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**Spousal Lifetime Access Trusts (“SLATs”): A Key Planning Tool**

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A KEY ESTATE PLANNING GUIDE Law Easy ChronicEstatePlanning.org

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## Spousal Lifetime Access Trusts (“SLATs”): A Key Planning Tool

Robust SLATs Serve Clients Well in Changing Times

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## Traditional Trust Types Possibly Incorporated into a SLAT

- Life insurance trust (ILIT).
- Dynasty trust.
- Grandchildren’s trust.
- Children’s trust.
- Asset protection trust.
- Inter-vivos credit shelter trust.

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## Tax Laws - Permanent Uncertainty

- The tax laws are uncertain. Will the estate tax be repealed? If repealed, will there be a sunset?
- If repealed, might the next administration reinstate the estate tax with harsher rules than currently exist? Might we see a \$2.5M or lower exemption again?
- Might the estate tax be replaced with a capital gains tax on death? Perhaps a capital gains tax on gift and death?
- Will basis step-up on death remain?
- How might income tax rules change now? Might contribution deductions be restricted or eliminated for individuals? Might trusts provide a more advantageous vehicle through which to make charitable gifts?
- Both transfer and income taxes have fluctuated significantly and may change radically under the Trump administration, and perhaps back again under a future administration.
- SLATs can be adapted to address each of these scenarios. Clients will have more options with assets held in flexible SLATs than in individual name. Not planning is unlikely to be the optimal approach.

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## The New Dynamic of Estate Tax Planning

- Historically, tax minimization has been a cornerstone of planning and it should remain important, even in light of substantial uncertainty, or even in the event of estate tax repeal. SLATs can be crafted with considerable flexibility to address many aspects of this uncertainty.
- State income tax systems vary significantly from no tax states to states, that tax at very high rates, like NY and CA, among others. SLATs can provide flexibility to allocate income amongst a class of beneficiaries to those in lower or no tax states.
- Federal tax rates have historically been progressive, although the difference between the highest and lowest rates has fluctuated widely over time, and may continue to do so. SLATs provide a mechanism to allocate income amongst a class of beneficiaries to those in lower federal tax brackets.

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## The New Dynamic of Estate Tax Planning

- Basis maximization can provide valuable income tax planning opportunities, and SLATs can be tailored to facilitate this through:
  - Distribution of assets to beneficiaries, e.g. a spouse/beneficiary of advanced age.
  - Utilization of powers of appointment, e.g. give an elderly parent a general power of appointment to cause SLAT assets to be included in their estate and to achieve a basis step up during the grantor's lifetime.
- Swap powers can provide more flexibility to maximize income tax basis or accomplish several other important planning goals. The traditional application of a swap power is for an elderly or infirm grantor to swap cash into the SLAT in exchange for highly appreciated SLAT assets.

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## The New Dynamic of Estate Non-Tax Planning

- Aging and longevity bring new issues to the fore of planning. Estate plans must protect aging and infirm clients. Irrevocable trusts, including SLATs, should play a role in this later life planning.
- Asset protection as a foundation of estate planning and wealth preservation seems more important than ever before. Even if Congress restricts some liability exposure (e.g., medical malpractice) the importance of asset protection planning will increase. Those viewing the wealthy with disdain, the loss of privacy, and changing societal norms, will all serve to increase the importance of asset protection planning. SLATs will have a critical role in this type of planning for many clients.

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## Spousal Lifetime Access Trusts (“SLATs”): A Key Planning Tool

### Other SLAT Benefits

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## SLAT Benefits – Professional Trust and Other Services

- SLATs, like most trusts can provide a vehicle through which to retain professional asset management or, better yet, a full complement of professional wealth management and trust services.
- SLATs can be designed to initially, or at some future time, include an institutional trustee. This can provide professional investment and trust management services. Many clients don't have family members who are both trustworthy and financially savvy enough to serve as fiduciaries, so the flexibility to name a financial institution can be quite valuable.
- SLATs can (and often should) incorporate a trust protector who can remove and replace the institutional trustee if such trustee fails to perform as desired.

