



TRUSTS & ESTATES

The  WealthManagement.com journal for estate-planning professionals

By **Jennifer B. Goode**

Resizing a Past Transfer to Trust

It must be done carefully to sidestep any tax and fiduciary landmines

Life often presents us with pivotal moments that clearly mark a “before” and “after.” Trust planning is no different. Once you fund an irrevocable trust, reversing the transaction comes with significant consequences, both in terms of taxes and fiduciary responsibilities. For example, an irrevocable trust’s estate tax benefits depend on the grantor’s willingness to let go of transferred assets, with any attempts at retaining access jeopardizing the strategy’s effectiveness. Additionally, a trust represents a fiduciary relationship between the trustee and the trust’s beneficiaries.¹ As such, a trustee who benefits the grantor to the beneficiaries’ detriment could face potential legal liability. Further, failing to adhere to fiduciary duties may undermine the tax strategy, creating a double whammy. But this doesn’t mean that an executed transfer tax strategy is set in stone. Rather, clients who need access to previously transferred assets may be able to adjust—or “resize”—their past transfers. However, this must be done carefully to sidestep any tax and fiduciary landmines.

Why Resize?

Before unpacking how to modify an established planning strategy, let’s explore some scenarios that may lead to resizing. For instance, a client may experience a decline in the value of assets kept outside of the trust. Alternatively, their spending needs could change, or they may suffer a liquidity pinch due to income taxes paid on behalf of a previously created trust.

To illustrate further, let’s revisit the couple I introduced in a past article in this journal,² Amir and Dalia. They were considering funding two, non-reciprocal spousal lifetime access trusts (SLATs). Now imagine their assets have grown to \$42 million. Let’s look at the outcome of each of them funding a SLAT with their current \$13.99 million applicable exclusion amount from federal gift and estate tax, as detailed in “Case Study: Meet Amir and Dalia”.

As an initial matter, this plan may leave Amir and Dalia without sufficient liquidity to support their lifestyles. Let’s assume the couple currently generates enough income to support \$300,000 in annual spending but will need to draw down on their portfolio after retiring in five years. A cash flow analysis suggests that they should have kept between \$8.8 and \$10.6 million outside of the trusts to support themselves for the balance of their lifetimes, depending on their asset allocation (their core capital). However, they only retained \$6.52 million in liquid assets, including tax-deferred retirement assets they may wish to keep invested for as long as possible.

Additionally, the couple hasn’t yet set aside a reserve to pay each SLAT’s annual income tax liability without relying on trust distributions. Each SLAT will qualify as a grantor trust, that is, a trust disregarded for income tax purposes if the grantor’s spouse can receive distributions of income and principal from the trust without the consent or approval of a trust beneficiary whose interest may be negatively impacted by such distribution (an adverse party).³ Any taxable income and capital gains generated within the SLATs will flow through to Amir and Dalia’s personal income tax return.⁴ And this additional tax burden can be sizable! Ignoring the SLATs’ illiquid assets and assuming all liquid



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assets are invested in a mix of 60% stocks and 40% bonds, the pair would need to put aside an extra \$6.7 million today, on top of their core capital, to cover the trusts' taxes over time.

After accounting for their personal spending and tax payments, it appears that Amir and Dalia will deplete their liquid non-trust assets in roughly 24 years or less unless the market experiences better-than-average returns. See "Liquidity Concerns With Funding Both Spousal Lifetime Access Trusts". How can the couple's estate-planning counsel help them address these liquidity concerns?

Exchanging Assets

To start, one spouse could consider exchanging an illiquid asset from their personal balance sheet for liquid assets held by the SLAT such spouse created. This could be done through asset substitution or by selling the illiquid asset to the SLAT, provided the trust instrument permits such actions. Notably, neither method will trigger negative income tax

consequences, assuming the SLAT qualifies as a grantor trust. In this case, the transferring spouse is considered the deemed owner of the receiving trust's assets, effectively treating the transaction as a transfer to and from himself.⁵

Where these strategies differ is in their fiduciary considerations. A grantor's power to reacquire trust property by substituting an asset of equal fair market value will trigger grantor trust status only if the grantor can exercise this power in their personal, rather than fiduciary, capacity.⁶ Because trust instruments often include a grantor's substitution power to ensure grantor trust status, the grantor typically isn't bound by fiduciary considerations when exercising this power. This means the grantor needn't consider how a contemplated exchange might impact the trust's beneficiaries. However, the trustee must still observe certain fiduciary duties to prevent a substitution power from causing estate inclusion.

