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New Missouri Laws Present Unique Estate Planning Opportunity for Married Couples

by

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The purpose of this article is to illustrate how married couples can now utilize two unique Missouri statutes to not only help insulate their assets from lawsuit during either or both of their lifetimes, but also to achieve maximum income tax basis step-up at each of their deaths, all while preserving maximum control and estate planning flexibility during their lifetimes. The article also explains how it may be possible for non-residents of Missouri to utilize at least some of these statutory provisions in their planning.

A brief overview of the recently-enacted Missouri Qualified Spousal Trust ("MQST") and the Missouri Asset Protection Trust ("MAP Trust") is first required in order to understand the new income tax basis planning technique explained in this article. More complete information about each of these two laws can be found in separate *Journal of the Missouri Bar* articles.[1]

[1] *See* Blase, "The Missouri Qualified Spousal Trust: A Potential Estate Planning Panacea," 68 Journal of the Missouri Bar 144 (May-June 2012); Blase, "The Missouri Asset Protection Trust," 61 Journal of the Missouri Bar 72 (March-April 2005).

Brief Summary of the Missouri Qualified Spousal Trust ("MQST")

A 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 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 MQST.

The emphasis of the MQST 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 MQST 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 MQST is employed by the couple, the decedent spouse's share of the MQST will remain creditor protected for the surviving spouse, as a standard "spendthrift trust." The surviving spouse can then elect to establish a MAP Trust (discussed below) 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" MQST 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 a tenancy by the entirety, a MQST does not protect against joint claims against a married couple. Unlike tenancy by the entirety property, however, the two-share MQST 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 MQST therefore has utility even if the couple is not in a taxable estate situation.

Significantly, a two-share MQST can accomplish its goals without destroying the status of the transferred property for 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.

Brief Summary of the Missouri Asset Protection Trust ("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 settler 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; and

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 is that, although the statute does not prohibit the settlor from serving as trustee of the trust, many estate planning attorneys nevertheless advise this, presumably for fear that the trust would otherwise not be considered irrevocable by the settlor. Thus, a friend or relative might need to serve as trustee of the MAP Trust, which obviously 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. Another drawback of the MAP Trust is that transfers to the same are subject to a potential five-year look back period if the settlor should file for bankruptcy, whether voluntary or involuntary.

The biggest advantage of the MAP Trust is that it insulates assets from lawsuits for single people; not just for married couples. As such, the availability of the MAP Trust 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, subject to the potential five-year look back period for claims in bankruptcy.

Planning Under Missouri Law During the Joint Lifetime of the Couple

The technical language enabling the MQST, RSMo Section 456.950, defines a MQST to include, in relevant part, a single-share trust established by a husband and wife, funded with tenancy by entirety property, and "[t]he terms of which provide that during the joint lives of the settlors all property or interests in property transferred to, or held by, the trustee are [h]eld and administered in one trust for the benefit of both settlors, revocable by either or both settlors acting together while either or both are alive, and each settlor having 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."[2]

Although the introductory clause to the definition purports to only apply "during the joint lives of the settlors," reading the definition as a whole it would appear to be applicable through the surviving spouse's death, also. This subsequent provision of the MQST statute would likewise also appear to be limited by these same specific definition requirements: "Upon the death of each settlor, all property and interests in property held by the trustee of the qualified spousal trust shall be distributed as directed by the then current terms of the governing instrument of such trust."[3] In other words, after the first spouse's death the surviving spouse must continue to have the right to revoke the entire trust, and must be entitled to receive distributions of income or principal from the entire trust.

Creating Complete Income Tax Basis Step-Up at the First Spouse's Death

Somewhere around 99 percent of married couples today will no longer need to seriously concern themselves with the federal estate tax, as a result of the combination of a much larger federal estate and gift tax exemption than in years past, coupled with the availability of the new "spousal portability election." For this vast majority of clients, an old technique which historically suffered from significant income and transfer tax uncertainties[4], as well as from the loss of creditor protection during the couples' joint lifetimes and the potential loss of the same after the first spouse to die's death, and which further did not generate a second level of income tax basis step-up at the surviving spouse's death, should now be re-examined in light of this recent dramatic change in the level of the federal estate tax exemption, as well as Missouri's above-described asset protection legislation.

