

Estate Planning in Uncertain Times

WRITTEN BY

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“God, grant me the serenity to accept the things I cannot change, courage to change the things I can, and wisdom to know the difference.”- The Serenity Prayer

The first 100 days of President Trump’s administration have been full of change, and the markets have been a rollercoaster ride,^[1] leading many of my estate planning clients (regardless of political affiliation) to shelter in place to ride out the storm. The purpose of this article is to remind clients that “in the midst of chaos, there is also opportunity.”^[2] Below are five estate planning opportunities that, if implemented now, can yield significant and lasting benefits.

1. Consider Claiming the Deceased Spousal Unused Exclusion (DSUE) for the Surviving Spouse

DSUE and portability were first introduced as part of the Tax Relief, Unemployment Reauthorization, and Job Creation Act of 2010 (TRA 2010), which became effective for married persons dying on or after January 1, 2011. Basically, portability allows the surviving spouse to claim the unused portion of a decedent’s applicable exemption amount and add it to their own. In theory, every surviving spouse should be doing this. In practice, most are not.

The basic exclusion amount is adjusted for inflation annually and is currently \$13.99 million.^[3] Given that the average net worth of U.S. households in 2022 was \$1,059,470^[4] and the median net worth was \$192,700,^[5] most individuals have no obligation to file federal estate tax returns.^[6] For those who do, DSUE can be a huge benefit.^[7]

To claim the DSUE, the executor of the deceased spouse’s estate must elect to transfer the DSUE amount to the surviving spouse on a timely filed Form 706: United States Estate (and Generation-Skipping Transfer) Tax Return.^[8] If the executor did not have a filing requirement under IRC. § 6018(a) and failed to timely file Form 706 to make the portability election, the executor may be eligible for an extension under Rev. Proc. 2022-32, 2022-30 I.R.B. 101 (superseding Rev. Proc. 2017-34, 2017-26 I.R.B. 1282).^[9] An executor filing to elect portability may now file the Form 706 on or before the fifth anniversary of the decedent’s death.^[10]

Under Treas. Regs. § 20.2010-2(a)(7)(ii), if the total value of the gross estate and adjusted taxable gifts is less than the basic exclusion amount (see IRC § 6018(a)) and Form 706 is being filed only to elect portability of the DSUE amount, the estate is not required to report the value of certain property eligible for the marital or charitable deduction,^[11] which should make the preparation of the Form 706 less expensive. Once the DSUE has been transferred, any taxable gifts made by the surviving spouse will be applied against the DSUE until it is exhausted, or the surviving spouse receives the DSUE of a subsequent deceased spouse.^[12]

2. Consider Spousal Lifetime Access Trusts (SLATs)

SLATs are often overprescribed, and the downsides often overlooked, but in the right situations, they can be highly effective tools for reducing estate tax and providing asset protection. The purchase of life insurance inside a SLAT can also provide needed return and liquidity in unsteady markets. If spouses have a taxable estate and have not fully utilized their applicable exclusion amounts, properly prepared and maintained SLATs can significantly reduce their estate tax burden. SLAT planning combines fully utilizing one's currently existing applicable exclusion amount (before the potential sunset) and asset freezing.^[13]

A SLAT is an irrevocable, typically intentionally defective grantor trust created by one spouse, the settlor, for the benefit of the other (and sometimes other family members). In funding the trust, the settlor uses all the remaining applicable exclusion amount often by making gifts of highly appreciating assets to the trust.^[14] Once transferred, those assets and the future appreciation on those assets are out of the settlor's gross estate for estate tax purposes. The assets and the income from the assets are available for the benefit of the settlor's spouse for the spouse's lifetime and then often remain in trust for the settlor's descendants. Importantly, the settlor can benefit indirectly from the trust through his spouse, the beneficiary. For example, if the trust provides for the spouse's maintenance and support, the trustee can maintain a home for the beneficiary, where the settlor likely resides.

It is important to note that while this is a possibility (and perhaps a probability), it is not a guaranty. If the settlor and the settlor's spouse divorce, the settlor will learn just how complete the gift to the trust is and that the assets and the income from those assets are gone. This is also true when the settlor's spouse dies, and the assets pass to the settlor's descendants and are no longer available to the settlor, even indirectly. This risk is often downplayed and lost in client conversations, which tend to focus more on the reciprocal trust doctrine as the greatest risk to SLAT planning. If divorce is a possibility (no matter how remote), SLATs should not be considered.

