USRAP Surprise Trigger of Delaware Tax Trap

Exercising a special power of appointment to create another special power of appointment can cause estate tax inclusion and certain benefits in most states.

LES RAATZ

An often-overlooked provision of the Uniform Statutory Rule Against Perpetuities (USRAP) may truly be a tax trap. This article follows up on concepts explored in an article written by the present author that was published in the February 2014 issue of ESTATE PLANNING,[1] But first a little background.

Rule Against Perpetuities (RAP)

The common law RAP (which has been more accurately referred to as the "Rule Against Remoteness") has been articulated as follows:

> No interest is good unless it *must* vest, if at all, not later than 21 years after some life in being at the creation of the interest.[2]

What the rule generally means. One cannot create uncertainty in full ownership rights in a property or interest if it is possible that the uncertainty could continue for more than the permissible period. This sounds simple enough, but applying the rule can be complicated. For instance, consider the following three "quiz questions." In answering them, disregard any anti-lapse rules. In any event, an understanding of all the nuances of the common law RAP is not necessary to comprehend and make use of the concepts presented in this article.

Quiz 1. Ann deeds a house to Brett for his and his successors' use and possession until the earlier of when the Cubs are in the World Series or 30 years, then to the then-living descendants of Brett. The remainder interest goes to Carol. Does this violate the common law rule? Who has what interest?

This scenario violates the RAP. Here is why: Assume the Cubs do not make it to the World Series. Also assume Brett has a child in year 2 and that Brett and all of his children living at time of the deed die in year 3. Consequently, in year 30, vesting did not occur within 21 years after the death of those living on the date of the deed. The reference to the Cubs is not determinative for purposes of vesting, but does affect possessory rights. The result is the failure of Brett's descendants to take, with possession, until the earlier of 30 years or the Cubs reaching the World Series. The vested remainder goes to Carol or her estate.

Quiz 2. Ann deeds a house to Brett for his and his successors' use and possession until the later of when the Cubs are in the World Series or 30 years, then in fee to Ann's older brother, Oliver, if living. The remainder passes to Carol if Oliver is not then living. Does this violate the common law rule? Who has what interest?

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This scenario does not violate the RAP. Oliver is living on the date of deed. Therefore, vesting *must* occur within his life. The moment of his death will cause *vesting* of the remainder in Carol, which, nonetheless, may take possession no earlier than 30 years or after *hundreds of years*. Alternatively, Oliver may be living when the Cubs reach the World Series, or, if later, 30 years have elapsed. The result is possession to Brett or his successor until the later of 30 years or when the Cubs reach the World Series. The remainder goes to Oliver if he is then living, otherwise to Carol. (However, there may be a violation of another common law rule—the Rule Against Unreasonable Restraints on Alienation.[3])

Quiz 3. (a) Who played the lead lawyer character in the 1981 movie *Body Heat*? (b) Why is this a question?

The actor is William Hurt, in the role of Ned Racine. Kathleen Turner's character sought out Ned because she believed he was perfect for her nefarious plan. She believed he was sufficiently gullible because she was told by another lawyer that he had committed malpractice in drafting a will. She set him up by getting him to admit that he prepared a will that turned out to provide for a bequest that violated the RAP, so as a result she inherited the entire estate of her husband.

USRAP

The USRAP was intended to mitigate the harshness of the common law RAP. The National Conference of Commissioners on Uniform State Laws (NCCUSL, a/k/a Uniform Law Commission) drafted the USRAP as a standalone act in 1986. NCCUSL incorporated USRAP into the Uniform Probate Code (UPC) in 1990, as were many other uniform acts. The comments to the USRAP in the standalone act differ from those in the UPC regarding the USRAP. The primary difference is that the UPC comments are not as lengthy, so the standalone act has some deeper discussion.

The most important change of the USRAP to the application of the RAP was to "install a workable wait-and-see element"[4] that may save an otherwise defective gift against invalidity, and to the extent it does not so do, will permit reformation.[5] It also permits selection of an alternative vesting period of 90 years.[6] But it can produce an unanticipated tax consequence.

