

SLATs and Other Techniques for Estate Planning Now

SLATs, DAPTs, SPATs, and more
By: Robert Keebler, CPA, Jonathan
G. Blattmachr, Esq. and Martin M.
Shenkman, Esq.



Law Easy

General Disclaimer

- The information and/or the materials provided as part of this program are intended and provided solely for informational and educational purposes. None of the information and/or materials provided as part of this power point or ancillary materials are intended to be, nor should they be construed to be the basis of any investment, legal, tax or other professional advice. Under no circumstances should the audio, power point or other materials be considered to be, or used as independent legal, tax, investment or other professional advice. The discussions are general in nature and not person specific. Laws vary by state and are subject to constant change. Economic developments could dramatically alter the illustrations or recommendations offered in the program or materials.

Introduction and Overview

**Planning In the
Current Environment**



Introduction

- The presenters will consider several strategies (planning vehicles) and various options for each – domestic asset protection trusts (DAPT's and variations of them), spousal lifetime access trusts (SLATs), special power of appointment trusts (SPATs), and more.
- We will demonstrate drafting documents to implement the different strategies, illustrating the power of document drafting software, so that attorneys aren't starting from scratch when drafting complex structures.
- This webinar will provide an overview of “high-end” strategies that clients should implement now before the exemption is reduced in 2026, and before the planning landscape may change.

Specific Trusts for the Current Environment: How to Plan and Draft Them

1. **SLATs** – spousal lifetime access trusts that permit each spouse to be a beneficiary of the trust created by the other spouse
2. **DAPT**s – self-settled domestic asset protection trusts that permit access by naming the grantor as a beneficiary
3. **Hybrid DAPT**s – non-self-settled trusts that permit access by giving someone a non-fiduciary power to add beneficiaries from a class that includes the grantor.
4. **SPAT**s – Special power of appointment trusts that permit access but avoid self-settled trust status.

This is Planning for the Client Not Just Heirs

- Asset protection benefits the client, not just the client's heirs. Litigation and bankruptcies increase when the economy falters, hence the uncertainty in the current environment makes asset protection planning quite important.
- Non-grantor trust status (e.g., so-called “ING Trusts”) may also save the client current income taxes (given the likelihood of rates increasing to pay for bailouts). Lower income taxes is the same as building wealth. We will not, however, address non-grantor trust planning in this presentation due to time limitations.

Goals to Address in Planning

- **Access:**
 - Most clients will not shift significant wealth if they cannot have access to that wealth
 - The current economic problems (recession?), stock market decline, and uncertainty exacerbate the need for access if clients are to plan now
 - The techniques to use now are more robust and different than what many practitioners did in 2012 (and we all recall some “buyer’s remorse” with 2012 planning)
- **Exemption:** Use of exemption and estate reduction before laws become less favorable
 - Plan to reduce client’s estates before tax laws are changed to be harsher
 - In 2026 the exemption declines by half
- **Asset protection:**
 - All planning should protect assets for the client as well. This will help motivate clients to act. It’s not just about helping heirs but protecting the client as well.

1. SLATs – Spousal Lifetime Access Trusts

**Benefitting Grantor's Spouse
Without Creditor Issues or
Estate Tax Inclusion**



SLATs: How They Work

- Each spouse creates a trust for the other spouse, avoiding the state law creditor and tax Reciprocal Trust Doctrines.
- This occurs by making the trusts sufficiently different so the doctrines will not apply.
- The trusts can be created at different times, with different assets and trustees, and with very different terms.

SLATs: How to Make Them Work

- Create each SLAT in a different state. This is simple with document generation software, you merely select the state for each.
- In one trust, the beneficiary spouse can be entitled to distributions each year, have a lifetime broad special power of appointment, can change trustees (within Rev. Rul. 95-58 safe harbor), withdraw under HEMS.
- In the other trust, the beneficiary spouse would have no entitlement to distributions (perhaps is not even a current beneficiary), no power to change trustees, and no power of appointment, but could become eligible to receive a distributions only upon exercise by a trusted child of a power to add beneficiaries.
- You can readily select different options for each trust using document generation software, or use preselected forms that incorporate differences.
- Do not let child know of her right to receive distributions until after trust is created.
- A detailed checklist follows at the end of this section of the PowerPoint.

