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INFORMATION SHEET

ALTER EGO (JOINT PARTNER) TRUSTS

This Information Sheet will provide information on Alter Ego and Joint Partner Trusts, what are they, what is their purpose, the advantages and disadvantages of an Alter Ego Trust and what the process looks like if you make the decision to have one.

What is an Alter Ego Trust?

An Alter Ego Trust is a trust created by an individual who is:

- a resident of Canada,
- alive at the time the trust is created, and
- over the age of 65.

An Alter Ego Trust is a trust created by and for a single individual. A joint partner trust is created by and for a couple. The legal concepts and the advantages and disadvantages of an Alter Ego Trust apply equally to a Joint Partner Trust. For simplicity's sake, this information sheet will restrict our discussion to Alter Ego Trusts.

The creation of an Alter Ego Trust creates a separate legal entity. All, or substantially all, of an individual's property will be transferred to the Alter Ego Trust upon its creation. The trust then manages the individual's property in accordance with the instructions contained in the trust document.

The terms of the Alter Ego Trust document must provide that no person except for the individual that created the trust may receive or use the income or capital of the trust during their lifetime. In the case of a joint partner trust, the trust document must provide that no person except for the couple, or the survivor of them, may receive or use the income or capital of the trust during their lifetime.

After the individual has died, or in the case of a couple after both partners have died, the individual's property is distributed in accordance with the instructions in the trust document in very much the same manner as instructions in a person's Will.

Advantages of an Alter Ego Trust

There are six commonly accepted advantages for creating an Alter Ego Trust.

1. Reduction in Probate Fees

Obtaining a grant of probate is the name given to the court process of validating a person's Will. Before an executor named in a will can carry out the instructions in that will, the executor must obtain the approval of a Supreme Court judge. The court process of approval has four basic elements. They are (1) confirming the validity of the Will document itself, (2) confirming the identity of the executor, confirming the assets and liabilities of the estate, and (4) confirming that the executor will carry out the

instructions contained in the Will. Prior to granting their approval, the court will require the payment of the probate fees. Probate fees are approximately 1.4% of the gross value of a person's estate. For example, if you have an estate worth \$4 million dollars then your estate would be responsible for paying approximately \$55,000 in probate fees to the provincial government.

As indicated earlier, as all, or substantially all, of an individual's assets would be transferred to their Alter Ego Trust, there would be no assets held in the individual's name and therefore no requirement to obtain a grant of probate or pay the probate fee. As a result there is potentially an immediate and substantial savings depending on the value of an individual's estate.

2. Reducing Estate Litigation

In BC, the Wills, Estates and Succession Act ("WESA") allows for a spouse or child to challenge the validity of the will if they feel that the will does not make adequate provision for their proper maintenance and support. If a challenge is successful, a court may re-write an individual's will in any manner that the court thinks adequate, just and equitable in the Court's view. Under WESA, a child includes any natural or adopted child and a spouse includes both married and common-law relationships.

WESA does not apply to trust generally or alter ego or joint partner trust specifically. As a result, an individual who is unhappy with the scheme of distribution in an Alter Ego Trust does not have a statutory right to have the trust document varied. The creation of an Alter Ego Trust can substantially reduce the likelihood that an individual will challenge a scheme of distribution in an Alter Ego Trust in addition to substantially reducing the likelihood of an individual succeeding in challenging the distribution of an Alter Ego Trust.

Said in a different way, as all or substantially all of an individual's property has been transferred to the Alter Ego Trust, when that person dies that person's estate will not own any assets. As the estate does not own any assets there is little or no reason to commence estate litigation to have a court rewrite a deceased person's will using the WESA legislation.

If you intend to distribute your estate in a manner that may potentially result in a spouse or child being unhappy with your instructions, then the choice of an Alter Ego Trust is one that should be given serious consideration. Without an Alter Ego Trust, your estate may be frozen while the estate litigation proceeds through the BC Supreme Court process, which process can take years to be finalized. In addition to the length of time, there would be very expensive legal fees for the lawyers representing the estate in addition to legal fees for the unhappy spouse or child which, win or lose, the estate may have to bear some portion of. In addition, estate litigation often creates an adversarial conflict between family members which conflict may destroy or tear apart family relationships.

