the power to act on their behalf.

The Act permits two types of Enduring Power of Attorney. A power of attorney as to property authorises an attorney to act in relation to all or a specified part of another person's property, including finances, and the appointment of a power of attorney as to personal care and welfare provides a mechanism for the appointee to make personal and medical decisions when the person granting the power of attorney ceases to have the legal capacity to make those decisions for themselves. The two types are similar to the court approved welfare guardian or property manager orders we have already discussed.

An enduring power of attorney can continue to have legal effect even if the person granting it ceases to have the ability to make decisions after they granted the attorney. It is, however, necessary that any person granting an enduring power of attorney understand the implications of doing so when they are set up and the legal capacity to enter into the attorney documents. Generally, people with intellectual disabilities will not have sufficient understanding, and as a result it is seldom that they will be able to grant their own enduring powers of attorney to someone to act on their behalf, and as a result the Court approved welfare guardian and property manager is the more likely approach for Hōhepa residents.

Gifts and Bequests to Hōhepa

The philosophies of Hōhepa engender very strong relationships with the families of residents. In turn the residents generally have very strong bonds with each other and with staff of the various communities to the extent that Hōhepa is frequently regarded as an important part of their family. It is therefore quite natural that parents will often wish to acknowledge their appreciation by making gifts or bequests to Hōhepa. The generosity of parents and families to the Hōhepa Homes Trust Board and The Foundation over a long period has made a very significant contribution to the growth and development of Hōhepa's services.

The value and form of gifts to Hōhepa will depend on many factors and the circumstances of individual families. Parents may sometimes be able to make immediate gifts or donations towards specified projects so that their own family member with an intellectual disability may receive direct or indirect benefit. In other cases, parents may not have the ability to set aside funds during their lifetimes and may therefore choose to provide gifts to Hōhepa, under their Wills.

The policies of the Trust Board and The Hōhepa Foundation are to apply all gifts and donations within the community or towards any purpose specified by any donor. Where donors intend that gifts or bequests are to be held as long term endowments rather than being used for general operating purposes or immediate projects, the Trust Board encourages these to be made to The Hōhepa Foundation.

The Hōhepa Foundation has established a portfolio of professionally managed funds built up over the years from a number of generous gifts given to it. These gifts support the ability of the Hōhepa Trust Board and Hōhepa Services Ltd to continue providing the services and care they do with regular grants from The Foundation earnings. This has become of greater importance at a time when government policies do not provide any assistance for buildings and are limited to subsidies for operating costs.

There are several different ways for parents to make immediate or deferred gifts. It is, however, important that parents distinguish between those gifts that are made directly to Hōhepa for community benefit (through one of the Hōhepa charities such as the Trust Board or The Foundation), and those which are to be held by Hōhepa Trustees Limited to provide for the child of the parents as an individual resident. In some cases, it may be appropriate under a Will of a parent (or other family member) looking to provide for their child and Hōhepa to set aside funds in trust to provide for the specific resident with any remainder passing to Hōhepa after the resident's death. In other cases, gifts or bequests under a Will may provide for other beneficiaries such as a surviving partner or other person to have the right to enjoy the income or benefit of assets for their lifetime, and for Hōhepa to benefit once the family members have passed away.

Some of the different ways of achieving this are covered in later sections of this Handbook including:

- a) Gifts of money or assets or bequests (either by Will or under a specific trust) that are to be held in trust by Hōhepa Trustees Limited to provide for an individual resident during their lifetime with any remainder passing to The Foundation after his or her death.
- b) Gifts of money or assets by Will to be held in trust by Hōhepa Trustees Limited for a beneficiary other than the Hōhepa resident (i.e. another family member of the resident) with any remainder to pass to The Hōhepa Foundation after the death of the beneficiary.
- c) Gifts of money or assets directly to Hōhepa or to The Hōhepa Foundation for the general or specified purposes of Hōhepa.
- d) Bequests under Wills of money or assets directly to Hōhepa or to The Hōhepa Foundation for the general or specified purposes of Hōhepa.

