TAXATION

CALIFORNIA LAWYERS ASSOCIATION

presents

2023 Estate and Gift Tax Conference

Back End SLAT

Thursday, March 9, 2023
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Speakers:

George Karibjanian

Conference Reference Materials

ANALYSIS OF THE VIABILITY OF STATUTES CREATING "BACK-END SLATS"

California Lawyers Association, Taxation Section
2023 Estate and Gift Tax Conference

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San Francisco, California

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George D. Karibjanian is a Founding Member of Franklin Karibjanian & Law, a national boutique law firm based in Washington, D.C., with additional offices in Boca Raton, Florida and Naples, Florida. George practices predominantly in the firm's Boca Raton office. George is Board Certified by the Florida Bar in Wills, Trusts & Estates and is a Fellow in the American College of Trust and Estate Counsel.

George divides his time between the Boca Raton and Washington offices, spending the majority of his time in Boca Raton. George is admitted to practice in Florida, the District of Columbia, Maryland and Virginia.

He earned his B.B.A. in Accounting from the University of Notre Dame in 1984, his J.D. from the Villanova University School of Law in 1987, and his LL.M. in Taxation from the University of Florida in 1988. George has practiced his entire legal career in South Florida (over 33 years), practicing exclusively in the areas of estate planning and probate and trust administration, and also represents numerous clients with respect to nuptial agreements. George has participated in over 200 formal presentations, either individually or as part of a panel discussion, to national, state-wide and local groups, and has over 80 publication credits in national and regional periodicals and journals. Born and raised in Vineland, New Jersey (in the heart of South Jersey), George has called Boca Raton home since 1988.

On the topic of the Uniform Voidable Transactions Act and its potential negative effect on estate planning, George has published many articles and has lectured in cities across the nation such as Las Vegas, Nashville, New York, Phoenix, Portland (Or.), San Diego, San Francisco, and Wilmington (Del.), and presented webinars to groups in South Dakota and Alaska. George has also presented on the topic in October 2016 at the 42nd Annual Notre Dame Tax and Estate Planning Institute in South Bend, Indiana.

On the topic of same-sex estate planning, George has lectured at various conferences and estate planning councils throughout the United States and has published numerous articles in publications such as Steve Leimberg's LISI Estate Planning Newsletters, Trusts & Estates Magazine and the Florida Bar Journal. George has also been quoted by several publications and websites.

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George's other lectures have included topics such as Portability, Decanting, Trustee Selection and Duties, Current Developments in Estate Planning and Taxation, Representing a Client with Potential Capacity Issues, Whether a Supplemental 706 is Required, Inter-Vivos QTIP Planning, Prenuptial Agreements for the Estate Planner, the Advantages and Disadvantages of Domestic Asset Protection Trusts and Differences in the States' Version of the Uniform Trust Code.

For the American Bar Association's Section of Taxation, he is a past Co-Chair of the Estate and Gift Tax Committee; was the Chairperson for the Section's 2016 Comments on the Basis Consistency Regulations, the Chairperson for a 2011-12 Section Task Force Subcommittee Advocating Changes to the Portability Provisions Added by the 2010 Tax Act; and a contributing draftsman to the Section's 2012 Comments on decanting.

For the American Bar Association's Section of Real Property Trusts & Estates, Income and Transfer Tax Planning Group, he is a current Co-Chair of the Art and Collectibles Subcommittee, and a past Co-Chair of the Estate and Gift Tax Committee.

For the Florida Bar's Real Property Probate & Trust Law Section, he is a past Chair of the Asset Protection Committee; the Co-Vice Chair – Probate & Trust and National Events Editor for the Section's "ActionLine" publication from 2012-2022; the Co-Chairperson of the RPPTL Ad Hoc Committee regarding potential statutory changes in light of a change in Florida's DOMA laws; a member of the Ad Hoc committee to study changes to Florida's decanting statutes (which led the 2018 legislation enacting the suggested changes); the Chairperson and primary draftsman of the Section's 2012 comments to the IRS on decanting, a member of the RPPTL Ad Hoc Committee that drafted a statutory change in response to Florida's Morey v. Everbank decision; and a member of the Section's Executive Council from 2012-2022.

George is also a member of the Greater Boca Raton Estate Planning Council and the South Palm Beach County Bar Association.

George currently serves on the Professional Advisory Committee for George Snow Memorial Scholarship Foundation. Previously, George served on the Professional Advisory Committee for the Boca Raton Museum of Art from 2011 to 2019 and served on the Board of Directors for the Palm Beach County Wealth & Estate Planning Seminar from January 2015 until its suspension in January 2019. George also served as President and a member of the Board of Directors of the Notre Dame Alumni Club of Boca Raton (1996-1997), a member of the St. Jude's Church (Boca Raton) Financial Education Council (1994-1996), and Vice President and a member of the Board of Directors of the Boca Raton Girls Fastpitch Softball Association (2004-2008).

A. Introduction

- Exploring the "Back-End SLAT" – Mining Valuable Estate Planning Riches or Merely Mining Fool's Gold?

  47 Bloomberg Tax Management Estates, Gifts and Trusts Journal 6 (11/10/22)

- Asset Protection is a Controversial Topic
  - Any time that the topic of discussion is "asset protection," the topic suddenly becomes controversial.
  - Which is understandable – when most people think of "asset protection," they immediately think of the unscrupulous wealthy individual using off-shore trusts to "hide" assets.

A. Introduction

- Summary of the Presentation
  - This Presentation will analyze what the "Back End SLAT Statute," where an individual can create a "spousal lifetime access trust" ("SLAT") for her/his spouse, and, upon the spouse's death, retain the possibility that, if the donor spouse survives the donee spouse, an interest in the trust can continue for the donor spouse, and how and why such an interest may not be subject to estate taxes in the donor spouse's gross estate for Federal estate tax purposes.

B. Overview of the "Back-End SLAT"

- The Purpose for a Back-End SLAT Statute
  - The Use of SLAT's
    - SLAT's use the Donor Spouse's AEA while allowing funds to remain in the "marital unit"
    - What happens if the Donee Spouse predeceases the Donor Spouse – the Donor Spouse loses the use of the funds.
    - If the SLAT creates a beneficial interest in the Donor Spouse, the SLAT becomes a "self-settled spendthrift trust"

B. Overview of the "Back-End SLAT"

- The Purpose for a Back-End SLAT Statute
  - Self-Settled Spendthrift Trust Doctrine
    - As a SSST, the trust would arguably be includible in the Donor Spouse's gross estate because the Donor Spouse's creditors can reach the Donor Spouse's interest.
    - The reachability is called the "Self-Settled Spendthrift Doctrine"

B. Overview of the "Back-End SLAT"

- The Purpose for a Back-End SLAT Statute
  - Self-Settled Spendthrift Trust Doctrine
    - This is why states enact DAPT legislation; to prevent the implementation of the SSST Doctrine.
    - Starting with Alaska in 1997, 20 jurisdictions have DAPT statutes.
    - This means that 31 of 51 U.S. jurisdictions, or more than 60%, adhere to the SSST Doctrine.

B. Overview of the "Back-End SLAT"

- Introducing the Back-End SLAT Statute
  - In order for any legislation to be adopted that would limit creditor's rights, there would have to be some other overriding reason that would allow the jurisdiction to justify adopting legislation that would override the self-settled spendthrift trust doctrine.
  - The inadvertent Gross Estate inclusion from a Back-End SLAT appears to be such a reason, and, as a result, the Back-End SLAT Statute was born.

B. Overview of the "Back-End SLAT"

- Introducing the Back-End SLAT Statute
  - The Donor Spouse's creditors are unable to reach the property as the trust is, by statute, a third-party trust created by the DONEE Spouse and under which a spendthrift clause would be valid.
  - With its 2022 adoption of a Back-End SLAT Statute, Florida is now the 10th jurisdiction to adopt a specific Back-End SLAT Statute, joining Arizona, Delaware, Kentucky, Mississippi, North Carolina, South Dakota, Tennessee, Texas, and Wisconsin.

C. Justifying Back-End SLAT Statutes

- Increases in the BEA
  - During the 2010's and into the 2020's, large increases in the §2010(c)(3) "basic exclusion amount" ("BEA"), when combined with the threat of similar reductions in the BEA, caused many taxpayers to engage in planning techniques intended to utilize the BEA before it was lost.

C. Justifying Back-End SLAT Statutes

- Increases in the BEA
  - 2010 the BEA increased to $5,000,000 for 2011 and 2012
  - If no legislation, in 2013 the BEA was set to fall back to 2001 levels of $1,000,000
  - 2017 Doubled the BEA
  - 2021 - If not for 2 Senators, the Democratic White House and Congress would have ended the doubling
  - 2026 – Pursuant to the reconciliation nature of the 2017 Tax Act, the Doubling ends

C. Justifying Back-End SLAT Statutes

- With the sizeable increase in funds transferred to SLATs, suddenly the Donor Spouse's risk of loss of the use of the funds if the Donee Spouse predeceased her/him grew exponentially.
- Consider if a Donor Spouse has a net worth of $50,000,000 and fully funds a SLAT with $12,000,000 (rounded); if the Donee Spouse dies on the day after the transfer, the Donor Spouse will have lost the use of 24% of her/his entire net worth ($12,000,000/$50,000,000) which could affect her/his standard of living.

C. Justifying Back-End SLAT Statutes

- While this would appear to be a problem for only high net worth individuals, the underlying issue is certainly justifiable without regard to net worth.
- Should a taxpayer be penalized for using a benefit given to said taxpayer by Congress and then taken away by the very same Congress without any fault on the part of said taxpayer?
- From this perspective, reducing the potential Federal estate tax impact is a justifiable reason for the adoption of a Back-End SLAT Statute.

D. Interpreting the Various Back-End SLAT Statutes

- With respect to the creation of the Donor Spouse's Back-End interest in a Back-End SLAT, all statutes reference that the Donor's Spouse's interest must be created upon the death of the Donee Spouse.
- However, the impact of these provisions can be divided into two groups – those that follow a "strict Interpretation" and those that follow a "broad interpretation."

