ESTATE PLANING
AND
CREDITOR PROTECTION
UNDER MISSOURI LAW

Introduction

An increasingly important purpose of estate planning is to protect a client's assets from creditors to the greatest extent possible. When anyone acquires wealth, a primary goal must be to keep it. If that wealth is lost when it could have been preserved, the rest of the terms providing for the efficient and inexpensive disposition of that wealth are irrelevant. With individuals who face significant risk of lawsuits (physicians and other professionals, small business owners, landowners, etc.) the ability to protect income or assets from lawsuits is a vitally important consideration. This article addresses the legitimate ways this goal can be accomplished under recent changes in Missouri law.

Missouri law has always provided some important protections for an individual's property, and, with recent changes to the Missouri Uniform Trust Code and other trust-related statutes, Missouri now allows even greater flexibility for individuals who want to preserve their estates from certain creditor claims. Unfortunately, too much misinformation exists about what an individual can and cannot do to shield his property from those who would attempt to seize it. Without knowing both the asset protection strategies that work and those that do not, clients face a nearly impossible task in choosing the best estate plan to meet their needs. This article is designed to provide a clear summary of what you can and cannot do under Missouri law to protect your estate.

Tenants by the Entirety Property

One of the most important protections provided by Missouri law against creditor claims is the ability to own property as *tenants-by-the-entirety*. When a husband and wife own property jointly, they are presumed to own it as tenants-by-the-entirety.[1] This tenants-by-the-entirety property ownership is available only to spouses and not to any other parties who own property jointly.

If two individuals who are not married own property jointly with the right of the surviving owner to inherit the asset (for example, most jointly owned bank accounts), these non-spouses own their property as *joint tenants with right of survivorship*. If there is no right of survivorship, so that each co-owner's share would pass to his or her heirs upon death, then the individuals own the property as *tenants in common*. For estate planning and other reasons, it is vitally important to understand whether any bank accounts, land, or other assets that a client owns with a non-spouse are owned as joint tenants with right of survivorship or as tenants in common, but for creditor protection purposes, these two types of ownership are the same. If you own property jointly with a non-spouse, then your creditors can seize your interest in the property; each owner's interest in any asset is usually the same as that person's contribution to it unless they intended to make a gift to the other owner (e.g., if one of two owners contributed 80% of the money to a bank account or 80% of the purchase price of land, her interest in the account or the land would be 80% of its value).[2] Consequently, the important point to remember for creditor protection is that a person is afforded no protection by simply adding, say, their child as a co-owner to their bank account.

As between spouses, however, jointly owned property offers substantial creditor

1 *Nelson v. Hotchkiss*, 601 S.W.2d 14 (Mo. banc 1980)
2 *Cf. Maskill v. Cummins*, 397 S.W.3d. 27, 32-34 (Mo. Ct .App. 2013)

protection. Owning property as tenants-by-the-entirety means that each spouse has an indivisible interest in all of the property. So, while the spouses are married, one spouse cannot unilaterally sever this joint ownership because he has no unilateral right or ability to separate his interest from his spouse's.[3] It follows that a creditor of only one spouse cannot seize or recover from tenants-by-the-entirety property because that debtor-spouse has no indivisible interest in the property for the creditor to seize—the entire property is also owned by the spouse who is not a debtor.[4] Therefore, if an individual creditor has a claim against a wife only, any property she owns with her husband as tenants-by-the-entirety is protected from the creditor's claim; the creditor must have a claim against both the husband and the wife to seize the asset. This is an extremely important creditor protection that is easy to achieve by having spouses title assets jointly; alternatively, the Missouri Uniform Trust Code now allows spouses to transfer tenants-by-the-entirety property into a trust (called a qualified spousal trust) and have both the benefits of tenants-by-the-entirety ownership and the benefits of a trust.[5] There are limits to the protection offered by tenants-by-the-entirety property, however; it offers no protection for a single person and no protection to a husband and wife if a creditor has a claim against both of them.

