



InterActive Legal®
Speaker Series

THIRTY-ONE FLAVORS OF SLATs

Objectives

- Today's discussion is designed to provide a deeper and broader perspective on SLATs and other irrevocable trust planning.
- We'll consider why the devil is not in the details but in ignoring them.
- You cannot logically "like" or "hate" SLATs, because there are so many different variations. The key is identifying the variants that fit the client situation.

Agenda

- SLAT overview
- SLAT challenges and solutions:
 - Divorce/separation (and possible remarriage)
 - Death of the spouse-beneficiary (and possible remarriage)
 - Creditor protection issues
 - Changes in tax laws
 - Changes in family circumstances
 - Trust income taxation
- Summary/Conclusions/Q&A

SLAT Review – What is a SLAT, and why do we use them?



SLATs

- A spousal lifetime access trust is an irrevocable trust created by one spouse for the other.
- The beneficiary-spouse has access to the trust assets during lifetime, BUT there are a myriad of variations of who else could have access and when. The key to good SLAT-like trust planning is discerning when to apply which variant, to which spouse, and how.
- Usually, the trust is set up to NOT be included in the taxable estate of the settlor-spouse, but as with all SLAT-like trust variants “IT DEPENDS.”
- Often, the trust is set up as a grantor trust for income tax purposes, but for specific clients, a non-grantor variant or a combination of different SLAT-like trusts may provide a better result.
- SLATs are a flexible tool, designed to address changes that arise after the trust is created.

Challenges in SLAT Design – Why some planners aren't SLAT fans



SLAT Challenges

- Marital discord or divorce: misconceptions or generalizations about how the practitioner (not the clients) should weigh that risk considering other client goals
- Beneficiary-spouse dies early
- Settlor-spouse remarries
- Creditor protection could be lost if the trust is determined to be self-settled
- Tax laws change such that estate exclusion is no longer the primary objective
- Family circumstances change such that the settlor would like to alter the beneficiaries or assets
- Trust income taxation – What is desired? Grantor vs. non-grantor? State considerations?

Divorce

- SLATs are attractive because one spouse can transfer assets away irrevocably yet retain INDIRECT access to the assets by being married to and living with the trust beneficiary. But what if the spouses later separate, no longer live together, or dissolve their marriage?
- If one spouse creates a grantor trust for the other, and the couple later divorces, the settlor-spouse remains liable for the income tax on trust income even if the now ex-spouse receives all that income as a beneficiary of the SLAT.
- How much (and how) can indirect benefit continue without undermining the SLAT?
- All clients face a risk of divorce – although the rate for the general public may be higher than for educated, high-net-worth clients. (Statistical data suggest that the divorce rate for wealthy, educated couples already in a long term marriage is substantially lower than for the population as a whole.)
- Can you create SLATs for married couples knowing they face this risk? OF COURSE. It is the client's decision how to weigh the benefits of SLATs versus the risk of divorce. It is the practitioner's responsibility to explain the issues, options, and implications so that the client can make an informed decision.
- How can this possibility be addressed in the trust agreement and ancillary planning?

Planning for Divorce

- “Floating Spouse” – define the spouse as the current spouse, but only if there is no separation or divorce (Flavor #1)
 - Consider a floating spouse clause at least for death so that if the beneficiary-spouse dies, the settlor-spouse could regain direct access in the event of remarriage
- Powers of appointment – include a collateral lifetime power of appointment in favor of a class that may include the settlor spouse (sometimes called a “backdoor SLAT”) (Flavor #2)
- Power to add or remove beneficiaries – allow a trust protector to later adjust beneficiaries (Flavor #3)
- Include other beneficiaries – such as children or other family members – who will have access to trust assets. (Flavor #4)