D. Interpreting the Various Back-End SLAT Statutes

- Strict Interpretation
  - Under a strict interpretation statute, the interest for the Donor Spouse can only arise upon the actual death of the Donee Spouse.
  - Florida's Back-End SLAT Statute is an example of this type of statute.
  - From Fla. Stat. §736.0505(3)(a)3.b.: "At no time during the lifetime of the settlor's spouse is the settlor a beneficiary as described in s. 736.0103(19)(a)"

D. Interpreting the Various Back-End SLAT Statutes

- Broad Interpretation
  - Under a 'broad interpretation" statute, the only requirement is that the trust must provide that the interest comes into being upon the death of the Donee Spouse.
  - consider the language of Texas Prop. Code §112.035(g)(2): "an irrevocable inter vivos trust for the settlor's spouse if the settlor is a beneficiary of the trust after the death of the settlor's spouse …"

D. Interpreting the Various Back-End SLAT Statutes

- Broad Interpretation
  - Unlike Florida, the Texas statute does not refer to the Donee Spouse's "lifetime."
  - This difference is significant in that the Donee Spouse does not actually have to be deceased – the only requirement is that trust provides that the Donor Spouse interest arises when the Donee Spouse is deemed to be deceased for purposes of the trust.
  - This opens up other planning possibilities, especially with the use of a "death on divorce" clause.

E. Why Do Some DAPT States Have Back-End SLAT Statutes?

- 4 of the jurisdictions – Delaware, Mississippi, South Dakota and Tennessee – are DAPT jurisdictions yet they each have adopted a Back-End SLAT Statute. Why? Doesn't the DAPT statute cover a Back-End SLAT?
- Consider:
  - During the Donee Spouse's lifetime, the Donor Spouse has no beneficial interest in the trust. Therefore, the provisions of UTC §505(a)(2) – meaning the "self-settled spendthrift trust doctrine" – do not apply because no amount can be distributed to or for the settlor's benefit.

E. Why Do Some DAPT States Have Back-End SLAT Statutes?

- Upon the Donee Spouse's death, the resulting trust in which the Donor Spouse has an interest would presumably fall within the jurisdiction's DAPT statute, so it is also protected from the Donor Spouse's creditors.

- So why would a DAPT state need a Back-End SLAT Statute?
  - First, the jurisdiction's DAPT statute is either unclear, or specifically provides that the trust be a DAPT at all times, so the Back-End SLAT Statute fills the gap.
  - Second, the "belt and suspenders" approach

E. Why Do Some DAPT States Have Back-End SLAT Statutes?

- Example – Virginia Code §64.2-745.1.A

  "A. A settlor may transfer assets to a qualified self-settled spendthrift trust and retain in that trust a qualified interest, and, except as otherwise provided in this article, §64.2-747 shall not apply to such qualified interest."

- By definition, then, the trust has to be a "qualified self-settled spendthrift trust" at the time that any transfers are made to it to fall within the protection of the Virginia DAPT statute.
- A SLAT is not, at the time of creation, a qualified self-settled spendthrift trust.

E. Why Do Some DAPT States Have Back-End SLAT Statutes?

- Does Nevada need a Back-End SLAT Statute? No!
  - Under Nev. Rev. Stat. §166.020, any trust with a spendthrift clause is a "Spendthift Trust"
  - Nev. Rev. Stat. §166.120(1) provides protection to ANY beneficiary of a Spendthrift Trust; this includes the Settlor
  - Further, Nev. Rev. Stat. §166.050 says no "magic language" is needed to designate a trust as a Spendthrift Trust

E. Why Do Some DAPT States Have Back-End SLAT Statutes?

- Does Nevada need a Back-End SLAT Statute? No!
  - Thus, a trust can always be a Spendthrift Trust regardless of when the Settlor becomes a beneficiary, which means that a Back-End SLAT is already viable under Nevada law and a separate statute is not required

F. Federal Estate Tax Laws and Back-End SLAT's

- While the statutes are intended to cut off creditors, an additional issue persists with respect to whether there is a retained interest that would create an estate tax problem.
- It is interesting to note that in enacting Back End SLAT Statutes, in the official legislative analysis, none of the states have explained the estate tax consequences of the statute.

F. Federal Estate Tax Laws and Back-End SLAT's

- Can you analogize the Back End SLAT to an Inter-Vivos QTIP Trust?
  - Treas. Reg. §25.2523(f)-1(f) Examples 10 and 11 state that a retained "back end" interest in an Inter-Vivos QTIP Trust is not an interest subject to §§2036 or 2038
  - What, though, about the SSST Doctrine? Since the Donor Spouse created the trust and has a retained interest, can't the Donor Spouse's creditors reach the interest and, if so, would that be gross estate inclusion?
  - Solution – "Super Charged Credit Shelter Trust"

F. Federal Estate Tax Laws and Back-End SLAT's

- Can you analogize the Back End SLAT to an Inter-Vivos QTIP Trust?
  - Florida and other states enacted "I-V QTIP Statutes" to provide that the settlor of the back-end interest trust would be the Donee Spouse.
  - Florida – Fla. Stat. §736.0505(3)(a)1 and 2
  - The comparison becomes problematic because the I-V QTIP Statute was enacted in response to a theoretical gap in a specific Treasury Regulation, whereas, with the Back-End SLAT Statute, there is no such regulation or any direct guidance whatsoever.

F. Federal Estate Tax Laws and Back-End SLAT's

- Relation-Back Doctrine
  - Creating a trust where the donor reserves an interest for herself/himself seems like an obvious "retained interest" scenario invoking §2036 which invokes a concept known as the "Relation-Back Doctrine."
  - Although discussed in terms of a power of appointment, the Relation-Back Doctrine is best described as this – the property which passes upon the exercise of a power of appointment is the property of the donor and not the property of the donee of the power.

F. Federal Estate Tax Laws and Back-End SLAT's

- Relation-Back Doctrine
  - In other words, it is the act of something "relating back" to the transferor which invokes the doctrine.
  - By creating the trust, the Donor Spouse who retains a back-end interest in the trust could be deemed to have retained a right to the possession or enjoyment of, or the right to the income from, the property from the moment of creation (hence the application of the Relation-Back Doctrine), which creates gross estate inclusion under §2036(a)(1).

F. Federal Estate Tax Laws and Back-End SLAT's

- Relation-Back Doctrine
  - Is the Relation-Back Doctrine "black letter law"? Consider the analysis from the Restatement (Second) of Property: Donative Transfers (the "2nd Restatement"), from the "Scope" provisions in Part 5 – Powers of Appointment:

    "However, the "relation back" theory has never been consistently followed, and it is often misleading to view the modern law of powers of appointment in terms of that doctrine."

F. Federal Estate Tax Laws and Back-End SLAT's

- Relation-Back Doctrine
  - 4th DCA thinks that it is real!
  - Note that in §13.4 of the 2nd Restatement, the analysis cites the Fourth District Court of Appeal's decision in In re Estate of Wylie, 342 So.2d 996 (Fla. 4th Dist. Ct. App. 1977), which held that the exercise of a general power of appointment did not cause the assets subject to the power to be considered to be probate assets (for purposes of fee calculations) but rather "related back" to the trust that created the power.

F. Federal Estate Tax Laws and Back-End SLAT's

- Relation-Back Doctrine
  - One purpose for the statute, then, is to try to break the connection for the Relation-Back Doctrine
  - From a state-law standpoint, the focus is on the reachability of the Donor Spouse's creditors; by having the Donee Spouse as the settlor of the back-end trust, the resulting trust is now a third-party trust from which the Donor Spouse's creditors cannot reach to satisfy any claims; therefore, the argument goes, there is no "retained interest" (i.e., relation back) to which includability can occur because the Donor Spouse is not the settlor of that trust.

F. Federal Estate Tax Laws and Back-End SLAT's

- PLR 200944002
  - Jonathan Blattmachr PLR involving a completed gift to an Alaska DAPT
  - HELD: if the Donor does not retain any control over the trust, then, on its face, the Donor has not retained any interest and therefore it would not be brought back into the Donor's gross estate.

F. Federal Estate Tax Laws and Back-End SLAT's

- PLR 200944002
  - CAVEAT:

    "We are specifically not ruling on whether Trustee's discretion to distribute income and principal of Trust to Grantor combined with other facts (such as, but not limited to, an understanding or pre-existing arrangement between Grantor and trustee regarding the exercise of this discretion) may cause inclusion of Trust's assets in Grantor's gross estate for federal estate tax purposes under §2036."

F. Federal Estate Tax Laws and Back-End SLAT's

- Rev. Rul. 2004-64
  - Stated that the discretionary power to reimburse the settlor of a grantor trust for income taxes owed by the settlor is not a power that causes gross estate inclusion.
  - Cites 3 ways that inclusion could occur:
    - "Prior Understanding"
    - Retained power to remove/replace the Trustee
    - Local law regarding reachability by creditors

F. Federal Estate Tax Laws and Back-End SLAT's

- Rev. Rul. 2008-22
  - The substitution power under §675(4)(C) is not a power causing gross estate inclusion, provided that:
    - The trustee has a fiduciary obligation (under local law or the trust instrument) to ensure the grantor's compliance with the terms of this power by satisfying itself that the properties acquired and substituted by the grantor are, in fact, of equivalent value; and
    - The "substitution power" cannot be exercised in a manner that can shift benefits among the trust beneficiaries.

F. Federal Estate Tax Laws and Back-End SLAT's

- What is a "Pre-Existing" Relationship or Understanding?
  - Broad Approach
    - Mere provision for the Donor Spouse denotes an understanding that the Donor Spouse should receive distributions.
    - How, though, can this be if the Trustee is a non-beneficiary and non-related or subordinate party, and if the Donor Spouse has no power to remove and replace the Trustee?

