Ep. 209 | Documents Aren’t a Plan: The Truth About Estate Planning With Marty Shenkman

The Patti Brennan Show

Editorial note: This transcript has been edited for clarity and readability by AI. Filler words, repetitions, and informal speech patterns have been cleaned up while preserving the original voices and meaning of both speakers.

Patti: Hi everybody, welcome to the Patti Brennan Show. Whether you have $20, $20 million, or $200 million, this show is for those of you who want to protect, grow, and use your assets to live your very best lives.

I am so excited about today’s show. I have with me Martin Shenkman, an estate planning attorney extraordinaire. Marty has written 40 books and over 1,400 articles, and before we started today, he and I were riffing about all the things we see in this space. The real issue, Marty, is that so many people think they have an estate plan because they have a will or a trust. But what we often find is that the legal, tax, and financial pieces are not working together. The family is not involved. The values are not reflected in any of it. And people are putting their heads in the sand, thinking AI is going to solve the problem. It is not. What we want to talk about today is the difference between having documents and having a well-coordinated plan. Welcome to the show.

Marty: Thank you. And just so everyone knows, you should call me Marty. The only person who ever called me Martin was my mother, and it always meant I was in trouble.

Documents Are Not a Plan

Marty: Part of the problem is that online services have sold people on the idea that estate planning means getting a document. You pay a fee, you get a trust, you check it off, and you move on. That almost never accomplishes what anyone needs, regardless of how much wealth they have.

And sophistication in planning is not just for the ultra-wealthy. Life gets complicated for a lot of us. Religion, health issues, blended families, addiction, special needs—every one of those factors has implications for how a plan should be structured. Too many people just want to check the box. Checking the box is not planning.

Patti: I hear it all the time. “I have this big thick document. I don’t know what it says, and I’ll never need most of it.” But the whole point of a comprehensive document is to anticipate every possible scenario. If those what-ifs are not addressed in writing, your family will not have solutions when they need them most.

Marty: Exactly. And when you distribute assets outright to a child or heir, you are exposing them to every risk life brings—lawsuits, divorce, mental health challenges. We live in a deeply litigious society. A 50% divorce rate. A 20% lifetime rate of mental health issues. Why would you not protect those assets in a long-term trust?

The Transmission of Values, Not Just Wealth

Marty: I came up with a phrase about 40 years ago: estate planning should not merely be about the transmission of wealth, but about the transmission of values. If you are not preparing your heirs for the wealth they are going to receive, things are not going to go well.

Patti: The family vacation home is a perfect example. Do all the kids want to keep it? How will they share it? Some of the worst fights I have seen in 30 years of this work have started over who gets the house for Christmas week.

Marty: Some of the worst fights in my 40-year career have been over that exact thing. Everyone wants it for Christmas and New Year’s. Nobody wants it in March. You have to have those conversations while you can still have them, and structure the plan to reflect what the family actually wants.

What Is a SLAT and Why Does It Matter?

Patti: Let’s talk about one of the most popular planning tools right now: the Spousal Lifetime Access Trust, or SLAT. Marty, can you break down what it is, how it works, and what questions people should be asking but rarely do?

Marty: A SLAT is a trust where one spouse creates a trust for the other. The spouse is named as a beneficiary, along with children, grandchildren, and future descendants. The concept is this: if a couple has $200 in assets and each puts $50 into a trust for the other, they have removed half of their wealth from the reach of creditors or the IRS—but they can still access 100% of their assets indirectly. As long as both spouses are alive and married, the money is accessible.

I take my own medicine. In 2012, my wife and I set up non-reciprocal SLATs for each other. The reason they are non-reciprocal is critical: if the trusts are mirror images of each other, the IRS can uncross them or a creditor can pierce them. The two trusts must be materially different.

With proposals in Congress to reduce the estate tax exemption from $15 million down to $3.5 million, this kind of planning is as relevant as ever. And do not get distracted by acronyms. A SLAT, an ILIT, a SLANT, a hybrid DAPT—these are all variations on the same concept. If you don’t understand the acronym, ask someone to explain it in plain English before you proceed.

Patti: One thing we have always been taught is that you need to fully fund a SLAT to make it worthwhile. But you are using them for people with far less. Tell us more about that.

SLATs Are Not Just for the Ultra-Wealthy

Marty: That is one of the critical misconceptions in this entire field. People take a very narrow view of what a tool can do. A SLAT is one of the most powerful estate planning tools available for high-net-worth couples—but it is also genuinely valuable for people worth two or three million dollars, or even less.

Here is an example. Two young physicians in their late 30s. They are both surgeons. Surgeons face roughly a 20% annual lawsuit rate. They want asset protection, but they are waiting until they have more money to start planning. That is a mistake. Create the trust now, before any claim exists. Courts have consistently recognized that a trust created long before a claim arose is far more defensible. If you wait until you have millions to put in, you may also have outstanding claims that make funding the trust complicated or legally problematic.

You can start with a home-state SLAT, a family member trustee, and a trust protector who has the power to move the trust or change the trustee later. As the wealth grows, you enhance it. You have gained years of what I call fermentation—time that strengthens and deepens the quality of the plan.

Funding gradually over time also makes it harder for a creditor to argue fraudulent conveyance. Putting in $200,000 one year, $100,000 the next, $150,000 after that is very different from moving everything at once.

