DRAFTING SPOUSAL LIFETIME ACCESS TRUSTS

JASON R. FLAHERTY, *Austin*
Brink Bennett Flaherty Golden

CORPUS CHRISTI ESTATE PLANNING COUNCIL
November 21, 2019

Jason Roy Flaherty, JD, CPA

Brink Bennett Flaherty Golden pllc
7800 North Mopac, Ste 200
Austin, Texas 78759

(512) 407-8888
jflaherty@bbfglaw.com

Practice Areas

- Estate Planning
- Tax
- Private Business
- Private Jets and Aircraft Services

Jason concentrates his practice in tax and estate planning and in advising private business owners. He builds estate plans for individuals, keeping in mind their family values, goals and needs, and desire to protect and care for their family and loved ones while minimizing taxes. Jason also assists individuals and professional trust companies with probate, trust and estate administration, family settlement agreements, and all matters related to trusts and estates.

Jason enjoys pre-liquidity event planning for entrepreneurs and investors to protect assets and minimize taxes. Jason frequently structures and implements advanced planning techniques, such as spousal lifetime access trusts, grantor retained annuity trusts, and installment sales to grantor trusts.

Jason also has substantial experience representing clients in the acquisition and ownership of private jets to ensure compliance with the legal requirements of aircraft ownership, including with sales, use, property, and income tax law. Jason practiced accounting for over 6 years and is a licensed Certified Public Accountant.

Professional Certifications

- Certified Public Accountant
- Board Certified in Estate Planning and Probate by the Texas Board of Legal Specialization

Representative Experience

- Guide business owners, professionals, and high net worth individuals and families through the estate planning process
- Plan for the transfer of family wealth and values to later generations
- Structure business organizations to reduce tax
- Reduce transfer taxes and advance charitable goals
- Protect surviving spouses and minor children including beneficiaries with disabilities, special needs or limited financial knowledge or experience
- Counsel executors and trustees, including professional trust departments
- Help business owners and entrepreneurs plan for the death, disability, retirement, or divorce of a business partner with business succession plans and buy-sell agreements
- Design plans to protect personal and family assets
- Structure the acquisition of private jets to minimize taxes and limit liability

Education

Northwestern University School of Law, Chicago, IL

- J.D., 2002, *cum laude*
- Order of the Coif
- Northwestern University Law Review, Associate Editor
- Arlyn Miner Book Award for Excellence in Legal Writing

University of Kansas, Lawrence, KS

- B.S., Accounting & Business Administration, 1992

Career History

- Brink Bennett Flaherty Golden pllc, Austin, Texas: 2008 – Present
- Winstead PC, Austin, Texas: 2007 – 2008
- Jenkens & Gilchrist, P.C., Austin, Texas: 2002 – 2007
- Sprint Corporation, Finance Department, Overland Park, Kansas: 1993 - 1999

Professional & Community Involvement

- Editorial Board, The REPTL Reporter, State Bar of Texas (2009 - Present)
- President, Estate Planning and Probate Section, Austin Bar Association (2011-2012)
- Chair, Estate and Gift Tax Committee, Tax Section, State Bar of Texas (2010-2011)
- President Elect, Estate Planning and Probate Section, Austin Bar Association (2010-2011)
- Vice-Chair, Estate and Gift Tax Committee, State Bar of Texas (2008-2010)
- Treasurer, Estate Planning and Probate Section, Austin Bar Association (2009)
- Director, Estate Planning and Probate Section, Austin Bar Association (2008-2014)
- Sustaining Life Fellow, Texas Bar Foundation (2018 – present)
- Fellow, Austin Bar Foundation (2016 – present)
- Member, College of the State Bar of Texas
- Trustee, Zach Scott Theatre (2007 - 2010)
- Member, Austin Bar Association
- Volunteer Admissions Interviewer, Northwestern University School of Law (2002 - Present)
- President, Austin Tax Study Group (2017 – Present)
- Director and Treasurer, Circle C Seals (2014 – 2017)

Awards & Recognition

- Named “Texas Super Lawyer” by *Law and Politics* as seen in Texas Monthly magazine (2014 - 2019) and named “Rising Star” (2005 - 2012)
- Named “Best Lawyers” (2020)