SLAT Divorce Planning Options

- Beneficiary-spouse loses beneficiary status upon divorce. This could be a dangerous option. Cutting a spouse out may eliminate grantor trust tax issues but will the post-divorce couple have sufficient assets to survive post-divorce?
 - Be careful using removal of a spouse as beneficiary post-divorce without the clients understanding the economic implications. That might be disastrous for a couple that needs those assets post divorce.
- Split the trust into two SLATs on divorce: ½ into a new SLAT that is identical to the existing SLAT retaining the beneficiary-spouse in that capacity; and the second half into a new SLAT that has a floating spouse clause so that the settlor-spouse may have indirect access if they remarry. The second trust also cuts off the ex-spouse as a beneficiary and the tax problem that creates. (Flavor #5)
- Use a hybrid DAPT, SPAT, or traditional DAPT structure so that the settlor-spouse can gain access to the trust if necessary to negotiate divorce arrangements. (Flavor #6)
 - You might even make the hybrid DAPT, SPAT, or traditional DAPT mechanism only permissible after a divorce or death of the beneficiary-spouse.
- Contrast these other options with the automatic removal of the spouse on divorce. Which approach provides the access the clients need now and post-divorce?
- Some clients may reasonably assess that they are more concerned about estate tax, asset protection, or other SLAT-like trust benefits than they are about divorce risk. Some clients may weigh the tax and asset protection risks and complexity of DAPT, hybrid-DAPT, SPAT uncertainties as greater than the risks of divorce.

Quick Drafting (Floating Spouse; SPAT)

Floating Spouse option:

Spouse defined herein as

- ☐ Person to whom Ms. Ewing is married at any time
- ☒ The current spouse (even after divorce)
- ☐ The current spouse (but not if separated or divorced)

☒ Include provisions to terminate grantor trust status on divorce

Special Power of Appointment Trust (SPAT) Options – on the next page

SPECIAL POWER OF APPOINTMENT

DRAFTING TIP: With a SPAT, creation of a non-grantor trust requires either a) that the powerholder of the special power of appointment be an adverse party or b) that the special power only be exercisable with the consent of an adverse party. Any exercise of the special power may result in a gift by the adverse party(ies). It will not always be clear whether a certain person is adverse for grantor trust purposes. See Help Text below and Drafting Tip that will appear upon selection of the option to require consent to exercise the special power for additional information.

Special power of appointment held by:

Name of Powerholder

Ray Krebbs

- ☒ Individual
☐ Group

☒ Delay time until power of appointment can be exercised

DRAFTING TIP: By delaying the time at which the power of appointment is effective, you may be able to create a period of time before the power may be exercised in which the trust is deemed to be a non-grantor trust even if the person holding the power or the person whose consent is required (or both) is non-adverse. This may be a viable option to make non-reciprocal trusts or to add an extra argument against a claim that the SPAT is a self-settled trust. Selecting this option will give you an option to indicate the period of time during which the power is not exercisable. Not selecting this option will make the power immediately exercisable.

What is the time period before the power becomes exercisable

- ☒ After 1 year
☐ After 10 years
☐ Custom

☒ Require consent to exercise power

Whose consent is required for exercise of the power of appointment

- ☒ adverse party
☐ other

DRAFTING TIP: If you are creating a non-grantor trust and have not provided for an adverse person(s) to exercise the special power of appointment, the person whose consent is required cannot be the Grantor and must be adverse to the exercise of the power of appointment in order to avoid triggering grantor trust status. Be aware that a conservative reading of *Estate of Regester*, 83 T.C. 1 (1984) indicates that the exercise of the power of appointment by a beneficiary of the trust will result in a potentially taxable gift by the beneficiary. In the current high estate tax exemption era, this may not be an insurmountable obstacle and the value of any gift in a discretionary trust with many beneficiaries may be difficult to determine and may well be de minimis. Blattmachr, Shenkman and Gans, "Use Trusts to Bypass Limit on State and Local Tax Deduction", Estate Planning, p. 11 (April, 2018). If you are creating a grantor trust or have provided for an adverse party to exercise the special power of appointment, you may consider whether to require the consent of a knowledgeable third party, such as a partner in the law firm representing the grantor, in order to exercise of the power of attorney to ensure that assets are not unintentionally diverted away from the grantor. Use of a nonadverse party does not have gift tax consequences as there can be no gift. Do not give the "trustees", as trustees, the power to consent to the exercise of the power of appointment because there is a risk that the trust will be considered a self-settled trust because the power will not be exercisable in a non-fiduciary capacity.

It will not always be clear whether a certain person is adverse for grantor trust purposes. See generally, Lipkind, Shenkman and Blattmachr, "How ING Trusts Can Offset Adverse Effects of Tax Law: Part II", Trusts & Estate (November, 2018). Several PLRs (not precedent) discussed in that article indicate that current beneficiaries of a trust or remainder beneficiaries of a trust may be adverse. You need to carefully consider that issue.