Trusts

When clients desire increased protection from creditors, they often contemplate trusts. Missouri law now has several statutes that provide very powerful protections for a client's property held in trust for his benefit. Some of these protections had been invalidated by federal

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3 *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shackelford,* 591 S.W.2d 210 (Mo. Ct. App. 1979)
4 *Id*.
5 Section 456.950, RSMo.

courts in the past, but the latest changes to Missouri trust law have recently been upheld by the Federal Bankruptcy Court in Missouri.[6] While creditors and bankruptcy trustees will certainly continue to challenge the breadth of protections trusts may provide against creditor claims, it is clear that Missouri law now provides more creditor protection than ever before. It is essential, therefore, to understand what valuable protections a trust can afford against creditors, but it is equally important to understand the limitations on what these trusts can legitimately accomplish since much "general information" about trusts and creditors is misleading.

Typically, a standard revocable trust that clients use to avoid probate or facilitate planning for estate-tax purposes offers no more or less protection from creditors than outright ownership of assets. As mentioned above, Missouri law has now expressly made clear that spouses who enjoyed the creditor protection aspects of tenants-by-the-entirety property now can maintain that protection through the proper use of a qualified spousal trust. In this article, however, we are examining the additional protections a trust can afford an individual against creditor claims; in other words, we are examining not standard, revocable, or living trusts, but what are commonly referred to as *asset protection trusts*.

Through the recognition of an Asset Protection Trust, Missouri law now allows clients much greater flexibility in using trusts to shelter some assets from creditor claims.[7] When trusts are used properly, you can protect a large portion of you estate from almost any future creditor claims while also keeping some degree of control over those assets, being able to enjoy their use,

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6 *In re Reuter*, 499 B.R. 655 (Bankr. W.D. Mo. 2013).

7 Section 456.5-503, RSMo., provides certain classes of creditors that can never be barred from attaching from a trust Beneficiary's interest. The following creditors may obtain a court order attaching a Beneficiary's present or future interest in a trust: a Beneficiary's child, spouse, or former spouse who has a judgment against the Beneficiary for support or maintenance or a judgment creditor who has provided services for the protection of a Beneficiary's interest in the trust. Also the state or the federal government may attach a Beneficiary's trust interest to the extent a state or federal statute so provides.

and also avoiding the common risk of sheltering assets from your own creditors only to unwittingly subject them to the creditors of another. To do so, however, you must understand the basic rules of Asset Protection Trusts and then should consult with a qualified attorney in drafting and funding one. You can realize the additional benefits of an Asset Protection Trust by following some simple rules, though these can be more difficult to accomplish than to discuss and they are virtually worthless if a you attempt to accomplish more than the law allows or ignore even one of the essential elements of these estate planning tools.

Irrevocable

The key to protecting assets when you transfer them to a trust is that the trust must be irrevocable. This means that the trust cannot be revoked or cancelled after it is created. Missouri law now presumes that any trust is revocable (meaning it can be cancelled or revoked, amended in any way, etc.) unless the trust expressly states that it is "irrevocable."[8] Therefore, the most fundamental step creating in an Asset Protection Trust is to make it expressly irrevocable.[9]

If you create a revocable trust, then it affords no protection from creditors beyond what you would already have; if a trust can simply be revoked by the person who established it, then the law treats the property in the trust just as if it were not in a trust at all. So an Asset Protection Trust must be expressly *irrevocable*, and that also means that the person establishing the trust (called the *Settlor*) cannot retain either a power to revoke the trust or any other equivalent power (such as an unlimited power to amend the trust). Similarly, a Settlor cannot retain the authority simply to withdraw all of the property from the trust in that such an action is

8 Section 456.6-602, RSMo.

9 *See* §§ 456.5-502 (regarding validity of spendthrift trusts) and 456.5-505, RSMo. (regarding a creditor's right to attach a Settlor's interest in a revocable or irrevocable trust). *In re Rueter*, 499 B.R. 655 (Bankr. W.D. Mo. 2013).

effectively the same as revocation. The bottom line is that if you establish a trust that you can revoke, completely amend, or empty by withdrawing all the property from it, you have not put the property sufficiently out of reach from either yourself or your creditors. Thus, Asset Protection Trusts must be irrevocable, without granting anyone the power to revoke, the power to withdraw assets, or an unlimited power to amend.[10] If you can simply cancel what you have created, your creditors can too.