Selected Presentation Topics and Papers

- Planning with Retirement Accounts, Texas Society of CPAs Advanced Estate Planning Course (August 16, 2019)
- Dealing with Uncertainty in Estate Tax & Income Tax Planning with High and Changing Exclusions, 37th Annual Advanced Tax Law (Aug. 2, 2019)
- Estate and Gift Tax Developments, REPTL Reporter, Vol. 57, No. 3 (2019)
- Estate and Gift Tax Developments, REPTL Reporter, Vol. 57, No. 2 (2019)
- ‘Til Death Do Us Part – Planning with Retirement Benefits, San Antonio Estate Planners Council (Oct 16, 2018)
- Estate and Gift Tax Developments, REPTL Reporter, Vol. 57, No. 1 (2019)
- Planning with Retirement Accounts, 42nd Adv. Estate Plan’g & Probate (June 13, 2018)
- Estate and Gift Tax Developments, REPTL Reporter, Vol. 56, No. 1 (2018)
- Buying and Selling Private Aircraft - What Could Go Wrong?, TexasBar CLE webcast (Mar. 29, 2017)
- Estate and Gift Tax Developments, REPTL Reporter, Vol. 55, No. 4 (2017)
- Navigating the Acquisition and Sale of Private Aircraft, 27th Estate Plan’g and Probate Drafting (Oct. 7, 2016)
- Estate and Gift Tax Developments, REPTL Reporter, Vol. 55, No. 3 (2017)
- Estate and Gift Tax Developments, REPTL Reporter, Vol. 55, No. 2 (2017)
- Tax Planning with Short Life Expectancies, 40th Adv. Estate Plan’g & Probate (June 23, 2016)
- Estate and Gift Tax Developments, REPTL Reporter, Vol. 55, No. 1 (2016)
- Estate and Gift Tax Developments, REPTL Reporter, Vol. 54, No. 4 (2016)
- Practical Income Tax Gems for Estate Planners, 39th Adv. Estate Plan’g & Probate (June 10, 2015)
- Estate and Gift Tax Developments, REPTL Reporter, Vol. 53, No. 4 (2015)
- Preparing Your First Will, TexasBar CLE webcast (Nov. 18, 2015)
- Estate and Gift Tax Developments, REPTL Reporter, Vol. 53, No. 2 (2015)
- Estate and Gift Tax Developments, REPTL Reporter, Vol. 53, No. 1 (2014)
- Drafting with High Exemptions and Portability, 25th Estate Plan’g and Probate Drafting (Oct. 10, 2014)
- Estate and Gift Tax Developments, REPTL Reporter, Vol. 52, No. 4 (2014)

- Accidental Minor Inheritance: UTMA vs. 142 Trusts vs. 1301 Trusts vs. Account FBO a Minor, Intermediate Estate Planning & Probate Course (June 9, 2014)
- Estate and Gift Tax Developments, REPTL Reporter, Vol. 52, No. 3 (2014)
- Rethinking the A/B Plan, Corpus Christi Estate Planning Council (Jan. 16, 2014)
- Marital Deduction Planning in 2013, 24th Annual Estate Planning and Probate Drafting (Oct. 24, 2013)
- Estate and Gift Tax Developments, REPTL Reporter, Vol. 52, No. 2 (2013)
- Marital Deduction Planning in 2013, Austin Bar Assoc., Estate Plan'g & Probate Sec. (Sept. 20, 2013)
- Estate and Gift Tax Developments, REPTL Reporter, Vol. 51, No. 1 and 2 (2013)
- Estate Planning & Probate 101, 36th Annual Adv. Estate Planning and Probate (June 25, 2012)
- Advanced GRAT Planning, Austin Chapter of the Texas Society of CPA's (2009)
- Estate and Gift Tax Developments, REPTL Reporter, Vol. 47, No. 3 (2009)
- American Jobs Creation Act of 2004: Selected Highlights and New Guidance, Annual Tax Conference of the Austin Chapter of the Texas Society of CPA's (2005)
- Tax Relief for Employment Plaintiffs, TRIAL magazine, Vol. 41, No. 08 (2005)

TABLE OF CONTENTS

I. OVERVIEW 1
  A. What is a Spousal Lifetime Access Trust 1
  B. Why use a SLAT 1

II. PROBLEMS WITH SLATS 1
  A. Jointly representing spouses 1
  B. Death and Divorce 2
  C. Spousal duties of support 2
  D. Reciprocal trust doctrine 2
  E. Approaches to avoid the reciprocal trust doctrine 3
    1. Only one spouse makes a gift. 3
    2. Gifts at different times. 3
    3. Different powers of appointment. 3
    4. Different forms of gifts and trust funding 3
    5. Trusts in different jurisdictions. 3
    6. Do not include the spouses as initial beneficiaries of the trusts. 4
    7. Other differences. 4

