Ep21: Cyber Security

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PATTI BRENNAN: Hi, everybody. Welcome to the "Patti Brennan Show." Hey, whether you have $20 or $20 million, this show is for those of you who want to protect, grow, and use your assets to live your very best lives.

Today I have with me Stacey McConnell. Stacey is the chair of the Estate Planning Department at Lamb McErlane. She is a wonderful, wonderful attorney for many, many reasons.

First of all, Stacey has five children of her own. She is the oldest of five children so she's truly the definition of the sandwich generation. Stacey, welcome to the show.

STACEY MCCONNELL: Thank you for having me Patti.

PATTI: Absolutely. Today we're talking about the most common mistakes people make when drafting their wills. It's not just in the drafting of the wills. It's in the planning itself.

When you think about it, probably the number one mistake that you and I find is that people don't have wills in the first place, right?

STACEY: Correct. A very large proportion of the public does not have a will.

PATTI: That's unfortunate for a couple of reasons.

STACEY: Correct.

PATTI: Not just in terms of, gee, nobody knows what you want to do with what you've worked so hard for. Also, the other documents, like powers of attorney, financial powers of attorney, healthcare power of attorney, that go along with the estate planning package.

STACEY: Yes. The complete package is a will, a financial power of attorney, and a healthcare power. Everybody needs one of each of those for a complete estate plan.

PATTI: The worst thing that could happen is you don't have these documents. Whether you're married or single, car accidents happen. People get into the hospital. Who's going to pay your bills?

STACEY: If you don't have a power of attorney, the family ends up in court to have a guardian appointed, which is not a good result. It becomes public. All of your assets are public. It's very expensive – lots of legal fees.

PATTI: That's the last thing you need when somebody's sick.

STACEY: Absolutely.

PATTI: That's interesting. Let's assume that people have wills. What would you say would be the next most common mistake that people make?

STACEY: Well, not going back and looking at them periodically. You shouldn't prepare a will and put it in the drawer, and forget about it for 20 years.

PATTI: That's a really good point. Stacey, you and I worked on a case together where husband and wife had a will they drafted. They put in motion 25 years ago, never looked at it again, ended up becoming very successful, having significant assets, and the wife died quite suddenly. Unfortunately, in this case, the husband was stuck with what they put 25 years ago.

It is really important to take a look at what you have in place. For those of you who are listening, I know you're thinking, "Yeah, yeah, yeah, I know. I probably should look at it."

Stacey, why should they look at it? What are they looking for? What could have changed?

STACEY: Certainly, the tax law could have changed, and that would be a detriment, probably not so much to them, but to their heirs. They may not like the executor they choose.

They'll be surprised who they pick, perhaps, maybe a child that's not been financially very diligent and would not be a great executor.

Or power of attorney, they pick someone maybe that's not even living their brother or sister, someone that's not even in the picture anymore.

PATTI: All good points. Going back to the tax law, 25 years ago, the amount that you could leave to the next generation was $600,000, right?

STACEY: That's right.

PATTI: If your will was done in a way to optimize the tax planning, you might have a lot of assets going into a trust for the surviving spouse. It might turn out that you don't even need it anymore.

The surviving spouse is stuck with the terms of this trust that you don't even need.

STACEY: Correct. That is a scenario we've seen many, many times for that very reason.

PATTI: In that case, Stacey, is there anything that you can do with the first death, or is it a mandatory? It's got to go into trust and spouse's access to the income, for example.

STACEY: You may be able to work with the whole family to do what's called a non judicial settlement agreement.

They all agree maybe not have the trust be in place at all, a shortened term, or something different about it, but that would involve working with the spouse and the kids and grown grandchildren.

It might be a solution, but it might not be a solution, depending on the situation.

PATTI: It's very interesting. I know that when my dad passed away in 1997, I was the co executor or I was the executor actually, turned out to be. I was also the co trustee with my mom.

It was interesting because depending on what you want to have happened for your surviving spouse and your children, that may or may not work out.

In that particular case, it worked because I was working with my mom, making sure that she was financially secure. From the court's perspective, I was considered an adverse party because eventually, I'm one of the beneficiaries of that trust.

STACEY: Whatever doesn't go to your father would go to you. That's considered adverse enough from a tax perspective.

PATTI: That's excellent. That's excellent. You don't want to do everything from a tax planning perspective, especially given the fact that under current law, you can leave $11 million plus per person. A couple can leave $22 million.

In that case, Stacey, the question then comes. Do you really even need a trust at all? Back then, if it didn't go into a trust, you lost that credit. Right?

STACEY: Right. You may not need a trust, particularly for your spouse, but you may for other reasons. That's something you want to sit down and evaluate.

