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JOHN P. TAMBOER, PLC

## 25 Common Estate Planning Mistakes and How to Avoid Them

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This is a guide to common estate planning mistakes that we see every day in our practice. Please use it when you complete your own estate plan.

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## Mistake #1

### Failure to Prepare and Sign a Will or Trust

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Recent studies indicate that more half of the U.S. adult population does not have basic estate planning documents in place. This leaves property distribution, appointment of fiduciaries, payment of debts, and support of spouses and children in doubt for millions of families.

Basic estate planning documents can prevent loss of property, decrease administrative expenses, reduce taxes, maintain family harmony, and protect your family.

**Solution:** You may have thought about planning your estate, but never found the time. Stop putting it off. It is easier and less expensive than you think.

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## Mistake #2

### Failure to Properly Store Estate Planning Documents

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You are the only person who knows where your estate planning documents are located. In order to administer your estate, a personal representative or trustee must be able to find your last will and testament, revocable trust, or other estate planning documents. Many documents go unused simply because no one knows where to find them. Estate planning documents may be stored by a probate court for safe keeping, but that can be an expensive option. It is up to you to store your documents where they are secure and can be found.

**Solution:** Discuss your estate plan with the persons that you expect to carry it out. Keep your estate plan current, and store it in a secure, but accessible, location. If you modify your estate plan, be sure that out-of-date documents are destroyed.

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## Mistake #3

### Failure to Properly Store Information About Assets

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The importance of this mistake cannot be overstated. Millions of dollars in bank accounts, life insurance, safe deposit boxes, bonds, and other assets goes unclaimed every year simply because no one knows it's there. If an asset remains unclaimed after a few years, it is turned over to the state government. Many people assume that the government knows where our property is located, or that there is a central database of financial accounts. There is not. It is up to you to keep track of your accounts and pass that information to your heirs.

**Solution:** Keep a comprehensive list of assets, and where to find them, with your estate planning documents. Include the name and address of your attorney, accountant, and financial advisor.

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## Mistake #4

### Appointing the Wrong Person to be Your Fiduciary

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A fiduciary is someone appointed to act for the benefit of another person. Planning an estate involves naming several fiduciaries. Executors, trustees, patient advocates, guardians, and agents acting under a power of attorney are fiduciaries that may play vital roles in managing and protecting property for you. The importance of the roles played by these individuals cannot be overlooked. And the wrong person appointed as executor or trustee can result in mismanagement of property and disharmony among family members.

**Solution:** Consult with your advisor regarding the various roles played by fiduciaries. A family member may be suitable to act as a fiduciary, but in other cases, a professional is the only logical choice. Careful consideration is the best solution.

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## Mistake #5

### Failure to Coordinate Assets with Estate Planning Documents

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Proper estate planning involves coordination of assets, beneficiaries, and documents to achieve a specific goal. Nothing happens by accident when it comes to transferring property to your heirs. If you are not certain *exactly* how your property will be transferred to your heirs, then you really do not have a plan.

Every estate plan should answer these questions: What property will be transferred to your heirs? How will they receive it? Who will be responsible to transfer the property? Who will receive the property, and in what proportions? When will the property be received?

The answer to these questions could be different for each type of asset that you own. Many people are not even aware that a last will and testament does not cover all types of property, or that a will must be admitted to probate in order for it to be used. We see the effects of improper planning every day -- assets that don't reach their intended recipient, or needless waste of money on post-death administrative costs.

**Solution:** Coordinate your estate plan so that each type of property is considered in light of your overall objectives. This requires an asset-by-asset review. There is no room for shortcuts on this important point.

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## Mistake #6

### Failure to Plan for Management of Assets for Minor Children

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The first step to plan your estate is to evaluate all of the property that you own now, including the value of your life insurance benefits. This exercise will help you understand the amount of assets that could be transferred to your children if you passed away. Unless you want all of your property to be distributed to your children at age 18, then you must have a properly drafted trust. In addition, you must also ensure that all of your assets are coordinated to work with your estate planning documents.

**Solution:** Incorporate a trust into your estate planning arrangement to provide for management of assets until your children reach an age specified by you. Your property will be available for the health care, education and support of your children, but a person appointed by you (a "trustee") will manage it for them.

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## Mistake #7

### Failure to Name a Guardian for Minor Children

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If you don't nominate a person to be the guardian of your children, then the probate court will do it for you. There may be several people among your family or friends who would be qualified to care for your children. Why leave them guessing on such an important matter?

