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ABA REPORT

Task Force Do-It Yourself Estate Planning

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Preliminary Commentary of ABA Taskforce on Do-It Yourself Estate Planning

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I. Introduction

The phrase "Do it Yourself" evokes images of a weekend trip to the Home Depot, a bruised thumb, and the feeling of satisfaction that comes from a freshly painted room, a repaired deck or a newly-constructed patio planter. But even the experts at do-it-yourself publications such as This Old House frequently remind us not to delve into projects in the domain of experts such as plumbers, electricians, excavators and the like. The consequences there -- a broken gas main or electrical shocks -- could have disastrous results.

In recent years, do-it-yourself ("DIY") providers have emerged in many fields ranging from income tax preparation to estate planning. These services purport to provide, at low cost, the ability to generate computer-drafted documents that may bear some of the hallmarks of professionally-prepared documents. While these services provide tools to enable the DIY project, as with the home improvement world, they should be used with caution.

Those who seek to replace proper professional advice with a do-it-yourself online document in complex fields like estate planning should understand the effects of their actions. One should bear in mind that even those with fairly sophisticated skills think twice before venturing beyond their area of expertise. Consider eminent Judge Rifkind's observation on the subject of tax law that "after 50 years of practice, I would no more have the audacity to formulate my own tax return than I would engage in open heart surgery."[1]

These concerns prompted the American Bar Association Section of Real Property Trust & Estate Law (the "Section") to designate this Task Force to evaluate the use of DIY methods in estate planning. The Task Force has considered a number of issues, including the reasons why DIY options may be inadequate or incomplete for many individuals. The Task Force is reviewing much of the commentary on DIY estate planning and will publish a more

[1] Simon H. Rifkind, Are We Asking Too Much of Our Courts?, 15 Judge's J. 43 (1976).

detailed report in the future. This Preliminary Commentary identifies some of the many concerns identified by the Task Force.

The Emergence of Internet-Based DIY Tools

The list of DIY legal providers continues to grow. LegalZoom may be the most widely advertised of all DIY providers. Other providers include Lawdepot.com; LawyerAhead; RocketLawyer; Nolo; Corporate Filing Solutions Made Easy; BusinessRocket.net; We The People; Standard Legal, and others.[2]

DIY providers promote themselves by charging low rates for documents that ordinarily would cost much more if produced by an attorney. For example, LegalZoom charges $69 to prepare a Will. LegalZoom has provided services to over 500,000 clients.[3] As a result, DIY estate planning has gained attention in the national media

[2] See Jonathan G. Blattmachr, "Looking Back and Looking Ahead: Preparing Your Practice for the Future: Do Not Get Behind the Change Curve" 45 Heckerling Institute on Estate Planning, 18-1,18-16;18-17.

[3] See Blattmachr, *infra.* However, there are hidden costs in preparing an estate plan with LegalZoom. The cost of preparing an estate plan for a married couple on Legal Zoom increases once one includes all the documents, for both spouses, which form part of a standard estate plan including Wills, Durable Powers of Attorney, Living Wills and Health Care Proxies (a/k/a Financial Powers of Attorney and Health Care Powers of Attorney). The total cost then is approximately $300.00 for a married couple.

including The New York Times[4] and Consumer Reports, as well as legal periodicals.[5] Questions have arisen as to whether DIY legal providers are engaged in the unauthorized practice of law. LegalZoom alone has been sued in at least three states (Missouri, North Carolina and Connecticut) for violating those states' unauthorized practice of law statutes.[6]

As some attorneys have noted, perhaps the greatest danger of preparing one's estate plan with LegalZoom or other DIY legal providers is that they lull clients into a false sense of security.[7]

Is DIY for You?

Given the recent media attention focused on DIY estate planning, a person might ask himself: "Should I do my own Will?"

In some limited circumstances, it may be appropriate to do so. For example, if a person has modest assets in his name alone, and

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[4] T.S. Bernard, In Using Software to Write a Will, a Lawyer Is Still Helpful, N.Y. Times, September 10, 2010.

[5] Wendy S. Goffe and Rochelle Haller, From Zoom to Doom? Risks of Do-it-Yourself Estate Planning, 38 Estate Planning Magazine 27 (April 2011).

