

MAKING TRUSTS WORK—2008
PAPER 6.1

Family Trusts and Alter Ego Trusts: Record Keeping

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FAMILY TRUSTS AND ALTER EGO TRUSTS: RECORD KEEPING

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I. Introduction

The purpose of this paper is to suggest how a lawyer can assist his or her client to maintain a Trust Minute and Records Book for a family trust or an alter ego trust.¹

Marni M. K. Whitaker, in Chapter 13 of *Widdifield On Executors and Trustees* (Carswell: 2002) 6th edition, Carmen S. Thériault Ed. sets out a good summary of the Trustee’s duty to keep records. In the 2005 CLE Estate Litigation Update, Rhys Davies, QC, wrote a thoughtful paper entitled “Beneficiaries’ Rights to Document from their Trustee or their Executor.” Mr. Davies’ paper remains an accurate summary of the law concerning access to information, the right to disclosure and in what circumstances a trustee may withhold disclosure.

When taking instructions to prepare a family trust or an alter ego trust, it is important (and I would say critical) for the lawyer to insist that he or she be allowed to prepare a Trust Minute and Records

1 Although this paper will make reference to a trust, not every trust will require a Trust Minute and Records Book. For example, where a trustee holds the beneficial interest in real property for a third party, the rights and duties of the Trustee may be set out in a Bare Trust and Agency Agreement. The Trustee may then keep a file setting out the written instructions received from the third party and the signed authorization or directions requesting or permitting the Trustee to deal with the property. For the purposes of this paper, I do not make any distinction between an alter ego trust or a joint partner trust.

Book so that the key documents for the trust can be found in one place. Just as every solicitor who incorporates a company would not hesitate to create a records book for that company, whether the lawyer acts as the records or registered office or both of the company, the same principles should apply when assisting a client settle a family trust or an alter ego trust.

II. Basic Documents

The basic documents for a Trust Minute and Records Book would be:

A. Index or Table of Contents to the Trust Minute and Records Book

The Index or Table of Contents would set out in an organized fashion a list of the documents in the Trust Minute and Records Book.

At a minimum the Index or Table of Contents would include:

- i. Reporting letter(s) by date;
- ii. The original Trust Indenture signed by the Settlor and the Original Trustee;
- iii. If one of the assets of the Trust includes real property, then you may want to have the original Trust Indenture cited in one or more land title offices where the Trustee of the Trust holds real property on behalf of the Trust. A copy of the cited Trust Indenture with registration particulars from each land title office should be kept in the Trust Minute and Records Book;
- iv. Proof of settlement of the original Trust property (typically a small silver bar which costs about \$12 to \$15 to purchase);
- v. A signed acknowledgement by the Trustee of the silver bar;
- vi. A Register of Trustees for the Trust;
- vii. An Income and Expense ledger for the Trust;
- viii. A Declaration form for income from the Trust;
- ix. A Declaration form for Capital Distribution from the Trust;
- x. Minutes of the Trust;
- xi. Copies of various agreements entered into by the Trustee of the Trust. Depending on the nature of the Trust, these agreements would include:
 1. Original Deed signed by the Settlor of the Trust setting out how the income and the capital of the Trust are to be dealt with during the Settlor's lifetime and upon his death. Usually, this Deed is made revocable so that the Settlor can amend the Deed at some later time;
 2. Original Deed of Appointment for a successor or substituted Trustee. The Settlor may want to have one or more alternate successor or substituted Trustee's to act, in which case the Settlor would also provide a letter of direction setting out the priority order and the conditions to be satisfied before the Deeds of Appointment may be released to the successor Trustee or if applicable, filed in a land title office;
 3. Original Bill of Sale (Absolute) transferring personal property from the Settlor to the Original Trustee of the Trust;
 4. Copy of any mortgage or other financing entered into by the Trustee of the Trust;

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5. Copy of any opinion letters in support of 4 or other matters for the Trustee of the Trust;
6. Copy of any share certificates for privately held companies showing the registration of the share certificates;
7. Copy of the Settlor's Will, if appropriate;
8. Copy of the Settlor's Power of Attorney and Memorandum for use or delivery of the Power of Attorney;
9. Copy of the Settlor's Representation Agreement for health care matters;
10. Copy of the Settlor's Cohabitation or Marriage Agreement, if applicable;
11. Crucial Dates Checklist; and
12. Records Office Agreement.

The foregoing list is not exhaustive and may be added to or otherwise customized as the circumstances may require.

