THE ESTATE PLANNER

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SHARING IS CARING
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Estate Planning Red Flag
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Sharing is caring

How much should you tell your loved ones about your estate plan?

After you've created your estate plan, it's important to consider how much information you should disclose to your loved ones about its details. What you share depends in part on your particular circumstances and your relationship with family members. Here are factors to consider.

Advantages of sharing

Sharing the details of your estate plan provides many benefits, including:

Explaining your wishes. Most people, when they design their estate plans, want to treat all their loved ones fairly. But "fair" doesn't necessarily mean "equal." The problem is that your beneficiaries may not understand that without an explanation.

Suppose, for example, that you have adult children from a previous marriage and minor children from your second marriage. Treating both sets of children equally may not be fair, especially if the adult children are financially independent and the younger children face significant living and educational expenses. It may make sense to leave more of your wealth to your younger children, but explaining your reasoning upfront can go a long way toward avoiding hurt feelings or disputes.

Obtaining feedback. Sharing your plans with loved ones gives them an opportunity to ask questions and provide feedback. If family members feel that they're being treated unfairly, you may wish to discuss alternatives that better meet their needs while still satisfying your estate planning objectives. But even if you don't change anything, providing loved ones with an opportunity to be heard can increase the chances that everyone will accept your plan. Soliciting feedback may also reveal holes in your estate plan, such as potential beneficiaries who were inadvertently omitted.

Streamlining estate administration. Sharing details of your plan with your executor, trustees of any trusts and any holders of powers of attorney will enable them to act quickly and efficiently when the time comes. This is particularly important for persons you've designated to make health care decisions or handle your financial affairs in the event you become incapacitated.

Policing your trust. Disclosing the details of a trust to its beneficiaries allows them to monitor the trustee's activities and ensure that the trustee is acting in their best interests. If no one is "policing" the trust, there's a risk that mismanagement of the trust assets won't be discovered until it's too late. In some states, it may be possible to appoint a third-party surrogate to police the trust.

Accentuate the positive with an incentive trust

One reason that people may be reluctant to share their estate plans with their loved ones is a concern that it will encourage irresponsible behavior. But even if you keep the details of your plan a secret, actually keeping your *wealth* secret may be difficult if not impossible. Since your loved ones will undoubtedly expect to share in that wealth one day, keeping your plans under wraps will likely do little to discourage irresponsible behavior.

A better approach may be to create an incentive trust, which provides positive reinforcement that encourages desirable behavior. These trusts may, for example, condition distributions on behavior you wish to encourage, such as obtaining a college or graduate degree, maintaining gainful employment, pursuing worthy volunteer activities or avoiding alcohol abuse.

Alternatively, to avoid a complex set of rules that may not cover every situation, you might consider a principle trust. This trust type outlines general principles for distributing funds to beneficiaries and gives the trustee broad discretion to reward responsible behavior on a case-by-case basis.

Disadvantages of sharing

There may be some disadvantages to sharing the details of your plan, including:

Loss of privacy. Disclosure may not be desirable if you wish to maintain the confidentiality of your financial affairs and estate planning arrangements.

Strained relationships. Some loved ones may be disappointed when they learn the details of your estate plan, which can lead to strained relationships. Keeping your plans to yourself allows you to avoid these uncomfortable situations. On the other hand, it also deprives you of an opportunity to resolve such conflicts during your lifetime.

Encouragement of irresponsible behavior. Some affluent parents worry that the promise of financial independence may provide their children with a disincentive to behave in a financially responsible manner, pursue higher education and gainful employment, and generally lead a productive life. Rather than keeping your children's inheritance a secret, however, a better approach may be to use your estate plan to encourage desirable behavior. (See "Accentuate the positive with an incentive trust" above.)

What does state law require?

As you think about how much you wish to disclose to your loved ones about your estate plan, be sure to consider applicable state law. The rules about what a trustee must disclose to beneficiaries about the terms of the trust vary from state to state. Some states permit so-called "quiet trusts," also known as "silent trusts," which make it possible to keep the trust a secret from your loved ones.

Other states require trustees to inform the beneficiaries of the existence and terms of the trust, often when they reach a certain age. For example, trustees may be required to provide beneficiaries with a copy of the trust and an annual accounting of its assets and financial activities. However, many states allow you to place limits on the information provided to beneficiaries.

Weigh the pros and cons

Your estate planning advisor can help you weigh the pros and cons of sharing your plans with your loved ones. He or she can also help you develop strategies for accomplishing your estate planning objectives while maintaining family harmony. ∎

Have you ever wondered what that estate planning term means?

When it comes to estate planning, you're likely familiar with some of its more common terms. These terms typically include a will, a trust or an executor. But estate planning has a language all its own, and many of the terms may be foreign to you. Let's take a closer look at some of the other terms you may come across in your estate plan.