Name of Adverse Party or Parties whose consent is necessary

the eldest living adult descendant of the Settlor



Permissible appointees under special power of appointment

- ☐ Descendants of grantor's parents
☒ Descendants of grantor's grandparents
☐ Custom draft

SLAT Divorce Practice Considerations

When representing spouses in ANY estate planning, including SLATs:

- Try to communicate key consequences and warnings in writing. Clients are unlikely to remember, or may develop selective memory, if a future issue arises.
- Remember, this is not only about SLATs. Any change in asset ownership can have adverse consequences if a divorce occurs. Even the most common and basic planning can have material and negative impact.
- Address (in your retainer agreement) conflicts that are inherent in representing spouses.
- Explicitly address in your retainer agreement whether you must disclose confidences from one spouse to the other spouse, or whether you cannot do so. Be clear about your policy and be sure everyone is aware of it.
- State in your retainer agreement that if only one spouse attends a meeting, they agree to inform the other spouse of what was discussed, and the other spouse agrees to this. Be certain to address all communications to both spouses if both are represented.
- Remind clients in communications of open issues, considerations, and options. Let the client make the final decision as to whether the estate tax, asset protection, or other benefits of a SLAT-like plan outweigh the risk of divorce. Guide the client to make the decision. Only the client can weigh how they view the different risks.

SLAT Divorce Practice Considerations

- If two non-reciprocal SLAT-like trusts are used, identify the key differences between them in a letter/memo delivered with the draft trust documents. That should reinforce the reality that there are material economic consequences to provisions drafted to address tax issues, e.g., the reciprocal trust doctrine.
- Encourage clients to have their financial planner prepare projections illustrating possible outcomes, and review both investment and insurance planning to determine which of the financial “gaps” created by the SLAT-like plan should be addressed. Life, disability, and long-term care coverage can’t address divorce, but they do address other risks and issues.
- Having a second person on the planning team independently meet with clients can help clients understand these matters and may be protective of the estate planner, since another independent adviser confirming that the client understood the economic consequences and considered the investment and insurance options that may address some of those gaps will be helpful.
- Offer the client DAPT, hybrid DAPT and SPAT variations, or splitting a SLAT into two trusts one with a floating spouse clause and one with the same spouse continuing. There are options. Let the client choose. Consider documenting in writing what options were offered.
- Consider that if the couple has important asset protection, income tax (e.g. SLANT), estate tax, or other objectives a SLAT-like plan can meet, not offering SLAT-like plans because of the adviser’s fear of SLATs may reflect negatively on that adviser.

Spouse-Beneficiary Dies Early

- In addition to divorce, the settlor-spouse also loses the indirect access inherent in a SLAT-like trust if the beneficiary-spouse dies – which is an easier topic to discuss with happily-married clients than divorce.
- What mechanisms can be used to maintain some level of possible indirect access if the beneficiary-spouse passes away well before it was expected?
- Some solutions are similar to those used to plan for divorce (floating spouse, allowing the possibility of future indirect access if the settlor-spouse remarries).

Planning for Spouse's Death

- “Floating Spouse” – define the spouse to be the person to whom the settlor is married at any time – to allow the possibility of indirect access via a future spouse in the event of remarriage. (Flavor #7)
- Powers of appointment – include a collateral lifetime power of appointment in favor of a class (Flavor #8)
- Power to add or remove beneficiaries – allow a trust protector to later adjust beneficiaries (Flavor #9)
- Consider whether access is available via other beneficiary (Flavor #10)
- Even better - have the beneficiary-spouse create a non-reciprocal SLAT/ILIT that benefits the settlor-spouse. This trust can purchase life insurance to protect against a premature death, with the spouse who created the SLAT being made whole not by access to the SLAT assets, but rather by the life insurance in another trust. (Flavor #11)

Creditor Issues

- Wealth correlates strongly with being targeted in liability lawsuits, particularly because lawyers pursue deep-pocket defendants.
- A SLAT (or a SLAT-like trust) can facilitate asset protection planning while preserving access.
- These trusts may be scrutinized and later determined to be self-settled – potentially removing the asset protection and estate exclusion benefits
- One of the goals in designing SLAT-like trusts is to balance the hoped for benefits – such as asset protection – against the degree of access that can be provided. Often, the more access, the greater the risk of creditor reach or estate inclusion, so there may be a trade-off for the client to decide upon.

Protecting the Asset Protection

- Set up the trust in a state that permits self-settled asset protection trusts (Flavor #12)
- Hybrid-DAPT (Flavor #13)
- Decanting (Flavor #14)
- Warn the client to have the trust properly administered by their advisor team with regular meetings.
- Formalities may be critical to achieve asset protection goals.
- For SLAT-like trusts in particular, how far can “indirect” access be pushed without exposing assets to the settlor-spouse’s creditors?
- Ignoring the formalities of the trust can sabotage its objectives.

