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SELF-SETTLED ASSET PROTECTION TRUSTS FOR MARRIED COUPLES IN MARYLAND

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Even though Maryland does not have a general domestic asset protection trust statute, it allows married couples to engage in asset protection through a tenants by the entirety immunity trust and/or an irrevocable inter vivos QTIP trust. The creditor protection afforded to these two trusts is provided by statute. This paper explains the statutory requirements that must be satisfied in order to claim the safe harbor and the creditors who may defeat that protection.

TENANTS BY THE ENITRETY IMMUNITY TRUST

Maryland, like several other states[1], permits a married couple to create trusts that enjoy creditor protection similar to that of a tenancy by the entirety.[2] So long as the couple held the property as tenants by the entirety before transferring it to a trustee, remains married while the trustee holds the property and are both beneficiaries of the trust, the property will enjoy the same immunity from the spouses' separate creditors as though the couple held the property free of trust as tenants by the entirety.[3] Thus, the statute allows a couple to take advantage of the asset protection qualities of a tenancy by the entirety while also being able to hold their assets in revocable trusts.

Unlike a true tenancy by the entirety, however, the statute does not require the deceased

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[1] Virginia, *see* VA. CODE ANN. § 55-20.2; Tennessee, *see* TENN. CODE ANN. § 35-15-510; Missouri, *see* MO. CODE ANN. § 456.950; Wyoming, *see* WYO. STAT. ANN. § 4-10-402.

[2] MD. CODE ANN. EST. & TRUSTS § 14.5-511.

[3] *Id.*

spouse's share of the property to pass automatically to the surviving spouse.[4] The statute abrogates the surviving spouse's inheritance rights because while in trust, the couple does not hold the property in an entirety tenancy as defined by the historical and technical requirements of the term.[5] As a result, a couple is able to protect the trust property from their separate creditors during their lifetimes and direct the trust assets under the provisions of the revocable trust upon the first death to avoid the claims of the surviving spouse's separate creditors.

Like other domestic asset protection devices, Maryland's tenants by the entirety trust has its shortcomings, pitfalls, and accompanying ambiguous law. Nevertheless, Maryland may have created a new type of domestic asset protection trust—one with powerful and expansive asset protection possibilities.

A. Historical Developments of the Tenancy by the Entirety

Blackstone penned the classic definition of a tenancy by the entirety in his 18th century commentary when he wrote: "if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common: for the husband and wife are considered one person in law, they cannot take the estate by moieties, but both are seized of the entirety, per tout et non per my; the consequences of which is, that neither the husband nor the wife can dispose of the any part without the assent of the other, but the whole must remain to the survivor."[6] When Blackstone wrote his commentaries, the common law allowed the husband to rule the tenancy.[7] He, and he alone, had sweeping powers over an entirety property.[8] During the

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[4] This is based on the literal reading of the statute and Maryland case law.
[5] MD. CODE ANN. EST. & TRUSTS §14.5-511(g).
[6] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 182 (9th ed. 1783), quoted in Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 437 (Winter 2001).
[7] *See* Oval A. Phipps, *Tenancy by Entireties*, 25 TEMP. L. Q. 24, 24 (1951).
[8] *Id.* at 25.

marriage, he could occupy the property and consume, manage, control and dispose of the income.[9] He alone could use the property as the basis for obtaining credit and he represented the property in litigation.[10] The wife's interests in the property, in contrast, were subject to the husband's decisions.[11]

By the 1850s, male dominance of the entirety tenancy started to diminish in America as various states enacted Married Women's Property Acts.[12] These acts sought to bring the property rights of both spouses into parity.[13] In response to these legislative changes, courts dealt with the common law of tenancy by the entirety in three ways.[14] First, a handful of jurisdictions abolished the tenancy altogether.[15] Second, most jurisdictions reinterpreted the tenancy to mean that the spouses property rights were equal.[16] Lastly, a few jurisdictions denied that the new acts had any impact on the old common law form of the tenancy.[17] Eventually, however, these states fell into line with the majority of states that reinterpreted the tenancy to reflect the equal property rights of married women.[18]

As time progressed, the states that reworked the common law form of the tenancy became either a full bar jurisdiction or a modified bar jurisdiction.[19] The states that became full bar jurisdictions prohibited one spouse from controlling or alienating the tenancy property by unilateral action.[20] Thus, these states require both spouses to act together in order to alienate or

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Fred Franke, *Asset Protection and Tenancy by the Entirety*, 34 ACTEC J. 210, 211 (2009).
[13] *Id.*
[14] *See Id.*
[15] Phipps, *supra* note 7, at 28.
[16] Franke, *supra* note 12.
[17] *Id.*
[18] *Id.*
[19] *Id.* at 212.
[20] *Id.*

encumber an entirety property.[21] In contrast, states that became modified bar jurisdictions gave each spouse separate and distinct rights to control or alienate specific attributes of an entirety property.[22] As a result, these states grant a spouse's separate creditors limited rights to attach entirety property despite the other spouse's ownership interests in the property.[23]

Maryland is a full bar jurisdiction. Therefore, in order to alienate or encumber entirety property, whether the property is real estate, tangible personal property, or intangible personal property, both spouses must act unanimously.[24] This means that a spouse's separate judgment creditors cannot destroy the tenancy to recover a claim.[25] Except in the case of absolute divorce, a couple can only terminate a tenancy by the entirety through joint action of both individuals and a conveyance to a third person or entity.[26]

The asset protection benefit of Maryland's tenancy by the entirety is evidenced in case law. In *Watterson v. Edgerly*, 40 Md. App. 230 (1979), a creditor filed a judgment lien against the husband. The wife was not involved in the original debt or the judgment lien. After the judgment lien was filed, the husband transferred his interest in the real property, which was held as tenants by the entirety, to his wife. Sixty-one days after the transfer, the wife died, whereupon the property was placed in a testamentary trust for the benefit of the husband. The Maryland Court of Special Appeals upheld the conveyance when the creditor claimed the transfer was fraudulent. The court said "[w]hen, as here, a husband and wife hold title as tenants by the entirety, the judgment creditor of the husband or of the wife has no lien against the property held as entireties, and has no standing to complain of a conveyance which prevents the property from