F. Federal Estate Tax Laws and Back-End SLAT's

- What is a "Pre-Existing" Relationship or Understanding?
  - Narrow Approach
    - Proof is needed to show an understanding, such as attorney's memoranda and notes indicating that this would occur
    - What if notes suggest that funds are available as a last resort, but states that no mandate or understanding that funds WILL be available?
    - What if notes state that funds can be distributed only after considering other resources?

F. Federal Estate Tax Laws and Back-End SLAT's

- What is a "Pre-Existing" Relationship or Understanding?
  - This is definitely a "gray" area.
  - Best analysis is that the likely answer is in-between the Broad and Narrow description - the analysis of PLR 200944022 suggests that sound logic dictates that the retention alone would not cause gross estate inclusion because too many variables are at play – independent fiduciaries and survival of the spouse.
- Bottom Line – there's a debate, but there is clearly a sound argument as to why this should avoid gross estate inclusion.

G. Back-End SLAT's and Anti-Abuse Regulations

- Anti-Abuse Regulations
  - Proposed Reg. §20.2010-1(c)(3) is intended to prevent the "gaining of the system" with respect to the use of BEA before it falls.
  - Intention of such abuse is not to get appreciation out of the estate; rather, it is solely to "lock in" the BEA.
  - Example: creating a trust that intentionally violates Chapter 14. The Donor knows this and expects the property to be brought back into her/his gross estate; however, the Regs. would state that the Donor "gets back" the BEA used on the transfer.

G. Back-End SLAT's and Anti-Abuse Regulations

- Anti-Abuse Regulations
  - Prop. Reg. §20.2010-1(c)(3)(i)(A) – transfers subject to the regs are transfers that come back into the estate under 2035, 2036, 2037, 2038 or 2042.
  - If the Back-End SLAT comes back into the gross estate, it would be under such sections, so the Back-End SLAT is seemingly subject to the Anti-Abuse Regs.
  - While it could fall within certain exceptions (5% value of retained interest or transfer occurs solely as a result of the passage of time), it definitely falls outside of the other transactions because there is no intent to "gain the system."

H. Caution as to Voidable Transfer Act Laws

- Can anyone in a jurisdiction that does not have a Back-End SLAT statute create a Back-End SLAT in a jurisdiction that has the statute?
- Yes, but beware of the UVTA!!!

H. Caution as to Voidable Transfer Act Laws

- 7th Paragraph to Comment 8 to UVTA §4:

  "By contrast, if Debtor's principal residence is in jurisdiction Y, which also has enacted this Act but has no legislation validating such trusts, and if Debtor establishes such a trust under the law of X and transfers assets to it, then the result would be different. Under § 10 of this Act, the voidable transfer law of Y would apply to the transfer. If Y follows the historical interpretation referred to in Comment 2, the transfer would be voidable under § 4(a)(1) as in force in Y."

- This Comment could be used to render any transfer voidable per se.

I. Drafting Back End Interests

- 3 Ways to Draft a Back End Interest:
  - Donor Spouse has a definite interest in resulting trust
  - Donor Spouse is a permissible appointee under a LPOA
  - Trust Director has authority to add Donor Spouse as a beneficiary after Donee Spouse's death

I. Drafting Back End Interests

- Definite Interest in Resulting Trust
  - Least favorable among options given potential Relation-Back Doctrine issue
- LPOA in Donee Spouse
  - Seems to be the preferred choice in the ACTEC List Serve, but…what if there's a divorce?
- Trust Director
  - Best approach especially if the Donor Spouse cannot appoint or change the Trust Director
  - Liability issue – what liability is there if the Trust Director adds a beneficiary? Is this a "Pre-Existing Understanding"?

I. Drafting Back End Interests

- Optimal Solution – Limited Power Plus Trust Director Appointment
  - This approach eliminates the divorce option and also helps negate the pre-arranged understanding because the Donor Spouse can be added by an independent party.
  - Caution must be given as to the potential effect of the Proposed Regs. The Trust Director should be given the power to negate the interest of the Donor Spouse if the anti-abuse regs would apply to this, if the "doomsday" reasons for the interest are no longer applicable, or if it is determined that gross estate inclusion WILL occur.

J. Conclusion

- Who Should Use the Statute?
  - The statute is NOT for everyone!!!
  - Wheelhouse of those in and around $50mm range.
- How to Discuss with Clients
  - MUST, MUST, MUST emphasize the risks of gross estate inclusion, i.e., no definitive case law and the anti-abuse regulations.

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George D. Karibjanian is a Founding Member of Franklin Karibjanian & Law, a national boutique law firm based in Washington, D.C., with additional offices in Boca Raton, Florida and Naples, Florida. George is Board Certified by the Florida Bar in Wills, Trusts & Estates and is a Fellow in the American College of Trust and Estate Counsel.

George divides his time between the Boca Raton and Washington offices, spending the majority of his time in Boca Raton. George is a member of the Florida, D.C., Maryland and Virginia Bars.

He earned his B.B.A. in Accounting from the University of Notre Dame in 1984, his J.D. from the Villanova University School of Law in 1987, and his LL.M. in Taxation from the University of Florida in 1988. George has practiced predominantly in South Florida (over 34 years), practicing exclusively in the areas of estate planning and probate and trust administration, and also represents numerous clients with respect to nuptial agreements. George has participated in over 200 formal presentations, either individually or as part of a panel discussion, to national, state-wide and local groups, and has over 80 publication credits in national and regional periodicals and journals. Born and raised in Vineland, New Jersey (in the heart of South Jersey), George has called Boca Raton home since 1988.

When not attending Miami Marlins home games in non-pandemic times, George is any one or more of reading anything and everything regarding the entertainment industry or is keeping current and/or binge-watching television programming that skews way below his supposed demographic (think “Derry Girls”), way above his supposed demographic (think “PBS Masterpiece”) and even in-between (think “Cobra Kai”). George’s 2016 personal highlights began on January 21 when he was fortunate to see Lin Manuel Miranda and the Original Broadway Cast in “Hamilton” at the Richard Rogers Theater in New York, and then on April 4, he was in attendance at NRG Stadium in Houston, Texas, to watch his law school alma mater, Villanova University, win the 2016 NCAA Men’s College Basketball national championship.

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George was presenter at the 48th Annual Heckerling Institute on Estate Planning in Orlando, Florida in 2014, speaking on a panel discussion titled, “Living and Working with the Uniform Principal and Income Act,” focusing on the tax effects on the power to adjust trust principal to income, the power to convert an income trust to a unitrust, comparing the various unitrust statues and focusing on potential litigation facing fiduciaries in this area.

George’s other lectures have included topics such as Portability, Decanting, Trustee Selection and Duties, Current Developments in Estate Planning and Taxation, Representing a Client with Potential Capacity Issues, Whether a Supplemental 706 is Required, Inter-Vivos QTIP Planning, Prenuptial Agreements for the Estate Planner, the Advantages and Disadvantages of Domestic Asset Protection Trusts and Differences in the States’ Version of the Uniform Trust Code.

For the American Bar Association’s Section of Taxation, he is a past Co-Chair of the Estate and Gift Tax Committee; was the Chairperson for the Section’s 2016 Comments on the Basis Consistency Regulations, the Chairperson for a 2011-12 Section Task Force Subcommittee Advocating Changes to the Portability Provisions Added by the 2010 Tax Act; and a contributing draftsman to the Section’s 2012 Comments on decanting.

For the American Bar Association’s Section of Real Property Trusts & Estates, Income and Transfer Tax Planning Group, he is a current Co-Chair of the Art and Collectibles Subcommittee, and a past Co-Chair of the Estate and Gift Tax Committee.

For the Florida Bar’s Real Property Probate & Trust Law Section, he is a past Chair of the Asset Protection Committee; the Co-Vice Chair – Probate & Trust and National Events Editor for the Section’s “ActionLine” publication from 2012 - 2022; the Co-Chairperson of the RPPTL Ad Hoc Committee regarding potential statutory changes in light of a change in Florida’s DOMA laws; a member of the Ad Hoc committee to study changes to Florida’s decanting statutes (which led the 2018 legislation enacting the suggested changes); the Chairperson and primary draftsman of the Section’s 2012 comments to the IRS on decanting, a member of the RPPTL Ad Hoc Committee that drafted a statutory change in response to Florida’s Morey v. Everbank decision; and a member of the Section’s Executive Council from 2012 - 2022.

George is also a member of the Greater Boca Raton Estate Planning Council and the South Palm Beach County Bar Association.

George currently serves on the Professional Advisory Committee for George Snow Memorial Scholarship Foundation. Previously, George served on the Professional Advisory Committee for the Boca Raton Museum of Art from 2011 to 2019 and served on the Board of Directors for the Palm Beach County Wealth & Estate Planning Seminar from January 2015 until its suspension in January 2019. George also served as President and a member of the Board of Directors of the Notre Dame Alumni Club of Boca Raton (1996-1997), a member of the St. Jude's Church (Boca Raton) Financial Education Council (1994-1996), and Vice President and a member of the Board of Directors of the Boca Raton Girls Fastpitch Softball Association (2004-2008).

TABLE OF CONTENTS

ANALYSIS OF THE
VIABILITY OF STATUTES
CREATING "BACK-END SLATs"

A. Introduction

(1) Asset Protection is a Controversial Topic

Any time that the topic of discussion is "asset protection," the topic suddenly becomes controversial. Which is understandable – when most people think of "asset protection," they immediately think of the unscrupulous wealthy individual using off-shore trusts to "hide" assets.

(2) Summary of the Outline

This Outline will analyze what the author calls the "Back End SLAT Statute," where an individual (the "Donor Spouse") can create a "spousal lifetime access trust" ("SLAT") for her/his spouse (the "Donee Spouse"), and, upon the spouse's death, retain the possibility that, if the Donor Spouse survives the Donee Spouse, an interest in the trust can continue for the Donor Spouse, and how and why such an interest may not be subject to estate taxes in the Donor Spouse's gross estate for Federal estate tax purposes.

