CALU REPORT

NOVEMBER 14, 2012

Alter Ego and Joint Partner Trusts: Where do they fit? (part 2 of 2)

Alter ego and joint partner trusts have now been part of the Canadian tax landscape for over a decade. The pros and cons of using these types of trusts for estate and tax planning purposes have been debated since their introduction. In the February 2012 edition of *CALU Report*, Margaret O´Sullivan, LLB, provided an overview of possible uses of these types of trusts as substitutes for wills and powers of attorney in her article "Alter Ego and Joint Partner Trusts: Where do they fit?". In this her follow-up article, Margaret focuses primarily on the tax attributes of these trusts and how the tax rules can influence the use and application of these trusts in planning situations. There is also a discussion of important tax considerations when considering insurance within an alter ego or joint partner trust.

CALU thanks Margaret for her contribution.

Regards,
Kevin Wark, LLB, CLU, TEP
President, CALU

Table Of Contents

- Introduction
- Tax Considerations in Using an Alter Ego or Joint Partner Trust as a Will Substitute
- Legal Considerations in Using an Alter Ego or Joint Partner Trust as a Will Substitute
- Conclusion
- About the Author
- Endnotes

Introduction

This is the second of two articles focusing on the legal and tax attributes of alter ego and joint partner trusts. The first article provided an overview of possible uses of these types of trusts as substitutes for wills and powers of attorney and in succession planning for those aged 65 and older.[1] This article will focus on the tax attributes of these trusts and how the tax rules can influence the use and application of these trusts. Select issues relating to the use of insurance in alter ego and joint partner trusts will also be reviewed.

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RETURN TO TOP

Tax Considerations in Using an Alter Ego or Joint Partner Trust as a Will Substitute

(a) Exception to the 21-Year Rule
Under the *Income Tax Act* (Canada) (the “Act”), there is a deemed realization of the assets of an alter ego trust on the date of death of the settlor, and on the date of death of the survivor of the partners in the case of a joint partner trust, and every 21 years thereafter unless an election is made to trigger an earlier disposition.[2] Accordingly, alter ego and joint partner trusts have different treatment than most *inter vivos* trusts which are subject to a deemed realization on their 21st anniversary date.[3]

(b) Taxation on Death: Top Marginal Rates
While the deceased and testamentary trusts are subject to graduated rates of tax, *inter vivos* trusts are subject to the top marginal rate applicable to individuals.[4]

Where assets are held directly by a deceased, capital gains arising from the deemed disposition on death of capital property and land inventory would be taxed at his or her graduated rates of tax.[5] If instead such assets have been transferred to an alter ego or joint partner trust, and there is a deemed disposition resulting from the death of the settlor (or second death under a joint partner trust), any income or gains will be subject to top marginal rates of tax, resulting in more tax than if directly held.

(c) Loss of Testamentary Trust Status
If part of the estate plan involves the use of multiple testamentary trusts for income-splitting purposes, (e.g., multiple trusts under the will for children and grandchildren to whom income is to be paid or payable) an alter ego or joint partner trust which provides for a plan of distribution on death, establishing such trusts will not achieve these planning objectives because the property was settled *inter vivos*.[6] Consideration may then be given to the relative advantages and disadvantages of each approach, as well as to whether a trust can be used in tandem with a will, under which testamentary trusts are provided for, and sufficient assets left at the estate level in order that this planning opportunity may be optimally utilized.