Other challenges

- Tax laws and tax objectives change
 - Grantor trusts vs. non-grantor trusts
 - Estate exclusion vs. inclusion
- Family circumstances change
- All of the above create a need for flexibility
- Attorneys must consider what we want to draft (and don't want to draft) for each client, and then how to add the necessary flexibility.
- Multiple flavors/options on upcoming pages

What to Draft (and not to Draft)

- **Income tax** – grantor (SLAT) or non-grantor (“SLANT”) with an adverse party approval
 - SLATs may be used for tax burn, to transfer assets with the ability to swap back for basis adjustment, to permit broader flexibility with loan and tax reimbursement provisions.
 - SLANTs are powerful to maximize SALT, charitable, QSB (199A), state income taxes (in NY and CA as completed gift variants), and other benefits, not just estate taxes.
 - Mechanism to turn off grantor status may or may not be express.
- **Estate tax** – completed gift or incomplete gift
 - Completed gift SLATs have been the norm to shift wealth out of a client’s estate. Concerns over future estate tax changes keep this as a viable planning goal even if not applicable today.
 - Incomplete gift SLATs are not as common, but many SLATs incorporate incomplete gift trusts as part of a mechanism to deflect gift tax on a large note/sale transaction. Post-OBBA, an incomplete gift SLAT might be used to secure asset protection while still qualifying for basis step up on death.
- **GST tax** – exempt or non-exempt
 - Simple home-state ILITs often were not designed to be GST exempt, many are paid out to children at specified ages, and therefore had no GST exemption allocation.
 - Modern planning would typically structure SLATs as GST-exempt dynastic trusts for continued asset protection for heirs, as well as future transfer tax savings.

Quick Drafting (Swap power, adding GPOA)

"Swap power"

Select if Trust to be a "grantor trust" for income tax purposes

☒ Yes for each trust
☐ Only for certain trust(s)
☐ Only for certain time(s)
☐ Do not mention in document
☐ No

Using Code Sec. 675(4)(C) to Cause Grantor Trust Status

☒ Grant power to substitute property of equal value

☒ Power to substitute property is to be granted to the grantor

☐ Name successor individual to grant power to substitute property

Power to add GPOA:

Trust Terms (Check All That Apply)

☒ Trustee can confer on Husband a general power ✕

☐ Trustee may favor Spouse

☐ Include 5 & 5 power

☐ Spouse has power to withdraw for health, education, maintenance or support (HEMS)

☐ Husband to have lifetime special power of appointment

☒ Spouse to have testamentary power of appointment

WARNING: Exercise of this discretionary power to confer a general power of appointment on the surviving spouse will subject the family trust assets subject to the power of appointment to estate tax in the surviving spouse's estate under Code Sec. 2041(a)(2) and will likely eliminate protection from the creditors of the surviving spouse for the family trust assets subject to the power of appointment. It is anticipated that the Trustee would only choose to exercise its discretion to confer such a power if it is likely that the income tax consequences of subjecting the assets to the estate tax in the surviving spouse's estate outweighed the estate tax consequences of doing so along with the potential loss of creditor protection.

Quick Drafting (Non-grantor trusts)

Non-grantor trust options:

GRANTOR TRUST ISSUES	
CLICK for Practice Tip	
Select if Trust to be a "grantor trust" for income tax purposes	
<input type="radio"/> Yes for each trust	
<input type="radio"/> Only for certain trust(s)	
<input type="radio"/> Only for certain time(s)	
<input type="radio"/> Do not mention in document	
<input checked="" type="radio"/> No	
<input checked="" type="checkbox"/> Include language that may help keep each trust not intended to be grantor trust from being such a trust	DRAFTING TIP: THIS OPTION -- No -- attempts to prevent any trusts under this Irrevocable Trust from being a "grantor trust."