[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 225.
[25] *Beall v. Beall*, 291 Md. 224, 234 (1981) (citations omitted); *see also Carroll v. Manor Care*, 237 B.R. 872, 874 (D. Md. 1999) (stating that "property held by the entireties is watertight as to claims against one spouse only").
[26] *Beall*, 291 Md. at 234.

falling into [the creditor's] grasp."[27]

This holding was not an aberration. In *Spitz v. Williams*, 69 Md. App. 694 (1987), the very same issue raised by *Watterson* came before the Court of Special Appeals again. The appellant sought to determine if a husband could convey his entirety property interest to his wife, so as to shield the property from the husband's judgment creditors.[28] The court succinctly replied, "[o]ur answer remains the same; yes."[29]

Based on the holdings of these two cases, it follows that Maryland would also protect transfers of entirety property like the one found in *Sawada v. Endo*, 561 P.2d 1291 (Haw. 1977). In *Sawada*, a judgment was rendered against a husband for an automobile tort. After the judgment was issued, the husband and wife conveyed their entirety property to their children. The Supreme Court of Hawaii ruled that the creditors could not avoid the conveyance because the creditors had no attachable interest in the property due to the entirety tenancy.[30]

As these cases illustrate, the asset protection power of a tenancy by the entirety is robust. It permits a couple to transfer the entirety property in the face of a spouse's judgment creditors. The couple can transfer the entirety property to the non-debtor spouse or to a third party, and courts will respect the transfer. Furthermore, the property is protected even when the non-debtor spouse, after receiving the tenancy property in fee simple from the debtor-spouse, leaves the property in trust for the benefit of the debtor-spouse.

B. Tenancy by the Entirety Trust: Joint Lifetime of Settlors

The statute granting tenancy by the entirety immunity to trusts is found in Maryland

[27] *Watterson v. Edgerly*, 40 Md. App. 230, 238 (1979).
[28] *Spitz v. Williams*, 69 Md. App. 694, 694 (1987).
[29] *Id.*
[30] *Sawada v. Endo*, 561 P.2d 1291, 1295-97 (Haw. 1977).

Estates and Trusts Article § 14.5-511. It states that the property of a husband and wife "that was held . . . as tenants by the entirety and subsequently conveyed to the trustee or trustees of one or more trusts" enjoys the "same immunity" from the couple's separate creditors as would have existed had the husband and wife continued to hold the property as tenants by the entirety.[31] In order to secure this creditor immunity, however, four elements must be met:

> 1. The husband and wife must remain married after the property is transfer to trust;[32]
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> 2. The property must be held in trust by the trustee or trustees;[33]
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> 3. Both the husband and wife must be beneficiaries of the trust or trusts;[34] and
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> 4. The trust instrument, deed, or other instrument of conveyance states that the transfer of property took place pursuant to the statute.[35]

The statute has several other notable provisions as well. First, the statute permits the proceeds obtained from the trust principal to enjoy the same entirety-like immunity so long as the trustee holds the proceeds.[36] Second, the statute stipulates that after a couple has made a conveyance pursuant to the statute, "the property transferred [is] no longer . . . held by the husband and wife as tenants by the entirety."[37] Thus, the statute states that the trust property only enjoys creditor immunity and that it is not subject to survivorship rights as is typical in a true tenancy by the entirety. Lastly, the statute states that it "may not be construed to affect existing

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[31] MD. CODE ANN. EST. & TRUSTS § 14.5-511(b).
[32] *Id.* § 14.5-511(b)(1).
[33] *Id.* § 14.5-511(b)(2).
[34] *Id.* § 14.5-511(b)(3).
[35] *Id.* § 14.5-511(b)(4).
[36] *Id.* § 14.5-511(b), (b)(2) and (b)(4).
[37] *Id.* § 14.5-511(g).

state law with respect to tenancy by the entirety."[38] This last provision seems to further strengthen the notion that the creditor immunity granted to trust property under the statute is a concept separate and apart from the common law construction of a tenancy by the entirety.

i. Limitations of Creditor Immunity: Federal Bankruptcy Law

Under federal bankruptcy law, all property owned by a debtor is pulled into the bankruptcy estate[39] unless it falls under an exemption pursuant to 11 U.S.C. § 522(b).[40] The Maryland General Assembly opted out of the federal exemptions and requires debtors to use Maryland's exemptions.[41] When Maryland adopted the entirety trust statute, the General Assembly modified the state bankruptcy exemptions so that property held in an entirety trust is exempt from bankruptcy proceedings.[42] It is important to remember, however, that this exemption only applies when one spouse files for bankruptcy individually, not when spouses declare bankruptcy jointly.[43]

Despite Maryland's exemptions, the trust res may still be included in the bankruptcy estate under other provisions of the federal bankruptcy code. Under 11 U.S.C. § 548(a)(1), a trustee may avoid any transfer of an interest in property made by the debtor so long as the transfer occurred within two years of the date of the filing of a bankruptcy petition.[44] Of course, transfers avoided by the bankruptcy trustee under this section are done either because the debtor

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[38] *Id.* § 14.5-511(h).
[39] 11 U.S.C. § 541 (2012).
[40] *Id.* § 522(b)(1).
[41] MD. CODE ANN. CTS. & JUD. PROC. § 11-504(g).
[42] *Id.* § 11-504(b)(8) and (9).
[43] *Id.*; *but see Bunker v. Peyton*, 312 F.3d 145, 152 (4th Cir. 2002) where both husband and wife filed separate bankruptcy petitions which were then consolidated into one proceeding. Because they did not have joint debts, the entirety property was exempt from the proceeding even though the husband and wife owed individual debts to the same creditor.
[44] 11 U.S.C. § 548(a)(1). In addition, a non-fraudulent transfer may be set aside as a "preference" if the transfer occurred on or within 90 days of the filing of the petition. 11 U.S.C. § 547(b).