Funding the Trust

One extremely important restriction on Asset Protection Trusts that is, unfortunately, overlooked far too often is a restriction on what can be transferred to the trust. An individual cannot establish a valid Asset Protection Trust if the transfer of assets to it are a *transfer in fraud of creditors*.[11] In short, this means that you cannot transfer all of your property into an Asset Protection Trust. You can easily protect a family farm, business, or large portion of your estate, but you cannot simply put everything into an Asset Protection Trust because, by doing so, you have knowingly made yourself unable to pay any bills. You also cannot fund an Asset Protection Trust for the purpose of avoiding current creditor claims or reasonably foreseeable claims.[12] If you transfer enough property into a trust that what remains outside of it is insufficient to pay what you owe (or know you will soon owe), then the Asset Protection Trust can be completely set aside for a period of four years from the date of the transfer.[13]

This restriction means that you can protect certain assets that you have earned or

10 The Settlor and/or Beneficiaries of an irrevocable trust may, in limited circumstances, judicially modify the terms of or terminate the trust. *See* §§ 456.4A-411 and 456.4B-411. Also, in some circumstances, an irrevocable trust may be: (1) modified or terminated because of unanticipated circumstances or inability to administer the trust effectively (§ 456.4-412); (2) modified or terminated if the trust becomes uneconomical (§ 456.4-414); reformed to correct a mistake (§ 456.4-415); or modified to achieve the Settlor's tax objectives (§ 456.4.416).
11 *See Citizens Nat. Bank of Maryville v. Cook*, 857 S.W.2d 502 (Mo. Ct. App. 1993). *See also* § 456.5-505, RSMo.
12 *Id. See also* § 428.029, RSMo.
13 Section 428.049, RSMo.

inherited from a family member from any future creditor claims that might arise, but you cannot simply avoid existing claims by establishing a trust or leave so little outside the trust that you essentially own nothing. If it sounds too good to be true, it is. Asset Protection Trusts are extremely valuable tools for sheltering some assets from the possibility of future creditor claims, but they are not get-out-of-jail-free cards with respect to existing creditors.[14] Good estate planning, like any planning, requires you to look ahead.

Of course, if a third party creates a trust with their own assets to be used for another's benefit (e.g., a parent establishing a trust for a child), then the person who can benefit from that trust, called the *beneficiary*, does not need to worry about whether that transfer was in fraud of *his* creditors because it could not be in that these were not *his* assets.[15] Thus, having a parent or other third party create an Asset Protection Trust for your ultimate benefit can provide even greater creditor protection for you than using your own funds—assuming you are fortunate enough to know someone willing to do this for you. In the case of a third party using his or her assets to benefit you, those assets can be sheltered in the trust from almost any creditor claims and even allow you to obtain Medicaid or other government benefits that would not be available if the trust were funded with your own property. The focus of this article, however, is not on these third-party or special needs trusts that are established by one person for another, but instead on what you can do to protect assets you already own from creditors—and that means establishing an irrevocable trust, properly funding it with only some of your assets without attempting to avoid current or reasonably foreseeable creditor claims, and then following the rest of the steps outlined below.

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14 Moreover, as stated in note 9 above, certain creditors are allowed, by state law, to bypass a trust and attach a trust Beneficiary's interest. *See supra* note 9 and section 456.5-503, RSMo.

15 If that trust was created in fraud of the *parent's* creditors, however, it would be invalid.

The Trustee

When a Settlor establishes an irrevocable trust, he or she designates the person or entity, called the *trustee*, who manages the property in the trust for the Beneficiaries. With respect to Asset Protection Trusts, the most important question is whether the Settlor can serve as Trustee of his own Asset Protection Trust or whether, if he did serve as Trustee, his powers as Trustee could invalidate the trust or even be seized by the creditor and used to pay the creditor's claims. The easiest way to ensure that the Settlor's power over a trust cannot be seized by creditors is to designate a third party or a corporation to manage the trust. Simply put, if a Settlor is not the Trustee of an irrevocable Asset Protection Trust, there are no powers that person would retain as Trustee for any creditor to use or attempt to seize. (Missouri law is clear that any powers held by a Trustee over a trust he or she did not create cannot be seized.[16]) This is why the safest advice is for a Settlor to appoint an independent third party as Trustee of his or her Asset Protection Trust.