Are you worried about a second marriage? Are you worried about the spouse's capacity maybe at the time of your death? Those are other reasons to have a trust, but there may not be a tax reason anymore.

PATTI: How about trusts for children? In today's world, we find a lot of kids are underemployed. Or the opposite could have happened. They won the lottery, and they're doing really well.

They may want or may not want to receive the assets themselves but instead have the assets go directly to their children. In that case, that would be a generation skipping trust. Right?

STACEY: Yes, and that's where you need to keep pulling out that trust. Maybe when you wrote it 10 years ago, it made sense to go to certain ages and equally to all the kids. Now, it doesn't make sense anymore that one share maybe should skip to grandchildren. That's where you need to keep looking at it.

PATTI: That's an excellent point. I think the other thing that I've seen – and you've seen it as well is, unfortunately, in America today, we have a crisis. It's the opioid crisis. What I've seen you do brilliantly, if I may add, is to add a substance abuse clause. Can you explain to our listeners what that's all about?

STACEY: Yes. The trustee can make a determination at the time when money could potentially be handed out about whether if it's appropriate for each beneficiary. If they see a family member that's struggling with a drug addiction, they may be able to withhold money going directly to the beneficiary.

Be able to spend money for their therapy, their care, even their housing but not hand them money, which could not be a good result for them at all.

PATTI: That's enabling in a whole different level, isn't it?

STACEY: Yes.

PATTI: You don't want necessarily have what you've worked for going to some drug dealer. When we think about some of the other things to consider as it relates to the estate planning, let's talk about cost basis. That's a technical loophole that exists in the law today. How does that work, and how can we optimize the tax planning for the listeners today?

STACEY: Cost basis is important from an income tax perspective. When you buy a stock, your cost basis is what you paid for it. That remains the same through your lifetime. When you die, the cost basis steps up to the value on the date of your death.

That's a great benefit to your heirs, because they can sell that stock and not pay a capital gain, whereas you would have had to pay a capital gain.

PATTI: It's a really good point. I know that when my dad got sick, the first thing we did was that we moved the title of their home up in the Poconos from my mom's name to my dad's name. They had paid $50,000 for it. Upon his death, it was worth $250,000.

Mom didn't want to keep the Poconos. It was too much for her to take care of. The beauty of that was that when she sold it, there was no income tax due on that $200,000 gain.

That was a huge benefit for my mom. She was able to keep that 40, 50 thousand dollars that they would have had to pay in taxes. Being aware of those opportunities.

I was referred into a case recently where, unfortunately, the wife got a bad diagnosis. We had our initial meeting. Then time passed. They were busy with the therapies, treatments, and things of that nature. They came back in about three or four months later.

At that time, we did that balance sheet evaluation, and we began to move the assets into her name. Unfortunately, she only lived eight months. The benefit that we were trying to get was only partially fulfilled.

What is the deal on that, Stacey? Why don't you tell our listeners? How much time did she have to own those assets in order for us to get the full benefit of the full step up in cost basis?

STACEY: She needs to survive one year after the transfer, so that didn't happen. Now, they're not in any worse situation than they would have been without the planning. That just didn't work in this case.

PATTI: That's interesting. It was a heads you win, tails you break even?

STACEY: Correct.

PATTI: If she had lived the 12 months, they would have gotten 100 percent step up in basis, no income taxes if they wanted to sell those assets. Tails they break even, they're no worse off than they were if they hadn't done anything at all.

STACEY: Correct.

PATTI: That to me is a win win situation. You try to do these things to optimize. Again, it's not something that you want to think about when someone gets his diagnosis but somebody should be.

STACEY: At least, present the options to the family. They can decide whether or not they want to do it or not.

PATTI: Let's go back to irrevocable trust. I think it's important for our listeners to hear from you.

Are irrevocable trusts really irrevocable?

STACEY: They used to be. You couldn't change them without going to court for a modification. Starting in 2005, there was a change in the trust law. Now, by family agreement – what's called a non judicial settlement agreement – everyone can agree to modify the trust.

Some of these trusts have been around a long time. Maybe they own a life insurance policy from 1990. The provisions aren't the right thing anymore, but they're not irrevocable anymore. With the family agreement, they can modify them.

PATTI: That's good to know. Don't be afraid to set these trusts up. We often talk about trust. It used to be that people did trust merely for tax planning, but I find that trust can be wonderful tools to protect the people that you love sometimes from themselves and usually from predators.

You can protect them in the event of a divorce – those assets never become a marital asset lawsuits, things of that nature. Stacey, you know my kids. I often tell a story of my kids and when they were driving. When they were learning to drive, they were terrible, terrible drivers.

Unfortunately, if one of my kids made a bad choice and was drinking and driving and killed someone, who's going to get sued? Ed and I would have been sued for everything we have.