wanted to "hinder, delay or defraud" a creditor[45] or the debtor received less than fair market value for the property and became insolvent or unable to meet his or her obligations after the transfer.[46] Thus, if an individual transfers property held individually to his or her spouse in order to create an entirety tenancy, and the couple then transfers the property to an entirety trust, and the transfer leaves the individual insolvent, the transfer may be avoided and brought into the individual's bankruptcy estate if it falls within the two-year window. Furthermore, when property is brought back into a bankruptcy estate, it does not come back as a tenant by the entirety interest; rather, it comes back as tenant in common interest and therefore attachable by the individual creditors of the spouses.[47]

Section 548(e)(1) of the federal bankruptcy code is similar. The provision allows a bankruptcy trustee to avoid a transfer of debtor property to a self-settled trust or similar device within 10 years of filing for bankruptcy.[48] It is unclear if a tenants by the entirety trust is self-settled.[49] However, it is highly probable that an entirety trust would be classified as a "similar device." The term is certainly broad and meant to pull a variety of asset protection vehicles into the statute's control.[50]

To avoid transfers under these two provisions, a bankruptcy trustee typically must establish that the debtor acted with actual intent to defraud.[51] "Because the element is often difficult to prove with direct evidence, courts will look to circumstantial badges of fraud to

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[45] 11 U.S.C. § 548(a)(1)(A).
[46] 11 U.S.C. § 548(a)(1)(B)(i) and (ii)(I).
[47] Dana Yankowitz, *I Could Have Exempted it Anyway: Can a Trustee Avoid a Debtor's Pre-petition Transfer of Exempt Property?*, 23 EMORY BANKR. DEV. J. 217 (2006); *see also* Fred Franke, *Asset Protection and Tenancy by the Entirety*, 34 ACTEC J. 209, 214 n. 29 (2009).
[48] 11 U.S.C. § 548(e)(1).
[49] *Compare Sec. Pac. Bank of Wash. v. Chang*, 80 F.3d 1412, 1417 (1996) *and In re Markmueller*, 51 F.3d 755, 776 n. 3 (8th Cir. 1995) *with Bolton Roofing Co. v. Hedrick*, 701 S.W.2d 183 (Mo. App. 1985).
[50] *In re Mortensen*, 2011 WL 5025249, *6-7 (May 26, 2011)(citing 5 COLLIER ON BANKRUPTCY ¶ 548.10[1](citing H.R. Rep. No. 109-31. 109th Cong., 1st Sess. 449 (2005)(statement of Rep. Cannon))).
[51] *In re Mortensen*, 2011 WL 5025249, *7 (May 26, 2011)(citing 5 COLLIER ON BANKRUPTCY ¶ 548.10[3][d]).

determine fraudulent intent."[52] When using an entirety trust, fraudulent intent may be easier to detect if an individual takes steps to protect an individually held asset because the individual must make two transfers to protect the asset—one to the spouse to create the entirety tenancy and one to the entirety trust.[53] However, if the couple already owns the asset as tenants by the entirety and then transfers the asset to an entirety trust, actual intent to defraud may be much more difficult for the bankruptcy trustee to establish.

ii. Limitations of Creditor Immunity: Federal Tax Liens

In *Drye v. United States*,[54] a unanimous U.S. Supreme Court held that federal tax liens may attach to an inheritance regardless of a disclaimer filed by the heir. The *Drye* analysis became the basis for *United States v. Craft*,[55] where the Court breached an entirety interest to satisfy a federal tax lien levied against only one of the spouses. Because the Maryland entirety trust enjoys the same immunity as a true tenancy by the entirety, it is likely that the corpus will be subject to federal tax liens as well.

Drye resolved the question of whether disclaiming an inheritance under state law prevents federal tax liens from attaching to the disclaimed interest. In *Drye*, an insolvent heir validly disclaimed his inheritance under Arkansas state law.[56] The U.S. Government argued that, because a lien is imposed on any and all "property" or "rights to property" belonging to the taxpayer to satisfy tax debts owed, it was entitled to a lien on the heir's inheritance, disclaimer notwithstanding.[57] The United States Supreme Court agreed with the IRS and held that the tax

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[52] *In re Mortensen*, 2011 WL 5025252, *2 (July 8, 2011)(citing *Acequia, Inc. v. Clinton*, 34 F.3d 800, 806 (9th Cir. 1994)).
[53] *See* MD. CODE ANN. EST. & TRUSTS § 14.5-511(b).
[54] 528 U.S. 49 (1999).
[55] 535 U.S. 274 (2002).
[56] *See Drye*, 535 U.S. at 52.
[57] *Id.* at 54.

lien could attach. The Court found that the heir had a "valuable, transferable, legally protected" property right to the inheritance at the time of his mother's death.[58] Rather than personally take the interest, the heir chose to channel his interest to close family members through the act of disclaiming. In determining whether a federal taxpayer's state-law rights constitute "property" or "rights to property," the Court found that "the important consideration is the breadth of the control the taxpayer could exercise over the property."[59] "Drye had the unqualified right to receive the entire value of his mother's estate . . . or channel that value to his daughter. The control rein he held under state law rendered the inheritance "property" or "rights to property" belonging to him within the meaning of [the IRC], and hence subject to the federal tax liens."[60]

Craft held that tenants by the entirety property is subject to a federal tax lien filed against only one spouse. *Craft* may be seen as an extension of *Drye* but, unlike *Drye*, it was a split decision with Justices Stevens, Scalia and Thomas dissenting. According to Justice O'Connor's opinion, whether the lien attaches to one spouse's interest in an entirety tenancy is ultimately a question of federal law. In analyzing this question, the Court followed the *Drye* approach: it looked first to state law to determine what rights a taxpayer had in the specific property the government sought; then it decided whether the taxpayer's rights qualified as property or rights to property under federal law.[61] Justice O'Connor concluded that the rights of the debtor-taxpayer in the tenants by entirety property comprised of a sufficient number of presently existing "sticks" in the "bundle" to give rise to an attachable interest.[62] Among others, these rights included rights of possession, of income, and of sale proceeds if the non-debtor spouse agreed to the sale.[63]

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[58] *Id.* at 60.
[59] *Id.* at 61 (citations omitted).
[60] *Id.*; it is important to note that this is not the Maryland rule for non-tax-lien creditors. MD. CODE ANN. EST. & TRUSTS § 9-202(f)(2)("creditors of the disclaimant have no interest in the property disclaimed").
[61] *United States v. Craft*, 535 U.S. 274, 278 (2002).
[62] *Id.* at 285.
[63] *Id.* at 285-83.