While the safest approach is for the Settlor never to serve as Trustee of an Asset Protection Trust, that may no longer be necessary. Previously, restrictions in federal law and, particularly, in bankruptcy court were such that if you named yourself as Trustee of your own Asset Protection Trust and subsequently were forced to declare bankruptcy, the Bankruptcy Court could essentially take over as Trustee.[17] Fortunately, however, Missouri law has changed so that you now may be able to serve Trustee of an Asset Protection Trust that you established without necessarily subjecting the assets in the trust to creditor claims, and federal courts have

16 Section 456.5-507, RSMo.; *Cf. In re Rine & Rine Auctioneers, Inc.*, 74 F.3d 854 (8th Cir. 1996) (property held by debtor as an agent not includable in bankruptcy estate).

17 *In re Markmueller*, 51 F.3d 775 (8th Cir. 1995) and *In re Edelmann*, 308 B.R. 395 (Bankr. E.D. Mo. 2004).

recently recognized this change (though the law is far from settled in this regard).[18]

Consequently, it is still the safest approach to name a third party as the sole Trustee of your Asset Protection Trust, but it may not be necessary in all cases. A Settlor can now consider establishing an Asset Protection Trust and name himself *as one of the Trustees*. By doing so, the Settlor retains very valuable rights to participate in the management of the trust, but the Settlor must be sure to name at least one other party as an independent Co-Trustee (meaning both Trustees would have to agree to make any distributions or take other actions) so that the Settlor's rights *as the Trustee* could not later be seized by the bankruptcy court or used as evidence that the Settlor has retained so much control over the trust that it fails entirely to protect assets from creditor claims.[19] It is also advisable that the co-trustee be a corporate trust department or some other individual that creditors could not argue was under the Settlor's control. With respect to Trustees, then, the bottom line is that a third party as the sole Trustee is advisable, but a Settlor who wishes to retain authority to partcipate in management of the trust may be able to serve as one of the Trustees of his or her Asset Protection Trust if he or she names an independent co-trustee.

Beneficiaries

If an individual can establish an irrevocable Asset Protection Trust as the Settlor and can serve as one of the Trustees, then the next question that must be answered is who are the Beneficiaries of the trust and what rights do they have. By definition, a trust has a Settlor, a Trustee, and, most importantly, a Beneficiary or Beneficiaries. If you want to protect your

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18 *See In re Reuter*, 499 B.R. 655 (Bankr. W.D. Mo. 2013).
19 *See In re Reuter*, 499 B.R. 655, 670-671 (Bankr. W.D. Mo. 2013) (court held that debtor's powers as co-trustee were part could be exercised by bankruptcy trustee, subject to the limitations on co-trustees in the trust docuemtn); *In re Markmueller*, 51 F.3d 775, 776-777 (8th Cir. 1995) (court held that debtor, as sole trustee and beneficiary exercised impermissible dominion and control over trust assets such that trust was includable in debtor's bankruptcy estate)

assets through an Asset Protection Trust and still have the abililty to enjoy those assets, it is obviously necessary that you, as the Settlor, are also a Beneficiary; that is the fundamental difference between simply giving your assets away to children or other people and keeping the assets for your own benefit, but with creditor protection. Several restrictions on the Beneficiary's rights, however, must be imposed by the trust document or the Asset Protection Trust will fail.

The most important restriction is that the Beneficiary not have the legal right to receive a certain amount of property or distributions from the trust. If a Beneficiary has the right to withdraw money from the trust or to compel certain mandatory distributions, that right is subject to seizure and use by creditors.[20] Thus, the trust Beneficiary must have no right to withdraw the property and no right to any mandatory distributions; the Trustee should be given *discretion* to pay or distribute assets as the Trustee determines (and, as explained above, the Beneficiary should not be the sole Trustee to exercise that discretion).[21]

When a Beneficiary has only the ability to receive property as the Trustee determines in the Trustee's discretion, then, under Missouri law, creditors cannot compel distribution of any trust assets to the Beneficiary (which they would then claim) and a Beneficiary's right to a trust subject to this discretionary standard cannot be seized.[22] In order to make this discretionary power work, however, a Settlor should not be the sole Beneficiary. If a Settlor establishes a trust and is the only Beneficiary of it, a significant risk exists that creditors could succesfully claim that the trust is essentially a sham because it is not sufficiently different than a person hiring an asset manager for herself.

