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

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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. Although 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 DIY on-line 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 "[a]fter 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." Simon H. Rifkind, *Are We Asking Too Much of Our Courts?*, 15 Judges' J. 43, 50 (1976).

These concerns prompted the ABA RPTE Section to designate a 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 reviewed much of the commentary on DIY estate planning and will publish a more detailed report in the future. This article contains the author's report summarizing some of the many concerns identified by the task force. The task force comprised this author, Jo Ann Engelhardt, Rochelle Haller, Joseph Hodges, Susan

Porter, and Bruce Tannahill. The opinions expressed herein are those of this author, who chaired 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. See Jonathan G. Blattmachr, *Looking Back and Looking Ahead: Preparing Your Practice for the Future: Do Not Get Behind the Change Curve*, 36 ACTEC L.J. 1, 19–21 (2010–2011).

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. See Blattmachr, supra. There are hidden costs, however, in preparing an estate plan with LegalZoom. The cost of preparing an estate plan for a married couple on LegalZoom 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 for a married couple.

DIY estate planning has gained attention in the national media as well as in legal periodicals. Wendy S. Goffe & Rochelle L. Haller, *From Zoom to Doom? Risks of Do-It-Yourself Estate Planning*, 38 Est. Plan. 27 (Apr. 2011). Popular news media sources have commented on the value of DIY estate planning mechanisms.

For example, a *Forbes* writer identified a dilemma: although a will is one of the most important financial planning documents, an "astonishing number of people of all ages still don't have one." Deborah L. Jacobs, *The Case Against Do-It-Yourself Wills*, forbes.com (Sept. 7, 2010), www.forbes.com/2010/09/07/do-it-yourself-will-mishaps-personal-finances-estate-lawyers-overcharge.html. This writer recognized that estate planning is often delayed because people are reluctant to confront their own mortality and hesitate to spend money on estate planning because they do not directly benefit from it. Noting that these factors may have prompted growth of DIY books, software, and on-line forms, the *Forbes* writer observed, the proliferation of these "cookie cutter documents . . . makes me cringe." The author stated she was "strenuously opposed to do-it-yourself wills" because "[t]here are just so many things that can go wrong"—so much so that she made a hobby of collecting DIY horror stories. Before citing numerous examples of problematic DIY wills, the *Forbes* writer quoted a lawyer who said "using a DIY will is like 'pulling your own tooth with a pair of pliers instead of going to the dentist.'"

When Consumer Reports reviewed DIY products, it concluded that "using any of the three services [it reviewed] is generally better than drafting the documents yourself without legal training or not having them at all. But unless your needs are simple—say, you want to leave your entire estate to your spouse—none of the will-writing products is

likely to entirely meet your needs." *Legal DIY Websites Are No Match for a Pro*, Consumer Reports (Sept. 2012), www.consumerreports.org/cro/magazine/2012/09/legal-diy-websites-are-no-match-for-a-pro/index.htm.

A writer for the "Your Money" section of *the New York Times* used DIY software to draft her own will four times to test how computer-generated wills would fare under human scrutiny. After enduring what she described as a "tedious exercise," she reviewed the resulting DIY documents with estate planning lawyers. She noted that even though they seemed easy to draft, she "still needed a lawyer to help decode some seemingly standard clauses and their consequences in my home state." Tara Siegel Bernard, *In Using Software to Write a Will, a Lawyer Is Still Helpful*, N.Y. Times (Sept. 10, 2010), www.nytimes.com/2010/09/11/your-money/11money.html?_r=0.

The *Times* writer noted that lawyers informed her that even after she drafted her own will, it would not be valid unless it was executed with certain formalities. And while some web sites contained features such as a "self proving affidavit" that would reduce probate complications, at least one did not. She summarized the concerns discussed in her article by noting: "Of course, humans are also fallible, and some lawyers said they had seen poorly written wills drafted by professionals. But a computer program can't ask you about your family relationships or tease out complex dynamics, like your daughter's rocky marriage." She closed with a quote from an attorney, who reported that one client came back to him after looking at a software package and said, "I don't know what I don't know."

The popular media treatment of DIY estate planning focuses on important factors a person should consider in writing his own will. One writer noted that a DIY document could cause problems, because if the testator is "planning anything complicated, this might have all the authority of a grocery list that has been notarized." See Geoff Williams, *Where You Can Go Wrong with a Do-It-Yourself Will*, Reuters Money (Jan. 17, 2013), www.reuters.com/article/us-retirement-wills-idUSBRE90G0WI20130117.

