

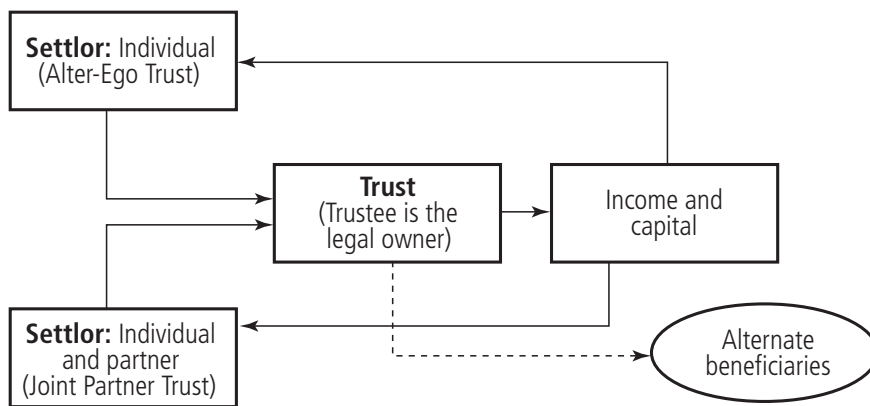
## Tax planning using alter ego and joint partner trusts

More and more, seniors are looking for alternatives to the traditional will and powers of attorney. They want options to help them protect and pass along assets they have built up over their lifetime. If you are looking for flexibility and control in planning your estate, alter ego and joint partner trusts could be what you need. The following describes some of the advantages they can provide in structuring your estate and controlling the future use of your property.

### How they work

Alter ego and joint partner trusts are *inter vivos* trusts, since they are set up during the lifetime of the settlor. (A settlor is a term used to refer to someone who has set up a trust.)

The diagram below shows how these trusts are structured. An alter ego trust is set up by one person acting on their own, while a joint partner trust is set up by a couple in partnership. The trustee becomes the legal owner of the assets in the trust, while the income and capital from the holdings flow back to the settlor. The settlor may act as the original trustee, but the trust document should include a provision for a substitute trustee to be appointed just in case the settlor is incapacitated or dies. On the death of the settlors, the trustee can distribute the assets to the beneficiaries.



<sup>1</sup> The term "partners" is used throughout this InfoPage and refers to legally married spouses and common-law partners, of the same or opposite sex.

### **When to use these trusts**

- If you are over 65 years old
- If you wish to continue to receive all of the income from the trust until your death (or the death of the second of two partners in the case of a joint partner trust)
- If you have beneficiaries who may need immediate access to your assets upon death

### **Why consider these trusts?**

There are estate-planning aspects of these trusts that can be very beneficial. Here is a brief overview of some of the advantages of using them in combination with a will or as an alternative for incapacity planning.

#### **Trusts combined with wills**

An alter ego or joint partner trust can be used as an alternative to your will, or in combination with it and other legal documents to ensure assets are handled according to your wishes. There are a number of benefits to this including avoiding probate and ensuring assets are distributed as originally intended. A will is still necessary, because you may have assets that are not included in the trust, or you may acquire assets after establishing the trust.

#### **Save time and eliminate probate fees**

Assets held by an alter ego or joint partner trust will not be included in your estate. Legally, the trustee owns the assets held in the trust. On the death of the settlors, the trustee can distribute the assets to the trust's beneficiary according to the trust document. There is no need to go to court to obtain probate or letters of administration, and no probate fees have to be paid. The amount that will be saved on probate fees depends on where you live, as fees vary between provinces. They are usually based on the value of the estate. If you have assets in more than one province or country, it may be necessary to apply for probate in each jurisdiction.

For more information relating to the probate process, please see our Tax & Estate InfoPage, *Probate planning*.

#### **Ensure estate liquidity and continuity**

The trustee of the alter ego or joint partner trust can immediately access the assets in the trust, and can distribute these assets to the trust's beneficiaries. This can be a benefit to your heirs as it can be an expensive and slow process to have a will probated. Generally, upon a person's death, their heirs may have limited access to any money held in bank accounts until the deceased's will has been probated. This can take several weeks to complete.

During this time, the deceased's family may be left without sufficient funds for day-to-day living expenses or bills. Sometimes this can create financial problems for family members. Also, if the deceased owned a business, delays in obtaining probate may interfere with its ongoing management.

