



Heritage Law\*

### **Heritage Law Alter Ego/Joint Partner Trust Package**

**Fees: \$10,000.00**

#### **Documents:**

1. Will(s)
2. Power(s) of Attorney
3. Representation Agreement(s)
4. Alter Ego or Joint Partner 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
    - Land Owner Transparency Report
5. Trust Minute Book

#### **Basic Estate Planning:**

There are three documents everyone should have:

1. A Simple Will
2. A Power of Attorney
3. A Representation Agreement

A **Will** sets out who you would like to administer your estate, to receive your assets and to be the guardians of your minor children in the event you died. This allows the maker of the will to make these decisions themselves rather than default to the legislative provisions that apply when a person dies without a will.

A **Power of Attorney** is a legal document where you can appoint someone (the attorney) to manage your financial and legal affairs in the event you were unable to do so yourself, for example due to illness, injury or travel. An **Enduring Power of Attorney** remains

valid even if the person giving it loses mental capacity. It must be signed before the person loses capacity.

A **Representation Agreement** (which is a combined advance health care directive, personal directive and living will) allows you to designate someone you trust to make health and personal care decisions for you should you not be able to make such decisions yourself. If you have any particular health care wishes, you can include them in a Representation Agreement.

### **Alter Ego and Joint Partner Trusts**

If there appears to be a significant risk that a spouse or children will challenge your will or distribution of your estate after the time of your death, you should consider using an alter ego or joint partner trust, which are trusts you create during your lifetime which set out the distribution of trust assets at the time of your death. We will discuss alter ego trusts below (for single individuals), but the concepts are equally applicable to joint partner trusts (for couples).

An alter ego trust is one established after 1999 by a living individual who is at least 65 years of age where that individual is entitled to receive all the income of the trust arising before his or her death and no person except the individual may receive or otherwise obtain the use of any of the income or capital of the trust before the individual's death.

Trust income is paid or payable to the income beneficiary throughout his or her lifetime and is therefore taxed at the individual's marginal tax rates. The transferor has access to the trust income and full control of the trust property prior to death.

Generally speaking, an individual may transfer property to his or her alter ego trust on a tax deferred (rollover) basis. The rollover will apply automatically unless the settlor elects to have the transfer take place at fair market value.

### **Benefit 1: Avoiding Wills Variation Litigation**

In British Columbia, a child or spouse of a deceased individual who is unhappy with their share under a Will may apply to Court to have the Will altered, pursuant to the *Wills, Estates and Succession Act*. A "child" includes all natural or adopted children, and a "spouse" includes someone you may have been living with in a marriage-like relationship for at least two years. The *Wills, Estates and Succession Act* causes uncertainty as to how an estate may be divided after someone's death. There are many similar fact patterns which have had very different outcomes in court. Accordingly, it is very difficult to predict what the eventual decision will be with a specific case. As well, the practical effect of any such action, win or lose, is greater legal fees payable by the estate, acrimony between surviving family members and the freezing of the estate assets until the case is resolved, which could take years.

If there is a risk of litigation under the *Wills, Estates and Succession Act*, an alter ego trust is a good preventative measure. Since the assets are gifted before the person's death to the alter ego trust, and are no longer owned by the person, those assets do not pass through that person's estate when they eventually pass away. Accordingly, the assets would not become involved in the *Wills, Estates and Succession Act* litigation.

## **Benefit 2: Probate Fees Avoidance**

The probate process can be expensive. All of your assets are 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). As well, there will be legal and accounting fees, which vary, depending on the nature of the assets involved. Altogether, the amounts involved to the estate can be significant. As the assets are no longer in the estate, there will be no probate fees payable on assets located in an alter ego trust. Particularly in larger estates, this can be a large savings.

## **How will the Alter Ego Trust be set up?**

Once the form of the Alter Ego 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 \$10.00 for this purpose;
- the client will sign four original trust documents as Settlor;
- the client will sign all four documents as Trustees;
- we will retain three original trust documents, one original will be given to you
- one notarially certified copy will be made for your accountant who will file the income tax returns
- one notarially certified copy will be made for the purposes of you opening a bank account in the name of the Alter Ego Trust;

### 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 home to the Alter Ego Trust. You will continue to hold these assets in your own name as “bare trustee” on behalf of the Alter Ego 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, the principal then 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 Revenue 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 Transfer

- you will sign three copies of a Form A Transfer, transferring legal title to your home from your name as bare trustee to your name as Trustee of the Alter Ego Trust

#### Land Owner Transparency Report

- you will be required to sign a Land Owner Transparency Report to be compliant with the *Land Owner Transparency Act* that came into effect November 30, 2020, to disclose the bare trustee of land that has been transferred to the Trust.

#### Wills and Enduring Powers of Attorney

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

In addition, the Alter Ego Trust will permit an alternate trustee to manage your assets 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.

#### Banking Arrangements

Subsequent to the meeting setting up the trust, you will need to set up a bank account in the name of the Alter Ego Trust with you as the signing authority. In addition, you will need to arrange for ownership of your cash and investment assets to be transferred from you personally into the name of yourself as Trustee of the Alter Ego Trust. We can assist you with this.

#### 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);
- Copies of income tax returns; and
- A checklist of deadlines
  - Fiscal year end (Dec 31);

- Preferred beneficiary income tax filing (March 31 or March 30 in a leap year);
- Trust income tax and information return filing (March 31 or March 30 in a leap year); and
- Information slip filing (such as a T3 Supplementary) Feb 28 or Feb 29 in a leap year.

Note: Property Transfer Tax Issue

One of the main benefits of a Alter Ego Trust is that there is a tax free rollover of property to the trust. Regarding real estate, a transfer of legal ownership from you to the Alter Ego Trust will not incur any capital gains taxes but it will trigger property transfer taxes under the BC *Property Transfer Tax Act*.

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 Alter Ego Trust for the benefit of the beneficiaries of the Alter Ego 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 home in the name of the Alter Ego Trust will not be registered until after you pass 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. That said, there is a large amount of unregistered trust property in existence and you may be prepared to accept this risk.