It had been suggested when alter ego and joint partner trusts were first introduced that if an inter vivos trust is used, a power of appointment could be given to the settlor to appoint the trust assets on his or her death exercisable by deed or under will. The power could be exercised to direct that the trust assets be held on continuing trusts, and if the view were taken that only on death do such trusts come into existence, it was arguable they would qualify as testamentary trusts. Alternatively, it had also been suggested that trust agreements could be executed but left unfunded during the settlor´s lifetime, to be funded on death. The terms of the alter ego trust or joint partner trust could name the trusts as beneficiaries on the settlor´s death, directing the property be paid to the trustees to be held subject to the terms of the pre-existing trust agreements.[7]

CRA has taken the position that neither of these techniques are viable in order to enjoy testamentary trust status.[8] CRA's view is that a person cannot transfer his or her property on or after his or her death except by a will or other testamentary instrument and therefore the transfer of property from an alter ego trust to a trust created after the death of the settlor is not a transfer of property by the settlor of the trust. As well, property transferred to a trust prior to the settlor's death does not belong to the settlor at the time of his or her death and therefore cannot be considered to be a contribution by the settlor as a consequence of the settlor's death to a trust created subsequent to the settlor's death. Accordingly, CRA takes the position that trusts created upon the death of the settlor pursuant to the provisions contained in an inter vivos trust are inter vivos trusts and do not qualify as testamentary trusts.

The special election permitting a trust to designate income which was paid or payable as not having been paid or payable for tax purposes under the Act should be considered since its utility may either not be available or compromised if not taken into account where a trust is used as a will substitute.[9] Where the beneficiaries are all at high marginal tax rates, the ability to tax income in a testamentary trust at graduated rates presents a relevant income-splitting opportunity, particularly where there are continuing testamentary trusts. Again, a solution may be to ensure sufficient assets are retained at the estate level to utilize this planning opportunity, and the surplus settled on trust.

(d) Separate Year of Death Returns
In the year of death, as well as the basic final return, several separate returns may be filed in which deductions and credits can be claimed.[10] An income-splitting advantage arises because the taxable income in each return is taxed at marginal rates.

If an alter ego or joint partner trust is used as a will substitute, this opportunity will be lost unless there are also directly held assets of the deceased at death which can take advantage of this opportunity and the trust has not been fully funded.

(e) Fiscal Year-End Planning
While all *inter vivos* trusts must have a year-end of December 31, testamentary trusts have more flexibility. Often the date before the anniversary date of the date of death of the deceased person is chosen. However, any date may be chosen provided the first year-end of the estate is no longer than one year from the date of death.[11]

The ability to choose a year-end offers a number of tax planning opportunities which will not be available where an alter ego or joint partner trust is used as a will substitute. For example, where multiple lump-sum amounts are received on

different dates, choosing a year-end between the dates of such receipts can result in a deferral. As well, for other reasons it might be advantageous to tie in the year-end with other relevant year-ends based on the deceased´s assets, for example, any corporate or partnership interests.

(f) Filing Deadlines and Post-Mortem Planning
For all *inter vivos* trusts, a T3 Trust Tax Return is due on March 31, except in a leap year when the return is due on March 30.[12]

The terminal T1 Tax Return is generally due on the later of April 30 of the year following death and six months after date of death.[13] In the case of testamentary trusts, the T3 Return is due 90 days after the chosen year-end.

It would seem that if death occurs later in the year, such as in November or December, if an alter ego or joint partner trust is used as a will substitute, there will be an extremely short time in which to prepare and file the T3 Return, and pay the tax due, which might be substantial if there is a deemed realization of the trust assets on death. Raising the necessary cash in an orderly and advantageous way, including from an investment perspective, is more problematic than in the estate situation where a will is used and there is more leeway in terms of filing dates. In particular, timing problems can arise where complicated valuations must be obtained for business and real estate assets for purposes of computing the tax.

(g) Impact on Charitable Donation Tax Credit Planning
In the year of death, a charitable donation credit equal to 100% of net income is available for gifts made under a deceased person's will to a registered charity or other qualified donee.[14] As well, if bequests on death are greater than the amount eligible under this limit, the excess may be carried back to the taxation year prior to death and applied against the tax payable for that year, subject to the same limits.[15]