Blackstone's legal fiction, ingrained by state law, that neither tenant had an interest separable from the other did not control the scope of the federal tax lien: "[I]f neither of them had a property interest in the entireties property, who did? This result not only seems absurd, but would also allow spouses to shield their property from federal taxation by classifying it as entireties property, facilitating abuse of the federal tax system."[64]

Whether the property in a Maryland tenants by the entirety trust is subject to a federal tax lien has not yet been decided. Under the *Drye* analysis, a tax lien would probably attach to property held in an entirety trust because the beneficiaries had a modicum of control over the property when it was transferred to the trust. Additionally, under Justice O'Connor's decision in *Craft*, a tax lien would attach to entirety trust property because the beneficiaries could have rights to possession, income and sale proceeds.

C. Tenancy by the Entirety Trust: First Death

When using a tenants by the entirety immunity trust to engage in asset protection, practitioners will be concerned about two scenarios: (1) when the first spouse to die has separate creditors and (2) when the surviving spouse has separate creditors. According to Maryland Estates and Trusts §14.5-511(c), upon the death of the first spouse to die, all property held in trust, which was immune from the claims of a couple's separate creditors under the statute, continues to have the same immunity from the claims of the decedent's separate creditors. Thus, if the first spouse to die is the debtor-spouse, the statute itself protects the trust property from the decedent's creditors.[65] As a result, the trust document could send the decedent's share upon his or her death to the surviving spouse or to a third party, whether outright or in a separate trust, and

[64] *Id.* at 286.
[65] MD. CODE ANN. EST. & TRUSTS § 14.5-511(c).

the decedent's creditors would have no room to complain.[66]

The second scenario is more important for practitioners and much more ambiguous. What happens to the trust corpus when the surviving spouse has creditors? The current version of the statute fails to articulate the rights of the surviving spouse's creditors in respect to the trust property, whether the share is attributable to the decedent or the surviving spouse.[67] The previous version of the statute subjected the decedent's share of the trust property to the creditors of the surviving spouse "to the extent that the surviving spouse [remained] a beneficiary of the trust."[68] This provision of the statute, however, was eliminated when the General Assembly adopted the Maryland Trust Act. Because of the change, the surviving spouse's creditors are probably unable to attach the share of the trust corpus attributable to the deceased spouse. Individuals seeking asset protection under the entirety trust can be assured that at least the portion of the trust attributable to the deceased spouse will be protected from the surviving spouse's creditors.[69]

What happens to the trust corpus attributable to the surviving spouse? Can it also be protected from the individual creditors of the surviving spouse at the first death? The immunity provided by the entirety trust statute arguably ends at the first death because the couple is no

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[66] *See Watterson v. Edgerly*, 40 Md. App. 230, 238 (1979).

[67] THE NEW MARYLAND TRUST ACT, Maryland State Bar Association, Course 5134-14, p. 30 (September 11, 2014)(comments from John P. Edgar, reporter on of Maryland Trust Act: "§ 14.5-511 re-enacts most of existing § 14-113. However, the Senate Judicial Proceedings Committee deleted § 14-113(c)(2). This section provided that to the extent the surviving spouse remains a beneficiary of the trust, the property that was immune from the claims of the separate creditors of the decedent shall be subject to the claims of the separate creditors of the surviving spouse. This deletion could represent a significant change to current Maryland law by permitting spouse to retain immunity from creditors for property owned as tenants by the entirety, even after the death of the first spouse, if a transfer is made pursuant to this provisions. Presumably, § 14.5-511 is unaffected by new § 14.5-801(a)(1), providing that during the lifetime of the settlor, the property of a revocable trust is subject to the claims of the creditors of the settlor, but this is not clear.").

[68] MD. CODE ANN. EST. & TRUSTS § 14-113(c)(2) (West 2014). This provision was removed from the statute when the Maryland General Assembly enacted the Maryland Trust Act.

[69] *See Id.* § 14.5-508(a)(3)("If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the interest of the settlor in the portion of the trust attributable to the contribution of that settlor"). It is difficult to divide the entirety asset into shares attributable to each spouse. *See* Steve R. Johnson, *Why Craft Isn't Scary*, 37 REAL PROP. PROB. & TR. J. 439, 475 n. 223 (2002) (citing Steve R. Johnson, *After Craft: Implementation Issues*, 96 TAX NOTES 553, 564-68 (2002)). It may be prudent to create a disclaimer trust with a spendthrift provision for the decedent's share. The surviving spouse should not be granted a testamentary power of appointment over the principal.

longer married.[70] Furthermore, if the surviving spouse is deemed to be a settlor of the trust[71], Maryland Estates and Trust § 14.5-508 states that "during the lifetime of the settlor, the property of a revocable trust is subject to the claims of the creditors of the settlor."[72] The surviving spouse's share of the trust property under this statutory provision would, therefore, be subject to the claims of his or her separate creditors upon the first death.

The surviving spouse, however, may still be able to avoid the impact of § 14.5-508 by sending the principal attributable to the surviving spouse to a new irrevocable spendthrift trust for his or her benefit. Because it's a spendthrift trust, the creditors of the surviving spouse would not be able to reach the trust corpus.[73] The weakness of this theory is that the new spendthrift trust may be classified as self-settled,[74] and a spendthrift clause is generally invalid as to a self-settled trust.[75] Despite these limitations, two legal theories may validate the spendthrift clause of the new trust. The first is based in the policy rationale underpinning the spendthrift clause and the other is found in Maryland statutory law.

i. Validity of a Spendthrift Clause in a Self-Settled Trust

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[70] MD. CODE ANN. EST. & TRUSTS § 14.5-511(b)(1).

[71] *Sec. Pac. Bank of Wash. v. Chang*, 80 F.3d 1412, 1418 (1996) (debtor was the settlor even though the debtor contributed entirety property with his wife).

[72] *Id.* § 14.5-508(a)(1).

