



ALTER EGO AND JOINT PARTNER TRUST – ADVANTAGES

In 2001, Canada introduced two new trusts: the alter ego and joint partner trust. Essentially, both trusts allow a settlor of an inter vivos trust to transfer capital assets into a trust on a tax deferred basis if the following conditions are met:

- The settlor must be at least 65 at the time the trust was created
- The trust is created after 1999
- In the case of an alter ego trust the settlor must be entitled to receive all the income of the trust that arises before his or her death. In the case of a joint partner trust the settlor or his or her partner, in combination with one another are entitled to all income of the trust that arises prior to the death of the survivor of them
- No person except the settlor (and their spouse in a joint partner trust) may, before the settlor's death (or the survivor's death in a joint partner situation) may receive or otherwise obtain the use of any income or capital of the trust
- A majority of the trustees must be Canadian

These trusts have a series of traps or downsides which were discussed in a previous article. This article discusses some of the planning opportunities offered by these trusts

PROBATE SAVINGS

One of the primary motivators in setting up a trust is to minimize probate fees. Probate fees are calculated on the value of the estate assets passing through the will of the deceased. Since the assets held in an alter ego or joint partner trust are not owned by the deceased they transfer in accordance with the terms of the trust and not through the deceased's will.

In provinces, such as Ontario, Nova Scotia and British Columbia with higher probate rates, the savings can be substantial. For instance, assuming the assets held in the trust are valued at \$2 million, the probate fees paid in these provinces would be \$29,500, \$27,450 and over \$33,200, respectively.

DELAY AND OTHER PROBATE ISSUES

Another attractive feature of a trust is that since the assets pass outside of the estate the delay and legal formalities associated with a probate application are avoided. As a result the funds are immediately available to family of the deceased. This is a particularly attractive feature where liquidity is required immediately after death, for instance where the deceased had a dependent.

CONFIDENTIALITY AND ADMINISTRATIVE CONVENIENCE

A trust deed is confidential as opposed to a probated will which is a public document. A person who wishes to maintain confidentiality respecting the distribution of assets may want to consider a trust.

From an administrative perspective since the assets are already collected in the trust, the estate administration is simplified for the personal representative of the deceased.

REAL PROPERTY IN OTHER JURISDICTIONS

There may be procedural advantages when dealing with real property in other provinces as each jurisdiction has unique succession rules.



For instance, a unique feature of British Columbia is the wills variation provisions in its Wills, Estate and Succession Act. Under these provisions, a court has a jurisdiction to alter a will if a child or the spouse of the deceased was treated inequitably. The Act applies to personal property if the deceased was domiciled in British Columbia at the time of death. However, it will apply to real property located in British Columbia regardless of where the deceased live. Therefore, a person with a property in British Columbia may wish to consider creating a trust as the variation jurisdiction of the court only applies to wills and not to trusts.

POWER OF ATTORNEY SUBSTITUTE

The trust deed can provide for a succession of trustees and can therefore be used as a substitute for a financial care power of attorney. The trust deed is usually more detailed and personalized in issues of importance to the settlor than is a power of attorney document. Should the settlor become incompetent the deed can provide for a substitute trustee and

the administration can continue. Also, since powers of attorney are provincially regulated a separate power of attorney may be required in each province where assets are held, whereas a trust is effective in all provinces.

CREDITOR PROOFING

The trust deed, if properly drafted, can provide some protection for beneficiaries from a creditor perspective. Usually, assets passing through a will into the hands of a beneficiary can be seized. This may not be the case in a trust deed.

CONCLUSION

In a previous article we discussed some of the disadvantages of an alter ego or joint partner trust. These trusts are not a suitable solution for everyone and the concerns set out in that article should be considered before implementing the structure. However, for the right client in the right circumstances these trusts can prove beneficial.

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