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## SLAT Benefits – Capital Gains

- SLATs reduce/avoid capital gains on the grantor's death.
- Under current law, if the trust holds appreciated assets, the settlor could swap those assets out of the trust and into his name before death by transferring assets to the trust (that is, cash) having an equivalent value. This is an estate tax neutral transaction as the same value remains in both the trust and settlor's estate. However, the appreciated assets in the hands of the settlor will qualify for an income tax basis step-up at death, thus eliminating the unrealized appreciation.
- If the estate tax is repealed, it could be replaced by a capital gains tax at death. There might also be a capital gains tax when gifts are made of appreciated assets. Assets transferred to a SLAT before such a change may avoid any capital gains tax on gift. On death, the same swap or substitution power used above can be applied in the opposite manner as a reverse swap. If the settlor has appreciated assets in her name prior to death, she may be able to swap them into the SLAT prior to death and avoid a capital gains tax on death. Under either scenario, it's possible that the SLAT may provide an income tax planning advantage.

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### SLAT Benefits – Probate, State Tax, Grantor Trusts

- Assets in a SLAT will avoid probate. This should reduce probate costs and time delays. Assets in the trust are immediately available for post-death distribution.
- About 20 states still have an estate tax. The future of state estate taxes is quite uncertain. For example, New Jersey repealed its estate tax effective in 2018, but most New Jersey estate planners anticipate the tax being reinstated because of state fiscal issues. Whether or not the federal estate tax is repealed, few people are confident that there will ever be permanence or certainty to the federal estate tax system. So, having wealthy clients shift assets out of their taxable estates while retaining alternate avenues to access such property just seems prudent.
- SLATs, because they by definition benefit the grantor's spouse, are taxed as grantor trusts for income tax purposes. Thus, the grantor bears the income tax burden on trust earnings. This assumption of the tax burden permits the trusts to effectively grow tax-free, thereby enhancing the estate tax and asset protection benefits.

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### SLAT Benefits – Life Insurance/ILIT

- SLATs can serve as a traditional irrevocable life insurance trusts (ILITs). Most if not all SLATs should be drafted to facilitate the future ownership of life insurance even if that is not part of the current plan. There is no harm and negligible cost in adding this flexibility.
- Life insurance remains at the heart of many estate and financial plans. Regardless of the status of the estate tax, SLATs can function as ILITs and be used to protect and manage life insurance proceeds. Because SLATs tend to be more robust than traditional life insurance trusts, they'll often hold more assets than a traditional "naked" insurance trust, that is, assets other than an insurance policy and a nominal checking account.
- The income earned on these other assets can be used to pay annual policy premiums and avoid the need for annual cash gifts and associated Crummey powers. SLATs may also be drafted or administered with more flexibility than a traditional ILIT. SLATs might have beneficiaries acknowledge the right to receive annual withdrawal notices and waive the requirement of future withdrawal notices, thereby dispensing with the annual Crummey power ritual many clients find burdensome and annoying.

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### SLAT Benefits – Life Insurance/ILIT

- For clients unlikely to face an estate tax, the simplification of a multi-purpose SLAT/ILIT may be a welcome option. Permanent life insurance policies used to fund the SLATs will represent an alternative asset class (in most to be invested in a conservative manner), and the accumulated cash values can be accessed, tax-free, for retirement or other purposes, via trust distributions to the spouse-beneficiary. In the event of a spouse beneficiary's premature death, the surviving spouse is protected because the trust in which the survivor is a beneficiary will collect a death benefit that the surviving spouse and descendants can access.
- In most SLAT planning, consideration should be given to having forecasts done to confirm whether some life insurance is prudent to address the risk of either spouse dying prematurely.
- Life insurance cash values will grow tax-free, and the eventual death benefit won't be subject to either income tax or transfer taxes.

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**SLAT Benefits – Asset Protection**

- SLATs can provide meaningful asset protection from potential claims of creditors and other predators (that is, a beneficiary's spouse in the event of divorce). This protection applies to assets transferred to the trust if not characterized as a fraudulent conveyance. When a SLAT serves as an ILIT, policy cash values during the insured's life, as well as death benefit proceeds, should be protected.
- Because SLATs aren't self-settled trusts, they shouldn't be subject to the risks that some commentators believe inherent in self-settled trusts created in certain domestic asset protection trust (DAPT) jurisdictions permitting such trusts, by settlors residing in jurisdictions that don't permit them.
- It's critical that only the grantor spouse contribute property to his DAPT and that jointly owned property not be used to fund either spouse's DAPT.
- Consider organizing the SLATs in DAPT jurisdictions (that is, those that permit self-settled trusts) to protect against such a slip-up.