Namely, the trustee must ensure the equivalent value of the properties exchanged, and the

Case Study: Meet Amir and Dalia

Liquid assets remaining in estate vs. assets contributed to trusts

Amir and Dalia are both 60 years of age and residents of Florida

- Their assets total \$42 million, of which \$23 million is liquid
- Their after-tax income should cover their expenses through 2029. Beginning in 2030, they will need to support annual inflation-adjusted living expenses of \$300,000, in today's dollars, from their portfolio
- They're considering creating non-reciprocal spousal lifetime access trusts (SLATs) with \$13.99 million each, to be funded as follows:

	Amir	Dalia	Joint	Total
Marketable securities/cash (contributed to trusts)	\$7.99 million	\$8.49 million		\$16.48 million
Marketable securities/cash (remaining in estate)	\$0.71 million	\$0.81 million	\$2 million	\$3.52 million
Real estate	\$6 million (rental)		\$4 million (home)	\$9.5 million
Retirement assets	\$1.8 million	\$1.2 million		\$3 million
Business interests	\$4 million (active)	\$5.5 million (passive)		\$9.5 million
Total	\$20.5 million	\$16 million	\$5.5 million	\$42 million

■ Liquid assets remaining in estate

■ Assets contributed to trusts

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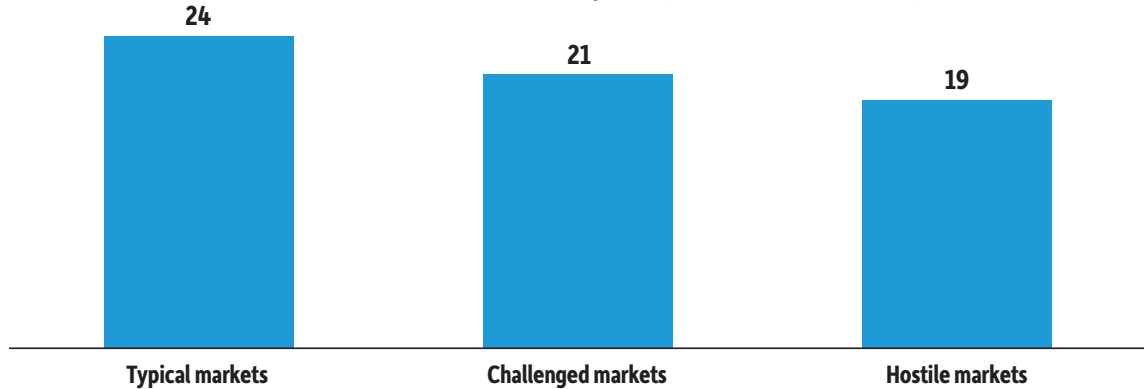


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Liquidity Concerns With Funding Both Spousal Lifetime Access Trusts

May stress their ability to maintain spending over time

Years Before Personal Portfolio is Depleted (60% stocks/40% bonds)



Note: "Typical markets" represents the 50th percentile outcomes. "Challenged markets" represents the 75th percentile outcomes. "Hostile markets" represents the 90th percentile outcomes. Assumes personal and spousal lifetime access trust portfolios are invested in 60% global stocks and 40% bonds. Assumes annual spending of \$300,000 in today's dollars, adjusted for inflation, beginning in 2030. Based on Bernstein's estimates of the range of returns for the applicable capital markets over the next 30 years. Data doesn't represent past performance and isn't a promise of actual or future results.

