

ESTATE PLANNING STRATEGIES

The Spousal Lifetime Access Trust: A Potential Solution for the Hesitant Donor

Wealth and Estate Planning Strategists
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Many individuals appreciate the concept of making lifetime gifts of their estate to reduce their federal estate tax exposure, but the idea of giving away control and benefit of a large amount of assets can be anxiety-provoking. Directing gifts to a Spousal Lifetime Access Trust (“SLAT”) may provide comfort to some hesitant donors.

Federal Gift, Estate, and Generation-Skipping Transfer Tax

The Internal Revenue Code imposes certain transfer taxes when a person gifts assets during life or bequeaths assets to non-charitable recipients at death. Each U.S. person¹ is entitled to transfer via gifts during life or bequests at death a certain amount of assets free of federal gift or estate tax. In 2025, the federal gift and estate tax exemption (the “Lifetime Exemption”) is \$13,990,000 per individual (\$27,980,000 for a married couple). This amount is based on \$10,000,000, indexed for inflation each year from 2010, so it adjusts annually.

The Tax Cuts and Jobs Act of 2017 (“TCJA”) increased the Lifetime Exemption from a base of \$5,000,000 per person to \$10,000,000. However, the increase under the TCJA was only temporary and current Lifetime Exemption is set to automatically sunset on December 31, 2025, causing it to

revert to \$5,000,000, adjusted for inflation from 2010, unless Congress proactively changes the law. If transfers made during life or at death exceed the donor’s Lifetime Exemption, the excess is subject to federal gift or estate tax at a maximum rate of 40%.

In addition to the federal gift and estate tax, there is a separate and distinct tax known as the Generation Skipping-Transfer Tax (“GST Tax”).² The GST Tax is an additional layer of tax imposed on transfers to grandchildren or anyone else treated as being two or more generations below the donor. Like the federal gift and estate tax, there is an exemption from the GST Tax which is currently also \$13,990,000 per individual in 2025. Transfers subject to the GST Tax above the donor’s GST exemption amount are subject to 40% tax.

¹ For purposes of this article, U.S. person means a U.S. citizen or person domiciled in the U.S. For federal transfer tax purposes, a person is domiciled in the U.S. if the person is living in the U.S. with no present definite intention of living elsewhere. Determining whether a person is domiciled in the U.S. is a facts and circumstances test.

² Use of the exemption and application of GST Tax is complex and nuanced. This white paper provides only a high-level discussion, as a detailed discussion of the nuances is beyond its scope.

Many advanced estate planning techniques involve gifting assets and removing them from the donor's control and benefit. Generally, when an asset is gifted, not only does the donor remove the gifted asset from their estate for estate tax purposes, but they also remove all of the future appreciation on such asset from their estate. By way of example, if a donor gifts \$1 million, and that \$1 million grows to \$3 million after the time of the gift and before the death of the donor, the donor will shift the \$2 million in appreciation out of their estate at a cost of only \$1 million of their Lifetime Exemption.

When many people think of gifts, they commonly think of transferring assets to recipients outright, which can be a part of any gifting strategy. For example, a parent may gift each of their children the annual exclusion amount outright each year.³ Another common option is to make gifts using trusts, which can provide, if structured appropriately, additional benefits such as creditor protection, estate and gift tax efficiency for the recipients, and GST Tax planning. One such trust is the Spousal Lifetime Access Trust ("SLAT").

The Spousal Lifetime Access Trust

A SLAT is an irrevocable trust created by a donor for the benefit of the donor's spouse. The beneficiary spouse is generally the primary beneficiary of the trust during their lifetime and may receive distributions of principal and income under the trust terms. Children, grandchildren, and others may also be beneficiaries of the trust during the lifetime of the beneficiary spouse, but, in many cases, the needs of the other beneficiaries are secondary to the needs of the beneficiary spouse.

A SLAT must be funded with the separate property of the donor spouse. This may require breaking apart joint assets to ensure the donor spouse has enough separate assets to gift. Couples who live in a community property state may need to enter into a transmutation agreement under which the couple agrees that the character of certain property is changed—or transmuted—from community property to

separate property. It is vital to work with a skilled attorney to determine and follow appropriate formalities and timing of these steps to ensure that the beneficiary spouse cannot be treated as contributing their own property to the trust, which could have significant adverse transfer tax consequences.