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**SLAT Benefits – Asset Protection**

- Create SLATs and transfer assets to them to use up current estate tax exemption. For larger estate sales and other techniques can be used to shift value into protective trust structures.
- If there is a known issue your client may not be able to transfer assets without it being viewed as hindering, delaying or defrauding the claimant (a fraudulent conveyance). The time to plan is when the client does not yet need to plan. So regardless of the status of the gift, estate or GST taxes, planning now is better than waiting to later.
- For some physicians, or others concerned about and facing ongoing liabilities, "creeping" SLATs might be a useful approach. Create the SLAT now and make ongoing gifts to the SLAT each year so that no one gift transfer is significant.

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**SLAT Benefits – Aging Clients**

- SLATs can incorporate several safeguards to provide robust later life planning. They use distinct tax identification numbers so that they may insulate the settlor from identity theft risks. Naming an institutional trustee as noted above may be a vital safeguard for aging clients to protect them from predators.
- Naming a trust protector to act can provide an independent person to monitor trustee performance and take appropriate action if that performance isn't satisfactory. There are approximately 20 states that have statutes governing protectors. The positions of those statutes are not uniform as to whether the protector must act in a fiduciary capacity. There are also differences among commentators. Although it would seem that if a protector can change the trustee, the protector must act in a fiduciary capacity to do so.

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**Spousal Lifetime Access Trusts (“SLATs”): A Key Planning Tool**

**Drafting and Structuring Considerations**

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**Beneficiaries**

- Encourage clients to consider including a broad class of beneficiaries in SLATs, not just the spouse.
- Many attorneys still draft trusts including only the spouse or only the spouse and children as current beneficiaries instead of including the spouse and all descendants.
- If the NIIT is not repealed each child’s AGI is viewed separately from the parent’s AGI for purposes of testing whether the Medicare tax on passive income applies. IRC Sec. 1411. If the child’s AGI is under \$200,000 the child will not be subject to the Medicare tax.
- Unless there is an overarching reason to limit the class of beneficiaries, don’t.
- More beneficiaries means more flexibility for future income tax planning and a more robust SLAT.
- Should “floating spouse” clauses be used for flexibility?
- Can/should a new spouse waive rights as a floating spouse under existing trusts in a new prenuptial agreement?

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**Include Trust Protectors**

- Include trust protectors in almost all SLATs.
- This position has become more common in irrevocable trusts. Giving a protector, acting in a fiduciary capacity, the power to change the governing law and situs, and so forth, infuses flexibility to respond to future changes.
- Caution – naming a protector might subject a trust, once no longer a grantor trust, to state tax nexus based on the residence of the protector. One approach suggested to mitigate this risk is to “house” all ancillary functions (trust protector, investment adviser, et.) inside an LLC formed in the trust friendly jurisdiction where the trust is based.

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**Trust Protectors Powers**

- The power to remove Trustees.
- The power to appoint an individual, corporation or other entity with fiduciary powers to replace any removed Trustee, or to add a new additional co-Trustee.
- The power to appoint an individual, corporation or other entity who is not related or subordinate to the Grantor or the Beneficiaries with fiduciary powers to exercise powers granted in this Trust.
- The power to change situs and governing law of the trust, correct scrivener's errors, modify administrative provisions that have no effect on the beneficial interests in the trust.
- The power to modify or amend the supplemental needs trust provisions herein to conform with any changes in applicable law.
- The power to restrict or eliminate the right of the Trustee to apply the income of this trust to pay life insurance premiums on the life of the Grantor and/or the Grantor's spouse.

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**Trust Protectors Powers**

- The power to change the name of the Trust.
- The power to demand an accounting and the right in the Trust Protector's sole discretion to submit same to a court or not.
- The power to direct the Trustee as to which beneficiaries, fiduciaries or other persons holding powers hereunder (whether in a fiduciary capacity) (individually or collectively "Notice Persons") shall or shall not be entitled to receive information concerning this Trust, including but not limited to periodic investment statements and other notifications, to the extent not inconsistent with applicable state law. While Grantor is alive and not disabled no such notifications shall be given to any Notice Persons hereunder other than the Grantor and the Trust Protector unless the Trust Protector authorizes same, or applicable state law requires otherwise. No trustee shall be liable for notifications following Grantor's disability until such Trustee has actual knowledge, or receives written notice from
- The power to restrict or eliminate the powers granted herein to the Designator or the Appointer. These terms are explained and illustrated below.