III. GRANTOR TRUST TAXATION OF SLATS 4

EXHIBIT A 7

EXHIBIT B 9

DRAFTING SPOUSAL LIFETIME ACCESS TRUSTS

I. OVERVIEW

Spousal lifetime access trusts (SLATs) are a useful tool for wealthy married couples to reduce estate, gift and general skipping-transfer (GST) taxes and to protect assets. SLATs also help build-in flexibility to an irrevocable trust that may or may not be needed to avoid estate tax given the uncertainty of the transfer tax system.

A. What is a Spousal Lifetime Access Trust

A SLAT is a trust for the benefit of the grantor's spouse and typically additional beneficiaries such as the grantor's children and grandchildren. The SLAT is irrevocable and is typically structured to avoid inclusion in the spouse's estate. While the donor spouse gives up access to the gifted property, the donee spouse has access to the property as a discretionary beneficiary and, therefore, the donor spouse indirectly may have some access to the trust property. How the trust is structured will be different for each family. In some cases, the SLAT might be designed with the spouse as primary beneficiary and the children and other beneficiaries as secondary beneficiaries. Other SLATs might be drafted with the spouse to be a beneficiary only after other resources have been exhausted. Or, in other cases the spouse might only be a beneficiary after being added as a beneficiary by a nonadverse party. In all cases the SLAT should only be funded with the donor spouse's separate property.

B. Why use a SLAT

Flexibility is the primary advantage of a SLAT over traditional intervivos irrevocable trusts for children and other descendants. Discretionary distributions to the spouse could be used to lessen the amount of trust property available to the children and other beneficiaries for various reasons. For example, the spouses might not have anticipated that a wealth transfer planning tool such as a grantor retained annuity trust (GRAT) would be successful to the extent that it was and would prefer to tamper down the amount ultimately available for the children and other descendants.

SLATs can also serve as a safety net for the spouse in the event other income or resources are depleted or exposed to liability. For persons who may believe (often irrationally) that they could run out of money, a SLAT can help them get comfortable engaging in wealth transfer planning. While most SLATs will be taxed as a grantor trust (as discussed below), traditional irrevocable grantor trusts for children and other descendants are typically structured so that the grantor trust status can be turned off by, for example, waiving a power of substitution. In some cases, taxpayers turn off the grantor trust status out of fear of running out of money even though continuing the grantor trust status would significantly lower their estate subject to estate tax upon the death of the grantor.

SLATs are also a useful tool for young clients with young children, but who despite their youth will still likely benefit from wealth transfer planning because of interests in technology startups or other ventures with significant growth potential. While it is relatively easy to project potential estate tax savings for these wealthy young couples, locking up the client's assets in irrevocable trusts from a young age might be imprudent for non-tax reasons. The flexibility to make distributions to the spouse can mitigate the non-tax restrictions and costs of having the property held in trust.

II. PROBLEMS WITH SLATS

A. Jointly representing spouses

Jointly representing two persons, even a husband and wife, requires pre-engagement disclosure and written consent. The Texas Disciplinary Rules of Professional Conduct, Rule 1.06(b) states that "a lawyer shall not represent a person if the representation of that person: (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests."

TDRPC Rule 1.06(c) states "A lawyer may represent a client in the circumstances described in (b) if: (1) the lawyer reasonably believes the representation of each client will not be materially affected; and (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any."

If it is known from the outset that one of the spouses intends to make a gift to a SLAT for the other, then it may be possible to avoid jointly representing the spouses to avoid the conflict. In most cases, though, the spouses may want joint representation and the engagement usually starts with wills, revocable trusts, and more fundamental planning before discussion of wealth transfer planning begins.

If the lawyer starts out jointly representing the spouses, can the lawyer later withdraw from the representation of one spouse in order to prepare the SLAT and avoid the conflict? Probably not. If the lawyer proceeds with the joint representation while preparing one or more SLATs, it may be difficult to

prepare a waiver that fully discloses all possible adverse consequences of the common representation as required by Rule 1.06(c).