[6] See Blattmachr, *infra*; and http://inventblog.com/uspto/legalzoom-sued-for-unauthorized-practice-of-law.html.

[7] See, http://www.texaswillsandtrustslaw.com/2010/05/24/legalzoom-vs-lawyer-what-you-dont-know-can-hurt-you/.

desires to leave them to his closest surviving relative, it may be appropriate and cost-effective to use an online service. But for individuals with even slightly more complicated circumstances, creating a Will online creates risk -- risk in an area that will have lasting consequences.

Historically, what we now casually describe as a "Will" carried the more somber label "Last Will and Testament." That label accurately conveys the importance that should be afforded such instruments -- a Will is one of the few human acts that survives death. It carries a legacy that can have lasting financial and emotional consequences on those who matter most -- our loved ones. Mistakes made in the drafting of such an important document can profoundly alter familial relationships, leaving our family members at best confused or disappointed and at worst locked in hostile litigation.

Consider one example. A New Jersey resident opted to purchase -- surely at a nominal cost -- a Will form kit. He carefully handwrote his intended dispositions into the form document. He did not have it properly witnessed. Undoubtedly believing he had

completed his "simple Will" properly, he signed it and then apparently committed suicide. His heirs, however, eventually paid for his efforts. In the ensuing lawsuit (Matter of Will of Feree),[8] a New Jersey trial court struggled to find a way to interpret and give effect to his handwritten additions to the form. Under New Jersey probate law, the language on the pre-printed form was not admissible because the Will was not properly signed by Mr. Feree (most states require a Will to be signed in the presence of two witnesses, a few even require three witnesses). The Court's effort to salvage Mr. Feree's work -- and the ensuing trip to the New Jersey appellate court -- almost certainly cost the family tens of thousands of dollars or more. At least Mr. Feree never saw that enormous expenditure -- he passed away believing he had saved money.[9]

[8] 369 N.J. Super. 136 (Ch. Div. 2003), aff'd, 369 N.J. Super. 1 (App. Div. 2004).
[9] Many states have left open the chance for probate of such defective documents by enacting statutes that permit probate of a "writing intended as a will." See, e.g., N.J.S.A. 3B:3-3. Those statutes, however, require proof of "clear and convincing" evidence at a hearing to achieve probate. This undoubtedly is an uncertain and expensive proposition.

Will Your DIY Plan Work When You are Gone?

A Will must meet requirements for probate, properly make dispositions of the estate, address the payment of debts, taxes and other obligations, appoint fiduciaries to administer the estate and potentially guardians for minor children, and achieve all of that without creating litigation or hostility among the beneficiaries. A person who drafts his own Will must bear in mind that the critical test of his efforts will occur after his death. At that point, his voice has been forever silenced. If he does prepares his Will on his own, it's likely no one -- or at least no person who is not seen as biased due to his financial interest in the outcome -- will be able to explain his intentions.

Why Retain an Experienced Estate Planning Lawyer?

The Task Force urges those who may engage in DIY estate planning to evaluate the following considerations before taking the leap and drafting his own estate planning documents:

The Role of the Counselor-at-Law: An estate planning lawyer provides more than technical expertise in drafting complicated documents. Most have extensive experience in counseling clients in these most intimate decisions. For example, most have helped couples sift through the various possible options in selecting a guardian for the couple's most-cherished "possession" -- their minor children. That decision often seems simple, but the "ideal" guardian candidate may have a less than ideal spouse, lack financial experience, or otherwise be unable or unwilling to serve. Spouses may disagree as to the choice of guardian. They may need advice to understand a guardian's role. The Counselor-at-Law plays an important role in these and many other estate planning discussions.

The "Simple Plan": Consider the elderly woman with a seemingly simple plan: she has two loving, adult children (one who lives with her) and two assets: a house worth $300,000 and a bank account worth the same. Her simple solution? She'll keep both children happy by dividing things equally. So she drafts a Will and leaves the house to her son and the account to her daughter. She tucks

the Will in her desk and lives happily ever after. Her children? They are not so happy. After her death, they realize Mom spent down her bank accounts to pay her bills so there is nothing left for the daughter. One can envision the son (who gets the house) telling the daughter he feels sorry for her, but Mom wanted him to have the house. The daughter, of course, concludes Mom's intent was defeated. She sues the brother.[10] With proper counseling and advice, that suit could have been avoided if Mom's intentions were properly ascertained and expressed.