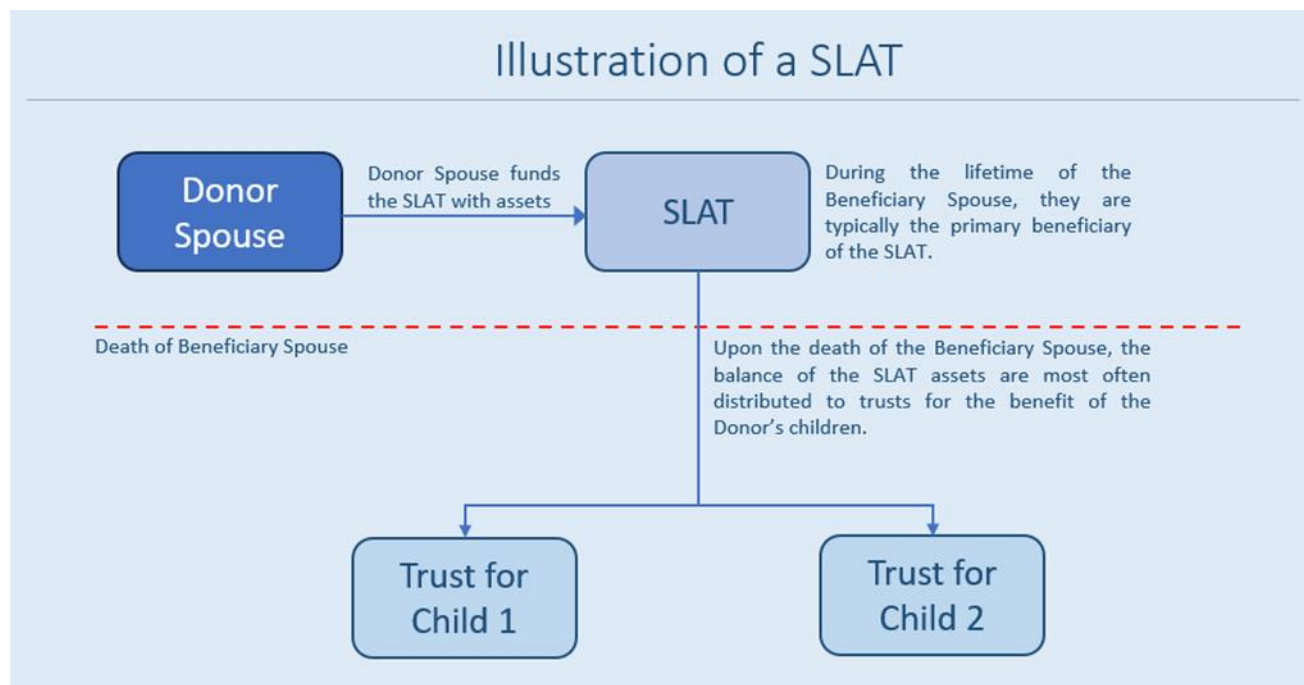
This technique can be further leveraged by making a partial gift of illiquid assets, such as income producing real estate or a non-managing membership interest of a Family Limited Partnership (FLP) or Limited Liability Company (LLC), to the SLAT, as these types of assets can be subject to discounts on the value of the gift for lack of control and lack of marketability.

The SLAT is also a good vehicle for GST Tax planning. Often, people who create a SLAT allocate their GST Tax exemption to the trust at the time of creation and funding. After the death of the beneficiary spouse, the assets of the trust are not included in either the donor spouse's or the beneficiary spouse's taxable estate and can continue in trust for the benefit of the spouses' children without being subject to estate tax. Upon the death of a child beneficiary, the assets of the trust are excluded from the child's taxable estate and instead may pass to trusts for the benefit of their children (the donor's grandchildren). This may continue until the trust runs out of money or the expiration of the perpetuities period applicable to the trust.⁴

To receive the benefit of proper GST Tax planning, the trust should provide that the assets stay in trust for as long as possible. This means that, as discussed above, upon the death of a beneficiary, the assets should continue in trust for the next generation of beneficiaries rather than being distributed outright. Additionally, there should be no mandatory distributions of principal or income (e.g., distributions of a large portion of principal upon a beneficiary attaining a certain age) or withdrawal rights. It is also important to ensure that GST Tax exemption is allocated to the gift on a timely filed federal Gift Tax Return.

³ Excluded from gift tax are gifts of a present interest in property of up to \$19,000 (as of 2025) per donor per recipient per year (the "annual exclusion").

