SECRETS THAT SHOULD BE TOLD

Last week I received an urgent call from a young lady who was quite distressed. She explained that her grandfather, whose estate plan I had prepared a couple of years ago, was in the hospital with a serious illness. One of his daughters (her aunt) had been to the hospital and was "raising Cain" with the doctors and other family members. This aunt had also tried to gain access to his house and assets. The problem was that this aunt was a known drug addict and, in general, a "bad actor". Because she was legally the next of kin, she was seeking to assert authority over her father's affairs.

Fortunately for my client, he had foreseen the potential problems that this daughter could present. He had created an estate plan that put control of his financial affairs and medical decisions in the hands of his mature, responsible granddaughter (the person that called me) through his living trust, power of attorney and advance health care directive. The problem was, however, that he had never disclosed those facts to the granddaughter. Had he told her about the power he had given her in his estate plan and told her where to find the relevant documents, a lot of chaos could have been avoided.

One of the primary reasons that living trusts are favored is that, unlike a will, they are not subject to public inspection. A will becomes a public document when it goes through probate. On the other hand, a living trust is not subject to probate and thus the grantor can keep his or her affairs private. Privacy however, can be carried too far. As the above case demonstrates, it is important that a person creating an estate plan tell those who need to know (1) that an estate plan has been created, (2) the identity of persons appointed as successor trustees, agents under a power of attorney or health care directive, or guardian for minor children of their appointment, and (3) where to find the estate planning documents.

On the subject of privacy, it should be noted that a recently adopted federal law concerning privacy of medical information may affect some existing estate plans. Many common provisions in living trusts, powers of attorney and advance health care directives require that a doctor render an opinion as to a person's mental and/or physical capacity in order for others to assume power over that person's affairs. However, under the new law, called the Health Insurance Portability and Accountability Act (HIPAA), many doctors and health care providers will not provide the necessary opinions or access to medical information to third parties without an express waiver of the HIPAA privacy provision. Thus, if you have an estate plan executed prior to 2004, you may wish to have a HIPAA waiver prepared and included in your estate plan.