3. Continuity of Asset Management

If an executor is required to probate your will, and executor does not have the authority to deal with your assets until such time as the probate process has been completed. This process can take several months in an uncontested estate, but can take years if there is a challenge to the validity of a will. Unlike the probate process, property held in an Alter Ego Trust does not require the probate approval process.

Accordingly, the trustees of your trust will have relatively seamless transition and continuity with respect to the management of your assets. This is particularly important, if you have assets held in different provinces or jurisdictions as a grant of probate may be required to be obtained in each jurisdiction in which you hold property.

4. Privacy and Confidentiality

The probate process is a public process. Once probate documents are filed at the Courthouse, any individual can go to the Courthouse and request copies of those documents. As an Alter Ego Trust does not require the probate process, the trust document is private and confidential and will only be provided to those people or institutions that the trustee of the Alter Ego Trust deems necessary. The only individuals with an absolute right to see the trust document will be those individuals that created the trust, any of the trustees of the trust and any of the beneficiaries named in the trust.

5. Asset Protection

An Alter Ego Trust may reduce the ability of a creditor to make claims against an estate's assets. As an individual no longer owns the assets in their own name, a creditor may have a more difficult time in making a claim on those assets. However, if an individual is entitled to the capital of a trust, as most individuals who create Alter Ego Trusts are, a creditor may be able to make a claim against that individual's interest in the trust. If an individual has existing debts, the transfer of property to an Alter Ego Trust will not assist in protecting that individual from those creditors.

6. Substitute for a Power of Attorney

A power of attorney is a document that gives another person the legal authority to deal with your property and financial affairs. It allows them to do everything with your property that you yourself could do. An Alter Ego Trust offers several benefits that are superior to a power of attorney for managing your assets. Unlike a power of attorney, an Alter Ego Trust can be used in multiple legal jurisdictions. If you own property in multiple jurisdictions, you may be required to have a separate power of attorney for each of those jurisdictions.

An Alter Ego Trust offers better protection and control for your estate in the event of an individual's mental incapacity. If one becomes mentally incapable, a person could apply to the courts to be appointed as the incapacitated person's Committee. The person applying may not be a person you would wish to have in charge of your affairs. If they were successful, any power of attorney that you had previously authorized would be cancelled. The appointment of a person as an incapacitated person's Committee would not affect authority of a trustee of an Alter Ego Trust. In addition, whereas a Power Of Attorney ceases to be effective upon the death of the person giving the Power Of Attorney, an Alter Ego Trust continues after the death or incapacity of that individual allowing for relatively seamless management and control of one's assets.

Disadvantages of an Alter Ego Trust

There are four commonly accepted disadvantages to an Alter Ego Trust.

1. Cost

There are both legal and accounting fees during the initial setup phase followed by ongoing legal and accounting fees to administer the trust during its lifetime. In addition, if a professional trustee is retained to administer the trust, then those professional trustee fees also have to be taken into account. Careful consideration needs to be taken to ensure that the choice of creating an Alter Ego Trust is the correct one for an individual's circumstances. However, given the significant reduction in probate fees and other benefits, an Alter Ego Trust is often a valid choice.

2. Control

Once an individual's assets are transferred to an Alter Ego Trust, the individual loses ownership and control over those assets. The ownership of those assets passes to the Alter Ego Trust and the control over those assets passes to the trustees of the trust. While it is common to have individual transferring the assets to the trust be named as the initial trustee, is also common to have one or more individuals appointed as co-trustees to assist in managing the trust assets. In such an event, the individual may lose sole control over the assets depending on how the Alter Ego Trust has been written.

3. Flexibility

An Alter Ego Trust, much like trusts in general, are more difficult to alter and amend than a Will. When changing the terms of the trust, including who the beneficiaries of the trust may be, one must consider whether there may be tax consequences as a result of that decision. Whereas with a Will, you may change your Will as many times as you wish and there are no adverse tax consequences as a result of a change.

4. Charitable Interests

Charitable donations while you are living can be more complicated when using an Alter Ego Trust. As indicated earlier, only you (or your spouse in a Joint Partner Trust) are entitled to any income or capital of the trust during your lifetime. If you wish to provide a gift to a charity, you must first receive the funds from the Alter Ego Trust personally and then make the gift to the charity. If you wish for a charity to benefit from the Alter Ego Trust upon your death, then you need to make special provisions in your Alter Ego Trust to ensure that the gift is structured properly as a Charitable Remainder Trust so that all the available tax credits can be obtained.