⁴ The rule against perpetuities ("RAP") is an old English common law rule, codified in most states, restricting the longevity of an irrevocable trust. Some states have eliminated their RAPs or have extended their duration to many hundreds of years.



What Is the Big Deal About SLATs?

Many individuals are understandably wary of giving up control of or access to their assets in order to engage in estate tax planning. It's impossible to predict the future, so they have no way of knowing whether a change in their financial situation will cause them to regret giving away the assets. However, to remove an asset from a donor's taxable estate, the Internal Revenue Code requires the donor to give up control and benefit of the gifted assets.

This concept is also true with a SLAT—after the donor gifts assets to the SLAT, they no longer have access to the assets and will not be able to benefit from the assets directly. On the other hand, the beneficiary spouse will have access to the assets and can benefit from them through distributions made in accordance with the standards provided in the trust. As a result, as long as the spouses remain married, the donor spouse retains indirect access to the assets contributed to the SLAT via the beneficiary spouse, who may apply distributions from the SLAT to benefit the marital unit.

In many ways, SLATs are viewed as disaster planning: the donor removes assets from their estate, but, in the event their retained assets decrease in value significantly or an unexpected event happens, they will retain indirect access to the assets of the SLAT as long as the marriage is intact.

Put differently, the SLAT assets may be considered a safety net.

For those wary of making large gifts, this can be very meaningful. While a goal of many individuals is to be as estate tax efficient as possible, many also fear running out of money or not having enough money to do what they want to do for the rest of their lives. Of course, gifts should only be made if donors are comfortable doing so and they retain sufficient assets to accomplish their goals and maintain their lifestyle. But many who can afford to make gifts of this magnitude are still uncomfortable making gifts due to overall uncertainty. For those individuals, the added security of the indirect access to the SLAT could be the difference between entering into a gifting transaction or not.

As noted above, an important element of proper SLAT planning is to ensure the donor retains enough assets in their own name to support their lifestyle after the gift, as well as support the donor's obligation to pay the SLAT's income taxes (discussed further below). SLATs function best as a "break in case of emergency" option after creation, rather than a regular use fund for the beneficiary spouse. Put differently, the assets gifted to a SLAT should be assets the donor spouse can afford to part with because,

while it is possible for the beneficiary spouse to receive distributions from the trust, it is inefficient, from an estate tax planning perspective, to use Lifetime Exclusion to give assets away, then turn around and pull those same assets back into the taxable estate by making distributions to the beneficiary spouse. It is generally better to spend down the retained assets outside of the trust that still have estate tax exposure, while letting the SLAT assets grow and appreciate outside of the taxable estate for the benefit of future beneficiaries.

While SLATs are a great estate planning tool, they are not without their own risks. The two primary risks associated with SLATs are the early death of the beneficiary spouse and divorce, both of which are discussed further, below.

Income Taxation of SLATs

By default, a SLAT will nearly always be treated as a grantor trust for federal income tax purposes. An irrevocable grantor trust is a trust that generally allows the trust assets to be excluded from the donor's estate for federal estate tax purposes but are considered to be the donor's property for federal income tax purposes. This means the donor will be responsible for paying the federal income tax generated by the trust and will report the trust's income, gain, and loss on their individual tax return. As an example, if the grantor trust sells stock, all the proceeds from the sale will remain in the grantor trust, and the donor of the trust will be responsible for paying the capital gains taxes on the sale from their personal assets. In this way, the donor is able to further reduce their taxable estate through the payment of income taxes attributable to the trust. Effectively, the income tax payments may be thought of as additional indirect gifts to the trust that are not subject to federal gift tax.

It may be possible to structure a SLAT as a non-grantor trust, commonly referred to as a Spousal Lifetime Access Non-grantor Trust ("SLANT"). While donors should always work with competent legal counsel in establishing an irrevocable trust, it is even more important for a donor seeking to establish a SLANT, as such trusts require careful drafting to avoid the default grantor trust income tax treatment.

Frequently Asked Questions

What are common risks associated with SLATs and can those risks be mitigated?

As noted above, the primary risks associated with a SLAT are the untimely death of the beneficiary spouse and divorce. A significant advantage of a SLAT is that the donor is married to the beneficiary spouse and, as a result, can indirectly benefit from the beneficiary spouse receiving a distribution from the SLAT. This benefit is lost upon a divorce. To reduce mortality risk, often the spouse with a shorter life expectancy will fund a SLAT for the spouse with the longer life expectancy.