If jointly representing the spouses, a prudent approach would be to require that the spouses each separately engage separate counsel to review the transaction and the documents and to advise them separately of the possible adverse consequences. Of course, one of the most obvious adverse consequence of making an irrevocable gift to an irrevocable trust for the grantor's spouse is divorce. For that reason, it might be best if the spouses' separate attorneys are family law attorneys.

B. Death and Divorce

If the grantor's hope or expectation is that he may indirectly benefit from the SLAT through his spouse's status as a beneficiary, such a plan would come to a halt upon the death of the spouse or upon their divorce. In some situations, the other resources available to the grantor may be so substantial that losing the indirect access to the trust is viewed as inconsequential. For others, it may be important to continue as beneficiaries, directly or indirectly, during the joint lifetimes of the grantor and the grantor's spouse.

The spouse beneficiary could be given a testamentary special power of appointment that the spouse beneficiary could be permitted to exercise in favor of the grantor or a trust for the grantor. If the spouse exercises the power of appointment in favor of a trust for the grantor, the trust could be structured to avoid inclusion in the grantor's estate. See the discussion below of the *Levy* case. If the spouse is given the power, a concern is how long should the spouse wait to exercise the power to avoid the appearance of a prearrangement?

If the spouses divorce, some consideration should be given to whether the spouse should be automatically removed as a beneficiary of the trust. Some grantors may even wish for the spouse as defined in the agreement to be the person who is then married to the grantor. There is authority that such a provision will not cause the trust assets to be included in the grantor's estate. *Estate of Tully v. Comm'r*, 528 F.2d 1401 (Ct. Cl. 1976) (holding that power to alter death benefit plan by terminating employment or divorcing wife was not an IRC § 2038(a) power); Rev. Rul. 80-255 (ruling that including the settlor's after-born and after-adopted children as additional beneficiaries is not the retention of a power to change beneficial interests under IRC §§ 2036(a)(2) or 2038).

C. Spousal duties of support

Spouses have a duty to support one another. If the grantor's spouse is a beneficiary of a trust, could the trust be included in the grantor's estate because of the spouse beneficiary's duty to support the grantor spouse? To avoid such a result, a provision limiting the trustee's authority to make distributions that would discharge the legal obligations of the trustee or beneficiary should be included. Such a provision is sometimes called an "Upjohn clause." *Upjohn v. U.S.*, 30 AFTR 2d 72- 5918 (D.C. MI 1972).

D. Reciprocal trust doctrine

A significant concern when structuring SLATs for both spouses is the reciprocal trust doctrine and the risk that the Internal Revenue Service may view the SLATs as an arrangement between the spouses to essentially create self-settled trusts for themselves without any real change in their economic position despite the gift to the other spouse's trust. The US Supreme Court recognized the reciprocal trust doctrine in *Grace v. United States*, in which the Court held that "application of the reciprocal trust doctrine requires only that the trusts be interrelated, and that the arrangement, to the extent of mutual value, leaves the settlors in approximately the same economic position as they would have been in had they created trusts naming themselves as life beneficiaries." 395 U.S. 316 (1969).

In *Grace*, the husband created a trust for the benefit of his wife during her lifetime and wife was given a testamentary power of appointment over the remaining property to be distributed among husband and their children. Fifteen days later, wife created a virtually identical trust for the benefit of husband. The Court ruled that the trusts were substantially identical in terms and were created at approximately the same time leaving the husband and wife in the same objective economic positions. The court said it was not relevant that the transferred properties were different in character because they were of equal economic value. *Id*. at 324.

In *Grace*, the court was troubled with what appeared to be a prearranged plan under which the spouses would remain in the same economic position despite the gifts to each other's trusts. The court was not concerned with an analysis of the parties' subjective intents and focused solely on the economic effect of the transactions.

But, where trusts were created by a husband and wife on the same day and with identical properties, the court has refused to apply the reciprocal trust doctrine if the trusts have substantial differences. In *Levy v. Comm'r*, the court held that two trusts created by husband and wife were not reciprocal trusts when the trusts were created and funded on the same day with identical property and had identical trust instruments except that wife's trust gave her an intervivos limited power to appoint all of principal of the trust in favor of any person or persons other than herself, her creditors,

her estate, or the creditors of her estate. T.C. Memo. 1983-453. The court reasoned that the wife's power of appointment had objective value which cannot be ignored and therefore the trusts were not interrelated and non-reciprocal.