The reciprocal trust doctrine is a significant concern when preparing SLATs for married couples, but with proper planning, its impact can be minimized. Estate planning attorneys often focus on this doctrine because of the clear legal risk, and a common adversary — the Internal Revenue Service (IRS) — rather than addressing potentially sensitive issues such as the clients' marriage.

The reciprocal trust doctrine is a tax rule that allows the IRS to disregard a completed gift of assets out of one's estate when the plan leaves the donor and the beneficiary in the same positions they were in before implementing the transfers. This doctrine is similar to the substance over form^[15] argument and the economic substance^[16] argument. To avoid creating SLATs that mirror each other in their trust terms, the spouses can vary: (i) the timing of the creation of the trusts, (ii) the trustees, (iii) the beneficiaries (e.g., one SLAT benefits the husband, and the other SLAT benefits the wife and their children); (iv) the distributions from the trusts (one SLAT can provide for immediate benefits for the beneficiary's health, education, maintenance, and support and the other for periodic distributions of a specific dollar amount), (v) the powers of appointment given to the beneficiaries, and (vi) the assets contributed to the trusts. Ultimately, the question is whether the spouses are in the same economic position after the transfer as they were before.

Other important considerations with SLATs are:

- That the assets in SLATs do not benefit from the step-up in basis at the settlor's death.

- In community property states, extra care must be taken to ensure that the assets contributed to a SLAT are separate property of the settlor.
- That income that is not immediately used be kept in the SLAT to avoid including the assets in the beneficiary's estate.
- That in the event of a divorce, the settlor is not obligated to pay the income tax on trust income used for the ex-spouse's benefit.

Although SLATs are irrevocable by definition and design, non-judicial modifications such as decanting, mergers, and sales (or substitutions, if applicable) can be used to keep SLATs from failing. Proper structuring and continued review of SLATs remain crucial to ensure they remain aligned with the settlor's objectives and changing personal and legal circumstances.

3. Consider Converting Traditional Individual Retirement Accounts (IRAs) to Roth IRAs

A traditional IRA is the least tax-efficient asset to pass on at death because it does not get a step-up in basis at death and the "stretch IRA," which allowed beneficiaries to withdraw funds from inherited IRAs over their lifetimes, was eliminated for most non-spousal beneficiaries by the SECURE Act of 2019. Presently, most non-spousal beneficiaries must withdraw all of the funds from inherited IRAs by the end of the 10th year after the original owner's death. Fortunately, several options are available to deal with this asset class depending on the client's goals.

One option for charitable individuals is the Qualified Charitable Distribution (QCD). The QCD allows a person to direct up to \$108,000^[17] in 2025 of required minimum distributions from a traditional IRA to charity (not a donor-advised fund) each year while excluding that amount from taxable income. For the very charitable, one can name a charity as the beneficiary of an IRA and have the entire amount pass to the charity at one's death. However, for those who want to leave IRAs to individuals (and not charities), a Roth conversion is another great option.

A Roth conversion is basically an election to pay the tax on all or a portion of the traditional IRA at ordinary income tax rates in the year of conversion. There is no 10% early withdrawal penalty associated with the conversion. Once the tax is paid, the converted portion is held in a Roth IRA and is no longer subject to income tax as long as the client does not take distributions before age 59½ and the client has met the five-year holding period requirement.^[18]

The discussion about whether to convert a traditional IRA to a Roth IRA centers on the tax consequences and timing. In the year of conversion, the client's income will be increased, and the conversion could push the client into a higher tax bracket. The client must have liquid assets to pay the tax on the higher tax base at a potentially higher tax rate. As for timing, despite a general sense that federal income taxes are unfair,^[19] they are at historic lows.

To maximize the benefit of the conversion, it should be done when the client's personal income taxes will be the lowest. This could be when the client is first retired but not yet receiving Social Security benefits so the client has

lower taxable income than when the client was working, but it could also be in a year when the fair market value of the client's traditional IRA drops significantly due to market volatility. However, converting after a significant market drop might not be ideal if the initial drop was followed by additional losses in the same year.[\[20\]](#)

In addition to choosing the proper timing for the conversion, one must also consider long-term policy risk, especially whether Congress will maintain the tax-exempt status of Roth IRAs. A historical precedent is Social Security: originally, benefits were "explicitly excluded from federal income taxation" until 1984, when "up to one-half of the value of the Social Security benefit was made potentially taxable income" by Congress.[\[21\]](#) Then in 1993, Congress decided to increase the taxable percentage to 85% for higher-income beneficiaries.[\[22\]](#) Caveat emptor.