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**Permit Adding/Including Charitable Beneficiaries**

- Before swap powers became de-rigueur trusts sometimes included a right for a person, acting in a non-fiduciary capacity, to add a charitable beneficiary. This right, during the grantor's lifetime, characterizes the trust as a grantor trust.
- With all the uncertainty over income and estate tax law changes, consider adding a broader charitable designator provision.
  - If the estate tax is repealed there may be no downside to making charitable gifts of trust assets.
  - If the income tax rules for charitable contribution deductions become more restrictive perhaps it will be advantageous from an income tax perspective to make the gifts out of a trust instead of by the individual.
- Don't have the power end on the grantor's death, permit it to continue in perpetuity since the purpose is not merely to trigger grantor trust status, but to add flexibility to planning. If the estate plan is successful significant wealth will be shifted out of your client's estate to long term irrevocable trusts. What resources will future generations direct to charity if their inherited wealth is in trust with no charitable beneficiaries?

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### Provision to Make Loans

- It had been common to include a power to a person acting in a non-fiduciary capacity to make loans to the settlor of the trust. Adequate interest should be charged but adequate security is not necessary. This too should have characterized the trust as a grantor trust.
- While grantor trust status might be achieved with a swap power, perhaps a loan provision should still be included, but now more for providing a means for the settlor to access trust principal than for grantor trust characterization. If the estate tax is repealed your client might be happier with the planning knowing that there is a means to provide the client access to trust funds, even if that is as a loan.

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### 2038 Power

- The trust could give the trustee, or perhaps a third party acting in a non-fiduciary capacity, a power to grant the settlor the right to control the beneficial enjoyment of trust assets. This would cause estate tax inclusion in the settlor's estate under IRC Sec. 2038. A corporate trustee may be unwilling to exercise such a power so it may be advisable to grant the power to an individual. Consider giving the power to a non-fiduciary. This can provide a mechanism to cause estate inclusion and obtain a basis step up on the settlor's death if that proves advantageous. It might be advantageous to grant the trustee the right to select which assets to grant this power over. If an asset has declined in value, it may be preferable to avoid changing the basis at death. Caution, if the estate tax is repealed, there will presumably be no IRC Sec. 2038, so how the step up in basis would be effected under a repeal regime is uncertain.

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### Express Decanting Power

- Give the trustee an express power to decant. Do not rely on state law. Permit the power to merge the trust into a new and improved trust so administrative provisions can be modified to address future circumstances. Decanting can be used to add or remove a swap power, add an insurance trustee provision so insurance can be added to a trust that did not provide for it, and so much more. Even if the desired modifications can be accomplished with a trust protector action, or non-judicial modification by beneficiaries, including broad decanting powers is like chicken soup – it can't hurt.

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**Spousal Lifetime Access Trusts (“SLATs”): A Key Planning Tool**

**Swap Powers in SLATs**

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**Swap/Substitution Powers**

- This power can be used to create grantor trust status (income of the trust is taxed to the settlor).
- But it also is an incredible tool to build in flexibility. Your client can transfer family business interests to an irrevocable trust, locking in valuation discounts available under current law. But if your client later wants to return those assets to your name, the settlor can swap in an equivalent amount of cash and get the business back.
- This could be useful to obtain a basis step up on death. It could enable the client to change his or her dispositive scheme and transfer the business to another heir. See above.
- If a capital gains tax on death is enacted, a reverse swap might prove beneficial. Shift appreciated assets into the trust (the opposite of what most folks try to do under current law) to avoid a capital gains on death.

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**Make Swap Powers Practical**

- The client/settlor must have property available to effectuate a swap. In many cases cash might be the easiest or preferable asset, but few settlors have addressed this. Practitioners can assist these clients in creating lines of credit to be “at the ready.”
- Analyze trusts for highly appreciated assets part of the annual review process.
- Assure that if a swap is done that the terms of the trust are followed so that the transaction is in compliance with its requirements.

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**Swap Powers and Divorce**

- Another common power that has been used to cause trusts to be characterized as grantor trusts for tax purposes and to provide planning flexibility is the swap or substitution power. This gives the settlor the right to swap assets of equivalent value for assets in the trust.
- **Example:** Wife started a widget manufacturing company and gifted 20% of the stock to an irrevocable trust for the children. Husband was named trustee. The business grew substantially. In the maelstrom of the divorce the status of the trust was overlooked. Post-divorce, wife wanted to reclaim her stock, since a 20% minority interest in the business out of her control would be an impediment to her selling the company. So she attempted to swap a personal note to the trust in exchange for the stock. The now ex-husband, who remained the trustee, refused to honor the transaction. So while a swap power could have been an important tool for flexibility had the issues been addressed during the pendency of the divorce it may prove elusive.

