



Joint Trusts - Too Much Togetherness?

By Lisa Lipman and Amy Owen

When people get married, they promise to intertwine their lives forever. Should they do the same with their estate plans?

A joint trust is often touted as an easy way for a married couple to administer their assets for both of their lifetimes. Once the couple's assets are trans-

ferred into the joint trust, both spouses can access those assets as they would a joint bank account. If one of the spouses becomes incapacitated, the well spouse can continue to manage the couple's assets with no complications. If one spouse passes away, there is no probate required, and the trust can be designed so there is no additional administration at that time. At the death of the surviving spouse, the trust assets again avoid probate.

While administrative simplicity is certainly compelling, joint trusts offer some equally compelling disadvantages.



Many joint trusts state that the assets held within it are available to both spouses during their lifetimes, and to the survivor upon the first spouse's death. However, titling assets in a joint trust with this language will typically allow creditors of either spouse to attach the assets within the joint trust. This would not be the case if the spouses owned assets as tenants by the entirety ("TBE"), because TBE assets are protected from creditors of either spouse. (Note that most states only afford TBE status to real

estate. In Florida, however, all types of property may be owned as TBE.) If the couple had instead used separate trusts, each spouse's trust would be protected from the creditors of the other spouse.

Additionally, very few joint trusts are completely administration-free upon the death of the first spouse. Most include provisions allowing amendment only when both spouses are alive, or alternatively only as it relates to the surviving spouse's pro-rata share of the trust assets. The first spouse's death triggers the creation of a new irrevocable trust, distinct from prior joint trust. After the creation of the new trust, many surviving spouses may be frustrated when they no longer have the ability to alter the trust terms – an ability that was never in question while his or her spouse was alive.

Furthermore, joint trusts can create significant accounting or tax issues. Spouses often do not keep records of the value of assets contributed to the joint trust. As time passes, it becomes harder to determine which spouse contributed particular assets, and thus harder to determine how much of the trust assets are attributable to the first-to-die spouse and how much is attributable to the survivor. This could create confusion if the trust is designed to become irrevocable with respect to the deceased spouse's assets, and the survivor can't clearly identify those assets. It also might become difficult to identify which assets should receive a step up in basis for income tax purposes due to the death of the first spouse. Additionally, if a joint trust transitions in whole or in part from a revocable trust to an irrevocable trust upon the death of a spouse, it is likely that the surviving spouse will be deemed to have made a taxable gift to the new irrevocable trust.

Togetherness has its benefits, as do joint trusts. However, in order to avoid the issues that affect joint trusts, it is important to (1) keep accurate records about contributed property; (2) regularly review the joint trust while both spouses are alive in order to ensure there are no inadvertent tax results or restrictions on the surviving spouse, and, most importantly, (3) consult with an attorney to determine whether the couple would be best served by TBE ownership or two separate revocable trusts.

Lisa Lipman is an attorney with Roetzel & Andress, P.A. and Amy Owen, JD, LLM, is with Hawthorn PNC Family Wealth.