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substitution can't shift beneficial interests under the trust instrument.⁷ The Internal Revenue Service clarified this second requirement under Revenue Ruling 2008-22, noting that an exchange won't impact beneficial interests under a trust if: (1) the trustee has the power to reinvest the trust's property subject to a fiduciary duty of impartiality; or (2) the trust's investments or level of income wouldn't directly impact the beneficiaries' interests, such as when a trustee has full discretion over income and principal distributions.⁸

Notably, this is a lesser fiduciary standard than that applied to an asset sale entered into by the trustee. A trustee agreeing to an asset sale must abide by all applicable fiduciary duties, including those of loyalty, care and impartiality.⁹ See "Fiduciary Duty Considerations". Thus, if the sale doesn't benefit the trust's beneficiaries, the trustee risks breaching the trust by proceeding. This can both expose the trustee to fiduciary liability and demonstrate the grantor's retained interest in the trust's assets pursuant to an implied understanding between the grantor and the trustee. Indeed, if the trustee pursues an action benefiting the grantor

to the trustee's detriment, it would suggest an understanding between the trustee and the grantor regarding the grantor's indirect control over the trust assets. And, as discussed more fully in my prior article, Internal Revenue Code Section 2036(a)(1) can trigger inclusion of trust assets in a grantor's taxable estate based on this type of implied, unenforceable understanding that the grantor will retain the use and enjoyment of property transferred to the trust by gift.

With respect to Amir and Dalia, let's assume that Amir has the power to substitute his \$4 million business interest for \$4 million of marketable securities from the SLAT created for Dalia's benefit. As the assets have the same value, this swap satisfies the basic requirements of the trust instrument. But this isn't the end of the analysis. What if the SLAT requires mandatory income payments to Dalia? In that case, an exchange of assets could potentially impact Dalia's beneficial interest under the trust unless the trustee has the authority to sell the business interest and reinvest the sale proceeds—an undesirable outcome for Amir if he's an active participant in the business.¹⁰ To protect against



Fiduciary Duty Considerations

A trustee agreeing to an asset sale must comply with these



Duty of Loyalty

The trustee must act solely in the interest of the trust's beneficiaries without interference from the trustee's own interests or those of third parties, unless the trust terms provide otherwise.

Unless waived by the trust agreement, the "no-further-inquiry rule" renders transactions voidable if they involve: (1) a trustee's self-dealing, or (2) an existing or potential conflict of interest between the trustee's fiduciary duties and personal interests, regardless of whether the transaction benefits the beneficiaries.

When the no-further-inquiry rule doesn't apply, the trustee must act fairly, in good faith and in the interests of the trust's beneficiaries.



Duty of Care

The trustee must invest and manage the trust's assets like a "prudent investor," by considering the trust's purposes, terms, distribution requirements and other circumstances.

The trustee must evaluate each investment in the context of the overall portfolio, rather than on an individual basis.

The trustee may incorporate "compensated risk" when beneficial to total return and should look to lessen the impact of uncompensated risk through diversification.



Duty of Impartiality

The trustee must act with due regard for the interests of all trust beneficiaries.

To address conflicting objectives, the trustee must interpret the trust's terms to identify where prioritization is permitted or required.

This duty requires fair consideration of all beneficiary interests and the trustee's reasonable exercise of fiduciary discretion, but it doesn't require the beneficiaries' equal treatment.

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potential estate inclusion due to the asset exchange, the trustee would need to document a thorough analysis of any decision to retain the business interest in light of the trust instrument's investment provisions and after considering the needs of Dalia and the trust's remaindermen.

Distributing Funds

As an alternative to an asset exchange, Dalia could seek one or more distributions from the SLAT created for her benefit. Yet before pursuing this strategy, the couple should consider whether the distribution will create an adverse fact pattern during an audit. Previous court rulings suggest that relying on trust assets to cover expenses for the grantor or the grantor's family, which were reasonably foreseeable when the trust was established, can serve as evidence of the grantor's retained interest under IRC Section 2036(a)(1).¹¹ This holds true even when the distributions are made to or at the request of the grantor's spouse as a trust beneficiary.¹² Thus, in assessing the potential tax consequences of

distributing SLAT funds to Dalia, the trustee should assess whether these funds will be used to cover expenses that were reasonably foreseeable when the trust was created. Notably, the couple's cash-flow analysis shows the potential need to support their basic spending through trust distributions over time.