B. Overview of the "Back-End SLAT"

(1) The Purpose for a Back-End SLAT Statute

(a) The Use of SLAT's

(i) With typical SLAT's, the Donor Spouse creates a trust for the benefit of the Donee Spouse in which the Donor Spouse uses her/his §2010(c)(2)[1] "applicable exclusion amount" ("AEA") while still allowing the gifted funds to benefit the "marital unit" (i.e., the Donor Spouse and the Donee Spouse).

(ii) The primary drawback to a SLAT is what happens if the Donee Spouse predeceases the Donor Spouse. Under the typical SLAT, if that were to occur, the SLAT then continues in further trust for the benefit of the Donor Spouse's descendants, in which case the Donor Spouse loses the use of the gifted funds.

(iii) Why not just provide a continuing trust (the "Resulting Trust") in which an interest is created for the Donor Spouse (a "Back-End Interest")? Because the trust benefits the Donor Spouse and the Donor Spouse created the trust, the trust is, in effect, a "self-settled spendthrift trust" ("SSST" or "DAPT" (domestic asset

[1] Unless otherwise specifically stated to the contrary, section references shall refer to sections in the Internal Revenue Code of 1986, as amended.

protection trust)). As a DAPT, this could create adverse estate tax consequences to the Donor Spouse and negate the transfer tax advantages of the SLAT.

(b) Self-Settled Spendthrift Trust Doctrine

(i) While most trusts or state law will contain a clause preventing a beneficiary's creditors from attaching a judgment to the beneficiary's interest in the trust (referred to as a "spendthrift clause"), such spendthrift clauses are invalid as to the settlor due to the common-law principle known as the "self-settled spendthrift trust doctrine."[2]

(ii) If the jurisdiction governing the SLAT adheres to the self-settled spendthrift trust doctrine, the Donor Spouse's interest could still be considered to be a "retained interest" subject to Gross Estate inclusion by the Donor Spouse because the SLAT could be used to satisfy any amounts owed to the Donor Spouse's creditors.[3]

(iii) Since 1997, 20 jurisdictions have adopted legislation seeking to prevent the imposition of the self-settled spendthrift trust doctrine with respect to DAPTs.[4]

(iv) If only 20 jurisdictions have adopted DAPT legislation, this means that 31 jurisdictions, or more than 60% of the jurisdictions within

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[2] For a more detailed explanation of the history of the self-settled spendthrift trust doctrine, see Karibjanian, Rubin and Nenno, *The Uniform Voidable Transactions Act: Why Transfers to Self-Settled Spendthrift Trusts by Settlors in Non-APT States Are Not Voidable Transfers Per Se,* 42 TAX MANAGEMENT ESTATES, GIFTS, AND TRUSTS JOURNAL, No. 4 (07/13/17), p. 173 ("Karibjanian, Rubin and Nenno Article").

[3] Under the Uniform Trust Code (the "UTC"), which has been adopted in 36 jurisdictions (Alabama, Arizona, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin and Wyoming, and is currently being considered by the New York legislature), the "self-settled spendthrift trust doctrine" is codified in §505(a)(2), which provides as follows:

> "(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:
>
> …
>
> (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. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution."

See https://www.uniformlaws.org/committees/community-home?communitykey=193ff839-7955-4846-8f3c-ce74ac23938d.

[4] As of the date of this outline, only 20 jurisdictions have enacted DAPT legislation: Alabama, Alaska, Connecticut, Delaware, Hawaii, Indiana, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia and Wyoming. *See* https://www.actec.org/assets/1/6/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes.pdf?hssc=1.

the United States, do not have DAPT legislation. Further, such jurisdictions may have public policy or other legitimate reasons as to why they have chosen not to limit the rights of the trust settlor's creditors.

(c) Introducing the Back-End SLAT Statute

(i) In order for any legislation to be adopted that would limit creditor's rights, there would have to be some other overriding reason that would allow the jurisdiction to justify adopting legislation that would override the self-settled spendthrift trust doctrine.

(ii) The inadvertent Gross Estate inclusion from a Back-End SLAT appears to be such a reason, and, as a result, the Back-End SLAT Statute was born.

(iii) Under a Back End SLAT Statute, if a Donor Spouse creates a SLAT, and if the Donee Spouse dies before the Donor Spouse, a continuing interest can be created for the Donor Spouse; however, the Back End SLAT Statute states that, for creditor purposes, the settlor of the trust is the DONEE spouse and not the Donor Spouse; this way, the Donor Spouse's creditors are unable to reach the property as the trust is, by statute, a third-party trust and under which a spendthrift clause would be valid.

(iv) With its 2022 adoption of a Back-End SLAT Statute, Florida is now the 10th jurisdiction to adopt a specific Back-End SLAT Statute, joining Arizona, Delaware, Kentucky, Mississippi, North Carolina, South Dakota, Tennessee, Texas, and Wisconsin.[5]

C. Justifying Back-End SLAT Statutes

(1) The Ever-Changing BEA

(a) As stated above, in a SLAT, if the Donee Spouse predeceases the Donor Spouse, the Donor Spouse loses the use of the funds held in the SLAT.

(b) During the 2010's and into the 2020's, large increases in the §2010(c)(3) "basic exclusion amount" ("BEA"),[6] when combined with the threat of similar reductions in the BEA, caused many taxpayers to

[5] Arizona - Ariz. Rev. Stat. §14-10505(E); Delaware - Del. Code Ann. tit. 12, §3536(c); Kentucky - Ky. Rev. Stat. Ann. §386B.5-020(8)(a); Mississippi - Miss. Code Ann. §91-8-504(d)(2); North Carolina - N.C. Gen. Stat. §36C-5-505(c); South Dakota - S.D.C.L. §55-1-36; Tennessee - Tenn. Code Ann. §35-15-505(h); Texas - Tex. Prop. Code §112.035(g)(2); Wisconsin - Wisc. Stat. Ann. §701.0505(2)(e).

[6] This section references the increases in the "BEA," whereas what is used by the taxpayer is the taxpayer's "AEA." The use of "BEA" is intentional because the BEA component of the AEA is what was increased and potentially decreased.

engage in planning techniques intended to utilize the BEA before it was lost.

(i) Consider that, by 2009, the Economic. Growth and Tax Relief Reconciliation Act of 2001 (the "2001 Act")[7] had increased the BEA to $3,500,000. Because the 2001 Act was a reconciliation act, the changes under the 2001 Act were set to expire at the end of 2010 and, as a result, in 2011, the BEA was set to return to the 2001 amount of $1,000,000.

(ii) Before this could happen, the Tax Relief Unemployment Insurance Reauthorization and Job Creation Act of 2010[8] increased the BEA to $5,000,000, and combined this increase with annual inflation adjustments and introduced portability of a deceased spouse's unused exclusion amount (which led to the creation of the AEA).

(iii) Then, as part of the Tax Cuts and Jobs Act of 2017,[9] the BEA was doubled, albeit with a sunset occurring in 2026. For example, in 2020, the BEA was $11,580,000; in 2021, the BEA was $11,700,000; and in 2023, the BEA will increase to $12,920,000.

(iv) In 2021, with a Democratic White House, House of Representatives and (technically) Senate, the discussion focused on Congressional bills to eliminate the 2017 increase in the BEA. With threat of the reduction of the BEA, individuals faced significant planning decisions as how to utilize the BEA provided to them by Congress before Congress took it away.

(c) With the sizeable increase in funds transferred to SLATs, suddenly the Donor Spouse's risk of loss of the use of the funds if the Donee Spouse predeceased her/him grew exponentially.

(i) Consider if a Donor Spouse has a net worth of $50,000,000 and fully funds a SLAT with $12,000,000 (rounded); if the Donee Spouse dies on the day after the transfer, the Donor Spouse will have lost the use of 24% of her/his entire net worth ($12,000,000/$50,000,000) which could affect her/his standard of living.

(ii) While this would appear to be a problem for only high net worth individuals, the underlying issue is certainly justifiable without regard to net worth – should a taxpayer be penalized for using a benefit given to said taxpayer by Congress and then taken away

[7] Public Law No: 107-16.

[8] Public Law No: 111-312.

[9] Public Law No: 115-97.

by the very same Congress without any fault on the part of said taxpayer?

(iii) In any technique involving inter-vivos gifting, caution should be given to the client concerning the use of the AEA without any significant impact on the client's standard of living. For this reason, the Back-End SLAT would be an ideal vehicle because the "Back-End interest" for the Donor Spouse provides the hedge against the unanticipated death of the Donee Spouse. However, for the reasons stated above (the "retained interest" and the "self-settled spendthrift trust doctrine"), the use of this technique could result in adverse Federal estate tax consequences.

(d) Therefore, from this perspective, reducing the potential Federal estate tax impact is a justifiable reason for the adoption of a Back-End SLAT Statute.

D. Interpreting the Various Back-End SLAT Statutes

(1) Strict vs. Broad Interpretation

(a) With respect to the creation of the Donor Spouse's Back-End interest in a Back-End SLAT, all statutes reference that the Donor's Spouse's interest must be created upon the death of the Donee Spouse.

(b) However, the impact of these provisions can be divided into two groups – those that follow a "strict Interpretation" and those that follow a "broad interpretation."

(2) Strict Interpretation

(a) Under a strict interpretation statute, the interest for the Donor Spouse can only arise upon the actual death of the Donee Spouse.

(b) Florida's Back-End SLAT Statute is an example of this type of statute.

(c) The Florida Back-End SLAT Statute, codified as §736.0505(3)(a)3, provides, in pertinent part, as follows:

"(3) … the assets in:

…

(a) 3. An irrevocable trust … in which:

…

b. At no time during the lifetime of the settlor's spouse is the settlor a beneficiary as described in s. 736.0103(19)(a) …

…

shall, after the death of the settlor's spouse, be deemed to have been contributed by the settlor's spouse and not by the settlor."

