

The Advisor

June 19, 2013

Alter Ego and Joint Partner Trusts: Estate Planning Beyond a Will



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For many, estate planning begins and ends with the preparation and execution of a legally valid Will. Certainly, a valid Will, together with an Enduring Power of Attorney and a Personal Directive, allows an individual to dispose of their property on death in accordance with his or her wishes, and provides authority for financial and non-financial decision-making in the event of the individual's incapacity during their lifetime.

However, *inter vivos* trusts can also play an important role in estate planning. *Inter vivos* trusts are trusts that are established and operate during the individual's lifetime (and often continue after the individual's death). By contrast, testamentary trusts are established pursuant to the provisions of a Will or other testamentary document, and become effective only upon the individual's death. Once established, an *inter vivos* trust may serve a number of functions, including allowing the individual to distribute assets outside of the individual's estate without limiting the individual's right to enjoy the assets during his or her lifetime.

Generally, the transfer of capital property into an *inter vivos* trust is considered a disposition of that property for tax purposes, attracting income tax on any unrealized capital gains accrued on the property. However, in 2001, the *Income Tax Act* was amended to permit taxpayers aged 65 years or older to transfer property *inter vivos* or "during their lifetime" into a trust on a tax-deferred basis. Such trusts are called "alter ego" or "joint partner" trusts. If a trust qualifies as either an "alter ego" or "joint partner" trust, taxes on accrued capital gains are typically deferred until the earlier of the disposition of the trust property or the death of the individual or surviving Partner. An "alter ego" trust is an *inter vivos* trust established for the individual's own benefit. A "joint partner" trust is an *inter vivos* trust established for the benefit of the individual and his or her spouse or common law partner of either the same or opposite sex (the "Partner").

Requirements

There are certain requirements that must be met to establish a valid alter ego trust or a joint partner trust.

1. The trust must be created after 1999 and must be created by an individual (also referred to as the "settlor") who is at least 65 years of age.
2. In an alter ego trust, during the individual's lifetime the individual must be the only person entitled to receive the income of the trust. In a joint partner trust, the individual and his or her Partner must be the only persons entitled to receive the income of the trust prior to the death of the individual and his or her Partner.
3. In an alter ego trust, the individual creating the trust must be the only person entitled to receive the benefit of the trust property prior to the death of the individual. In a joint partner trust, the individual and his or her Partner must be the only persons entitled to receive the benefit of the trust property prior to the death of the individual and his or her Partner.
4. The individual and his or her Partner must be resident in Canada.

Benefits

Alter ego or joint partner trusts have many benefits:

1. Trusts as a Will substitute: The transfer of property to an alter ego or joint partner trust may obviate the need for a Will with respect to the property transferred, as the terms of the trust will provide for the disposition of the property to one or more beneficiaries upon the death of the individual or the surviving Partner.

2. Privacy and Efficiency: The assets in an alter ego or joint partner trust devolve to the beneficiaries outside of the estate. Therefore, an individual may be afforded more privacy regarding the nature, extent and disposition of his or her assets on death as there is typically no need to apply for probate, which is a public process, with respect to the trust property. Additionally, as the assets held on trust are not included among the assets to be distributed as part of the deceased's estate, the trustee will have continuous legal title to the property and can distribute to the beneficiaries according to the terms of the trust document without the delays inherent in the probate process.

3. Trusts as a Power of Attorney substitute: An alter ego or joint partner trust can be used to provide for the continuous management of the assets of the individual and his or her Partner in the event of incapacity. These trusts may therefore serve as an alternative to a power of attorney and, unlike a power of attorney, the terms of the trust will survive the death of the individual and his or her Partner.

4. Tax planning: The transfer of assets to an alter ego or joint partner trust is typically not a disposition for tax purposes. Instead, the property is rolled-over, delaying any realization of capital gains and the tax owing thereon until the death of the individual or surviving Partner. In addition, unlike other *inter vivos* trusts, alter ego and joint partner trusts are not subject to the 21-year deemed disposition rule during the lifetime of the individual and his or her Partner. Rather, the taxation of capital gains will be deferred until the death of the individual or surviving Partner even if death occurs more than 21 years after the trust is established. If the trust continues to exist after the death of the individual or the surviving Partner, a deemed disposition will occur every 21 years thereafter.

5. Creditor protection and protection from claims against the estate: The trust structure typically makes it more difficult for creditors and claimants to execute against property that is validly transferred into the trust.

6. Probate fee savings: The assets in an alter ego trust or joint partner trust will not form part of the individual's estate. Accordingly, the assets will not be subject to probate fees. Although probate fees are capped at \$400 in Alberta irrespective of the size of a deceased individual's estate, in many other Canadian provinces, probate fees are calculated based on a percentage of the value of the assets in the deceased's estate and are often an important consideration for clients with assets in other jurisdictions.

For all of these reasons, Canadians aged 65 years or older may want to consider establishing either an alter ego trust or a joint partner trust during their lifetime. If you wish to discuss whether such trusts might be recommended in your circumstances, please contact Field Law's [Wills, Estates and Trusts Group](#).

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