[73] *See C.I.T. Corporation v. Flint*, 333 Pa. 350 (1939) *and Murphy v. C.I.T. Corporation*, 347 Pa. 591 (1943). These two decisions involve the same set of facts. A husband and wife transferred tenants by the entirety property to trust even though the husband was the subject of a judgment. The wife died and the judgment creditors of the husband claimed the transfer was fraudulent. The court upheld the transfer because it was tenants by the entirety property and the husband's creditor's had no claim on the property. In the second case, the husband's creditors sought to claim the life estate given to the husband in the trust property. The court ruled that the spendthrift clause was invalid because the trust was self-settled. The trust allowed the survivor to "revoke this trust either in part or in its entirety, or from time to time to alter or amend the same in any manner that to them shall seem fit or proper." 347 Pa. at 593.

[74] *Sec. Pac. Bank of Wash. v. Chang*, 80 F.3d at 1418; s*ee also In re Markmueller*, 51 F.3d 755 (8th Cir. 1995). It is possible to get around this issue by having the trust provisions send the principal to a new trust for the benefit of a third party upon the death of the first spouse. As soon as the first spouse dies, the surviving spouse has no interest in the property and the creditors of the surviving spouse have nothing to attach. In addition, a spendthrift clause would then protect the corpus from the creditors of the third party. This type of asset protection planning would work well if the surviving spouse is willing to part with the property. However, most clients are not inclined to do so.

[75] The exception to this is domestic asset protection statutes.

A spendthrift clause in a self-settled trust is invalid because the settlor-beneficiary should not be able to place property that otherwise would be available to his or her creditors beyond their reach while still being able to keep the property for his or her own needs.[76] This policy rational is not applicable to a tenancy by the entirety trust, or any subsequent trust used to hold the corpus, because the principal was not available to the spouse's separate creditors before the property was transferred to trust.[77] In order for the entirety trust to exist, the couple must hold the property as tenants by the entirety prior to transferring property to trust, and entirety ownership precludes a spouse's separate creditors from attaching the property.[78] Respecting the spendthrift clause in the new trust, therefore, does not violate public policy.[79] It does not prevent the surviving spouse's separate creditors from accessing assets that were available to them prior to the funding of the entirety trust.[80]

This analysis is supported by dicta in *Watterson v. Edgerly*.[81] In that case, the court respected the debtor husband's transfer of entirety property to his wife. It was chance that the wife died after the transfer, causing the property to be placed in a testamentary trust for the benefit of the husband. The court noted that their holding placed "the creditor . . . in no worse position than if the wife were still living with the property in her name or she had survived the husband."[82] Thus, if a court deems a subsequent trust to be self-settled by the surviving spouse, the court may still respect a spendthrift clause against the surviving spouse's separate creditors

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[76] David B. Young, *The Pro Tanto Invalidity of Protective Trusts: Partial Self-Settlement and Beneficiary Control*, 78 MARQ. L. REV. 807, 842 n. 209 (1995); RESTATEMENT (SECOND) OF TRUSTS § 156; *Duvall v. McGee*, 375 Md. 476, 484 (2003)(citing *Smith v. Towers*, 69 Md. 77, 88-90 (1888)).
[77] Young, 78 MARQ. L. REV. at 843-49.
[78] *Compare* MD. CODE ANN. EST. & TRUSTS § 14.5-511(b)(requiring the transferred property to be tenants by the entirety) *with Sec. Pac. Bank of Wash. v. Chang*, 80 F.3d 1412, 1418 (1996) (stating that even though the trust corpus was held as tenants by the entirety before being transfer to trust, the transfer terminated the entirety interest; in addition the debt was incurred after the entirety interest was severed).
[79] Young, 78 MARQ. L. REV. at 847.
[80] *See Watterson v. Edgerly*, 40 Md. App. 230, 238 (1978).
[81] *Watterson*, 40 Md. App. at 238.
[82] *Id.*

because those creditors could not reach the assets before they were transferred to trust.

ii. Preventing Self-Settled Status

It may also be possible for a spendthrift clause of an entirety trust to be valid under the theory that the common law treated a tenancy by the entirety as a separate entity from the individual constituents of the couple.[83] Thus, the couple, as settlors, is a separate entity from the beneficiaries. This legal theory, however, may be overly formalistic since the individuals of the tenancy by the entirety are the same individuals who settled the trust.[84]

Self-settled status, however, can be avoided through the trust provisions. According to Maryland Estates and Trusts § 14.5-103(t)(1), a settlor is defined as a person that creates or contributes property to a trust. The next clause of the statute qualifies this rule. Paragraph (2) states that a settlor includes a person who contributes property to a trust, but only to the extent that the trust or property cannot be revoked or withdrawn by another person.[85]

Two bankruptcy cases illustrate the power of this definition. In *In re Reuter*, a husband had judgment creditors and filed for bankruptcy. The bankruptcy trustee tried to pull assets held by his wife's revocable trust into the bankruptcy estate because the husband was a beneficiary of the trust and contributed assets to it. Under the bankruptcy trustee's theory, the spendthrift clause was invalid because the husband's contributions to the wife's trust made him a settlor. The court, in interpreting Missouri's definition of settlor, which parallels Maryland's, disagreed because the debtor's wife had the "sole power to revoke or withdraw the portion of the trust property

[83] *Bolton Roofing Co. v. Hedrick*, 701 S.W.2d 183 (Mo. Ct. App. 1985).
[84] *Sec. Pac. Bank of Wash. v. Chang*, 80 F.3d 1412, 1418 (9th Cir. 1996) (even though the property was transferred to trust as tenants by entirety, the entirety interest was severed upon transfer and it was a self-settled trust); *compare In re Markmueller*, 51 F.3d 775 (8th Cir. 1995) (rejecting holding in *Bolton Roofing*) *and Bolton Roofing Co. v. Hedrick*, 701 S.W.2d 183 (Mo. Ct. App. 1985)(stating that funding a trust with tenants by entirety property does not create a self-settled trust).
[85] MD. EST. & TRUSTS § 14.5-103(t)(2).