ARTICLE XXV |

Not a Grantor Trust

It is intended that the Settlor not be treated under Subpart E of Part I of Subchapter J of Chapter 1 of the Code as the owner of any trust created hereunder and the Settlor directs that this Declaration of Trust shall be construed and the trusts hereunder administered in accordance with and to carry out that intent. Accordingly, during the Settlor's lifetime and notwithstanding any other provision of this Declaration of Trust, neither the Settlor nor any other "nonadverse party" as that term is used in Code Sec. 672(b) shall have the power (1) to purchase, exchange or otherwise deal with or dispose of any principal or income of any trust hereunder for less than an adequate consideration in money or money's worth, or (2) to borrow any principal or income of any trust hereunder, directly or indirectly, without adequate interest or adequate security; no person in a non-fiduciary capacity shall have the power (1) to vote or direct the voting of stock or other securities of a corporation in which the holdings of the Settlor and any trust hereunder are significant from the viewpoint of voting control, (2) to control the investment of any trust assets either by directing investments or reinvestment or by vetoing proposed investments or reinvestment, to the extent that the trust assets consist of stocks or securities of a corporation in

What to Draft (and not to Draft)

- **Access** – SLATs can be an effective part of an asset protection or tax plan, but a key motive is assuring access if needed, as discussed earlier.
 - Have an insurance plan done to fill financial gaps in the plan. The agent will need to understand differences for reciprocal trust planning, etc. Depending on age, wealth and anticipated work: disability, long term care, life on one or even both spouses.
 - What does the financial modeling reflect? Consider a 50% likelihood of success to reach the IRS-table life expectancy to deflect an implied agreement or fraudulent conveyance, and a 80% likelihood to reach age 95 or 100 for client peace of mind. The financial forecasting can direct what mechanisms and access the plan needs and which ones it might leave out. Stress test the results.
 - Spousal access but consider cautions about use, savings language, separate checking accounts, risks of premature death and divorce.
 - SPAT, DAPT, hybrid-DAPT and other provisions for enhanced access. The conversation should never be about “SLATs” but about all the variants in trust design that are possible and which make sense to the client. The client should weigh the benefits that perhaps a DAPT may provide for increased access versus the increased risk that may add to a SLAT variant.
 - Variations on the above with hurdles: 10 years + 1 day before beneficiary status becomes active, net worth under specified threshold, no spouse, other?
 - Loan provision.
 - Tax reimbursement clause.
 - Right of non-fiduciary to add charitable and other beneficiaries.

Quick Drafting

(Lending power, changing beneficiaries)

Using Code Sec. 675(2) to Cause Grantor Trust Status

☒ Someone may loan trust assets to the Settlor

Name of person who may loan trust assets to the Settlor

Clayton Farlow

Using Code Sec. 674 to Cause Grantor Trust Status

☒ Trustee has power to pay income/principal pursuant to Code Sec. 674

☒ Name person (selector) to expand the beneficiary class

Specify the class of persons who may be added as beneficiaries

the descendants of any grandparent of the Settlor

DRAFTING TIP: Your answer will complete the sentence: "Until the Grantor's death, the Selector is authorized, acting in an individual capacity and not in a fiduciary capacity, at any time and from time to time, to add one or more of [the descendants of any grandparent of the Settlor] to the class of beneficiaries. . ."
Please conform to the voice (first/third person) used in this document.

Specify the "selector" who holds power to add to the beneficiary class

Jenna Wade

Quick Drafting

(Tax reimbursement, DAPT timing)

Tax reimbursement provision:

ARTICLE XII | Certain Income Taxes

For each taxable year thereof, the Trustee (excluding, however, any Interested Trustee) may, but shall not be required to, reimburse the Settlor from assets of any trust hereunder for the Settlor's income tax (Federal, state, local, or foreign) on the amount (if any) of the gross income of such trust that is reportable directly on the Settlor's return under Code Sec. 671.

DAPT beneficiary timing options:

Grantor is to be a beneficiary (or only beneficiary) who may receive distributions from the trust during the Grantor's lifetime


☒ Yes ☐ No

Purpose of self-settled trust

☐ Asset protection only (not estate tax exclusion) ☒ Estate tax exclusion

Grantor eligible to receive distributions from the trust only after a certain period of time after property is transferred to trust.

☐ No
☐ Yes, only after one year
☒ Yes, after ten years and one day
☐ Yes, using a custom period



What to Draft (and not to Draft)