Similar treatment is not afforded to alter ego and joint partner trusts. In the year of death where an alter ego or joint partner trust is used, a deemed disposition of the trust´s assets may result in significant income in the hands of the trustees. It will accordingly be important to plan for charitable gifts, and how they may be best effected and structured. It should be noted that whether or not a "gift" to a charity allows for a donation receipt at all will depend on the terms of the trust. In some cases, CRA has taken the position that a distribution from a trust to a charity is in satisfaction of the charity's income or capital interest which does not qualify for a donation receipt, as opposed to a gift.[16] While the one-year carry-back of charitable gifts will not be available, the trust can carry forward unused gifts for five years.[17] As well, the trust is only entitled to claims a credit of up to 75% of income and capital gains in the year as opposed to 100%.[18] Given the short time period available to file a T3 Return where death occurs near calendar year-end, it may be problematic to physically pay out charitable bequests in such a short time frame and provide the appropriate receipts on filing.

(h) Amendment and Variation of the Trust
As discussed in the first article,[19] one of the major perceived benefits of a will is its ambulatory nature, i.e., that it can be changed at any time and only comes into effect on death. As a result, the client is free to change his or her will provisions as he or she sees fit, and because the ownership interests do not arise until the moment of death, there are no tax consequences to effecting such changes.

Use of an alter ego or joint partner trust is more problematic because on settlement of the trust, the trust´s ownership interest in the transferred property comes immediately into effect. As a result, if at a future date the settlor wishes to make changes to the provisions of the trust, the issue will arise of whether such changes result in a taxable event and a possible disposition with tax consequences. Although the legislation for alter ego and joint partner trusts permits tax-free transfers into the trust, it does not address the tax consequences of an amendment or variation of the trust and whether these events give rise to a taxable disposition in respect of capital property or land inventory held by the trust.[20]

(i) Capital Gains Exemption Available on Death
On death, a $750,000 capital gains exemption is available in respect of qualified small business corporation shares and qualified farm and fishing property, provided the deceased has not previously utilized this exemption.[21] This exemption, which would otherwise apply if the property were owned directly by the deceased, cannot be claimed by an *inter vivos* trust, although it is possible in certain instances to allocate gains out to a beneficiary who can then claim the exemption in his or her return in respect of the gains. On death of the settlor or the survivor of the partners in the context of an alter ego trust or joint partner trust, however, any gains on the deemed disposition of trust property is taxable to the trust and cannot be allocated to a beneficiary under the provisions of the Act. Accordingly, in respect of such property, consideration will need to be given to utilizing the capital gains exemption prior to transfer of qualifying property to an alter ego or joint partner trust.

(j) Land Transfer Tax
Another consideration in funding an alter ego or joint partner trust is whether any provincial or municipal land transfer tax, also known as property transfer tax, where applicable, is payable on the transfer of real property or any interest therein to it.[22] For example, in Ontario, property settled on a trust for no consideration (including the assumption of any encumbrances), while constituting a change of beneficial ownership, does not trigger a liability for land transfer tax. An Affidavit sworn by the Trustees may be required to be submitted to the relevant provincial authorities in respect of a land transfer.[23]

(k) HST or GST
Consideration should also be given to whether Harmonized Sales Tax (HST) or Goods and Services Tax (GST) applies on transfer of property to an alter ego or joint partner trust or a distribution from it. Generally, HST should not be payable if the transfer was for no consideration and was not done in the course of a commercial activity. A transfer of real estate is considered a commercial supply unless exempted. An exemption applies for used residential property. The rules in this area are complex and beyond the scope of this article.

(l) Principal Residence Exemption
An asset commonly transferred to an alter ego or joint partner trust is a principal residence. While probate fee minimization may be accomplished by a variety of means for financial assets, such as using a holding company in conjunction with a primary will and a secondary will, the latter of which will govern assets which may not require probate such as private company shares, holding companies are typically not used to hold personal use properties because of the shareholder benefit rules under the Act. The principal residence exemption is generally available to a personal trust, including an alter ego trust and a joint partner trust. It can be claimed by the trust provided certain requirements are met under the Act, including that the trust designates the property as a principal residence and the trust has a "specified beneficiary" who ordinarily inhabits the residence, or the specified beneficiary's spouse, common-law partner, former spouse or common-law partner or child of the specified beneficiary does so.[24]

