

The Missouri Qualified Spousal Trust: A Potential Estate Planning Panacea

by

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New Section 456.950 of the Revised Missouri Statutes, the “Qualified Spousal Trust” (hereinafter in this article sometimes referred to as a “QST”), became effective on August 28, 2011. The new section applies to all trusts which fulfill the criteria set forth in the statute for a QST regardless of whether the trust was created before or after August 28, 2011. Although there remains room for improvement to the new statute, if properly structured by the attorney, and carefully operated by the clients, the QST represents an estate planning panacea, allowing married couple clients to eliminate or minimize their federal estate taxes, without exposing themselves to lawsuits or unintended marital property consequences.

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Background

Estate planning attorneys have historically struggled to avoid sacrificing one or more of their estate planning goals when they plan their clients' estates, especially higher net worth estates. The central goals of estate planning attorneys include:

1. Avoiding probate for their clients;
2. Avoiding estate taxes for their clients;
3. Protecting their clients' assets from potential lawsuits; and
4. Accomplishing all of the above without disturbing their clients' marital rights in the event of divorce.

For married estate planning clients with net worths which are comfortably below the federal (and potential future state) estate tax exemption level, whatever one determines that level is likely to be after 2012, existing Missouri law has already provided most if not all of the tools necessary to achieve each of the above goals. Through the judicious use of a joint revocable trust and Missouri's nonprobate transfers law, it has long been possible for Missouri estate planning attorneys to avoid probate for estate planning clients not having taxable estates, without creating potential creditor and/or divorce issues. The problem instead has been determining where the estate tax exemption is headed, and therefore when utilization of a joint revocable trust, or some variation of the same, is prudent.²

For married estate planning clients with net worths nearing or above the federal estate tax exemption level, however, achieving all of the above-outlined estate planning goals has traditionally been much more challenging. In order to avoid or minimize estate tax at the surviving spouse's

²See Blase, "Flexible Estate Planning for Married Couples in an Uncertain Estate Tax Environment," 22 *Journal of Financial Planning* 42 (January 2009).

death, these couples must typically sever joint tenancies and divide their assets between themselves. Proceeding in this estate tax-sensitive manner causes the couple to lose their tenancy by the entirety creditor protected status.

In recent years the Missouri Asset Protection Trust (or “MAP Trust,” for short)³ has provided a measure of assistance for estate planning attorneys, but among the several drawbacks to the MAP Trust include the fact that it must be irrevocable and the fact that it carries with it a potential 10-year waiting period for federal bankruptcy purposes. With up to a total of \$10 million in assets potentially being divided between the spouses (assuming a \$5 million federal estate tax exemption), the importance of protecting this amount of assets from potential creditor attack is obvious.

The Qualified Spousal Trust

To the potential rescue comes the new QST. The purpose of this new form of Missouri revocable trust is to preserve the creditor protected character of Missouri tenancy by the entirety property for married couples when the property is transferred either to one revocable trust, or two separate shares of one revocable trust. The QST benefits all clients, i.e., not only those engaged in high risk professions.

The basic requirements of a QST are the following:

1. The settlors of the trust must be husband and wife at the time of the creation of the trust;
and
2. The terms of the trust agreement must provide that, during the joint lives of the settlors, all property or interests in property transferred to or held by the trustee are either:
 - a. Held and administered in one trust for the benefit of both settlors, revocable by

³See Blase, “The Missouri Asset Protection Trust”, 61 *Journal of the Missouri Bar* 72 (March 2005).

either or both of them 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; or

b. Held and administered in two separate shares of one trust for the benefit of each of the settlors, with the trust being revocable by each settlor with respect to that settlor's separate share of the trust without the participation or consent of the other settlor, and with each settlor having the right to receive distributions of income or principal, whether mandatory or within the discretion of the trustee, from that settlor's separate share for that settlor's life.

If a trust satisfies the above rules, any tenancy by the entirety property transferred to the same thereafter has "the same immunity from the claims of the separate creditors of the settlors as would have existed if the settlors had continued to hold that property as husband and wife as tenants by the entirety, so long as . . . [t]he property, proceeds, or income continue to be held in trust by the trustee of the qualified spousal trust." The statute also makes clear that the exempt status exists only while "[b]oth settlors are alive and remain married." Finally, in an apparent effort to emphasize that the separate share of a deceased settlor spouse should not be treated as a self-settled trust as to the surviving settlor spouse, the statute provides that, "[u]pon the death of the first settlor to die, if immediately prior to death the predeceased settlor's interest in the qualified spousal trust was then held in such settlor's separate share, the property or interests in property in such settlor's separate share may pass into an irrevocable trust for the benefit of the surviving settlor upon such terms as the governing instrument shall direct, including without limitation a spendthrift provision as provided in section 456.5.502."

