Back Door SLATs – Issues When Grantor Becomes Beneficiary or Appointee of SLAT

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Back Door SLATs – Issues When Grantor Becomes Beneficiary or Appointee of SLAT

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Agenda

Back Door Interests in SLATs

Agenda – Back Door Interests in SLATs

- The discussions will assume SLAT intended as completed gift, grantor trust
- SLAT Balancing Act – Access v. Estate Inclusion v. Asset Protection
- UTC §505(a)(2) and the Difference with Common Law, Restatement
- State Statutory Fixes to Intervivos QTIPs (and sometimes SLATs)
- Hybrid-DAPT, Power Trusts, SPATs, Trust Protector Ability to Add Grantor as Beneficiary – risk-free for creditor protection or estate tax inclusion purposes?
- IRC §2036 – Always a factual issue, be it DAPT or other vehicle (cf. QTIP exception)
- Divorce – Problems with the "Floating Spouse"? Cf. Rev Rul 80-255
- Other ways that SLAT benefits can be destroyed
- Grantor trust tax reimbursement – Can trustee go back to inception?
- Summary – Drawbacks to Back Door Access?

Balancing Act for SLATs

Weigh Client Objectives vs. Risks

Balancing Act for SLATs

- **Holy Grail** of planning – while spouses get along, grantor has indirect access without estate inclusion, and can even live in a trust-owned residence as a guest of the beneficiary-spouse without Section 2036 retained interest! Rev. Rul. 70-155, citing Estate of Gutchess v. Comm., 46 T.C. 554 (1966), acq. 1967-1 C.B. 2
- What if donee-spouse dies and grantor-spouse becomes a beneficiary (other than through exercise of a general power of appointment)? How is a general power vs. a special power vs. automatically becoming a beneficiary different?
- Easy to plan for billionaire – just give up all access after donee-spouse dies, but for clients with "only" $20 million or so, this prospect is harder to swallow! For mass affluent clients using SLATs for asset protection or state estate tax benefits even though no federal estate tax, access is absolutely essential.

Balancing Act for SLATs

- General rule – **the more access is given to the grantor, the greater the chance of later estate inclusion and/or creditor access** (this is true even if the donor/settlor is **never** a beneficiary at all.
- See In Estate of McCabe v. United States, 475 F.2d 1142 (Fed. Cir. 1973) - Husband established trust with longtime friend and business associate as trustee. Income plus principal for illness or emergency to wife, remainder to children. 20 years later, wife sent trustee letters requesting distributions be made to her husband the grantor. Four payments before death. Court found IRC 2036 retained interest even though no fancy trust protector added him as beneficiary.

Balancing Act for SLATs

- Goal of discussion – where is the sweet spot and how to convey the risks to clients?
- There are two overlapping issues: creditor protection and estate inclusion.
- In reality this is more like a multi-dimensional chess game as there are often a myriad of personal considerations and client idiosyncrasies that influence planning decisions. Examples: “I want it simple.” “Yes I want a DAPT but no I will never use an institutional trustee.” “I will never accept a floating spouse clause and if I die prematurely that’s just too bad, no new spouse will ever be a beneficairy.” And so on….
- Reality check you can never identify the exact sweet spot and practitioners should caution clients of that reality. There is never an optimal plan that can be achieved, and certainly one can never even know what “optimal” was except with hindsight.

UTC §505(a)(2)

vs. Common Law, vs. Restatement, etc.

UTC §505(a)(2) v. Common Law, Restatement

- UTC §505(a)(2) provides that:
- "(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit." Notice that it does not say "distributed by the trustee" – so this is arguably triggered whenever a distribution advisor, trust protector or powerholder of a lifetime limited power of appointment (e.g., a SPAT) may cause distribution of the trust assets to the settlor. But the commentary to the section says, "a creditor of the settlor may reach the maximum amount that the **trustee** could have paid to the settlor."
- And virtually no one worries that the donee of a gift could give it back (outright or in trust) to the grantor. Why should receiving it via a special power be different?