Even while you are away from home on vacation or business travel, you should consider temporarily delegating parental authority to another person *in writing*. Michigan law expressly allows parents to delegate their authority for care of children for up to 6 months. This is especially important for a temporary guardian to make medical decisions for children.

**Solution:** Protect your children by appointing a guardian to care for them in your last will and testament, and by executing a temporary delegation of parental authority.

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## Mistake #8

### Failure to Maintain Adequate Life Insurance Coverage

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Life insurance benefits generate cash to support children and spouses, pay debts, continue a business, or pay estate taxes. For many people, life insurance coverage is the only source of cash at the time of death. Unfortunately, many families do not have enough life insurance coverage, even though the cost of insurance has fallen dramatically in the last few years.

**Solution:** Consult with an insurance professional regarding suitable coverage. There are a multitude of insurance products available, and coverage must be designed specifically to fit your budget and needs. We do not sell financial products, but we can suggest a qualified person who does.

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## Mistake #9

### Using Revocable Living Trusts to Avoid Probate in Michigan

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Living trusts are sold primarily to avoid probate even though other methods may be easier and less expensive to implement. Besides cost, there are significant drawbacks to using living trusts. For example, using a living trust may result in the loss of title insurance coverage, loss of protection from creditors for married couples, and loss of Medicaid eligibility for long term nursing care.

The following types of assets in Michigan can be transferred to heirs without probate, without using a living trust, and without any loss of control over the asset:

- Real property
- Motor Vehicles
- Bank Accounts
- Stocks
- Bonds
- Life Insurance
- 401K
- IRA
- Business interests
- Brokerage Accounts
- And Everything Else You Own . . .

**Solution:** Use our handbook entitled "Asset Transfer Guide to Avoid Probate in Michigan" to transfer all of your assets to your heirs upon death without probate, and without using a living trust.

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## Mistake #10

### Failure to Plan for Probate Outside of Michigan

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Post-death transfer of assets using probate administration outside of Michigan can be very expensive. It is easy to overlook these additional costs when planning your estate. However, if you own assets outside of Michigan, you should be aware that a Michigan probate court does not have jurisdiction to transfer those assets to your heirs. As a result, a separate probate proceeding must be started to handle out-of-state property.

**Solution:** Place any assets located outside of Michigan under the control of a living trust, or consult with an estate planning attorney in the jurisdiction where the asset is located for advice concerning non-probate transfers.

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## Mistake #11

### Using a Quit Claim Deed to Avoid Probate

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Many people are persuaded to transfer their real estate to their heirs using a quit claim deed in order to avoid probate. This form of do-it-yourself estate planning has numerous potential adverse consequences:

1. **Loss of homestead status.** A person's primary home is taxed at reduced property tax rates, which is referred to as "homestead" property. Transferring ownership of such property to a person that does not actually reside there will trigger the loss of homestead status, and result in higher property tax payments.
2. **Increase in Taxable Value.** Under Michigan's tax law, the taxable value of real property is "capped" (i.e., limited) for purposes of property tax assessments. However, when property is transferred to a new owner, the taxable value will be "uncapped" which results in higher property tax payments.
3. **Loss of Control.** Property transferred to another person using a quit claim deed cannot be reclaimed without his or her consent. In addition, the person to whom the property is transferred has no obligation to share the property with anyone else, even if that was the grantor's intent. Obviously, this often results in family disputes.

4. Loss of Medicaid Eligibility. Transferring property to another person for less than fair market value may result in a lengthy period of ineligibility for Medicaid benefits.

5. Gift Tax. Delivering a deed to another person, and recording it, may cause the IRS to construe the transfer of a home as a gift. This may cause the assessment of gift tax unless an appropriate return is filed and an exemption is claimed using available lifetime gift tax credits.

6. Capital Gains Tax. Property transferred to another person *after* death is given preferential treatment with respect to capital gains tax. On the other hand, lifetime transfers of property may result in much larger capital gains tax for the person to whom the property is transferred. Therefore, the savings obtained by avoiding probate may be outweighed by the capital gains tax.

7. Seizure by Creditors. Property transferred to another person may be seized by that person's creditors. This may result in a loss of the property if the transferee is sued, divorced, or becomes bankrupt. They could also use the property as collateral to assume another debt, or sell it to pay creditors.