[2] RSMo §456.950.1(2)(a).

[3] RSMo §456.950.5.

[4] The uncertainties related to loss of income tax basis step-up at the first spouse's to die death, pursuant to the IRS' application of IRC Section 1014(e), and an at best questionable gift tax marital deduction at the first spouse to die's death, by the surviving spouse.

For the very first time, it is now possible for a married couple, residing in a non-community property state, to establish and fund a joint revocable trust with tenancy by entirety property, and not only assure full income tax basis step-up for the trust's assets at the death of the first spouse to die as well as at the death of the surviving spouse, but do so in a fashion which protects the assets from all but joint lawsuits, both during the couple's joint lifetime as well as after the first spouse to die's death, all without creating any transfer tax uncertainty, and while maintaining maximum flexibility and access to the trust assets. How does this new joint revocable trust work?5

As set out above, the MQST statute requires that each settlor spouse of a single-share MQST 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 is the fact that the statute places no limitations on the extent of the right which each spouse must possess, and the right may be mandatory as opposed to only within the discretion of the trustee. Thus, for example, under the MQST enabling statute the trust document may 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," a right which 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 IRC Sections 2036, 2038 and 2041.[6]

Significantly, even if a decedent has only an inter vivos general power that cannot be exercised by will, he or she is treated as having the power at death for purposes of IRC Section 2041 federal estate tax inclusion,[7] and therefore for purposes of the IRC Section 1014(b)(9) "property acquired from the decedent" requirements.8 Further, even if a spouse's power to require the trustee to make distributions for his or her "welfare and happiness" is not contemplated by the MQST statutory language "right to receive distributions of income and principal, whether mandatory or within the discretion of the trustee," the MQST statute also provides that "[a] qualified spousal trust may contain any other trust terms that are not inconsistent with the provisions of this section,"[9] Because there is no apparent reason why the broad withdrawal power in each spouse would be inconsistent with the other MQST statutory provisions, especially considering the statute provides

5 For an in-depth discussion of this technique, *see* Blase, "The Minimum Income Tax Trust," published in the May, 2014 issue of *Trusts & Estates*.

[6] 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.

[7] *See, e.g.,* Snyder v. United States, 203 F. Supp. 195 (W.D. Ky. 1962); Jenkins v. United States, 428 F.2d 538 (5th Cir. 1970).

8 This position is also supported in PLR 200210051 (December 10, 2001).

[9] RSMo §456.950.2.

that each spouse may possess unrestricted and mandatory trust distribution rights, the power of withdrawal would appear to be permitted by the statute.

The suggested income and principal withdrawal right not only causes complete gross estate inclusion in the first spouse to die's gross estate for federal estate tax purposes, but it does so in a fashion which does not violate the Section 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 Section 25.2511-1(h)(4) of the Regulations: "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."[10] 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 which 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.[11]

Note also that the MQST statute appears to permit the trust instrument to be drafted to allow each spouse the ability to revoke his or her contributions to the trust, during the couple's joint lifetimes, as a result of the statutory requirement that the trust must be "revocable by *either or both* settlors acting together while either or both are alive,"[12] thus lending further support for the absence of a completed gift.[13] After the first spouse dies, the surviving spouse can effectively access the entire trust corpus, not only because of his or her right to income and principal from the entire trust corpus for his or her welfare and happiness, but also because of his or her unilateral power to revoke the trust at that point.

It might be argued that only one-half of the value of the trust should be includible in the first spouse to die's gross estate, as a qualified joint interest pursuant to IRC Section 2040(b). In

[10] *See also* Regs. §§25.2511-2(b), (c). (Emphasis supplied.) This position is supported in PLR 200210051 (December 10, 2001). Under the facts of that particular private letter 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.

[11] Regs. §25.2511-2(g).

[12] RSMo §456.950.1(2)(a). (Emphasis supplied.)