Property other than property held as tenants by the entirety may also be transferred to a QST, but the property will not be treated as though it was held by the settlors as tenants by the entirety.

The statute provides that a QST may also contain “any other trust terms that are not inconsistent with the provisions of this section.” As will be discussed further below, this provision is easier written than satisfied.

Finally, the statute provides that “[n]o transfer by a husband and wife as settlors to a qualified spousal trust shall affect or change either settlor’s marital property rights to the transferred property or interest therein immediately prior to such transfer in the event of dissolution of marriage of the spouses, unless both spouses otherwise expressly agree in writing.” Although for space limitations reasons a complete examination of the topic is beyond the scope of this article, attorneys and their clients should be forewarned that this provision of the new law may have associated estate, gift and income tax consequences, especially if property transferred to the QST is the nonmarital property of either or both of the spouses.

What Does it All Mean?

So how is the QST relevant to Missouri estate planning attorneys and their clients?

As discussed above, in situations where estate taxes are not an issue, it has long been possible for married couple clients to avoid probate and lawsuits filed against only one of them, provided they kept all of their property titled in joint names, pay on death (or transfer on death) to a joint revocable trust. Subsequent to the passage of the Missouri Nonprobate Transfers Law in 1989, tenancy by the entirety property should not have been retitled in the name of a joint revocable trust, unless there was no other option available to the clients for avoiding probate. Prior to August 28, 2011, the transfer of tenancy by the entirety property to a joint revocable trust ran the serious risk of destroying the creditor protection aspects of the tenancy by the entirety property, this despite the fact that, in the

recent case of *In re Bellingroehr*,⁴ the court found that a joint revocable trust which restricted the couple in the identical manner they were when the property which was transferred to the trust was held by them as tenants by the entirety, preserved tenancy by entirety type creditor protection for the transferred assets.

Where estate taxes are an issue, however, married couple clients are commonly required to sever property previously held by them as tenants by the entirety. In the past this process destroyed the creditor protection which tenants by the entirety property ownership had afforded them for claims against only one spouse. Under the new law, if properly structured and funded, a “two-share” QST funded with tenancy by entirety can not only minimize or eliminate the married couple clients’ potential estate tax liability, it will also preserve the status of the transferred tenancy by the entirety property as protected against the claims of creditors of either spouse. Furthermore, the new statute can accomplish this 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.

The limited creditor-protected status of the transferred property under the new Missouri law should also exist for federal bankruptcy purposes. The reason for this is *not* based upon the general exemption for tenancy by the entirety under the federal Bankruptcy Code,⁵ but is instead based upon the fact that Missouri is a so-called “opt out” state for federal bankruptcy purposes, meaning that it has elected to apply its own creditor exemptions for federal bankruptcy purposes. Missouri’s general “opt out” rules are codified in Section 513.427 of the Revised Missouri Statutes, which provides, in

⁴403 B.R. 818 (Bankr. W.D. Mo. 2009).

⁵11 U.S.C. §522(b)(2)(B).

relevant part, as follows:

Every person by or against whom an order is sought for relief under Title 11, United States Code, shall be permitted to exempt from property of the estate any property that is exempt from attachment and execution under the law of the state of Missouri or under federal law.

Because new Section 456.950 of the Revised Missouri Statutes provides that tenancy by entirety property transferred to a QST shall “have the same immunity from the claims of the separate creditors of the settlors as would have existed if the settlors had continued to hold that property as husband and wife as tenants by the entirety,” and because Missouri law exempts from attachment and execution tenancy by the entirety property where only one of the entirety interest holders (i.e., only one of the spouses) is indebted,⁶ tenancy by the entirety property which is transferred to a QST should also be exempt from attachment in a federal bankruptcy proceeding. Section 456.950 should therefore effectively reverse the recent contrary holdings in *Cutcliff v. Reuter (In re Reuter)*,⁷ and *In re Stanke*⁸.

Prior to the enactment of Section 456.950, if a high net worth couple desired to make maximum use of each of their estate tax exemptions, while minimizing exposure to lawsuits, they had to either utilize the above-referenced irrevocable MAP Trust technique, or plan to have the surviving spouse make a qualified disclaimer of all or part of his or her survivorship interest in the tenancy by the entirety property. The former approach carried with it the above-discussed disadvantages of requiring the establishment of an irrevocable trust, along with a potential 10-year waiting period for federal bankruptcy purposes, whereas the latter approach had the disadvantages of uncertainty

⁶*Brown v. Eads (In re Eads)*, 271 B.R. 371, 374-75 (Bankr. W.D. Mo. 2002). See also *In re Garner*, 952 F.2d 232, 234-35 (8th Cir. 1991).