SLATs: Additional Ways to Provide Grantor Access - 1

- **Loans**: Consider granting to someone the power, in a non-fiduciary capacity, to loan the grantor trust assets. Some might refer to this as a “loan director,” but other titles might be used as well. A loan director can determine to loan funds to grantor of the SLAT without adequate security for the loan (but the loan director could be required to charge adequate interest to avoid tax issues). This mechanism provides the grantor another means to access trust assets should the grantor require them.
- **Charity**: You might also infuse another means of the grantor indirectly “accessing” funds in a SLAT. Give someone, in a non-fiduciary capacity, the power to add charitable beneficiaries. This person might be called a “charitable director,” but other titles might be used as well. A charitable director can determine to add charitable beneficiaries to a SLAT. This provides the grantor an indirect means of “access” to the SLAT by making a charitable donation the charitable director can add the charity to the SLAT and the donation can be made out of SLAT funds not the grantor’s funds. However, the SLAT cannot pay a charitable pledge of the grantor.

SLATs: Additional Ways to Provide Grantor Access - 2

- **Vacation Home**: A SLAT could own an interest in a vacation home. And if the grantor's spouse/beneficiary uses the vacation home, the grantor presumably can as part of the spouse's family. Bear in mind if that is to be done a limited liability company ("LLC") should be formed in the state where the SLAT is governed and administered. That LLC should be authorized to do business in the state where the vacation home is located. That LLC would own the vacation home property and in turn the trust could own some or all the interests in the LLC.
- **Income Tax Reimbursement**: If the SLAT is structured to be a grantor trust (i.e., the grantor pays the income tax on trust income) consider including a discretionary income tax reimbursement clause. This permits the trustee of your SLAT, in the trustee's discretion (it cannot be mandatory) to reimburse the grantor for income tax paid on trust income. A tax reimbursement provision can add valuable flexibility and access to the grantor.

Sample SLAT Provisions

- **Distributions to Spouse During Grantor's Lifetime**
- The Trustee may, but shall not be required to, distribute as much of the net income and/or principal of the Lifetime Trust as the Trustee (excluding, however, any Interested Trustee) may at any time and from time to time determine to the Grantor's Wife and the Grantor's descendants in such amounts or proportions as the Trustee (excluding, however, any Interested Trustee) may from time to time select, for any purpose.
- Any net income not so distributed shall be accumulated and annually added to principal.

Sample SLAT Provisions

- **Wife's Lifetime Power of Appointment During Husband's Lifetime (Wife's SLAT for Husband would modify or exclude this Power)**
- Trustee shall distribute such income and/or principal of the trust to such one or more persons out of a class composed of the Grantor's descendants and surviving spouses of the Grantor's descendants on such terms as the Grantor's Wife may appoint by a signed writing that is acknowledged before a notary public specifically referring to this power of appointment and delivered to the Trustee provided, however, that any such appointment by the Grantor's Wife shall only be effective if a trustee who is non adverse within the meaning of Reg. § 25.2511-2(e) consents to the appointment in an acknowledged written instrument, and provided further, however, that this power of appointment may be exercised on the Grantor's Wife's behalf by a guardian or attorney-in-fact appointed to represent the Grantor's Wife and expressly authorized to do so.

Checklist of Differences to Integrate into SLATs - 1

- The following checklist is from Steiner and Shenkman, “Beware of the Reciprocal Trust Doctrine,” Trusts & Estates magazine:
- Draft the trusts pursuant to different plans. A separate memorandum or portions of a memorandum dealing with each trust separately may support this.
- Don’t put a husband and wife in the same economic position following the establishment of the two trusts. For example, the husband could create a trust for the benefit of his wife and issue, and the wife could create a trust for the benefit of her issue, in which her husband isn’t a beneficiary. Or one spouse could be a beneficiary of the trust he creates, if the trust is formed in an asset protection jurisdiction such as Alaska, Delaware, Nevada or South Dakota, and the other spouse could create a trust in which he isn’t a beneficiary (that is, a trust that’s not a domestic asset protection trust).
- Use different distribution standards in each trust. For example, one trust could limit distributions to an ascertainable standard, while the other trust could be fully discretionary. However, limiting distributions to an ascertainable standard reduces flexibility may prevent decanting and may expose the trust assets to a beneficiary’s creditors.