4. Terminate Unneeded Non-Operating Private Foundation

With the rise of donor-advised funds, there has been a decline in the demand for the formation of non-operating (grant-making) private foundations. Much of my work related to private foundations is focused on restoring compliance after years of missed tax filings. This trend also highlights an important estate planning idea — properly terminating non-operating foundations that are no longer serving their intended purpose or are administratively burdensome to maintain.

A private foundation can be terminated in four ways, with two requiring the payment of taxes:[\[23\]](#)

- Voluntary termination by notifying the IRS of the intent to terminate and paying a termination tax.
- Involuntary termination for either willful repeated violations or willful and flagrant violation of the private foundation excise tax provisions and becoming subject to the termination tax.
- Transfer of assets to certain public charities.
- Or operating as a public charity for a continuous period of 60 months after giving appropriate notice.[\[24\]](#)

For most clients, the third option is the appropriate one. The private foundation simply distributes all of its net assets to a public charity with similar exempt purposes, which has been in existence for a continuous period of at least 60 calendar months immediately preceding such distribution.[\[25\]](#) Under this scenario, the private foundation does not have to give the IRS notice of its intent to terminate; it simply files a final tax return and terminates its existence with the state it was formed.[\[26\]](#) The termination of the unneeded foundation avoids ongoing compliance costs and eliminates the need for the client's family to deal with the inevitable termination later.

5. Deal With Your Cryptocurrency

Cryptocurrency is no longer new, but compared to other assets, it is still relatively novel in estate planning. It does not easily fit in the category of administrable assets because even if left to someone through a will or a trust, it is impossible to access without the keys. Apparently, many have difficulty remembering their keys as reported by the *New York Times* article, "Lost Passwords Lock Millionaires Out of Their Bitcoin Fortunes" (published January 12,

2021):

[C]ryptocurrency's unusual nature has also meant that many people are locked out of their Bitcoin fortunes as a result of lost or forgotten keys. They have been forced to watch, helpless, as the price has risen and fallen sharply, unable to cash in on their digital wealth.

Of the existing 18.5 million Bitcoin, around 20 percent — currently worth around \$140 billion — appear to be in lost or otherwise stranded wallets, according to the cryptocurrency data firm Chainalysis. Wallet Recovery Services, a business that helps find lost digital keys, said it had gotten 70 requests a day from people who wanted help recovering their riches, three times the number of a month ago.^[27]

In addition to the practical issue of accessing cryptocurrency, many owners still value the anonymity of their cryptocurrency holdings and are keeping their holdings to themselves. The IRS has focused on cryptocurrency over the past few years and is trying to force holders to properly report their income from cryptocurrency, which has further popularized it as an investment type,^[28] as the IRS develops rules on reporting and tax treatment. For those holders who have resisted disclosure thus far, the IRS has a Voluntary Disclosure Program which significantly reduces the risk of criminal prosecution for nondisclosure.

As it becomes more mainstream, the number of individuals losing or forgetting their keys is bound to increase. The two best options appear to be providing the keys to a third-party fiduciary for safekeeping or storing the keys in tangible form in a safe place.^[29] Both of these can risk exposing assets to dishonest individuals, but that is a risk shared by many other types of assets.

Estate planning — like investing — is a dynamic process. Changes in one's personal life and financial situation, the economy, and the law are often outside of a person's control but the individual's reaction to those changes is not. In closing, I repeat The Serenity Prayer, "God, grant me the serenity to accept the things I cannot change, courage to change the things I can, and wisdom to know the difference."

[1] <https://www.usatoday.com/story/news/politics/elections/2025/04/25/trump-100-days-changes-in-america/83042626007/>, last visited May 20, 2025.

[2] Sun Tzu, *The Art of War*.

[3] On May 12, 2025, the House Republicans released the tax portion of the "One, Big, Beautiful Bill", a budget reconciliation bill, which includes the permanent extension and limited modifications of the provisions of the Tax Cuts and Jobs Act of 2017. The bill proposes a permanent \$15 million applicable exemption amount for individuals dying in 2026, which would be adjusted annually for inflation.