(m) U.S. Estate Tax Mismatch Issues
Where a client has potential exposure to U.S. estate tax on his or her death, either because he or she is a U.S. person for U.S. estate tax purposes or if the trust holds U.S. situs assets, use of an alter ego trust or joint partner trust may not be appropriate. Under the Protocol to the Canada-U.S. Tax Treaty, relief is given between the two jurisdictions with respect to payment of U.S. estate tax and Canadian capital gains tax on the same assets in order to avoid double taxation.[25] If Canadian capital gains and U.S. estate tax is payable on the same assets, a credit is available equal to the amount of the U.S. estate tax, which can be applied against the Canadian tax paid on the capital gains. However, a mismatch could occur if there is a personal trust which holds the assets. While the U.S. estate tax liability can occur at the client's personal level as U.S. tax rules "look through" the trust to the individual (including the situation where the individual is the beneficiary of a revocable trust), the Canadian capital gains liability occurs at the trust level. A mismatch results which could result in double tax that might otherwise have been avoided if the assets were held personally. The rules are complex and cross-border tax advice is required in such situations.

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RETURN TO TOP

Legal Considerations in Using an Alter Ego or Joint Partner Trust as a Will Substitute

(a) Structuring the Trust used as a Will Substitute
(i) During the Settlor´s Lifetime
For the transfer of property to the trust to qualify for rollover treatment, and for the trust to qualify as an alter ego or joint partner trust, its terms must meet the requirements under the Act. In this regard, the following conditions must be met:

- the transfer to the trust must be a “qualifying transfer”;
- the transferor (i.e., the settlor) and the trust must be resident in Canada, the latter without reference to any deeming provision in the Act.

As well, the trust must have been created after 1999 and the settlor must have been age 65 or older at the time the

trust is created.[26]

Due regard must also be paid to a specific anti-avoidance rule which provides that the transfer to the trust must not be part of a series of transactions or events that included a transfer to the individual where one of the main purposes of such transactions was to avoid a disposition under the 21-year rule.[27]

In order to qualify as an alter ego trust, the settlor must be entitled to receive all of the income of the trust that arises before the settlor´s death, and no person other than the settlor, before his or her death, may receive or obtain the use of any of the income or capital of the trust.[28]

In order to qualify as a joint partner trust, the settlor and his or her spouse or common-law partner must, in combination with each other, be entitled to receive all of the income of the trust that arises before the later of the death of the individual and the spouse or common-law partner, and no other person may, before the later of those deaths, receive or obtain the use of any of the income or capital of the trust.[29]

To ensure the above requirements are met requires careful review of the trust agreement, including the trustees´ powers, to ensure that the income rights are correctly preserved and not in any way “tainted”, similar to the issues that arise in constructing a qualifying post-1971 spouse trust.
If the trust is being used as a probate avoidance technique, the terms of the trust will usually attempt to maximize the settlor´s control and beneficial enjoyment during his or her lifetime, an issue which will undoubtedly be of prime concern to clients.

To ensure maximum control and beneficial enjoyment, many clients will wish to ensure that as settlor, they have some or all of the following powers:

- A power to revoke the trust or to amend or modify it;
- A power to withdraw trust assets further to a direction to the trustee to do so;
- A power to direct the investment of the trust assets but with the power to delegate this power to the trustees;
- Powers allowing the settlor control over the trusteeship, including appointment and removal powers;
- Power to determine who receives the trust fund on the settlor´s death or termination of the trust.

If the trust is also to be used for incapacity planning, it may contain additional provisions for how the determination of incapacity will be made, and create tailored provisions to deal with the above issues. In addition, the trust agreement could provide for it to become irrevocable upon incapacity. Alternately, a continuing or enduring power of attorney for property could contain provisions that the attorney´s powers are limited and do not include any power to revoke the trust. This may be the more flexible alternative and better address the situation of a settlor regaining his or her capacity who may wish to have the power to revoke the trust to ensure maximum control.

