

Asset Protection Planning for Missouri Residents, Part 1

By JIM BLASE

Missouri residents are uniquely positioned by very favorable asset protection laws - perhaps the most favorable in the country. These laws include not only the complete employment of the "tenancy by the entirety" form of asset titling and transfer on death (TOD) and pay on death (POD) forms of asset registration, which when combined properly allow Missouri married couples to easily protect their assets from lawsuits while they are both living, but also recent asset protection statutes authorizing the Missouri Asset Protection (MAP Trust), which was enacted by the Missouri legislature in 2004, as well as the Qualified Spousal Trust (QST), which was passed by the Missouri legislature just two years ago.

Tenancy by Entirety Property

Tenancy by entirety property is property titled jointly in the name of a husband and wife, in a state which recognizes the same as protected from creditors of either spouse individually, i.e., as opposed to being protected from a joint claim against both spouses. Missouri is one of only 20 states and the District of Columbia which recognizes tenancy by the entirety property for both real property and personal property. (Illinois recognizes this form of ownership for a couple's principal residence, and Kansas does not recognize tenancy by the entirety for real or personal property). In Missouri, any property owned in the joint names of a married couple is presumed to be tenancy by entirety property, which is not the case in Illinois.

As a result of the rise in the federal estate tax exemption to the \$5.25 million level (per spouse), combined with the new spousal portability election, holding property in tenancy by entirety form is now much easier to do than it was even a dozen years ago, when the estate tax exemption was only \$675,000. Twelve years ago many couples were forced to sever all or some of their tenancy by entirety property and divide the same between the two of them, in order to achieve a total estate tax exemption of \$1,350,000. As a direct consequence of this division, the couple had now exposed their assets to lawsuits against either spouse.

Today, with a "relatively" permanent \$5.25 million federal estate tax exemption, as well as the addition of the spousal portability election, most Missouri married couples will no longer need to divide their assets between themselves, in order to avoid estate taxes at the surviving spouse's death. As a consequence, the couple can now keep their assets titled in joint names, and thereby qualify for Missouri's full tenancy by the entirety protections.

The only disadvantage to this approach to titling comes after the death of the first spouse to die, when now the assets are fully subject to the creditors of the surviving spouse, and without additional planning will be subject to probate when the surviv-

ing spouse dies. It is also still possible that a successful joint action can be filed against the couple. Fortunately, Missouri has several other laws which can readily be used to address each of these issues.

Transfer on Death and Pay on Death

At least 17 states currently have TOD statutes. Missouri permits TOD or POD forms of registration on virtually every asset conceivable, including real estate, motor vehicles and watercraft. Illinois, on the other hand, only recently passed legislation which permits real property TOD registrations for "residential real estate" only. The question is: How can Missouri's expansive TOD and POD legislation help insulate a Missouri resident's assets from lawsuits?

The addition of the TOD or POD registration to assets titled in a Missouri married couple's joint names is what creates the level of asset protection. Adding a TOD or POD designation to assets titled in tenancy by entirety form allows a Missouri married couple to not only minimize their exposure to lawsuits, but also to eliminate probate at each of their deaths. Probate is avoided at the first death as a result of the joint titling, and probate is avoided at the second death as a result of the second-to-die TOD or POD registration.

On the other hand, one of the best asset protection uses of TOD for Missouri married couple residents involves severing the joint titling of the couple's automobiles. Most married couples tend to title their automobiles in joint names. The problem this creates is that if either spouse is involved in an automobile accident, and if there is any defect in the automobile (e.g., worn brakes) which contributes to the accident, both spouses can be founded liable for the accident.

If the couple is jointly liable, then the plaintiff may be able to recover against all of the couple's joint assets. If, however, each spouse owns the car he or she primarily drives in his or her own name, and titles it TOD to his or her spouse or to another individual or entity, the chances for a successful joint lawsuit against the couple are minimized. TOD registration of automobiles is accomplished at the client's local Missouri department of motor vehicles office, and typically involves only a nominal fee as well as a nominal amount of time.

