

SPOUSAL TRUST CREATED UNDER A WILL

Spouses commonly make an outright bequest of their respective estates to the survivor. Sometimes, a better alternative is to provide for the surviving spouse through a trust that pays income to that spouse. The will of the first-spouse-to-die would stipulate that all or a portion of his or her estate would fund the trust, and the trustee would be empowered to pay income to the survivor and also to make discretionary distributions of principal. At the death of the survivor, the remaining principal could be distributed to family members or charities.

A spousal trust provides expert financial management of assets when the survivor may lack that skill, and it assures that the remaining assets will be distributed as the deceased spouse would have wished. For example, a spouse who has children by a previous marriage may want property eventually to pass to them, but in the meantime wants the surviving spouse to be financially secure. A spouse who has no children might stipulate that remaining assets go to a charitable organization such as ours.

The estate of the person who creates a spousal trust will not recognize any capital gain on property transferred to the spousal trust provided three conditions are met:

- (1) The surviving spouse is a Canadian resident for tax purposes,
- (2) All of the income is paid to the surviving spouse during his or her lifetime, and
- (3) None of the capital can be distributed to anyone other than the surviving spouse during that spouse's lifetime.

The gain in the trust property will be taxed only when the trustee sells appreciated assets or distributes them to beneficiaries at the termination of the trust. The ability to defer taxation of gain is a major benefit because it means that property left by the decedent spouse can be invested to generate income without being diminished by taxation.

Spousal Trust with a Charitable Beneficiary

If you simply make a charitable bequest in your will, less of your estate will remain to generate income to your surviving spouse. On the other hand, if you simply leave everything to your surviving spouse, there is no assurance that a favorite charity will

receive anything, as these distributions will be determined in the will of your surviving spouse.

To make sure that a surviving spouse has enough money for expenses and contingencies, while assuring that your charitable objectives will be realized, consider a spousal trust. Your spouse will be protected because s/he will receive all of the net income of the trust and can also receive principal distributions based on need. Your charities will benefit when your trustee distributes remaining trust assets to them.

Besides deferring taxation of capital gain in property transferred to the trust, you can reduce the tax due on termination of the trust by giving your trustee the discretion to make charitable contributions. Presumably, you will have conveyed your wishes to your trustee, in which case the contributions will be as you had wished. The charity will then issue a donation receipt resulting in a tax credit for the trust.

You may establish a spousal trust while you are living instead of under your will, but the latter option, which has been discussed in this article, is more common. You should consult your legal advisor as to whether a spousal trust might be appropriate for your situation.

Also, we would be pleased to talk to you about how a spousal trust can be used to make a future, legacy gift.