[13] *Compare* PLR 200210051 (December 10, 2001), where on similar facts the IRS agreed there was no gift by either spouse during their joint lifetime, but there was a gift at the death of the first spouse to die, because (unlike the joint trust arrangement contemplated by this article) at that point the surviving spouse's ability to revoke the surviving spouse's portion of the trust terminated. The IRS did not attempt to argue the applicability of IRC §2514(e) when the surviving spouse's lifetime general power of appointment over the first spouse to die's share of the joint trust lapsed at the first spouse to die's death, mostly likely because the IRS would have then just made the consistent argument that the lapse qualified for the gift tax marital deduction.

somewhat analogous cases applying the Internal Revenue Code of 1939, courts have so ruled.[14] Significantly, however, whereas the 1939 Code (and the Revenue Act of 1926, which preceded it) employed the term "joint tenants," the 1954 Code added the words "with right of survivorship," presumably in an effort to make clear that one of the two joint tenants cannot simply take the entire joint interest as his or her own, thereby effectively eliminating the other joint tenant's right of survivorship. Further, in the cases decided under the 1939 Code, there was no ability for one of the trust beneficiaries to receive a greater share than the other during their joint lifetime, which would have been a violation of the "unity of possession" requirement of a joint tenancy. It would thus appear to be rather clear that the type of single-share MQST trust arrangement described above is distinguishable from the cases decided under the 1939 Code, and as such would not constitute a qualified joint interest under IRC Section 2040(b). The interests of the first spouse to die should therefore be fully includible in his or her gross estate, under a combination of IRC Sections 2036, 2038 and 2041.[15]

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.

Finally, if an interest in a corporation or other entity treated as a S corporation for federal income tax purposes is transferred to a single-share MQST or to the joint share of a MQST, an issue arises whether the trust will qualify under the IRC Section 1361(c)(2)(A)(i) requirement that the trust be treated as owned by only one individual under subpart E. In a series of private letter rulings extending over a dozen years,[16] from 1985 to 1997, the IRS consistently ruled that a joint revocable trust established by a husband and wife would be treated as owned by only one individual under subpart E (at least if the couple files a joint income tax return). In each private letter ruling the Internal Revenue Service referenced IRC Section 1361(c)(1), which provides that a husband and wife will be treated as one shareholder for purpose of the IRC Section 1361(b)(1)(A) maximum number

[14] *See, e.g.,* Derby v. Commissioner, 20 T.C. 164 (1953); Hornor's Estate v. Commissioner, 130 F.2d 649 (3rd Cir. 1942).

[15] The trust interest would also not be includible under the general IRC Section 2040(a), since it does not amount to a deposit "with any person carrying on the banking business, in their joint names and payable to either or the survivor." *See also* PLRs 200101021 (October 2, 2000) and 200210051 (December 10, 2001), where on similar facts the IRS made no effort to argue IRC §2040 applied; nor did the IRS attempt to argue that Section 2041 was inapplicable under a theory that the trust arrangement "effectively" required the consent of the other spouse in order to exercise the general power of appointment, i.e., because either spouse could revoke the trust, presumably instead choosing to rely on the literal language of the trust document, which did not require the consent of the other spouse in order to exercise the general power of appointment.

[16] Private Letter Rulings 9729025, 9044031, 8915043, 8836055, 8717021, 8704092 and 8506060.

of shareholders requirement, as the apparent or implied authority for its position that a joint revocable trust is owned by only one individual.

A married couple owning an interest in a corporation or other entity treated as an S corporation therefore has at least three options. First, they can choose to rely on this consistent series of private letter rulings (in which case the trust document should include as much protective language as possible in case this reliance ends up being misplaced). Second the couple can spend the time and money for a private letter ruling of their own, which will most likely be a favorable one. Finally, they can simply opt not to transfer their S interest to a joint trust or joint share, and instead have the stock divided between the separate husband and wife shares under the MQST, in which case at the death of the first spouse a new income tax basis will only be available for the interest owned by the decedent spouse.

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"[17] 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.[18] 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.[19]

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, in order to minimize estate taxes at the surviving spouse's death, and protect assets for the surviving spouse via a spendthrift-protected bypass trust.