TOD and POD designations on a couple's jointly-owned assets generally will not protect against joint lawsuits while the couple is married; nor will the designations protect the surviving spouse's assets after the first spouse's death. The following discussed additional Missouri laws are needed to achieve this greater level of protection

The MAP Trust

The MAP Trust affords a settlor establishing and funding the same *full* creditor protection, provided the following trust drafting guidelines are adhered to:

- The trust must be irrevocable and incapable of being amended by the settlor;
- The settlor may not be the sole beneficiary of either the income or principal of the trust;
- The trust must contain a spendthrift clause applicable to the settlor's interest in the trust; and
- The settlor may not retain a right to receive a specific portion of the income or principal of the trust pursuant to the trust instrument; in other words, any interest of the settlor in the trust must be a discretionary interest only.

Although the settlor may not amend the terms of the MAP Trust, the settlor may redirect where the trust assets pass at his or her death.

The advantages of the MAP Trust over relying exclusively on tenancy by the entirety protections include:

- MAP Trust assets are insulated from joint lawsuits as well as suits against either spouse;
- MAP Trusts provide full creditor protection for the surviving spouse, as opposed to tenancy by the entirety titling which provides no protection for the surviving spouse;
- MAP Trusts provide the only avenue for protection for a single individual, unless the individual is a surviving spouse and his or her predeceased spouse established a spendthrift trust for his or her benefit.

The biggest drawback to a MAP Trust, however, in addition to the fact that it is irrevocable, is that the settlor of the trust should not serve as trustee (although the statute actually does not prohibit this). Thus, a friend or relative would need to serve as trustee of the MAP Trust, which means that this trustee's permission will be required before any discretionary distributions may be made to or for the benefit of the settlor. For some clients, this is not a big deal; for others, it is a deal breaker.

The biggest advantage of the MAP Trust is that it protects the assets of single people from lawsuits, as well as married couples. As such, the availability of the MAP Trust for residents of Missouri who are single should be raised at every opportunity. Married couples should also be made aware that the MAP Trust is the only technique which will provide full asset protection against joint lawsuits as well as suits against the surviving spouse.

The QST

A QST is simply a modified version of the traditional revocable trust agreement or agreements married couples have executed in the past. The purpose of the QST is to preserve the creditor protected character of tenancy by the entirety property when the same is transferred by the Missouri couple either to a joint QST, or to a two separate shares version of the QST (the latter of which essentially amounts to nothing more than one separate revocable trust for each spouse). If a QST 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 husband and wife as tenants by the entirety, so long as the property, proceeds, or income continue to be held in trust by the trustee of the QST.

The emphasis of the QST is on tenancy by the entirety property transferred to the trust. An extremely careful funding system must therefore be followed in order to ensure a proper tracing of trust funding, if necessary down the road, and clients need to be reminded that the QST will not avoid joint claims against both spouses.

The statute makes clear that the exempt status exists only while the husband and wife are both alive and remain married. Thus, after the death of the first spouse, the special tenancy by the entirety protection no longer exists. However, if the "two-share version" of the QST is employed by the couple, the decedent spouse's share of the QST will remain creditor protected for the surviving spouse, as a standard "spendthrift trust." The surviving spouse can then elect to establish a MAP Trust at that time, with his or her own separate share assets.

Where estate taxes are an issue, married couples are commonly required to divide property previously held as tenants by the entirety in order to minimize estate taxes. In the past this process destroyed the creditor protection which tenants by the entirety property ownership possesses for claims against only one spouse. Under the new law, however, if properly structured and funded, a "two-share" QST funded with tenancy by entirety property can not only minimize or eliminate the married couple's potential estate tax liability, but it will also preserve the status of the transferred tenancy by the entirety property as protected against the claims of future creditors of either spouse.

Note that, similar to tenancy by the entirety, a QST does not protect against joint claims against a married couple. Unlike tenancy by the entirety property, however, the two-share QST should at least protect approximately one-half of the couple's assets from creditor attack after the first spouse to die's death. The two-share QST therefore has utility even if the couple is not in a taxable estate situation.

Significantly, a two-share QST can accomplish its goals without destroying the status of the transferred property for Missouri marital property purposes, in the event of a divorce. Under prior law, dividing tenancy by the entirety property between two revocable trusts would potentially have had marital property consequences, and the same rule would apply if tenancy by the entirety property were divided between two MAP Trusts.



James G. Blase, CPA, JD, LLM, is a Principal with Blase & Associates, LLC Attorneys at Law in St. Louis. He can be reached at www.blaselaw.com