USRAP section 2(c) [UPC section 2-902(c)] provides a method to spring the Delaware Tax Trap ("Trap"). This provision permits any nonfiduciary holder of a special power of appointment in a typical USRAP state to cause inclusion of trust property in his or her gross estate for federal estate tax purposes if it can be appointed to an existing trust ("recipient trust") which grants another a power of appointment, including a special power of appointment. This could be done intentionally by having a material sum contributed to such a recipient trust, and thereafter the powerholder of the trust holding the low-basis asset appoints to the recipient trust.

Under the USRAP, if an interest or power of appointment arises from a transfer of property to a previously funded trust (recipient trust), then the creation date (for RAP purposes) of the the interest or power is the date of the creation of the recipient trust, even for the appointed property. The result is that the RAP beginning date of the holder of a power of appointment granted to another pursuant to the recipient trust is the date of creation of that trust, which is not the beginning date of the RAP period applicable to the trust from which the first power arose. Consequently, the Delaware Tax Trap is sprung, and the person exercising the power appointing property from the source trust to the recipient trust has made a gift or estate taxable transfer. This will be discussed further below.

The Delaware tax trap

The Trap causes the property of a trust to be treated as transferred for estate and gift tax purposes by

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1 Raatz, "'Delaware Tax Trap' Opens Door to Higher Basis for Trust Assets," 41 ETPL 3 (February 2014).

2 Gray, *The Rule Against Perpetuities* § 201, page 191 (4th ed., 1942).

3 This rule is applicable in Arizona, which is where the author practices. Tovrea v. Umphress, 556 P.2d 814 (Ariz. App. 1976).

4 Uniform Statutory Rule Against Perpetuities (with 1990 Amendments) Prefatory Note, 8 U.L.A. 392 (2014).

5 USRAP section 3 [UPC section 2-903].

6 USRAP section 1 [UPC section 2-901].

a person exercising a power of appointment under specified conditions. This occurs if the person exercises a power of appointment to grant another a power of appointment that can be exercised in a manner to postpone vesting for a RAP period that is not dependent on the RAP period applicable to the first power. The RAP period applicable to the first power is generally the date of irrevocability of the trust. The Delaware Tax Trap applicable for lifetime gifts is Internal Revenue Code Section 2514(d) and at death is Section 2041(a)(3). Section 2041(a)(3) provides that a decedent's gross estate includes certain property appointed under a power:

> Creation of another power in certain cases. To the extent of any property with respect to which the decedent—
>
> (A) by will, or
>
> (B) by a disposition which is of such nature that if it were a transfer of property owned by the decedent such property would be includible in the decedent's gross estate under section 2035, 2036, or 2037,
>
> exercises a power of appointment created after October 21, 1942, *by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, **for a period ascertainable without regard to the date of the creation of the first power.***[7]

Exercise one power to create another

To spring the Trap, a special power of appointment (SPA) must be exercised to create another power of appointment. The power being exercised needs to be a special power of appointment. If the power possessed were a general power of appointment (GPA), it would cause the property to be includable in the estate of the powerholder, regardless of whether the power was exercised.[8] Inclusion would occur without use of the Trap.

By exercise of a special power of appointment, is there a preferable kind of power of appointment to create in another? Two fundamental types of powers of appointment can be granted to spring the Trap to step up trust assets' bases: a GPA and an SPA. A GPA permits the powerholder to appoint the trust assets to any one or more persons, including one or more of the powerholder, the powerholder's estate, or the creditors of either. An SPA permits the powerholder to appoint to any one or more persons, outright or in trust, but not directly or indirectly to or for the powerholder. The difference is important. An SPA is generally preferable for at least three reasons:

1. It continues to permit protection of trust property from the creditors of all beneficiaries.
2. Trust property does not have to be made available for the immediate taking by any beneficiary or other person.
3. It will not require the trust assets to be included in the new powerholder's estate for estate tax purposes or treated as a gift if appointed during his or her lifetime in whole or in part to others.

Unfortunately, in almost all states there is no choice, and the Trap can be sprung only by creation of a presently exercisable GPA. Under the common law and the law of most states, the creation date for purposes of measuring the RAP period of an SPA created by the exercise of an SPA remains the date of funding of the irrevocable trust. So, the exercise of an SPA creating another SPA would not spring the Trap, and the assets would not be included in the powerholder's estate and the appointed asset bases would not be stepped up.