(d) Review closely the provision in b.: "At no time during the lifetime of the settlor's spouse is the settlor a beneficiary as described in s. 736.0103(19)(a)."[10]

(i) Taken literally, the statute provides that the Donor Spouse's interest cannot arise until after the death of the Donee Spouse.

(ii) This means that a common provision in a SLAT – a "death on divorce" clause (which provides that, in the event of a divorce, the Donee Spouse will be deemed for purposes of the SLAT to be deceased) cannot be included in a Florida Back-End SLAT because the Donor Spouse Back-End Interest would come into being before the Donee Spouse's death.

(3) Broad Interpretation

(a) Compare the "strict interpretation" statute with a "broad interpretation" statute.

(b) Under a 'broad interpretation" statute, the only requirement is that the *trust* must provide that the interest comes into being upon the death of the Donee Spouse.

(c) For example, consider the language of Texas Prop. Code §112.035(g)(2):

"(g) For the purposes of this section, property contributed to the following trusts is not considered to have been contributed by the settlor, and a person who would otherwise be treated as a settlor or a deemed settlor of the following trusts may not be treated as a settlor:

…

[10] Under UTC §103(13)(A), this is the "first tier" within the definition of "qualified beneficiary," meaning a beneficiary who is entitled to receive mandatory or discretionary distributions of current income or principal from a trust.

(2) an irrevocable inter vivos trust for the settlor's spouse if the settlor is a beneficiary of the trust after the death of the settlor's spouse …"

(d) Reading the language carefully, (2) does not state that the Donee Spouse must actually be deceased – it states that the Donor Spouse becomes a beneficiary after the death of the Donor's Spouse.

(e) Unlike Florida, the Texas statute does not refer to the Donee Spouse's "lifetime." This difference is significant in that the Donee Spouse does not actually have to be deceased – the only requirement is that trust provides that the Donor Spouse interest arises when the Donee Spouse is deemed to be deceased for purposes of the trust.

(f) This opens up other planning possibilities, especially with the use of a "death on divorce" clause. If the SLAT includes a "death on divorce" clause, then, upon a divorce, the Donee Spouse will be deemed – solely for purposes of the SLAT – to be deceased, which means that the Donor Spouse's Back-End Interest can be created even though technically the Donee Spouse is living.[11]

E. Why Do Some DAPT States Have Back-End SLAT Statutes?

(1) Introduction

(a) Wait, 4 of the jurisdictions listed above – Delaware, Mississippi, South Dakota and Tennessee – are DAPT jurisdictions yet they each have adopted a Back-End SLAT Statute. Why? Doesn't the DAPT statute cover a Back-End SLAT?

(b) Consider a DAPT jurisdiction that is also a UTC jurisdiction – or has adopted the "self-settled spendthrift trust" doctrine - where the DAPT statute would apply to any irrevocable trust granting the donor a beneficial interest regardless of when the beneficial interest comes into being. Now consider a typical Back-End SLAT where the Donor Spouse's interest does not come into fruition until after the death of the Donee Spouse.

(2) Are Special Statutes Even Needed?

(a) During the Donee Spouse's lifetime, the Donor Spouse has no beneficial interest in the trust. Therefore, the provisions of UTC §505(a)(2) – meaning the "self-settled spendthrift trust doctrine" – do not apply because no amount can be distributed to or for the settlor's

[11] The "death on divorce" clause has other importance with respect to the income taxation of a SLAT upon a divorce. *See* Karibjanian, Franklin and Law, *Alimony, Prenuptial Agreements and Trusts Under the 2017 Tax Act*, 43 BLOOMBERG BNA TAX MANAGEMENT ESTATES, GIFTS AND TRUSTS JOURNAL No. 3 (May/June 2018), p. 155.

benefit. Thus, the Donor Spouse's creditors should not be able to reach the trust during this time.

(b) Upon the Donee Spouse's death, the resulting trust in which the Donor Spouse has an interest would presumably fall within the jurisdiction's DAPT statute, so it is also protected from the Donor Spouse's creditors.

(c) If the above statements are correct, then why would the Back-End SLAT Statute be needed? The answer is likely that the Back-End SLAT Statute satisfies one of two conditions.

(i) First, the jurisdiction's DAPT statute is either unclear, or specifically provides that the trust be a DAPT at all times, so the Back-End SLAT Statute fills the gap.

(ii) Second, the jurisdiction decided that it needed a "belt and suspenders" approach so that in the event that the jurisdiction's DAPT statute was held not to apply, it would be covered by the Back-End SLAT provision.

(3) Example – The Virginia's DAPT Statute

(a) The Virginia DAPT Statute is an example of why a separate Back-End SLAT Statute might be needed.

(b) Virginia has a DAPT statute, e.g., Va. Code §64.2-745.1 and §64.2-745.2, but a careful review of the statutes reveals that the statutes only appear to apply to a trust that is always a DAPT.

(c) Va. Code § 64.2-745.1.A provides, in pertinent part, as follows:

> "A. A settlor may transfer assets to a qualified self-settled spendthrift trust and retain in that trust a qualified interest, and, except as otherwise provided in this article, §64.2-747 shall not apply to such qualified interest."

(d) By definition, then, the trust has to be a "qualified self-settled spendthrift trust" at the time that any transfers are made to it to fall within the protection of the Virginia DAPT statute.

(e) What, though, is a definition of a "self-settled spendthrift trust?" This term is defined in Va. Code §64.2-745.2 as:

> "Qualified self-settled spendthrift trust" means a trust if:
>
> 1. The trust is irrevocable;

2. The trust is created during the settlor's lifetime;

3. There is, at all times when distributions could be made to the settlor pursuant to the settlor's qualified interest …"

(f) According to the definition, the settlor has to have a "qualified interest." This is defined in the same statute, which provides, in pertinent part, as follows:

> "Qualified interest" means a settlor's interest in a qualified self-settled spendthrift trust, to the extent that such interest entitles the settlor to receive distributions of income, principal, or both, in the sole discretion of an independent qualified trustee. …"

(g) The literal interpretation of these above-quoted provisions suggests that for the Virginia DAPT protection to apply, the trust must have been a DAPT from the outset. A Back-End SLAT is not a DAPT from the outset; therefore, it can be concluded that the Virginia DAPT statute would not apply to a Back-End SLAT.

(4) Does Nevada Need a Back-End SLAT Statute? No!

(a) As described above, the DAPT statutes in some jurisdictions are limited in scope, so in order for a Back-End SLAT to be viable in such jurisdictions, those states require a specific statute.

(b) Nevada, however, is not one of them.

(i) Nevada does not rely on a version of UTC §505 for spendthrift protection as Nev. Rev. Stat. §166.120 encompasses such protection.

(A) Nev. Rev. Stat. §166.020 defines a "spendthrift trust" as "a trust in which by the terms thereof a valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary is imposed. It is an active trust not governed or executed by any use or rule of law of uses."

(B) Nev. Rev. Stat. §166.120(1) provides, in pertinent part, as follows:

> "1. A spendthrift trust … restrains and prohibits generally the assignment, alienation, acceleration and anticipation of any interest of the beneficiary under the trust by the

> voluntary or involuntary act of the beneficiary, or by operation of law or any process or at all. …"

(C) The term "beneficiary" is not limited to individuals other than the Settlor; therefore, "beneficiary" includes the settlor if the settlor retains a beneficial interest in the trust, and if the trust contains a spendthrift clause, it is, under Nevada law, a "spendthrift trust."

(ii) With respect to Nevada spendthrift trusts, Nev. Rev. Stat. §166.050 makes it very easy to create a spendthrift trust – in fact, nothing special is required:

> "No specific language is necessary for the creation of a spendthrift trust. It is sufficient if by the terms of the writing (construed in the light of this chapter if necessary) the creator manifests an intention to create such a trust."

(iii) Thus, because any trust that contains a spendthrift clause is a spendthrift trust, and because no language is required, the settlor is not required to have a beneficial interest in the trust at all times because the trust is always a Nevada spendthrift trust. Therefore, a Back-End SLAT would already be valid under Nevada law and no special Back-End SLAT Statute is needed.

F. Federal Estate Tax Laws and Back-End SLAT's

(1) Introduction

(a) The above analysis governs state law and creditor protection as a way to "cut off" potential Gross Estate inclusion issue as to creditors.

(b) However, as stated at the outset of this article, there are two concerns with respect to Gross Estate inclusion – the creditor issue, and also the "retained interest" issue. This section will now discuss the potential impact of the retained interest issue.

(2) Lack of Published Legislative Analysis on the Transfer Tax Consequences

(a) It is interesting to note that in enacting Back End SLAT Statutes, in the official legislative analysis, none of the states have explained the estate tax consequences of the statute.

(b) Arizona

(i) Consider the Arizona Legislative Analysis to its Back End SLAT Statute:[12]

· "Stipulates that the following amounts and property are not deemed to have been contributed by a settlor:

· An irrevocable inter vivos marital trust that is treated as qualified terminable interest property, if the settlor is a beneficiary after the death of the beneficiary's spouse.

· An irrevocable inter vivos marital trust that is treated as a general power of appointment trust under the Internal Revenue Code if the settlor is a beneficiary of the trust after the death of the beneficiary's spouse.

· An irrevocable inter vivos trust for the settlor's spouse that does not qualify for the gift tax marital deduction if the settlor is a beneficiary after the death of the beneficiary's spouse.

· An irrevocable inter vivos trust created by a person for the benefit of that person's spouse."

(ii) No mention is made in explaining the potential estate tax consequences.

(c) Florida

(i) Also consider the Florida Bar Tax Section's White Paper on the new Back-End SLAT Statute.[13]

(ii) In the last paragraph, the White Paper provides as follows

"The proposed amendment to Fla. Stat. § 736.0505(3) will allow Florida residents to use an inter vivos irrevocable trust as an efficient and flexible vehicle to transfer wealth for the benefit of the donor's spouse and other beneficiaries. *Florida couples will be able to take full advantage of current Exemption Amounts* and address other situations where a SLAT is desirable, *while potentially having access to the trust assets upon the beneficiary-spouse's death. The proposed changes to Fla. Stat. §736.0505(3) will provide Florida residents the same estate and gift tax planning opportunities already available to residents of more than twenty (20) other states.* Finally, the proposed changes to Fla. Stat.