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**Swap Powers and Divorce**

- A similar fact pattern arose in a recent case. The trustee was the wife and mother of the daughter of the marriage who was the beneficiary of trust. The couple divorced. The ex-husband tried to exercise swap power and now ex-wife trustee refused. He tried to swap in a note and the ex-wife/trustee objected saying it was not of equivalent value as required by the trust instrument. *Schinazi v. Edger*, 2016 WL 5867215. In the divorce the issue of trustee and trust actions should have been addressed. It may have been preferable for all involved to have had the wife/ex-wife resign as trustee in favor of an independent, and ideally an institutional, trustee.
- If a swap power is included in a trust consider naming an independent trustee. The trustee may have to confirm that the value of the property being swapped into the trust is of equivalent value to the property being swapped out of the trust to the settlor. If a spouse is trustee for a trust with a swap power, as part of the divorce negotiations, consider naming an independent trustee to prevent the ex-spouse/trustee from unreasonably inhibiting the exercise of a swap or other powers.
- Even better, provide that upon a divorce any interest a spouse has should be terminated (i.e. Spouse deemed to be predeceased). Consider the impact on grantor trust status for income tax purposes.

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**Spousal Lifetime Access Trusts (“SLATs”): A Key Planning Tool**

Tailored LPOAs and GPOAs

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### Powers of Appointment

- Include powers of appointment (someone can designate how trust property will be distributed and to whom). This can provide flexibility.
- Granting someone the power to transmute limited powers of appointment ("LPOA") into general powers of appointment ("GPOA") that can be used to cause some or all the trust assets to be included in the client's estate to qualify for a basis step up on death should that prove advantageous under a future tax system.
- If the power holder dies without exercising a GPOA the property subject to the power is include in the power holder's estate and will be subject to a step-up in basis. Treas. Reg. Sec. 1.1014-2(b)(2).

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### Powers of Appointment

- How far can this go? Can the general power of appointment be granted only over appreciated assets?
- Might it be feasible to structure a tiered formula of sequential contingent general powers of appointment to secure a basis step up on assets exposed to the highest tax brackets first?
- For those living in a decoupled state, the cost of a state death tax must be factored into the analysis. Some practitioners might prefer not having the spouse serve as the trustee if these powers are granted.
- If the client is uncomfortable giving this person a general power of appointment over the trust assets there are options to make this approach safer.
- Will an institutional trustee ever convert a LPOA to a GPOA? Perhaps never.
- Include in a trust that may grant an LPOA a named trust protector who can grant or modify the terms of a limited power of appointment "LPOA" and convert it to a general power of appointment.

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### Powers of Appointment to Poor Elderly Family Member

- Include additional beneficiaries, e.g. an elderly family member, who have modest estates.
- "My clients would never do that." Think again.
- 32% of those who have a parent age 65 and older have provided financial support to that parent.
- This data suggests many clients have an elderly relative (the statistic is only for parents) who they may support and thus who likely has a modest estate (or why else would they need support).
- If the client provides financial assistance to this elderly family member there is likely some level of trust.

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## LPOA Converted to GPOA

- Grant the beneficiary a limited testamentary power of appointment over the trust assets (e.g., to the client's children or only to the person's creditors).
- Give the trustee (or another specified person) the authority to divide the trust into separate trusts and to use the power to create a sub-trust to which all highly appreciated assets can be transferred.
- Give the trustee the right to convert the beneficiary's limited power of appointment into a general power of appointment over the appreciated asset sub-trust.
- This will cause inclusion in the beneficiary's estate of those appreciated assets, and obtain the desired basis step up without the need to actually distribute those assets to the beneficiary and potentially years or decades before the surviving spouse dies.
  - Caution – confirm that state law that governs the power will not expose the mere existence of an unexercised GPOA to the power holder's creditors. Will that be the law of the state governing the trust creating the power or the law of the state where the power holder resides?