There is an exception when the new power created is a power given to someone who can immediately take the assets out of the trust, a *presently exercisable GPA*. In that case, under the common law and in all states, the date of creation of the new GPA is the date of *exercise* of the initial power creating the new GPA.[9] Under Kentucky or Wisconsin law, the creation of a general power of appointment exercisable at death will also start a new perpetuities period and therefore spring the Trap.[10] Consequently, the appointed asset will be includable in the gross estate of the powerholder potentially subject to federal estate tax, and the basis of the asset will be stepped up. However, when the only means to spring the Trap is to create a presently exercisable GPA, the price paid for basis step up is exposure of the assets to the sole control of the person granted the power, and to his or her creditors, as well as inclusion in his or her estate upon the powerholder's death for estate tax purposes.[11]

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[7] Emphasis added. The gift tax provision, Section 2514(d) reads: "If a power of appointment created after October 21, 1942, is exercised by creating another power of appointment which, under the applicable local law, can be validly exercised so as to postpone the vesting of any estate or interest in the property which was subject to the first power, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power, such exercise of the first power shall, to the extent of the property subject to the second power, be deemed a transfer of property by the individual possessing such power."

[8] Section 2041(a)(2).

[9] Comment c. to Restatement of Property, section 373; Restatement of Property, section 391; Comment d., and Reporter's Note 5, to Restatement (Second) of Property (Donative Transfers), section 1.2.

[10] Zaritsky, "The Rule Against Perpetuities: A Survey of State (and D.C.) Law[rdquo] (2012), available at www.actec.org/assets/1/6/Zaritsky_RAP_Survey.pdf (last visited 12/24/2015). This work is a handy resource, and useful for this article.

[11] This is a second inclusion in an estate or transfer tax base, and would not have to occur as a consequence to springing the Trap if a new SPA could have been created in a state where the date of creation of the new SPA for RAP purposes is the date of exercise of the first power.

EXHIBIT 1
USRAP Section 2(c) and UPC Section 2-902(c) Comments

The below paragraphs are excerpted from the Uniform Law Commission's "Uniform Statutory Rule Against Perpetuities (1986/1990)," available on the www.uniformlaws.org website.

From the Summary of the Uniform Statutory Rule Against Perpetuities in Original USRAP re Section 2(c):

Section 2(c) provides that nonvested property interests and powers of appointment arising out of transfers to a previously funded trust or other existing property arrangement are created when the nonvested property interest or power of appointment arising out of the original contribution was created. This avoids an administrative difficulty that can arise at common law when subsequent transfers are made to an existing irrevocable trust. Arguably, at common law, each transfer starts the period of the Rule running anew as to that transfer. This difficulty is avoided by subsection (c).

In Original USRAP Comment to Section 2(c):

Subsection (c): No Staggered Periods. For purposes of this Act, subsection (c) in effect treats a transfer of property to a previously funded trust or other existing property arrangement as having been made when the nonvested property interest or power of appointment in the original contribution was created. The purpose of subsection (c) is to avoid the administrative difficulties that would otherwise result where subsequent transfers are made to an existing irrevocable trust. Without subsection (c), the allowable period under the Statutory Rule would be marked off in such cases from different times with respect to different portions of the same trust.

Example (5)—Series of Transfers Case. In Year One, G created an irrevocable inter vivos trust, funding it with $20,000 cash. In Year Five, when the value of the investments in which the original $20,000 contribution was placed had risen to a value of $30,000, G added $10,000 cash to the trust. G died in Year Ten. G's will poured the residuary of his estate into the trust. G's residuary estate consisted of Blackacre (worth $20,000) and securities (worth $80,000). At G's death, the value of the investments in which the original $20,000 contribution and the subsequent $10,000 contribution were placed had risen to a value of $50,000. Were it not for subsection (c), the permissible vesting period under the Statutory Rule would be marked off from three different times: Year One, Year Five, and Year Ten. The effect of subsection (c) is that the permissible vesting period under the Statutory Rule starts running only once—in Year One—with respect to the entire trust. This result is defensible not only to prevent the administrative difficulties inherent in recognizing staggered periods. It also is defensible because if G's inter vivos trust had contained a perpetuity saving clause, the perpetuity-period component of the clause would be geared to the time when the original contribution to the trust was made; this clause would cover the subsequent contributions as well. Since the major justification for the adoption by this Act of the wait-and-see method of perpetuity reform is that it amounts to a statutory insertion of a saving clause (see the Prefatory Note), subsection (c) is consistent with the theory of this Act.