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. See Blattmachr, supra; and http://inventblog.com/uspto/legalzoom-sued-for-unauthorized-practice-of-law.html. Apparently, one such lawsuit in North Carolina was recently settled. Terry Carter, *LegalZoom Resolves $10.5M Antitrust Suit Against North Carolina State Bar*, A.B.A.J. (Oct. 23, 2015). (This article indicates that the settlement may have taken into account factors addressed in *North Carolina State Board of Dental Examiners v. Fed. Trade Comm'n*, 135 S. Ct. 1101 (2015).)

As some attorneys have noted, perhaps the greatest danger in preparing one's estate plan with LegalZoom or other DIY legal providers is that they lull clients into a false sense of security. See Rania Combs, *LegalZoom vs. Lawyer: What You Don't Know Can Hurt You* (May 24, 2010), www.texaswillsandtrustslaw.com/2010/05/24/legalzoom-vs-lawyer-what-you-dont-know-can-hurt-you.

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 desires to leave them to his closest surviving relative, it may be appropriate and cost-effective to use an on-line service. But for individuals with even slightly more complicated circumstances, creating a will on-line 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.

Courts Struggle with DIY Planning

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, a New Jersey trial court struggled to find a way to interpret and give effect to his handwritten additions to the form. *In re Will of Feree,* 848 A.2d 81 (N.J. Ch. 2003), aff'd, 848 A.2d 1 (N.J. Super. Ct. App. Div. 2004). 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. (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. Stat. Ann. § 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.)

The concerns highlighted in *Feree* were considered by the Florida Supreme Court in *Aldrich v. Basile*, 136 So. 3d 530 (Fla. 2014), in which the testator wrote her will on an "E–Z Legal Form." In Article III of that will, entitled "Bequests," just after the form's pre-printed language "direct[ing] that after payment of all my just debts, my property be bequeathed in the manner following," she handwrote instructions directing that all of the following "possessions listed" go to her sister, Mary Jane Eaton." She then listed her

home, car, an IRA account, and insurance, among other things. She specified account numbers of similar identifying features for each item. She then wrote: "If Mary Jane Eaton dies before I do, I leave all listed to my brother James Aldrich . . . ."

The testator's sister, Ms. Eaton, predeceased her, but left substantial assets to the testator. The testator died in 2009. She had never revised her will to dispose of the property she inherited from her sister. The testator's brother (Aldrich) asserted that because he was named by the testator as the alternate beneficiary of the items listed in the testator's will, he should take her entire estate (including the property the testator inherited from Eaton). The testator's nieces objected, claiming that the after-inherited property should pass by intestacy (presumably so they would share it with Aldrich).

The testator's original will was accompanied by a piece of paper bearing the printed title "Just a Note" on which the testator wrote: "This is an addendum to my will . . . ." She stated that, because her sister had died, she wanted to "reiterate that all my worldly possessions pass to" her brother, Aldrich. Although the testator signed this document, it was not properly witnessed and therefore was not an enforceable testamentary instrument under the Florida Probate Code.

Analyzing various provisions of the Florida Probate Code that addressed property inherited after a will was executed, and other provisions addressing whether property not included in the will devolved by intestacy, the *Aldrich* court observed that while the will was clear in devising the testator's property to her brother in the event her sister pre-deceased her, she "expressed no intent as to any property that she may have acquired after the execution of her will, as the document did not include a residuary clause, nor did it include any general bequests that could encompass the inherited property." It rejected the brother's effort to go beyond the "four corners" of the document. It determined that the testator's apparent intent to devise all of the property she owned at death to her brother "would have been better served through the use of a residuary clause or general devises of personal and real property in the will."

The *Aldrich* court declined to consider extrinsic evidence to alter the testator's will, which appeared unambiguous on its face unless it considered extrinsic evidence:

Any other interpretation of the testator's actions would require this Court to rewrite the will to include provisions regarding property for which the testator made none. In the present case, this Court would be forced to speculate that the testator intended for her sole devisee to have more than she specifically listed in her will, despite language in the will indicating the opposite.

Aldrich, 136 So. 3d at 537.

Thus, the *Aldrich* court, constrained by the terms of the DIY instrument that the testator drafted (without the benefit of counsel), was compelled to dispose of the property not specifically identified in her will by intestacy, even though that required it to ignore her apparent intent as memorialized in the handwritten note that was not admissible as a

codicil. (As noted earlier, some states might have applied concepts such as the writings intended as wills provision, N.J. Stat. Ann. § 3B:3-3, to determine whether that paper could have been accepted for probate even though it was not duly executed.)