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## Consent Requirement on GPOA

- **Example:** Aunt Nellie is named as an additional beneficiary of an inter-vivos SLAT. She is given a GPOA to appoint trust assets. The client is a bit worried that she might add in other nieces and nephews.
- A possible solution to provide the client comfort is to make Aunt Nellie's exercise of the power subject to the consent of a non-adverse person.
- The person holding the consent power cannot have a substantial interest adverse to the exercise of the power in favor of the decedent, his or her estate, his or her creditors or the creditors of his or her estate. Treas. Reg. Sec. 20.2041-3(c)(2).
- The client's brother who is not a beneficiary of the trust is given the power to consent to Aunt Nellie's exercise of the GPOA before it can be effective.
- A trust with GPOA in state where disclosure are not required (Delaware, Nevada or South Dakota), i.e. where a quiet trust is permitted, may achieve this goal. There is no law confirming that a general power of appointment the holder is not informed of is valid for basis step up purposes.

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## Spousal Lifetime Access Trusts (“SLATs”): A Key Planning Tool

**Consider Hybrid DAPT Provision**

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**Hybrid DAPT**

- If the trust is formed and administered in one of the 16 states that permit self-settled domestic asset protection trusts (DAPTs), the settlor can be a beneficiary of his or her own trust.
- However, if the settlor resides in a state that does not permit these trusts, some advisers view it as risky, or even not viable, to create a DAPT in a state that does.
- There is a hybrid solution that might reduce the risk some experts perceive, yet leave open the possibility of the settlor benefiting from the trust. Don't name the settlor initially as a beneficiary. Instead give someone the right to add as beneficiaries of the trust the descendants of settlor's grandparents. So, if your client/the settlor is not a beneficiary now, the trust should not face that risk. But the client has the possibility of being a beneficiary if your client needs access in the future.

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**Hybrid DAPT Provision - 1**

- Give the person who might call the "Designator" the right/power to add descendants of Grantor's grandparents, including grantor, as a beneficiary of the trust.
- Sample Provision:

**Power to Designate Additional Beneficiaries**

- The Grantor appoints NAME as the Designator. During the Grantor's lifetime, the Designator, shall have the power, exercisable at any time and from time to time in a non-fiduciary capacity, and without the approval or consent of any person in a fiduciary capacity, to add as additional beneficiaries hereunder any person who is a descendant of Grantor's grandparents who is not already designated herein as a...

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**Hybrid DAPT Provision - 2**

**Power to Designate Additional Beneficiaries**

- ...Beneficiary. Further, the Designator may at any time remove any person so added by written notice to the General Trustee, so that from the date of such written notification that added descendant of Grantor's grandparents shall cease being a beneficiary hereunder. The Grantor directs that this power is not assignable. In the event that NAME dies before the Grantor dies, the successor Designator shall be such individual (other than the Grantor, any person acting as a Trustee under this instrument) whom NAME shall have designated by an instrument in writing. Any person other than NAME acting as a Designator hereunder shall also have the power to name such additional beneficiaries as hereinabove provided.

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**Hybrid DAPT issues**

- What if the person holding the power, the Designator, dies or becomes incapacitated, before exercising the power? Is a successor named?
- Might a court infer an implied agreement between the Designator and the settlor?
- Will a client have a person or persons they are comfortable to name?

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**Spousal Lifetime Access Trusts (“SLATs”): A Key Planning Tool**

**Improving Old/Existing Irrevocable Trusts**

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**Improving Old/Existing Irrevocable Trusts Generally**

- State laws have evolved in recent years such that if a trust could be moved to a state with more advantageous laws, that alone might significantly improve the trust, SLAT or otherwise.
- Changing trustees to an institution (in a state with advantageous laws) may be the initial step in the process.
- A trust protector may have the power to change a number of characteristics of the trust, or to exert a variety of powers over the trust. These might include the right to terminate and replace the trustee, and change governing law and situs.

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### Improving Old/Existing Irrevocable Trusts - Example

- **Example:** An old irrevocable life insurance trust ("ILIT") terminates after the death of the second spouse and when the beneficiaries reach age 35. This provides very limited divorce or asset protection. The trusts are subject to income taxation in the settlor's home state. The Trust Protector terminates the home state trustee, names an institutional trustee in a state that may no longer be subject the trust to income tax in the home state (although this result is not assured), and which has laws that are more protective, including a liberal statute permitting decanting to modify the trust terms to continue the trust perpetually. The old ILIT is decanted into a modern SLAT.