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20 *See* section 456.5-501, RSMo.
21 *See* section 456.5-504 and section 456.5-505, RSMo.
22 *Id*.

A Settlor, therefore, should be one of only a class of Beneficiaries with, for example, the Settlor's spouse or the Settlor's children. This normally is not a problem because individuals often consider making distributions at some point to, for example, their children. If a husband establishes an irrevocable Asset Protection Trust, transfers some of his property to it, and names himself and a third party as Trustees, then he can name himself, his spouse, and his children as the class of potential Beneficiaries with the Trustees having discretion over who receives money. This design is not drastically different than how an individual may want to manage his property, but the proper use of a trust and the forfeiture of just enough control could also afford very valuable protection from future creditor claims. The bottom line with respect to Beneficiaries of an Asset Protection Trust, then, is that a Settlor of an Asset Protection Trust can be a Beneficiary (and almost always will be), but should be only one of several and none should have the right to withdraw assets, receive mandatory distributions, or have any right to a specific portion of the trust; instead, any Beneficiary's interest should be subject to the Trustee's discretion.

Spendthrift Clause

Every Asset Protection Trust should also have a *spendthrift clause*; in fact, a spendthrift clause is arguably the defining provision of an Asset Protection Trust.[23] A spendthrift clause is a provision that states a creditor of a Beneficiary cannot seize the Beneficiary's interest in the trust.[24] A spendthrift clause can also prohibit (and it is usually advisable to prohibit) any Beneficiary from attempting to borrow against his trust interest or use his interest in the trust as collateral. These spendthrift clauses are valid under Missouri law even for an individual who has established the trust and continues to be a Beneficiary; in fact, this was the recent change to

23 *See, e.g.*, *Gentemann v. Dyer*, 140 S.W.2d 75, 78 (Mo. Ct. App. 1940).
24 Section 456.5-502, RSMo.

Missouri law that overturned federal precedent that did not recognize the validity of these clauses.[25] If a client desires a trust to protect against creditor claims, the trust must contain a spendthrift clause; it is that simple.

One must note, however, note that spendthrift clauses are not effective against certain creditors: (1) a Beneficiary's child, spouse, or former spouse who has a judgment against the Beneficiary for support or maintenance; (2) a judgment creditor who has provided services for the protection of a Beneficiary's interest in the trust; and (3) the state or federal government, to the extent a state or federal statute so provides. These individuals and entities may attach a Beneficiary's trust interest notwithstanding a spendthrift clause.[26] Consequently, every Asset Protection Trust must have a spendthrift clause, but it is also important to understand the limitations of these clauses and that all the other steps discussed in this article are necessary to make that restriction against creditor claims valid.

Summary of Asset Protection Trust Requirements

A properly drafted Asset Protection Trust should be expressly irrevocable and be funded properly with only a portion of the client's assets. The Settlor may be one of the Beneficiaries and even one of the Trustees, though the more roles you play or more power you reserve creates a risk that the trust will be deemed a sham transaction—so you should never to be the sole Trustee or sole beneficiary of a trust you create. The trust should make any distributions subject to the Trustee's discretion, with no right to any certain distributions or shares, and the trust should also contain a spendthrift clause. These two provisions give separate protections to

25 Section 456.5-505, RSMo., as explained in *In re Reuter*, 499 B.R. 655 (Bankr. W.D. Mo. 2013).
26 Section 456.5-503, RSMo. It should be noted, however, that the protections afforded by a discretionary distribution standard is separate from that arising from the spendthrift provision, and these protections are not subject to the exceptions noted in 456.5-503, RSMo (presumably because the beneficiary's interest in the trust is so remote because the Trustee can exercise discretion to give him nothing).

the client against creditors, and, with these two provisions (along with all the other provisions stated above), you are able to get the most protection from the trust that is allowed by law. By taking these steps, you can establish an estate planning vehicle that avoids probate, minimizes the risk of estate tax, and also protects certain assets from future creditor claims—without ceding too much authority over the management of these assets and the group of people who will ultimately benefit from them. To accomplish this, however, you must recognize the need not to take shortcuts in establishing the required elements of an Asset Protection Trust, and you also need to recognize what an Asset Protection Trust canot accomplish.