⁷427 B.R. 727 (Bankr. W.D. Mo. 2010).

⁸234 B.R. 439 (Bankr. W.D. Mo. 1999), *aff'd* 443 B.R. 427 (B.A.P. 8th Cir. 2011).

regarding how the surviving spouse would ultimately decide to act, along with the required probate administration of the disclaimed survivorship interest.

Under prior law the high net worth couple dividing tenancy by the entirety assets could also choose to utilize umbrella and other forms of insurance in order to insulate themselves against lawsuits, although it was of course impossible to determine exactly how much insurance was needed, and the couple also had to address the potential marital property consequences of the division of assets. And where either or both spouses was engaged in a high risk profession, the annual cost of additional malpractice insurance was usually prohibitive.

Impact of New Federal Spousal Portability Rule

The new federal estate tax law allows the surviving spouse to add the unused portion of the first spouse to die's federal estate tax exemption to the surviving spouse's exemption, thereby potentially doubling the size of the surviving spouse's exemption, and in effect making the couples' separate estate tax exemptions "portable." One line of reasoning is that this new federal law means that it no longer necessary for a married couple to sever or divide joint or tenancy by the entirety property, in order to utilize each spouse's federal estate tax exemption. By extension it might therefore also be argued that this new federal "spousal portability rule" has rendered moot the primary purpose underlying the QST.

The problem is that the new federal spousal portability rule has severe limitations. Even acknowledging that it is likely the rule will be made permanent before it sunsets on December 31, 2012, the largest problem with the spousal portability rule is that it will not apply if the surviving spouse remarries, and the new spouse predeceases the surviving spouse. Other significant transfer tax limitations include the fact that the spousal portability rule does not apply for federal generation-skipping transfer taxes, and it will not eliminate estate tax on the appreciation in the value of the

deceased spouse's interest in the property over the surviving spouse's remaining lifetime.

Many clients will also prefer to utilize trusts for nontax reasons, including, for example, in second marriage situations, in situations where the clients desire the professional management of a trustee for the surviving spouse, and in order to maintain creditor protection for the surviving spouse.

The spousal portability rule thus is rarely relied on by attorneys in planning their higher net worth clients' estates.

Potential Issues and Suggested Solutions

Although the new law is intended to change the considerations and techniques of the past applicable to estate planning for married couples, careful attention to the details described below is paramount in order for a QST to operate effectively.

Tracing and Burden of Proof

The significant tracing problems associated with new Section 456.950 are self-evident. The statute exempts only "property or interests in property held as tenants by the entirety" which are transferred to the QST. Ten or more years after the QST has been established and initially funded, how will the settlors be able to prove what portion of the trust corpus consists of property which was originally tenancy by the entirety property, including the proceeds therefrom and income thereon? And will the burden of proof on this issue be on the creditor, or on the settlors?

Recognizing that it will not be practical to think that all clients will keep perfect records over an extended time frame, one suggested approach for alleviating the tracing problem might be to prepare the trust document with appropriate and highlighted warnings intended to address the tracing issue, and perhaps thereby also better ensure that the burden of proof in this area will be on the creditor. For example, the trust document might contain a bold-faced warning to the trustees, at the outset of the trust document, to hold all tenancy by the entirety property transferred to the trust in

a specially designated share or shares of the trust (e.g., Shares H and W), with all other property transferred to the trust held in a different share or shares (e.g., Shares H-1 and W-1). The document could also require the trustee to correct any situations where funding allocation errors may have been made in the past. Finally, the trust document should state at the outset that the purpose of the same is to comply with RSMo Section 456.950, and that all provisions of the trust document should be limited accordingly. The inclusion of this type of protective language in the trust document will place the clients in the best possible situation if a creditor claim is ever made, and potentially shift the burden of proof with respect to the statutory compliance and tracing issues to the creditor.

