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SPOUSAL LIFETIME ACCESS TRUSTS: A NEW "WINDOW OF OPPORTUNITY" AFTER THE 2017 TAX CUTS AND JOBS ACT

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The current federal estate tax landscape is extremely favorable with a high exemption amount and the recent permanence of portability in the tax code. It is now possible with minimal to no estate or financial planning - a common reality today - for a married couple to pass up to $22.4 million in assets under the recently enacted 2017 Tax Cuts and Jobs Act ("Act") at the time of the second spouse's passing without being concerned about federal estate taxes.

The premise of the Spousal Lifetime Access Trust ("SLAT") is none-too-complex. During an individual's life, the individual transfers property to the SLAT where the property is used to provide for the support of the individual's spouse. This is an irrevocable transfer by the person creating the trust, so once made, the assets cannot be retrieved. In theory, the individual is giving up the property by transferring it to the trust, though the reality is he/she retains indirect access to the assets through the spouse. For those with estates are either currently or are projected to be either near or above $11.2 million, a SLAT offers a number of potential benefits.

The foremost advantage of the SLAT, and the primary reason for its promotion, is that it offers significant creditor protection while still keeping the property close to and indirectly accessible by the grantor. With some careful planning and drafting, the attorney can make it so that the assets are unreachable by both the grantor's creditors, since the assets are no longer part of his/her estate, and the spouse's creditors, since the assets never became a part of his/her estate. But the spouse does have access to the trust for support, and the grantor has access to the trust through the spouse. The SLAT offers fairly robust asset security without removing the assets too far.

In conjunction with a SLAT established by the other spouse - also known as a dual SLAT - it can amount to an effective shield from creditors of either spouse. This is riskier and requires particularly specialized drafting as the judiciary can intervene through the reciprocal trust doctrine ("RTD"). If the trusts are too similar, as determined by a number of factors, the property will be returned to the grantor's estate. Varying the terms of each trust so that they are reasonably different from one another and creating the trusts at different dates should be sufficient to avoid the RTD allegation by the IRS.Giving up control on one's assets is not easy and a SLAT does have its risks. It requires a particular conviction in the enduring nature of one's marriage. Divorce removes even indirect access to the property in the trust and could also mean supporting one's estranged spouse for life. However, there is a remedy as the SLAT can be written so that the spouse is a general term and not a specifically identified person. If there was a divorce, there would no longer be a spouse, and the trust would be administered for the benefit of the next group of beneficiaries - likely the grantor's children. Should the grantor remarry, there would be a new spouse, and the trust would then exist for the new spouse's benefit.

Another overlooked feature of a SLAT is its capture of the generation-skipping transfer tax exemption, which is also currently $11.2 million (under the Act) but cannot be passed between spouses. Portability does not apply. Loosely speaking, the generation-skipping transfer tax is levied on transfers to individuals beyond the next immediate generation. By relying exclusively on portability, the first spouse forfeits his or her generation-skipping transfer exemption. If a couple's planning includes the generation beyond their children, and they have assets in excess of the exemption, this means the loss of a tax savings. The GST exemption can be preserved by creating a SLAT.

In the end, and with the right couple, the SLAT is a very relevant estate planning tool; especially in light of the fact the aforementioned exemption amounts are mandated to "sunset" under the Act on 12/31/2025. Failure to transfer the higher exemption amount into a SLAT before the exemption amount reverts to the previous $5 million level (indexed to inflation projected to be $6.3 million in 2026), will be tantamount to losing a once in a lifetime "window of opportunity" to shift wealth free of any future estate taxes and generation-skipping transfer taxes! It is a "use it or lose it" proposition. But, in order to take full advantage of the higher exemption amount before the snap back on 1/1/2026, a taxpayer must use 100% of his or her lifetime exemption amount before that time. This is a trap for the unwary! Example: if a taxpayer makes a gift of $8 million before 2026, he will be considered to have used his exclusion amount from the "bottom up" rather than from the "top down." Therefore, the 2026 exemption amount of $6.3 million will be lost since that taxpayer gave away more during his lifetime and assuming an $11.2 million individual exemption, this taxpayer will have foregone $3.2 million of available exclusion! Effective 1/1/2026 the taxpayer will have zero exclusion remaining. So, even if your estate is not close to the current $11.2 million threshold but is above the projected 2026 exemption threshold, it would be advisable to shift your full exemption amount you have available into a SLAT or risk losing the excess amount.

Bottom line, through the SLAT, assets can be kept close to the grantor while still receiving the creditor protection and tax savings benefits provided by an irrevocable transfer to a trust.

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Sol is a Director in the Dallas office, with over 30 years' experience in trusts and estate planning law. He counsels clients on estate planning, with a philosophy that estate planning is a process of planning for the accumulation, conservation and distribution of wealth between the generations. He is admitted to the U.S. Tax Court.

Sol has received the designation as an Accredited Estate Planner from the National Association of Estate Planners, 1995, and was selected to "5-Star" Wealth Manager in 2010-2017 and to the Texas Super Lawyers list in 2011-2017.

Admitted

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- LL.M. Estate Planning, 1982, University of Miami in Miami, Florida
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Honors and Awards

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Publications and Presentations

- "Auld Lang Syne for Professional Personal Service Corporations," State Bar of Texas, Texas Bar Journal (May 1983)
- "Section 401(k) Plans-An Alternative to an IRA," Warren, Gorham & Lamont, The Review of Taxation of Individuals (Spring 1985)
- "The Foreign Sales Corporation-An Analysis of Its Impact, Attributes and Planning Opportunities after the 1984 Tax Reform Act," Prentice-Hall, Tax Ideas (Fall 1985)
- "Choosing a FSC Jurisdiction," Prentice-Hall, U.S. Taxation of International Operations (September 25, 1985)
- "Structural Considerations for a FSC," Prentice-Hall, U.S. Taxation of International Operations (October 9, 1985)
- "Are Living Trusts for You," T.A.L.S. Docket (March 1991)

Activities

- Adjunct Professor in Estate Planning, School of Business, University of Texas-Dallas (2015-present)
- Estate Planning Instructor, SMU Certificate Program for Financial Planning, 2010-present
- Estate Planning Instructor, Graduate School of Business at the University of Dallas, 1995-2010
- Professional Development Institute at the University of North Texas (May 1993-June 2010)
- Southeastern Paralegal Institute (June 1992 – May 1998).
- Judicial Law Clerk for Judge Jack Swink in the Probate Court of Los Angeles (1979)