Administrator: An individual or fiduciary appointed by a court to manage an estate if no executor or personal representative has been appointed or the appointee is unable or unwilling to serve.

Ascertainable standard: The legal standard, typically relating to an individual's health, education, support and maintenance, that's used to determine what distributions are permitted from a trust.

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Attorney-in-fact: The individual named as the agent under a power of attorney to handle the financial and/or health affairs of another person.

Codicil: A legally binding document that makes minor modifications to an existing will without requiring a complete rewrite of the will.

Community property: A form of ownership in certain states in which property acquired during a marriage is presumed to be jointly owned regardless of who paid for it.

Credit shelter trust: A trust established to bypass the surviving spouse's estate to take full advantage

of each spouse's federal estate tax exemption. It's also known as a bypass trust or A-B trust.

Fiduciary: An individual or entity, such as an executor or trustee, designated to manage assets or funds for beneficiaries and is legally required to exercise an established standard of care.

Grantor trust: A trust in which the grantor retains certain control so that it's disregarded for income tax purposes and the trust's assets are included in the grantor's taxable estate.

Inter vivos: The legal phrase used to describe various actions (such as transfers to a trust) made by an individual during his or her lifetime.

Intestacy: If a person dies without a legally valid will, the deceased's estate is distributed in accordance with the applicable state's intestacy laws.

Joint tenancy: An ownership right in which two or more individuals (such as a married couple) own assets, often with rights of survivorship.

No-contest clause: A provision in a will or trust that is designed to ensure that an individual who pursues a legal challenge to assets will forfeit his or her inheritance or interest.

Pour-over will: A will used, upon death, to pass ownership of assets that weren't transferred to a revocable trust.

Power of appointment: The power granted to an individual under a trust that authorizes him or her to distribute assets on the termination of his or her interest in the trust or in certain other circumstances.

Power of attorney (POA): A legal document authorizing someone to act as attorney-in-fact for another person relating to financial and/or health matters. A "durable" POA continues if the person is incapacitated.

Qualified disclaimer: The formal refusal by a beneficiary to accept an inheritance or gift or to allow the inheritance or gift to pass to the successor beneficiary.

Probate: The legal process of settling an estate in which the validity of the will is proven, the deceased's assets are identified and distributed, and debts and taxes are paid.

Spendthrift clause: A clause in a will or trust restricting the ability of a beneficiary (such as a child under a specified age) to transfer or distribute assets.

Tenancy by the entirety: An ownership right exclusively for spouses in which property is owned by the pair. As with other joint property, ownership automatically passes to the surviving spouse on the death of the first spouse to die.

Tenancy in common: An ownership right in which each person possesses rights and ownership of an undivided interest in the property.

Bear in mind that this is just a brief overview of estate planning terms. Turn to your estate planning advisor for a more detailed explanation. ▮

Dispute over Norman Rockwell works illustrates importance of estate planning

In a recent case, a federal court ruled on the ownership of four Norman Rockwell illustrations. The case demonstrates the importance of careful planning for the disposition of personal property. This includes preparing a thorough accounting of such property in an estate and documenting significant gifts.

Details of the case

The case — *Elam v. Early* — involved four large illustrations — collectively known as "So You Want to See the President?" — created by Norman Rockwell in 1943 and gifted to Stephen T. Early, President Franklin Roosevelt's longtime press secretary. Fast-forward 80 years to a dispute over ownership of the illustrations among Early's descendants. Early died intestate (without a will) in 1951, survived by his wife and three children.

At the time of the dispute, Early's wife and all three children were also deceased. One of his grandchildren (the plaintiff) sought a judgment declaring him the sole owner of the illustrations. The defendants — two other grandchildren and Early's daughter-in-law — claimed that, under the laws of intestate succession, they each had a claim for partial ownership of the illustrations.

The plaintiff asserted that Early had gifted the illustrations to his mother in 1949 and that he acquired sole ownership through a gift or inheritance from his mother.

Possession is nine-tenths of the law

The U.S. District Court for the Eastern District of Virginia ruled in favor of the plaintiff, finding that he was the sole and rightful owner of the illustrations. Noting that "possession is nine-tenths of the law," the court explained that there's a presumption that the individual in physical possession of the property is the owner, which can be overcome by proof of superior title. In this case, the evidence showed that the plaintiff's mother had physical possession of the illustrations from 1960 (or at least 1972) until 1978, when they were loaned to the White House until 2022.

As the last person to physically possess the illustrations, the plaintiff's mother — and, therefore, the plaintiff — enjoyed a presumption of ownership. The defendants offered several theories to rebut the presumption, but the court found all of them to be insufficient.