UPC Comment to Section 2-902(c) showing redline from Original USRAP Comment to Section 2(c):

Subsection (c). ~~Section 2~~ Subsection (c) provides that nonvested property interests and powers of appointment arising out of transfers to a previously funded trust or other existing property arrangement are created when the nonvested property interest or power of appointment arising out of the original contribution was created. This avoids an administrative difficulty that can arise at common law when subsequent transfers are made to an existing irrevocable inter-vivos trust. Arguably, at common law, each transfer starts the period of the Rule running anew as to ~~that~~ each transfer. ~~This difficulty is avoided by subsection (c).~~ The prospect of staggered periods is avoided by subsection (c). Subsection (c) is in accord with the saving-clause principle of wait-and-see embraced by Part 9. If the irrevocable inter-vivos trust had contained a saving clause, the perpetuity-period component of the clause would be measured by reference to lives in being when the original contribution to the trust was made, and the clause would cover subsequent contributions as well.

As shown above, all states permit a powerholder to spring the Trap if the powerholder creates a presently exercisable general power of appointment in the beneficiary. Under the common law and the law of most states, if the holder of an SPA over trust property appoints the property to another trust granting another a new SPA, then the date of creation of the SPA for the RAP remains the date the trust first became irrevocable. This would prevent the springing of the Trap under Sections 2041(a)(3) and 2514(d). So the way it can be sprung in most jurisdictions is limited to granting another a presently exercisable general power of appointment. This is the accepted view. The inability to create a new SPA and still spring the Trap is detrimental for various reasons.

Arizona clearly permits it to be sprung without giving a beneficiary the immediate power to take the assets out of trust, thereby additionally permitting the assets to remain protected from the beneficiary's creditors. Arizona Revised

EXHIBIT 2
Specimen Trust RAP Clause

As a practical matter, unless some unusual drafting error is made, USRAP will not act to invalidate any interests or powers under a trust, although it may cut back the RAP period to the common law RAP. Here is a traditional USRAP derived clause, for discussion purposes, to avoid the accidental springing of the Delaware Tax Trap, and is not necessarily appropriate for any specific application. Note particularly, subparagraphs (c) and (d), which are intended to prevent accidental application of USRAP section 2(c):

0.11 **Rule Against Perpetuities**.

(a) Except to the extent earlier terminated in accordance with other provisions of this Trust Agreement or the terms of any trust or powers created by exercise of powers granted under this Trust Agreement:

(1) An interest created under or pursuant to this Trust Agreement shall terminate one day before ninety years after it was created, and which ninety-year period will be reduced if and only to the extent necessary to avoid invalidity of the trust.

(2) A general power of appointment created under or pursuant to this Trust Agreement over property or interests that is not presently exercisable because of a condition precedent shall terminate, unless the condition precedent is satisfied, one day before ninety years after it was created.

(3) A nongeneral power of appointment or general testamentary power of appointment created under or pursuant to this Trust Agreement shall terminate one day before ninety years after it was created; provided that, in all events such a power is inoperative to the extent it produces a period of time that ends after one day before ninety years after the creation of the trust to do either of the following:

1. Disallow the vesting or termination of an interest or trust beyond that time, or
2. Postpone the vesting or termination of an interest or trust until that time.

(b) Upon termination of a trust (or, if applicable, any portion thereof if less than the entire trust) pursuant to the provisions of this Paragraph 0.11, the Trustee shall distribute any such remaining trust (or, if applicable, the portion of the trust terminated), together with any accumulated and any undistributed net income, to those beneficiaries who are reasonably determined by the Trustee to be the primary beneficiaries of the trust, and otherwise to whom the Trustee may make available any income and principal of such trust, in shares proportionately equal to their respective interests in the income distributions from the applicable trust, as determined in the reasonable discretion of the Trustee, or if their interests are indefinite, to the beneficiaries in equal shares.