It must be recognized that once a trust relationship is established, and if there is a plan of distribution on death under the trust, there are potential contingent beneficiaries who have rights, including the right to scrutinize the administration of the trust and the conduct of the trustees. The settlor is no longer the sole beneficial owner of the property and cannot act as such. If the integrity of the trust relationship is to be maintained, due regard must be had to this underlying change in ownership. As well, additional consideration must be given to providing protection to the settlor and co-trustees who are acting during the settlor´s lifetime. In this regard consideration should be given to the following:

1. broad investment powers;
2. private approval of the trust accounts without resort to the courts;
3. power in the settlor during his or her lifetime to approve trustee compensation;
4. broad release and indemnity provisions for the trustees during the settlor´s lifetime.

(ii) After the Settlor´s Death
It is critical to ensure that the trust is properly integrated with the client´s will. As well, it is important to ensure the client has a will to dispose of any assets not transferred to the trust. Some of the issues which will need to be addressed include the following:

- if there is a deficiency in the estate, whether testamentary debts and expenses and tax liabilities can be paid out of the trust;
- if there is a deficiency in the estate, whether any bequests or legacies under the will are to be satisfied out of the trust assets;

- if a claim is made by a surviving spouse against the estate for equalization, whether any benefits provided for the spouse under the trust should terminate.

(b) Funding the Trust
A number of possibilities exist with respect to funding the trust. Some clients may be reticent to transfer all their property to the trust due to concerns with respect to control and management, particularly if there is need for a co-trustee, as further discussed below.

To properly operate as a probate avoidance vehicle, the assets must, however, have been transferred to the trustees prior to death. Consideration can be given to ensuring the client also has a continuing or enduring power of attorney for property which specifically empowers the attorney to fund the trust. Of course, this approach will only assist if the transfer process is completed prior to death.

As well, to operate as an incapacity planning vehicle, it will be necessary to fund the trust with the bulk of the individual´s assets. The continuing or enduring power of attorney for property can also be used in such event to fund the trust.

Where the dispositive provisions under the will are different than those under the trust, however, careful consideration must be given to the situations in which the attorneys should be able to fund the trust to ensure the client´s objectives are carried out, and his or her dispositive plan not thwarted.

(c) Execution Requirements
Where a trust is used as a will substitute, and the settlor retains such a significant degree of control over the trust arrangement, that in fact, the trustees may be seen to be agents, then no immediate trust may have been created and that the purported *inter vivos* trust may be considered a testamentary disposition. The upshot is that unless the trust has been formally executed in accordance with requirements for the execution of wills, the testamentary disposition will fail on death of the settlor.

In determining whether the trust has immediate effect, *Waters´ Law of Trusts in Canada* provides some guidance on these issues, as follows:

> "The control issue … lies in the background, especially with 'alter ego´ trusts where the settlor retains full interest in his lifetime, and is also trustee… The difficulty there, tax law aside, is whether the purported trust instrument creates instead an agency relationship between 'settlor´ and 'trustee´…. Interests are provided for on the settlor´s death, and this means that the trust dispositive terms embrace another or others beyond the settlor himself. But is there a trust only on the settlor´s death? In the U.S. the revocable *inter vivos* rules are to the effect that the trust arises on its creation... In Canada in the absence of direct authority the better view appears to be that, if the settlor has standard trustee powers, and *bona fide* conducts himself as a trustee, the purported trust will be received as a trust."[30]

It may be suggested that where co-trustees are appointed, on a practical basis, the demonstration that the property is held as trustees may more easily be demonstrated than by the sole settlor/trustee. In any event, a cautious approach, depending on the terms of the trust, is to execute the trust in accordance with the requirements for wills. Alternately, consideration could be given to contemplating possible failure by incorporating the terms of the trust by reference in the client´s will or providing for a dispositive plan under the terms of the will.

(d) Merger
An issue which is well-developed under U.S. trust law involves what is sometimes termed merger of interest. It is trite law that given the creation of a trust involves the separation of legal and beneficial ownership of property, if one person has the entire legal and beneficial interest in property, there is no trust.