Thus, for example, if a couple owns a combined estate of $6 million (including $2 million of appreciated assets), they might choose to place the $2 million of appreciated assets in the joint share, $2 million in Share H, and $2 million in Share W, thus ensuring that all of the couple's appreciated

[17] *See* RSMo §456.950.2(b).

[18] RSMo §456.950.2(c).

[19] RSMo §456.950.5.

assets receive an income tax basis step-up at the death of the first spouse to die, while minimizing their exposure to federal estate tax at the surviving spouse's death, and protecting at least $2 million worth of assets in a spendthrift-protected bypass trust for the surviving spouse.

For even larger estates, the couple might 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), and fund the joint share with their highly appreciated assets. Thus, for example, a couple with a $20 million net worth might elect to place approximately $5 million worth of assets in each of Share H and Share W, and place up to $10 million worth of appreciated assets in the joint share. In this fashion 75% of the couple's assets will receive an income tax basis step-up at the first spouse's death, without exposing any of the couple's assets to lawsuits against either spouse (i.e., as opposed to joint lawsuits), and while protecting the Share H or Share W of the first spouse to die from lawsuits as against the surviving spouse, and from estate taxes at the surviving spouse's death.[20]

If, on the other hand, of their $20 million net worth only $2 million consisted of appreciated assets, the wisest strategy would be to place only the $2 million worth of appreciated assets in the joint share, and then transfer approximately $9 million of assets each to Share H and Share W. In this fashion the couple would achieve all the income tax basis step-up available, while continuing to insulate $9 million worth of assets in the spendthrift-protected bypass trust for the surviving spouse.

Achieving Asset Protection and Maximum Basis Step-Up After the First Spouse Dies

After the first spouse dies, the surviving spouse will lose the asset protection benefits of the joint MQST share, as well as of his or her separate Share H or Share W, if any. Also, the assets in the bypass trust funded with the Share H or Share W assets of the first spouse to die would typically not receive a second income tax step-up at the surviving spouse's death. There is a plan available here, too, thanks to the MAP Trust legislation, as well as to the new larger federal estate tax exemption. Here is how the plan would work:

1. The surviving spouse could establish an irrevocable and non-amendable MAP Trust[21] for his or her own benefit. If properly structured to ensure that the trustee's discretionary distribution powers are restricted, the surviving spouse should be able to serve as trustee of the MAP Trust, although, as discussed above, many Missouri estate planning attorneys would caution against this. Also as discussed above, there must be at least one other current beneficiary of the MAP Trust in order to secure the desired asset protection benefits, but the surviving spouse may retain the flexibility of a limited testamentary power to appoint the trust assets at his or her death.

[20] Note, however, that as described above, for non-tax reasons maximum funding of the joint share may not always be appropriate or advisable.

[21] RSMo §§456.5-505.3, .4.

2. A simpler alternative, apparently sanctioned by the MQST statute[22], might be to structure the MQST to enable the surviving spouse to release his or her power to revoke and amend the single-share MQST after the first spouse to die's death, in which event the single-share MQST could convert to an irrevocable and non-amendable MAP Trust, provided all of the other separate MAP Trust statutory requirements are satisfied, including the above-mentioned requirement that there be more than the surviving spouse as current beneficiary, and the separate requirement that the surviving spouse not retain any right to a specific portion of the trust income or principal. The problem with this simpler approach, of course, is that the MAP Trust statutory requirements may change over time, so the surviving spouse would need to be reminded of the potential need to amend the MQST, prior to releasing his or her power to revoke and amend the trust.

3. The bypass trust established under the first spouse to die's Share H or Share W could include a conditional testamentary general power of appointment in the surviving spouse over the most appreciated assets of the bypass trust, to the extent the same will not cause the surviving spouse's estate to be liable for federal or state estate or inheritance taxes. The reason for including the conditional testamentary general power of appointment is to maximize the income tax basis step-up for the bypass trust assets at the surviving spouse's death, i.e., by intentionally including the most appreciated assets of the bypass trust in the surviving spouse's gross estate, to the extent the same will not cause an increase in estate or inheritance taxes payable at the surviving spouse's death.23

4. Depending upon state law, another potential avenue for achieving income tax basis step-up at the surviving spouse's death is to include a limited testamentary power of appointment in the surviving spouse, and then allow the surviving spouse to intentionally violate Section 2041(a)(3) of the Internal Revenue Code - the so-called "Delaware Tax Trap," to the extent it will not cause estate taxes to be payable at the surviving spouse's death.

