

# Joint Spousal and Alter Ego Trusts – New Estate Planning Opportunities

A trust can be defined as an arrangement whereby, under law, a person or family establishes an agreement to ensure property is taken care of for the benefit of one or more individuals, otherwise known as beneficiaries. Typically this arrangement is formal in that a legal document is drawn up with the assistance of a lawyer. This legal document, sometimes referred to as a trust deed or indenture, establishes in writing, the parameters of the trust.

Trusts exist in two forms; **inter vivos** and **testamentary**. Both can play an important role in your financial and estate plans. Inter vivos (created during your lifetime) trusts are used to set assets aside for custodial purposes, to ensure they are cared for in a certain manner, as dictated by the trust deed. In many instances, income splitting and other tax planning strategies are often applied. In contrast, a testamentary trust is created upon your death may be planned for in your Will.

In December of 1999, the Department of Finance introduced draft legislation to allow two new types of inter vivos trusts. These are referred to as Alter Ego and Spousal Trusts. For those ages 65 and older, these trusts will offer some new and effective estate planning opportunities.

## *How They Work*

As an alternative to distributing your assets by will, prior to your death you can put them into a trust. In the past, however, a change of ownership of the asset from you to a non-spousal trust that names other persons as beneficiaries, would result in a disposition of those assets at fair market value for income tax purposes. Under the proposed changes, the transfer of capital property to a trust that meets specific criteria will not result in a disposition for tax purposes. Instead a disposition will be deemed to occur at the fair market value of the capital property upon your death (alter ego trust) or upon the death of the surviving spouse (joint spousal trust).

An **alter ego trust** can be set up and have assets transferred to it without triggering tax on any deferred gains provided:

- You are age 65 or older
- The trust is created after 1999
- You are the only person entitled to receive income or capital from the trust during your lifetime

A **joint spousal trust** can be established for you or your spouse's (including a common law spouse) personal benefit provided:

- You are age 65 or older
- The trust is created after 1999
- Only you or your spouse are entitled to receive income or capital from the trust during either of your lives

It's important to note that the attribution rules for income will apply (income from any assets in the trust will be attributed and taxed as income to the contributor of that asset). The accrued capital gain on these assets will be realized at the death of the last of you and your spouse. As with an alter ego trust, the fair market of the assets at that time will be used for tax purposes.

### *Estate Planning Considerations*

Traditionally, most Canadians use a will to distribute assets at death. There are however, several issues that arise when using a will. As an alternative, using these new inter vivos trusts will provide the following benefits:

- **Avoid Probate Fees** – Assets passing by will are subject to provincial probate fees. Assets held in the trust will never be included as part of an individual's estate and therefore will not pass via the Will. The assets will instead be administered or distributed upon death as per provisions of the trust. This will result in not having to pay probate fees on these assets.
- **Limit Public Access** – Anyone who wishes to, after paying a nominal fee, can obtain a copy of the probate application which lists all of the assets of a deceased person. Assets held in a trust and details of their distribution do not become public information at death. Therefore, if confidentiality is one of your estate objectives, these trusts will help you attain it.
- **Avoid The Wills Variation Act (BC)/Substitution Act (Ontario)** – Your spouse and/or dependents can apply to the courts to alter the terms of your will if they feel they were not adequately provided for as beneficiaries. These trusts help you to avoid this problem by allowing your assets to pass to your beneficiaries without using a Will.
- **Escape the 21-year rule** – Trusts are deemed to dispose of their assets every 21 years. Because these trusts are deemed to dispose of assets at your death (alter ego) or the last of your and your spouse's death (joint spousal), the 21 year rule does not start to apply until after this deemed disposition. This means these trusts will not have to deal with deemed dispositions during your lifetime.
- **Name a Successor Trustee** – Under the proposed legislation, through these inter vivos trusts it will be possible to name a successor trustee as well as provide other direction in the event of your mental incapacity.

These new planning tools will be an effective way to help individuals accomplish their estate objectives. A review of your retirement and estate plans would be meaningful at this time in order to determine if they are appropriate for you.