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**14<sup>TH</sup> ANNUAL NATIONAL  
CAGP-ACPD CONFERENCE**

**Halifax – April 12, 2007**

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**Alter Ego Trust/Joint Partner Trusts:  
An Effective Vehicle for Making Large  
Gifts?**

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By M. Elena Hoffstein – Fasken Martineau DuMoulin LLP  
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Revised

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**INTRODUCTION**

- Useful estate planning tool
  - Avoid dependant relief legislation
  - Avoid probate tax
- Will replacement
- However, there are differences between gifting by will and gifting through AET/JP

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**OVERVIEW**

- What is an alter ego trust/joint partner trust
- Advantages
- Disadvantages
- Issues with respect to gifting to charities through AET/JPT
- Test

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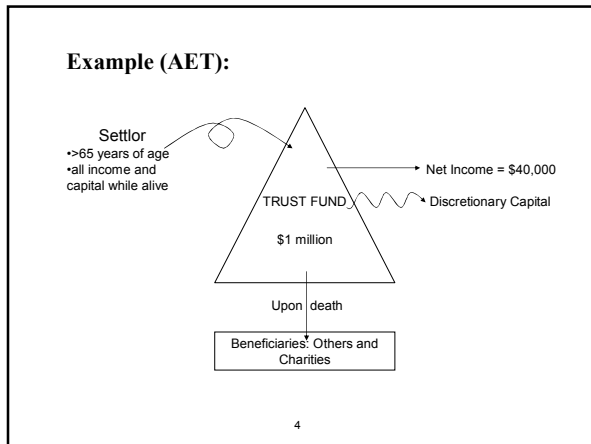
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**ALTER EGO TRUSTS**

- Contributor and trust must be resident in Canada
- Contributor must be 65 years of age
- Contributor entitled to receive all income
- No person except contributor can receive or obtain use of income or capital

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**JOINT PARTNER TRUSTS**

- Contributor and trust must be resident in Canada
- Contributor must be at least 65 years of age
- Contributor and/or spouse/common law partner must be entitled to receive all of the income
- No other person of contributor and/or spouse/common law partner can receive or otherwise obtain use of income or capital of the trust before the deaths of both

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**OTHER ELEMENTS**

- Can have remainder beneficiaries following deaths of contributor (AET) or contributor and spouse (JPT)
- Transfers of property to trust can be accomplished on tax deferred basis
- Deemed disposition on death of contributor (AET) or death of contributor and spouse (JPT)
- On death, gains/losses arising on the deemed disposition will be taxed in trust
- 21 year rule can apply to AET if elect out of rollover

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**ADVANTAGES**

- Probate tax savings
- Centralization of property/continuity of management
- Alternative to power of attorney
- Privacy
- In BC – protection against *Wills Variation Act* claim
- Asset protection for settlor/contributor and for beneficiaries

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**DISADVANTAGES**

- Cost/complexity
- Loss of control
- Loss of marginal tax rates
  - Deemed disposition on death
  - Testamentary trusts following death of contributor

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**CHARITABLE GIFTING: WILL VS AET/JPT**

**A. By Will**

- Gift by will can be claimed as charitable tax credit in terminal return for year of death
- Enhanced donation limit in year of death and prior year up to 100% of income
- If there is a prior life interest before gift to charity-donation tax credit is only available in terminal return if there is no power to encroach on the capital during the lifetime of the life tenant (O'Brien case)

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**B. By AET/JPT**

- Important to consider timing of tax credit
- Donation tax credit must be taken when gift made to trust
- In order to claim the donation tax credit at time gift is made, cannot have power to encroach on capital for life tenant
- AET and Settlor are separate tax payers
  - Be careful in transferring assets to AET to avoid gains in AET and losses in settlor's hands on death of settlor
  - Similarly with charitable gift – if gift through will but capital gains in AET on death of settler – mismatch of charity tax credit and tax in trust

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**B. By AET/JPT (cont'd)**

- No carry back with AET as with will
- If the AET is making charitable gift on death of settlor, need to perfect gift in same year as settlor dies to ensure donation tax credit is available to offset against gains realized on death of settlor
- Amount of tax credit
  - Will – 100%
  - AET - subject to limit of 75% of income of AET

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**CHARITABLE GIFTS BY TRUST: SOME ISSUES**

**Distribution by trust to charity: gift or distribution to beneficiary?**

- (i) is it eligible for donation tax credit under ss 118.1(3) as a charitable gift by trust or
- (ii) is it rollout under s.107(2) as a distribution to charity in satisfaction of its capital interest or
- (iii) a deduction under s.104(6)(b) in satisfaction of charity's income interest?

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**CRA Position - different if gift by will v. gift by trust**

**A. Gift by Will**

- a) Deemed to be made by individual immediately before death donation tax credit in year of death unless gift considered to be made by estate
- b) Gift considered to be made by estate if Executor/ Trustee has discretion as to quantum of gift

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**Summary**

<u>Gift by Will</u>	<u>Gift by Estate</u>
<ul style="list-style-type: none"><li>• If list of charities provided and specific amount to go to charities so only discretion of trustee is in allocation amount among charities</li><li>• Will provides specific amount, no charity named, and trustees select charity</li></ul>	<ul style="list-style-type: none"><li>• Trustee has discretion as to amount of gift and which charity to benefit</li></ul>

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**B. If gift by trust is desired**

- Give discretion to trustee
- What is key is whether distribution is to charity as beneficiary or charity as recipient of a gift
- If gift is to charity as beneficiary then trust will not be able to claim donation tax credit

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**B. If gift by trust is desired (cont'd)**

- Trust agreement must include general power to donate trust property
- Trustee should be given full discretion after death of settlor whether to make charitable gift, the charity to benefit and the amount of the gift

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**C. AET/JPT as Charitable Remainder Trust**

- If settlor (& spouse of settlor in case of JPT) is entitled to income but no right to encroach on capital
- Donation tax credit can be claimed at time gift is made & carried forward for next 5 years
- Donation credit will not be available to offset capital gains tax on death of settlor (as that gain is in the trust)

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**Test**

**1. “My Trustees are authorized to distribute \$2 million to Canadian registered charities.”**

- **Is the donation creditable in the year of death or in estate?**

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**Test (cont’d)**

**2. “My Trustees are authorised on the death of the settlor to distribute income and capital in their discretion among any one or more of and to the exclusion of any one or more of the following: my children and other issue, my spouse and registered charities.”**

- **If the trust makes a distribution to the CCS, what are the tax consequences to trust?**
- **How is it received for DQ purposes?**
- **If you don’t want this result, how do you change this?**

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**Test (cont’d)**

**3. “The Trustees are authorized to distribute income to the settlor or a spouse of the settlor, but may not encroach upon capital under any circumstances. Upon the death of the settlor the capital and remaining income is to be paid to the following registered charities: ....”**

- **When can the donation tax credit be claimed?**

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