

# Protecting Assets from Lawsuits Under Missouri Law

## Tenancy by entirety property, MAP Trust and QST are available tools

By James G. Blase, CPA, JD, LLM

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, which allows 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 in 2011.

### 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.

The only disadvantage to this approach to titling comes after the death of the first spouse, 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 surviving 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.



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### 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:

1. The trust must be irrevocable and incapable of being amended by the settlor;
2. The settlor may not be the sole beneficiary of either the income or principal of the trust;
3. The trust must contain a spendthrift clause applicable to the settlor’s interest in the trust; and
4. 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:

1. MAP Trust assets are insulated from joint lawsuits as well as suits against either spouse;
2. 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;
3. 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 treat any property transferred to the trust as though it was tenancy by entirety property for creditor purposes, whether the property is transferred 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 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 held 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 QST will therefore 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 can not only minimize or eliminate the married couple's potential estate tax liability, but it will also protect all of the trust property from 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.



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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 property between two revocable trusts would potentially have had marital property consequences.

### 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.

### 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 wages, 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. —