The Uniqueness of the "Missouri Plan"

The unique aspect of the "Missouri plan" is that complete income tax basis step-up for the assets of the joint share at the first spouse's death is achieved without exposing the trust assets to other than joint lawsuits against the couple, all while retaining maximum control and estate planning flexibility because of the revocable nature of the MQST. Previous revocable joint trust proposals not only do not achieve all of the tax benefits described in this article, but the proposals also sacrifice asset protection and flexibility during the couple's joint lifetime. Other state statutes insulate trust assets from lawsuits, but the asset protection trusts authorized in each of those states must be

[22] RSMo §456.950.5.

23 If the surviving spouse remarries, the conditional general power of appointment should normally only be included in the discretion of an independent trustee, to ensure the maximum potential advantages from the spousal portability election at the surviving spouse's death.

irrevocable.

It would be a relatively easy matter in any state which recognizes a tenancy by the entirety in personal property to structure an agreement between two spouses granting each of them a unilateral and unrestricted power to freely withdraw assets from a joint brokerage account, and thus achieve full income tax basis step-up at the first spouse's death. The requisite "unity of possession" of the joint brokerage account would then be destroyed, however, and as a consequence so too would the tenancy by entirety creditor protection of the account. For a similar reason half of the joint account may actually be subject to probate at the first spouse's death.

Transferring the joint share to an irrevocable MAP Trust after the death of the first spouse to die also preserves an element of estate planning flexibility after the death of the first spouse, as the Missouri statute specifically authorizes the surviving spouse to retain a limited testamentary power of appointment over the trust assets.[24] As described above, it is also at least arguable that the surviving spouse may serve as trustee of the MAP Trust, as long as appropriate trustee encroachment and distribution standards are included in the trust document, i.e., in order to prevent the trust from being considered revocable by the surviving spouse. This "fiduciary responsibility" of the MAP Trust trustee is reinforced by the distinguishing requirement in the Missouri statute that the settlor may not be the only current beneficiary of the trust.[25]

Utilizing the Missouri Statutory Approach 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.[26]

The question thus becomes whether non-residents 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[27] 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.

[24] RSMo §456.5-505.4.

[25] RSMo §456.5-505.3.

[26] RSMo §456.1-107(1).

[27] *In re Donald G. Huber*, 493 B.R. 798 (W.D. Wash. 2013).

Because the non-resident 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, at least with respect to the MQST portion of the arrangement, 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. Transfers by the surviving spouse to a MAP Trust, on the other hand, would likely not be honored in a state which has not previously passed similar "domestic asset protection trust" legislation, at least where there are not significant contacts with the State of Missouri.

Conclusion

"The Missouri Plan" allows an estate planning attorney to guide his or her married couple clients down a path which will not only allow them to avoid probate and minimize estate taxes, but will also enable them to minimize their exposure to lawsuits and maximize the income tax basis the surviving spouse and subsequent heirs will receive at the death of each spouse. Missouri married couples are thus not only finally on (or near 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 non-residents of Missouri residing in tenancy by the entirety states to achieve all or most of the advantages afforded by the Missouri Plan.

About the Author

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Mr. Blase spent the first 13 years of his legal career as an associate and partner in the estate planning and administration department of what is now the Thompson Coburn law firm in St. Louis, Missouri, then spent four years as partner and chairman of the trusts and estates department of what is now the Armstrong Teasdale law firm in Clayton, Missouri. In 1999, Mr. Blase formed his own law firm in St. Louis County, Missouri.

Mr. Blase is also an adjunct professor at the St. Louis University School of Law, where he teaches a "practical skills" course in estate planning to third-year law students. Mr. Blase is a frequent author and lecturer on a wide variety of estate planning subjects, and has authored over 35 articles and chapters for various professional and Missouri continuing legal education publications.

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