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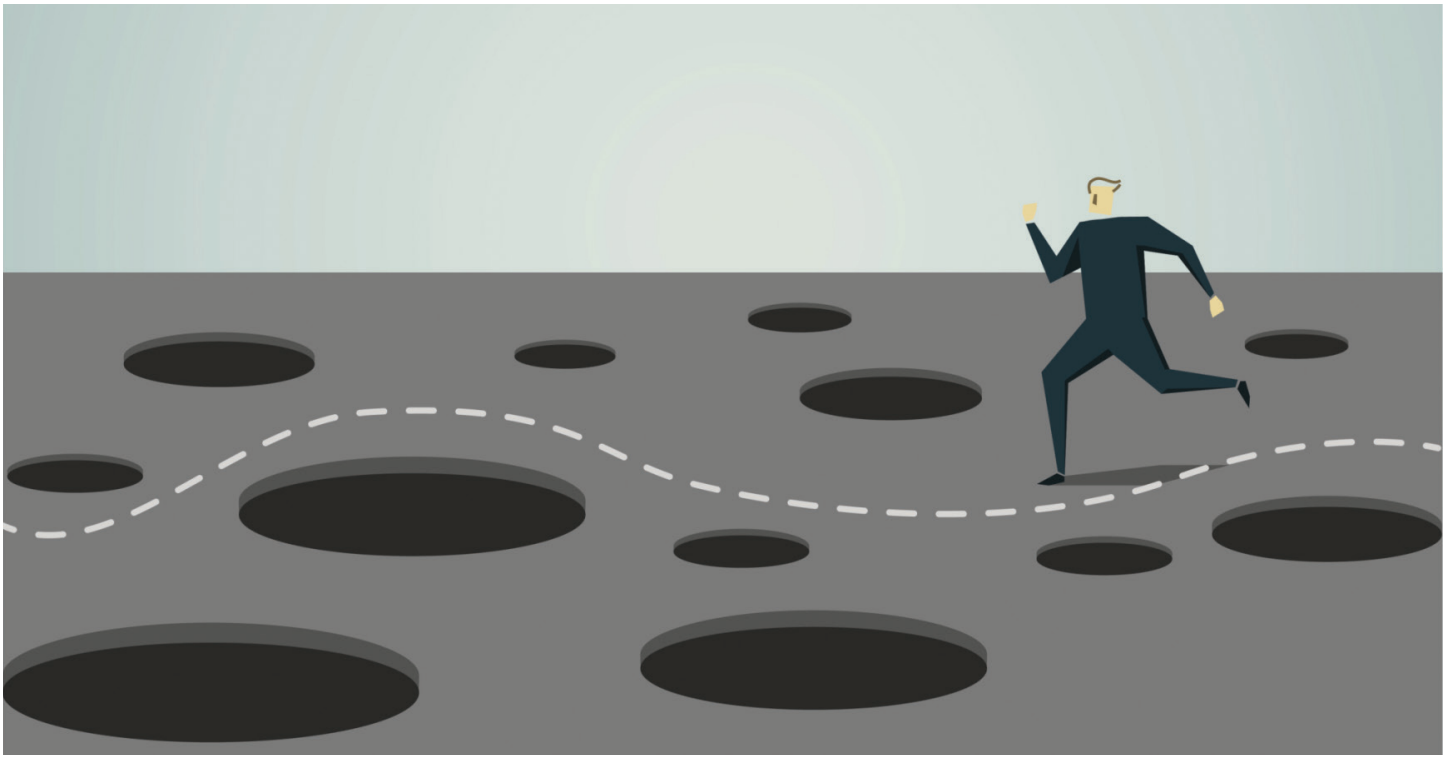
# Estate Planning Focus

**Trusts & Estates Newsletter** WINTER 2015



## Avoiding Common Estate Planning Mistakes

**BY BETH O'LAUGHLIN**
**bolaughlin@wnj.com**

In today's internet age, it's easier than ever to create your own estate plan. All it takes is a quick Google search to find the online forms and you're halfway there, right? Wrong.

With the rising number of products available to create low-priced, do-it-yourself estate planning documents, cost-conscious consumers may be tempted to use these forms as an acceptable alternative to more expensive estate plans developed by experienced attorneys. However, while the potential to save money upfront is an attractive proposition, estate planning is fraught with potential problems and pitfalls, any of which could ultimately lead to your final wishes not being implemented as intended.