Canadian trust law on these matters is by no means as well-developed as the extensive case law that exists in the United States. What can be said, however, is that the situation of a "self-settled" trust, or declaration of trust where the settlor holds the property as sole trustee, is more problematic than where there is a transfer to trustees. Older Canadian case law is ambiguous even on the issue of whether a trust is binding where it contains a power of revocation, although the modern view would clearly accept there is no legal conceptual impediment to reserving a power of revocation.[31]

It would seem that where a person acts as his or her sole trustee, and also has a life interest in the income, as well as a power to revoke, and to draw on the capital as he or she sees fit, and if further complicated by the retention of a general power of appointment over the trust property, an argument can be made that a valid trust has not been established, and

that there was no true intention to establish a trust, nor any real alienation of beneficial interest on others. The ambiguous state of the law in Canada on these issues leaves the matter unclear.

A transfer to trustees where the settlor acts with co-trustees obviates many of these issues. Another approach may be to create a vested interest in a portion of the trust property which cannot be defeated by the actions of the declarant/trustee.

Should the disposition plan on death under the trust differ from that under the estate, the issue of attacks on the trust on the basis that no trust existed becomes very germane in particular where a purpose of the trust was as a defense against such attacks. It is critical in such instances to ensure that the trust cannot be attacked and set aside in order to claw-back assets from the trust into the estate.

Uses of Insurance in an Alter Ego and Joint Partner Trust[32]

There may be circumstances where it is appropriate and desirable for an alter ego or joint partner trust to acquire, pay the premiums and/or be the beneficiary of an exempt life insurance policy on the life of the settlor or jointly on the life of the settlor and partner/spouse. For example, the trust may own assets, such as the shares in a private corporation, with significant accumulated capital gains that will be realized on the death of the spouse. Life insurance under which the trust is the owner and/or beneficiary can ensure there is sufficient liquidity in the trust to pay any resulting taxes. This is particularly beneficial when the trust property is illiquid or the trust beneficiaries want the property to be retained and distributed in specie to them.

However, at the 2012 CALU AGM, the Canada Revenue Agency (CRA) indicated that its position relating to spousal testamentary trusts and life insurance (discussed below) also extends to alter ego and joint partner trusts. As a consequence, the ownership of insurance on the life of the settlor or settlor and partner/spouse may “taint” the trust such that the rollover of property to the trust may not be available.

In TI 2006-0174041C6 and 2006-0185551C6 the CRA was asked the following question:

> “If a testamentary trust is obligated to fund a life insurance policy on the life of the surviving spouse and the trust is the beneficiary of the policy, would this taint the trust and preclude it being a spousal trust pursuant to subsection 70(6) of the Act? If trust income is used to pay the premium, would this cause the trust to fall offside? If the trust capital is used to pay the premium, would this cause the trust to fall offside?

The CRA responded as follows:

> “For purposes of our reply we have assumed that the insurance policy is not an annuity or segregated fund contract and that the policy provides only benefits in respect of pure life insurance (i.e. benefits arising only on the death of the life insured) such that no part of the policy premium payments relates to any benefit other than pure life insurance protection.
>
> Principles of insurance law and trust law both would apply in informing our understanding of the nature of the legal relations involved in the circumstances described in your question. These principles may vary from province to province. Therefore, to provide a detailed reply to your question we would require additional information, including: (1) the applicable provincial law governing the policy and the trust, (2) the nature of the life insurance provided under the policy (e.g., an annuity, segregated fund, or pure life insurance), (3) whether the premiums are fully paid, (4) whether policy beneficiaries have been designated by the owner or named in the contract and, if so, whether the designations are irrevocable, (5) an analysis of whether under the applicable law a trustee can acquire an ownership interest in the policy and, if so, (6) whether the policy beneficiaries are trust beneficiaries.
>
> We are prepared, however, to offer some general comments on the potential income tax consequences in the circumstances you describe.
>
> We have limited our analysis to the application of subparagraph 70(6)(b)(ii) of the Act.
>
> In order for property to be transferred on a tax-deferred (“rollover”) basis from a deceased taxpayer to a trust, subparagraph 70(6)(b)(ii) requires that the trust be one under which no person except the surviving spouse or common-law partner (“survivor”) of the taxpayer may, before the survivor´s death, receive or otherwise obtain the use of any of the income or capital of the trust. Our position is that the mere possibility of a person other than the survivor receiving or obtaining, before the survivor´s death, use of the trust capital or income is sufficient to disqualify the property transfer from the rollover.