- **Asset protection** – SLATs can be an effective part of an asset protection plan.
 - This is especially so for clients of more moderate means that will need access to the trust assets.
 - Clients of all wealth levels, not merely those with \$40M net worth or higher, may benefit from this application of SLAT planning.
 - The time to implement asset protection planning is before it is needed. A young surgeon with modest wealth should consider a SLAT that they can add to in future years. Consider the recent DE case *In the Matter of the CES 2007 Trust*, Court of Chancery of the State of Delaware, C.A. No. 2023-0925-SEM (May 2, 2025) that stressed the importance that the DAPT was created 7 years before the matter that gave rise to the claim.
 - Consider due diligence: AI background check, forensic analysis, projections, balance sheet, insurance summary, and solvency affidavit.
- **Basis planning** – Post-OBBBA, basis planning is a more significant planning objective for many.
 - SLATs can include a circumscribed GPOA to senior family members with wealth below the \$15M exemption amount to gain a basis step-up. This one benefit/technique could justify a SLAT plan for a couple with a net worth of only a few million dollars.
 - Swap powers (or the settlor's purchase of assets from a grantor trust) can facilitate bringing assets back into the estate to gain a basis step-up.
 - Powers of appointment can also be included to facilitate basis adjustment.

What to Draft (and not to Draft)

Fiduciaries– which fiduciary, non-fiduciary, and powerholder positions might you include to accomplish client goals, differentiate the trusts for purposes of the reciprocal trust doctrine, permit access, and more?

- Spouse as trustee:
 - Pros: No cost, easy, simple, and comfortable for clients.
 - Cons: May not adhere to formalities, potential abuse if divorce arises, no independence, less protection from creditor challenges and IRS arguments for estate inclusion, distributions to spouse are limited to HEMS.
- Non-spouse individual trustee.
- Corporate trustee in trust friendly jurisdiction.
 - Pros: better state law, back up DAPT argument if non-reciprocal SLATs are uncrossed, better state tax position when trust is or becomes non-grantor, professional management, better asset protection.
 - Cons: costs, complexity.
 - Hybrid – name a family member or friend as trustee now and give trust protector the right to change trustees, governing law and situs.
- Separate or bifurcated trustee positions:
 - Investment Trustee; Distributions Trustee; Insurance Trustee; Art Trustee
 - General and administrative trustees.
 - Others?
- Investment advisor or trustee.
 - Create directed trust structure for more flexibility.
 - Investment advisor committee to facilitate business succession planning. How many people and how robust?
 - Different investment advisers appointed for different categories of assets.
- Should fiduciaries/powerholders be “housed” in an entity formed in the state where the trust has situs?

Quick Drafting (Special function fiduciaries)

TRUSTEES

DRAFTING TIP: An option to limit Trustee liability in general with respect to this specific document is available on the Drafting Preferences screen in this interview. Please see that screen to select this option for this document. If you wish to make this option a default option for all documents, the global option is located in the Firm Preferences interview on the Drafting Preferences screen. Once selected in Firm Preferences, the option can be "turned off" for a specific document or matter in the Drafting Preferences screen of that document interview or that Matter interview.

☐ Successor Trustees, if named, will have reduced liability

Will you be naming Special Function Trustees

☒ Yes ☐ No

Special Function Trustee

Which special function trustee roles will you require

- ☒ General
- ☐ Administrative
- ☒ Distributions
- ☒ Investment
- ☐ Charitable
- ☐ Insurance
- ☐ Literary
- ☐ Custom



Special Function Trustees Explained

GENERAL TRUSTEES The General Trustee is the Trustee who will carry out all fiduciary functions other than those specifically assigned to the Special Function Trustees. A person named as a General Trustee may also serve as a Special Function Trustee.

DISTRIBUTIONS TRUSTEES: In some circumstances, the client will want one or more individuals or a bank or trust company, or a group of individuals and a bank or trust company, to make decisions with respect to discretionary distributions to one or more beneficiaries of a trust but not otherwise to act as trustee or trustees. In such a case, the Distributions Trustee(s) will have the sole power and authority (acting alone and without the consent or approval of any other trustee) to take action about the exercise of any discretion over beneficial payments for beneficiaries such as the distribution or application of income or corpus as set forth in the instrument, including if authorized under the instrument or state law (see, e.g., NY EPTL 10-6.6 and Alaska Stat. § 13.36.157) to transfer assets to another trust for one or more of the beneficiaries.

The powers conferred on the Distributions Trustee(s) include the ability to purchase and hold a residence or tangible personal property (such as furniture or art) for use by a beneficiary, the power to allocate receipts between income and principal and to make elections under the tax law. The powers conferred upon the Distributions Trustee(s) usurp or trump the power of any Investment Trustee. For example, if the Distributions Trustee decides to acquire a home for a beneficiary, the power of the Distributions Trustees to do that will control even if another trustee or trustees has powers to make investments.

Quick Drafting (Directed Trusts)

TRUSTEES AND DIRECTORS

DRAFTING TIP: A Director can be any person other than a Trustee.