When considering the estate planning process as a whole, from drafting to administration, it becomes evident that the do-it-yourself estate planning should be avoided. Here are some reasons why:


## ONE SIZE DOES NOT FIT ALL

In order to make do-it-yourself forms useful for the masses, the forms are designed to be as general as possible. This poses problems as these forms must operate in an area of law that is both state-specific and fact-sensitive. Documents claiming to be valid in each of the 50 states must be broad in a way that will undoubtedly fail to address the intricacies of your own state's laws. Additionally, in order to avoid overwhelming consumers, do-it-yourself forms provide a limited range of options and planning techniques. Such simplicity leads to documents that are unable to consider specific financial and personal circumstances, leaving you with a form document that is poorly suited to meet your individual estate planning goals.

## ESTATE PLANNING LAW IS COMPLEX

While do-it-yourself forms attempt to portray estate planning law as simple and straightforward, the laws surrounding estate planning are both intricate and constantly evolving. Even in dealing with "simple wills," a barrage of formalities must be addressed in order for the document to be enforceable, let alone effective. Beyond that, more sophisticated planning strategies need to be utilized when dealing with relatively common complexities, such as children with special needs, assets requiring additional protections or children from a prior marriage. None of these circumstances can be properly addressed with the simplicity of do-it-yourself forms.

## YOU DON'T KNOW WHAT YOU DON'T KNOW

A key component of preparing a quality estate plan is knowing the particular circumstances, both personal and financial, that require special planning techniques. While do-it-yourself forms can create a basic framework for documents, they cannot and do not provide valuable legal advice. In fact, sources providing such forms clearly state that they are not substitutes for attorneys and that they are prohibited from providing any kind of legal advice. Without the help of an estate planning attorney who is experienced at issue spotting, it is impossible to know the right legal solution to a particular situation or what planning opportunities are available.

## THERE ARE NO DO-OVERS

While many people using do-it-yourself forms believe "at least they're better than nothing," this is not always the case. As an example, I recently reviewed estate plan documents prepared by a client using a popular online program. This program had defaulted to disinherit any children born to the client after execution of the will, which was not the intent of the client. Had the do-it-yourself form been administered, it would have resulted in one of his children being left with nothing. This highlights the principal risk in using do-it-yourself forms: if a mistake is made, it likely won't be revealed until it is too late.

## YOU GET WHAT YOU PAY FOR

Everyone likes to save money. And when it comes to fixing your own sink or staining your own deck, the do-it-yourself route may be the best way to go. But when it comes to planning your own estate, the risk of unintended results is simply too great, particularly when the expense of correcting poorly drafted forms will likely far outweigh the cost of preparing a proper estate plan in the first place. Spending the money now to ensure your loved ones are properly cared for at your passing will avoid uncertainty during life and potential disaster after death.

Ultimately, you have one opportunity to leave an estate plan that correctly carries out your last wishes. Trusting this job to do-it-yourself forms could prove extraordinarily costly in the end.

# Serving as an Amateur Fiduciary is Risky – Legally and Financially

BY DAVID L.J.M. SKIDMORE
dskidmore@wnj.com

Have you ever been asked to manage another person's property and finances? Perhaps a family member named you as agent under a durable power of attorney, so that you can manage his finances if he becomes disabled. Maybe an elderly neighbor added your name to her bank accounts because physical limitations prevent her from leaving the house and she needs you to handle her banking. Helping a person in need is commendable, but you should understand the legal implications and risks before you accept and start to act.

If you agree to act as a formal or informal agent for the benefit of another person, you are likely serving as a fiduciary for that person (called the principal). A fiduciary relationship is characterized by the principal placing great trust, confidence and reliance in the fiduciary. It is often marked by an imbalance of power, because the principal may be disabled or weakened in some way. And the fiduciary relationship is abused when the agent acts for his own benefit, rather than the benefit of the principal.

Because of the unique nature of the fiduciary relationship, Michigan law imposes certain duties on those who serve as fiduciaries:

- A fiduciary has a duty to keep the principal's property separate from the fiduciary's property. This duty is violated when the fiduciary "co-mingles" the property in a common pot – such as depositing the principal's pension checks in the fiduciary's personal checking account.
- A fiduciary owes a duty of absolute loyalty to his principal, meaning that the fiduciary's actions must be taken to promote and protect the interests of the person for whom the fiduciary is acting – and not the interests of the fiduciary. If you are entrusted with selling a parcel of land for the principal, you cannot sell the land to yourself for a low price and then re-sell it to a buyer for a high price. Under that scenario, you, as fiduciary, have violated the duty of loyalty by putting your own interests above the interests of your principal.
- A fiduciary owes a duty of care to his principal. If you are taking care of the principal's unheated cottage but fail to winterize it, and the pipes freeze and burst as a result, that would violate the duty of care.
- A fiduciary owes a duty of good faith and honesty to his principal. A fiduciary has a duty to keep records showing how he administered the principal's property and finances.
- A fiduciary also has a duty to follow the prudent investor rule, under which the principal's portfolio of investments should generally be diversified.

