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New Missouri Law Provides Unique Estate Planning Opportunity for Married Couples

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Missouri married couples can now utilize a new and unique Missouri statute[2] not only to help insulate their assets from lawsuits or other claims during their joint lifetimes, but also to achieve a maximum §1014 income tax basis step up at the death of the first spouse to die, all while preserving maximum control and estate planning flexibility. It may also be possible for nonresidents of Missouri residing in a tenancy by the entirety state to utilize the new Missouri law in their planning.

General Concept

The Missouri Qualified Spousal Trust (MQST) is simply a modified version of the traditional revocable trust agreement or agreements married couples have executed in the past. The purpose of the MQST is to preserve the creditor protected character of tenancy by the entirety property when the same is transferred by the Missouri couple either: (1) to a joint MQST; (2) to two separate shares of a MQST (which essentially amounts to nothing more than one separate revocable trust for each spouse); or (3) to a combination of (1) and (2). If a MQST satisfies all of the statutory requirements, any *tenancy by the entirety* property transferred to it thereafter has the same immunity from the claims of the separate creditors of the couple as would have existed if the couple had continued to hold that property as tenants by the entirety, so long as the property, proceeds, or income continue to be held in trust by the trustee of the MQST.

Where estate taxes are an issue, married couples often divide property previously held as tenants by the entirety to minimize estate taxes by using the §2010(c) estate tax exemption of each spouse. In the past, this process destroyed the creditor protection that tenants by the entirety property ownership possesses for claims against only one spouse. Under this new Missouri law, if properly structured and funded, a ''two-share'' MQST funded with tenancy by entirety property can not only minimize or eliminate the married couple's potential estate tax liability, but it can also preserve the status of the transferred tenancy by the entirety property as protected against the claims of future creditors of either spouse. Somewhere around 99% of married couples today will no longer need to seriously concern themselves with the federal estate tax, however, as a result of the combination of a much larger federal estate and gift tax exemption than in years past, coupled with the availability for married couples of the election to use the deceased spousal unused exclusion amount,[3] or ''portability.'' For this vast majority of clients, an old technique, which historically suffered from significant income and transfer tax uncertainties,[4] should now be re-examined in light of this recent dramatic change in the level of the federal estate tax exemption, as well as the new MQST.

[1] See the website for Blase & Associates, LLC, www.blaselaw.com, for additional information on this planning technique.

[2] *See* Mo. Ann. Stat. §456.950.

[3] *See* §2010(c)(4).

[4] The uncertainties related to full or partial loss of income tax

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The MQST statute provides that each settlor spouse of a single-share MQST must possess ''the right to receive distributions of income or principal, whether mandatory or within the discretion of the trustee, from the entire trust for the joint lives of the settlors and for the survivor's life.'' Noteworthy, however, is the fact that the statute places no limitations on the extent of the right that each spouse must possess, and the fact that the right may be mandatory as opposed to only within the discretion of the trustee. The MQST enabling statute should, therefore, allow the trust document to grant each spouse the right to receive, without the consent of the trustee or other spouse, distributions of income and principal, out of the entire trust, for his or her ''welfare and happiness.'' Such a right is not limited by an ascertainable standard and does not require the consent of the other spouse and, therefore, causes full inclusion of the trust corpus in each spouse's gross estate, under a combination of §2036, §2038 and §2041.[5] A new income tax basis at the death of the first spouse to die then ensues for the entire trust corpus, as a result of §1014(a) and §1014(b).

The suggested income and principal withdrawal right not only causes complete gross estate inclusion in the estate of the first spouse to die for federal estate tax purposes, but it does so in a fashion that does not violate the §1014(e) exception for gifts to the decedent within one year of death. The reason for this is that the surviving spouse never makes a completed gift to the decedent spouse under this arrangement, as demonstrated by Reg. §25.2511-1(h)(4) (emphasis supplied):[6]

> If A creates a joint bank account for himself and B (*or a similar type of ownership by which A can regain the entire fund without B's consent*), there is a gift to B when B draws upon the account for his own benefit, to the extent of the amount drawn without any obligation to account for a part of the proceeds to A.

Because the trust document provides that either spouse can demand the entire trust income and corpus for his or her own individual welfare and happiness, a right that is not limited by a fixed or ascertainable standard, each spouse can effectively regain his or her own contributed share of the trust corpus, and as a result has not made a completed gift.[7]

It must be emphasized that, because the consent of the other spouse is not required for either spouse to withdraw the entire trust corpus with impunity, for non-tax reasons, the joint trust strategy described above may not be appropriate or advisable in many instances, including, for example, in second marriage situations or other situations where the couple is not comfortable with granting each spouse a basically unrestricted unilateral power of withdrawal over the trust corpus. Clients should, therefore, always be cautioned of the risks involved, prior to funding the type of joint trust contemplated in this article.