8. Loss of Title Insurance: Transferring property by deed severs the title insurance coverage that was obtained when the property was purchased.

**Solution:** Don't use quit claim deeds to save money on probate. With our "Asset Transfer Guide to Avoid Probate in Michigan", you will be able to retain full control of your property, avoid probate, transfer property to your heirs, reduce your estate planning costs, and save taxes.

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## Mistake #12

### Using Joint Tenancy to Avoid Probate

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Using joint ownership as a way to avoid probate can be a costly mistake for several reasons: 1) any joint owner can take control of the property at any time, 2) creditors of any joint owner can seize the property, and 3) all joint owners must consent to any subsequent transfer of the property.

Joint ownership may also result in confusion concerning distribution of property following death because there are no written directions concerning how property should be handled. Michigan law establishes a presumption that jointly owned property belongs to the surviving joint owners, but that presumption can be overcome in court proceedings. Joint property is frequently the subject of litigation between family members.

**Solution:** We can prepare a comprehensive estate plan for you to avoid probate and transfer property to your heirs without the risks associated with joint tenancy.

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## Mistake #13

### Failure to Plan for Estate Taxes

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Estate taxes are not just for “wealthy” people. The value of your taxable estate includes all of your assets, including life insurance benefits, annuities, small business interests, recreational property, and retirement accounts - regardless of where in the world that the property is located. For most people, the value of their taxable assets is much larger than they expect.

**Solution:** Write down the value of every item of property that will be transferred to your heirs if you pass away. We can help you determine your potential tax liability. There are many options to avoid estate tax that comply with federal law.

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## Mistake #14

### Failure to Minimize Capital Gains Taxes

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Highly appreciated assets should not be given away during your lifetime because post-death distribution can significantly reduce capital gains taxes. The reason for this is that the “basis” of property is stepped-up to fair market value at death.

An example will illustrate this concept. Suppose that your uncle owns publically-traded stocks that he purchased for \$10 per share, and the shares are now worth \$40 each. If your uncle gives the shares to you while he is alive, and you sell them, then you will pay capital gains tax on the appreciation of \$30 per share. On the other hand, if your uncle bequeaths the same shares to you in his estate plan, you will not pay any tax on the increase in value that occurred during your uncle’s lifetime. Again, this is because the basis is fully stepped-up for inherited property.

**Solution:** If possible, do not make lifetime gifts of highly appreciated property. These assets should be included in your estate plan.

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## Mistake #15

### Failure to Fund a Revocable Living Trust

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A living trust must be “funded” in order to be effective. “Funding” a trust is the process of transferring property to the ownership of a trustee. If a trust is not funded, then the trustee will not have any property to manage, and the trust will be useless. Many living trusts are never funded by their owners. The result is that many of these documents simply do not work.

Funding a trust is a complex process, and it must be done in a very specific manner. A trust document, standing on its own, is virtually worthless. Assets that are not funded to a trust usually must be handled in probate administration to be distributed to heirs.

**Solution:** Consult with an experienced attorney concerning the steps required to properly fund a trust. Any mistakes in this area can be very costly.

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## Mistake #16

### Expecting a Living Trust to Solve All Post-Death Administration Problems

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You have heard it before and we'll say it again: "If it sounds too good to be true, then it probably is." Living trusts are often promoted as being the answer to every estate planning problem. Trusts are certainly valuable tools when properly implemented. However, most people are surprised to learn that a living trust does not eliminate all post-death administrative duties.

At a minimum, the trustee of a living trust must pay the debts and expenses of the estate, prepare final tax returns, handle trust assets (e.g., investment, sale, or disposal), distribute property, and prepare an accounting for the beneficiaries. In fact, the post-death administrative duties of a trustee can be very extensive. Understanding exactly how trusts work is a vital part of the estate planning process.

**Solution:** Consult with an experienced advisor to weigh all of your options. If someone is merely selling form trust documents, then their sole motivation is to sell a product, and not to protect your interests. There are advantages and disadvantages to every estate planning technique. That is why an estate plan must be tailored to fit your individual needs.

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## Mistake #17

### Failure to Provide for Both Families in a Second Marriage Situation

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Second marriages involve a myriad of estate planning issues because each spouse may have different objectives with respect to distribution of property. A simple will may not be effective because family members can easily be disinherited by a surviving spouse - intentionally or not. Second marriages require the utmost care in planning to ensure harmony between the spouses, and to prevent litigation among family members when expectations for inheritance are not met.