contributed by the debtor."[86] Thus, the husband was not a "settlor as to the term defined by Missouri law."[87]

A bankruptcy case from Florida, *In re Quaid*, is similar.[88] The husband and wife in *Quaid* held a bank account as tenants by the entirety. Before the husband filed for bankruptcy, the couple transferred the entirety account to a trust settled by the wife. The wife had sole authority to manage, control and withdraw trust assets. The bankruptcy trustee sought to invalidate the trust spendthrift provision under the theory that because the husband was a beneficiary of the trust and contributed property to it, the husband was a settlor. The court disagreed and concluded that the debtor-husband was not a settlor under Florida law because his wife had the "sole power to revoke or withdraw any trust assets, including the amounts contributed by the debtor. Thus, his beneficial interest was protected from his creditors by the spendthrift provision."[89]

Because Maryland's definition of settlor is similar to that of Missouri[90] and Florida[91], a practitioner is able to draft the entirety trust in a manner as to exclude the debtor-spouse from the definition of settlor. In order to do so, the trust provisions must grant only the non-debtor spouse the ability to revoke the trust or withdraw assets contributed by the couple. Thus, if the debtor-spouse is the survivor, the spendthrift clause will be valid against claims of his or her creditors because the surviving spouse is not a settlor of the trust under the law.[92]

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[86] *In re Reuter*, 499 B.R. 655, 672 (W.D. Mo. 2013).
[87] *Id.*
[88] *In re Quaid*, 2011 WL 5572605 (Nov. 16, 2011).
[89] *In re Reuter*, 499 B.R. at 675 (citing *In re Quaid*, 2011 WL 5572605 *2-3 (Nov. 16, 2011)).
[90] MO. ANN. STAT. § 456.1-103(23)("settlor means a person . . . who creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion pursuant to the terms of the trust.").
[91] FLA. STAT. ANN. § 736.0103(18)("Settlor means a person . . who creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.").
[92] *In re Reuter*, 499 B.R. at 675; *In re Quaid*, 2011 WL 5572605, *2-3 (Nov. 16, 2011).

ii. Beneficiary Control of Corpus

If the spendthrift clause is respected, a practitioner should also worry about the degree of control the surviving spouse can exert over the trust property because too much control may cause the spendthrift clause to be invalidated as well. A beneficiary can control trust corpus in two ways: (1) the beneficiary can be given a withdrawal power and (2) the beneficiary can serve as his or her own trustee.

A court may invalidate a spendthrift provision in a trust when the terms of the trust allow the surviving spouse to demand distributions.[93] Courts do this because "the beneficiary has the legal right to receive trust assets by . . . purely unilateral action."[94] As a result, the beneficiary's "interest [in the corpus] is indistinguishable from outright ownership."[95] Under these circumstances the spendthrift clause has no effect and the separate creditors of the surviving spouse can reach the trust assets.[96] To avoid this issue, a practitioner should not provide the surviving spouse with a demand right or ability to terminate the trust.

A court may also invalidate a spendthrift provision when the surviving spouse serves as his or her own trustee.[97] Because the surviving spouse, as trustee, has the power to make distributions some courts take the position that it too is indistinguishable from outright ownership.[98] The new Maryland Trust Act, however, solves this problem. Under § 14.5-510, a creditor is prohibited from attaching, exercising, reaching or otherwise compelling a "distribution of the beneficial interest of a beneficiary that is a trustee or the sole trustee of the trust."[99]

Even though Maryland has no case interpreting this statute yet, a bankruptcy case from

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[93] *See* MD. CODE ANN. EST. & TRUSTS §14.5-502(e).
[94] David B. Young, *The Pro Tanto Invalidity of Protective Trusts: Partial Self-Settlement and Beneficiary Control*, 78 MARQ. L. REV. 807, 853 (1995).
[95] *Id.*
[96] *See In Re McCoy*, 274 B.R. 751 (N.D. Ill. 2002).
[97] Young, 78 MARQ. L. REV. at 855-57.
[98] *Id.*
[99] MD. CODE ANN. EST. & TRUSTS § 14.5-510(a).

California enforced a similar statute from North Carolina. In *In re Trawick*, the debtors, a husband and wife, filed for Chapter 7 bankruptcy in California.[100] The wife's parents had established a revocable trust governed by the laws of North Carolina. When her parents died, the wife became the trustee of the trust for her and her brothers' benefit. It was a discretionary trust, and therefore, the wife had all duties and powers to make distributions. The bankruptcy trustee sought to bring the trust assets into the bankruptcy estate because the beneficiary had the ability to "exert dominion and control over the trust."[101] The court rejected the trustee's argument holding the spendthrift clause valid because the statute allows beneficiaries to serve as their own trustees.[102]

D. Conclusion

A tenants by the entirety trust allows a couple to protect assets from their individual creditors during their lifetimes. With the exception of the federal bankruptcy clawback rules and federal tax liens, the entirety immunity provided by the statute will protect real, tangible, or intangible property so long as the couple satisfies the requirements of the statute. If the debtor-spouse dies first, the property will be protected from the deceased spouse's creditors by virtue of the statute. If the debtor-spouse is the survivor, it is probable that the principal will continue to be protected from the surviving spouse's creditors if the corpus is sent to a new irrevocable spendthrift trust so long as the surviving spouse is not deemed to be the settlor. By so doing, the surviving spouse can enjoy the use of the property while also being able to escape the claims of

[100] 497 B.R. 572 (C.D. Cal. 2013).
[101] *Id.* at 579.
[102] *Id.* at 580 n. 1; MD. CODE ANN. EST. & TRUSTS § 14.5-510 does not allow a creditor to compel the "distribution of the beneficial interest of a beneficiary" who is acting as their own trustee or sole trustee, so long as the beneficiary "is not a settlor of the trust."

his or her own creditors. Even though Maryland has not adopted a domestic asset protection statute like Alaska or Delaware, the tenants by the entirety trust may provide asset protection capabilities similar in scope to these asset protection vehicles.