In another case, the court refused to apply the reciprocal trust doctrine to similar trusts established by the spouses fifteen months apart. In *Estate of Lueders v. Commissioner*, the court held that the reciprocal trust doctrine did not apply to similar trusts established by the spouses under instruments fifteen months apart. The court noted there was no evidence of any agreement, express or implied, or even an "understanding" to make reciprocal transfers of property at the time the husband's trust was created. 164 F2d 128 (3d Cir. 1947).

E. Approaches to avoid the reciprocal trust doctrine

To avoid the reciprocal trust doctrine, there cannot be an agreement between the spouses to make the gifts to each other's trust, or even the appearance of an arrangement. The trust agreements must contain substantial differences. Some strategies to avoid the reciprocal trust doctrine include:

1. <u>Only one spouse makes a gift.</u>

Obviously, if only one spouse makes a gift to the other in the form of a SLAT or otherwise, there is zero risk of the reciprocal trust doctrine. For some spouses, this strategy may be born of necessity because only one spouse has significant wealth. For couples that have a net worth in excess of approximately $10 million, they may be concerned about the looming reduction in the basic exclusion amount in 2025 (or possibly sooner). Some couples may which to choose for one of them to make a large taxable gift to a SLAT to use the $11.4+ million basic exclusion amount before it is reduced in half in 2025. And, while that couple may have enough wealth to make an $11.4 million gift, they may not have enough wealth for both of them to make a large gift. While the spouse is of course a discretionary beneficiary of the SLAT, it is probably good practice for the spouse to not count on the trust for distributions and instead seek distributions from the SLAT only for extraordinary needs.

2. <u>Gifts at different times.</u>

Gifts made to SLATs at different times could be made far enough apart to avoid the reciprocal trust doctrine. In *Leuders*, fifteen months was held to be far enough apart. In *Grace*, fifteen days was not enough. The prudent approach would be to space the gifts more than one year apart.

3. <u>Different powers of appointment.</u>

In *Levy*, one spouse's intervivos limited power to appoint all of principal of the trust in favor of any person or persons other than herself, her creditors, her estate, or the creditors of her estate was considered a substantial difference that avoided the reciprocal trust doctrine, even for otherwise identical trusts funded on the same day with the same property. This author likes to use trusts with intervivos powers of appointment and testamentary powers of appointment. One spouse's trust could give the spouse beneficiary the broadest possible testamentary limited power of appointment exercisable in favor of anyone other than the spouse, the spouse's creditors, the spouse's estate, and the creditors of the spouse's estate. On the other hand, the other spouse could be given a testamentary limited power of appointment exercisable in favor of the grantor, the grantor's descendants, their spouses, and charities.

In all cases, if the intent is for the trust assets to be available to the grantors during their joint lifetimes, the spouse beneficiary should be given a testamentary limited power of appointment exercisable at least in favor of the grantor.

After the trusts are created, it is unclear how long the spouses should wait to exercise their powers of appointment to avoid the appearance of a prearranged plan.

4. <u>Different forms of gifts and trust funding.</u>

In *Grace*, the Court made clear that the reciprocal trust doctrine may apply to trusts funded with different property. But, if trusts are funded with different property and in different fashions, then these differences may be helpful to avoid the reciprocal trust doctrine. For example, one trust could be funded with an outright gift of cash followed by a installment sale in exchange for a down payment and an long-term promissory note. The other trust could be funded with a GRAT or an outright gift of property to use the spouse's basic exclusion amount.

5. <u>Trusts in different jurisdictions.</u>

One spouse could create a SLAT under Texas law and subject to Texas law including the rule against perpetuities. The other spouse could create a trust under the law of another jurisdiction, such as Delaware or South Dakota, that is perpetual. The perpetual trust could also be structured as a directed trust while the Texas trust is a traditional trust under which the trustee's duties are not subject to the direction of a distribution advisor or investment advisor. For wealthy clients with relationships with professional advisors, setting up a trust in Delaware or South Dakota or another state is often relatively easy and inexpensive and comes with the added benefit of being a perpetual trust.

