ADVANCED PLANNING

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Insights & Ideas

New Florida Law Gives SLAT Grantors Rights to Trust Property

On May 10th, 2022, Florida Governor Ron DeSantis signed a new law limiting claims by creditors against grantors of certain Spousal Limited Access Trusts ("SLATs"). The legislation allows Florida residents to establish trusts after June 30, 2022 that allow the grantor spouse to be a beneficiary of the trust following the death of the initial beneficiary spouse, with the trust assets remaining outside the grantor's estate.

Background

With a SLAT, one spouse, who is the trust grantor, creates an irrevocable trust and transfers property to it. The other spouse is a trust beneficiary, along with the children and perhaps the grandchildren. In its traditional structure, the trust terms are irrevocable, and the grantor spouse does not have any beneficial interest in the trust, keeping trust assets outside the estate of both spouses for federal estate tax purposes. The obvious benefit of this type of trust planning is that while the beneficiary spouse is alive the trustee may make distributions to him/her and return the assets back to the marital unit. The drawback is if the beneficiary spouse dies before the grantor spouse, the assets are unavailable except to other trust beneficiaries. (Divorce has a similar effect in some cases.)

One solution to this drawback has been for both spouses to create a trust benefiting the other, taking care that they not be reciprocal, i.e. mirror images of each other. But this solution requires careful planning and also, obviously, that each spouse has substantial assets of their own to give for the benefit of the other.

Florida's New Law

The law provides a grantor spouse who is a Florida resident access to trust property if:

1. The grantor spouse can't be a beneficiary until after the death of the initial beneficiary spouse; and
2. The initial beneficiary spouse must remain a beneficiary for their entire lifetime; and
3. Transfers to the trust by the grantor spouse must be considered completed gifts under Internal Revenue Code Section 2511.

At the time these three requirements are met, the grantor spouse is deemed to have made no contribution to the trust, defeating a separate provision of Florida's trust law allowing "a creditor or assignee of the settlor [to] reach the maximum amount that can be distributed to or for the settlor's benefit."[1] This last provision, some form of which is found in the laws of every state, are what make self-settled asset protection trusts in general tricky to execute, because the best workaround (in states that allow it) is to permit a trust beneficiary to appoint trust assets for the grantor's benefit - something they can't be compelled to do and might never do. Florida, with its new law, has solved some of the uncertainty by making the grantor an automatic beneficiary if the correct circumstances arise, rather than relying on the future action of a power holder. It may also eliminate the need in some cases for the two-SLAT approach discussed above.

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Estate Inclusion

Florida has no estate tax, while at the federal level, Internal Revenue Code Section 2036(a) causes property transferred during life to be included in the transferor's estate to the extent he or she retains "the possession or enjoyment of, or the right to the income from, the property."[2] Although this language might seem to counter the effect of the new Florida law, the Florida lawmakers' intent is to make S. 2036 inapplicable by requiring a completed gift. A completed gift is described this way in the Treasury Regulations: "As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another, the gift is complete."[3] It remains to be seen what circumstances, if any, may arise that cause the IRS to challenge the new law even when the gift is technically complete. (Example: a young, healthy grantor marries an older or infirm spouse with a short life expectancy, then settles a Florida SLAT for that spouse's benefit.)

Certain exceptions to the creditor limitations apply, such as amounts owed for alimony or child support. There also remain common situations where planning could go awry. These include "floating spouse" provisions where the beneficiary spouse loses their beneficiary status on divorce, because the new law requires the beneficiary spouse to remain an unconditional beneficiary for their entire life. A similar situation could arise if a trust protector has some discretion to remove the initial beneficiary spouse as a trust beneficiary. And if the trustee is empowered to reimburse the grantor for taxes paid on trust income, the grantor may be considered a trust beneficiary, whether or not any reimbursements are actually made.

Prudential's Advanced Planning team is available to discuss the new law's application with you as you prepare to talk to clients about this new development. We look forward to being of assistance, and can be reached at 800-800-2738, Option 4.

[1]*Florida Statutes § 736.0505(1)(b)*
[2]*IRC § 2036(a)(1)*
[3] *Treas. Reg. § 25.2511-2(b)*