Checklist of Differences to Integrate into SLATs - 2

- Use different trustees or co-trustees. If each spouse is a trustee of the trust the other spouse creates, add another trustee to one or both trusts. If adding another trustee to each trust, consider adding a different trustee for each trust and using different institutional trustees.
- Give one spouse a noncumulative “5 and 5” power, but not the other. This power permits the holder to withdraw up to the greater of \$5,000 or 5 percent of the trust principal each year. The amount the powerholder could have withdrawn at the time of death is includible in his estate. However, the lapse of the power, not in excess of the greater of \$5,000 or 5 percent of the trust assets each year, isn’t considered a release of the power includible in the powerholder’s estate²⁴ or a taxable gift. However, this power may expose assets of the trust to the powerholder’s creditors.
- As in *Levy* and PLR 9643013, give one spouse a special power of appointment, but not the other. However, the absence of a power of appointment reduces the flexibility of the trust. This might be viewed as particularly significant in light of the continued estate tax uncertainty.

Checklist of Differences to Integrate into SLATs - 3

- Give one spouse the broadest possible special power of appointment²⁶ and the other spouse a special power of appointment exercisable only in favor of a narrower class of permissible appointees, such as issue, or issue and their spouses.
- Give one spouse a power of appointment exercisable both during lifetime and by will and the other spouse a power of appointment exercisable only by will.
- In the case of insurance trusts, include a marital deduction savings clause in one trust, but not the other. A marital deduction savings clause provides that if any property is included in the grantor's estate because the grantor dies within three years after transferring a policy on his life to the trust, some or all the proceeds of the policy is held in a qualified terminable interest property trust²⁸ or is payable to the surviving spouse outright. Alternatively, if each trust has a marital deduction savings clause, the provisions of the two could be different.

Checklist of Differences to Integrate into SLATs - 4

- Create different vesting provisions for each trust. For example, the two trusts could mandate distributions at different ages, or in a state that has repealed or allows a transferor to elect out of the rule against perpetuities, one trust could be a perpetual dynasty trust. However, mandating distributions severely reduces the flexibility of the trust, throws the trust assets into the beneficiary's estate for estate tax purposes and exposes the assets to the beneficiary's creditors and spouses.
- Instead of mandating distributions, give the beneficiaries control or a different degree of control, at different ages. For example, the ages at which each child can become a trustee, have the right to remove and replace his co-trustee, and have a special power of appointment could be different in each trust.
- Vary the beneficiaries. For example, one spouse could create a trust for the spouse and issue, and the other spouse could create a trust just for the issue. Note that if, for example, the husband creates a trust for his wife and their first child, and the wife creates a trust for her husband and their second child, the gifts could still be viewed as reciprocal.

Checklist of Differences to Integrate into SLATs - 5

- Create the trusts at different times. In *Lueders' Estate v. Commissioner*, a husband and wife each created a trust and gave the other the power to withdraw any or all of the trust assets. Inasmuch as the trusts were created 15 months' apart, the Third Circuit, in applying *Lehman*, held that there was no consideration or *quid pro quo* for the transfers. However, it should be noted that *Lueders* preceded *Grace*, in which, while the trusts were created two weeks apart, the Supreme Court held that the motive for creating the trusts wasn't relevant. If the difference in time is a factor post-*Grace*, a short time might be sufficient in light of *Holman v. Comm'r*, in which a gift of partnership interests six days after the formation of the partnership wasn't a step transaction. The closer we get to the end of 2012 and the possible end of the \$5.12 million gift tax exempt amount, the more difficult it will be to interpose any meaningful time difference between the formation of the two trusts. Practitioners should also bear in mind that if the same transaction includes funding an LLC, then making gifts to the trusts that are to qualify for fractional interest or other discounts, they will be dealing with the challenge of two dating issues: the difference between the trusts, and the maturation period of assets in the LLC prior to gift or sale.

Checklist of Differences to Integrate into SLATs - 6

- Contribute different assets to each trust, either as to the nature or the value of the assets. However, if the purpose is to contribute \$5.12 million to each trust, it may not be feasible to contribute assets of different value, and in any event varying the value of the trust only serves to reduce the amount to which the reciprocal trust doctrine may apply. Contributing different assets may not negate the application of the reciprocal trust doctrine, since the assets in a trust may be susceptible to change over time. However, if one trust is funded with non-liquid assets, or assets subject to contractual restrictions on sale (e.g., operating agreement restrictions on transfer of interests in an LLC) that may be viewed as a more meaningful difference in assets that may not be susceptible to ready modification.