If continued trust distributions to Dalia seem too risky, the couple may consider a larger, one-time distribution to her to eliminate future reliance on trust assets. This approach is viable if the trust instrument allows for a substantial distribution and the trustee can prioritize Dalia's interests over those of the trust's remaindermen.¹³ To mitigate the risk of estate inclusion under Section 2036(a)(1), this distribution could be paired with measures that evidence the release of any retained interest in the trust funds. For example, an updated cash-flow analysis could demonstrate that the couple no longer needs trust distributions, and appointing a third-party, independent trustee could further distance the couple from the trust assets.¹⁴ Of course, a trust distribution to Dalia could trigger additional estate



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tax liability if both spouses were to die shortly thereafter. To hedge against such risk, the couple may consider holding a short-term life insurance policy in an irrevocable trust or relying on charitable planning strategies.

Loaning Liquidity

Counsel may also suggest structuring the couple's use of trust assets as loans, rather than distributions. To ensure the funds are recognized as a loan, the parties must establish a bona fide creditor-debtor relationship.¹⁵ That is, the lender must have a real expectation of repayment and a clear intention to enforce the loan's terms.¹⁶ Courts determine the legitimacy of this arrangement on a case-by-case basis, considering factors such as documentation of the loan, payment of adequate interest, security pledged as collateral and the borrower's repayment ability.¹⁷

A trustee extending a loan to the trust's grantor must determine whether the loan furthers the beneficiaries' interests, in accordance with the trustee's fiduciary duties.

Additionally, a trustee extending a loan to the trust's grantor must determine whether the loan furthers the beneficiaries' interests, in accordance with the trustee's fiduciary duties. Could the trustee invest this liquidity elsewhere to generate a higher return with the same level of security? If so, proceeding with the loan may violate the trustee's duty of loyalty.¹⁸ While the trust document may allow some modifications to this duty, it can't completely waive it.¹⁹

Returning to Amir and Dalia, let's assume that Amir considers taking a loan from the SLAT established for Dalia's benefit to provide the couple with some temporary liquidity.²⁰ To ensure the

loan is properly recognized for tax purposes, it will need to carry adequate interest. What qualifies as adequate interest? IRC Section 7872(e) defines a "below-market loan," that is, a loan that results in a taxable gift of foregone interest to the borrower, as a term loan accruing interest at less than the applicable federal rate (AFR).²¹ Notably, the AFR is typically lower than prevailing market interest rates.

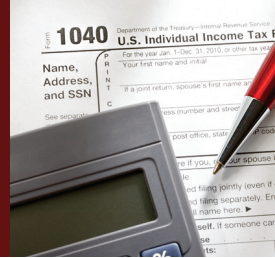
However, IRC Section 7872 provides a safe harbor against triggering a taxable gift, but it doesn't eliminate the need for a bona fide creditor-debtor relationship. From that perspective, using this low AFR may depend on other characteristics of the loan. For example, if Amir can't provide adequate security because his business interest is restricted from being used as collateral, the trustee may require an increase in the loan's interest rate to reflect the additional risk of an unsecured loan.²² After determining the required payment schedule for a bona fide loan, the couple must assess whether they have the liquidity needed to meet it.²³ Given that the couple is already facing potential liquidity issues, this strategy could exacerbate their problems rather than solve them.

Reducing the Tax Burden

Beyond providing access to trust funds through an exchange, distribution or loan, how can Amir and Dalia blunt the impact of a SLAT's grantor trust status? One strategy is for the trustee to reimburse the grantor for taxes paid on the trust's behalf, provided the trust instrument allows for this. This reimbursement can help replenish the couple's liquidity. However, if the trustee exercises this power too frequently, the IRS may begin to question whether the trustee is exercising this authority due to an implied understanding regarding the grantor's retained interest in the trust—triggering all the related estate tax consequences.²⁴

The trustee could also take advantage of non-taxable investments or house income-producing assets in a private placement life insurance (PPLI) policy to limit the level of taxable income flowing through to Amir and Dalia.²⁵ However, each of these strategies comes with its own set of drawbacks. Non-taxable assets typically offer lower returns, meaning a non-taxable asset would generate a benefit for the grantor but harm the beneficiary's bottom line.

