

# Trust Connection

A Monthly Report of Trust News and Information

March 2022

# Smith Salley

## PRIVATE TRUST

### ABOUT US

Smith Salley Private Trust provides trust solutions for clients who want the peace of mind that their estate will be protected and distributed according to their wishes. Our clients don't need to change their investment philosophy, asset management style, or portfolio holdings, because our trust services integrate seamlessly with the same comprehensive financial planning approach they already enjoy.

### Forms of Property Ownership in Estate Planning

Historically, estate planning centered on wealth transfer, but many families and their advisors have started to look at wealth preservation. Why? Because increase and portability, coupled with laws that capped damages in injury cases being struck down across the country, has made this option more appealing.

Wealth preservation is not just for the wealthy or for people in high-risk professions, such as doctors and lawyers. Consider the laws of California, Florida and other states that make parents financially liable for motor vehicle injuries caused by a minor, or the laws that make a homeowner responsible for someone falling on their sidewalk.

Wealth preservation, or "asset protection" as it's commonly called, consists of three primary strategies: asset ownership, insurance, and trusts. This segment will focus on asset ownership.

#### ASSET OWNERSHIP

Creditors' rights differ by state, and how property is owned typically affects a creditor's ability to seize or garnish it. Generally speaking, if property is owned with another party, some or all of the ownership may be protected from creditors.

#### Jointly owned property

There are generally three ways for two or more people to own both real and personal property: tenants in common, joint tenants with right of survivorship, and tenancy by the entirety.

#### Tenants in common

There is little or no asset protection under this form of ownership. Each tenant owns an equal, divisible interest. Any co-tenant or a creditor can force a sale of the property and a creditor can seize the property or the proceeds of that sale.

#### Joint tenants/joint tenants with right of survivorship

Each joint tenant owns a divisible interest in the whole property. As with tenants in common, a creditor of a joint tenant may execute upon the proportionate interest owned by that tenant. Generally, unless stated otherwise, the percentage of ownership is proportionate to the number of owners. In some states, if a joint owner can prove that he/she contributed all of the funds, a creditor has no claim.

*Side Note:* Take care before creating a joint account. Not having a legal claim doesn't stop a creditor from garnishing an asset and sometimes seizing it entirely. For example, you

*Continued>>*



## A Local Trust Solution

Call us today at  
(336) 379-7556 to learn more  
about working with Smith Salley  
Private Trust.

For information and assistance,  
please feel free to contact one of  
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Let us protect and preserve  
your wealth so you can remain  
confident about the future of  
your estate.

add your son's name to your bank account so he can pay the bills. If you are unable to avoid probate without a trust and your son owes child support to the state and the state finds the account and sends a garnishment order to the bank, your bank is obligated to follow the directive. Your account will be frozen and may even be sent to the state agency, forcing you to fight the government to get it back.

### Tenancy by the entirety

Tenancy by the entirety is a special form of joint ownership, available only to a married couple and only in about 13 states. Unlike joint tenancy or tenancy in common, each tenant owns an interest in the entire property, not just a proportionate share. Consequently, a creditor of only one spouse cannot execute on any part of the property. One issue to note is that although this protection is guaranteed by statute where available, if your spouse dies or you divorce, you no longer qualify for this type of ownership.

### Joint trusts

Some spouses opt to create a joint revocable trust. With a joint trust, both spouses create the trust and transfer assets to it. Only a handful of states have addressed the issue of whether property held in a joint revocable trust has the same creditor protection status as tenancy by the entirety. For example, in Virginia, tenancy by the entirety is extended to a joint trust or the separate trusts created by a married couple. In Florida, case law suggests that this protection may be available, but it is not definite. In Missouri, spouses can use a "qualified spousal trust," statutorily created for this purpose.

### Self-settled trusts

A self-settled trust, also called a domestic asset protection trust, is an irrevocable trust designed to protect assets from the creditors of the settlor even though he or she remains a beneficiary of the trust. Historically, public policy has prohibited these types of trusts, but at least 12 states have adopted a form of a self-settled trust (available to residents and non-residents alike). The IRS recently examined such a trust and found that it could also shift income tax liability from the grantor to the trust (a valuable shift for grantors in high-tax states).

### CONCLUSION

Understanding how the title or ownership of your assets affects the rights of your creditors and those of your joint owner is a vital part of wealth preservation. You should consult a knowledgeable attorney and your financial advisor to assist you with this important part of your wealth strategy.

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