Limits on Creditor Protection Trusts:

Long Term Care and Medicaid

Equally important to understanding what an Asset Protection Trust can do is understanding what it cannot do. When examining trusts you create with your own assets, which is the focus of this article, rather than trusts that third parties might create for you, the trusts have limits on the scope of creditor protections (for example, voiding any trust created by a *transfer in fraud of creditors* and exempting some creditors from the effect of the spendthrift clause). A related and even more pervasive limitation, which is often gravely misunderstood, is the limitation of Asset Protection Trusts as applied to long-term care.

Far too many people have heard far too much misinformation suggesting that an Asset Protection Trust can be created and used to protect most of their assets, all while having Medicaid pay for their nursing home or other long-term care; this is not the case. The threat of spending (or losing, depending on your perspective) your assets due to the costs of long-term care is so great that people too frequently listen to bad advice in attempting to solve a problem they do not truly understand. The root of the problem is as simple as it is obvious: as people age, they usually require increased amounts of health care, which often means nursing home care, and that intensive level of care that can continue for a long (and unknown) duration is extremely expensive. While the root of the problem of affording long-term care may be obvious, many clients have a fundamental misunderstanding of the creditor-protection issues associated with it. This problem is then compounded by individuals who will suggest that a trust can somehow easily solve the problem of the nursing home "taking" your assets when that is not the case.

The starting point to correctly understand the limits of Asset Protection Trusts as applied to long-term care is to understand exactly what the creditor issues are with respect to long term care planning and nursing homes. If you were to enter a nursing home and somehow manage to receive care while not paying for it and the nursing home only later sought to recover payment for its services, you might have a traditional creditor issue to address. This, of course, is almost never the case as nursing homes do not *first* provide care and *then* seek to recover payment long after the fact. Instead, the nursing home functions just like the grocery store: providing services or goods only upon contemporaneous payment for them. Therefore, long-term care presents a creditor-protection issue that is different than the ones addressed above (protecting assets from a future, unknown tort claim or unforeseeable default on a debt). The question is not how to keep a nursing home from "taking" your assets (or, stated differently, how to protect assets from the nursing home to which a bill is owed) because the nursing home will not allow you to incur a significant bill in the first place any more than a grocery store would provide you food and only later seek payment.

When people talk about protecting their assets from a nursing home, they are (knowingly or not) really talking about how they can get the nursing home to charge someone else for their care. This someone else, in the vast majority of cases, is Medicaid. Put another way, if you go into a nursing home, someone must agree to pay for it. If you allege (rightly or wrongly) that you do not have the funds to pay for the nursing home, then you either will not receive any nursing home care at all or will receive nursing home care because Medicaid is paying the cost.

When you understand that you would be attempting to have Medicaid pay for your care in a nursing home while you continue to own assets in a trust, it is easier to understand how the long-term care creditor issues are different than those related to protecting assets from future tort claims or other unforeseeable bills. Since everyone should know the government writes its own rules about what bills it will pay, it is no longer hard to understand why setting up a trust and transferring your assets to it is not a magic solution that enables you to keep the control and benefit of your assets while the government pays for your nursing home bill. If it were that easy, then everyone would do it. It is not that easy because the federal government has decided that people cannot keep ownership of non-exempt assets (which is basically anything other than a house, household contents, a car, and a prepaid funeral plan) and qualify for government-paid nursing home care.

Consequently, the law regarding qualifying for Medicaid is clear, even though it is often misunderstood. A person cannot take all of his or her assets, put them into their trust, and then qualify for Medicaid because the federal government has directly prohibited these transactions; allowing such actions would basically result in the United States paying 100% of the nursing home bills in the country. Medicaid requires individuals to disclose any trust in which they could receive a benefit, and if that trust has assets that were once theirs, they will not qualify for Medicaid.[27]

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27 *Masterson v. Dep't of Soc. Servs., Div. of Family Servs.*, 969 S.W.2d 746 (Mo. 1998)