> A duty to fund a life insurance policy out of trust capital or trust income would, in our view, be one under which a person may obtain the use of the trust capital or trust income. This is because the premium payment is assumed to maintain, for the period covered by the premium, the rights to receive insurance proceeds. Therefore, the existence of such a trust term would be relevant in determining whether a rollover of property can occur to the trust under paragraph 70(6)(b) of the Act.
>
> In the circumstances contemplated by your question, as a result of the duty to pay insurance premiums out of trust property it would appear that persons other than the survivor may, before the survivor´s death, obtain the use of the trust income or capital. Therefore, we are of the view that the trust would not satisfy the conditions of subparagraph 70(6)(b)(ii) of the Act.
>
> As a final comment, whether the trust is one that seeks to satisfy the requirement of paragraph 70(6)(b) of the Act or not, and whether the duty to pay the premium out of trust income or trust capital, it would appear that the policy beneficiary would have a benefit, from the trust´s payment of the policy premium, resulting in the application of section 105 of the Act."[33]

It appears that the underlying rationale for the CRA´s position is that the trust beneficiaries (and perhaps the trust itself if the beneficiary is changed to a third party) will not benefit from the insurance policy ownership and therefore income and capital is being "diverted" to other beneficiaries of the trust. However, this position doesn`t appear to recognize that the insurance policy remains an asset of the trust while the settlor and/or spouse/partner is alive and presumably can be surrendered or transferred for value, for the benefit of those beneficiaries.

It is therefore very important to understand the implications of transferring or owning insurance within an alter ego or joint partner trust on the rollover of property. It may be appropriate to have the insurance owned by another person (including another trust) with the alter ego or joint partner trust as beneficiary, to avoid a dispute with the CRA concerning the availability of the rollover.[34]

The Conference for Advanced Life Underwriting, November 2012

RETURN TO TOP

Conclusion

This article and the earlier one have surveyed various benefits of, and opportunities for, using an alter ego or joint partner trust in estate planning.

Intrusive legislation governing powers of attorney, and the punitive level of probate fees create a real incentive to the use of these types of trusts, which if properly drawn and in appropriate circumstances allow greater flexibility, tax and fee minimization and continued private management of one's affairs.

Reliance on the traditional "tried and true" but often simplistic will and power of attorney in planning for disposition of assets on death and incapacity do not fulfill many clients´ needs and consideration of the use of alter ego and joint partner trusts is a further option to be explored in comprehensive estate planning.

The Conference for Advanced Life Underwriting, November 2012

RETURN TO TOP

About the Author

Margaret O´Sullivan´s practice involves all aspects of private client work, including estate planning; will and trust planning; incapacity planning; estate litigation; advising executors, trustees and beneficiaries and administration of estates and trusts. Margaret is recognized in Euromoney´s *Guide to the World´s Leading Trust and Estate Practitioners* (2011 - 2012), *in The Canadian Legal LEXPERT Directory 2011 as* a leading practitioner in estate planning and in The Best Lawyers in Canada 2011. Prior to establishing an independent practice, Margaret was a partner in the Toronto

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O´Sullivan Estate Lawyers is named one of Canada's "Top 5 Trusts & Estates Law Boutiques" by *Canadian Lawyer*.

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RETURN TO TOP

Endnotes

[1] The first article was contained in the February 2012 issue of *CALU Report*.

[2] Para. 104(4)(a) of the Act.

