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Missouri's New Qualified Spousal Trust

This past summer, the Missouri Legislature passed Senate Bill No. 59 that was signed by Governor Nixon and became law as of August 28, 2011. This legislation made several changes and additions to Missouri's trust code. Perhaps the most noteworthy of the additions is the new statute authorizing the use of a Qualified Spousal Trust ("QST"). By using a QST for their estate planning needs, married couples in Missouri now can take advantage of the probate avoidance and privacy aspects of a living trust while also maintaining the creditor protection aspect of owning property together as a tenancy by the entirety. In general, in order to qualify as a QST the trust must meet the following general requirements:

- 1) The Settlers (creators) must be husband and wife at the time the trust is created;
- 2) The terms of the trust must provide that during the lifetimes of both Settlers the property transferred to the trust is held by the Trustee either:
 - a. As one trust revocable by either Settlor or both together with each having the right to receive income or principal from the entire trust while both are alive and for the lifetime of the survivor, or
 - b. As two separate shares of one trust revocable by each Settlor with respect to his or her share without consent or participation from the other spouse with each spouse having the right to receive income or principal from his or her share during his or her lifetime.

This QST enabling statute then goes on to provide that property interests held by a husband and wife as a tenancy by the entirety which are then transferred into the QST will retain their protection as assets held as tenants by the entirety. The reason that this is so important is that, in general, creditors of one spouse may not attach the assets of a couple to extinguish the debt of the debtor spouse where the assets are held as tenants by the entirety. Prior to this statute, assets that were held as tenants by the entirety that were transferred into a trust lost this protection.

Using a QST to address a couple's estate planning needs in Missouri also addresses one of the more practical difficulties estate planners have encountered when using revocable trusts in the past. Typically, where a couple had a joint estate in excess of the existing estate tax exemption amount, estate planning attorneys would suggest that the couple set up two separate trusts one in each spouse's name and transfer roughly equivalent amounts to each trust such that upon the death of the first spouse his or her estate tax exemption amount could be used to lower the joint estate tax burden on the couple. Joint trusts in Missouri and other common law states were typically not advised for couples whose combined estate was over the estate tax exemption amount due to the fact that the estate tax exemption of the first spouse to die would be tainted and wasted by the control asserted by the surviving spouse in the joint trust after the death of the first spouse which would lead to the inclusion of the entire joint trust in the surviving spouse's estate upon his or her death. However, one difficulty which historically arose in implementing these separate trusts is that many couples found the splitting up of assets for estate planning purposes to be disquieting and the loss of the tenants by the entirety protection also made this strategy a bit risky especially if one spouse was in a profession where a lawsuit against that spouse was possible. However, now by setting up a QST, especially one that meets the requirements of §2(b) above, these concerns may no longer apply.

With respect to drafting QST's in Missouri there are basically two methods. For couples whose joint estate is under the estate tax exemption amount drafting a QST in accordance with Paragraph 2 (a) is probably adviseable whereas for couples that anticipate having a joint estate in excess of the estate tax exemption amount drafting a QST in accordance with Paragraph 2 (b) would be adviseable.

Married couples that have already set up separate revocable trusts may want to consider merging the two trusts together into a QST. In the event a married couple decides to go that route, care must be taken when titling assets. The new statute provides that the extension of the tenants by the entirety protection will only occur if an asset is owned together by a husband and wife and then transferred into the QST. Thus a two-step transfer process may be necessary. The first step would be a transfer of the asset out of one spouse's separate trust to the couple as husband and wife and then a second transfer from the married couple to the QST. That should preserve the tenants by the entirety protection in the QST.

This is intended to be a general description of the new Missouri QST and is not intended to constitute legal advice. If you have any questions about the use of a QST in your own planning please feel free to contact me.