The Failure to Properly State Dispositions: A proper Will must clearly state the testamentary intent to dispose of assets. The language used must be dispositive in nature (a letter of instruction or words stating a person's general preferences will not suffice). Those who draft their own Wills run the risk of using words, terms or descriptions that could fail to make effective dispositions. The failure to use words of "testamentary intention" could void the Will, just as the use of

[10] Cf. Matter of Estate of Tateo, 338 N.J. Super. 121 (App. Div. 2001).

"precatory" language (i.e., "I would like") could render the dispositions unenforceable. [11]

Who Will Explain Your Intentions? If a dispute arises, the court will often hear a swirl of allegations as to the decedent's intentions from interested family members. Who will the court believe? Divining the intention of the deceased may be among the most difficult tasks conferred upon any judge. Many may look for the voice of the person who died in a person who had conversations with him while he was alive about what he intended after his death, and does not benefit from the Will -- that, more often than not, is an estate planning lawyer.

Will Your Document Survive Probate? Different states have adopted rules as to the probate of Wills. Some are more complicated than others, but the person drafting a Will should know them. For example, New York law creates a presumption of validity of a Will if it was executed under the supervision of an attorney. New Jersey law

[11] In Matter of Will of Smith, 108 N.J. 257, 262(1987) the court declined probate of a writing that lacked testamentary intent finding it was a letter of instruction regarding matters that would have been addressed in a Will.

imposes a presumption of "undue influence" if a Will benefits a person who stands in a close ("confidential") relationship with the person who died. An independent attorney may be the most important witness in rebutting such a presumption (if not rebutted, the Will can be declared invalid).

Who Will Keep Your Will Safe? Many states presume a Will was revoked if the person who died possessed the original Will and it cannot be located at death.[12] Given that presumption, it often makes sense to leave the original Will in the possession of the estate planning lawyer who could document custody and control of it. With that type of evidence – even if the lawyer loses it – it may be possible to probate a copy of the Will as no presumption of revocation would apply. An individual may not be aware, much less follow, these arcane rules that might preclude probate.

Tax Guidance: State and federal taxes imposed on estates change often and have become increasingly complicated. Congress recently increased the federal estate tax exemption to $5 million, but

[12] Matter of Will of Sapery, 28 N.J. 599 (1956).

that lasts only through the end of 2012. Meanwhile many States, looking for revenue to plug budget gaps, have adopted their own estate tax structures with much lower exemptions (ranging from a few hundred thousand to as much as $5 million). Careful planning needs to be done to realize the potential tax savings that can be achieved through a detailed understanding of numerous options available to reduce estate taxes.

Coordinating Probate and Non-Probate Assets: A Will generally governs the disposition of assets held in the decedent's name alone. Thus, one can draft a Will only to learn that it will have little impact if most of the assets are governed by beneficiary designations or other arrangements. Lawyers sometimes call assets governed by a Will "Probate Assets." Assets that are governed by a contract, joint ownership, a beneficiary designation or similar arrangement may be called "Non-Probate Assets" (these can include IRAs, 401ks, joint bank accounts, homes, other real estate and insurance). For many Americans, most of their assets may fall into these categories (all of which may be included in their "taxable estate"

for estate tax purposes). An experienced estate lawyer can guide the client through this process, helping to ensure that the client's desired objectives comport with the structure of his assets.

Births, Deaths, Marriage, Divorce and Incapacity: Each of these events may profoundly alter a person's life. They also may alter the desired disposition of an estate. For example, in some States that have adopted variations of the Uniform Probate Code, divorce may automatically revoke dispositions to the former spouse. But who takes the former spouse's share? That share might pass to minor children outright such that a court may have to appoint a guardian (possibly the former spouse) to hold and administer the assets. Or will the court hold those assets itself? The same types of considerations apply to all other changes in family relationships. A proper estate plan should address these contingencies.

