The Carter Center Presents:
Common Estate Planning Mistakes

With Guests: Emily Karr, Partner, Stoel Rives LLP &
Martin O’Toole, Partner, Harter Secrest & Emery LLP

Hosted By: Barry Nickelsberg, CAP, Chief Development Officer for Estate & Gift Planning
&
Mark N. Williams, Esq., CAP, Senior Associate Director
Thank You

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Thank You for Your Trust

We would also like to express our gratitude for allowing us to serve as your resource; it is a privilege to be trusted to provide you with information about these important topics.
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Emily Karr

- Head of Benefits, Tax and Private Client Group at Stoel Rives LLP
- Fellow of The American College of Trust & Estate Counsel
- Chair of the Board of Oregon Humanities
- Past president of the Estate Planning Council of Portland
Martin O’Toole

- Contributing author, *Harris Guide* and *New York Wills*

- 2011 Trusts & Estates Lawyer of the Year – Rochester, NY

- Selected by peers as one of *The Best Lawyers in America*® in Estate Planning

- Frequent contributor to publications on Trust & Estate law.
Notion of Estate Planning

• What Happens to His/Her Assets When Someone Dies?
  - Will or Living Trust are principal documents
  - Beneficiary Designation/Transfer on Death Designations, Insurance, IRAs, Qualified Plans and Annuities
  - Joint assets

• Documents to Deal With Disability
  - Power of Attorney
  - Health Care Proxy
Estate Planning Can Also Deal With

○ Needs of Disabled Individuals
  - Qualification for Medicaid
  - Supplemental Needs Trusts/Special Needs Trusts
  - Guardianship/Conservatorship

○ Handling Assets in Marriage
  - Pre-nuptial Agreement
  - Post-nuptial Agreement
  - Waiver of Spousal Rights in Event of Death
Estate Planning Also Deals With

- Gifts
  - To individuals: outright or in trust
  - To charity: outright or in trust
  - “Mixed” Individual/Charity:
    - Remainder Trusts
    - Lead Trusts
    - Charitable Gift Annuities
    - Life Estate in Real Property
Many individuals die with no advanced planning

For assets owned at death, states have rules that control where the property goes

State “plan” may not be what person would want

For assets while person is alive, need guardianship or conservatorship

For health care decisions, state may have law specifies who the decision-maker is

Individuals may also be unable to make decisions or care for themselves and have no plan in place to address their needs
Mistake #2: Failure to Supply/Gather Adequate Information (Family, Assets, Liabilities, Domicile, Prior Planning)

- An estate planning professional cannot plan for what he or she does not know.
- Information is best gathered in advance of initial meeting with any estate planning professional.
- Note to Professional Advisors: Do not make information gathering too difficult (e.g., account numbers generally not needed).
Mistake #3: Failure to Think in Advance About Plan

- Even in seemingly simple estates, planning may involve difficult decisions.
- Meetings with estate planning professionals are more efficient when you have done some thinking, even if preliminarily.
- Having done some advance thinking usually results in greater confidence that the plan reflects your wishes.
Mistake #4: Failure to Make Decisions/Ask for Clarification

- It is unrealistic to expect that most individuals will have every detail decided before meeting with the estate planning professionals.

- The planning meeting will discuss options and, in some cases, the impact of taxes.

- You should ask questions when there is something that you do not understand.
Mistake #4: Failure to Make Decisions/Ask for Clarification

- Professional estate planners should be sensitive to those topics that do not seem to be understood.

- In order for planning professionals to move the process along and produce drafts for your review, you will need to make some decisions, however tentative.
Mistake #5: Failure to Confront Hard Decisions

- Who should be executor or trustee? What is the difference?

- Preparedness of beneficiaries to handle assets responsibly

- Are all assets equally desirable (e.g., an interest in a vacation home for a child who is a continent away)?

- Second marriage: what to do for spouse and children from prior marriage?

- Control issues for closely held entities. What is a closely held entity? Same as a business?
Mistake #6: Bad Choices of People Left in Charge

- You need an executor or trustee who can make informed decisions promptly.
- Executors and/or trustees must be impartial.
- If there are concerns about giving a person too much discretion, consider a co-executor/trustee.
Mistake #7: Failure to Recognize Income-Related Implications of Assets (e.g., Regular IRAs, Annuities, Deferred Compensation, Stock Options)

- Under current law, some assets have built-in tax consequences
  - The “basis” (what you paid for the property) for income tax purposes in a home, or stocks, bonds, etc. (not in an annuity or IRA) have their basis reset at death
  - Generally, the change results in a “step-up,” so, capital gains are forgiven
  - This may change under the Biden Administration
Mistake #8: Failure to Understand Tax Consequences

- Many estate plans depend on certain assumptions about federal estate taxes
  - The unlimited marital deduction
  - The federal estate tax exemption has increased from $1M (2001) to $11.7M (2021)
- What does your plan look like if the exemption is reduced to $3.5M or $6M?
- The elimination of the step-up in basis would complicate planning
Mistake #9: Failure to Take Into Account Lifetime Planning (Including Loans)

- If you give loved ones disproportionate gifts during life, do you want your estate plan provide for equalization?