[12] Arizona 49th Legislative Session, 1st Regular Session - Explanation to HB2333 (2009). https://www.azleg.gov/legtext/49leg/1r/summary/h.hb2333_07-08-09_astransmittedtogovernor.doc.htm

[13] https://flabizlaw.org/wp-content/uploads/2021/08/Florida-Bar-Tax-Section-Whitepaper-Section-736.0505.pdf

§736.0505(3) are consistent with the exceptions available in current Fla. Stat. §736.0505(3), as it is currently written."

(iii) Again, the statute is explained, but there is no underlying transfer tax analysis.

(3) Does the Back-End SLAT Actually Avoid Estate Taxation as to the Donor Spouse?

(a) Analogous to Inter-Vivos QTIP Statute? Not Necessarily.

(i) The initial argument is that the Back-End SLAT is no different than an inter-vivos trust for the benefit of the Donee Spouse for which the Donor Spouse elected to treat the trust as "qualified terminable interest property" and elected the gift tax marital deduction under §2523(f) (and "I-V QTIP Trust").

(ii) The Back End SLAT Statute was created within the same statutory provision as the "Inter-Vivos QTIP Trust" provision in Fla. Stat. §736.0505(3) (the "I-V QTIP Statute"), which was created, in part, in response to analysis provided in a Probate & Property article titled "Supercharged Credit Shelter Trust" by Jonathan Blattmachr, Diana S.C. Zeydel and Mitchell M. Gans.[14]

(A) The premise of the article was the use of an Inter-Vivos QTIP Trust and how the Donor Spouse could provide herself/himself with a "back end interest" and not have the back end interest included in her/his gross estate.

(B) The basis for such non-includability was Treas. Reg. §25.2523(f)-1(f) Examples 10-11, which state that with an inter-vivos QTIP trust, if there is a resulting trust for the Donor Spouse's benefit, that trust would NOT be included in the Donor Spouse's estate under §2036 or §2038.

(C) The authors, however, brought state law into the equation and posed the question as to whether §2041 would be an issue because, since the Donor Spouse created the trust and subsequently has an interest in the trust, wouldn't this be a self-settled spendthrift trust, and therefore, in a non-DAPT jurisdiction, wouldn't the Donor Spouse's creditors be able to reach the interest? If so, then, since the trust would have been includible in the Donee Spouse's estate under §2044, he/she would be the transferor for transfer tax

[14] Gans, Blattmachr & Zeydel, *Supercharged Credit Shelter Trust*, 21 PROB. & PROP. 62 (2007),

purposes and therefore, wouldn't that be a §2041 issue as to the Donor Spouse?[15]

(D) To the authors, the §2041 issue was an oversight; clearly by the introduction of Examples 10 and 11, Treasury was indicating that a back-end interest from an Inter-Vivos QTIP Trust should not be included in the Donor Spouse's gross estate; however, such an inclusion was possible under a state law creditor analysis and this should be corrected to maintain Treasury's intentions for non-includability.

(E) Thus, to avoid a §2041 issue, the authors advocated that the resulting trust for the Donor Spouse's benefit should be governed by the laws of a DAPT jurisdiction in order to prevent the Donor Spouse's creditors from being able to reach the resulting trust.

(iii) In response to these concerns, Florida and other states draft and enacted I-V QTIP Statute as Fla. Stat. §736.0505(3)(a)1 and 2.

(A) The statute provides as follows:

> (3) Subject to the provisions of s. 726.105, for purposes of this section, the assets in:
>
> (a) 1. A trust described in s. 2523(e) of the Internal Revenue Code of 1986, as amended;
>
> 2. A trust for which the election described in s. 2523(f) of the Internal Revenue Code of 1986, as amended, has been made …
>
> …
>
> shall, after the death of the settlor's spouse, be deemed to have been contributed by the settlor's spouse and not by the settlor.

(B) The effect of the I-V QTIP Statute was to state that, if a trust qualified for the gift tax marital deduction, and if a Back-End Interest is created for the Donor Spouse upon the death of the Donee Spouse, then, so long as the original trust is

[15] Recall above where the discussion involved how a donor could not create a general power of appointment in herself/himself. However, the logic in this instance is that the trust is actually created, for transfer tax purposes, by the Donee Spouse, so therefore §2041 would come into play.

included in the Donee Spouse's Gross Estate under §2044, the settlor of the Resulting Trust would be deemed to be the Donee Spouse and not the Donor Spouse. The Resulting Trust becomes a third-party trust as to the Donor Spouse and, presuming that the Resulting Trust contains a spendthrift clause, the Donor Spouse's creditors would not be able to reach the assets in the resulting trust, thereby negating a §2041 argument.

(iv) The comparison of the Back-End SLAT Statute to the I-V QTIP Statute, however, becomes problematic because the I-V QTIP Statute was enacted in response to a theoretical gap in a specific Treasury Regulation, whereas, with the Back-End SLAT Statute, there is no such regulation or any direct guidance whatsoever. For this reason, a deeper Federal estate tax analysis is warranted.

(4) §2036(a)(1) and the Relation-Back Doctrine

(a) Introduction

(i) Creating a trust where the donor reserves an interest for herself/himself seems like an obvious "retained interest" scenario invoking §2036 which invokes a concept known as the "Relation-Back Doctrine."

(ii) Although discussed in terms of a power of appointment, the Relation-Back Doctrine is best described as this – the property which passes upon the exercise of a power of appointment is the property of the donor and not the property of the donee of the power.

(iii) It is said that the instrument by which the power is exercised is to be read back into the instrument which created the power. For this reason, it is said that the substantial validity of the exercise of the power is determined by the law which determines the validity of the trust under which the power was created.[16]

(iv) Another example is when a beneficiary under a will disclaims an inheritance, the disclaimer "relates back" to the time of the testator's death such that the testator's estate does not vest in the disclaiming heir, but instead, passes directly to the heirs of the disclaiming heir.[17]

[16] James P. Spica, *Conflict of Laws and the Transitivity of the "Relation Back" of Special Powers of Appointment*, 56 REAL PROPERTY, TRUST AND ESTATE LAW JOURNAL 333 at 336-7.

[17] Christopher P. Cline, *Bloomberg Tax Portfolio 848-3rd: Disclaimers — Federal Estate, Gift and Generation-Skipping Tax Considerations*, Section IV.N at Footnote 423.3.

(v) In other words, it is the act of something "relating back" to the transferor which invokes the doctrine. With respect to a retained interest, the relation back to the initial transfer thus has the effect of invoking Gross Estate inclusion under §2036(a)(1).

(b) §2036(a)(1)

(i) Statute:

> (a) General Rule.
>
> 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

(ii) Inclusion Argument – by creating the trust, the Donor Spouse who retains a Back-End interest in the trust could be deemed to have retained a right to the possession or enjoyment of, or the right to the income from, the property from the moment of creation (hence the application of the Relation-Back Doctrine), thereby creating Gross Estate inclusion under §2036(a)(1).

(c) Is the Relation-Back Doctrine "Black Letter" Law? Maybe and Maybe Not.

(i) Consider the analysis from the Restatement (Second) of Property: Donative Transfers (the "2nd Restatement"), from the "Scope" provisions in Part 5 – Powers of Appointment:

> "A power of appointment has traditionally been conceived to be merely an authority to the powerholder to do an act for the creator of the power. Thus, where O effectively devised Blackacre to a child for life, remainder to such person or persons as the child shall appoint, the powerholder is considered as having the authority to fill in a blank in O's will. When the powerholder exercises the power by making an appointment to some designated person, the designated person is considered to receive the property from O under O's will and not from the powerholder. The appointment is

said to "relate back" to the time of the creation of the power and to operate as if it had been originally contained in O's will. Many of the characteristic rules of the law of powers are accounted for by the conception of a power as a mere authority and its doctrinal corollary of "relation back." *However, the "relation back" theory has never been consistently followed, and it is often misleading to view the modern law of powers of appointment in terms of that doctrine.*

(Emphasis added.)

(ii) Note that in §13.4 of the 2nd Restatement, the analysis cites the Fourth District Court of Appeal's decision in In re Estate of Wylie, 342 So.2d 996 (Fla. 4th Dist. Ct. App. 1977), which held that the exercise of a general power of appointment did not cause the assets subject to the power to be considered to be probate assets (for purposes of fee calculations) but rather "related back" to the trust that created the power.

(iii) Application to SLATs[18]

(A) Does the Relation-Back Doctrine apply to SLATs? The focus is on the status of the Donor Spouse having created the Resulting Trust within the SLAT – the question becomes whether this should "relate back" to the creation of the SLAT, which would potentially fall within the scope of §2036(a)(1).

(B) In the event the Donor Spouse has some remainder benefit in the SLAT after the death of the Donee Spouse, the Donor Spouse may be treated as the grantor of a new trust established for his or her benefit upon the death of the Donee Spouse.

(C) For state law purposes, this would result in the deemed newly created trust being a "self-settled trust" and subject to claims of the Donor Spouse's creditors.

(D) A similar result can occur in the event a beneficiary appoints assets into trust for the benefit of the Donor Spouse, such as by the Donor Spouse upon his or her death.

(iv) The purpose, then, for a Back-End SLAT Statute is to try to break the connection in the transaction which would negate the application of the Relation-Back Doctrine.

[18] *See generally,* Devin Mills, *Advanced SLAT Issues*, Edmondson Sage Allen PLLC Newsletter – March 30, 2022. https://esapllc.com/advanced-slat-issues-2022/#_ftnref8

(A) By causing the Donee Spouse to be deemed to be the settlor of the Resulting Trust in a Back-End SLAT, should be enough to disassociate from the Relation Back Doctrine?

