



Heritage Law*

Primary Residence Trust Package

Fees: \$3,000

Documents:

1. Primary Residence Trust, with related documents, as required:

If registered in the Land Title Office:

- Form A Transfer
- Property Transfer Tax Return

If not registered in the Land Title Office:

- Transfer of Beneficial Interest
- Agency Agreement
- Bare Trustee Agreement
- Trust Minute Book

2. Trust Minute Book

Where both spouses (or common partners) are potentially exposed to creditors (i.e. where they are professionals or partners in a business), it may be appropriate for them to transfer the principal residence to an inter vivos discretionary trust. An inter vivos trust is one that is created during your lifetime. A discretionary trust is a trust where the beneficiaries' entitlements to the trust fund are not fixed, but are determined by the trustees of the trust.

Creditor Protection, Centralized Management and Multiple Beneficiaries

The trust can be structured to govern who is entitled to benefit from the property, how it is managed and what to do if the trustees can't agree.

The trustees of the trust are one or more individuals who have the power to make certain decisions, and the beneficiaries can include not only the trustees, but also children, grandchildren or other relatives. An advantage to a discretionary trust is that none of the beneficiaries have any vested right to the property – they will only be entitled to use the property as the trustees allow and/or when the trustees decide to distribute the property to them. If a beneficiary experiences creditor issues, they will have a strong argument that they have no interest in the property, and that it therefore should not be subject to seizure.

Probate Fee Avoidance

The property in the trust will not be subject to probate fees, currently approximately 1.4% of the gross value of the estate (and subject to being increased by the acting Provincial government of the day).

Retention of Primary Residence Capital Gains Exemption

The *Income Tax Act* allows a home owned by a “personal trust” to qualify as a principal residence if the property was ordinarily inhabited in the calendar year ending in the relevant fiscal year of the trust by an individual beneficiary of the trust or a child, spouse or former spouse of such a beneficiary.

Note: Property Transfer Tax Issue

For a primary residence, a transfer of legal ownership from you to the Trust in the Land Title Office will not incur any capital gains taxes but it will trigger property transfer taxes under the BC *Property Transfer Tax Act* (1% of the first 200,000 and 2% of the balance).

There is a way to work around this issue where legal title to the property will continue to be held by you as bare trustee on behalf of yourself as trustee of the Trust for the benefit of the beneficiaries of the Trust. The mechanisms to effect this transfer are an Agency Agreement, a Bare Trust Agreement, a Transfer of Beneficial Interest and a duly executed Form A Transfer. Legal title to your property in the name of the Trust will not be registered unless there was a potential creditor concern or you passed away and the property transfer taxes will be payable at that time by the trust. It is important to note that while this strategy will avoid the payment of property transfer taxes at this time, there is a risk that a creditor could register a judgment against the property against you as bare trustee in the interim. That said, there is a large amount of unregistered trust property in existence and you may be prepared to accept this risk.

How will the Trust be set up?

Once the form of the Trust has been agreed upon, we will arrange a meeting to set up the trust where the following will occur:

Trust

- the trust will be settled by the client with \$10.00 in Canadian currency. This means that on the date when the trust agreement is to be signed, the client should bring with her \$10 for this purpose;
- the client will sign four original trust documents as Settlor;
- the client will sign all four documents as Trustees;
- Our office will retain two original trust documents, one original will be given to you and one will be used for Land Title Purposes at a later date

Transfer of Beneficial Interest, Agency Agreement and Bare Trust Agreement

- If you intend to defer the payment of property transfer taxes, you will sign a document called a Transfer of Beneficial Interest, and Agency Agreement and an attached Bare Trust agreement which will operate to transfer beneficial ownership of your property (and vehicles) to the Trust. You will each continue to hold these assets in your own name as “bare trustee” on behalf of the Trust;
- The reason for the Agency Agreement is to first establish that there is a relationship of principal and agent between the parties. Having established the relationship, then the principal directs that the agent hold the property as a bare trustee for the beneficiary (who is also the principal). The main reason for pairing these documents is to make it absolutely certain that the bare trustee relationship is not seen as a real trust attracting income tax consequences and the necessity of making filings as a trust with the Canada Customs Agency (CRA). Specifically, the CRA has accepted that as long as there is absolutely no discretion held by the bare trustee, then that party was not effectively a trustee;

Form A Transfers

- you will sign three copies of two different Form A Transfers, one transferring legal title to your property from your name as bare trustee to your name as Trustee of the Trust and the other a blank Form A Transfer (which would allow your Trustees to avoid Property Transfer taxes completely after your death by transferring legal title to your property to a subsequent third party purchaser);

Wills and Enduring Powers of Attorney

Although the Trust will operate to act as a substitute will with respect to the property, your will remains in place in case it is required at some point in the future.

In addition, the Trust will permit an alternate trustee to manage the property if you cannot during your lifetime, but your power of attorney will be in place in case it is required as well, i.e. to file tax returns.

Trust Minute Book

We will prepare a Trust Minute Book, to include the following:

- The original signed trust document;
- Copies of any cheques or descriptions of any property given to the trust;
- List of trustee names and addresses;
- A record of all decisions and financial transactions of the trust (i.e. minutes of trustee meetings and copies of resolutions including any resolutions paying income to you, paying capital from the trust to you, regarding any unused income and regarding the payment of bills relating to the trust such as legal or accounting fees);