

Over-Focusing on Estate Taxes Creates Tunnel Vision

Joshua Dorsey, Managing Partner, Dorsey Law

September 14, 2026

As estate planners, our job is to protect our clients from their biggest perceived risks, which are often taxes, but not always. Different-sized estates have different risks. Typically, the estate tax is the biggest risk for large estates. But once estate taxes are covered or deemed inapplicable, there needs to be a shift toward what to do next.

Do we stop using trusts for non-taxable estates? Maybe, if we're focused merely on estate taxes. But if we're risk-centric, the answer is no. The goal is to hear clients' concerns and to use whatever tools we have at our disposal to protect them, their assets and their family.

We want to be careful not to limit our clients' planning tools because of our pre-conceived notions, while also ensuring we don't overcomplicate their lives. Believing a client may (or may not) have a future estate tax problem can often tilt the plan toward one central strategic focus while leaving other risks exposed.

Beyond the Death Tax

We've all been trained to plan for the big bad death tax, but when the death tax isn't the big bad wolf anymore, there are other important risks we need to be protecting our clients from. Probate fees and costs are the ones most often advertised, but there are many other risks to consider. These include:

- Asset protection for the surviving spouse.

- Asset protection for the kids from alimony and child support claims under a health, education, maintenance and support standard.
- Future estate tax avoidance for successful children who are making their own money;
- Loss of a step-up in cost basis because the asset was previously made “ugly” for minority discounting or gifting;
- Income tax efficiency for your children and grandchildren when assets will be locked up in a complex trust;
- Protection from future estate contests due to evolving family dynamics;
- Setting family governance for estates set to continue as “ugly assets” (that is, e possessions or financial holdings that cost a lot of money, cause family fights or create big tax problems for your heirs instead of helping them); or
- The unwinding of the complex, ugly assets we so beautifully designed when the estate tax mattered to the family.

Does Asset Alignment Always Matter?

If we aren't trying to avoid the estate tax, is trust funding and asset alignment still important? I say yes. So, why is it okay for attorneys to pass the buck with a 'Cover Your A**' letter for probate avoidance, in essence telling clients, “We created the trust, but now you need to fund it”? Wise counsel doesn't seem to take that same risk with estate tax avoidance, though. That's probably because with estate tax liability, the kids may come back and sue the attorney for failing to dot the I's and cross the T's.

The hope is that the trust gets fully funded, whether or not the estate is taxable. But a trust designed solely for estate tax avoidance, not for income tax mitigation for the heirs, is a ticking time bomb.

Income tax planning is just as important as estate tax planning for most families you work with. For high-net-worth and ultra-high-net-worth families, a federal estate tax of 40% above \$15 million (single) or \$30 million (married) is a big risk. But income taxes inside a complex trust after the parents die can be a longer risk. Complex trusts often pay higher ordinary income taxes than people. After the first \$16,000 in income in 2026, the trust pays 37% on every dollar earned.

If the assets are liquid investments, the traditional advice is for advisors to diversify the portfolio to increase tax-free income, capital gains or dividend rates. If a client's trust now owns a family business, what if the family wants to keep the family business and doesn't want to diversify? Suppose your client doesn't want to distribute all the ordinary income annually to the kids because they don't trust the child's spouse and don't want the income to be counted for alimony or child support purposes?

Too many trusts lack the ability to classify the ordinary income of a complex trust at the beneficiary level under Internal Revenue Code Section 678 or to plan for a beneficiary-deemed-owner trust. Short-term tunnel vision on mere estate tax avoidance can create hundreds of years of income tax pain, when both are equally important.

Clients often tell us their previous attorney told them they didn't need a trust because their estate won't be taxable when they die. Unfortunately, some attorneys forget that trusts are used for more than just estate tax planning. If complexity is okay for estate tax avoidance, should it be equally important for asset protection?

Suppose a client dies, avoiding the estate tax, but leaves everything outright to their wife? That outcome is possible because after 2011, a surviving spouse has the ability to file a Form 706 estate tax return to elect the portability of their deceased spouse's remaining lifetime exclusion. In essence, they're freezing the exemption like a coupon for later use. With

portability as an option, many attorneys often overlook the need for a marital trust to provide “asset protection” for the surviving spouse. Even worse, some attorneys prepare a marital trust for the surviving spouse, but neglect to align all the assets (especially after the proposed SECURE Act 3.0) to flow through the trust. By being solely estate-tax-focused and not asset-protection-focused, they often fail to include individual retirement accounts, IRC Section 401(k)s, life insurance proceeds and the homestead in the marital trust to protect the surviving spouse.

If a husband dies and leaves his assets directly to his wife, and she ultimately remarries, Florida law gives her new husband a guaranteed right to 50% of the house and 30% elective share claim to the rest of the estate, if the wife dies before her new husband. By overlooking trust-based planning because the estate isn’t taxable, the family estate is left unprotected from creditors and predators.

Great Estate Tax Strategy: Unintended Consequences

Suppose a couple completed estate tax planning years ago when the exemption was \$650,000 per person, and now their estate won’t even hit the \$30 million threshold? Do you leave all the ugly tools in place, or do you unravel them? What are the risks of leaving the tools in place

Sometimes the best estate tax avoidance strategies can unintentionally create conflict, resentment or confusion among heirs. What if we created ugly assets for better minority discounts without preparing for family governance or a well-thought-out exit plan? Suppose the “ugliness” of the asset is going to pass along a smaller step-up in cost basis because minority discounting still applies? By being too estate-tax focused, we often miss opportunities to build in family governance or to make an asset less ugly if the estate tax doesn’t have the same effect on the family. Without thoughtfully crafted and planned family governance or release valves, the family can be left in chaos for years.

Being too focused on estate tax planning often adds additional complexity for the next generation. Sometimes the cost of unraveling those strategies significantly offsets the perceived estate tax benefits that led the client to implement them in the first place. In the process of unraveling the messiness, families are often destroyed.

My primary goal, in consultation with the client, is to determine what they believe their biggest issue is. Often, it's ensuring that their family is taken care of when they're gone. Yes, they want to pay as few taxes as possible, but they also want their family to be together (peacefully) for the holidays. Not easy during these politically charged times. If the client's primary goal is taking care of their family when they're gone, don't let minimizing estate tax get in the way. That's why estate plans need to be built incrementally over time, with the flexibility to be modified as the situation and landscape change.

It's imperative for the next generation to be included in family governance, asset protection and tax conversations. The only way to plan is to remain flexible and avoid a single paradigm, especially in estate tax avoidance. Make sure clients have regular checkups with their estate attorney, which is built in if the attorney has a client care program.

About the Author



Managing Partner, Dorcey Law

Joshua Dorsey is Managing Partner of Dorsey Law headquartered in Fort Myers, Florida.