(B) Theoretically, it should – part of the theory of the Relation-Back Doctrine is that a reversion exists back to the Settlor's estate if the remainder fails, and by such reversion, the Settlor's creditors can reach the property.

(C) By deeming the Resulting Trust to be a third-party trust and not a self-settled trust, there is nothing from which to "relate back" because state law does not deem the Donor Spouse to be the settlor of the Resulting Trust.

(D) If, the Relation Back Doctrine is therefore broken, then the Donor Spouse's interest in the Resulting Trust is not reachable by her/his creditors and therefore there is no actual retained interest from which Gross Estate inclusion can occur.

(5) Applicable Tax Precedents?

(a) PLR 200944002 – Best Analysis for No Gross Estate Inclusion

(i) The support for the Back End SLAT is derived from the logic found in a 2009 Private Letter Ruling involving a completed gift to a DAPT, which is PLR 200944002.

(ii) In the ruling, the Settlor created an irrevocable trust that provided for the following:

(A) Income and principal can be distributed to any one or more of the settlor, the settlor's spouse and the settlor's descendants – in other words, a typical DAPT.

(B) Upon the death of the survivor of the settlor and the settlor's spouse, the property passes to the settlor's descendants in further trust.

(C) Neither the settlor nor the settlor's spouse, as well as any beneficiary or any "related or subordinate party," can be a Trustee.

(D) The settlor is not given the typical "remove and replace" right as to the Trustee.

(E) Although the trust is a grantor trust, a specific prohibition is added preventing the payment to the settlor of any income tax liability.

(iii) The ruling concludes that the transfer to the DAPT is a completed gift by the donor and that, citing Rev. Rul. 2008-22 (which concerned the "substitution power" of §674(4)(C)) and Rev. Rul. 2004-64 (under which a non-mandatory discretionary power in the trustee of a grantor trust that authorized the trustee to reimburse the grantor for income taxes paid on trust income), because there was no mandatory provision regarding distributions to the donor, the DAPT would not be brought back into the donor's estate.

(iv) However, the ruling contains an important caveat:

"We are specifically not ruling on whether Trustee's discretion to distribute income and principal of Trust to Grantor combined with other facts (such as, but not limited to, *an understanding or pre-existing arrangement between Grantor and trustee regarding the exercise of this discretion)* may cause inclusion of Trust's assets in Grantor's gross estate for federal estate tax purposes under §2036."

(v) Final thought: the PLR contains a cross-referencing typographical error – the ruling cites to Rev. Rul. 2008-16 with respect to the "substitution power" under §675(4)(C); the actual ruling is Rev. Rul. 2008-22.

(b) Rev. Rul. 2004-64

(i) The earlier of the two Revenue Rulings cited in PLR 200944002, involved the gross estate includability of a grantor trust and the income taxes paid by the settlor of the trust.

(ii) The ruling involved three options: first, where the grantor paid the taxes on the income attributed to the grantor; second, where the trustee was required to reimburse the grantor for any income taxes attributed to the grantor; and third, where the trustee had the discretion to pay the income taxes attributed to the grantor.

(iii) Under the first scenario, the ruling stated that there was no gross estate includability because the grantor had not retained the right to have the trust property expended in discharge of the grantor's legal obligation (i.e., to pay the income taxes on trust income).

(iv) Under the second scenario, because the trustee was required to reimburse the grantor, the grantor had retained a right to receive trust property and the trust would be includible in the grantor's gross estate under §2036(a)(1).

(v) Under the third scenario, assuming that there was no understanding (express or implied) between the grantor and the

trustee with respect to discretion, the discretion alone would not cause gross estate inclusion as to the grantor.

(A) The IRS noted that the ruling would be the same even if the discretionary ability was granted under state law and not the trust instrument.

(B) The ruling provided examples of what might be cause gross estate inclusion:

(I) An understanding or pre-existing arrangement between the grantor and trustee regarding the exercise of discretion;

(II) A power retained by the grantor to remove the trustee and name herself/himself as the successor trustee; and

(III) Applicable local law subjecting the trust assets to the claims of the grantor's creditors.

(c) Rev. Rul. 2008-22

(i) Rev. Rul. 2008-22 concerned the potential gross estate including under §2036 or §2038 where the grantor of a trust retained the power to substitute assets to and from the trust of equivalent value, which caused the trust to be a grantor trust under §675(4)(C).

(ii) The IRS determined that a grantor's retained power, exercisable in a nonfiduciary capacity, to acquire property held in trust by substituting property of equivalent value will not, by itself, cause the value of the trust corpus to be includible in the grantor's gross estate under §2036 or §2038, provided that:

(A) The trustee has a fiduciary obligation (under local law or the trust instrument) to ensure the grantor's compliance with the terms of this power by satisfying itself that the properties acquired and substituted by the grantor are, in fact, of equivalent value; and

(B) The "substitution power" cannot be exercised in a manner that can shift benefits among the trust beneficiaries.

(6) Can "Understanding or Pre-Existing Arrangement" Be Defined?

(a) The focus is now on this limiting language – how broadly or how narrowly is the "understanding or pre-existing arrangement" is to be construed.

(b) Broad Analysis

(i) Taking this broadly, the fact that a trust contains a "back end interest" for the donor would seem to be an understanding or pre-existing arrangement.

(ii) However, as the trust is a totally discretionary trust, wouldn't the naming of a non-beneficiary, non-"related or subordinate party" as the Trustee remove the specter of any pre-existing agreement?

(c) Narrow Analysis

(i) Taking this narrowly, what would be required for proof of a "pre-existing relationship" – attorney's memoranda and notes during the planning stage indicating that funds will be distributed?

(ii) What if the memoranda and notes merely states that "funds can be available if needed"?

(iii) What if the memoranda and notes discussed a provision stating that funds could be distributed to the Donor Spouse "only after considering all of the Donor Spouse's other resources"?

(7) Conclusion – Gray Area at Best

(a) To some, the retention of a "back end interest" automatically would denote gross estate inclusion. To others, given the discretionary nature of the trust, and the independent fiduciary, the retention of a "back end interest" definitely does not denote gross estate inclusion.

(b) The best response to this is that it is definitely in-between the two. The analysis of PLR 200944022 suggests that sound logic dictates that the retention alone would not cause gross estate inclusion because too many variables are at play – independent fiduciaries and survival of the spouse. However, an argument could be made as to how broadly a "pre-existing arrangement" is construed.

(c) Thus, this is a gray area, but there is clearly a sound argument with related precedent that a Back End SLAT should avoid gross estate inclusion.

G. Will the Back End SLAT Statute Run Afoul of the Anti-Abuse Regulations?

(1) Introduction

(a) Suppose that in late 2022, Ted, who is married to Rebecca, executes a Florida SLAT that is a Back End SLAT. Ted transfers $12,060,000 into the SLAT. Rebecca dies in 2023 and Ted dies in 2027 after the AEA has fallen back down to pre-2017 levels. At the time of Ted's death, the

SLAT holds assets with an estate tax value of $30,000,000. In an audit of Federal Estate Tax Return filed on behalf of Ted's estate, the Internal Revenue Service determines that Ted retained an interest in the SLAT that causes the SLAT to be included in Ted's gross estate for Federal estate tax purposes.

(b) Under Treas. Reg. §20.2010-1(c), if a taxable gift is made and, by the donor's date of death the AEA has fallen based on a statutory reduction, the donor's estate is entitled to the AEA used at the time of the gift, even if the gift is included back into the gross estate.

(c) In 2022, under Prop. Reg. §20.2010-1(c)(3), if certain circumstances apply and if the gift is subsequently included in the Donor Spouse's gross estate, the special rule described above would not apply and the Donor Spouse's estate would not receive the benefit of the higher AEA at the time of the gift; these regulations are referred to as the "anti-abuse regulations."

(d) Query, then, whether a Back End SLAT that fails would fall within the proposed "anti-abuse" regulations of Prop. Reg. §20.2010-1(c)(3)?

(2) The Proposed Regulations

(a) Consider that the SLAT uses the Donor Spouse's AEA. Prior to the issuance of the Proposed Regulations in February 2022, if Donor Spouse died after 2025, and if it were determined that the SLAT came back into the Donor Spouse's gross estate, the Donor Spouse would still receive the benefit of the "additional" AEA that was phased out as of 1/1/26.

(b) However, we now have the Proposed Regulations to §2010 (the "Proposed Regs"), which provide, in pertinent part, as follows:

> "(3) Exception to the special rule.
>
> (i) Transfers to which the special rule does not apply. Except as provided in paragraph (c)(3)(ii) of this section, the special rule of paragraph (c) of this section does not apply to transfers includible in the gross estate, or treated as includible in the gross estate for purposes of section 2001(b), including without limitation the following transfers:
>
> (A) Transfers includible in the gross estate pursuant to section 2035, 2036, 2037, 2038, or 2042, regardless of whether all or any part of the transfer was deductible pursuant to section 2522 or 2523;

(B) Transfers made by enforceable promise to the extent they remain unsatisfied as of the date of death;

(C) Transfers described in §25.2701-5(a)(4) or §25.2702-6(a)(1) of this chapter; and

(D) Transfers that would have been described in paragraph (c)(3)(i)(A), (B), or (C) of this section but for the transfer, relinquishment, or elimination of an interest, power, or property, effectuated within 18 months of the date of the decedent's death by the decedent alone, by the decedent in conjunction with any other person, or by any other person.

(ii) Transfers to which the special rule continues to apply. Notwithstanding paragraph (c)(3)(i) of this section, the special rule of paragraph (c) of this section applies to the following transfers:

(A) Transfers includible in the gross estate in which the value of the taxable portion of the transfer, determined as of the date of the transfer, was 5 percent or less of the total value of the transfer; and

(B) Transfers, relinquishments, or eliminations described in paragraph (c)(3)(i)(D) of this section effectuated by the termination of the durational period described in the original instrument of transfer by either the mere passage of time or the death of any person.

