

ALTER EGO AND JOINT PARTNER TRUSTS

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In the last issue of *Letter of the Law*, we discussed how the provisions of your will could be subject to variation under dependent relief legislation, if, in the opinion of the court, you fail to make “adequate, just, and equitable” provision for your spouse and children. One way of preventing the courts from interfering with your estate plan is to transfer your assets to a trust during your lifetime (known as an inter vivos transfer) through the creation of either an alter ego trust or a joint partner trust. Placing your assets in a trust may also have additional benefits such as reducing probate fees, protecting against creditor claims, and deferring or saving taxes.

Under an alter ego trust, the settlor transfers his or her property to a trust which provides that the settlor alone is entitled to receive all of the income of the trust and no-one else can receive any of the income or the capital of the trust before the settlor’s death. To qualify for an alter ego trust the settlor must be over 65 and a resident of Canada. When the settlor dies the assets are distributed pursuant to the terms of the trust rather than a will.

A joint partner trust is much like an alter ego trust but is particularly useful for spouses. The main difference over an alter ego trust is that the assets are disposed of upon the death of the surviving spouse. With a joint partner trust the settlor must again be over 65 and both the settlor and his or her spouse must be Canadian residents. The terms of the trust must again provide that only the settlor and his or her spouse receive the trust’s income or the capital of the trust.

By using a joint partner trust, the settlor can ensure that his or her spouse continues to receive the benefit of the assets during their lifetimes. The assets only devolve on the deaths of the settlor and his or her spouse.

There are considerable advantages that lead estate planners to favour an alter ego trust over a will. The assets in such a trust do not form part of the estate. The *Wills Variation Act* only applies to a person’s estate so a settlor’s spouse and children cannot apply to a court for variation of the trust.

Other advantages of an alter ego or joint partner trust include the following:

- No probate is necessary for the assets to be passed under the trust, creating fewer administrative complications and lower probate fees payable on the settlor's death.
- The trust can include provisions for the management of assets if the settlor becomes incapacitated.
- To be probated, a will must be filed in the B.C. Supreme Court—it becomes a public document. This subjects the devolution of assets in the will to public scrutiny. But an alter ego or joint partner trust is a private document and information regarding assets and beneficiaries of that document remains private.
- An alter ego or joint partner trust may offer some level of creditor protection.
- There may be tax benefits, due to the possibility that the disposition of assets can be made on a tax-deferred basis.
- Transfers of property to these trusts do not constitute dispositions of property for the purposes of the *Income Tax Act*.
- A joint partner trust is particularly useful in a blended family scenario where a deceased wishes to ensure that a surviving spouse from a second marriage receives the benefit of the assets but, on the latter's death, the assets pass to the children of a first marriage.

These types of trusts are not necessarily advantageous; some drawbacks include:

- A loss of control of property, since a settlor must transfer the legal and beneficial ownership of the property to the trustee.
- If the settlor is also acting as the trustee (for the purpose of controlling the assets of the trust), capital gains earned and accumulated by the trust will be attributable to the settlor during his or her lifetime;
- The cost of administering a trust is higher than simply preparing a will because the latter doesn't take effect until the testator's death;
- Changing the method of asset distribution can also be potentially difficult because the settlor has disposed of the property upon the making of the trust. It is not as straightforward as writing a new will or a codicil.

The establishment of an inter vivos trust is more complex than the creation of a will and usually requires that the settlor also obtain tax advice. However, in many circumstances, the creation of an alter ego trust or a joint partner trust can prevent costly disputes and save estate fees and taxes over the long run.