UTC §505(a)(2) v. Common Law, Restatement

- The common law has always had some rule against self-settled trusts (RASST). The Restatement of Trusts (3d § 58(2), 2d § 156), however, focuses only on the power of the **trustee,** permitting creditors of the settlor to access the maximum amount that can be distributed **by a trustee** for the settlor's benefit as beneficiary. I would argue that this does NOT include trusts where a lifetime limited power of appointment includes the settlor as a mere potential appointee. Is there a difference when a non-trustee is given such a power? Might it make a difference if a trust protector is a fiduciary or not? Or in those cases does it still trigger the common law rule against self-settled trusts because the trustee has this power, only it is only with the permission of the powerholder/protector/other party?

UTC §505(a)(2) v. Common Law, Restatement

- Some states have tweaked their version of UTC to clarify that the self-settled trust rule does not apply when someone else other than a trustee has the power
- Ohio R.C. §5805.06(a)(2) (Ohio's version of UTC §505(a)(2) at first reads similarly:
- "Except to the extent that a trust is established pursuant to, or otherwise is wholly or partially governed by or subject to Chapter 5816 [Ohio's DAPT] of the Revised Code, with respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit."
- However, it then clarifies that "(2) None of the following shall be considered an amount that can be distributed to or for the benefit of the settlor:
- "(a) Trust property that could be, but has not yet been, distributed to or for the benefit of the settlor **only as a result of the exercise of a power of appointment held in a nonfiduciary capacity by any person other than the settlor**;"
- [it also excepts back door access from intervivos marital trusts and tax reimbursement clauses discussed later herein]
- Note that under Alaska law, a creditor of a general power holder cannot attach trust property except to the extent it is actually distributed to the beneficiary

UTC 505(a)(2) v. Common Law, Restatement

- **Nutshell** – unless a settlor uses a DAPT or a common law state where such a power does not create a self-settled trust or a UTC state that has fixed this issue, granting a powerholder (or trust protector) the power to distribute funds to settlor, may cause the SLAT to be accessible to creditors, and therefore an incomplete gift, or if added later, a retained interest or power of disposition brought back into the estate under IRC Sections 2036/2038.
- It may, however, be a different story if such a power does not arise until the death of the donee/beneficiary-spouse.
- A state legislative trend in recent years is to protect intervivos QTIP trusts (and sometimes SLATs) that may later benefit the settlor-spouse if the donee-spouse predeceases. Example: H establishes an intervivos QTIP trust for W, but W dies first, and uses her testamentary limited power of appointment to appoint to a trust (Trust-2) **for H** and her children. Under state law (and federal income tax law, Treas. Reg. §1.671-2(e)), the settlor/grantor of the Trust-2 remains H. For estate/gift tax law, Regs prevent this "back door access" from being a §2036/2038 retained interest (see Treas. Reg. §25.2523-1). This Reg. would **not** help non-marital SLATs.

UTC 505(a)(2) v. Common Law, Restatement

- However, might this cause estate inclusion indirectly if creditors can access the trust since it's still considered self-settled for state law? Technically, it should not be a general power of appointment, since a power that can only be exercised with the consent of the creator of the power is not a general power under IRC §2041(b)(1)(C)(i). However, there is still uncertainty on estate inclusion, and the asset protection issue to worry about even aside from estate tax. See how states have responded…
- States that have addressed this include: Arizona* (Ariz. Rev. Stat. §14-10505(E)); Arkansas (Ark. Code Ann. §28-73-505(c)); Delaware* (12 Del Code §3536(c)(2)); Florida* (Fla Stat. §736.0505(3)); Georgia (O.C.G.A Section 53-12-82(b)); Kentucky* (Ky. Rev. Stat. Ann. § 381.180(8)(a)); Maryland (Md. Est. & Tr. Code Ann. § 14-116(a)(1)-(2)); Michigan (MCL §700.7506(4)); Mississippi* (Miss. Code. Ann. 91-8-504); New Hampshire (N.H. Rev. Stat. Ann. §564-B:5-505(a)(2)(d)); North Carolina* (N.C. Gen Stat. § 36C-5-505(c)); Ohio (Ohio R.C. §5805.06(B)(2)(b)); Oregon (Or. Rev. Stat. § 130.315(4)); South Carolina (S.C. Code Ann. § 62-7-505(b)(2)); Tennessee* (Tenn. Code Ann. §35-15-505(d)); Texas* (Tex. Prop. Code §112.035(g)); Virginia (Va. Code §55-545.05(B)); Wisconsin* (Wisc. Stat. §701.0505(2)(e)); Wyoming (Wyo. Stat. Ann. § 4-10-506(e)).
- See Barry Nelson's LISI article in the material on Florida's §736.0505(3)(b).