Should Both or Only One Spouse Fund a SLAT? - 1

- **Example - 1:** Husband and wife have a combined estate of \$16 million and are willing to make \$8 million in total gift transfers in 2020 to safeguard a portion of their temporary exemptions. If each of husband and wife transfer \$4 million to a non-reciprocal spousal lifetime access trust (“SLAT”) they will have safeguarded \$8 million of exemption (and any future growth on those assets) in case the law changes. In 2026 when the exemption declines by half, to \$5 million each (ignoring inflation adjustments) each spouse will be left with \$1 million of exemption. So if you add the \$4 million each spouse used in the 2020 planning and the \$1 million each has left in 2026, the couple will have preserved \$10 million of exemption. Good, but they can do better. If in 2020 with a Dem sweep and the estate tax exemption is reduced to \$3.5 million, the couple will have no further exemption left, but they’ll be hugging their estate planning for having helped them safeguard \$8 million before those changes.
- But then the total exemption safeguarded is only \$8 million. Is that optimal? Maybe. But perhaps not. Consider having one spouse, not both, use current exemption thereby preserving more exemption for future planning.

Should Both or Only One Spouse Fund a SLAT? - 2

- **Example - 2:** Assume the same facts as in the above example. Husband and wife have a combined estate of \$16 million and are willing to make \$8 million in transfers to irrevocable trusts to secure a portion of their temporary exemptions. But instead of setting up two non-reciprocal SLATs as in the above example, the wife gifts \$8 million to a DAPT. Her husband and all descendants are beneficiaries of the trust. So with husband as a beneficiary, so long as he is alive and they remain married she has indirect access to the \$8 million through husband. You could incorporate a mechanism into the trust to add wife in as a beneficiary in the future (see hybrid DAPT below) just in case her husband dies prematurely or divorces. If the exemption drops to \$5 million in 2026 as the law currently provides. Wife used \$8 million of her exemption so she'll have none left. But, since husband did not use any of his exemption in the plan, he will still have \$5 million of exemption left in 2026. So his \$5 million of exemption and the \$8 million of exemption the wife used in 2020 means the couple has preserved \$13 million of exemption, \$3 million more than had they used the non-reciprocal SLAT approach in the prior example.

2. DAPTs – Domestic Asset Protection Trusts

**No Longer Void
Everywhere in the
US: 19 States Permit**



DAPTs: What They Were

- General rule throughout the US before 1987: any trust from which a distribution may be made to the Grantor by the Trustee is considered “self-settled” and the trust property was permanently subject to the claims of the Grantor’s creditors regardless of the motivation for creating the trust. It is just a rule.
- New York EPTL 7-3.1 says “A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator.”
- Section 548(e) of the US Bankruptcy Code pulls into the bankruptcy estate any self-settled trust or similar device if it was created to hinder, delay or defraud a creditor and bankruptcy is commenced within ten years.

DAPTs: What They Are Now

- Alaska enacted AS 34.4.110 providing complete asset protection for a self-settled trust if the Grantor was not trying to defraud a known creditor (plus other requirements).
- Now 19 states protect self-settled trusts from claims of the Grantor's creditors.
- Does this work in other states? It's not certain, but likely if all "Ps and Qs" are followed—e.g., all persons and assets involved are in a "DAPT" state.
- The trust should be excluded from the Grantor's gross estate if the gift to the trust is complete. See Rev. Rul. 76-103, Rev. Rul. 2004-64, and PLR 200944002 (not precedent). This may provide a complete "bullet proof" reason for creating the trust.

DAPT Planning and Drafting Options

- Have assets held in underlying LLC that DAPT holds only a non-controlling interest in.
- Perform lien and judgement searches, have a balance sheet, and have client sign a solvency affidavit regardless of whether state law requires.
- Consider client changing domicile to DAPT jurisdiction if feasible. With 19 states having DAPT legislation there may be a nearby state.
- Prohibit distributions for 10 years plus 1 day to avoid 548(e) of the Bankruptcy code.
- Prohibit distributions if grantor is married as spouse can receive distributions.
- Prohibit distributions if grantor's net worth is in excess of some stated amount.
- Provide a non-fiduciary the power to remove the grantor as a beneficiary.
- Using document generation software makes it easy and efficient to select from a range of options that might be appropriate for any particular client's circumstances.

Sample DAPT Provisions - 1

- **Distributions to Grantor, Spouse and Descendants During Grantor's Lifetime**
- During the Grantor's life, the Trustee shall administer the trust (the "Lifetime Trust") pursuant to this paragraph:
- The Trustee may, but shall not be required to, distribute as much of the net income and/or principal of the Lifetime Trust as the Trustee may at any time and from time to time determine to such one or more of the Grantor, the Grantor's Wife and the Grantor's descendants in such amounts or proportions as the Trustee may from time to time select for the recipient's health, education, maintenance or support in his or her accustomed manner of living.
- However, no distribution shall be made to the Grantor during any period that the Grantor is married to and living with another person as a married couple and provided, further, however, that no distribution shall be made to the Grantor until one year after the initial contribution to this trust.

