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Alter-Ego and Spousal Trusts in Estate Planning

A will is the traditional way to distribute your assets following your death. But it may not be the best estate planning tool for you. Depending on your circumstances, an alter ego trust or joint spousal or partner trust could be a better choice.

When assets pass under a will, probate fees must be paid. In BC, where probate taxes are the second highest in Canada (1.4% of estate values over \$50,000 – about \$14,000 per \$1 million of estate value), these costs can be hefty.

Also, with a will, a child or spouse (including a common-law spouse) unhappy with their share of the estate can attack your will under the *Wills Variation Act*. They can ask the court to change the terms of the will. If the court concludes that your will doesn't adequately provide for the proper maintenance and support of the disgruntled claimant, the court can vary your will and order whatever distribution it thinks is “adequate, just and equitable.”

This is where trusts can be useful. Assets in a trust don't form part of your estate (the trust owns the assets) and therefore do not pass under your will. This means there are no probate fees payable in relation to these assets, and the assets are not subject to claims under the *Wills Variation Act*.

One of the problems traditionally faced in setting up a trust that takes effect while you're still alive is that it generally triggered a tax liability for any accrued capital gains on property transferred to the trust (except your principal residence, which is exempt from capital gains tax).

Enter alter ego trusts and joint spousal or partner trusts. Since 2000, you have had the option of creating an alter ego or joint spousal trust without attracting any immediate tax consequences. You can transfer property to an alter ego trust or joint spousal or partner trust without triggering any capital gains tax.

You have to be 65 or older to set up one of these trusts. With a joint spousal or partner trust, your property and assets are transferred into the trust, but you still have the use of your assets and continue to receive income on the trust assets. On your death, the assets pass to your spouse or partner according to the terms of the trust. An alter ego trust is similar but is for people who don't have a spouse. After your death, the assets pass to the named trust beneficiaries.

Do you lose control over the trust assets? The trust can be set up so you're the trustee, and in this way you can maintain control. Also, the trust agreement can give you as trustee the ability to dip into the capital for your benefit (for an alter ego trust) or your spouse's benefit (for an joint partner trust) – and to even wind up the trust if necessary.

If you're in a second or third marriage, a joint spousal trust can be particularly useful if you want to support your spouse, but also want to protect your assets and have them pass to your children from your first marriage.

Income earned in trusts can be subject to different rates of tax than income earned by an individual or an estate. It is therefore a good idea to talk to both your lawyer and your tax advisor about whether an alter ego trust or joint spousal or partner trust is right for you.

This article was written by Janice Mucalov, LL.B. with contribution by James MacLean of MILNE SELKIRK. A version of this was previously published in the Langley Times. Copyright by Janice Mucalov. "You and the Law" is a registered trade-mark. Please call James MacLean (604-882-5015) if you have any questions or for legal advice.