DRAFTING TIP: An option to limit Trustee liability in general with respect to this specific document is available on the Drafting Preferences screen in this interview. Please see that screen to select this option for this document. If you wish to make this option a default option for all documents, the global option is located in the Firm Preferences interview on the Drafting Preferences screen. Once selected in Firm Preferences, the option can be "turned off" for a specific document or matter in the Drafting Preferences screen of that document interview or that Matter interview.

☐ Successor Fiduciaries, if named, will have reduced liability

Select the type of director you wish to name (choose as many as apply)

- ☒ Distribution Director
- ☒ Investment Director
- ☒ Custom Director



DRAFTING TIP: The Distribution Director and Investment Director options have specific powers and duties allocated to each director in the governing law article of the trust. Choosing a Custom director will enable you to describe your own set of powers and duties granted to the Custom director. Be aware that significant custom drafting and editing of the assembled document will likely be necessary to adequately divide the powers and duties of the Trustee and the Custom director.

Trustees who may be appointed (check all that apply)

- ☒ Initial
- ☒ Successor Level 1
- ☐ Successor Level 2

What to Draft (and not to Draft)

Powerholders and Non-Fiduciaries

- Spouse may be given 5/5 power in one SLAT (but not the other spouse in the other SLAT). Consider the power this can create to remove wealth from the trust and redirect it, e.g., to children from a prior marriage.
- Circumscribed GPOA to try to obtain a basis step-up on death of a family member with an estate well below the exemption.
- Hybrid DAPT or SPAT power held by independent non-fiduciary.
 - Should the Hybrid DAPT or SPAT be in a DAPT jurisdiction from inception or required to be moved by a trust protector action before the hybrid DAPT or SPAT mechanism can be triggered?
 - Variations on the above with, for example, hurdles: 10 years + 1 day before beneficiary status becomes active, net worth under specified threshold, no spouse, other?
- If grantor SLAT, a power to a non-fiduciary to add a charitable or other beneficiary.
- Power to loan held by non-fiduciary.
- Power for independent trustee to reimburse for income taxes.
- Swap or substitution power.
- Power given to a beneficiary to disclaim entirety of transfer to trust.

What to Draft (and not to Draft)

Assets – What will be transferred, and how:

- Simple old-style ILIT with life insurance and small bank account.
- Robust GST-exempt SLAT-like trust in a trust friendly jurisdiction directed to hold non-marketable assets.
- Gifts of assets.
- Gifts of assets subject to a defined value mechanism.
- Sale of assets.
 - For a regular installment note.
 - Modified provisions in the installment note.
 - Self cancelling installment note (principal or interest adjustment).
- Sale of assets subject to a defined value mechanism.
- Home or vacation home the couple can use.
 - Transfer existing home vs. SLAT buying a new home.
- What portion of client wealth is to be transferred now and perhaps in future years?
- What impact on title to assets changing from current ownership to trust?
- Contractual arrangements affecting assets in trust, e.g. lease from trust-owned real estate LLC to family operating company in another trust vs. retained rights, etc.

Flavor Tracker

- Divorce (6+ flavors)
- Death of beneficiary-spouse (5+ flavors)
- Creditor protection (3+ flavors)
- Income tax treatment (6+ flavors)
- Estate inclusion (6+ flavors)
- Other Access options (4+ flavors)
- Trustee, powerholder, and asset options (so many flavors)



Far more than 31 flavors!

Authority to Consider and Traps to Avoid (i.e., what not to do)



United States V. Estate Of Grace 395 U.S. 316 (1969) – Controlling Spouse Issue

- Estate of Grace is the seminal case on the reciprocal trust doctrine. But consider the control the husband exercised that called the plan into question:
- “Decedent [husband] retained effective control over the family's business affairs, including the property transferred to his wife. She took no interest and no part in business affairs and relied upon her husband's judgment. Whenever some formal action was required regarding property in her name, decedent would have the appropriate instrument prepared and she would execute it.”
- “The trust instruments were prepared by one of decedent's employees in accordance with a plan devised by decedent to create additional trusts before the advent of a new gift tax expected to be enacted the next year. Decedent selected the properties to be included in each trust.”
- “Grace, acting in accordance with this plan, executed her trust instrument at decedent's request.”
- “Indeed, they were part of a single transaction designed and carried out by decedent.”