General donations or gifts to either the Hōhepa Homes Trust Board or to The Hōhepa Foundation are exempt from taxation as charitable donations and may qualify for a small tax rebate applicable to donations to charities in New Zealand. (Specific tax advice would obviously be required for any tax structuring).

Forms for Wills, Bequests, Special Trusts and Gifts

The following pages include a number of suggested deeds, documents and forms of bequest that may be included in Wills. These have been included for illustrative purposes only and it is important that parents do not attempt to complete documents without proper advice and assistance. In appropriate cases the suggested deeds or clauses should be referred to the appointed professional adviser.

- 12.1 Complete Will to provide for surviving spouse followed by equal division among children and the share of the disabled beneficiary to be held on protective trust
- 12.2 Form of bequest under Will to provide for the establishment of a special trust under the umbrella of Hōhepa (by Hōhepa Trustees Limited)
- 12.3 Form of Legacy to Hōhepa Foundation
- 12.4 Form of Deed to establish a special trust under the umbrella of Hōhepa (by Hōhepa Trustees Limited)

12.1 Sample Will to provide for surviving spouse followed by equal division to children and share of disabled family member held on protective trust:

This is the last Will and testament of me WILLIAM JOHN SMITH of Eketahuna, Company Manager.

1. *I revoke all former Wills and declare this to be my last Will.*
2. *I give the whole of my estate to my wife Mary Jane Smith providing she shall survive me by one calendar month and I appoint her the sole executor of this my Will.*
3. *If my said wife predeceases me or fails to survive me by one calendar month I appoint xxxxx as substitute executor and trustee and I give the whole of my estate to firstly pay all of my just debts funeral and testamentary expenses and subject to the trust provided in clause 4, to divide my residuary estate among such of my children as shall survive me as tenants in common in equal shares providing however that should any of my children predecease me leaving children such children shall take and if more than one in equal shares that part of my estate which would otherwise pass to such children had they survived.*
4. *I direct that my trustee shall set aside the share of my daughter Katie Joan Smith pursuant to clause (3) and shall hold the same on the following trusts.*
 - a) *During the lifetime of the said Katie Joan Smith I direct that my trustee shall at its absolute and uncontrolled discretion pay or apply the whole of the income and capital in or towards the care, support, comfort, wellbeing and general benefit of the said Katie Joan Smith and subject to any terms and conditions which the trustee may decide.*
 - b) *On the death of my said daughter Katie Joan Smith I direct my trustee to firstly pay any amounts which may be owing for her care or past care and any amounts required for the payment of any funeral or burial expenses of my daughter Katie Joan Smith and I direct that any funds then remaining in the hands of my trustee shall be paid to The Hōhepa Foundation (registration number CC10696) for its general purposes and free of any trusts. A receipt given on behalf of the said Hōhepa Foundation (registration number CC10696) (or other replacement charitable institution) will be a complete discharge to my trustee.*

c) For the purposes of this clause where The Hōhepa Foundation as it exists at the date of my will has, upon my death or subsequent, changed its name, restructured, been amalgamated with any other charity or otherwise ceased to exist in its current state, then the term 'The Hōhepa Foundation' shall include any other charitable institution which provides (or provided) care, support, advocacy or other services to my daughter Katie Joan Smith during her lifetime.

d) I appoint my son Bruce Smith to be the Advisory Trustee of the trusts for my daughter Katie Joan Smith.

IN WITNESS WHEREOF I have signed my name this _____ day of _____ 20XX.