Professional fiduciaries (such as trust departments at banks) are familiar with the governing legal principles. Laypeople serving in a fiduciary role are often unfamiliar with the concept and implications of fiduciary duty, which can create a perilous situation for the fiduciary.

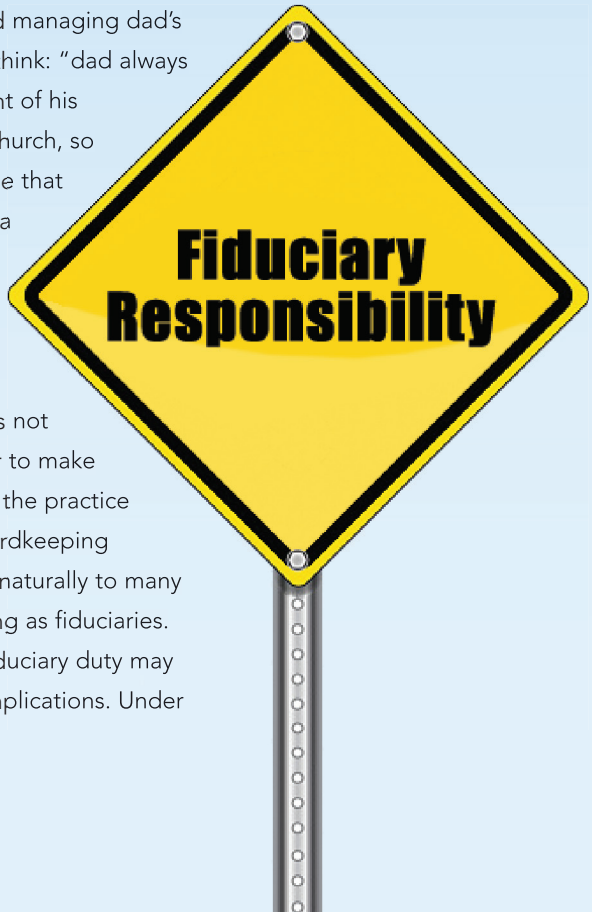
### ADDITIONAL WARNINGS TO CONSIDER:

- A fiduciary is subject to fiduciary duties whether or not he actually knows about the rules; ignorance is no excuse.

Fiduciary: An individual in whom another has placed the utmost trust and confidence to manage and protect property and money. The duties of a fiduciary include loyalty and reasonable care of the assets within custody and all of the fiduciary's actions are performed for the advantage of the beneficiary.

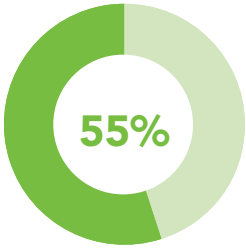
- If a fiduciary violates one of these duties, and the violation causes financial harm to the principal, the fiduciary may be held liable for such financial harm – such as paying to replace all the pipes that burst in the un-winterized cottage. Such liability would be determined in a lawsuit brought by an interested person against the fiduciary.
- Some fiduciary duties run counter to the thinking of many laypeople. An adult child, who is managing dad's finances because dad has dementia, might think: "This is dad's money; dad always invested 100 percent of his assets in GM stock, so now that's what I should do." That would be wrong, because it is contrary to the prudent investor rule, which calls for portfolio diversification. That same adult child managing dad's finances might think: "dad always tithed 10 percent of his income to the church, so I should continue that practice." Such a decision may be improper if the underlying durable power of attorney does not grant the power to make gifts. Moreover, the practice of rigorous recordkeeping does not come naturally to many laypeople serving as fiduciaries.
- A violation of fiduciary duty may have criminal implications. Under Michigan law (MCL 750.145n.), it is a crime to financially exploit a vulnerable person. An adult child, serving as an agent for a mother who has dementia, may continue mom's practice of gift-giving to himself and his siblings and then find himself accused of the crime of vulnerable adult abuse.

Too often, a layperson serving as a fiduciary consults an attorney only after he/she has been sued for violating a fiduciary duty. If you are managing another person's property or finances, you should get legal advice on how to perform that role early, often and before any problems arise. The estate planning attorneys at Warner Norcross & Judd are prepared to help you.