IRREVOCABLE INTER VIVOS QTIP TRUSTS

Another asset protection trust available to married couples in Maryland is the inter vivos QTIP trust.[103] The settlor creates and funds an irrevocable trust for the benefit his or her spouse, and under the terms of the trust, the donee-spouse retains a qualifying income interest in the property as defined in IRC § 2523.[104] The result of this transfer is that the settlor looses control of the property; however, by relinquishing control of the property, it is no longer subject to the creditors of the settlor. Moreover, while the donee-spouse is benefiting from the income of the property, the creditors of the donee-spouse are unable to attach the assets of the QTIP trust due to a spendthrift clause.[105] The trust is not, of course, self-settled by the donee-spouse. In addition, Maryland's statute permits the settlor to be the remainder beneficiary after the death of the donee-spouse and the settlor's creditors are still precluded from attaching the property under the spendthrift clause.[106] A couple could decide to create irrevocable QTIP trusts for each other (the husband funding an inter vivos QTIP trust for the wife and the wife funding an inter vivos QTIP trust for the husband), and by so doing, protect all of their assets. Even though the irrevocable inter vivos QTIP trust can be expansive in its protection, it contains several disadvantages which practitioners and clients must consider before effectuating the transaction. By navigating the pitfalls successfully, however, a couple can secure solid creditor protection for all of their assets

[103] MD. CODE ANN. EST. & TRUSTS § 14.5-1003.
[104] *See id.*
[105] *Id.*
[106] *Id.*

during their lifetimes, enjoy sophisticated tax benefits, and pass more of their wealth to future generations.

A. Establishing Creditor Protection: Maryland Trust Act § 14.5-1003

Estates and Trusts § 14.5-1003 of the Maryland Code provides asset protection for an irrevocable inter vivos QTIP trust when the settlor becomes the remainderman of the trust after the death of the donee-spouse. The statute states that the settlor of an irrevocable inter vivos QTIP trust is not considered the settlor of the trust if the following elements are met:

> (1) the trust was created for the benefit of the settlor's spouse;
>
> (2) the principal of the trust is qualified terminable interest property under section 2523(f) of the Internal Revenue Code; and
>
> (3) the settlor's interest in the trust income and principal comes after the settlor's spouse's interest in the trust has terminated.

As defined in I.R.C. § 2523, "qualified terminable interest property" is property held in trust in which the donee-spouse has a "qualifying income interest" for his or her lifetime.[107] A "qualifying income interest" means that the donee-spouse is entitled to all income from the property,[108] or, in lieu of an income interest, the trust provides the donee spouse with a "usufruct interest" in the trust property.[109] Moreover, the trust property, if subject to a power of appointment, can only be appointed to the donee-spouse at his or her death.[110] To be a QTIP for tax purposes, the donor-spouse must make an election on his or her gift tax return.[111] Therefore,

[107] I.R.C. § 2523(f)(2)(B)-(f)(3)(stating that the rules under I.R.C. § 2056(b)(7)(B) apply to the gift tax provisions as well).
[108] *Id.* § 2056(b)(7)(B)(ii)(I)(stating that the income must be paid at least annually).
[109] *Id.*
[110] *Id.* § 2056(b)(7)(B)(ii)(II)(stating that the section does "not apply to a power exercisable only at or after the death of the surviving spouse").
[111] *Id.*

the election for QTIP treatment is likewise a requirement for the trust to fall within the safe harbor of the Maryland statute.[112]

Once the inter vivos QTIP trust is settled, the statute continues to protect the trust res from the settlor's own creditors, when the settlor becomes a beneficiary of the trust after the death of the donee-spouse.[113] Because the settlor is not deemed to be the "settlor" when the trust meets the statutory requirements, the trust cannot be classified as self-settled when the settlor steps into the shoes of the donee-spouse. As a result, the spendthrift clause is valid and creditors are unable to attach the property. The statute reiterates this theory by stating that once the settlor becomes a beneficiary after the death of the settlor's spouse, a "creditor . . . may not attach, reach or otherwise compel a distribution of any principal or income of the trust.[114]

In using the inter vivos QTIP trust to secure asset protection for clients, it is important to remember that transfers to a QTIP trust are subject to federal bankruptcy law and Maryland's fraudulent transfer legislation. The Maryland General Assembly mandates that the trust "may not be construed to affect any state law with respect to a fraudulent transfer by an individual to a trustee."[115] Transfers to a QTIP trust are likely subject to 11 U.S.C. § 548(a)(1)[116] and (e)(1)[117] as well.

B. Income and Wealth Transfer Tax Benefits

In addition to asset protection, the inter vivos QTIP trust provides several tax advantages

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[112] This is a potential trap because with the high federal estate tax threshold, securing the marital deduction may no longer be useful.
[113] MD. CODE ANN. EST. & TRUSTS § 14.5-1003(a) and (a)(2)(iii).
[114] *Id.* § 14.5-1003(b)(1).
[115] *Id.* § 14.5-1003(c).
[116] 11 U.S.C. § 548(a)(1) permits a bankruptcy trustee to avoid a transfer of property if the transfer was made within two years of the debtor's filing for bankruptcy.
[117] 11 U.S.C. § 548(e)(1) permits a bankruptcy trustee to avoid a transfer of property if the transfer was made within 10 years of filing for bankruptcy and the transfer was made pursuant to a domestic asset protection statute or similar device. It seems that the QTIP trust would qualify as a similar device.

to a couple if they create separate QTIP trusts for each other. Gans, Blattmachr and Zeydel's article, *Supercharged Credit Shelter Trust*SM, addresses these advantages.[118] Because this course focuses on asset protection, the income and wealth transfer tax implications of the inter vivos QTIP trust exceed the scope of this discussion.