[3] Para. 104(4)(b) of the Act.

[4] Subsection 122(1) and section 117 of the Act.

[5] Subsection 70(5) and section 117 of the Act.

[6] Re income splitting, see subsections 104(13), 104(6), and 104(24) of the Act.

[7] See Howard M. Carr, "Taxation of Trusts", Death and Taxes II, Law Society of Upper Canada, June 14, 2000, pp. 25-26.

[8] Income Tax Technical Bulletins 2000-007928 (Nov. 2, 2001) and 2001-007537 (March 23, 2001).

[9] Paragraph 104(6)(b) and subsections 104(13.1) and 104(13.2) of the Act.

[10] Subsection 70(2), paragraph 104(23)(d) and subsection 150(4) of the Act.

[11] Paragraph 104(23)(a) of the Act.

[12] Paragraph 150(1)(c) of the Act.

[13] Paragraphs 150(1)(b) and (d) of the Act.

[14] Subsections 118.1(1) and (3) of the Act.

[15] Subsections 118.1(4) and (5) of the Act.

[16] For a thorough consideration of charitable donations and related tax issues reference please refer to Ian Worland, "Alter Ego and Joint Partner Trusts", Estates, Trusts & Pensions Journal, Vol. 27 [2008] pp.306 - 333. See also Technical Interpretation 2003-0182905, "Gifts of Interest in Alter Ego Trust".

[17] See definition of "total charitable gifts" in Subsection 118.1(1) of the Act.

[18] See definition of "total gifts" in subsection 118.1(1) of the Act.

[19] See footnote 1.

[20] Re tax-free transfers into certain trusts: see subsections 73(1),73(1.01) and 73(1.02) of the Act.

[21] Section 110.6 of the Act.

[22] Land transfer tax typically varies by province. Alberta does not have land transfer tax. Ontario and British Columbia have land transfer tax, as does the City of Toronto.

[23] For Ontario, see Ontario Ministry of Finance, Ontario Tax Bulletin: Land Transfer Tax, LTT 1-2005 (Toronto: June 2008), and Ontario Ministry of Finance, *Guide to the Requirements to Evidence NIL Value of Consideration for Conveyances Involving Trusts* (Toronto: April 2004, content reviewed September 2009). For British Columbia, contrast Property Transfer Tax Act, R.S.B.C. 1996, c. 378.

[24] CRA, Form T1079, *Designation of a Property as a Principal Residence by a Personal Trust.*

[25] *Convention Between Canada and the United States of America With Respect to Taxes on Income and On Capital* (signed 26 September 1980), as amended.

[26] Supra note 20.

[27] Subsection 107(2) of the Act.

[28] Subsection 248(1) and paragraph 104(4)(a) of the Act.

[29] Ibid.

[30] Waters, Gillen, Smith, *Waters´ Law of Trusts in Canada*, 3rd edition, (Toronto: Carswell, 2005), p. 211.

[31] For a discussion on these points see *Waters'*, supra note 30.

[32] This section has been excerpted from the June 2012 issue of *CALU Report* relating to the 2012 CRA Roundtable.

[33] CRA TI 2008-030188, dated Oct. 9 2009, confirmed that no benefit under subsection 105(1) arises for beneficiaries of a trust when the trust owns and is the beneficiary of a life insurance policy.

[34] In CRA TI 2010-0358461E5, dated Dec. 15, 2010, the CRA was asked to consider whether the payment of insurance proceeds to the trustees of a testamentary spousal trust could “taint” the trust for purposes of the rollover under subsection 70(6) of the Act. The CRA responded that “if the proceeds of the insurance policy are validly designated in favour of the trustees and the trustees in that capacity and wholly in accordance with the terms of the designation add the proceeds to the capital of the trust, this would not, in our view, of and by itself preclude the application of subsection 70(6) to determine the tax consequences in respect of other properties transferred to the trust.”. Presumably a similar position would apply with respect to an alter ego and joint partner trust being the beneficiary of a life insurance policy.

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RETURN TO TOP