As already alluded to above, unless the QST will contain separate shares for each of the settlors, it is recommended to utilize the Missouri nonprobate transfers law to make pay on death and transfer on death designations of tenancy by the entirety property to the joint revocable trust, rather than physically transfer tenancy by the entirety property to the trust during the settlors' joint lifetimes. It makes little sense to take any risk with respect to the tracing issues outlined above, if retitling tenancy by the entirety property in the name of the single trust form of QST is not necessary. Also, although space limitations do not allow for a complete discussion of the matter in this article, if a lawsuit is brought in another jurisdiction during the joint lifetime of the married couple, even a jurisdiction which would have recognized the protections of a tenancy by the entirety, it is possible that the new Missouri law would not protect assets which have been transferred to a QST established in Missouri.⁹

As discussed further below, using the available Missouri nonprobate transfers rules to fund a joint revocable trust at the death of the surviving spouse will also make application of the IRC

⁹For an analogous discussion as it applies to the Missouri Asset Protection Trust, *see* Blase, "The Missouri Asset Protection Trust", 61 *Journal of the Missouri Bar* 72 at 76-77 (March 2005).

Section 1014 income tax basis rules much clearer at the death of the first spouse, since attempting to apply the income tax basis rules to assets owned by a joint revocable trust, without the benefit of adequate tracing, will be virtually impossible.

How Does the Two-Share Approach Work?

When the tenancy by the entirety property is transferred to a “two-share” QST, what happens? The statute merely provides that the tenancy by entirety property transferred to the trust shall be “[h]eld and administered in two separate shares of one trust for the benefit of each of the settlors, with the trust being revocable by each settlor with respect to that settlor’s separate share of that [sic] trust without the participation or consent of the other settlor, and [sic] each settlor having the right to receive distributions of income or principal, whether mandatory or within the discretion of the trustee, from that settlor’s separate share for that settlor’s life.”

The first and probably most important question attending the two-share approach of the QST is this: Must the tenancy by the entirety property which is transferred to the QST be divided equally between the two shares, e.g., as tenants in common? Or may the property be divided between the two shares in any manner which the settlors direct? The statute is surprisingly silent on this significant point.

Resolution of the issue is important, because in many married couple estate planning cases one of the spouses may own a significant amount in retirements benefits, stock options, life insurance, etc., with his or her employer, and/or may own an interest in a closely-held business which his or her spouse is not permitted to also own, as a result of a buy-sell agreement or otherwise. If the new law were clear that the settlors could transfer property to the two shares in an unequal manner, it might be advisable for the couple to transfer more of the tenancy by the entirety property to the share of the spouse with the lesser amount of assets, thereby potentially better dividing the value of the couples’

separate estates for estate tax purposes. Depending upon the particular situation, it might also be advisable to transfer more of the low income tax basis stock to one share or the other, for potential income tax basis step-up purposes after the death of the first spouse.

The problem, again, is that the law on this division of assets point is not clear. Some would argue that the implication of the statute is that the tenancy by the entirety property must be divided equally between the two shares, or as tenants in common. Others would argue at least as forcefully that, because the statute is silent on the point, disproportional transfers may be made.

More Complex Trust Funding Arrangements

As alluded to above, obviously there are bound to be many situations where it is impossible or not advisable to transfer only tenancy by the entirety property to the QST, and the statute itself anticipates this: “Property or interests in property held by a husband and wife or held in the sole name of a husband or wife that is not held as tenant by the entirety and is transferred to a qualified spousal trust shall be held as directed in the qualified spousal trust’s governing instrument or in the instrument of transfer and the rights of any claimant to any interest in that property shall not be affected by this section.” What type of structural arrangement or arrangements does this statutory provision envision?

If the QST is of the “joint” variety, the implication is that the trust document may establish one or two separate trusts to accept this type of “non-tenancy by the entirety” property from the husband and/or wife. If the QST is of the “separate share” variety, the implication is that the trust instrument may establish one or two separate trusts to accept non-tenancy by the entirety property from the husband and/or wife (or up to a total of four “trusts,” after factoring in the two tenancy by the entirety “shares”).

What arguably does not appear to be permitted by the statute, however, is the establishment under a single trust instrument of one “joint” trust (i.e., as a receptacle of tenancy by the entirety property which the spouses do not wish to separate into two shares), along with two separate “shares” for other tenancy by the entirety property, and up to an additional two more trusts for non-tenancy by the entirety property, or five total trusts or shares, under a single document. The rationale behind this conclusion is that the statute appears to imply that the “joint trust” and “separate share” alternative forms of qualified spousal trust are mutually exclusive, as a result of the utilization of the words “either” and “or” in defining the term “qualified spousal trust.” A couple should be able to establish both forms of QST, but it does not appear that the two forms of QST may be combined into one trust instrument. Thus, caution would dictate that the couple not attempt to combine the two forms of QST, at the present time.