B. *The Trust Minute and Records Book would hold originals of the various documents set out above.*

III. Who Should Hold the Original Trust Minute and Records Book?

My preference is to hold the original of the Trust Minute and Records Book and provide both the Settlor and his or her accountant with a copy of the Trust Minute and Records Book. How many of you have had a client call you up years later and tell you that they have moved and cannot find the Trust Minute and Records Book or they have misplaced the Trust Minute and Records Book? How many of you have been asked to provide a notarial copy or a certified copy of the original Trust Settlement Deed but no original can be found?

Some lawyers write to the Settlor and the Accountant for the Trust on an annual basis and put the onus on the Settlor and the Accountant to tell the lawyer whether the Trust has had any activity in the past year which requires a Minute to be prepared.

In some cases, the lawyer who holds the Trust Minute and Records Book is the lawyer for the Settlor for all purposes. In other cases, the lawyer may only perform one task and hold the Trust Minute and Records Book. I am aware of some cases where the follow up letter from the lawyer who holds the Trust Minute and Records Book has prompted the accountant and the Settlor to somewhat sheepishly advise the lawyer about various transactions that have occurred in the past year which were documented correctly taking into account the requirements of the *Business Corporations Act* but which overlooked having the Trustee create a Minute to authorize the Trustee's participation, except after the fact.

IV. Appendices

Attached to this paper I have provided:

- A. a sample Index to a Trust Minute and Records Book;
- B. a sample acknowledgement of Settlement of Trust property (silver bar);
- C. a sample Register of Trustees;
- D. a sample Income and Expense Ledger;
- E. a sample Declaration of Income Distribution;

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- F. a sample Declaration of Capital Distribution;
- G. a sample Deed of Appointment for Successor or Substituted Trustee; and
- H. a sample Bill of Sale (Absolute).

Other sources to be considered for precedents include *British Columbia Estate Planning & Wealth Preservation* (CLE: 2002, updated loose-leaf service: most current release is 2008) and *British Columbia Company Law Practice Manual 2 Vol.* (CLE: 2002, updated loose-leaf service: most current release is August 2007).

V. Appendix “A”— Sample Index to a Trust Minute and Records Book

APPENDIX "A"

***The @ Alter Ego Trust*
Trust Minute and Records Book Index
(updated @)**

@ [name of firm] @ [date of letter] Reporting Letter 1

@ [name of firm] Final Reporting Letter @ [date of letter] 2

@ [name of firm] Reporting Letter @ [date of letter] 2A

Trust Indenture for The @ Alter Ego Trust 3

as filed in the @ Land Title office on @
under @ (the “Trust”) A

as signed by the Settlor and the Trustee on @ [date Trust signed] B

Settlement of Trust Property (Silver Bar) 4

Register of Trustees 5

Income and Expense Ledger 6

Declaration of Income Distribution 7

Declaration of Capital Distribution 8

Minutes 9

Agreements entered into by the Trust 10

Deed dated @ revocably reserving Income and Capital of the Trust
to @ (“@”) and revocable direction to disposition of
Trust Fund following @’s death A

Deed dated @ revocably reserving Income and Capital of the Trust
to @ (“@”) and revocable direction to disposition of
Trust Fund following @’s death A1

Deed of Appointment appointing @ (“@”) as the Substituted
Trustee of the Trust B

Deed of Appointment appointing @ (“@”) as the Substituted
Trustee of the Trust C

Deed of Appointment appointing @ (“@”) as the Substituted Trustee of the Trust D

Letter of Direction to @ [name of law firm] from @ dated @ as to the order of priority for release of the 3 Deeds of Appointment for Substituted Trustee E

Bill of Sale (Absolute) transferring @’s interest in the contents of @, @, BC, to @ as Trustee of the Trust F

Copy of the mortgage in favour the @ [insert mortgage company name] to help pay for the purchase of the @ Property, along with copy of @ opinion letter dated @, provided to the @ mortgage company, to @, counsel to the mortgage company and to @, who assisted @ to buy the @ Property as Trustee of the Trust G

Copy of @letter to @ dated @ requesting transfer of @’s interest in @ Limited and the Debenture from @ Limited to @ as Trustee of the TrustH

Copy of @ letter to @ dated @ requesting transfer of @ interest in each of @ Ltd., @, and @ Ltd. I

Copy of The @ Limited Share and Debenture in @’s name as Trustee of the Trust, along with @ report J

Copy of Share certificates for each of @ Ltd., Ltd. and Ltd. in @’s name as Trustee of the TrustK