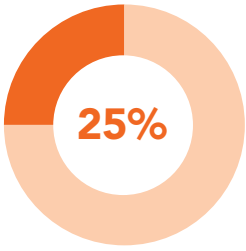

# Bridging the Generation Info-Gap

The *Chicago Tribune's* www.caring.com survey of 1,000 adults revealed these startling figures:



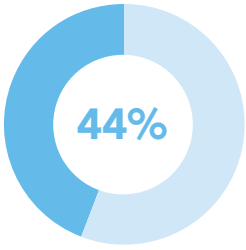

## Will or Trust

Roughly 55% of respondents said their parents have a will or trust document.




## Estate Planning

25% of people 65 and older said they don't know where their elderly parents keep their estate planning documents.

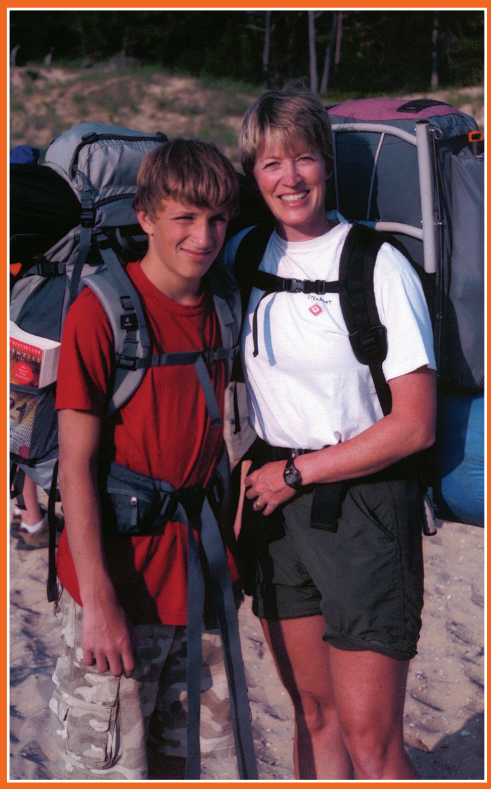



## Document Content

44% admitted they don't know what's in those documents.

# Meet Susie Meyers

Susie Meyers wasn't planning to be a lawyer. In fact, the more her mother suggested she become a lawyer, the more she resisted the idea. Instead, Susie was an English major at the University of Michigan and moved to Chicago right after graduation with a goal of working in the publishing industry. Instead she got a job at the American Bar Association as a meeting planner where she coordinated meetings and helped coordinate legal articles for publication in various law journals. That's when she became intrigued with the law, took the LSAT and enrolled in law school at Indiana University. The area of trusts & estates law was of special interest for Susie early on as she enjoyed putting together the puzzle pieces of real property law, tax law and probate and trust law to achieve her client's goals. She loves working with individual clients and the positive and proactive nature of her practice.



Susie joined Warner Norcross after earning her J.D. and has become a key leader in the firm. She currently chairs the firm's Trusts & Estates Group and has twice served on the firm's Management Committee. In 2015 she was named one of the state's leading "Women in the Law" by Michigan Lawyers Weekly, has been named a Michigan Super Lawyer since 2006 and has been included in Best Lawyers in America since 2003.

When she's not in the office serving clients and leading the efforts of the firm's more than 20 trust & estate lawyers and eight paralegals, Susie can usually be found outdoors. She loves all seasonal outdoor activities including cross country skiing, snowshoeing, mountain biking, tennis and hiking. She is an avid bird watcher and gardener (her dad was an allergist and she grew up learning all about plants). She and her husband are empty nesters this year with both of her children attending college at her alma mater, Indiana University.

# Seen and Heard

**MARK HARDER** will speak on November 17 at the Family Office Exchange (FOX) Trustees and Beneficiaries Workshop in New York City on "Selecting the Right Trustee – Know Your Options." (www.familyoffice.com)

Top Saginaw business attorneys **GREGORY DEMERS** and **DAVID KLIPPERT** joined Warner Norcross and are based in the Midland office. (Oct. 7 WNJ.com)

Welcome to **DAVID THOMS**, who recently joined Warner Norcross & Judd and divides his time between the Southfield and Kalamazoo offices. (Sept. 9 WNJ.com)

**MARK HARDER** has authored a commentary for Michigan's Uniform Principal and Income Act. Harder's commentary explains key terms and provisions of the legislation which provides guidance and requirements for those who administer ongoing trusts.

**SUSAN (SUSIE) GELL MEYERS** has been honored by *Michigan Lawyers Weekly* as one of the leading "Women in the Law." (July 29 WNJ.com)

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