Consequently, the only way to plan to qualify for Medicaid is to give your assets away. If you give away your property to another person more than five years before applying for Medicaid, then you may qualify for Medicaid payments of long-term care or other healthcare bills.[28] What you are really doing, however, is voluntarily impoverishing yourself by giving your assets away, with the hope you will not need them while you wait to qualify for Medicaid. If you hope that recipients of these gifts—normally children—will voluntarily use what was your money for your benefit by paying for things other than long-term care (once you qualify for Medicaid), you are not only putting an extraordinary amount of trust in your children, which can sometimes be abused, but you have now simply swapped which person's creditors can seize the assets. Even if your children comply with your legally-unenforceable wishes, your children's creditors may not. This is rarely the best option as you are not really protecting assets as much as choosing who takes them away. You might be ensuring that your children get your property since it will not be spent for long-term care, but the waiting-period, the risk that the children (voluntarily or not) will lose the assets, and the consequences of voluntary impoverishment make this a questionable asset protection strategy.

What is worse, however, is the unfortunate situation where the client thinks he can both qualify for Medicaid *and* keep control over and the benefit from his property through a trust. At least those who give away their property actually accomplish what they set out to do—not own anything so that Medicaid will pay for their care. People who think they can establish trusts of some type to have their cake and eat it to end up with neither.[29]

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28 Section 6011 of the Deficit Reduction Act of 2005, accessed at http://www.gpo.gov/fdsys/pkg/BILLS-109s1932enr/pdf/BILLS-109s1932enr.pdf.

29 *See* Matthew Wilson, *The Future of Medicaid Planning in Missouri*, 62 Journal of the Missouri Bar 62 (2006). Mr. Wilson discusses the ethical implications of Medicaid planning, concluding that use of Medicaid planning devices do not traverse any moral or ethical boundaries. The authors offer no opinion as to the morality of Medicaid

In sum, clients should consult with a qualified attorney and carefully consider any and all options for financing long term care because many people who attempt to protect assets from nursing homes end up making disastrous decisions whereby they no longer own the property they worked hard to acquire, but they have also failed even to qualify for Medicaid after paying thousands of dollars for a trust that does not work as advertised.[30] What is often preferable is to finance possible long-term care costs through an insurance policy or other investments. If that is not possible, then clients should know they can continue to own their house, their car, all household effects and personal property, and other exempt assets and still receive Medicaid (with Medicaid simply reserving the right to recover the costs it paid from these assets after death of the client or the client's spouse). So, you should consider converting monies and other non-exempt assets into these exempt properties before considering giving them away and certainly before establishing a trust that will not work.[31] These exempt properties can also be structured so they pass outside of probate upon your death, which actually reduces the chances that Medicaid will later seek to recover from them.

Conclusion

Missouri provides many extremely valuable protections against creditor claims that can be utilized in estate planning if properly understood. Married couples already have significant

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planning techniques only that any decision to transfer assets to try to qualify for Medicaid must be done after careful thought and consideration.

30 For the consequences to the *transferee* of transferring assets to another and using a trust to try to qualify for Medicaid, see *In re Woodworth*, 2013 WL 753509 (Bk.E.D.Va., Feb.6, 2013) and an article by Jay Adkisson "Asset Planning In Anticipation of Medicaid Fails In Woodworth Case" at http://onforb.es/XDzw6R.

31 If a third party creates a trust for the client's benefit using the third party's own property, then these restrictions do not apply and the client may be able to have an interest the trust and still qualify for Medicaid. *See* Micah Huff and Martha Brown, Special-Needs Trusts: Drafting and Administration Issues, found at http://www.mobar.org/uploadedFiles/Home/Member_Services/Solo_and_Small_Firm/Special-Needs%20Trusts%20Drafting%20and%20Administration%20Issues.pdf. These special needs trusts, however, are inapplicable for people seeking to protect their own assets.

creditor protections for joinly owned property if a creditor has a claim only against one of the spouses. To achieve greater creditor protection, client’s should consider an Asset Protection Trust as these tools have grown more powerful and flexible in the last few years, but many specific and occassionally complex requirements exist to create a trust that will survive a creditor claim. People must also recognize that there are still some situations in which Asset Protection Trusts do not work; an irrevocable trust can be disastrous if it does not accomplish its goals because it cannot be changed. There is no substitute for having an experienced, qualified estate planning attorney draft an Asset Protection Trust, but there is also no substitute for being informed as to what can and cannot be delivered.