Signed by the above named WILLIAM JOHN SMITH
in our presence and in the presence of each other

12.2. Establishment of Trust under the umbrella of Hōhepa (by Hōhepa Trustees Limited) by way of bequest under Will (i.e. alternative to clause 4 under sample Will in Section 12.1)

I direct that the share of my daughter Katie Joan Smith pursuant to clause () above shall be paid to Hōhepa Trustees Limited (company registration number 3171486)) and I direct that the Directors of the said Hōhepa Trustees Limited shall hold the same on the following trusts:

- a) During the lifetime of my daughter Katie Joan Smith, to pay or apply the whole or any part of the income or capital of such share:
- i. As a priority, in or towards the care, support, comfort, wellbeing and general benefit of my daughter Katie Joan Smith; and
 - ii. Subject to that, for the general purposes of The Hōhepa Foundation (registration number CC10696), with a priority to be given to regional purposes that might be of indirect benefit to my daughter Katie Joan Smith.
- b) On the death of my daughter Katie Joan Smith to pay any amounts which may be owing for her care or past care and any amounts required for the payment of any funeral and burial expenses of my daughter Katie Joan Smith and then to apply any funds then remaining for the general purposes of The Hōhepa Foundation, free of any trusts.
- i. A receipt given on behalf of The Hōhepa Foundation (or other replacement charitable institution) will be a complete discharge to my trustee.
 - ii. For the purposes of this clause where The Hōhepa Foundation as it exists at the date of my Will has, upon my death or subsequent, changed its name, restructured, been amalgamated with any other charity or otherwise ceased to exist in its current state, then the term "The Hōhepa Foundation" shall include any other charitable institution which provides (or provided) care, support, advocacy or other services to my daughter Katie Joan Smith during her lifetime.

12.3 Form of Legacy to The Hōhepa Foundation (absolute gift to The Hōhepa Foundation with no obligation relating to an individual resident)

I give the sum of (\$) to The Hōhepa Foundation (registration number CC10696) for its general purposes (or any other charitable institution which may, in the opinion of my trustee, represent the same at my death if The Hōhepa Foundation shall have changed its name, restructured, been amalgamated with any other charity or otherwise ceased to exist as it exists at the date of my Will). A receipt given on behalf of The Hōhepa Foundation (or other replacement charitable institution) will be a complete discharge to my trustee.

12.4 Specimen Deed to establish a Personal Trust for a resident under the umbrella of Hōhepa (by Hōhepa Trustees Limited)

THE Hōhepa (VVVV) TRUST

THIS DEED is made on the _____ day of _____ 20XX.

BETWEEN

XXX and XXXX ("The Settlers")

and HŌHEPA TRUSTEES LIMITED ("the Trustee")

BACKGROUND

- A The Settlers wish to establish a Trust for the purpose of making provision for their son/ daughter, VVVV, who is a resident of Hōhepa at [Specify region] and have made an initial advance of \$ to constitute the Trust.*
- B The purpose of the Trust is to provide for the enhancement of the lifestyle of VVVV not funded as part of the welfare funding VVVV receives from the Government during his/her lifetime.*
- C It is anticipated that further money, property or assets may from time to time be transferred to the Trustees by the Settlers or by other parties.*

DEED

NAME OF TRUST

The name of the Trust shall be The Hōhepa (VVVV) Trust.

TERM OF TRUST

The term of the Trust shall be the lifetime of VVVV or such other date as the Trustee may nominate in writing so long as such date does not transgress the rules against perpetuities.

DECLARATION OF TRUST

The Settlers direct and the Trustee acknowledges that the Trustee holds the Trust Fund in a separately identifiable fund to be known as The Hōhepa (VVVV) Trust.

BENEFICIARIES

The Beneficiaries of the Trust shall be:

- a VVVV (Primary Beneficiary); and*
- b Hōhepa Foundation (registration number CC10696) (Final Beneficiary)*

....% to the Regional Fund (specify) where VVVV resides

....% to the General Fund

TRUSTS RELATING TO CAPITAL AND INCOME

The Trustees shall hold the Trust Fund during the term of the Trust on the following trusts, with and subject to the powers, discretions and limitations expressed or implied in this deed:

- a Income - to pay or apply all or any part of the income of the Trust Fund to or for the maintenance, education, advancement or benefit of all or such one or more to the exclusion of the other or others of the Beneficiaries as the Trustees shall think fit.*
- b Capital - to pay or apply all or any part of the capital of the Trust Fund to or for the maintenance, education, advancement or benefit of all or such one or more to the exclusion of the other or others of the Beneficiaries as the Trustees shall think fit.*

The Trustees may pay or apply income or capital at any time or times and in such manner and on such terms, conditions and trusts as the Trustees shall think fit, provided that during the lifetime of the Primary Beneficiary, the interests of the Primary Beneficiary shall take priority over those of the Final Beneficiary.