Penny Wise, Pound Foolish

Aldrich illustrates the problems that may be created by a DIY will. It provides a "cautionary tale of the potential dangers" of such planning, as highlighted in a concurring opinion:

This unfortunate result [here] stems . . . from the fact that Ms. Aldrich wrote her will using a commercially available form, an "E-Z Legal Form," which did not adequately address her specific needs—apparently without obtaining any legal assistance. This form . . . did not have space to include a residuary clause or pre-printed language that would allow a testator to elect to use such a clause.

. . .

While I appreciate that there are many individuals in this state who might have difficulty affording a lawyer, this case does remind me of the old adage "penny-wise and pound-foolish." . . . [A]s illustrated by this case, the ultimate cost of utilizing such a form to draft one's will has the potential to far surpass the cost of hiring a lawyer at the outset. In a case such as this, which involved a substantial sum of money, the time, effort, and expense of extensive litigation undertaken in order to prove a testator's true intent after the testator's death can necessitate the expenditure of much more substantial amounts in attorney's fees than was avoided during the testator's life by the use of a pre-printed form.

Aldrich, 136 So. 3d at 538 (Pariente, J., concurring).

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 prepare his will on his own, it's likely no one—or at least no person who is not seen as biased because of 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 their 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 on 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. Cf. *In re Estate of Tateo*, 768 A.2d 243 (N.J. Super. Ct. App. Div. 2001). 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 "precatory" language (that is, "I would like") could render the dispositions unenforceable. (In *In re Will of Smith*, 528 A.2d 918, 920 (N.J. 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.)

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. Whom will the court believe? Divining the intention of the deceased can be among the most difficult tasks conferred on 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 who does not benefit from the will. That person, more often than not, is an estate planning lawyer. (Both the Uniform Trust Code and the Restatement (Third) of Trusts now recognize that a document may be reformed to implement "probable intent." This concept, long established in some states, for example, *In re Estate of Branigan*, 609 A.2d 431 (N.J. 1992), has recently been recognized in other states to

allow a court to correct otherwise unambiguous evidence in wills based on extrinsic evidence. See *Estate of Duke v. Jewish Nat'l Fund*, 190 Cal. Rptr. 3d 295 (Cal. 2015).)

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 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.*In re Sapery's Estate*, 147 A.2d 777 (N.J. 1959). 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 increased the federal estate tax exemption to more than $5 million. 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 Nonprobate 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 effect 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, particularly when considering how beneficiaries should be designated.

Designation, by itself, can involve complicated legal concepts that warrant consultation with counsel. For example, the U.S. Supreme Court has recognized, in the concept of retirement plans governed by ERISA, that benefits will be paid to the person designated under the beneficiary designation requirements of the plan, notwithstanding evidence or

documents setting forth a contrary disposition. See *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, 555 U.S. 285 (2009). That outcome left open the question of whether an interested person could claim the proceeds after they were received by the designated beneficiary, a question considered in *Estate of Kensinger v. URL Pharma Inc.*, 674 F.3d 131 (3d Cir. 2012).

Births, Deaths, Marriage, Divorce, and Incapacity. Each of these events can profoundly alter a person's life. They also can 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 or 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. Blattmachr, supra. 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 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. The same considerations apply to unmarried cohabitants, whose rights, if any, may be very limited without proper planning.

Post-Death Planning. Proper estate planning can require prompt consideration of post-death planning options, such as the ability of 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, because 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. 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.

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 can 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, 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 valuation, 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 urges those who would consider drafting their own estate planning documents to explore resources available—many can be found on the Section's web site—before considering DIY estate planning. For example, the web site includes checklists of frequently asked questions regarding estate planning. The Section also invites those considering estate planning to contact some of its many members who practice in the trust and estate area, with lawyers in virtually every locale in the country. The costs of estate planning vary by location and the experience of the lawyer—but the needs of each individual are as varied as the lawyers who can serve him.

Conclusion

Although the task force identified a number of concerns, it recognized that some people— principally motivated by cost concerns—will do their own wills. The task force anticipated that in certain situations involving the disposition of modest assets among close relatives, the DIY plan might work effectively. Yet the task force perceived many other situations in which a person might 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 concluded, 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.