Smaldino v. Comm'r, T.C. Memo 2021-127 (Nov. 10, 2021) – Controlling Spouse Issue

- The Smaldino Court recharacterized a purported transfer from husband to wife and then wife to trust as a direct gift from husband to the trust because of the excessive control the husband maintained.
- “Mrs. Smaldino testified that before the purported transfer in question she had already made “a commitment, promise” to her husband and family that she would transfer the LLC units to the Dynasty Trust.”
- “...as a practical matter **there was never a time when Mrs. Smaldino would have been able to effectively exercise any ownership rights** with respect to any LLC membership interests. Moreover, for the reasons previously discussed, we do not believe that petitioner ever intended for her to do so.”

C.S. V. R.H., 2025 N.Y. Slip Op. 51426(u), 2025 WI 2640123 (N.Y. Sup. Ct. September 8, 2025) – Controlling Spouse Issue

- "...since the outset, he [the husband] has and continues to actively manage and control the trust assets."
- "...Wife impressed as a committed woman who acquiesced to Husband on all things..."
- "...completely trusted Husband with the family finances..."
- "Husband lacked credibility on the core financial issues, specifically as to the critical matter of his control over the Trusts...he alone decided who to appoint and remove as Trustee and Managing Director of the LLCs and which assets went into the Trusts and when, and that he alone set the below-market rents for the Trust properties in which the family lived..."
- "Husband did not adequately explain why he did not seek court approval for his post-commencement conduct with respect to Trust assets, including, *inter alia*, removing Wife from the LLCs and evicting her from the Trust homes; paying "distributions"; and, ultimately, decanting the Trusts into two new Trusts formed under Delaware law."
- "...Husband was Mr. McCabe's [estate planning attorney] "main point of contact..."
- "I trusted him, and I had a full plate with the girls and it didn't interest me."
- "...Wife testified credibly that she first saw documents when the parties went into Mr. McCabe's office to sign them; she was not provided any documents prior to the meetings..."

C.S. V. R.H., Continued

- “Wife received no independent legal or financial advice about the creation of the Trusts and was not advised to obtain independent counsel; she was not informed as to what would happen to the marital assets held in trust in the event of divorce...”
- “Wife testified credibly that she does not know what a GRAT is (10/13/22 Tr. 51) and the record is devoid of proof that she was involved in their formation.”
- “Wife was not consulted or involved in the creation of any of the LLCs, did not know what her duties and responsibilities as Managing Director were, and was not advised to seek independent counsel with respect to her removal as Trustee and appointment as Managing Director (10/13/22 Tr. 79; 12/2/22 Tr. 41, answering questions as to how Wife signed the LLC operating agreements: “R. asked me to sign it, and I signed it”)...”
- “...Husband commenced a systematic effort to totally remove her from the Trusts, cut her off from the marital assets and out of the family wealth, and evict her from her homes without court approval or any notice.”
- “Husband has had and continues to maintain unrestricted control over and access to Trust assets and enjoys their use and benefit without interruption. On the other hand, Wife never had any control over the Trusts, LLCs, or assets; she was a figure-head who served in name only at Husband's pleasure.”

SLATs Are Not Inherently “Bad” – But Bad Actors Are

- Where one spouse exerts unreasonable control over transactions, trusts, and LLCs, the intended consequences (whether for tax, asset protection or matrimonial purposes) may not be realized.
- Practitioners need to be wary of the controlling spouse and **be certain that the passive spouse:**
 - Is involved in meetings.
 - Receives documents to review in advance of meetings directly.
 - Understands documents he or she signs.
- Practitioners should **warn the overly controlling spouse** to:
 - Respect the formalities of the trust and any entity structures.
 - Observe formalities.
 - Permit those properly charged with certain functions and duties to fulfil them, and not to usurp them.

Conclusions

- SLATs are like ice cream – many, many different variants, but far more than 31 flavors. There are a myriad number of ways to tailor a SLAT-like trust plan for spouses depending on their goals, needs, willingness to accept the costs and complexity of an advanced plan, and their view of the risk of divorce.
- By using a robust, broad, and holistic approach to planning, considering reasonable available techniques and variations on each, practitioners can both protect themselves and better serve their clients.

Questions?



Thank you for joining us!

For more information about future Speaker Series webinars, InterActive Legal Academy, or our document assembly systems, visit www.interactivelegal.com



InterActive Legal[®]
Speaker Series



InterActive Legal[®]
Academy

Speaker Contact Information:
Shenkman@shenkmanlaw.com
content@interactivelegal.com