Their primary argument was that the plaintiff offered no evidence that Early gifted the illustrations to the plaintiff's mother, so that they must have passed through the laws of intestate succession. But pointing to this lack of evidence wasn't enough for the defendants to meet their burden of producing evidence of superior title. The defendants also attempted to rebut the presumption under a theory of theft by the plaintiff, but offered no proof.

Not only did the defendants fail to meet their burden, but the evidence actually supported the conclusion that the plaintiff had superior title. Most significant, when Early died, the official accounting of his estate didn't include the illustrations, even though, as the defendants admitted, they were their "most precious and prized possession."

To ensure that your wishes are carried out, it's critical to prepare a complete inventory of personal property and to carefully document lifetime gifts.

The accounting — deemed "a true and perfect inventory" of Early's estate — was signed under oath by Early's wife and included assets worth as little as $1.50. "One can only conclude," the court reasoned, "that the illustrations were not a part of … Early's estate because he had already gifted them during his lifetime."

This conclusion was supported by the fact that, of Early's heirs, only the plaintiff's mother referred to the illustrations in her estate plan. Although the defendants offered several hypotheses for the omission of the illustrations from the other heirs' estates — including tax avoidance — the court dismissed them as "rank speculation."

Document your gifts

As this case illustrates, to ensure that your wishes are carried out, it's critical to prepare a complete inventory of personal property and to carefully document lifetime gifts. Had Early documented the gift to his daughter, the parties may have avoided litigation. ▮

ESTATE PLANNING RED FLAG

You haven't signed a HIPAA authorization

An important part of estate planning is to empower people you trust to make health care decisions on your behalf in the event you become incapacitated by an illness or injury and are unable to communicate your wishes. Common documents used for this purpose include:

- A living will, which expresses your preferences regarding life-sustaining medical treatment, and
- A health care power of attorney, which authorizes your representative to make medical decisions on your behalf.

Even if you've signed these documents, however, your representatives may not be able to make informed decisions about your care unless they have access to your medical records and information. That's because the Health Insurance Portability and Accountability Act (HIPAA) prohibits health care providers from using certain sensitive patient health information or sharing it with third parties absent the patient's consent. So, to ensure that your living will or health care power of attorney is effective, you should also sign a HIPAA authorization.

To be valid, a HIPAA authorization must meet certain requirements. Among other things, it must:

- Specify the health information that may be used or disclosed,
- Specify the person or class of persons authorized to use or disclose the information,
- Specify the person or class of persons to whom the information may be disclosed,
- Describe the purpose of the requested use or disclosure (for example, simply say, "at the request of the individual"),
- Set an expiration date or expiration event (for example, "the end of the research study"), and
- Be signed and dated by you.

A HIPAA authorization may be incorporated into your living will, health care power of attorney or other document, but it may be a good idea to use a standalone authorization. Some health care providers are reluctant to honor older authorizations, so your document should be updated every few years.

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Legal Insight. Business Instinct. Community Impact.

Founded in 1925, the Shumaker team of more than 300 lawyers and advisors is a premier provider of legal and legislative solutions, focused on being a positive and impactful difference maker for our clients and in the communities we serve. Aligned with this mission, we are committed to understanding your business in order to provide the exact legal resources you need.

Our firm's presence in multiple states dramatically increases our ability to meet our clients' estate planning and estate administration needs. Shumaker attorneys are located across our 12 offices in Toledo, Columbus, and Akron, Ohio; Tampa, Sarasota, Tallahassee, Dade City, and St. Petersburg, Florida; Bloomington, Minnesota; Charleston and Greenville, South Carolina; and Charlotte, North Carolina. In total, we have attorneys licensed to practice in 26 states, the District of Columbia, Puerto Rico, and Ontario, Canada and have established relationships with partner firms in the other states to seamlessly manage transactions across state lines.

Wealth Strategies

Shumaker's Wealth Strategies Service Line focuses on all areas of personal succession, business succession, insurance, asset protection, and charitable giving planning to develop fully informed estate plans that meet the specific needs and wishes of individuals, families, and business owners. Our attorneys regularly advise high-net-worth individuals and business owners on estate planning strategies that maximize wealth preservation and minimize taxes on transfers to family members, charities, and other recipients. Recognizing the importance of a strong lawyer-client relationship, we work as strategic partners with our clients, allowing us to respond effectively to their evolving estate planning and estate administration objectives.

Since the complexities of estate planning can involve many areas of the law, we arrange for clients whose complex estate plans are impacted by tax, corporate, and pension planning issues to consult with firm colleagues in these areas in order to develop fully informed plans. Clients depend on our familiarity with all aspects of the estate planning and administration process, as well as with the latest planning tools and techniques, to help them achieve their goals.

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We welcome the opportunity to discuss your situation and provide the services required to help you achieve your estate planning goals. Please call us today and let us know how we can be of assistance.

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