- Was it a gift or a loan? Not surprisingly, recollections can differ.

- If you loaned someone money, is the loan to be forgiven on your death?
  - If you don’t have enough “other assets” for other beneficiaries, will they have to worry about debtor/loved one paying on note?
Mistake #10: Failure to Consider Non-Probate Assets

- What is a Probate vs. Non-Probate asset?
- A Will controls your probate property as you designate
- A living trust controls your assets already titled to the trust or payable to the trust following death
Mistake #10: Failure to Consider Non-Probate Assets

- A common mistake is a lack of coordination among your beneficiary designations, your Will and/or your Living Trust
  - For example, if you name children as beneficiaries of a life insurance policy, the money will go to them outright; however, giving them something in your Will/Living Trust means other rules apply
  - In effect, have two estate plans?

- If you want to support charities in your estate plan, consider use of IRAs, qualified plans or annuities
  - This preserves assets without the built-in income (and therefore income tax) for individuals
Mistake #11: Failure to Provide for Debts, Taxes, etc.

- How will “known debts” (such as a mortgage) be paid?

- It is important to consider how possible estate taxes will be paid
  - The possibility of a reduction in the federal exemption/increase in rates complicates matters
Mistake #12: Opting for Simplicity When Complexity Would be Better

- The impulse is understandable: “Do I really need all these pages?”
- Depending on the situation, the answer is, unfortunately, “Yes.”
- Diagrams and explanations may be helpful
Mistake #13: Opting for Complexity When Simplicity Would be Better

- This is an issue more for the professional estate planner
- When people do not understand their estate plan, they will not have confidence in it, and may be reluctant to finalize it
- Planning should be as complicated as it needs to be — no more
Mistake #14: Considering Potential Problems with Personal Property

- The distribution of your personal items can be a flashpoint, particularly if there is some dysfunction or disharmony present in the family.

- Estate planning professionals encourage us to consider the ramifications of not spelling things out:
  - Be clear as to the items
  - Identify items with “permanency” ... no Post-It notes!
  - Date and sign any list
  - Update lists
Mistake #15: Inadequate Attention to Power of Attorney

- Who Will Serve?

- Scope of Authority: what are you comfortable asking your chosen representative(s) to do?

- Making gifts or changes to Beneficiary Designations: most states require this authority to be explicitly given

- Who will monitor?

- Accountability
Mistake #16: Failure to Finish Planning

- Documents: Try not to obsess (even though it is your final statement)
  - Don’t allow the pursuit of perfection to stop the estate planning process

- Beneficiary Designations
  - Provide forms or language (if done online)
  - Get confirmation from plan administrator or IRA custodian that designation was accepted
  - If you change a designation, you have changed the plan
Mistake #17: Off-Site Signing of Documents

- Offsite signing of estate planning documents – outside the presence of your attorney, is ill-advised

- Signing of documents can be difficult in a remote environment
  - Clients’ printing can be an issue (double-sided paper; change in pagination)
  - Good practice to review what client will be signing before pen is put to paper
Mistake #18: Failure to Update Plan As Needs & Circumstances Change

- A dual responsibility
  - Professional: reminding us of our need to regularly review our estate plans
  - Individual: Taking the initiative to call your professional advisors when your needs or circumstances change
Mistake #19: Failure to Keep Records & Provide Guidance for Your Representatives

- In our current digital age, when many of us bank and pay bills online, we need to consider what would be involved in accessing our financial records, if we were not around to provide direction.

- A simple question to ask: would anyone know where to look if you could not tell them?

- Security of user names and passwords is an obvious issue.
Mistake #20: Difficulty in Communicating Plans to Family

- Too Little: “Who do we call now that Dad has had a stroke?” or

- Too Much: Parent says: “Here is my plan, but I can change it.” Child hears: “Here is my plan.”

- An appropriate test: what do children need to know in order to have a fighting chance of managing assets?
Mistake #21: Failure to Communicate Desires Regarding Long Term Care & End of Life Decisions

- Your healthcare representative may not have much detail beyond authorizing discontinuing life support when death is imminent.

- You may be able to supplement instructions in a Health Care Proxy or Power of Attorney documents.

- If you don’t want to live in a nursing home, what are you prepared to do to stay in your home and have you communicated this in your estate plan?
Mistake #22: Family Dysfunction (Particularly as People Age)

- Family disharmony and dysfunction can frustrate estate planning
- Asking estate planning to undo years or decades of unhappiness is unreasonable
  - One possible solution: use an ethical Will to tell family members why you did what you did
- If you would like more information on Ethical Wills, please CLICK HERE to watch our webinar on this subject
Thank You!
Questions?