Obtaining Maximum Asset Protection and Basis Step Up with Larger Estates

Although the author does not advocate the use of joint trusts to ensure the full utilization of each spouse's separate federal estate tax exemption amount, a combination ''single-share'' and ''separate share,''[8] the MQST can achieve maximum income tax basis step up for larger estates, while preserving the couple's entire estate against all but joint lawsuits. This ''combination approach'' is specifically authorized by the MQST statute.[9] Here is how the trust drafting and funding would look:

1. The trust document would divide the initial trust corpus into three shares. The first share would be the ''joint share'' described above. The other two shares would be separate shares for the husband and for the wife, which for our purposes will be labeled Share H and Share W.

2. The Share H or Share W of the first spouse to die would essentially become a bypass trust (including spendthrift provisions) for the benefit of the surviving spouse upon the first spouse to die's death, as specifically authorized by the MQST statute.[10]

3. Each of Share H and Share W would be funded only with assets that have not greatly appreciated in value, while the joint share would be funded only with appreciated assets, to minimize estate taxes at the surviving spouse's death, and protect

basis step-up at the death of the first spouse to die pursuant to §1014(e), when the property passed in trust for the benefit of the surviving spouse, as well as the uncertain gift tax consequences to the surviving spouse at the death of the first spouse to die.

[5] Note that, as discussed further below, this requisite unrestricted nature of each spouse's unilateral power of withdrawal may not be appropriate for or acceptable to all married couples and clients should, therefore, be cautioned of the obvious risks involved, prior to funding the joint trust.

[6] *See also* Reg. §25.2511-2(b), Reg. §25.2511-2(c). This position is supported in PLR 200210051. Under the facts of this particular ruling, however, there was a completed gift by the surviving spouse at the death of the first spouse to die, because at that point the surviving spouse no longer retained the power to revest the beneficial title to the property in himself. The type of joint trust contemplated in this article is, thus, distinguishable from the trust described in the PLR, in this important respect.

[7] Reg. §25.2511-2(g).

[8] *See* Mo. Ann. Stat. §456.950.1(2)(b).

[9] Mo. Ann. Stat. §456.950.1(2)(c).

[10] Mo. Ann. Stat. §456.950.5.

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assets for the surviving spouse via a spendthrift-protected bypass trust. An overriding principle in funding the joint share would be to ensure that estate taxes at the surviving spouse's death are not increased as a result of the funding, because the assets of the joint share will be includible in the gross estate of the surviving spouse.

For even larger estates in excess of $10 million, the couple might simply fund each of Share H and Share W with at least the federal estate tax exemption amount (after factoring in adjusted taxable gifts, of course), using their least appreciated assets, and fund the joint share with their highly appreciated assets.

Utilizing the "Missouri Plan" Outside the State of Missouri

Missouri law provides that the meaning and effect of the terms of a trust may be governed by the law of the State of Missouri provided (1) the trust terms provide for the same, and unless (2) the designation is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue.[11]

The question thus becomes whether nonresidents of the State of Missouri residing in tenancy by entirety states may utilize the above-described techniques to protect their tenancy by the entirety assets from lawsuits and maximize income tax basis step up at the death of the first spouse. A recent federal bankruptcy case[12] is illustrative of the fact that one can never count on the ''strong public policy'' argument turning in the favor of the debtor, unless the preponderance of the ''contacts'' are located in the State of Missouri.

Because the nonresident married couple would only be transferring previously protected tenancy by the entirety property to the Missouri joint trust, however, there is a good chance that the court of the forum state may not view Missouri's law as against its state's strong public policy and, therefore, uphold protections afforded by the Missouri law.

Conclusion

''The Missouri Plan'' allows an estate planning attorney to offer a planning option to married clients that not only can allow them to avoid probate and minimize estate taxes, but also will enable them to minimize their exposure to lawsuits and maximize the income tax basis the surviving spouse will receive at the death of the first spouse to die. Missouri married couples, thus, are not only finally on (or nearly on) a par with residents of community property states when it comes to receiving a full income tax basis step up on their combined assets at the death of the first spouse, but also continue to maintain a significant advantage over their community property and tenancy by the entirety counterparts for the asset protection element of their tenancy by the entirety property transferred to the revocable MQST. It may also be possible for nonresidents of Missouri residing in tenancy by the entirety states to achieve the same advantages afforded by the Missouri Plan.

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[11] Mo. Ann. Stat. §456.1-107(1).

[12] *In re Huber (Waldron v. Huber)*, 493 B.R. 798 (Bankr. W.D. Wash. 2013).

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