Copy of @’s last will and testament, dated @ (the “Will”) L

Copy of @’s Power of Attorney dated @ (“@ PA”) M

Copy of @’s Memorandum for use or delivery of @’s PA dated @ (“@’s Memorandum”)N

Copy of @’s Enhanced Representation Agreement for Health Care Matters dated @O

Copy of @’s Cohabitation Agreement with @ dated @ R

Originally signed Motor Vehicle Transfers S

Crucial Dates Checklist11

390814.1

**VI. Appendix "B"— Sample Acknowledgement of Settlement of Trust
Property (Silver Bar)**

APPENDIX "B"

SETTLEMENT OF TRUST PROPERTY

I, @, acknowledge receipt of a silver bar for The @ Alter Ego Trust effective @, 200@.

@

IX. Appendix "E"— Sample Declaration of Income Distribution

APPENDIX "E"

The @ Alter Ego Trust

DECLARATION OF INCOME DISTRIBUTION

I, _____, Trustee of The @ Alter
Ego Trust hereby declare the following income distribution:

<u>BENEFICIARY</u>	<u>AMOUNT</u>
--------------------	---------------

Dated the _____ day of _____, 20__.

Trustee of the @ Alter Ego Trust

X. Appendix "F"— Sample Declaration of Capital Distribution

APPENDIX "F"

The @ Alter Ego Trust

200@

DECLARATION OF CAPITAL DISTRIBUTION

The Trustee of The @ Alter Ego Trust hereby declares the following capital distribution effective _____, 20__:

BENEFICIARY

AMOUNT

Dated _____, 20__.

Trustee of The @ Alter Ego Trust

XI. Appendix "G"— Sample Deed of Appointment for Successor or Substituted Trustee

APPENDIX "G"

DEED OF APPOINTMENT

THIS DEED OF APPOINTMENT made this @ , 200@.

WHEREAS:

- A. On @, 200@, @ created The @ Alter Ego Trust and by instrument appointed @, as the Initial Trustee;
- B. The Settlor is concerned that there should be alternate trustees appointed in the event that @ as the Initial Trustee is unwilling or unable to act during the lifetime of the Settlor or thereafter to carry out obligations as a Trustee under the terms of The @Alter Ego Trust;
- C. The @ Alter Ego Trust provides that the Settlor may appoint trustees by instrument; and
- D. The Settlor has requested and @ has agreed to act as the Substituted Trustee of The @ Alter Ego Trust.

NOW THEREFORE THIS DEED WITNESSES as follows:

- 1. The appointment of @ as the Initial Trustee of The @ Alter Ego Trust is hereby ratified and confirmed.
- 2. In the event that @ is unwilling or unable to act as a Trustee of The @ Alter Ego Trust, then the Settlor nominates, constitutes and duly appoints @, @[occupation], presently of @, @[city], BC, @, to be the Trustee of The @ Alter Ego Trust.
- 3. For the purposes of this instrument, @ is referred to as the "Substituted Trustee".
- 4. To all to whom these presents may come, the same shall operate as an express vesting declaration, conveyance, transfer and full assurance by the Settlor and the Initial Trustee unto the Substituted Trustee by way of joint tenancy and for such purpose or purposes production of a duly executed original or counterpart of, or a notarially certified un-executed copy hereof shall constitute full and complete right and authority without further documentation for effecting, implementing or registering any such conveyance, transfer, and assurances aforesaid and as to the subject matter thereof.

IN WITNESS WHEREOF the Settlor, @, and the Initial Trustee, have each hereunto set their hand and seal the day and year first above written.

Execution Date
(Y/M/D)

Officer Signature(s)

Transferor(s) Signature(s)

_____ 0@/@/____

@, as Settlor

_____ 0@/@/____

@, as Initial Trustee

OFFICER CERTIFICATION: Your signature constitutes a representation that you are a solicitor, notary public or other person authorized by the *Evidence Act*, RSBC 1996, as amended, to take affidavits for use in British Columbia and certifies the matters set out in Part 5 of the *Land Title Act* RSBC 1996, as amended, as they pertain to the execution of this instrument.
390816.1

THIS INDENTURE is dated @ , 200@.

BY:

@, Businessperson

@

@, BC, @

(the "Settlor")

And:

@, Businessperson

@

@, BC, @

(the "Substituted Trustee")

DEED OF APPOINTMENT

@
Barristers & Solicitors

@
@, BC, @

Telephone: @

Facsimile: @

E-Mail: @

File: @ [initials of lawyer]

- - - - -

XII. Appendix "H"— Sample Bill of Sale (Absolute)

APPENDIX "H"

BILL OF SALE (ABSOLUTE)

THIS INDENTURE dated @ ____, 2007 made pursuant to the *Personal Property Security Act*, RSBC 1996, c.359, as amended and the *Sale of Goods Act*, RSBC 1996, c. 370, as amended.