Other Statutory Construction Issues

During the joint lifetime of the spouses, can anyone else (e.g., the couple’s children) be a beneficiary of the QST, in addition to the spouse(s)? The statute provides that the QST may have additional provisions “which are not inconsistent with the provisions” of the statute. But the statute also provides that the terms of the QST must provide that, “*during the joint lives of the settlors* all property or interests in property transferred to, or held by, the trustees are either . . . [h]eld and administered in one trust *for the benefit of both settlors*, . . . or [h]eld and administered in two separate shares of one trust *for the benefit of each of the settlors* . . .” (Emphasis supplied.) In light of these statutory provisions, would the inclusion of say, children, as beneficiaries of the QST during the joint lifetimes of the settlors, be considered “not inconsistent” with the statute? Caution would again appear to dictate that, at the present time at least, children or other beneficiaries *not* be included as beneficiaries of the QST during the joint lifetimes of the settlors.

Because of the legislators' use of the phrase "*both* settlors" (when referring to the single trust approach) versus the phrase "*each* of the settlors" (when referring to the separate share approach), it is not even certain whether, under the separate share approach, both spouses may be beneficiaries of each of the separate shares of the QST during the joint lifetimes of the settlors, or whether only the spouse having the power to revoke the separate share may be a beneficiary. Although it can be argued that the current statute already addresses the concerns raised in this and the preceding paragraph, i.e., by allowing for "any other trust terms that are not inconsistent with the provisions of this section," it can readily be argued that the addition of other individuals as beneficiaries *would* be inconsistent with the above specific provisions of the statute, and therefore not permitted.

What about after the first spouse dies? Who can be beneficiaries of a QST during the surviving settlor's lifetime? The statute provides that "*during the joint lives of the settlors* all property or interests in property transferred to, or held by, the trustee are either (a) [h]eld and administered in one trust for the benefit of both settlors . . . for the joint lives of the settlors *and for the survivor's life*; or (b) [h]eld and administered in two separate shares of one trust for the benefit of each of the settlors . . . *for that settlor's life*." (Emphasis supplied.) The confusion stems from the fact that the introductory language from the above quotation appears to apply only "during the joint lives of the settlors," whereas the balance of the quoted language is not so limited.

The statute also provides that, "[u]pon 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." (Emphasis supplied.) This sentence of the statute is not restricted to the separate version of the QST. Therefore, on the surface at least, this language can be read to infer that the single trust version of the QST need not continue for the surviving settlor after the first settlor dies. As described in the immediately preceding paragraph,

however, in the case of the single trust approach, the statute provides that trust must be held and administered in one trust for the benefit of both settlors . . . for the joint lives of the settlors *and for the survivor's life*. Although it can be argued that the addition of children or other beneficiaries *along with the survivor* should be permitted as “not inconsistent” with the provisions of the statute, caution would once again dictate that, at the present time at least, such additional beneficiaries not be included in the case of the single trust version of the QST. The statute is currently simply not clear enough on this point.

Use of Protective Language

One option to structuring the QST in the above-outlined conservative fashion would be to utilize the drafter's preferred trust language (which of course should at least be arguably permissible under the statute), but also include trust limitation or “protective” language which would render null and void any provision in the trust instrument which is not permitted under the statutory definition of the term “qualified spousal trust” - including as modified by any future changes to the law.

Note that the statute enabling the Missouri Asset Protection Trust (or MAP Trust)¹⁰ also contained, and continues to include, certain ambiguous language which would justify the insertion of similar trust limitation or protective language.¹¹ Although the Missouri legislature recently cleared up one of the ambiguities dealing with the retention of a limited power of appointment at death, other ambiguities remain, including, for example, the issues of whether the settlor may retain a *lifetime*

¹⁰RSMo §456.5-505.3.

¹¹See Blase, “The Missouri Asset Protection Trust,” 61 *Journal of the Missouri Bar* 72, 74-75 (March- April 2005).

limited power of appointment over the trust assets, and whether the settlor may serve as trustee of the trust.

Some attorneys would argue against the inclusion of such protective “purpose” language in MAP Trust agreements, for fear that doing so would more likely result in the application of the federal bankruptcy law 10-year waiting period for transfers to such trusts, since the federal bankruptcy law requires a showing of a designated purpose (i.e., “with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted,”) in order for the waiting period to apply. This same argument should not apply to a QST, however. Transfers of assets to a QST should not be regarded as having been made with a purpose to “hinder, delay or defraud” existing or future creditors because an identical level of creditor protection already existed when the property was owned by the settlors as tenants by the entirety immediately prior to the transfer. The 10-year waiting period applicable to transfers to a “self-settled trust or similar device”¹² accompanied by the requisite intent should therefore not apply to transfers to a QST, and the drafting attorney should therefore not be hesitant to include protective “purpose” language in the QST document.