(c) **[To preserve appointed trust property RAP period]** If a person appoints property of, or an interest in, a trust (the "Prior Trust") to another trust created under or pursuant to this Trust Agreement (the "Appointee Trust"), which appointment would be a taxable transfer for federal estate or gift tax purposes when such consequence would not result due to this sentence if the person does not provide otherwise as described in this sentence, then, except to the extent such person shall provide otherwise in the appointment or grant, for purposes of application of this Paragraph 0.11 to the appointed property or interest, the date of the creation of the Appointee Trust or power of appointment shall be deemed to be the date that the Prior Trust was created or deemed created with respect to the appointed property or interest.

(d) **[To preserve protection from GSTT of appointed assets]** If there is an appointment, distribution or transfer ("Transfer") of assets (such assets, and the income and proceeds therefrom, referred to as the "Applicable Assets") from a trust ("Prior Trust") to a trust subject to this Paragraph 0.11 ("Appointee Trust"), and as a result of the Transfer (i) part or all of the Applicable Assets will become subject to generation-skipping transfer tax when they were not so subject prior to the Transfer, or (ii) the Inclusion Ratio of the Applicable Assets or trusts holding the part or all of Applicable Assets will increase by 0.1 or more, or (iii) the benefit a prior GST Exemption allocation made with respect to a prior transfer of part or all of the Applicable Assets will be lost in whole or in part (such assets, and the income and proceeds therefrom, referred to as the "Applicable Property"), solely as a result of this Paragraph 0.11 or as a result of an increase or difference in the term or perpetuities period of the Appointee Trust from the term or perpetuities period of the Prior Trust ("Applicable Term"), then, except as otherwise provided in the Transfer, to the extent necessary to prevent the application of the generation-skipping transfer tax to, the increase in the Inclusion Ratio of, or loss of benefit of GST Exemption allocation with respect to, the Applicable Property the term or perpetuities period of the Appointee Trust applicable to the Applicable Property shall be the Applicable Term, and the Appointee Trust shall terminate as to the Applicable Property at the latest date that is within the Applicable Term, and which latest date will be earlier if and only to the extent necessary to avoid application of the generation-skipping transfer tax to or the increase in the Inclusion Ratio of the Applicable Property, and upon termination the provisions of Subparagraph (b) hereof shall apply thereto.

Statutes § 14-2905(C) permits the holder of an SPA to appoint to another SPA and provide that the exercise date is the creation date of the new SPA. Thus, the Trap is sprung, and the appointed assets are includable in the taxable estate of the powerholder, permitting step-up in basis and continued asset protection and avoidance of unwanted future transfer tax. But, alas, not everyone is blessed to be in Arizona.

USRAP can spring the Trap

USRAP states may also permit the Trap to be sprung when a person exercises a power of appointment to appoint to another trust which provides that someone else has an SPA. A majority of states,[12] the District of Columbia, and the Virgin Islands have enacted the USRAP. USRAP section 2(c) [UPC section 2-902(c)] should permit any holder of an SPA in a typical USRAP state to cause inclusion of trust property in his or her gross estate for federal estate tax purposes if it can be appointed to a trust that grants another an SPA. (For Uniform Law Commission comments to that provision, see Exhibit 1.)

USRAP section 2(c) [UPC section 2-902(c)] reads as follows:

> For purposes of this Act [UPC version: Subpart 1 of this Part], a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created.

USRAP section 2(c) facilitates the Delaware Tax Trap

The purpose of subsection (c) is to relieve the trustee of the recipient trust from the duty to keep separate records of the property subject to different RAP periods when the power of appointment over the property in the recipient trust has a different creation date than the creation date of the power exercised over the transferor trust.[13] It also provides both an opportunity for the aware and a trap for the unwary.

An SPA powerholder of trust T1 who is willing to cause assets of trust T1 to be includable in his or her gross estate can separately create an irrevocable trust T2 that grants a person (in theory, even the appointing person) an SPA, which may be the same or a narrower power than the first SPA. Alternatively, trust T2 may be created and funded by another. Thereafter, the powerholder of trust T1 appoints trust property to the newly settled trust T2 to the extent so empowered. The statute causes the T2 SPA to retain the T2 SPA creation date for all its property. This is so even if the property appointed from trust T1 to a new trust T3 created pursuant to the exercise of the power having identical terms as trust T2 would retain the trust T1 creation date instead of the trust T2 creation date. The appointment to trust T2 should spring the Trap because the permissible vesting period is determined without regard to the vesting period applicable to the power exercised.

Flies in the ointment?

Various potential obstacles should be considered when planning the implementation of the strategy discussed in this article.