Special Needs Planning: What if a child suffers from a learning disability, incapacity or is vulnerable to the influence of people seeking to grab his inheritance? What will happen to inherited funds if a child is disabled and requires governmental assistance such as

Medicaid? For parents with special needs children, or anyone who desires to leave assets to a child with special needs, specialized trust planning may be required to avoid risking a special needs child's public benefits. In fact, one estate planning attorney noted that when he informed a LegalZoom representative that he had a disabled child, the representative advised him that he needed a supplemental needs trust which LegalZoom did not provide and that he would need to contact an attorney to prepare one for him.[13] It is doubtful that a non-attorney would be aware of the need for such specialized planning but that omission could be costly.

Same Sex Couples and Other Relationships: Given the ever-changing legal framework governing same-sex couples and unmarried couples, it is important to have updated advice on the manner in which estate planning arrangements can be implemented. In many States, a same-sex partner or even spouse may not have rights if his partner dies before him, so any rights must be defined in carefully-analyzed estate planning documents. The same considerations apply

[13] Blattmachr, *infra*.

to unmarried cohabitants, whose rights, if any, may be very limited without proper planning.

Post Death Planning: Proper estate planning may require prompt consideration of post-death planning options, such as the ability for an heir to "disclaim" property (have the property pass as though the heir died before the person who died). Those options require the advice of an experienced attorney, but more importantly, individuals who may need to invoke such options need to understand that they must act quickly and should not take custody or control of the assets if they hope to achieve a valid tax-qualified disclaimer under the tax law.

Preparing for Estate Administration: The estate planning attorney often represents the executors or trustees (if any) in the administration of the estate. This may create significant advantages, since the estate planning attorney is familiar with decedent's assets, family issues and other factors that may allow for a speedy administration of the estate.

Multi-State and International Issues: Significant differences in law can exist among the various states. Some estate planning requires consideration of international issues (approximately 20% of the U.S. population is first generation or second generation with at least one foreign-born parent). This may increase the risk that a Will prepared through a DIY provider will not properly account for laws that govern assets situated in another state or country.[14]

Choosing Between DIY and Professional Advice -- Controlling the Costs

Notwithstanding the foregoing concerns, the Task Force understands that for certain people, the cost of doing a Will may be prohibitive. Before an individual reaches that conclusion, however, he should explore the potential costs of engaging proper counsel to assist in estate planning and the benefits (for example, peace of mind) that come with such assistance. Moreover, the individual should bear in mind his own ability to reduce the cost of estate planning by preparing for the initial meeting. This would include, for example,

[14] See, http:/www.census.gov/newsroom/releases/archive/foreignborn population/cb10-159.html.

preparing a full list of all assets and liabilities, a detailed evaluation of potential beneficiaries, the collection of relevant documents (deeds, beneficiary designations, prior Wills, property valuations and perhaps other documents such as divorce decrees and the like). Taking the time to do that homework before the initial estate planning consultation can reduce costs.

For these reasons, the Task Force is developing resources for those who are considering their estate planning options. In the coming months, the Task Force will post on the Section's website various materials to aid those considering estate planning. Those materials will include checklists to prepare for an estate planning meeting as well as a list of frequently-asked questions regarding estate planning. The Section also invites those considering estate planning to contact some of its approximate 30,000 members who practice in the Trust and Estates area, with lawyers in virtually every locale in the Country. The costs of estate planning vary by location and experience of the lawyer -- but the needs of each individual are as varied as the lawyers who can serve him.

Conclusion

The Task Force expects to further study the role of DIY estate planning. While it has identified a number of concerns, it recognizes that some people -- principally motivated by cost concerns -- will do their own Wills. The Task force anticipates that in certain situations involving the disposition of modest assets among close relatives, the DIY plan may work effectively. Yet the Task Force perceives many other situations where a person may have a false sense of security that he has addressed the disposition of his estate, only to have it discovered (after death) that important issues were not addressed. This could lead to increased difficulty and expense in the administration of the estate, with the prospect of litigation among the intended objects of the decedent's dispositions. For those reasons, the Task Force concludes, at least on preliminary review, that the average person should proceed with caution in using DIY estate planning as a substitute for a proper, professionally-drafted plan.