FINAL DISTRIBUTION

The Trustees shall hold the Trust Fund at the end of the term of the Trust for the Final Beneficiary.



PAULWOOD

THIRTEEN

Sample Memorandum of Wishes

To the Directors of Hōhepa Trustees Limited The Hōhepa VVVV Trust

The Trust is a discretionary one whereby you as Directors of Hōhepa Trustees Limited have vested in you the right to determine who of the beneficiaries will receive the benefits of the Trust.

This memorandum is intended to assist you in the exercise of your discretions by making known our wishes with regard to the on-going administration of the Trust and its eventual winding up.

1. The purpose of the Trust is to provide for the enhancement of the lifestyle of VVVV not funded as part of the welfare funding VVVV receives from the Government during his/her lifetime.
2. VVVV currently receives a State disability allowance to provide for his/her care. The on-going levels of State support may change, and accordingly this Trust is being established for 'peace of mind' to provide for whatever additional needs he/she may have including but not limited to - mechanical assistance or equipment, holidays, nursing assistance, health, physical or wellbeing treatment or services, sundry items and clothing.
3. The capital and income of the Trust Fund are, as a priority, to be applied for the maintenance and benefit of VVVV during his/her lifetime.
4. Prior to establishing the VVVV Trust we had general regard to our wider family circumstances and determined that the VVVV Trust was the most appropriate way of providing for VVVV's needs whilst in the care of Hōhepa Services Limited.
5. It is our wish that you consult with us regularly during VVVV's lifetime as to how the Trust Fund is to be spent and, on our death, it is our expectation that you will consult with any other family members in relation to the ongoing needs of VVVV.
6. We have included The Hōhepa Foundation as a beneficiary in VVVV's Trust as the Trust Fund cannot be seen to be for VVVV's benefit solely. This is to avoid it being regarded as belonging to VVVV and liable to be applied for his/her care before State assistance. Nonetheless, the VVVV Trust is intended primarily for VVVV's benefit, and only when it is established beyond any doubt that his/her needs do not extend to the assets of the Trust should such assets be distributed to The Hōhepa Foundation.
7. On the death of VVVV it is our intent that any residual trust funds shall be distributed to The Hōhepa Foundation [general or specific fund] to use as it sees fit in the continuation of its work to benefit of the broader Hōhepa community.
8. If during VVVV's lifetime the service provider for VVVV's care changes from Hōhepa Services Limited, it is our strong preference VVVV continue to obtain benefit from the trust fund.
9. This memorandum is not to be treated in any way as binding on you or restricting the discretions vested in you by the Trust Deed. It is intended to provide you with guidance in the exercise of those discretions and as such, we reserve the right to amend, revoke or replace this memorandum at any time.

Date and Signature

Left - Bird2, Paul Wood

Where to From Here?

COMPLETING THE DOCUMENTATION:

TRUST DEED:

Once finalised, Hōhepa Trustees Limited require two hard copies signed by the Settlor/s and witness, which will be signed by two Directors on behalf of Hōhepa Trustees Limited. A copy will be provided to the solicitor and family member.

COMPLIANCE AND ID DOCUMENTS REQUIRED:

- i. The Trust Deed signed in front of solicitor
- ii. Completion of Hōhepa Resident's Trust Check List
- iii. Original birth certificate, or other ID such as a passport, of the resident and the settlor, copies of which must be certified by a trusted referee, e.g. solicitor, Justice of the Peace. Requirements will be confirmed as the Trust is being set up.
- iv. Electronic Identity Verification: Settlers will be requested to complete this form for the investment company in addition to providing the required certificated identification, otherwise additional physical documents for identification will be required

Hōhepa Trustees Limited is required to provide additional documentation for the investment company to formally set up the Trust which must be signed by all Directors of Hōhepa Trustees Limited. As this process is being completed, Settlers will be requested to deposit the set-up funds into the Hōhepa Trustees Limited bank account which will then be on-forwarded to the investment company to deposit into the resident's trust.