C. Disadvantages of an Irrevocable Inter Vivos QTIP Trust

Despite the powerful asset protection and beneficial income and estate tax maneuvers provided by the inter vivos QTIP trust, engaging in the transaction has its pitfalls. A majority of the potential issues, however, are connected with the tax consequences of the transaction and not with the asset protection provided by the Maryland statute. The issues discussed in this section address potential problems with the QTIP trust and ways in which settlors may disqualify themselves from the benefits of the safe harbor.

i. Divorce of the Settlor and Beneficiary-Spouse

In order to qualify under the Maryland QTIP provision, the trust must be irrevocable. Therefore, once the transaction has been executed, the settlors are unable to unwind it. If the settlor and the beneficiary-spouse divorce, the beneficiary-spouse will enjoy the benefits of the settlor's assets for the remainder of his or her lifetime. Thus, the inter vivos QTIP trust should not be used if divorce is a possibility in the clients' future. The settlor, however, may be able to mitigate the effects of the divorce by writing specific provisions into the trust that become effective upon divorce. For example, the trust provisions could limit the beneficiary-spouse's

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[118] Mitchell M. Gans, Jonathan G. Blattmachr, Diana S. C. Zeydel, *Supercharged Credit Shelter Trust*, 21 PROB. & PROP. 52 (July/August 2007).

access to the principal so that "after divorce, only income distributions [are] mandated."[119]

ii. Citizenship of the Settlor and Beneficiary-Spouse

Non-U.S. citizens may not engage in asset protection through an inter vivos QTIP trust. The Maryland statute provides asset protection to the remainder interest only if the trust corpus can be treated as "qualified terminable interest property" under I.R.C. § 2523(f).[120] Only U.S. citizens may make a QTIP election.[121] Thus, without satisfying the requirements for the QTIP election, the trust fails to qualify for the asset protection provided by the statute.

iii. Jurisdiction

Not all states allow citizens to engage in asset protection via an inter vivos QTIP trust.[122] Thus, the practitioner should ensure that only Maryland law, or the law of another jurisdiction that allows asset protection for inter vivos QTIP trusts, governs in the trust document. If the law governing the trust switches to a jurisdiction without a statute, the trust corpus will likely be attachable by the settlor's creditors when the remainder interest invests in the settlor upon the death of the donee-spouse. The mobility of clients, therefore, can thwart the transaction. This pitfall can be carefully controlled through the provisions of the trust document.

iv. Reciprocal Trust Doctrine

In creating inter vivos QTIP trusts for each other, a couple may run into the reciprocal

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[119] Richard R. Gans & Barry A. Nelson, *New §736.0505(3) Assures Tax/Asset Protection of Inter Vivos QTIP Trusts*, 84 FLA. B. J., 50, 52(Dec. 2010).
[120] MD. CODE ANN. § 14.5-1003.
[121] I.R.C. § 2056(b)(7).
[122] Jurisdictions providing asset protection to the remainder interest of an inter vivos QTIP trusts include: Arizona, Delaware, Florida, Kentucky, Maryland, Michigan, North Carolina, Oregon, South Carolina, Texas, Virginia and Wyoming. Barry Nelson & Richard Franklin, *Inter Vivos QTIP Trusts Could Have Unanticipated Income Tax Results to Donor Post-Divorce*, STEVE LEIMBERG'S ESTATE PLANNING NEWSLETTER, Sept. 15, 2014.

trust doctrine, which was adopted by the Supreme Court of the United States in *United States v. Estate of Grace*, 395 U.S. 316 (1969). In the case, a husband created a trust for the benefit of his wife.[123] The trust provisions gave the wife an income interest and a power of appointment in favor of the couple's descendants and the husband.[124] Fifteen days after the husband created the trust, the wife created a second trust, giving the husband an income interest and a power of appointment in favor of the wife and the couple's descendants.[125] When the wife died, her estate claimed that the trust created by the husband was not includable in her gross estates under a previous version of I.R.C. §2036 because another party created the trust for her.[126] When the husband died a few years later, his estate used the same argument to exclude the trust created by his wife from his gross estate.[127] The IRS disagreed with the couple's approach and argued that form should not trump substance, that the transaction left the couple in a substantially similar economic circumstance, and that the transaction should be disregarded in order to make the estate tax fair.[128] The Supreme Court agreed with the IRS and found that the trust assets were includable in couple's respective estates.

It is important to remember that *Estate of Grace* uses the reciprocal trust doctrine to determine whether the trust assets were subject to the federal estate tax. It would seem, therefore, that the doctrine has little or no application to creditor rights under the Maryland Estate and Trust statute. However, the statutory creditor protection only attaches when a trust qualifies for the QTIP election.[129] It is possible that if the IRS denies the QTIP election because of the reciprocal trust doctrine, the trusts would not qualify for the asset protection under the statute.

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[123] *Estate of Grace*, 395 U.S. 316, 319 (1969).
[124] *Id.*
[125] *Id.*
[126] *Id.* at 320.
[127] *Id.*
[128] *Id.* at 322.
[129] MD. CODE ANN. EST. & TRUSTS § 14.5-1003(2)(ii).

Gans, Blattmachr and Zeydel believe that the reciprocal trust doctrine is inapplicable to the inter vivos QTIP trust.[130] But, they also warn estate planners to err on the side of caution and avoid the implication of the doctrine.[131] Some drafting suggestions used to avoid the doctrine include: appointing different trustees, allowing a considerable amount of time to pass between the creation of the two trusts, making sure the dispositive provisions of the two trusts are different, and using powers of appointment to modify the settlor's and beneficiary's powers under the trust terms.[132]

D. Conclusion

The inter vivos QTIP trust can provide significant protection to a couple's assets. The trust also has its short comings. Clients lose total control of the property, which can be problematic should the couple divorce. The plan only works if state law protects the settlor's remainder interest, which could be lost if clients move to a new state. Transfers to QTIP trusts can be avoided under bankruptcy law and may be subject to the reciprocal trust doctrine. If clients are willing to assume these risks, however, they can enjoy sophisticated tax benefits and powerful asset protection.

[130] Mitchell M. Gans, Jonathan G. Blattmachr, Diana S. C. Zeydel, *Supercharged Credit Shelter Trust*, 21 PROB. & PROP. 52, 56-59 (July/August 2007).
[131] *Id.* at 57-58; *see also* Richard R. Gans & Barry A. Nelson, *New §736.0505(3) Assures Tax/Asset Protection of Inter Vivos QTIP Trusts*, 84 FLA. B. J., 50, 52 (Dec. 2010).
[132] Gans, et al., 21 PROB. & PROPER. at 57-58; see also Gans & Nelson, 84 FLA. B. J., at 52.