Fly 1—Application of the USRAP. To what extent, if any, will either (1) closeness in time between creation of trust T2 and exercise of the power of appointment to trust T2, or (2) immaterial initial asset funding of trust T2, cause USRAP section 2(c) to be ineffective?

The Trap causes the property of a trust to be treated as transferred for estate and gift tax purposes by a person exercising a power of appointment under specified conditions.

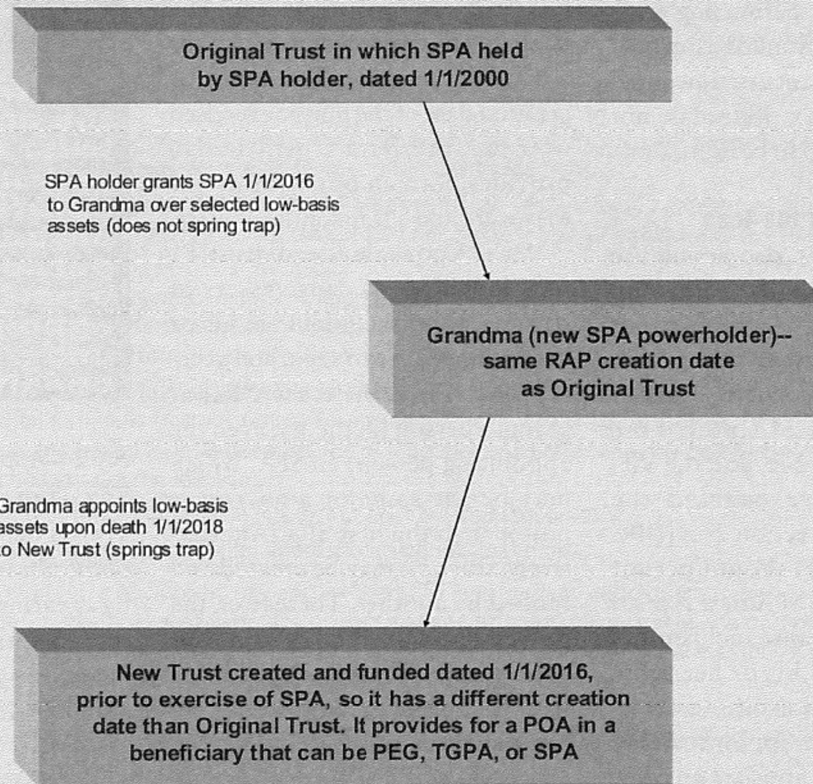
Fly 2—Application of the Delaware Tax Trap. The application of the Trap is dependent on the meaning of the phrase "exercises a power ... by creating another power...." Is that condition satisfied by appointment to any trust created by another? Does it require the prior creation of a trust only by the powerholder? Or is it applicable only if the power created is expressed in the exercise itself? The author believes that the appointment to any trust that is governed by USRAP section 2(c) is within the application of the Trap. The purpose of the Trap enactment was to treat the appointed property as owned by the powerholder if the result of the appointment was to re-set the RAP period.

The correlative situation is the IRS seeking to assert the Trap if it resulted in increased taxation through this technique. Few would doubt that the the IRS's position in such case would be strong, in that the design of the transaction was to effect the result identical to the transaction intended to be taxed. This opportunity/trap may exist so long as the state has enacted the

[12] Alaska Alabama, Arkansas, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Indiana, Kansas, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, and West Virginia.

[13] Comment to subsection (c) of UPC section 2-902: "This avoids an administrative difficulty that can arise at common law when subsequent transfers are made to an existing irrevocable inter vivos trust."

EXHIBIT 3
Springing the Delaware Tax Trap Under USRAP Section 2(c) [UPC Section 2-902(c)]: Graphic Example



Notes:

- PEG = presently exercisable general power of appointment
- TGPA = testamentary general power of appointment (e.g., Kentucky and Wisconsin)
- SPA = special power of appointment
- Assume Grandma's taxable estate can include appointed assets without increasing her estate tax.

USRAP with its section 2 [UPC section 2-902] unchanged.