…"

(c) The Proposed Regs state in Prop. Reg. §20.2010-1(c)(3)(i)(A) that, as to transfers where the used AEA does not come back into the calculation, "Transfers includible in the gross estate pursuant to sections 2035, 2036, 2037, 2038, or 2042 …"

(i) In other words, is a transfer to a Back End SLAT that is ultimately included in the Donor Spouse's gross estate such a transfer? Seemingly yes, because this would be a §2036 inclusion.

(ii) Would it also fall within the 5% exception of Prop. Reg. §20.2010-1(c)(3)(ii)(A), or would this be "a transfer where the interest arises solely by the termination of the durational period described in the

original instrument by either the mere passage of time or the death of any person" under the exception of Prop. Reg. §20.2010-1(c)(3)(ii)(B)?

(d) The anti-abuse regulations notwithstanding, what distinguishes a transfer that intentionally violates §2702[19] from a Back-End SLAT is that there is no precedent that would state that a Back-End SLAT is includible in the Donor Spouse's Gross Estate.

(i) In the former, the transfer is made knowing that it violates §2702 and was done to intentionally take advantage of the provisions of Treas. Reg. §20.2010-1(c)(1).

(ii) In the latter, the transfer tax consequences are presumed to be nil because it is believed that there is no Gross Estate inclusion. This distinction is important in that how can there be "abuse" if no "abuse" is intended?

(iii) It is hoped that the Final Regulations will clarify the "intent" issue.

H. Can Anyone Create a Back-End SLAT? Caution as to Other Laws of the Domiciliary State

(1) Example

(a) Suppose T, a California resident, wishes to create a Back-End SLAT. California does not have a Back-End SLAT Statute and nor does it have DAPT legislation, so T is advised to create a Delaware trust because Delaware has both a Back-End SLAT Statute and DAPT legislation.

(b) Two years after the transfer, C, a creditor of T, obtains a judgment against T and seeks to recover the assets transferred to the Back-End SLAT.

(c) T argues that the creditor cannot reach the assets because the Back-End SLAT is governed under Delaware law, and Delaware's Back-End SLAT statute protects her.

(d) C then proceeds to the California courts asking the court to void all transfers to the Back-End SLAT because such transfers are voidable

[19] For example, the taxpayer creates an irrevocable inter-vivos trust, retaining an income interest for 15 years with the remainder passing to her descendants. Pursuant to §2702, because the taxpayer retained the right to income and because the remainder passes to family members, the value of the retained interest for transfer tax purposes is $0, and therefore the entire transfer to the trust is subject to gift tax. The taxpayer does this knowing that the transfer will be fully subject to gift taxes, but engages in the transaction because she will be able to use her entire AEA in the process but still receives the full benefit of the property. If the taxpayer dies during the term of the trust, under Treas. Reg. §20-2010-1(c)(1), she receives credit for the AEA used at the time of the gift, even if the BEA has been reduced as of the date of her death. This is an example of the type of situation where the anti-abuse regulations would deny the use of the prior AEA in the estate tax calculation.

pursuant to California's adoption of the Uniform Voidable Transaction Act (the "UVTA").[20] What is the result?

(2) Effect of UVTA in Non-Back-End SLAT Jurisdictions

(a) For those states that have adopted the UVTA and have not disavowed the new Official Comments to the UVTA, a potential argument exists within the Comments that every transfer made to the Back-End SLAT is voidable per se, and that the court should issue a judgment as to that effect.

(b) Can this actually happen? Consider the effect of the 7th Paragraph to Comment 8 to UVTA §4, which provides as follows:

> "By contrast, if Debtor's principal residence is in jurisdiction Y, which also has enacted this Act but has no legislation validating such trusts, and if Debtor establishes such a trust under the law of X and transfers assets to it, then the result would be different. Under § 10 of this Act, the voidable transfer law of Y would apply to the transfer. If Y follows the historical interpretation referred to in Comment 2, the transfer would be voidable under § 4(a)(1) as in force in Y."

(c) If this Comment is to be followed, any attempt by a resident of a UVTA state without a Back-End SLAT Statute to form a Back-End SLAT in another jurisdiction runs the risk of litigation to determine that all transfers to the trust are voidable.[21]

I. Drafting Back End Interests

(1) Introduction

Conceivably, a back-end interest in a SLAT can occur in one of three ways:

(a) Definitive remainder interest naming the Donor Spouse.

(b) Permissible recipient of a limited power of appointed granted to the Donee Spouse.

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[20] https://www.uniformlaws.org/committees/community-home?CommunityKey=64ee1ccc-a3ae-4a5e-a18f-a5ba8206bf49#:~:text=The%20Uniform%20Voidable%20Transactions%20Act,unfair%20to%20the%20debtor's%20creditors.

[21] *See generally* Karibjanian, Rubin and Nenno Article; Karibjanian, Wehle, Lancaster and Sneeringer, *The New Uniform Voidable Transactions Act: Good for the Creditors' Bar, But Bad for the Estate Planning Bar? – Part Two*, LISI Asset Protection Planning Newsletter #317, (March 15, 2016); Karibjanian, Wehle and Lancaster, *History Has Its Eyes on UVTA – A Response to Asset Protection Newsletter #319*, LISI Asset Protection Planning Newsletter #320 (April 18, 2016); Karibjanian, *The Uniform Voidable Transaction Act Will Affect Your Practice*, 155 (5) Trusts & Estates 17 (May 2016); and Karibjanian, Wehle and Lancaster, A Memo to the States - The UVTA Is Flawed… So Fix It!!!, LISI Asset Protection Planning Newsletter #367 (May 1, 2018).

(c) Added as a beneficiary by a Trust Director.

(2) Definitive Remainder Interest

(a) The statute would allow a definitive interest.

(b) That is to say, “upon the Donee Spouse’s death, the property can be held in further trust under which the Donor Spouse is a permissible recipient of income and principal.”

(c) In terms of gross estate includability, should there be a definitive interest?

(i) If the concern is the “pre-existing understanding,” then possibly a direct interest would be troublesome.

(ii) If, however, the theory is that the back end interest is the equivalent of the back end interest in Treas. Reg. §25.2523-1(f) Ex. 11 and 12, then the back end interest could be drafted this way. This would seemingly be an aggressive take on the regulation.

(iii) What if the Donor Spouse is a permissible recipient subject to the discretion of an independent trustee? If trying to avoid a “pre-existing understanding,” then the payments to the Donor Spouse should definitely be discretionary and the trustee should definitely be a disinterested party.

(iv) With the discretionary interest, the Donor Spouse should NOT retain any other powers over the trust, such as “remove and replace” provision as to the Trustee. There should be no implication as to a “pre-existing understanding” – the provisions of Rev. Rul. 2004-64 and Rev. Rul. 2008-22 should be considered and adopted.

(3) Donee Under Limited Power of Appointment

(a) What about granting the Donee Spouse a limited power of appointment? On the ACTEC List Serve, this seems to be the most popular approach.

(b) The author, however, disagrees. If the Donor Spouse is looking to these funds as a potential down-the-road “security blanket,” then, if there is a divorce, there is no way that the power would be exercised.

(4) Trust Director Appointment

(a) Perhaps the best approach would be to have a Trust Director be granted the power to add the Donor Spouse as a beneficiary after the Donee Spouse's death.

(b) Query whether a Trust Protector would be subject to liability for adding a beneficiary?

(c) Further, in certain DAPT jurisdictions, the Trust Director could even add the donor as a beneficiary during the Donee Spouse's lifetime. Again, though, the issue of "implied agreement" would seem to surface, and this would also possibly raise the question that maybe it would not qualify for the exception under Prop. Reg. §20.2036-1(c)(ii)(B) because the Donor Spouse's interest is no longer based on the passage of time.

(5) Optimal Solution – Limited Power Plus Trust Director Appointment

(a) Perhaps the best approach is to grant the Donee Spouse the limited power of appointment but also allow for a Trust Director to appoint the Donor Spouse.

(b) This approach eliminates the divorce option and also helps negate the pre-arranged understanding because the Donor Spouse can be added by an independent party.

(c) Caution must be given as to the potential effect of the Proposed Regs. The Trust Director should be given the power to negate the interest of the Donor Spouse if:

(i) It is concluded that a Back-End SLAT would be subject to the anti-abuse provisions upon the issuance of final regulations,

(ii) The "doomsday" reasons for the creation of the Back-End Interest no longer are applicable, or

(iii) It is subsequently determined that Back-End Interests are taxable in the Donor Spouse's Gross Estate.

J. Conclusion

(1) Statute is NOT for Everyone

(a) This statute is not for everyone, but can provide a "security blanket" for clients wanting to use exemption but do not want to necessarily affect their lifestyle (think clients in the $50mm range).

(b) The target client would be someone who does not want to engage a Delaware Trustee and would like to avoid a DAPT, but still have some form of “doomsday” security blanket.

(c) Much of the conflicting views about the statute are really based on the post-adoption marketing and the assumption that it definitively provides estate tax benefits. As explained above, it may provide such benefits, but is misleading to say that such benefits are guaranteed.

(2) How to Discuss the Statute with Clients

(a) When SLAT’s are discussed – and this will come back in 2025 – many practitioners may be hesitant to discuss this statute, but the real question to ask is “why the hesitance?”

(b) The Back-End SLAT Statutes are valid, and very well may negate the Relation-Back Doctrine; further, if there is no “pre-existing understanding,” there is persuasive authority that the Back-End SLAT will avoid post-execution Gross Estate inclusion by the Donor Spouse.

(3) Discuss the Potential Negative Effects

(a) This is not to suggest that the Back-End SLAT is without its potential problems.

(b) In any discussion of SLATs, the Back-End SLAT should be discussed along with the risks for Gross Estate inclusion, including the potential effect of the anti-abuse regulations (presuming no changes are made to the proposed regulations once they become final).