Of course, unlike the irrevocable MAP Trust situation, the settlors of a QST can always amend the trust instrument in the future, if it turns out that one or more provisions of the trust instrument is not consistent with the statutory definition of a “qualified spousal trust.” Note, however that these changes would likely have little or no effect as against a creditor of either of the settlors

¹²11 U.S.C. §548(e).

individually, if the trust amendments are not made until after the creditor relationship has already been established.

Avoiding Unwanted Changes to Marital Rights

In order to avail oneself of the asset protection benefits of the new QST, it will obviously be necessary to transfer separately titled property into tenancy by the entirety form, first. Prior to taking this initial step, however, it is important to remember that transferring separately titled property (which may or may not constitute marital property, in whole or in part) into tenancy by entirety form may cause the creation of marital property where it did not previously exist for Missouri marital property purposes.¹³ In other words, although the new Missouri statute itself will not change the marital character of tenancy by the entirety property transferred to a QST, transferring nonmarital property into tenancy by the entirety form may, absent an agreement to the contrary.

Choosing Between Forms of QST

If a married couple desires the creditor protection benefits of the QST, which form should they choose - the one trust form or the two separate shares of one trust form? We have already addressed the reasons why, with the prevalence of transfer on death and pay on death forms of titling in Missouri, it would typically not be necessary or advisable to fund the one trust form of QST. Utilizing the two separate shares of one trust format should always be considered by married couples who need to avail themselves of the two shares in order to effectively double the size of their

¹³*Smith v. Smith*, 785 S.W.2d 764, 766 (Mo. App. E.D. 1990) (“Appellant, only four months after marrying respondent, had the deed to the home placed in both his and respondent's names. The execution of this deed represents evidence of appellant's donative intent to create marital property.”) *See also* Blase, “Validity of Antenuptial and Postnuptial Agreements in Missouri,” 41 *Journal of the Missouri Bar* 367 (September-October 1985).

combined federal estate tax exemption, but who wish to do so while minimizing their exposure to lawsuits.

The two-share form of QST also presents higher net worth clients with a unique asset protection advantage not previously available. Assuming a \$3.5 million federal estate tax exemption, higher net worth clients would typically fund each trust to the extent of \$3.5 million, but keep the balance of their assets titled in joint tenancy form, so as to minimize exposure to lawsuits while they are both alive. The problem with this approach to asset titling, however, was that, after the first spouse died, all but the deceased spouse assets (which presumably continue in a spendthrift protected trust for the benefit of the surviving spouse and (if desired) descendants) were then exposed to lawsuits in the hands of the surviving spouse. With the advent of the two-share QST, however, the couple may now transfer all of their assets to the two shares, thus insulating approximately half of the assets from lawsuits against the surviving spouse, i.e., when the deceased spouse's share of the QST continues in spendthrift trust form for the benefit of the surviving spouse and (if desired) descendants.

Couples with smaller estates should likewise not necessarily discount the use of the two-share form of QST on the theory that two shares are not needed in order to avoid estate tax. By utilizing the two-share approach rather than the single trust approach of QST, couples of all wealth sizes will now be able to minimize lawsuit exposure for the surviving spouse, i.e., by directing that the deceased spouse's separate share continue in a spendthrift trust for the benefit of the surviving spouse and (if desired) descendants.

Before retitling all of the couple's assets in two-share QST form, however, the attorney must warn the couple that, as alluded to above, if a lawsuit is brought in another jurisdiction during the joint lifetime of the married couple, even a jurisdiction which would have recognized the protections

of a tenancy by the entirety, it is possible that the new Missouri law would not protect assets which have been transferred to a QST established in Missouri.¹⁴

Planning with Existing MAP Trusts

If married couple clients have already established and funded one or more MAP Trusts in order to insulate assets from potential lawsuits, should they now consider terminating the existing MAP Trust arrangements, if possible (e.g., if the trust document grants an independent trustee the ability to terminate the trust), in favor of establishing a QST, in order to avoid the potential application of the 10-year bankruptcy waiting period applicable to MAP Trusts and/or to make their asset protection trust arrangements fully revocable? Although this step is definitely worthy of consideration, the planner should also recognize that the MAP Trust will insulate all trust assets against lawsuit after the expiration of the 10-year period (excluding, in some situations, transfers in fraud of existing creditors), even after the first spouse dies, whereas at best only limited asset protection will be available (e.g., in the form of a spendthrift trust for the deceased spouse's share of the two-share QST's assets) after the first spouse's death, utilizing the above-described two-share QST technique. Thus, depending upon the situation, it may be advisable to retain existing MAP Trusts in place, in order to retain this full asset protection after the expiration of the 10-year waiting period.