Example of springing USRAP Delaware Tax Trap. Alvin desires to spring the Trap as to a selected $1 million of assets in trust (T1) having a basis of $100,000. Alvin has an SPA to appoint the T1 trust property to anyone but himself, his estate, or the creditors of either. Alvin contributes $10,000 to a new trust (T2), in which Betty has a special power to appoint T2 trust property to anyone but herself, her estate, or the creditors of either.

Six months later Alvin appoints the property of T1 to T2. Pursuant to Section 2514(d), if Alvin appoints while living, or Section 2041(a)(3), if Alvin appoints T1 property effective upon his death, he has made either a taxable gift or has caused the $1 million of T1 property to be includable in his gross estate for federal estate tax purposes. If the appointment is effective upon death, then the basis of T1 property is stepped up to the fair market value of the property, increasing the basis by $900,000, regardless of whether a federal estate tax is due.[14]

Drafting to control the trap

The Trap sword cuts two ways. As can occur, the exercise of an SPA can be made to another irrevocable trust. For example, bypass trust assets may have been appointed by the surviving spouse to an existing irrevocable trust. Without more, the Trap may apply for the reasons discussed above. Therefore, it is prudent to have provisions in a trust agreement to protect against lapses in oversight. Exhibit 2 is a

specimen RAP savings clause that may have the effect of preventing the accidental springing of the Trap.

There are three components to a comprehensive RAP boilerplate clause for a trust agreement. The first component [Exhibit 2 Paragraph 0.11(a) and (b)] is a trust limitation provision to prevent violation of the three vesting limitations of USRAP section 1 [UPC section 2-901]. USRAP section 1 reads:

> USRAP Section 1 [UPC Section 2-901]. Statutory Rule Against Perpetuities.
>
> (a) **[Validity of Nonvested Property Interest.]** A nonvested property interest is invalid unless:
>
> (1) when the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or
>
> (2) the interest either vests or terminates within 90 years after its creation.
>
> (b) **[Validity of General Power of Appointment Subject to a Condition Precedent.]** A general power of appointment not presently exercisable because of a condition precedent is invalid unless:
>
> (1) when the power is created, the condition precedent is certain to be satisfied or becomes impossible to satisfy no later than 21 years after the death of an individual then alive; or
>
> (2) the condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.
>
> (c) **[Validity of Nongeneral or Testamentary Power of Appointment.]** A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:
>
> (1) when the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or
>
> (2) the power is irrevocably exercised or otherwise terminates within 90 years after its creation.
>
> (d) **[Possibility of Post-Death Child Disregarded.]** In determining whether a nonvested property interest or a power of appointment is valid under subsection (a)(1), (b)(1), or (c)(1), the possibility that a child will be born to an individual after the individual's death is disregarded.
>
> (e) **[Effect of Certain "Later-of" Type Language.]** If, in measuring a period from the creation of a trust or other property arrangement, language in a governing instrument (i) seeks to disallow the vesting or termination of any interest or trust beyond, (ii) seeks to postpone the vesting or termination of any interest or trust until, or (iii) seeks to operate in effect in any similar fashion upon, the later of (A) the expiration of a period of time not exceeding 21 years after the death of the survivor of specified lives in being at the creation of the trust or other property arrangement or (B) the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust or other property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives.

USRAP states may also permit the Trap to be sprung when a person exercises a power of appointment to appoint to another trust which provides that someone else has an SPA.

The second component [Exhibit 2, Paragraph 0.11(c)] is to prevent assets contributed *to the trust* from automatically becoming subject to its RAP period, except to the extent the appointor provides otherwise. This may otherwise occur as a result of USRAP Section 2(c).

The third component [Exhibit 2, Paragraph 0.11(d)] retains the RAP term from the prior trust applicable to assets contributed *to the trust* if that preserves beneficial generation-skipping transfer tax attributes applicable to such assets when the attributes would otherwise be lost due to application of the RAP term of the trust.

Conclusion

Depending on a client's particular situation, springing the Delaware Tax Trap to cause assets to be included in an estate may carry no adverse consequence. Appointing assets in one trust to an existing newer trust with a different RAP period should result in a tax-free step up in the appointed assets' bases. (See Exhibit 3 for an example of how this works.) In states that have adopted the USRAP, the use of trusts and SPAs can be the keys to achieving the desired results. ■

[14] See 1990 comment regarding subsection (c) to pre-UPC USRAP section 2: "Example (5)—Series of Transfers Case" in Exhibit 1.

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