BETWEEN:

@, Businessperson

@

@, BC, @

(the "Grantor")

AND:

@

Trustee of The @ Alter Ego Trust

@

@, BC, @

(the "Grantee")

WHEREAS the Grantor

- (a) is possessed of the goods, chattels and personal property hereafter described and
- (b) has agreed with the Grantee for the absolute sale to the Grantee of the same upon the terms and conditions and for the consideration hereinafter set forth,

NOW THIS INDENTURE WITNESSES

In consideration of the sum of One (\$1.00) Dollar of lawful money of Canada, paid by the Grantee to the Grantor at or before the sealing and delivery of this Indenture, the receipt whereof the Grantor hereby acknowledges, the Grantor hereby bargains, sells, assigns, transfers and sets over all and singular the goods, personal chattels and personal property (hereafter collectively called the "chattels") hereinafter described in Schedule "A", and all the right, title interest, property, claim and demand of the Grantor thereto and therein, unto the Grantee, to and for his sole and only use forever.

Jawl & Bundon
Lawyers

The Grantor hereby covenants, promises and agrees to and with the Grantee:

- (a) that all the chattels are now in the possession of the Grantor and are situate, lying and being in, upon or about @, @, BC,
- (b) that the Grantor is now rightfully and absolutely possessed of and entitled to the chattels hereby assigned, and to all and every part of them (save as aforesaid),
- (c) that the Grantor now has in himself good right to assign the chattels unto the Grantee in the manner aforesaid and according to the true intent and meaning of this Indenture (save as aforesaid),
- (d) that the chattels are free and clear of all charges and encumbrances of every nature and kind whatsoever save and except for the charges and encumbrances set forth and described in the Schedule,
- (e) that the Grantor will indemnify and save harmless the Grantee from any and all charges and encumbrances not so set forth and described in the Schedule,
- (f) that the Grantee shall and may from time to time, and at all times hereafter, peaceably and quietly have, hold, possess and enjoy the chattels hereby assigned, and all and every part of them, to and for his own use and benefit without any manner of hindrance, interruption, molestation, claim or demand whatsoever of, from or by the Grantor, or any person whomsoever, and
- (g) that the Grantor shall and will from time to time, and at all times hereafter, upon every reasonable request of the Grantee but at the expense of the Grantee, ~~make, do and execute, or cause or procure to be made, done and executed,~~ all such further acts, deeds and assurance for the more effectual assignment and assurance of the hereby assigned chattels unto the Grantee, in the manner aforesaid, and according to be true intent and meaning of this Indenture, as shall be reasonably required by the Grantee.

Jawl & Bundon
Lawyers

AND IT IS EXPRESSLY AGREED between the parties hereto that all grants, covenants, provisos and agreements, rights, powers privileges and liabilities contained in this Indenture shall be read and held as made by and with, granted to and imposed upon, the respective parties, hereto, and their respective heirs, executors, administrators, successors and assigns, the same as if the words heirs, executors, administrators, successors and assigns have been inscribed in all proper and necessary places; and wherever the singular or the masculine pronoun is used, the same shall be construed as meaning the plural or feminine or the body politic or corporate where the contents or the parties hereto so require, and where a party is more than one person, all covenants shall be deemed to be joint and several.

IN WITNESS WHEREOF the Grantor has hereunto set his hand and seal this @, 200@.

SIGNED, SEALED AND DELIVERED)
BY the Grantor in the presence)
of:)
)
) _____)
) @)
)
_____)
390821.1

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SCHEDULE "A"

All the right, title and interest of the Grantor to the contents of @, @, BC.

Jawl & Bundon
Lawyers

THIS INDENTURE dated @, 200@ made pursuant to the *Personal Property Security Act*, RSBC 1996, c.359, as amended and the *Sale of Goods Act*, RSBC 1996, c. 370, as amended.

BETWEEN:

@
@
@, BC, @ (the "Grantor")

AND:

@
Trustee of The @ Alter Ego Trust
@
@, BC, @ (the "Grantee")

BILL OF SALE (ABSOLUTE)

@
Barristers & Solicitors
@
@, BC, @

Telephone: @
Facsimile: @
E-Mail: @

File: @, @ [initials of lawyer]