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### Decant Old Trust into New Improved Trust

- An existing irrevocable trust can be merged into a new trust thereby changing many of the administrative aspects of the trust. This can be used to improve and enhance the benefits of an old ILIT, SLAT or other irrevocable trust.
- In a recent case the trustees of an irrevocable trust were permitted to merge an existing trust into a new trust. At the time the old trust was decanted the beneficiary had the current right to withdraw 75% of the trust principal and was in the midst of a divorce. These actions by the trustee might have facilitated the protection of those trust assets. Ferri v. Powell-Ferri, 476 Mass. 651 (2017).
- New York courts have also given a rather expansive view of a trustee's right to decant. Where the trustee had broad discretionary principal distribution authority the trustee was permitted to eliminate a beneficiary. Matter of Hoppenstein, NYLJ 1202783016744, Sur Ct, NY County 2017.

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### Non-Judicial Modification to Improve Old Irrevocable Trust

- Delaware law enacted in 2016 permits seemingly unlimited modification to an irrevocable trust if the administration of the trust is governed by Delaware law. So for a trust administered elsewhere the trust protector may be able to move the trust to Delaware and have Delaware law govern the administration of the trust to take advantage of this power:
- "Notwithstanding any provision of law or a trust's governing instrument limiting or prohibiting amendment of the trust, an irrevocable trust may be modified to include any provision that could have been included in the governing instrument of a trust created upon the date of the modification upon written consent or written nonobjection of the trustor, all then serving fiduciaries and all beneficiaries even if the modification violates a material purpose of the trust." Del. C. Sec. 3342(a).
- If the grantor is alive and competent there is almost no limit to how an "irrevocable" trust can be changed.

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## Spousal Lifetime Access Trusts (“SLATs”): A Key Planning Tool

### Ancillary Planning to Enhance SLAT Benefits

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## Combine SLATs with Entities

- Use family limited partnerships (“FLPs”) and/or limited liability companies (“LLCs”) to hold assets, e.g. any real estate property or business venture generally should be held in a separate LLC.
- Use separate entities for each operating business and real estate property. Segregate marketable securities in its own FLP or LLC.
- Entities may be manager managed to provide flexibility in management, even if held by a directed SLAT. Further, compensation for services of those serving may provide another mechanism for economic benefit to be distributed out of the SLAT structure.
- Entities are essential for a SLAT in a trust friendly jurisdiction to own real estate in a different state.

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## FLP and LLC Basis Adjustment

- If the planning incorporates the use of a general power of appointment (GPOA) to garner an increase in tax basis, if trust assets include partnership or LLCs taxed as partnerships, practitioners should also consider the impact of the entity on achieving that planning goal.
- Review the provisions in partnership and operating agreements governing 754 basis adjustments. It might be advantageous to negotiate that the election must be made.
- The tax basis and fair market value of all FLP/LLC assets needs to be determined as of the date of the decedent’s death to determine whether the 754 basis adjustment should be elected.
- For the FLP/LLC to adjust a member’s basis on death, or any other event permitted under applicable tax law, there must be a basis for authorization of the election under Code Section §754 and §743 (b) to be made under the LLC operating agreement. If not, then state law must be analyzed for a basis to permit the adjustment to be made.

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### SLATs at Backend of GRATs with Hybrid DAPT Provision

- For new GRATs create an irrevocable, non-GST, grantor trust to receive the backend of the GRAT. That receptacle irrevocable trust should own that remainder interest absolutely. Then, a GST exempt trust may buy back that remainder interest, effectively making the GRAT GST exempt.
- Consider using a SLAT/Hybrid DAPT to maximize access, both indirect (e.g. through the spouse) and direct (the hybrid DAPT provision is triggered).

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### Power of Attorney Gift Provision

- Powell Case – be sure POA permits gifts to fund irrevocable trusts as appropriate.
- "Principal authorizes Agent to make gifts of up to Principal's remaining federal gift tax exemption amount so long as such gifts are made to the irrevocable trust specified below." Principal understands that any of the above amounts may be changed by legislation following the execution of this Gift Rider to Power of Attorney, and such changed or indexed amounts shall apply.
- Comment: use for clients with an existing SLAT or other irrevocable trust.

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### Conclusion and Additional Information

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**Conclusion**

- The tax law and planning environment are and likely always will be in a state of flux.
- SLATs provide a useful planning tool for many married couples to achieve a wide range of both tax and non-tax goals.
- Plan SLATs with flexibility.

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**Additional information**

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