Sample DAPT Provisions - 2

- **Power to Eliminate Grantor as Beneficiary.** The Trust Protector may, by acknowledged instrument delivered to the Grantor, permanently and irrevocably eliminate the Grantor as a beneficiary of each trust hereunder. [OBJ:APT 1009002]
- **Note:** Consider also adding a restriction on no distributions until 10 years after funding.

3. Hybrid DAPTs – A DAPT Without a Grantor as Current Beneficiary

**Improving the
Odds of Protection**



Hybrid DAPTs: What They Are

- A Hybrid DAPT is a DAPT created for other family members (e.g., Grantor's spouse and descendants) but with some ability to add the Grantor in as a beneficiary.
- The power to add can be made conditional by time (e.g., only after 10 years in an attempt to avoid Bankruptcy Code 548(e), or when grantor is not married and is not living with another as the Grantor's spouse).
- Does it work? *Ianotti*, 725 NYS 2d 866 (2001) suggests not if the person who can add the Grantor (e.g., Trust Protector) is acting under a fiduciary duty.
- Hence, if you try this, make sure the person who can add is not acting under a fiduciary duty.

Hybrid DAPTs

- If the grantor may be added as a beneficiary have the trust divided into two separate trusts and add the grantor as a beneficiary of only that portion of the trust that is necessary.
- Sample Language:
 - **Division of Trusts.** The Trustee may divide any trust into two or more separate trusts and administer them as separate trusts, either before or after the trust is funded.

4. SPATs – Special Power of Appointment Trusts

**A Safer Form of
Domestic Asset
Protection Trust**



DAPT and Hybrid DAPT Limitations Suggest SPATs

- DAPTs are self-settled trusts and, therefore, potentially subject to claims of the Grantor's creditors, foiling asset protection and estate tax avoidance
- So why not avoid using a self-settled trust, and, which is a trust from which the TRUSTEE can make a distribution to the Grantor?
- And instead create a trust for the Grantor's family that prohibits the Trustee from ever making a distribution to the grantor or "Decanting" to a trust of which the grantor is a beneficiary.

SPATs: Safer for Asset Protection and Estate Tax Exclusion

- One or more individuals, who are not beneficiaries, are granted special “collateral” lifetime powers of appointment, which can be exercised in favor of members of a class that includes the Grantor (such as descendants of the Grantor’s mother).
- Make the power exercisable only with the consent of a trusted third party (e.g., the client’s lawyer or cousin).
- Exercise should be made outright only and exercised only if the Grantor has a need.

SPAT – Sample Provision - 1

- Notwithstanding anything to the contrary herein, from and after one (1) year from the date of this Trust Agreement and until the Grantor's death, Carol Roberts shall have the power acting solely in a non-fiduciary capacity, to appoint some or all of the then remaining income and principal of the trust to or for the benefit of any one or more persons who are descendants of the Grantor's grandparents, by a signed writing acknowledged before a notary public specifically referring to this power of appointment; provided however, that no such exercise of this special power of appointment may be made without the written consent of Molly Smith, acting in a non-fiduciary capacity.

SPAT – Sample Provision - 2

- Notwithstanding anything to the contrary herein, no powerholder shall have the power to appoint the principal of this trust during the Grantor's lifetime to himself or herself, to his or her estate, to his or her creditors, or to the creditors of his or her estate if such powerholder is otherwise a permissible appointee of this special power of appointment. The exercise of this power of appointment shall be effective upon delivery of the written exercise to the Trustee and the execution of a written consent to the exercise by Molly Smith. No powerholder shall have an obligation to exercise, or not to exercise, the power of appointment given in this paragraph nor shall any person whose consent is required for the effectual exercise of such power of appointment have an obligation to give such consent.

Conclusion and Additional Information



Conclusions

- A wide array of strategies are ripe for planning now, before the exemption is reduced. Key to these for most mid-wealth clients is retaining access to assets transferred.

Additional information

- Robert S. Keebler
Robert.Keebler@keeblerandassociates.com
- Jonathan G. Blattmachr
jblattmachr@hotmail.com
- Martin M. Shenkman
shenkman@shenkmanlaw.com

