Two Years ‘til Sunset: It’s Time for Sunshine State Residents to Consider the Implementation of a SLAT

Jul 14, 2023

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Tax Law Defined™ Blog

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One year ago, the Florida Legislature amended Florida Statute Section 736.0505, which made the tax-saving instruments, known as Spousal Lifetime Access Trusts (“SLATs”), a more advantageous option for Florida residents. By following the new statutory requirements discussed below, the settlor spouse who establishes the SLAT will be able to access the SLAT assets following the death of the beneficiary spouse, while likely maintaining the creditor and estate tax protections initially provided by the SLAT.

This amendment stepped onto the estate planning scene at a pivotal time as the Federal Estate Tax Exemption (the “Exemption”) is at a historic high. For example, the Exemption is $12,920,000 per individual (or $25,840,000 for married couples) in 2023. However, a significant reduction in the Exemption is expected to occur in 2026 after the provisions of the 2017 Tax Cuts and Jobs Act, which produced this tax savings environment, are set to sunset.

Thus, if Florida residents are looking to take advantage of the increased Exemption amount, it is time to consider advanced estate planning techniques—including the implementation of a SLAT with the new benefits provided under Florida law.

Advantages of a SLAT

SLATs are effective estate planning tools for married couples who want to utilize the remaining Exemption amount for one or both spouses but still provide cash flow to the marital household. To do so, one spouse (the “Settlor Spouse”) creates an irrevocable trust for the benefit of the other spouse (the “Beneficiary Spouse”) for the duration of the Beneficiary Spouse’s lifetime. Subsequently, the Settlor Spouse makes a completed gift, as determined by Internal Revenue Code Section 2511 and Treasury Regulation Section

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25.2511-2(b), to the SLAT for up to the amount of the Settlor Spouse's remaining Exemption. In doing so, the Settlor Spouse locks in the Exemption amount actually used for purposes of the after-death estate tax calculation, even if the post-2025 sunset causes the actual Exemption amount to be much lower in the later year of death.

Thus, the value of the assets gifted to the SLAT, including any appreciation thereon, will be excluded from both the Settlor Spouse's and the Beneficiary Spouse's gross estate for Federal Estate Tax purposes.

Florida-Specific Requirements and Additional Considerations

On and after July 1, 2022, and to take advantage of Florida's positive statutory changes, a SLAT created under Florida Statute Section 736.0505(3) must comply with the following requirements:

1. The Beneficiary Spouse must be a qualified beneficiary of the SLAT for the duration of the Beneficiary Spouse's lifetime.

Under this first requirement, the Beneficiary Spouse must be eligible to receive income and/or principal distributions from the SLAT for the remainder of the Beneficiary Spouse's lifetime. However, this requirement creates an issue in the event of divorce. To alleviate such an issue, a trust may include provisions that revoke the Beneficiary Spouse's interest in the trust assets and remove their authorization to exercise any right or power under the trust instrument in the case of subsequent divorce. Nevertheless, based on the plain language of the statute, such provisions would disqualify the SLAT from the benefits afforded by Florida Statute Section 736.0505(3). Thus, when creating a SLAT governed by Florida law, a Settlor Spouse who wishes to take advantage of the new law will need to consider the issues that might arise in the case of a divorce from the Beneficiary Spouse.

2. At no time during the Beneficiary Spouse's lifetime may the Settlor Spouse be a qualified beneficiary of the SLAT.

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Although the Settlor Spouse may indirectly benefit from SLAT distributions made to the Beneficiary Spouse, the Settlor Spouse cannot receive direct distributions from the SLAT during the Beneficiary Spouse's lifetime. As an example of a problematic clause, a trust may include a tax reimbursement clause for income taxes paid by the Settlor Spouse with respect to income or gains on the assets held in the trust. However, such reimbursement from the SLAT would render the Settlor Spouse a qualified beneficiary of the SLAT during the Beneficiary Spouse's lifetime. Thus, any tax reimbursement clauses should be excluded from a SLAT governed by Florida law.

Alternatively, after the amendment to Florida Statute Section 736.0505, the Settlor Spouse can possess a reversionary interest in the SLAT in the event of the Beneficiary Spouse's death. Moreover, the Beneficiary Spouse may be granted the power to appoint the SLAT assets in further trust for the benefit of the Settlor Spouse. The exercise of such power would allow the Settlor Spouse to maintain indirect access to the SLAT assets upon the Beneficiary Spouse's death. Thus, if a married couple chooses to implement a SLAT with such a power under the new Florida law, it will also be important to update the Beneficiary Spouse's Last Will and Testament to exercise such power of appointment in favor of the Settlor Spouse.

3. All transfers to the SLAT by the Settlor Spouse must be completed gifts under Section 2511 of the Internal Revenue Code.

The final requirement under Florida Statute Section 736.0505(3) is that the transfer to the SLAT must be a completed gift under the Internal Revenue Code. The Settlor Spouse might be concerned about the "completed gift" aspect of the SLAT strategy because of their loss of control over such assets. Yet, as with many irrevocable trusts, the SLAT may include a power of substitution, as allowed under Internal Revenue Code Section 675(4), whereby the Settlor Spouse can reacquire assets held under the SLAT by substituting property of an equivalent value determined as of the date of substitution. Thus, this power creates flexibility in the Settlor Spouse's estate plan and alleviates some of the concerns surrounding the completed gift requirement.

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Finally, a Florida SLAT's compliance with these requirements should prevent the SLAT assets from being treated as available to or reachable by creditors of the Settlor Spouse, even if the Settlor Spouse becomes a successor or remainder beneficiary after surviving the Beneficiary Spouse's death. Preventing the Settlor Spouse's creditors from reaching the SLAT assets is important to ensure that the Settlor Spouse's gift to the SLAT will be a completed gift and will not be included in the Settlor Spouse's estate for estate tax purposes after death.[1]

If you think a SLAT may be right for you, whether governed by Florida law or any other jurisdiction in which our attorneys are licensed, please contact the author of this article or any attorney in Frost Brown Todd's Estate Planning & Administration Group. You can also visit our Tax Law Defined® blog to get the latest insights on federal, state and local taxation and tax-saving strategies.

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[1] Under 26 C.F.R. § 20.2036-1(b)(1), a deceased Settlor Spouse (decedent) is treated as having retained "use, possession, . . ., or other enjoyment of the transferred property . . . to the extent that the use, possession, right to the income, or other enjoyment is to be applied toward the discharge of a legal obligation of the decedent." Obligations owed to even hypothetical creditors are legal obligations in this context. *See also* **Paxton v. Commissioner**. 86 T.C. 78 (1986); Rev. Rul. 76-103, 1976-1 C.B. 293, 1976 WL 36380.

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