TRANSFER THE MONEY INTO THE NEW TRUST

Once documentation is finalised, there will be a request to deposit the funds into the Hōhepa Trustees Limited Bank Account:

WHAT IS THE PROCESS TO INSTIGATE A WITHDRAWAL FROM A RESIDENT TRUST?

- Requests for withdrawals must be made in writing to Hōhepa Trustees Limited, via e-mail or hard copy to the Hōhepa Trustees Limited Administrator
- Request may be made by a settlor, family member or from the region where the resident resides (e.g. to top up a RIBA account or for purchase of personal items etc.)
- Depending on the request, quotes may be sought / provided before any expenditure is approved by the Directors. In all case receipts are required for proof of purchase/reimbursement.
- Confirmation of the expenditure/reimbursement is sought from the Regional General Manager, and when appropriate, provision by the region of background information may be sought by Directors to back up the claim
- Directors ensure that the request is in line with the terms of the Trust, together with any accompanying Memorandum of Wishes
- Advice may be sought from the settlor
- Directors' approval is based on Hōhepa Trustees Limited Delegated Authority (which dictates the number of Directors required to approve the level of reimbursement/expenditure)

WHAT HAPPENS WHEN I DIE?

Family members, when setting up a resident Trust, are encouraged to ensure that steps are in place to advise Hōhepa Trustees Limited and The Foundation when the family member with 'oversight' of the Trust dies, and who will take on that role and receive correspondence, provision of statements etc. from Hōhepa Trustees Limited.

WHAT HAPPENS WHEN MY CHILD DIES?

Upon official receipt of advice of the death of a resident with a resident trust through Hōhepa Trustees Limited (including provision of a certified copy of the Death Certificate), the Directors will adhere to the terms of the Trust Deed and work through the process to wind up the Trust and disburse the funds once any disbursements for funeral expenses etc. have been met. The timeframe would depend on the collection of required information and communications.

HOW LIQUID IS THE TRUST?

When a withdrawal is requested from a resident Trust, the process outlined above is followed by the Directors and the Hōhepa Trustees Limited Administrator. Depending on the level of proof required, collection of Director authorisation and communication with settlor/s and the investment company, it can take up to two weeks to complete the transaction. Liquidity of the underlying investments is daily (allow 2-3 days).

In effect, the Trusts are deemed to be 'liquid'.

ARE THERE ON-GOING COSTS ETC.?

Once the Trust has been set up and the family has met any legal costs involved in doing so, there are no on-going costs for the administration of the Trust. A Trust that follows the standard template may not incur much in the way of legal fees. There are no on-going charges from Hōhepa Trustees Limited. The Directors incur investment management costs which are paid out of the sums invested with these managers.

IS A TAX RETURN NEEDED?

As the funds in a Hōhepa Resident Fund are for the purpose of the named resident, the amounts paid into the Fund are not tax deductible (for the benefit of a registered charity) and the income earned is taxable.

The Funds are invested in PIE funds and the tax is payable within the Fund, currently at the nominated rate of 10.5%. The resident is not liable for any tax on the investment as the trust itself is the registered taxpayer.

It is worth noting that currently the residents' trusts which are managed by Milford Asset Management have a major portion of their earnings derived from capital gains which are not taxable.

Enquiries may be directed to: The Administrator
The Hōhepa Foundation & Hōhepa Trustees Limited
Hohepafoundation@outlook.com



Floral Lady - Lucy Smellie



Hohepa

every life fully lived

PO Box 28101, Christchurch 8242

hohepafoundation@outlook.com

Phone: 027 353 4240

www.Hohepa.com/Foundation