DAPTs, Hybrid DAPTs, SPATs, Etc.

Variations of SLAT-Like Concepts to Consider

Domestic Asset Protection Trusts (DAPTs)

- Self-settled DAPT statutes may also provide protection if prerequisites met.

For a continually updated list and description and comparison of the various state DAPT state statutes, consult ACTEC's DAPT comparison chart compiled by David Shaftel: https://www.actec.org/assets/1/6/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes.pdf?hssc=1

Hybrid-DAPT, Power of Appointment Trusts, SPATs, Trust Protector Ability to Add Grantor as Beneficiary

- These are not risk-free. But the risks involved cannot be measured. It is often impossible to compare the relative risks of different options. This might be in part why so many different views are espoused by different commentators on the "better" approaches to consider.
- PLR 9837007 and PLR 200944002 – Gifts can be complete to DAPTs (or other hybrid variants like SLATs or hybrid-DAPTs that may later add settlors), but the open question is when would the IRS find that IRC §2036 applies – in the PLRs, they punted on this issue, because it will be based on the facts and circumstances of the case.
- Regarding SPATs, See Abigail O'Connor, Mitchell Gans & Jonathan Blattmachr, "**SPATs – Special Power of Appointment Trust, A Flexible Alternative to Domestic Asset Protection Trusts (DAPTs)"** in material

What are the advantages of a SPAT design over a DAPT

- This may be especially so if in a non-DAPT state, but it may even be advantageous in a DAPT state.
- Should the holder of the lifetime limited power of appointment be a beneficiary (adverse) or a friend of the settlor? Should it be super-narrow (e.g., power to appoint to settlor only)? Pros and cons to each, potential gift tax ramifications if beneficiary. Can require consent of a third party (e.g., lawyer for the settlor) to exercise the power.

DAPT v. Special Power of Appointment Trusts (SPATs) – Compare/Contrast

- Is a DAPT less secure than a SPAT?
- DAPT v. Power Trusts (SPATs) – Compare/Contrast the pros/cons
- Remember in all of this that this is never just a technical analysis of the law but very much fact dependent on surrounding circumstances and how the particular trust plan is administered. Excessive foot faults in forming, funding or administering any trust plan could undermine the intended results no matter how secure the practitioner believes the law may be. Consider the Smaldino and Sorensen cases.

IRC Sec. 2036

More Detailed Look at 2036 Considerations

Consider IRC §2036

- Section 2036 is always a factual issue, be it a DAPT or other vehicle.
- The idea that the 2009 PLR is the only authority that discretionary interests do not by themselves cause estate inclusion is not correct. A 7th circuit case is pretty good authority.
- If creditors cannot access the trust under state/bankruptcy law, this clears the most dangerous hurdle, but what about later estate inclusion?
- IRC 2036(a) provides that:
  - "The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death— (1)**the possession or enjoyment of**, **or** the right to the income from, the property, or"

A Review of Selected 2036 Authorities

- **PLR 8037116** Earlier PLRs where the IRS held the self-settled trust were not in the settlor's estate on account of state law.
- **Estate of German**
- **PLR 200944002** – the IRS will look to facts of administration during settlor's lifetime and a discretionary interest does not trigger inclusion per se. PLRs are not citable authority, but there are cases so holding. Don't just cite Jonathan's PLR! Here are some cases on whether a settlor's discretionary interest causes inclusion (whether creditors could attach was either not at issue or did not apply). Most involve IRS victories on bad facts, but not all:
- **In re Uhl's Estate**, 241 F.2d 867 (7th Cir. 1957) – Settlor received $100/month and could receive more in discretion of trustee. The court found that the amount necessary to produce $100/mo of income was included in his estate, but the rest of the trust was **not** included in his estate, even though the trustee had wide discretion to distribute more (and did). The trustee exercised his discretion in favor of the settlor in only two out of the eight years of the Trust's duration, and during these two years the discretionary payments were irregular and were never paid directly to the settlor, but indirectly, for medical expenses.