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On the other hand, PPLI typically requires a cash investment. If the trust needs to liquidate assets to generate the necessary cash, this could trigger capital gains taxes for Amir and Dalia, thereby offsetting some of the intended tax benefits.

Alternatively, Amir and Dalia might consider converting one or both SLATs to non-grantor trusts. From a mechanical perspective, this conversion depends on the specific trust provisions that trigger each SLAT's income tax treatment. As mentioned above, if Dalia holds a discretionary beneficial interest in the SLAT's income and principal not subject to the consent or approval of an adverse party, the trust will qualify as a grantor trust under IRC Section 677(a). Thus, conversion to a non-grantor trust would require either termination of Dalia's beneficial interest or the introduction of an adverse party to oversee her future distributions. Beyond Dalia's beneficial interest, the SLAT may include a variety of other provisions to trigger grantor trust status. Some of these provisions could be addressed by actions taken by Amir, such as releasing certain powers, while others might require trustee intervention to negate.²⁶ Counsel should carefully review all such provisions to determine whether a conversion to a non-grantor trust is even possible.


Focusing solely on Dalia's beneficial interest, if she disclaimed her interest in the trust, it would likely qualify as a taxable gift to the trust's other beneficiaries.²⁷ Additionally, any attempt by the trustee to remove Dalia as a trust beneficiary or introduce an adverse party with the power to block a distribution to her would seem to squarely conflict with the trustee's duty of loyalty to Dalia.²⁸ Again, this not only exposes the trustee to potential legal liability but also begs the question of why a trustee would pursue such action without explicit direction from the grantor.

One potential solution involves Dalia's removal from only a portion of the SLAT to permit more specialized investing.²⁹ For example, the trustee could pair an outright distribution to Dalia with a decanting of the remaining trust assets to a newly created trust that excludes her as a beneficiary.³⁰ As a result, Dalia gains unfettered use of the distributed assets to pursue her own investment goals, while the trustee is free to construct a trust portfolio based on

the remaindermen's distinct distribution needs and time horizon. This strategy may prove especially meaningful if there's a large age gap between Dalia and the remainder beneficiaries.³¹

But beyond the mechanics of converting to non-grantor trust status, the trustee must also address the rationale behind such a change.³² Grantor trust status generally offers significant benefits to a trust's beneficiaries, and the trustee may face challenges in justifying why altering this status would be in their best interests. Indeed, while the strategy of eliminating Dalia's interest might be clear, it doesn't necessarily prevent the trust from maintaining grantor trust status for the remaining beneficiaries if the trustee chooses to do so.

Here again, however, the trustee may forge a path by pairing complementary benefits. For example, if Dalia and Amir move to a high income tax state in the future, could the conversion protect the trust from an increased state income tax burden? Alternatively, if Amir transfers a portion of his business interest to the SLAT, could turning off grantor trust status prevent Amir from mismanaging the asset due to liquidity constraints, ultimately benefiting the trust beneficiaries who are co-owners of the business? Lastly, if turning off grantor trust status lessens Dalia's need for liquidity due to her shared income tax liability with Amir, might this strategy allow the trustee to retain more assets in trust for the other beneficiaries?

To further flesh out this last argument, let's explore two potential resizing strategies. The trustee could either: (1) distribute \$5 million to Dalia from the SLAT to support her living expenses throughout the couple's lifetimes while maintaining the trust's grantor status; or (2) distribute \$4 million to Dalia for her living expenses and eliminate her beneficial interest, thereby converting the SLAT to a non-grantor trust. As shown in "Allocation of Family Wealth," p. 22, the non-grantor conversion not only allows Dalia to sustain her lifestyle but also results in the couple leaving \$200,000 more to their beneficiaries on an after-tax basis. By turning off grantor trust status, the trustee effectively reduces the amount of trust funds that Dalia requires, thereby increasing the assets available to the remaindermen—a win-win for everyone involved. 