You can protect your children against things of that nature if it's owned by a trust. The child doesn't own those assets and therefore cannot be attached in any way. Is that right?

STACEY: That's right.

PATTI: Are there any special considerations when you're setting up a trust for those reasons, especially as it relates to the people that you choose as trustees? How does that work?

STACEY: You need to pick an independent trustee so that the creditors can't attack it and say, "Well, you just picked a family member." They're going to do for that person, that is the debtor, whatever they want. We can attack and invade the trust. If you have an independent trustee, it's going to be much better protected from creditors or in a divorce situation.

PATTI: If someone wants to have that level of protection, an independent trustee can be a bank or an attorney. Or could it be a friend?

STACEY: Yes. It's somebody who doesn't have anything in the game, but there are standards in the trust they're supposed to follow, and they have obligation to the other beneficiaries of the trust. They truly are independent, because they're accountable to every beneficiary of that trust.

PATTI: In other words, if they don't do it correctly, they stand to be sued by the eventual beneficiaries by being too liberal. That's why the independent trustee in this situation works.

Again, you're using that kind of concept of adverse party so that someone – the posing counsel who's representing the future ex wife of your son – he can't come back and say, "Wait a minute. There's a quid pro quo going on here. You're just doing this for, you know, this woman's ex husband."

Actually, the trustee really has an obligation to their children. Therefore, is unlikely to be distributing assets liberally and therefore can't be attached, right?

STACEY: Correct, right. If you had picked a brother or a sister, that's more problematic. They could say, "Well, I won't give you money in your trust if you don't give me in my trust," and vice versa in that situation. That's a very different arrangement.

PATTI: I think that's a very interesting thing that you bring up in several meetings about choosing siblings to be co trustees of each other's trust. Why is that? You've had a lot of experience in that, haven't you?

STACEY: Yes, I have. I think that it can really ruin a relationship among siblings. Think about having to go to your brother and sister to ask for money. Generally, you're supposed to reveal your budget and why you need the money pursuant to the provisions of the trust. That is not the kind of relationship that you want to have with a sibling.

We've also had terrible ones where it's a second marriage, and the stepchild is named as trustee for the stepmother. That is not a good relationship either in terms of keeping a civil relationship between the two of them.

He's definitely an independent, because whatever doesn't go to her, goes to him or her, but it's very bad for the personal relationship between the two.

PATTI: It can definitely get a little achy there. It is very, very interesting. I think that another thing as it relates to all of these in terms of the people that you choose as the trustees or the powers of attorney, it's not just the people. It's the powers that you give to those people.

I know that you're working on a case right now that is a very interesting case. It's actually going to go to court. Tell me more about that.

STACEY: This is a situation where the man was very ill. It was his second marriage, and he had three daughters from the first marriage. He wrote a will that said, "I leave everything under my will to my wife but only because I have a directed beneficiary account that's gonna benefit my three daughters."

He then became more ill, and his wife got a power of attorney for him that included the power to change a beneficiary. A few days before he died, she changed the beneficiary on that directed beneficiary account – it was an IRA account – to herself.

Clearly, that was not in line with what he would have wanted. She did it, so now we're going to court to try to undo what happened there, because she actually had the power under the power of attorney to change a beneficiary.

PATTI: That is really interesting. In that case, the power of attorney gave her that opportunity to change the beneficiary. From a legal perspective, she did have the power to do that. However, doing it a couple of days before he died, it just doesn't meet the smell test. Does it?

STACEY: No. Luckily, the lawyer who wrote this power of attorney was very good. She mentioned the fact that any use of that type of a power to make a gift like that should be in line with his whole estate plan.

We think we'll be successful in this case because of what he had written in his will, that he wanted those accounts to go to those children. They're otherwise disinherited.

PATTI: Very interesting. Very interesting.

STACEY: We'll see what happens.

PATTI: These little nuances in the documents can really make a difference. It can make or break the overall estate plan. I think that is one example. The other example is gifts. The power of attorney may or may not be given the opportunity to gift assets while you're still alive to other people and to themselves.

STACEY: Right. We try to really speak carefully with the clients about those gift provisions. Sometimes they're appropriate, sometimes they might be too broad. You just have to look at the situation and see what's right and really go through those powers with the client and see if it's what is appropriate for them.

PATTI: Stacey, thank you so much for joining us today and bringing not just your expertise but your wisdom to the show and to our listeners today.

For those of you who want to reach out to Stacey directly, we'll have her contact information in the show notes. Again, Stacey, you've made such a difference for us and for all of our clients. Thank you so much for joining us.

STACEY: Thank you, Patti.

PATTI: OK folks. That’s it for today, so tune in to our next show. In the meantime, I hope y’all have just a wonderful day. This is Patti Brennan. You take care and have a great day.