How is an Alter Ego Trust created?

1. Trust Creation

Should you decide that an Alter Ego Trust is a good choice for you, your next step is to create one. How is this done? Much like the preparation of a Will, instructions are received from the client, informing us about the client's wishes for the terms of the Alter Ego Trust. Questions we ask are clients to consider are:

- Who do you wish to be the Trustee or Alternate Trustee of the Alter Ego Trust?
- After you die:
 - Do you have and specific cash gifts to make to a person or charity?
 - Do you have any specific items of personal or real property you wish to go to a specific person or persons?
 - How do you wish for the remainder of the property held by the Alter Ego Trust to be distributed (spouse, children, grandchildren or other)?

Using those instructions we will create a form of Alter Ego Trust for your review and approval. We generally also ask your permission to discuss you estate plan and Alter Ego Trust with you accountant and financial advisor. We find it helpful to create a team of professionals to discuss and agree on a plan of action. Once approved, the original trust document is signed in accordance with the procedure set out below:

2. Trust Signing

- The trust will be created (or "settled") by the client by the payment of a certain sum of money in Canadian currency (usually \$20);
- the client will sign the original trust document as Settlor;
- the client will sign the original trust document as Trustee; and
- the \$20 is stapled to the last page of the Alter Ego Trust document

And that is all it takes to create an Alter Ego Trust. There is no government registry or other system that governs the creation of a trust.

3. Transfer of Property to an Alter Ego Trust

To take advantage of the benefits of an Alter Ego Trust, the ownership of your assets must be changed. Assets that you own in your own name must be transferred or gifted to the Alter Ego Trust and be held (or owned) by the Alter Ego Trust. Deeds of Gift or Transfers will be prepared by our office and signed by you to begin the transfer process. There are two types of property: Real Property (or Real Estate) and Personal Property (essentially everything that is not Real Property.)

You may choose to transfer all of your Personal Property and all or your Real Property to the Alter Ego Trust or you may choose to only transfer specific items of Personal Property or Real Property. The choice will be yours.

a. Personal Property and Bank Accounts

As just mentioned, Personal Property is essentially everything that is not Real Property. This includes bank accounts, investment accounts, shares in companies or business interests, and all your personal belongings including planes, trains and automobiles (basically anything that is in your personal name).

To transfer Personal Property to your Alter Ego Trust you will be required to contact and provide written instructions to each financial or other institution where ownership of those assets are held or registered. For example, if you have an investment account at ABC Financial Inc., upon receiving your written instructions, ABC Financial Inc. will open a new account in the name of the Alter Ego Trust and transfer your holdings into the new account.

You must also set up a bank account in the name of the Alter Ego Trust with the trustee as the signing authority to carry out the day to day business of the trust. This includes receiving money, paying bills and transferring money from the Alter Ego Trust to the beneficiary.

b. Real Property

In British Columbia, and specifically the Lower Mainland, the value of real estate has become a primary source of wealth for many individuals. The benefit of an Alter Ego Trust is that this real estate wealth can be transferred to the Alter Ego Trust without income tax or capital gains being applied. It also allows for the transfer of the real estate wealth to your beneficiaries without paying the Probate Fee.

In a more perfect world, you would be able to transfer your Real Property by filing a transfer of your real estate holdings to your Alter Ego Trust in the Land Title Office without any adverse tax consequences. Unfortunately that is not the case. In British Columbia we have a tax called the Property Transfer Tax. This Tax is applied on the transfer of any real estate in British Columbia, unless the purchaser is entitled to an exemption. Transfers to an Alter Ego Trust do not qualify for an exemption. The Property Transfer Tax rate is significant:

- 1% on the first \$200,000,
- 2% on the amount greater than \$200,000 and up to and including \$2,000,000,
- 3% on the amount greater than \$2,000,000 and up to and including \$3,000,000, and
- 5% on the amount greater than \$3,000,000 (if the property is residential).

We suggest that you have two choices with respect to the payment of the Property Transfer Tax.

Choice One – Transfer the property and pay the tax

Choice Two – Defer the payment of the tax by only transferring the beneficial ownership

Transfer of Beneficial Ownership.

Before we explain how the transfer of beneficial ownership works, it is important to understand what it is.

There are two types of owners: (1) the registered or **legal ownership** and (2) the owner who is entitled to receive all of the benefit of the property, commonly referred to as the **beneficial ownership**.

