THE FUTURE OF TRUSTS – PART 1

Presented by Alex Bainov

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AGENDA

- BRIEF OVERVIEW
- TYPES OF TRUSTS & VALIDITY
- POSSIBLE USES – STILL USEFUL?

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BRIEF OVERVIEW

- Trust is a relationship – not a legal "person" or "entity" except for ITA purposes
- Simple "definition" – a trust exists where a property is held by someone for the benefit of someone else
- Division of legal and beneficial ownership
- ***Settlor*** – person who creates the trust (by transferring some property to the trustees)
- ***Trustee(s)*** – person(s) holding the property in trust (i.e. legal owner(s))
- ***Beneficiaries*** – person(s) entitled to benefit from property in trust (i.e. beneficial owners)
- Protector – person appointed to oversee the actions of the trustees

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TYPES OF TRUSTS

- Fixed – beneficiaries' interests are fixed amount or proportion
- Discretionary – trustees are granted discretion on allocations/distributions
- Testamentary trust – created by a Will or other testamentary document
- Inter vivos trust – created during lifetime of settlor
- Express – person intends to create (e.g. a trust in the Will for children)
- By operation of law – arise because a court finds a trust (e.g. joint account)
- Statutory – created by legislation (e.g. funeral prepayments)

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TYPES OF TRUSTS *(CONTINUED)*

- Some other trusts –
  - Bare trust
  - Blind trust
  - Protective or commercial trusts

- In our context –
  - Do not deal with statutory trusts on a regular basis
  - *In planning* – mainly dealing with express trusts
  - *In estate administration* – may be dealing with express trusts and trusts created by operation of law

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VALIDITY OF A TRUST

- *Capacity* – settlor needs to have capacity (assuming an inter vivos trust)

- *3 certainties* –
  - Intention – i.e. settlor intended to create a trust
  - Subject matter – i.e. need to be able to identify the property to be held in trust
  - Object – i.e. need to be able to identify the beneficiaries

- Constitution – i.e. trustees need to get legal title so can control and perform duties

- Formalities – i.e. properly executed (e.g. Will needs to be properly signed)

- Not against Public Policy – i.e. cannot be created for illegal purposes, etc.

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USING TRUSTS – STILL USEFUL

- Still a powerful tool to use in wealth and estate planning and assets management

- Charitable Remainder Trust
- Henson / Qualified Disability Trust
- Discretionary testamentary Trust
- Restricted testamentary Trust
- Insurance Trust
- Spousal Trust
- Alter Ego Trust / Joint Partner Trust
- Discretionary inter vivos trust

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CHARITABLE REMAINDER TRUST

- Only worth it if the donor is in the high marginal tax rate
- Do not see often in Canada
- Disposition for tax purposes at the time of the transfer
- Charitable receipt is based on discounted value based on wait time
- Can claim on current return only
- No further charitable receipt at death

- Ongoing charitable giving or through a Will provides more flexibility

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HENSON / QUALIFIED DISABILITY TRUST

- Allows a person on social assistance to maintain benefits
- Allows control of ultimate destination and "protects" the disabled person
- Must give trustees full and absolute discretion
- Still get access to graduated rates if QDT
- Need proper wording to ensure QDT qualification
- Beneficiary cannot have any enforcement right
- Need to create in the Will *(do not rely on EIA Disability Trust)*

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DISCRETIONARY & RESTRICTED TESTAMENTARY TRUSTS

- *In the past* – discretionary trusts often used for income splitting as primary goal
- More limited use now

  BUT still many possible uses and benefits

- Possible additional asset protection for Family Property purposes
- Possible opportunities for income and capital gains splitting
- Still useful when wish to restrict distributions at certain ages/times
- Still useful as a tool for spendthrift beneficiaries or special circumstances
- Still useful for long-term governance of certain property (e.g. cottage)

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DISCRETIONARY & RESTRICTED TESTAMENTARY TRUSTS *(CONTINUED)*

In Manitoba –

- Abolished rule against perpetuities
- Abolished rule against accumulations

BUT

- Be mindful of the 21-year rule
- Be mindful of other requirements – e.g. vesting rules for income tax purposes, farmland ownership rules for land transfer tax, etc.

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INSURANCE TRUSTS

- Still useful to have insurance bypass the estate
  - Probate purposes *(although may not be a concern in the future in MB)*
  - Protect from creditors (except possibly cash surrender value)
- Similar benefits as a testamentary trust through a Will – i.e.
  - Possible additional asset protection for Family Property purposes
  - Still possible opportunities for income splitting
  - Still useful when wish to restrict distributions at certain ages/times
  - Still useful as a tool for spendthrift beneficiaries

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SPOUSAL TRUST *(QUALIFIED OR NON-QUALIFIED)*

- A great tool in blended family situations
  - *assuming proper planning is done and maintained*
- Allow the spouse to benefit but control ultimate destination
- QST – allows for a "rollover" and can elect as needed
- QST – 21-year rule does not apply
- Allows for flexibility in planning

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ALTER EGO / JOINT PARTNER TRUST

- Probate fee avoidance *(although may not be a concern in the future in MB)*
- Less delay
- Possibly less complexity in administering after death
- Possible protection from Family Property claims
- Possible alternative to a Power of Attorney
- Privacy

- Still need to be careful not to "taint" (e.g. insurance purchase)

ALTER EGO / JOINT PARTNER TRUST *(CONTINUED)*

- *Why not do it?*
  - Initial expense
  - Additional ongoing expenses / filings (e.g. filing T3 annually)
  - No rollover available on death
  - Possible trapped losses
  - Possible issues on charitable gifts (if any contemplated)
  - Possible issues on U.S. tax credits (if U.S. tax returns may be involved)
  - Cannot flow through capital gains eligible for the LCGE

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DISCRETIONARY INTER VIVOS TRUST

- *In the past* – often used for income splitting as primary goal
- More limited use now due to TOSI rules
  - Assuming business qualifies – person needs direct ownership of shares

<u>BUT</u> still has possible uses and benefits

- Income splitting for a specified individual (i.e. if working required hours)
- Multiplication of the lifetime capital gains exemption
- Ongoing corporate purification

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DISCRETIONARY INTER VIVOS TRUST *(CONTINUED)*

- Income splitting planning through prescribed rate lending

- Estate freezes / inter-generational planning –
  - Still allows flexibility to freeze value and possibly "take back" future value
  - Business transition planning (possibly without knowing family successors)

- Marital breakdown and blended family issues – may allow for flexibility in marital division settlements

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CONCLUSION

THE FUTURE…

- Less focus on tax advantages / use as "pure income splitting tool"
- Still a useful and powerful tool in planning and helping clients to achieve goals
- Planning possibly "more involved" due to compliance requirements & concerns
- Administration possibly more costly due to compliance requirements

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NEXT TIME …

- More "technical" discussion on planning with inter vivos trusts
- Discussion on still useful rules for principal residence exemption
- Decision and considerations on when to wind-up a trust
- Discussion on tax issues and compliance rules

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THANK YOU

QUESTIONS OR FEEDBACK?

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