Planning**Matters**

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Contributing Writer:
Ron Voyer, Partner
CrossonVoyer Trust Company

Editor:
Marcela McBurney, CFA
Vice President, Portfolio Manager

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SUMMER **2016** EDITION

Trusts for those over 65 – benefits and pitfalls

Alter ego and joint partner trusts are excellent estate planning tools. Benefits range from probate savings to protection from wills variation litigation. However, they must be administered properly to work. To learn more about the benefits and how to avoid the pitfalls, read on.

Contemporary estate planning for those over 65 often includes the use of an alter ego trust (one person) or joint partner trust (marital or common law partners). In this edition of Planning Matters, we refer to both.

In simple terms, how a Trust works is that Joe, in his 70's, transfers his Opco shares with a $5M value to a Trust for him and his spouse, Mary. During their lifetimes, only Joe and Mary can receive Trust income and Trust capital. If the only property in the Trust is Opco shares, income will likely consist of Opco dividends and the capital will consist of Opco shares. If dividends received by the Trust are paid to Joe and Mary, the dividends are included in their personal incomes.

If Joe is the first to die, his death will have no effect on the Trust. On Mary's death, the Trust will be deemed to have disposed of its assets. The disposition of the Opco shares will be as Joe and Mary wished, as documented in the Trust deed.

The Trust can have significant benefits, but only if adequate compliance steps are followed. Below, we outline the benefits, the additional compliance steps and where the Trust plan can fall short.

Benefits of a Trust

There are 4 primary benefits:

Privacy – the Trust is a private document whereas a will is a public document.

Probate fees – Joe has transferred his Opco shares to the Trust during his lifetime. On his death, Joe does not own Opco shares, the Trust does. Probate savings on the Opco shares could be $70k (at $14 of tax for each $1,000 of value and a $5M value).

Litigation risk – again, Joe does not own Opco shares. If Joe's child argues unfair treatment in Joe's will, the Opco shares should not be subject to wills variation. Joe and Mary, through the Trust, are able to deal with the Opco shares as they wish.

Tax treatment – The transfer of the Opco shares to the Trust is tax deferred and any gain on the Opco shares is deferred until the later of the demise of Joe and Mary, similar to a will with a spousal trust.

Additional compliance

As part of the plan, Joe transfers his Opco shares to the Trust. As he no longer owns the shares and the Trust does, bankers and others need to be aware of this new ownership arrangement. Joe and Mary need to treat the Opco shares as Trust rather than personal assets. From a tax filing perspective, there is a new taxpayer, the Trust, which may not have any taxable income, but should still file an annual return.

Where can it all go wrong?

Trusts are often put in place and then ignored. If the primary purpose of the Trust is to minimize litigation risk, make sure the Trust is administered properly. Generally, the Trust should:

- Have time to mature. Putting a Trust in place at the last minute is far inferior to a Trust that has been in place for a number of years.
- Have a Protector for the Trust who has the ability to appoint and remove trustee(s). In our case, Joe could be the Protector and have the ability to appoint a trustee(s).
- Consider independence. Joe as Protector could appoint himself as a trustee and he should also consider another trustee independent from him and Mary. The independent trustee would help to ensure that the Trust is administered properly. It's not only Joe as trustee, but Joe and a second set of eyes.
- Have a separate bank account for the Trust. Often an account is initially set up, but ignored in the future. Don't use a personal bank account to deposit funds and pay bills thereby ignoring the Trust. Use the Trust's bank account like Opco would use its bank account.
- Have quarterly or annual meetings of the Trust's trustee(s) with minutes prepared and signed. These meetings should deal with the distribution of the Trust's income and capital distributions, expenses of the Trust, etc. These meetings should be no different in procedure than Opco's director's meetings.

Ignoring the Trust as a separate entity could lead to the Trust being ignored or looked through by the CRA and/or in court.

Trusts are an excellent estate planning tool. Administered properly, the benefits are many. Not administered properly, the benefits will be more uncertain.

About the Author:

Ron Voyer
Partner, CrossonVoyer Trust Company

Ron Voyer has 25 + years' experience in Canadian income tax advisory primarily focused on Estate Planning and Transaction Advisory. He is one of the founding partners of CrossonVoyer Trust Company, based in Vancouver. CrossonVoyer Trust Company brings an independent and informed perspective on tax strategy, corporate structuring, trust and estate planning combined with the security of a regulated trust company. **www.cvtrustco.com**

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Vancouver Office
Suite 1500
400 Burrard Street
Vancouver, British Columbia
V6C 3A6
Tel: 604.683.3391
Fax: 604.683.0323

Calgary Office
Suite 570
1100 1st Street SE
Calgary, Alberta
T2G 1B1
Tel: 403.648.4846
Fax: 403.648.4862

Toronto Office
Suite 1801
145 King Street W
Toronto, Ontario
M5H 1J8
Tel: 416.646.8240
Fax: 416.646.8249