6. Do not include the spouses as initial beneficiaries of the trusts.

Instead of including the spouse as one of the initial beneficiaries of the trust, the children and grandchildren could be listed as beneficiaries and a nonadverse party could be given the power to add the spouse (and possibly other persons and charities) as a beneficiary. This strategy has some appeal especially when the expectation is that the spouse will never seek distributions from the trust, except in the unlikely event the spouse's resources and income are unexpectedly depleted. See example provision at Exhibit A.

But, choosing a nonadverse party who is willing and able to appropriately make the decision to add (or remove) beneficiaries may be challenging. It might be best to have a committee of persons, at least a majority of which are nonadverse parties, to hold this power. The trust instrument or a letter of instruction should provide guidance on when and under what circumstances the grantor might like the powerholder to add the spouse as a beneficiary. In addition, the trust instrument should include broad exculpatory provisions relieving the powerholder of liability for exercising or failing to exercise the power.

7. Other differences.

Give one spouse, but not the other, a noncumulative 5 and 5 power to withdraw the greater of $5,000 or 5% of the value of the trust. Use different trustees. If using an independent trustee, make distributions by the independent trustee fully discretionary while distributions by the trustee of the trust for the other spouse are limited to health, education, maintenance, or support or another ascertainable standard.

III. GRANTOR TRUST TAXATION OF SLATS

A trust for the benefit of the grantor's spouse is a grantor trust under IRC § 677(a). Under § 677(a), the grantor shall be treated as the owner of any portion of a trust…whose income without the approval or consent of any adverse party is, or, in the discretion of the grantor or a nonadverse party, or both, may be distributed or accumulated for future distribution to the grantor or the grantor's spouse. If § 677(a) is the only provision by which the trust is taxed as a grantor trust, then the grantor trust status will end upon the death of the spouse.

If the spouse is not included as an initial beneficiary but a nonadverse party has the power to add the spouse (or other persons or charities) as a beneficiary, then the trust is taxed as a grantor trust under IRC § 674(a). If grantor trust status was achieved using an IRC § 674(a) power to add or remove beneficiaries and if the person holding the power relinquishes the power, then the grantor trust status will stop (assuming no other grantor trust provisions apply). As a result, if nongrantor trust status is desired for a SLAT, the spouse cannot be named as a beneficiary.

If grantor trust status is desired, it is advisable to include additional provisions to cause grantor trust status in addition to IRC § 677(a) to avoid the termination of the grantor trust status upon the death of the spouse, such as a nonadverse person's power to add or remove beneficiaries under § 674(a). Powers of substitution cause grantor trust status under § 675(4)(C) and can be useful for non-tax purposes.

Because a SLAT for the benefit of a spouse is taxed as a grantor trust under IRC § 677(a), it may be advisable to give an independent trustee or other nonadverse party the power to reimburse the grantor for the grantor's income taxes from the grantor trust. Consider Rev. Rul. 2004-64 (ruling trust assets includible in grantor's estate for estate tax purposes if the trustee may reimburse the grantor for income taxes on trust income imputed to the grantor under the grantor trust rules if there is an understanding that the trustee will reimburse the grantor). So long as there is no arrangement or pattern of always reimbursing the grantor, including a discretionary reimbursement provision should not cause the trust assets to be included in the grantor's estate. Such a provision could be useful in the event of the recognition of a large gain upon the sale of a business or other asset held by the trust. But, such a provision should not be counted on as a mechanism to reimburse the grantor on an ongoing basis for the income of the trust, such as from an operating business owned by the trust that is taxed as an S corporation or partnership. See example reimbursement provision at Exhibit B.

If the spouses divorce, not only will the grantor spouse lose indirect access to the trust, another issue is the continuing grantor trust status of the trust. Some commentators believe that if the trust is a grantor trust by virtue of the grantor spouse's status as a beneficiary of the income and principal of the trust under IRC § 677(a), that the trust will continue to be a grantor trust even after divorce. Some commentators believe this results from application of the spousal unity rule, which looks at an individual's status as the grantor's spouse at the time of creation of the spousal trust rights, not at the time of a subsequent divorce. This position is generally based on the failure of IRC § 672(e) to address directly the question of whether the spousal unity rule ends when the marriage ends. *See e.g.*, The American College of Trust and Estates Counsel (ACTEC), "Comments on Guidance in Connection with the Repeal of Section 622," Submitted to the Internal Revenue Service, July 2, 2018.