[4] https://www.federalreserve.gov/econres/scf/dataviz/scf/table/#series:Net_Worth;demographic:all;population:all;units:mean, last visited May 20, 2025.

[5] https://www.federalreserve.gov/econres/scf/dataviz/scf/table/#series:Net_Worth;demographic:all;population:all;units:mean

[s:median](#), last visited May 20, 2025.

[6] [https://taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax#:~:text=Estate%20tax%20liability%20totalled%20\\$19.2,7%2C100%20and%204%2C000%20for%202023](https://taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax#:~:text=Estate%20tax%20liability%20totalled%20$19.2,7%2C100%20and%204%2C000%20for%202023) (In 2022, when the applicable exclusion amount was \$12.06 million roughly 7,600 federal estate tax returns were filed and roughly 3,900 of those were taxable.)

[7] A nonresident surviving spouse who is not a citizen of the United States may not take into account the DSUE amount of a deceased spouse, except to the extent allowed by treaty with the nonresident surviving spouse's country of citizenship.

[8] <https://www.irs.gov/pub/irs-pdf/i706.pdf>, last visited May 20, 2025.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Asset freezing in the estate planning context means transferring an asset out of one's estate at its fair market value on the date of transfer but with the expectation that the asset will appreciate significantly in the future.

[14] In a tumultuous market, marketable securities that have fallen in value are ideal gifts.

[15] The substance over form doctrine arose from the U.S. Supreme Court case, *Gregory v. Helvering*, 293 U.S. 465 (1935), where the Court announced that, "as a general rule, the incident of taxation depends on the substance rather than form of the transaction."

[16] I.R.C. § 7701(o)(5)(A) defines the economic substance doctrine as "the common law doctrine under which ... transaction[s] are not allowable if the transaction does not have economic substance or lacks a business purpose." See also *Coltec Indus., Inc. v. United States*, 454 F.3d 1340, 1352 (Fed. Cir. 2006) ("[T]he economic substance doctrine [requires] disregarding, for tax purposes, transactions that comply with the literal terms of the tax code but lack economic reality.").

[17] <https://www.irs.gov/newsroom/give-more-tax-free-eligible-ira-owners-can-donate-up-to-105000-to-charity-in-2024>, last visited May 20, 2025.

[18] If the client takes a distribution from a traditional IRA that was converted to a Roth IRA within 5 years of January 1 of the year of the conversion, the client may incur a 10% early withdrawal penalty on the conversion amount in addition to the income taxes the client already paid for the conversion. Exceptions to the early withdrawal penalty include withdrawals of up to \$10,000 for a first home purchase, withdrawals for a client who has become permanently and totally disabled, and withdrawals for qualified educational expenses.

[19] <https://news.gallup.com/poll/659003/perceptions-fair-income-taxes-hold-near-record-low.aspx>, last visited May 20, 2025.

[20] Previously, a Roth IRA conversion could be reversed or recharacterized in the year of conversion, but the ability to recharacterize a Roth conversion was eliminated by the Tax Cuts and Jobs Act of 2017. Conversions made on or after January 1, 2018, cannot be undone.

[21] [https://www.ssa.gov/history/taxationofbenefits.html#:~:text=\(A%20revision%20was%20issued%20in,subject%20to%20federal%20income%20taxes](https://www.ssa.gov/history/taxationofbenefits.html#:~:text=(A%20revision%20was%20issued%20in,subject%20to%20federal%20income%20taxes), last visited May 20, 2025.

[22] *Id.*

[23] I.R.C. § 507.

[24] <https://www.irs.gov/charities-non-profits/private-foundations/termination-of-private-foundation-status>, last visited May 20, 2025.

[25] I.R.C. § 507(b)(1)(A).

[26] <https://www.irs.gov/charities-non-profits/termination-of-an-exempt-organization>, last visited May 20, 2025.

[27] <https://www.nytimes.com/2021/01/12/technology/bitcoin-passwords-wallets-fortunes.html>, last visited May 20, 2025.

[28] <https://red.msudenver.edu/2025/as-bitcoin-surges-irs-steps-up-oversight/#:~:text=As%20crypto's%20popularity%20has%20grown,investigative%20work%2C%E2%80%9D%20Persichitte%20said>, last visited May 20, 2025.

[29] <https://www.actec.org/resource-center/video/understanding-cryptocurrency-in-estate-planning/>, last visited May 20, 2025.

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