A Review of Selected 2036 Authorities

- **McNichol's Estate v. Comm**., 265 F.2d 667 (3d Cir. 1959) – Donor/Father gave away properties in fee simple to children but had oral agreement with them to receive the rental income and actually did receive it prior to death. Even if not binding, the court held the donor retained enjoyment of the property and it was included in the donor's estate.

- **Skinner's Estate v. United States**, 316 F.2d 517 (3d Cir. 1963) – Settlor had discretionary interest in trust (no right to income), but actually received the income annually for 17 years (in fact, she had tried to initially deduct the value of the life estate from the value of the gift but lost). The Court found that a prearrangement could be **inferred** from the evidence. The Court distinguished Uhl on its facts and held that the trust was fully included in the settlor's estate: "We point out, however, that every case of this sort must stand on its own facts and that the practice of assuming that a trustee, corporate or otherwise, is necessarily independent of the cestui whom he represents, need not be followed invariably but may be rebutted by circumstances." Similar is **Paul v. Comm**. (In re Estate of Green) , 64 T.C. 1049 (U.S.T.C. 1975). As the **McCabe** case illustrated, the focus of the question may not be on whether the settlor is even a de jure beneficiary, but whether they de facto receive the equivalent of the income (or possession or enjoyment) of the trust.

Trustee Independence; Implied Agreements; Etc.

- If there is no absolute right, an important focus will be on whether the trustee is truly independent, as was emphasized in Skinner's Estate – in McCabe, the trustee was a friend of the settlor. Consider this concern of the district court decision that was upheld in Skinner: "Most settlors would have no trouble finding a trustee friendly to his interests who could be counted on to honor informal prearrangements to exercise "absolute discretion" over income payments in favor of the settlor during his life. The existence of such prearrangements is difficult at best for the government to prove. Therefore, the court must go beyond the form in which the agreement is drawn, and, looking to the substance of the matter, draw reasonable inferences from the evidence that such a prearrangement did exist." A corporate trustee is the gold standard. What if the trustee is also an agent of the settlor, such as the settlor's attorney? Would this trigger questions as to independence, such as in the Diller v. Richardson litigation?

Trustee Independence; Implied Agreements; Etc.

- Similarly, the tax court in Estate of Paxton v. Comm., 86 T.C. 785 (1986) stated, “Indeed, the existence of an agreement or understanding by which the possession or enjoyment of the property is retained may be inferred from the circumstances of the transfer and the manner in which the transferred property is used.” Suppose the person with the power to appoint it to or for the grantor is unaware of the power until much later. Does that eliminate the “existence of an agreement or understanding”?

Loaning Funds to the Settlor

- If a trustee effectively loans the income from a trust back to the settlor, it may not matter at all if the settlor is not a beneficiary either! Reasonable bona fide loans are probably OK (just as a conservative installment sale to a SLAT ab initio would be), but loaning most of the corpus back when the grantor later has financial problems may not be. Arms-length is key. Who knows where each IRS agent or tax court judge will draw the line?