**Solution:** Time and money are well-spent on professional planning in the case of a second marriage. The options to coordinate assets to meet estate planning objectives are numerous, and range from simple to complex. In most cases, basic estate planning documents are not suitable for this planning situation.

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## Mistake #18

### Failure to Plan for a Non-U.S. Citizen Spouse

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Non-citizen spouses are not given the same relief from estate tax as a citizen spouse. In some cases, estate tax must be paid before property may be distributed to a non-citizen spouse. Fortunately, trusts that meet certain IRS qualifications may be included with your estate plan to avoid this result.

**Solution:** If you are married to a non-citizen spouse, it may be advisable to incorporate a Qualified Domestic Trust (QDOT) into your estate plan. This type of trust allows property to be held for the benefit of a non-citizen spouse without incurring estate taxes.

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## Mistake #19

### Failure to Provide for Life Partners

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Michigan does not recognize common law marriage, or marriages between partners of the same sex. Therefore, without an estate plan, life partners will have no right to inherit property from each other. Instead, all assets will go to other surviving family members.

**Solution:** A properly written will or trust can achieve the desired results for distribution of property. In the alternative, assets can be coordinated with your estate planning documents to achieve a beneficial result without probate.

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## Mistake #20

### “My Family Knows What I Want”

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So, you don't need an estate plan because you told someone else how to distribute your property? And you put all of your property in that person's name so that they could distribute it for you without probate?

Here is the problem – oral instructions are not enforceable. Litigation usually results from this type of “plan” as memories fade, and vague directions give rise to misunderstanding. More importantly, many questions remain unanswered: Who pays for funeral and burial expenses? How will capital gains tax, transfer tax, and gift tax be handled? Who pays the legal fees if litigation is necessary? What if an heir dies?

**Solution:** Don't assume anything. The best way to keep the family peace, and ensure a smooth transition of property, is to clearly state your intentions in writing. If you care where your property goes, then write it down using a will or trust.

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## Mistake #21

### Failure to Provide Support and Care for Pets

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Pets are considered personal property as far as the law is concerned. Fortunately, Michigan law also allows for pet trusts to be included as part of an estate plan. A pet trust will ensure that sufficient funds are set aside and expended for the care of pets. You may designate a sum of money to be given to a trusted person to be used the care and feeding of your pets.

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## Mistake #22

### Failure to List Specific Gifts on a Personal Property Memorandum

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Arguments over items of personal property cause more family disharmony than any other type of asset. The emotional and sentimental value of family heirlooms can make them the subject of explosive disagreements. A few minutes spent to identify beneficiaries of personal items can do more to promote family harmony than the even the most artfully drafted will or trust.

**Solution:** Incorporate a list of personal property and corresponding beneficiaries with your estate planning documents. The list of personal property should be coordinated with your will or trust.

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## Mistake #23

### Failure to Plan for Incapacity With a Power of Attorney

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In the event you become incapacitated, another person must be empowered to act on your behalf with respect to personal and financial matters. If you do not have a valid power of attorney, then someone must obtain approval from a probate court to act as your conservator. This process may delay action on your behalf, or prevent it altogether.

**Solution:** Execute a power of attorney to appoint another person to act for you in case you become incapacitated. This solution is so easy and inexpensive that it should be part of every estate plan.

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## Mistake #24

### Failure to Plan for End-of-Life Decisions

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Remember Terry Schiavo? Ms. Schiavo remained in a persistent vegetative state for 15 years while her husband and family battled each other in various courts before it was finally decided that her husband had the right to terminate her life support. All of Ms. Schiavo's assets (including a large medical malpractice award), and the assets of her husband, were expended in legal fees and medical bills prior to her death.

**Solution:** Clearly state your wishes regarding life support, and designate a trusted person to make health care decisions on your behalf if you become incapacitated. A health care directive should be part of every estate plan.

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## Mistake #25

### Using a Will or Trust Kit to Plan Your Estate

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Forms and software cannot think for you. Every person has different assets, family members, relationships, and objectives that will impact his or her estate plan. It is impossible to incorporate all of those variables into a single form and call it an estate plan. We have drafted thousands of estate planning documents and none of them could have been derived from the same form.

Remember, when the time comes to put your estate plan into action, it is too late to change it. Estate planning does not help you, it is for people you love.

**Solution:** If you have read this far, then you already know what to do.

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