### **Protect against estate litigation**

Currently, provincial family laws regarding wills do not apply to trusts, providing you with greater flexibility. This can be an important consideration. Under provincial family law, if a spouse, child or other dependent feels they have been treated unfairly under a will they may have the right to make a claim against the estate. In addition, some provinces have legal options for spouses that can effectively alter the terms of a will.

### **Trusts as alternatives in incapacity planning**

Alter ego or joint partner trusts can be used as alternatives to traditional incapacity documents and powers of attorney. (These are also referred to as representation agreements in British Columbia and mandates in the event of incapacity in Quebec). If you have no power of attorney and are incapacitated, who controls your personal and financial affairs may be decided by provincial law.

The benefit to using a trust is that you can avoid delays in appointing a substitute decision-maker and ensure continuity of asset management. Plus, incapacity documentation can often contain only a brief description of the duties and powers of the representative. On the other hand, the trust agreement very clearly sets out the duties and powers of the trustee. The trustee's powers extend through incapacity and, unlike some powers of attorney, continue in the event of death. Assets held in the trust will be managed by the trustee and can include assets located in more than one province. On the other hand, a power of attorney may not be accepted outside your home province.

For more information about incapacity planning, please refer to our Tax & Estate InfoPage, *Incapacity – planning ahead helps*.

### **Income tax benefits**

When you transfer property to a trust it's generally consider a sale, and results in immediate tax implications. However, alter ego and joint partner trusts are an exception to this rule. You may transfer assets to the trust and will not have to pay taxes until you sell the assets, or upon your death. All of the income and capital in the trust flows back to you as the settlor and you are required to pay taxes on any income or capital gains earned by the trust.

### **Make the best use of capital gains exemptions**

Under certain circumstances it can be a good idea to transfer assets at fair market value to an alter ego or joint partner trust in order to use capital gains exemptions. For example, you may want to take advantage of the \$500,000 capital gains exemption on qualified small business corporation shares or farm property. It cannot be used once assets are in the trust. On the other hand, your principal residence can generally be transferred into an alter ego or joint partner trust without losing out on the principal residence exemption.

### **What happens if the trust runs for longer than 21 years?**

For most trusts, assets are usually subject to a deemed disposition 21 years after the trust was created, and every 21 years after that. This means that the trust has to pay tax on any accrued capital gains on each 21-year anniversary of the trust. If the assets were transferred into the trust at fair market value instead of on an adjusted-cost base, the normal 21-year rule would apply. For alter ego and joint partner trusts, this deemed realization can be deferred until the death of the settlors. If the trust continues to run afterwards, then a deemed disposition will occur every 21 years.

### ***Inter vivos* trusts**

For individuals wanting to set up trusts in their wills for their heirs (also known as testamentary trusts), an alter ego or joint partner trust may not be the best option. There are different tax rules for testamentary trusts. Alter ego and joint partner trusts are considered *inter vivos* trusts, since they are set up during the lifetime of the settlor. Once the trust is established as an *inter vivos* trust, it will remain so. It will not become a testamentary trust upon the death of the settlor, even if assets remain in the trust after the death of the settlor.

If the trustee continues to manage the assets for the heirs, any income and/or capital gains that are taxable to the trust will be taxed at the top marginal tax rate. The graduated tax rates that would otherwise be available to a testamentary trust will not be applicable.

### **Other issues to consider**

As with any aspect of estate planning, these trusts are not necessarily the best option for everyone. There are some issues you should be kept in mind when considering using this strategy:

- The cost of setting up and running the trust (i.e., set-up fees, professional fees for legal and accounting advice and tax reporting) may not be worthwhile if your assets can be distributed efficiently through other estate planning methods
- If you plan to include private company shares or qualified farm property in the trust, you need to keep in mind that the \$500,000 capital gains exemption is not available to the trust on a subsequent sale of the property
- If you are intending to name a charity as beneficiary of the trust, you should be aware of the tax implications to your estate. A tax credit of up to 100% of your net income is available for donations from your estate. Anything over your net income may be carried back and used as a credit against your net income from the previous year. On the other hand, a trust can also make donations, but is limited to a maximum credit of 75% of income earned in the year of the settlors' death, and in addition, the carryback is not allowed.

### Effective and efficient

If you are looking for flexibility and control in planning your estate, alter ego and joint partner trusts could be what you need. Your advisor can help you explore different options for an effective and efficient estate plan.

The information provided is general in nature and is provided with the understanding that it may not be relied upon as, nor considered to be, the rendering of tax, legal, accounting or professional advice. Readers should consult with their own accountants and/or lawyers for advice on the specific circumstances before taking any action.

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