Divorce

Floating Spouses and More

Divorce

- There are considerations and problems with the “Floating Spouse” technique.
- Bear in mind that a non-divorce purpose of using a floating spouse clause is that if the spouse/beneficiary dies prematurely then if the settlor spouse remarries that new spouse will again provide indirect access
- Obvious to most, but worth reminding practitioners is that a spouse cannot be removed or have their access to all net income reduced if it is an intervivos QTIP or GPOA marital trust.
- “Floating spouse” provisions may kill state statutory back-door SLAT protections (e.g., Fla Stat. 736.0505(3)(a). Check your state statute.
- Such a clause does not by itself cause estate inclusion of a SLAT. It could even name the beneficiary as the “spouse”, defined as whomever the settlor is married to at the time, so that upon divorce/death and remarriage a new spouse becomes beneficiary (aka “floating spouse” definition). But should it be done? Can’t this easily backfire on the settlor? Keep in mind the trust may

Divorce

- Example: H gives $10 million to SLAT for W. Divorces. Has $20 million that is marital. If the SLAT had stayed intact, the divorce court might consider the W's equitable interest in the trust as part of her 50% share of total assets and award $5 million (or, consider this for alimony/support purposes, depending on how the state looks at the issue), but if W is removed, DR court may be compelled to award more – perhaps the full $10 million plus alimony. Might the floating spouse clause cost H more in the divorce settlement? Would a typical domestic relations judge really just sit in awe about how clever it is? Might it be better if a trust protector could modify the spouse's interest in the SLAT pursuant to DR court order so that that interest can be considered as part of that spouse's share of assets? Very messy issues that may vary by court/county as well as state. See Probate Law Journal of Ohio articles on SLAT/divorce cases Dayal v. Lakshmipathy, 2020-Ohio-5441 and Kim v. Kim.

Title

Sub-Title

Other Ways To Destroy SLAT Benefits

- Watch out for donee-spouse (or joint account) inadvertently funding the SLAT, or community property inadvertently funding the SLAT, which causes both an IRC 2036 retained interest problem as well as an asset protection issue of causing estate inclusion over that portion contributed by the beneficiary-spouse. May require a transmutation agreement for community property or gift between spouses for non-community property states.
- Estate of Grace, Levy v. Comm – reciprocal trust doctrine, quid pro quo funding.
- Same day immediate transfers from beneficiary-spouse to grantor-spouse (including transfers immediately after transmutation) and then to the SLAT risk being considered together as one transaction – i.e., a transfer from the beneficiary-spouse to their own SLAT, making the gift incomplete and/or triggering §2036. How much time between is needed?? See the recent Smaldino case and further back, Betty R. Brown v. U.S., 329 F.3d 664 (9th Cir. 2003).

Other Ways To Destroy SLAT Benefits

- Consider how expenses are handled as well. Husband's SLAT makes a distribution to Wife. Wife deposits funds in a joint checking account. Husband signs checks to pay for utilities and other joint living expenses. Is that an issue? Consider recommending that joint accounts be eliminated and use a DAPT jurisdiction.
- Beware Donor control and loose spending from LLC/LP/closely held stock owned by the SLAT. In Reichardt v. Comm'r (In re Estate of Reichardt), 114 T.C. 144 (U.S.T.C. 2000), the settlor transferred FLP interests, but retained control of partnership checking account and used it for personal expenses and lived in home owned by it rent-free. Held: included.

Tax Reimbursement Clauses

Considerations

Grantor Trust Income Tax Reimbursement Clauses

- Rev. Rul. 2004-64 concluded that grantor trust income tax reimbursement clauses do not cause a gift or § 2036 inclusion if they are discretionary, not mandatory or subject to any side agreement, and if they do not subject the trust to the grantor's creditors under state law. This last point is easily overlooked. Be careful changing situs from a protective to non-protective state.

- Some states have statutes that expressly permit reimbursing a settlor for grantor trust tax burden, even if the trust document does not permit. Example: C.R.S. § 15-5-818; 12 Del. C. § 3344; Fla. Stat. § 736.08145; N.H. Rev. Stat. § 564-B:8-816; New York EPTL § 7-1.11