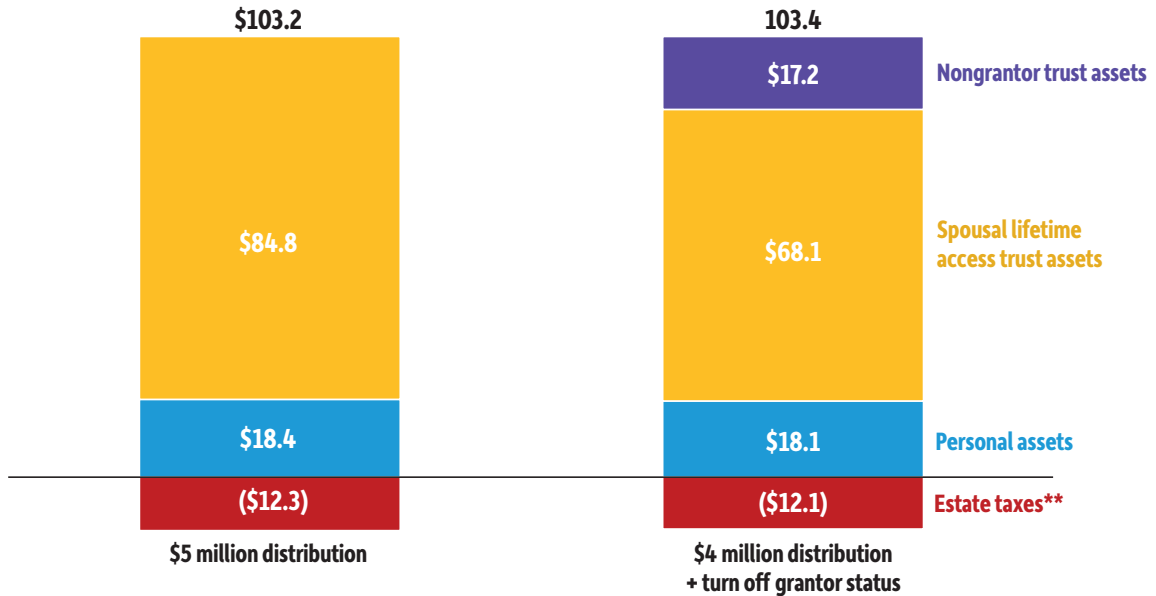


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Allocation of Family Wealth

Two potential resizing strategies

Year 30, Typical Markets* (\$ millions, nominal)



Notes

*"Typical Markets" results, meaning the 50th percentile results of 10,000 trials in our Wealth Forecasting System.

**Assumes a 40% federal estate tax rate and the applicable federal exclusion of \$6.995 million (resulting from sunset in 2025 of the Tax Cuts and Jobs Act) adjusted with chained consumer price index in the median case.

Personal and spousal lifetime access trust (SLAT) liquid assets are modeled with an allocation of 60% global stocks and 40% bonds. Liquid assets include \$3 million of tax-deferred retirement assets. Illiquid assets (real estate and business interest) are assumed to adjust by median headline inflation for 30 years. Assumes income and expenses offset for the first five years of the analysis. Beginning in 2030, annual living expenses total \$300,000 in today's dollars, adjusted for inflation. Assumes top marginal tax rates for the first five years, then federal tax rates are automatically calculated thereafter. Assumes the distribution from the SLAT is made in Year 1.

Based on Bernstein's estimates of the range of returns for the applicable capital markets over the next 30 years. Data doesn't represent past performance and isn't a promise of actual or range of results. Bernstein doesn't provide tax, legal or accounting advice.

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— For illustrative purposes only; not an advertisement and doesn't constitute an endorsement of any particular wealth transfer strategy. Bernstein doesn't provide legal or tax advice. Consult with competent professionals in these areas before making any decisions.