¹⁴See text accompanying footnote 9, *supra*.

How Will Creditors React to the New Law?

Because creditors will no longer be able to point to a spouse's revocable trust assets as a source for guaranteed repayment of a loan, etc., it can be expected that certain creditors may seek to force a husband or wife to transfer assets out of his or her QST or QST share, and into his or her own name, before making a loan secured or guaranteed by the spouse's separate assets; otherwise the creditor would risk dealing with property which may, under the new QST rules, be exempt from the claims of creditors of either spouse. The spouse may then be forced to resort to the Missouri Nonprobate Transfers Law in order to avoid probate on the assets used to secure or guarantee the creditor's claim.

The obvious alternative would be for creditors to have the trustee of the QST sign off on any loan, etc. documents. In many instances this will require a legal opinion that the trustee of the QST has the authority to enter into the transaction in question.

Potential Application of Step Transaction Doctrine

What if the clients currently own property separately (including in separate revocable trusts which do not qualify under the statute's requirement that the assets be held in separate "shares" of one trust), and wish to now avail themselves of the protections afforded by the new QST rules. So they decide to terminate their existing separate ownership arrangement, retitle the assets in tenancy by the entirety form, and then immediately transfer the tenancy by the entirety property to separate shares of a QST. Will this plan work, or will the arrangement be open to the claims of future creditors on "step transaction" grounds, i.e., that the transfers were in reality made of separately-owned properties, which is not protected under the statute? If a "waiting period" is required, how

long must this period be? A minimum of 90 days would seem advisable, but even waiting this long to transfer the new tenancy by the entirety property to the QST cannot be viewed as a guarantee of success. A six month to a year “waiting period” would appear to represent a better barrier to creditor attack.

Another potential application of the step transaction doctrine would arise under a scenario similar to this fact pattern: Spouse A owns property which would be considered the spouse’s nonmarital property for Missouri marital property purposes. Spouse A then transfers the property into tenancy by the entirety form with Spouse B, and subsequently the couple transfers the property to the two shares of the QST, while expressly agreeing in writing (as authorized by the new statute and by Chapter 451 of the Missouri Revised Statutes) each step of the way that the property transferred into tenancy by the entirety form, and ultimately to the two shares of the QST, will retain its character as nonmarital property of Spouse A in the event of a divorce.

In the situation described two paragraphs above, there was a significant change affecting the legal rights between the husband and wife, as a result of the *Smith* case discussed above, and as such the couple has likely placed themselves in a good position to argue against application of the step transaction doctrine. In the situation described in the immediately preceding paragraph, however, because the couple is in the same nonmarital property position both before and after the transfers, application of the step transaction doctrine would appear more likely. An obviously even worse set of facts would exist if the couple were to take the position that the new Missouri statute authorizes unequal divisions of the former tenancy by entirety property between the two shares of the QST, and transfer all or most of the subject property to the share of Spouse A.

Compliance with the statutory requirements of a QST is especially tricky for couples where either or both spouses is/are still working. If either or both spouses desire that their paycheck(s) retain tenancy by the entirety type creditor protection, they must be careful not to deposit the paycheck(s) directly into the QST, since the transferred funds would not be tenancy by the entirety assets. This is obviously a major trap in the new law, which will be difficult for most clients to avoid eventually triggering. In order to comply with the statutory requirements, the couple's respective paychecks must first be deposited into a joint account, and then retransferred from the joint account to the QST (preferably after first allowing the funds to remain in the joint account for at least 90 days), hoping that the step transaction doctrine discussed above will not apply to the arrangement. If everything is not done perfectly, commingling of protected funds and nonprotected funds will be the result, and the burden will no doubt be on the client to prove which trust assets should be protected under the new law.

Continued Need for Umbrella and Professional Liability Insurance

There are several important reasons why at least some level of umbrella and professional liability insurance should continue to be a vital part of every couple's estate plan, even if a QST is utilized and proper funding procedures are followed. These reasons include the following:

1. Not all property transferred in trust will have as its roots tenancy by the entirety property, e.g., where one spouse has significant assets deriving from his or her employment or entity ownership, or has inherited significant assets;

2. A significant proportion of married couple estate plans consist of second, etc. marriages, where there may be very little tenancy by the entirety property, and even less desire to create tenancy by the entirety property;
3. The new statute will have no effect on joint lawsuits against a married couple, including claims against the couple's unemancipated children; and
4. Creditors may still attempt to garnish the husband's or wife's wages, IRA and 401k payments, etc.