Other commentators disagree and believe the grantor trust status under IRC § 677(a) ends upon the divorce of the grantor and the grantor's spouse. Les Raatz has written:

Attribution of spousal powers and rights under Section 677 doesn't apply after divorce because:

1. Section 677 was part of the original IRC of 1954. It provided that a settlor of a trust will include its tax-able income as his income if he has certain rights or powers or if income of the trust may be used to pay premiums on insurance policies on his life. That is, the trust is a grantor trust of which he's the grantor.
2. In 1969, TRA 69 amended Section 677 to cause the settlor to be the grantor of the trust if his spouse has the above rights or powers or if the policies of insurance are on her life.
3. In 1971, Treas. Regs. Section 1.671-1 was amended in light of TRA 69 and provided that, on divorce, the settlor's ex-spouse is no longer his spouse in order to attribute to him the ex-spouse's rights, powers or status as an insured life under policies.
4. In 1988, TCA 88 amended Section 672(e), but the restatement didn't change its meaning as it pertains to divorce. Therefore, Treas. Regs. Section 1.671-1 remains fully effective.

Les Raatz, *Divorce, SLATs and the Grantor Trust Section 677 Ghost*, Trusts & Estates (August 2015).

EXHIBIT A

Power to Add or Remove Beneficiaries and to Modify Distribution Rights

The Trust Protector may add or remove beneficiaries or amend the dispositive provisions for any beneficiary of any trust created under this instrument. In exercising this power during my lifetime, the Trust Protector may add (or remove) MY HUSBAND, my descendants, or any charitable organization as a beneficiary of the trust. In exercising this power after my death, the Trust Protector may add MY HUSBAND or remove any charitable organization as a beneficiary of the trust. If MY HUSBAND is added as a beneficiary, his distribution rights and the provisions of the trust for his benefit shall be as set forth in **Error! Reference source not found.**, unless modified by the Trust Protector as set forth below.

Notwithstanding any provisions of this instrument that may seem to the contrary, the Trust Protector may not add as a beneficiary me, my estate, my creditors, creditors of my estate, the Trust Protector, creditors of the Trust Protector, the Trust Protector's estate, or the creditors of the Trust Protector's estate.

In addition, the Trust Protector may direct the Trustee to:

> modify the distribution rights of any beneficiary created by this instrument; or
>
> make, withhold, or amend the terms of any distribution for any beneficiary of a trust created under this instrument.

The Trust Protector may veto any power held by the Trustee to appoint any beneficiary's interest in further trust as provided under the law of the governing situs or jurisdiction of trust administration.

In exercising this power to add and remove beneficiaries, modify the distribution rights of any beneficiary created by this instrument and make, withhold, or amend the terms of any distribution for any beneficiary of a trust created under this instrument, I request but do not require that the Trust Protector bear in mind my goals to care for my children as my top priority. After giving consideration to the needs of my children, I request but do not require that the Trust Protector bear in mind my goals to care for MY HUSBAND as my secondary priority and my other descendants and favorite charitable organizations as my tertiary priority.

In exercising the powers in this section, I request but do not require that the Trust Protector bear in mind that I do not want the trust to become a disincentive for my children and other descendants to lead a fulfilling life. I want my children and other descendants to provide for themselves, but I acknowledge that all worthy endeavors and professions may not be remunerative.

Notwithstanding any provisions of this instrument that may seem to the contrary, the Trust Protector that is authorized to act with respect to this Subsection holds the powers and authorities of this Subsection in a non-fiduciary capacity and owes no fiduciary duty whatsoever to any beneficiaries or potential beneficiaries of any trust created hereunder and may exercise the power to add MY HUSBAND as a beneficiary, add or remove other beneficiaries, decline to exercise such power, or release such power without regard to the interests of any beneficiary. No one may impose a claim for breach of fiduciary duty upon any other party to this trust as a result of the exercise or non-exercise of the powers granted under this Section.

EXHIBIT B

Authorization to Reimburse Me for Income Tax Liability

I have no right to be reimbursed for any income tax paid by me on all or any part of the trust's income. The Trust Protector may direct the Trustee from time to time, however, to distribute to me or my Legal Representative, or elect to pay directly to the taxing authorities, so much of the income or principal of the trust as may be sufficient to satisfy all or part of my personal income tax liability attributable to the inclusion of all or part of the trust's income in my taxable income. In exercising its absolute discretion with respect to such distributions, the Trust Protector may consult with my tax or other advisors but is not bound to follow any recommendation made by them.