Endnotes

1. *Restatement (Third) of Trusts*, Section 2 (2007).
2. Jennifer B. Goode, "Sizing a Transfer Tax Strategy for Success," *Trusts & Estates* (September 2023), www.bernstein.com/content/dam/bernstein/us/en/email/pdf/Sizing_A_Transfer_Tax_Strategy_for_Success.pdf.
3. Internal Revenue Code Section 677(a); IRC Section 672(a).
4. Note, however, that if the grantor's spouse is limited to distributions of income only, grantor trust status may apply only to items allocated to income under local law (for example, taxable income but not capital gains). IRC Section 677(a).
5. Revenue Ruling 85-13.
6. IRC Section 675(4)(C).
7. Rev. Rul. 2008-22.
8. *Ibid*.
9. *Supra* note 1, Sections 78, 77 and 79.
10. Another potential hurdle for this strategy is that Amir may not want

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- or be able to fully let go of the business interest, with his retained control over the beneficiaries' use and enjoyment of the interest or its income triggering estate inclusion under IRC Section 2036(a).
- E.g., Strangi v. Commissioner*, 417 F.3d 468, 478 (5th Cir. 2005), *aff'd* 85 T.C.M. 1331 (2003) (decedent's failure to keep sufficient liquid assets outside of a family limited partnership (FLP) to meet basic living expenses, in conjunction with substantial partnership distributions to meet such needs, supported finding of an implied understanding of retained use under Section 2036(a)(1)) and *Estate of Moore v. Comm'r*, 119 T.C.M. 1251 (2020) (decedent's use of FLP assets to pay personal expenses and make gifts to family members, despite keeping sufficient assets outside partnership to meet these needs, supported finding of implied agreement of retained use under Section 2036(a)(1)). *Cf., Estate of Wells v. Comm'r*, 42 T.C.M. 1305 (1981) (finding against estate inclusion when decedent received distributions from a trust funded by decedent through gift, but estate was able to demonstrate through a cash-flow analysis that decedent had no need to retain access to trust assets to support known expenses at the trust's funding, and decedent didn't use trust funds to pay for such expenses).
 - E.g., McCabe's Estate v. United States*, 475 F.2d 1142 (Ct. Cl. 1973) (Section 2036(a)(1) implied agreement of retained use found when distributions to decedent's account were made at request of decedent's spouse as trust beneficiary, and distributed funds were used to support couple's personal and joint expenses).
 - Supra* note 1, Section 79. A trustee's duty of impartiality requires that the trustee give due regard to the interests of all beneficiaries when taking an action. As a large trust distribution to Dalia would necessarily benefit Dalia to the remaindermen's detriment, the trustee must first determine that prioritizing Dalia's interests over others complies with the trustee's fiduciary duties and the grantor's intent in creating the spousal lifetime access trust (SLAT). Again, any trust distribution made to satisfy the grantor's needs rather than in compliance with the trust's terms may evidence a retained interest under Section 2036(a)(1) to the grantor's detriment.
 - Amir must survive the release of any retained interest by three years to avoid estate inclusion under IRC Section 2035.
 - Miller v. Comm'r*, 71 T.C.M. 1674 (1996).
 - Ibid.*
 - Ibid.*
 - The duty of loyalty requires that the trustee act in the interests of the beneficiaries without interference by the trustee's own interests or those of a third party, including the grantor, unless otherwise allowed by the trust instrument. A showing that a loan to the grantor would generate a benefit to the beneficiaries not available otherwise could be evidence that such a loan aligns with the beneficiaries' interests apart from any consideration for the grantor.
- Conversely, a showing that the trustee could generate the same or better risk-adjusted return without the grantor's involvement begs the question as to whether the grantor's interests are impermissibly influencing the trustee's decision making. *Supra* note 1, Section 78.
- Ibid.*; Uniform Trust Code Section 105(b)(2) (2010). Even if the trust instrument allows the trustee to consider a third-party's interest, the resulting transaction must be fair to the beneficiaries, taken in good faith and supportive of the beneficiaries' interests. A trustee offering the trust's grantor a loan accruing interest at less than fair market terms must consider whether this transaction is indeed fair to the beneficiaries.
 - If Amir were to take a loan from the SLAT created for his benefit, he may be able to enjoy favorable loan terms as a means of furthering his beneficial interest in the trust. However, the trustee must still comply with the duty of impartiality in negotiating the loan terms and enforce such terms to avoid the loan being recharacterized as a distribution. Additionally, Dalia would need to report interest paid on the loan as taxable income as IRC Section 1041 provides an exception to the recognition of gain or loss for transactions between spouses but not an exception to the recognition of income. *See Gibbs v. Comm'r*, 73 T.C.M. 2669 (1997). For his part, Amir would be unable to deduct interest paid on the loan if it qualifies as personal interest. IRC Section 163(h).
 - IRC Sections 7872(e)(1)(B) and (f)(1).
 - In transactions between unrelated parties, lenders frequently charge higher interest rates for unsecured loans. *See* www.fdic.gov/consumer-resource-center/loans.
 - Notably, the Internal Revenue Service has been successful in arguing for Section 2036(a)(1) inclusion when a borrower's ability to repay a loan depends on the success or use of previously transferred assets. *Estate of Rosen v. Comm'r*, 91 T.C.M. 1220 (2006). As such, Amir and Dalia will want to avoid relying on distributions from the SLAT created for Dalia's benefit to repay this loan. Additionally, to avoid raising the specter of the reciprocal trust doctrine, they may similarly want to avoid relying on distributions from the SLAT created for Amir's benefit as this may support an argument that the two trusts are interrelated. *See* Goode, *supra* note 2.
 - The IRS has consistently carved out exceptions for a pre-existing arrangement under Section 2036(a)(1) from past rulings that otherwise "blessed" a trustee's discretionary ability to distribute trust assets to the trust's grantor without triggering estate inclusion. *E.g.*, Private Letter Ruling 200944002 (Oct. 30, 2009) and Rev. Rul. 2004-64.
 - Robert Dietz and Thomas Pauloski, "To Save Taxes on Alternative Investments, Pay Attention to Packaging," www.bernstein.com/our-insights/insights/2023/articles/to-save-taxes-on-alternative-investments-pay-attention-to-packaging.html.