Grantor Trust Income Tax Reimbursement Clauses

- Many trust documents now include a tax reimbursement clause, but this might be dangerous in some states. If your state has not fixed the creditor protection aspects in its version of UTC §505, (e.g., Ohio's version of UTC §505 adds an exception for:"(c) Trust property that, pursuant to the exercise of a discretionary power by a person other than the settlor, could be paid to a taxing authority or to reimburse the settlor for any income tax on trust income or principal that is payable by the settlor under the law imposing the tax." In addition to Ohio, see Ariz Rev. Stat. §14-10505, Georgia (O.C.G.A § 53-12-82(a)(2)(B)(ii), Idaho Code Ann. §15-7-502, Illinois 760 ILCS 3/505, Iowa Code Ann. §633A.2304, Ky. Rev. Stat. Ann. §386B.5-020, Md. Code Ann., Est. and Trusts §14.5-1003, M.G.L.A. 203E § 505, M.C.A. §72-38-505, N.C. Gen. Stat. Ann. §36C-5-505, 20 Pa. C.S.A. §7745, South Dakota (SDCL. §55-1-36); Tex. Prop. Code Ann. §112.035, Va. Code Ann. §64.2-747. The various state DAPT statutes probably provide protection as well, but make sure that DAPT formalities are followed to come under them (e.g., affidavit of solvency, etc.).

Grantor Trust Income Tax Reimbursement Clauses

- Imagine a 20-year old trust worth $20 million where the income tax attributable on the taxable income over the years is $4 million, and the trust permits the trustee to reimburse the grantor this amount back 20 years (documents rarely if ever have a cutoff date). If creditors can reach the maximum amount that the trustee can distribute to the settlor, this is $4 million, causing exposure of at least this amount to creditors and probably estate inclusion over all of it.

Conclusion and Additional Information

Sub-Title

Conclusion

- Take Precautions
- Adding any back-door access, whether through a trust protector or a lifetime limited power of appointment, adds some risk of creditor access.
- Potential creditor access may result in estate inclusion, but even if state law is protective, IRC 2036 can pull in a trust where settlor retains de facto "enjoyment and possession"
- Perhaps, a bankruptcy court would see explicit "back door" access in trust as a "similar device" to a DAPT under 11 USC § 548(e) 10-year fraudulent transfer rule?

Conclusion

- Take steps to make SLAT plans of all types safer:
  - Start with financial modeling and insurance planning to demonstrate that there is no likely need to access SLAT assets post transfer (e.g., Reichard case where donor had gifted away nearly everything and tax court found this suggested implied agreement with donees)
  - Using independent trustees also helps avoid prearrangement arguments (and sloppy administration) under IRC §2036 (e.g., McCabe case).
  - Better use independent institutional trustees.
  - Use a DAPT jurisdiction, or at least one with strong back door interest protection.
  - Have annual review meetings to monitor SLAT administration (including sloppy administration of closely-held entities owned by SLAT managed by settlor).

Conclusion

- Have both time and independent economic events intervene if assets are retitled as between spouses and report those transfers on gift tax returns.
- Warn clients in writing that each incremental access points adds additional risk but that none of those risks can be quantified.

Additional information

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Additional Sources You Might Consider

- Barry Nelson's LISI article and outline from his book.
- Jonathan's SPAT article.
- George Karibjanian also has excellent article on Exploring the Back End SLAT: Mining Valuable Estate Planning Riches or Merely Mining Fool's Gold?, in Bloomberg Tax Management Estates, Gifts and Trusts Journal, not in material, email him directly for copy at gkaribjanian@fkl-law.com.
- Marty Shenkman & Gideon Rothschild: "Self-Settled Trust Planning in the Aftermath of the Rush University Case," Steve Leimberg's Asset Protection Planning 215 2012-12-06 23:15:17.0.
- Jonathan Blattmachr, Matthew Blattmachr, Martin Shenkman & Alan Gassman on "Toni 1 Trust v. Wacker: Reports of the Death of DAPTs for Non-DAPT Residents Is Exaggerated," Steve Leimberg's Estate Planning 2651 2018-07-17 21:10:13.0.
- Sandra D. Glazier, Martin M. Shenkman & Alan Gassman on "DAPTs & Klabacka: At the Intersection of Estate Planning and Family Law," Steve Leimberg's Asset Protection Planning 357 2018-02-01 21:52:07.0.