Is an Irrevocable Trust Really Irrevocable?

Patti: You mentioned some backdoors earlier. Is an irrevocable trust ever truly irrevocable?

Marty: The world has evolved significantly here. There are several mechanisms that can be built into a trust to allow for change over time, even if the trust is technically irrevocable.

A limited power of appointment allows someone—a family member, a beneficiary, or a third party—to redirect trust assets to another trust within certain parameters. A trust protector can be named with authority to make certain types of changes. And then there is decanting: creating a new trust and pouring the old trust into it. You generally cannot change the beneficiaries, but you can modify administrative provisions significantly.

One of the most common reasons trusts are decanted today is to extend the term. If you have an old trust that pays out to children at age 30 or 35, have it decanted into a longer-term trust. Why hand assets outright to someone if they could be sued, divorced, or struggling with addiction the following year? Protecting them is not a sign of distrust. It is a sign of wisdom.

Patti: And the word “shall” in a trust document is one of my biggest pet peeves. The trustee shall pay income. The word “may” is so much more powerful. Give the trustee the flexibility to make a judgment call based on what is happening at the time. Do not force their hand.

Basis Planning: The Capital Gains Strategy Most People Miss

Marty: Let’s talk about basis planning, because this is where SLATs become even more powerful.

Say you bought a stock for five dollars a share and it is now worth $1,000 a share. You want to reduce your concentration risk, but selling means a significant capital gains tax. That is not necessarily wrong—but is there a better way?

In the physician couple example I mentioned earlier, each had an elderly parent they were already helping financially. We made each parent a beneficiary of the trust the other spouse created. We then gave each parent what is called a general power of appointment—a technical term that essentially means the parent can designate who receives those assets at death, including their own creditors or estate. Because the parent holds this general power, all of the trust assets are included in the parent's estate for tax purposes. And because assets included in an estate receive a step-up in basis to fair market value at death, every capital gain in that trust disappears. The couple can sell whatever they want the next day with zero capital gains cost.

So what we have taken is a tool that looks, on the surface, like it is only for people worth $30 million and up, and we have made it genuinely valuable for someone worth $1 or $2 million. Asset protection, income tax planning, basis step-up. These are not separate strategies. They are all achievable within a well-drafted SLAT.

The Lego Approach to Estate Planning

Marty: Here is a different way to think about how estate planning documents should be built. Most lawyers pull a standard form from a database and mark it up for the client. The amount of real customization that can happen is limited. I prefer what I call the Lego approach.

Instead of starting with a form and modifying it, I start by identifying the specific building blocks the client needs. Should you be able to access the trust you created if your spouse dies? That is one building block. Should there be a loan provision as a safety valve? Another building block. A tax reimbursement clause? Another. Each block adds a small amount of cost and complexity, but the result is a document built precisely for you, not a marked-up template built for an anonymous client.

And critically, the financial advisor and the insurance consultant need to be part of those decisions. If the financial modeling shows that the client will not need to access the trust assets for the next decade, maybe a loan provision is enough and you do not need to take on the legal risk of a self-settled provision. If a $2 million term life insurance policy can backstop the plan, that might be a cleaner solution than adding the spouse back as a beneficiary.

Patti: It is like an orchestra. When every musician plays in harmony, the music is extraordinary. When one person is playing off-script, it falls apart. That is exactly what we are talking about with a coordinated planning team.

What to Do Right Now: Action Steps

Patti: Let's close with practical next steps. People listening have documents. What should they do?

Marty: First, ask yourself how old your documents are. Tax laws change with every administration. Your financial situation has likely changed too. If your documents are more than a few years old, they need to be reviewed.

Second, get a team. An independent attorney, a financial advisor, an insurance consultant. When advisors are independent of each other, the client is protected. Nobody is selling you something.

Third, take a holistic view. Start with your goals. Who owns what? How are your assets titled? Because you can have the best will in the world, and if all of your assets have beneficiary designations, none of it matters. Nothing flows through your estate plan.

Fourth, do not dismiss AI as a tool for generating questions and exploring ideas—but understand its limits. I have been practicing for over 40 years and have written 44 books and over 1,400 articles. I have a deep well of knowledge that allows me to recognize when AI is wrong. Without that foundation, you may go down a rabbit hole that leads nowhere useful. Use AI to formulate questions, not to write your trust.

Fifth, and this applies if you are using an online service: get educated first. Watch videos, read articles. Understand what you are about to create before you start clicking. And do not do it alone. Bring in a trusted friend who is not a beneficiary to be your objective second set of eyes.

Closing Thoughts

Patti: Marty, thank you so much. You are incredible. What really stood out to me today was the depth of thought you bring to each situation, the different states, the different trust structures, the questions most people never think to ask. For our listeners, you can find Marty’s free educational resources at ShenkmanLaw.com, where he has hundreds of articles and videos covering even the most sophisticated topics. There is nothing sold on the site. It is purely educational.

Marty: Thank you, Patti. And to your listeners: make sure your advisors are keeping up. The world is changing rapidly. New case law, new tax laws, new planning opportunities and risks emerge constantly. A great planning team catches those changes before they become problems.

Patti: If you have questions about anything we talked about today, go to keyfinancialinc.com. We are here to help. Thank you for joining us today, and take care.