

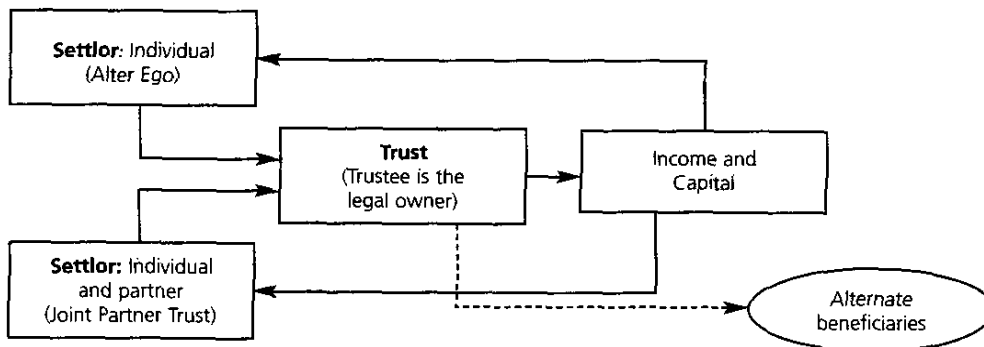


Estate planning using Alter Ego/ Joint Partner Trusts

Tax proposals introduced in December 1999 and passed into law in June 2001 contain measures that provide new flexibility in estate planning to individuals 65 years of age or older. Two new types of trusts, "Alter Ego" (if set up by an individual) and "Joint Partner" (if established by partners) now exist. The term "partners" will be used throughout this bulletin, and includes legally married spouses or common law partners, either of the same or opposite sex.

Depending on individual situations, there can be advantages in using these trusts to structure estate assets and control the future use of property. These trusts can also be useful as a complement to wills or substitute decision-making documents (e.g., powers of attorney, mandates for incapacity and representation agreements).

How the trust works



Conditions for setting up Alter Ego or Joint Partner Trusts:

- Individual(s) setting up the trust must be at least 65 years of age
- Trust must be set up after 1999
- The individual, or for Joint Partner Trusts, the individual and his or her spouse, must be entitled to receive all of the income from the trust until the time of death of the individual or the death of the second of the two partners
- Alternate ("contingent") beneficiaries can be named to inherit the assets in the trust upon the death of the settlor or the last to die of the partners



Why consider these trusts?

There are estate-planning aspects of these trusts that can be very beneficial. Here is a brief overview of each strategy:

1. Trusts in conjunction with wills

An Alter Ego or Joint Partner Trust can be used as an alternative to a will, or in combination with a will and other vehicles to dispose of assets upon death. A will is still necessary, especially if individuals have assets that are not included in the trust, or acquire assets after the trust has been established. Seniors can benefit from this strategy for a number of reasons. Here are a few of the benefits derived from using these trusts in conjunction with a will:

a. Save time and eliminate probate fees

In some provinces, the time and cost involved in probating a will are a major concern to seniors. Probate is very often a practical necessity (except for notarial wills in Quebec), and the fees charged vary by province. In most provinces, probate fees are based on the value of estate assets being distributed under the will. If assets are held in more than one province or country, the executor may need to apply for probate in each jurisdiction. This can be an expensive and time-consuming process that could create financial problems for family members or an active business. For more information relating to the probate process, please see our tax & estate info page, [Probate Planning](#).

Assets held by an Alter Ego or Joint Partner Trust are not included in the assets to be distributed under an individual's estate. The trustee has legal title to the assets in the trust, and upon the death of the individual or the survivor of the individual and his/her partner, the trustee can distribute the assets to the contingent beneficiary according to the trust document. There is no need to go to court to obtain probate or letters of administration, and there is no probate fee to be paid.

b. Ensure estate liquidity and continuity

Generally, upon death, all personally held assets, including bank accounts and registered plans, are inaccessible to heirs until the appropriate papers have been signed. It can take several weeks before the probate process is completed, and during this time, the family of the deceased may not be able to access funds needed for day-to-day living expenses or to pay bills. Also, delays in obtaining probate may interfere with the ongoing management of an active business

The trustee of the Alter Ego or Joint Partner Trust has immediate and continuous access to the assets in the trust and can distribute assets to beneficiaries according to the trust document.

Scenario:

When Jack and Rita (Ontario residents) wrote their wills, they included a clause to establish a spousal trust to provide for the survivor of each other. When Jack died, Rita discovered that her share under the spousal trust would not be enough to maintain her lifestyle. With legal guidance, she elected to take her share of the family property under the provincial laws for division of assets, and gave up her rights under the will.

Jack's intention in setting up the spousal trust was not fulfilled. If Jack had established a Joint Partner Trust while he was alive, under current laws the trust would have been continued for Rita after Jack's death.



c. Protect against estate litigation

Provincial legislation for dependent relief and family law allows spouses, children or other dependents to make a claim against the estate if they feel they have been treated unfairly under a will. In addition, in some provinces, a spouse can elect to take an entitlement under family law and, by doing so, can change all or some of the terms of a will. Currently, these provincial laws do not apply to trusts.

2. Trusts as alternatives in incapacity planning

Alter Ego and Joint Partner Trusts can be used as alternatives to powers of attorney (Representation Agreements in British Columbia and mandates in the event of incapacity in Quebec). The individual who sets up the trust (the “settlor”) can act as the original trustee or as one of two or more trustees. The trust document should include a provision for a trustee or trustees to carry on if the settlor becomes incapacitated or dies. Where no such plans exist, control over individual personal and financial affairs may be decided by provincial law. For more information about incapacity planning, please refer to our tax & estate info page, [Incapacity – planning ahead helps](#).

An Alter Ego or Joint Partner Trust can be used instead of traditional incapacity documents to avoid delays in appointing a substitute decision-maker and to ensure continuity of asset management through incapacity and/or death. Unlike other incapacity documentation that sometimes contains only a brief description of the duties and powers of the representative, the trust agreement very clearly sets out the duties and powers of the trustee.

These powers extend through incapacity and, unlike some powers of attorney, continue in the event of death. Assets held in the trust will be managed by the trustee and can include assets located in more than one province, whereas a power of attorney may not be accepted outside the individual’s province.



Other issues to consider

As with any aspect of estate planning, these trusts are not necessarily the best option for everyone. There are some issues that should be kept in mind when considering this strategy:

- The cost of setting up and running the trust (i.e., set-up fees, professional fees for legal and accounting advice and tax reporting) may not be worthwhile if assets can be distributed efficiently through other estate planning strategies
- If an individual plans to include private company shares or qualified farm property in the trust, he/she needs to keep in mind that the \$500,000 capital gains exemption is not available to the trust on a subsequent sale to the property

Summary

Due to changing laws and taxation rules, seniors are looking for alternatives to the traditional will and powers of attorney to maintain or distribute assets built over a lifetime. Individuals interested in setting up an Alter Ego or Joint Partner Trust should talk to their financial advisor to explore all options available for an effective and efficient estate plan.

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