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Asset Protection Planning for Missouri Residents, Part 2

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The first portion of this article was published in the August issue of *St. Louis Medical News*, and focused on presenting an overview of the wide variety of asset protection techniques currently available to Missouri residents. This second installment of the article will focus on additional and important selected aspects of asset protection planning for Missouri and non-Missouri residents.

MAP Trust and QST for Nonresidents

Can the MAP Trust and QST be utilized by nonresidents of the state of Missouri? The short answer to this question is "theoretically, yes." Missouri law provides that the law of the jurisdiction designated in the terms of the trust instrument applies unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue. The problem is that insulation from liability as against a particular state's creditors could easily be considered contrary to a strong public policy of that state, i.e., if the injury or other damage occurred in the other state.

The ability of a nonresident to utilize either or both of Missouri's asset protection statutes would be greatly enhanced if the nonresident were willing to change the administration of the trust to Missouri, e.g., by designating a Missouri individual or corporation as trustee. Obviously most individuals will not be excited about taking this relatively extreme step, however.

The "Best" Asset Protection Strategy

What is the best asset protection strategy depends upon the facts of each particular situation. Obviously the QST can only be used by married couples. The MAP Trust, on the other hand, is the best creditor protection technique currently available to Missouri single residents.

Titling assets in tenancy by the entirety form combined with a TOD or POD designation effective at the death of the surviving spouse will normally be all that most Missouri married couples will require, provided that their automobiles are titled in the name of the principal driver only, TOD to the other spouse or other individual or entity. If the couple owns a significant amount of life insurance, they may wish to couple this basic asset protection technique with a "bypass-type" spendthrift trust at the first spouse's death which will own the life insurance proceeds for the benefit of the surviving spouse. (This technique is sometimes referred to by the author as a "hybrid joint trust.")

Missouri married couples with somewhat larger estates may choose to utilize the two-share form of QST, in order to insulate approximately one-half of their assets from liability for the surviving spouse. Residents with taxable estates (i.e., net worths in excess of $5.25 million) will typically need to utilize the two-share form of QST, in order to guarantee that they will be able to utilize each spouse's $5.25 million exemption, since the availability of the spousal portability benefit at the surviving spouse's death is not automatic.

Limitation on Asset Protection Strategies

Remember that no Missouri asset protection strategy will avoid existing or reasonably foreseeable creditor situations. This would include not only the transfer of assets to a MAP Trust, but also the transfer of individually-owned assets into tenancy by the entirety form. Also, for federal bankruptcy purposes there is a potential five-year waiting period before transfers to a MAP Trust will become effective as against creditor claims in bankruptcy. There is likewise no guarantee that the Missouri asset protection laws will be effective if a claim is brought in another state.

Treatment of Existing Trust Arrangements

Obviously a large percentage of clients already executed and funded their separate or joint revocable trusts prior to the enactment of the MAP Trust provisions in 2004 and/or the QST provisions in 2011. The question thus becomes how to deal with these existing arrangements. There are several primary factors which will affect this decision.

Two of the most important factors affecting the analysis for married couples with existing revocable trusts are (i) the size of the federal estate tax exemption, which has now grown to $5.25 million, or 3,000% of what it was in 1981, and (ii) the availability of the new spousal portability election. Whereas in the past most married couples were essentially required to establish and fund two separate trusts, in order to achieve two federal estate tax exemptions, today most married couples no longer need to establish two trusts in order to avoid federal estate taxes and, even if they do, they normally do not need to fund the separate revocable trusts in full.

The single most important asset protection question for married couples with existing and funded *joint* revocable trusts (whether in one-share or two-share form) is whether they will be able to establish to a court of law or jury that the trusts not only meet all of the requirements of a QST under the Missouri statute, but also whether every asset which was used to fund the trust was owned by the couple as tenants by the entirety at the time it was transferred to the trust. If the couple is not in a position to prove the source of all of the trust's assets, they will need to consider returning the trust assets to joint names, and either establish and fund a new trust which qualifies as a QST, or add TOD and POD designations to their existing joint trust.

The most important asset protection question for married couples with existing *separate* trust agreements is whether and to what extent separate funded revocable trusts are still necessary, in light of the new $5.25 million estate tax exemption and new spousal portability election. If the couple needs to fully fund two separate trusts to ensure two federal estate tax exemptions (i.e., because the effectiveness of the spousal portability election is not automatic), they should consider terminating their existing separate trusts and establishing and funding a new two-share QST. When the couple terminates the existing separate revocable trusts, they should make sure that the assets which they transfer to the new two-share QST have been owned by them in joint names for more than just one day, i.e., in order to ward off a creditor attack that there was never any true intent to establish a tenancy by the entirety.

A two-share QST does not require that all assets transferred to the same be owned in joint names at the time of the transfer to the QST; however, it is important that separately-owned assets which are transferred to the two-share QST not be commingled with the previously jointly owned assets, e.g., by establishing a third and/or fourth share, to hold these separate assets. And, of course, these additional separate shares will not be insulated against future creditor attack.

If the couple's combined estate is only marginally over the $5.25 million level, they may wish to consider the limited strategy of transferring a large portion of the trust assets out of the trust and into their asset-protected joint names, and then add a TOD or POD designation to the survivor's revocable trust. The only disadvantage to this limited strategy is that it will not protect the jointly owned assets after the first spouse's death, as would be the case with the two-share QST technique.

If the couple's estate is substantially below the $5.25 million level, they should consider terminating their existing separate revocable trusts and either establish and fund a two-share QST (i.e., for the surviving spouse's added protection) or establish a one-share QST. If a one-share QST is utilized, the recommended plan is to keep all or most assets in joint names, and then add TOD or POD designations to the trust to be effective at the surviving spouse's death. The reason for not physically funding a single-share QST is that this would require the need to trace the funding of the trust in the event of a lawsuit.

Not to be Overlooked

The favorable asset protection laws in Missouri should not be viewed as a substitute for other forms of insurance protection, including umbrella insurance and malpractice insurance. Joint claims against a married couple may still occur, and the result of malpractice and other claims may be a garnishment against the individual's future income, etc.

Business and real estate owners should continue to consider utilizing a corporation, limited liability company or other entity in order to insulate the owner from personal liability for suits involving the business or real estate.

Married couples should pay particular attention to the effect asset protection planning may have on their marital property rights in assets which are retitled from separate names into joint (or "tenancy by entirety") form, either as a final step towards creating greater asset protection, or as a preliminary step where ultimately the new jointly-owned assets will be transferred to a QST. While Missouri law provides that transfers to a QST will not affect the marital rights of the spouses in the transferred property, transferring assets into joint names (again, either as an ultimate step or as a preliminary step towards funding a QST) may have this effect, if a postnuptial agreement clarifying the couples' marital rights in the retitled assets is not also entered into.

Regular spendthrift trust planning (available in most states) is also still an option, including normal bypass trust planning for a surviving spouse and spendthrift trusts for children and other descendants after the clients' death. Lifetime spendthrift trusts for the spouse and other third parties which are designed primarily for estate tax minimization purposes, including the so-called "spousal limited access trust" and irrevocable trusts for children, should still be recommended in appropriate cases.

Conclusion and Additional Reading Material

Existing Missouri law includes a unique combination of provisions whereby clients desiring to minimize the chance of a successful lawsuit recovery against their existing assets can readily do so. Utilizing a roadmap similar to that included in Parts 1 and 2 of this article, the advisor's job is to make the clients aware of the approach or approaches which work best in their particular situation.

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