The mortality risk may also be mitigated with insurance on the life of the beneficiary spouse for the benefit of the donor, which could provide a source of assets to make up for the donor's loss of indirect access to the SLAT assets.

Additionally, if the SLAT is treated as a grantor trust for income tax purposes solely because the donor's spouse is a beneficiary, the death of the beneficiary spouse will likely cause the trust to convert to a non-grantor trust for income tax purposes. If the donor wishes to maintain grantor trust income tax status through their lifetime, regardless of the beneficiary spouse's mortality, they should work with their attorney to include additional terms that trigger grantor trust income tax status so it may continue after the death of the beneficiary spouse.

Unfortunately, the consequences of a divorce are more difficult to address, and the donor should contemplate the risk carefully with their estate planning attorney. It is important to note that the federal income tax status of a SLAT may not change if the spouses divorce—depending on the terms of the trust the donor may continue to be responsible for the income taxes generated by the SLAT, paid from their own assets, but would have no control over the investment decisions that generate taxable income.

It may be possible for the trust agreement to provide that the beneficiary spouse will cease to be a beneficiary in the event of a divorce. In that case, the beneficiary spouse will be treated as having passed away, and the trust would continue for the benefit of the remainder beneficiaries (often, the donor's children).

Another option used by practitioners is to include a so-called “floating spouse” provision, which defines the “beneficiary spouse” to be whomever the donor is married to from time to time, without specifically naming the donor’s current spouse. Under this language choice, the current spouse would be removed as beneficiary in the event of divorce and, if the donor remarries, their new spouse would become the beneficiary of the SLAT. An important note: because trusts must have a current beneficiary, if the former spouse is removed as a beneficiary, the trust must include alternative beneficiaries for the period between the donor’s marriages to avoid termination of the trust.

A further option is for the spouses to enter into a post-nuptial agreement that specifies how the assets of the SLAT will be accounted for when allocating assets in divorce. As discussed above, the assets gifted to the SLAT must be the separate property of the donor. Therefore, it’s possible in a divorce for the beneficiary spouse to continue to have access to the assets of the SLAT while other marital assets outside of the trust are allocated equally between the donor and beneficiary spouse, providing the beneficiary spouse with a disproportionate windfall of the marital assets. To solve this issue, a post-nuptial agreement could be drafted to provide that, in divorce proceedings, the SLAT assets are to be considered marital assets for purposes of dividing the marital estate and allocated to the beneficiary spouse as part of their share. This strategy may be implemented for an existing SLAT that does not contemplate divorce.

Can each spouse create a SLAT for the benefit of the other spouse?

While it is possible, with careful planning, for each spouse to establish and fund a SLAT for the benefit of the other, the IRS has attacked this kind of mutual planning under the “reciprocal trust doctrine.” The doctrine provides that if two people mutually agree to an arrangement under which they each give to the other the same gift under the same structure, thereby receiving back exactly what they gave away, each person will be treated as having not made a gift, and the gifted assets will be pulled back into each person’s estate, effectively undoing the gift planning.

To avoid application of the reciprocal trust doctrine, it is generally recommended that the SLAT agreements include meaningful differences in terms of each beneficiary’s interest under the trust. Different practitioners may have varying perspectives about how to accomplish this, but may recommend one or more of the following: funding the SLATs at different times or in different tax years; funding with different assets; and drafting differing trust terms regarding trustees, income and principal distributions, withdrawal rights, powers of appointment, additional beneficiaries, etc.

It is important to understand that there are no bright line rules regarding which or how many differences are sufficient to avoid the doctrine. Therefore, if spouses wish to accomplish this type of planning, they should engage an experienced estate planning attorney to ensure the doctrine is not inadvertently triggered.

Can a SLAT also be a Dynasty Trust?

In general, a Dynasty Trust is an irrevocable trust located in a state that has eliminated or extended its perpetuities period and whose assets have been made exempt from the GST Tax, allowing for them to remain in trust for as long as possible, often many generations. In other words, a Dynasty Trust is intended to continue indefinitely until the trust runs out of money, there are no longer any living beneficiaries, or the perpetuities period that applies to the trust expires.

A SLAT is often also a Dynasty Trust. The primary distinction between them in discussions of estate planning strategies is whether or not the donor’s spouse is an initial beneficiary—a SLAT must include the donor’s spouse as a beneficiary, while a typical (non-SLAT) Dynasty Trust will not, instead benefitting, most commonly, the donor’s descendants.

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