Of course, it is one thing to advise married couple clients to purchase significant umbrella liability insurance to supplement their QST plan; it is quite another to spend the clients' money on purchasing significant additional malpractice liability insurance, e.g., in the case of physicians and others in high risk professions, which makes the QST especially relevant to these individuals.

Suggested Statutory Modifications

Clearing Up Ambiguities in Statute

It is important that the Missouri legislature clear up all the statutory ambiguities and inconsistencies already outlined above.

The statute should clarify whether individuals or entities other than the couple or surviving spouse may be permissible beneficiaries under either format of the QST either (i) during the joint lifetime of the couple, or (ii) during the surviving spouse's lifetime. The legislature should also clarify whether both spouses may be beneficiaries under each of the separate shares when the separate share approach to the QST is utilized.

The legislature should clarify whether existing trusts already owning property which was previously tenancy by the entirety property (including as separate shares of a joint trust) can be amended to come under the statutory definition of “qualified spousal trust.” It is not clear under the current law whether the trust must qualify at the time the tenancy by the entirety property is transferred to the trust, or whether the trust agreement may be amended later, to qualify.

The law should clarify that a QST document may have a joint trust and separate trusts (i.e., not either/or), and/or any other trusts. Again, unless there is a reason to require mutual exclusivity, clients should be given the options in this area.

The statute should clearly provide that transfers of tenancy by the entirety property to the two-share version of the QST need not be made on an equal, or tenancy in common, basis. Requiring that transfers of tenancy by the entirety property be made equally to the two shares may result in adverse estate tax consequences at the surviving spouse’s death.

Finally, and perhaps most importantly, unless a transfer in fraud of existing creditors issue is identified as existing at the time of the transfer, separately-owned property which the clients choose to transfer into tenancy by the entirety form, followed by an immediate transfer of the same to a QST, should be exempt from the separate claims of creditors of either spouse, and the statute should clarify this point. This express statutory clarification will eliminate all of the potential step-transaction type arguments described above.

Expanding the Scope of the Statute

Consideration needs to be given to allowing separate trusts to be granted the same creditor protection status which separate shares of a single QST do under the new law. Unless there

are reasons underlying the current restrictive nature of the law, tenancy by the entirety property transferred to separate trusts should be treated the same as tenancy by the entirety property transferred to “separate shares” of a single QST, since obviously the separate “shares” described under the new law are actually separate trusts. This consideration is important for two reasons. First, it would seem unfair to force separate trusts holders to terminate their existing trust arrangements and establish a new trust with separate shares, in order to gain the same creditor protections joint trust holders with separate shares receive under the new law. Second, for many clients the concept of having two shares under one trust is actually a much more difficult concept to understand than simply establishing two trusts utilizing separate trust instruments.

At first blush it might also seem beneficial to solve all of the tracing problems outlined above by simply providing in the statute that all property transferred to a QST (i.e., not just property which was tenancy by the entirety property immediately prior to the transfer) will receive tenancy by the entirety type protection from creditors. The problem with this proposed solution, however, is that Congress might regard this step as overreaching by the state of Missouri on behalf of its debtors. While Congress has always allowed a bankruptcy exemption for tenancy by the entirety property, it has also indicated it will take action on behalf of creditors if any jurisdiction enacts legislation which Congress views is overly protective of the jurisdiction’s debtors. As recently as the year 2005, for example, Congress chose to place restrictions on state homestead exemptions for federal bankruptcy purposes, and through its sponsor, Senator Talent from Missouri, also passed the above-described 10-year bankruptcy waiting period on transfers to self-settled trusts or similar arrangements, including the MAP Trust. Past valuable experience would therefore appear to argue in favor of utilizing the

above-described drafting techniques to solve the tracing issues associated with the current statute, rather than attempt to change the statute itself.

Conclusion

No probate or trust legislation enacted by the state of Missouri over the past several decades has the potential for solving all of a married couple's major estate planning goals the way new RSMo Section 456.950 can. The QST not only allows a married couple to avoid probate at each spouse's death, but it also allows them to do so in a fashion which minimizes estate taxes and creditor claims, all without disturbing the couple's marital property rights in the transferred property. However, attorneys and their clients must be careful to structure the QST document and operate the trust or shares established thereunder in a fashion which will minimize the above-discussed issues associated with commingling and the inability to trace the source of the contributions to the QST. Ambiguities and uncertainties in the current statute need to be clarified by the Missouri legislature as soon as possible, and the statute should be amended to allow transfers of tenancy by the entirety property to separate trusts to be treated in a fashion identical to transfers to separate shares of a single QST.