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26. The most problematic provisions are those beyond the grantor's sole control. Consider a trustee's power to loan assets to the grantor without adequate security, which triggers grantor trust status under Section 675(2). As the authority is granted to the trustee and isn't a right or interest of the grantor, the grantor can't technically disclaim this opportunity. At best, the grantor may consider renouncing any ability to borrow from the trust without adequate security, but it's unclear whether the IRS would recognize such renunciation as sufficient to eliminate grantor trust status.
27. Treasury Regulations Section 25.2511-1(c)(1). This assumes that Dalia doesn't execute a qualified disclaimer under IRC Section 2518.
28. To avoid a fiduciary breach, the trust instrument may grant a trust protector the power to remove Dalia as a beneficiary or to require the consent or approval of an adverse party for distributions to Dalia. However, state laws vary on the ability of a trust protector to serve in a nonfiduciary capacity, and some legal scholars have argued that trust protectors must be subject to the same floor of duties required for trustees. See Richard C. Ausness, "When Is a Trust Protector a Fiduciary?" *27 Quinnipiac Pro. L.J.* 277, 301 (2014).
29. The trustee could also consider decanting the SLAT assets to two separate trusts, one that includes Dalia as a beneficiary with terms more favorable to her, for example, a limited power of appointment or a right to withdraw the greater of 5% of the trust's value or \$5,000, and another trust of which Dalia isn't a beneficiary. In this way, the trustee may assert that such decanting benefits Dalia through greater access to part of the trust assets while benefiting the remainder beneficiaries by eliminating Dalia's interest as to the remainder.
30. The trustee may consider decanting the trust assets under a trust provision or state law that doesn't require Dalia's notice or consent to avoid a potential taxable gift to the trust remaindermen. See IRS Chief Counsel Advice 202352018 (Dec. 29, 2023).
31. The trustee should be careful, however, not to step over the line between decanting in furtherance of the beneficiaries' interests and commutation of the trust or face a potential recognition of gain under IRC Section 1001.
32. Again, assigning the powers needed to turn off grantor trust status to a trust protector may avoid fiduciary liability, provided that the trust protector can exercise them in a fully non-fiduciary capacity.