The legal owners of a property are separate from the beneficial owners and the legal owners do not have to be the same as the beneficial owners. The legal owner holds the beneficial interest in the property in trust for the beneficial owner. The beneficial owner of the land will have the right to the income and economic benefit of the property and a right to the proceeds of sale of the property.

To eliminate or defer the payment of the Property Transfer Tax on the transfer of your real property to the Alter Ego Trust, you will transfer the beneficial ownership of the real property to the Alter Ego Trust while the legal title to the real property remains in your name. There is no requirement to register the transfer of the beneficial ownership in the Land Title Office and therefore there is no requirement to pay the Property Transfer Tax.

To transfer the beneficial ownership of your real property you will be required to sign a number of documents to properly record the transfer of the beneficial interest to the Alter Ego Trust. These are:

- Transfer of Beneficial Interest
- Bare Trust and Agency Agreement
- Form A Transfer to the Alter Ego Trust
- Form A Transfer – Transferee left blank

The Bare Trust and Agency Agreement will confirm that while you remain the legal owner of the property, you now hold the property “in trust” for the Alter Ego Trust.

The Form A Transfers are signed to allow the property to be transferred to the Alter Ego Trust upon your passing. Property Transfer Tax will be required to be paid at that time. The “blank” Form A Transfer is used to cover the possibilities that the Trustees of the Trust may be different than contemplated today, or alternatively for use to transfer the property to a third party purchaser, avoiding the payment of the Property Transfer Tax altogether.

4. Trust Record Book

Finally, the Alter Ego Trust will have a record book (similar to a Corporate Record Book) that will contain all of the Alter Ego Trust’s records and documents. Our Trust Record Book contains the following information (organized into separate Tabs):

- Trust Documents
- Trustee Appointments & Resignations
- Trustee Resolutions
- Beneficiary Notices & Resolutions
- Documents Approved by Trustees
- Financial / Tax Records
- General Correspondence
- Miscellaneous
- Trust Property Records
- Historical Records

Other Essential Estate Planning Documents

While an Alter Ego Trust may address substantially all of a person's concerns regarding their estate planning, there is still often a requirement for additional documentation to compliment an Alter Ego Trust. These are:

1. Enduring Power of Attorney

An Enduring Power of Attorney is a document in which you appoint a person of your choosing, to have the power and authority to deal with your property. Having an Enduring Power of Attorney enables your property to be managed and cared for by another person while you are alive. This also includes when you may be mentally infirm and incapable of managing your own affairs. Any property owned by or transferred to the Alter Ego Trust will be managed by the trustees of the trust. But, there still may be property that has not been transferred to the Alter Ego Trust, like a personal bank account, a vehicle or boat etc. that may require a Power of Attorney.

2. Representation Agreement

A Representation Agreement is document in which a person appoints another person or persons (your "Representative(s)") to have the authority to decide about their legal, financial, medical and other personal matters. A person can also appoint a third party to act as a "monitor" to supervise your Representatives. We generally suggest that an "enhanced" or "general" Representation Agreement made under section 9 of the *Representation Agreement Act*. A "general" Representation Agreement allows you to give your Representative(s) the authority to make virtually any decisions that may be required, including Health Care, Personal Care, Financial and Property Affairs and Legal Affairs. A Representation Agreement may also include a statement regarding your wishes regarding life sustaining medical treatment in the event of your incapacity.

3. A Will

We have spent much of this Information Sheet explaining how an Alter Ego Trust can act as a replacement for your Will. We still recommend that you have a current Will to ensure that your possessions are distributed according to your own wishes. If you die without a Will and you have property that is not owned by an Alter Ego Trust, then that property would be distributed according to the formulas set out in the *Wills, Estates Succession Act*, a Provincial statute. It is therefore important to have a Will, no matter how simple, to ensure that you determine who your beneficiaries will be, the share they are to receive and when and how they are to receive their share.

Summary

The above provides a practical overview of what an Alter Ego Trust is. This Information Sheet is for informational purposes only. Readers are cautioned this Information Sheet does not constitute legal or professional advice and should not be relied on as such. Rather, readers should obtain specific legal advice in relation to the issues they are facing. For more information on whether an Alter Ego Trust is right for you, please contact one of our Wills and Estates lawyers at Kerfoot Burroughs LLP. We would be pleased to be of assistance.