Alter Ego and Joint Partner trusts

Alter Ego trusts, which are set up for individuals, and Joint-Partner trusts, which are set up for spouses (including common law couples), are often used as Will substitutes by many high net worth families. These trusts are inter-vivos trusts, created during the lifetime of the settlor (the person who sets up the trust). They offer complete confidentiality while providing important tax benefits, creditor protection and incapacity planning.

Requirements

Transferring personally held property to an Alter Ego or Joint Partner trust can be a non-taxable event. That is, the deemed disposition which otherwise would apply to the transfer of property to an inter-vivos trust (during one's lifetime) can be dispensed with so there would be no adverse tax consequences. The capital gains tax payable on the (otherwise) deemed disposition is then deferred to the date of death of the settlor, in the case of an Alter Ego trust, or to the date of death of the last to die in the case of a Joint Partner trust, as long as:

- The trust was created after 1999, by the settlor during their lifetime;
- The settlor is over 65 years of age when the trust is created;
- The settlor (the person creating the trust) and the settlor's spouse are Canadian residents;
- The trust is a Canadian resident trust (i.e. the controlling trustee(s) is/are Canadian resident(s));
- For an Alter Ego trust, only the settlor can receive the income and capital of the trust while the settlor is living; and
- For a Joint Partner trust, only the settlor and his or her spouse (while alive) can receive the income and capital of the trust while the settlor is living.

Advantages

The benefits of these trusts include:

- **Reduced Probate Fees** – Transferring assets into an Alter Ego or Joint Partner trust for the benefit of the settlor or the settlor and his or her spouse, in essence places the assets outside the estate of the settlor before death, hence reducing the value of the estate at the date of death for the purposes of probate fees. As long as the trust document provides for the ultimate distribution of trust assets upon the last death, it is likely that the value of those assets will not be subject to probate fees. Please note: If the trust provides that the final distribution is to occur according to the deceased's Will, probate fees will apply.
- **Creditor Protection** – Trust assets are protected from commercial creditors and, in some circumstances, from family law claims.
- **Incapacity Planning** – The ownership structure of the trust can provide for management of property by a trustee other than the settlor, in the event of the settlor's incapacity. Typically, this aspect of incapacity planning is established in addition to a Continuing Power of Attorney for Property which addresses all other property owned by the settlor and not held in the trust. It may be possible for an attorney for property to establish an Alter Ego or Joint Partner trust if the settlor lacks capacity to do so. The final distribution from the trust should align with the distribution that would occur through the Will.
- **Tax Deferral** – Capital gains tax is deferred upon settling the trust, and, in the case of a Joint Partner trust, also on the first death. Capital gains tax is payable on the date of death of the settlor of an Alter Ego trust or the last death of the settlor and spouse, in the case of a Joint Partner trust.
- **Succession Planning** – as a Will substitute, the trust terms govern succession of assets upon the death of the settlor of an Alter Ego trust or the last death of the settlor and spouse of a Joint Partner trust, outside the estate, not in the hands of the Executor under the Will but rather, in the hands of the trust's trustee or trustees.
- **Confidentiality** – Bypassing the estate keeps the matter private, not in the public domain.

Disadvantages

The disadvantages associated with these trusts include:

- Legal costs for creating the trust and fees for the annual tax filings have to be weighed against the potential future probate tax savings.
- The Income Tax Act has a number of provisions that are beneficial when the donation is made by way of the Will but may not be available for a trust.

Conclusion

As with many good plans, one size does not fit all, and the advantages may or may not outweigh the disadvantages. Like any formal trust, there are initial set-up costs when establishing an Alter Ego or Joint Partner trust, as well as the ongoing record keeping arrangements, including the filing of annual tax returns. Notwithstanding these costs, and depending on the circumstances, Alter Ego and Joint Partner trusts can be useful tools when designing a comprehensive estate plan.

Professional advice is essential when considering the establishment of an Alter Ego or Joint Partner trust.

For more information, please speak with your BMO financial professional.

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