

From Zoom To Doom? The Risks Of Do-It-Yourself Estate Planning

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A. Introduction

1. The Internet has provided society with an unimaginable source of do-it-yourself advice — from home repairs to the diagnosis of medical conditions. What was once left to highly trained and educated professionals is now available at the fingertips of millions. A simple Google search for “do-it-yourself” results in over 410 million hits. Especially in the estate planning practice, lawyers report that the do-it-yourself phenomenon has made an impact on the services they provide, even for some high net worth clients who would receive the most value from the estate planning lawyer's expertise. The onslaught of websites offering discounted, do-it-yourself estate planning documents, such as [LegalZoom.com](https://www.legalzoom.com), [LawDepot.com](https://www.lawdepot.com), and [Nolo.com](https://www.nolo.com) have already been credited with providing millions of consumers with estate planning documents. In fact, LegalZoom alone claims to have served over 1 million customers. Although such sites and services may provide affordable legal options to those who would otherwise not be able to afford them, there are legitimate concerns about the potential pitfalls of putting legal decision-making in the hands of novices and the long-term impact that do-it-yourself estate planning can have on the estate planning legal profession.
2. This outline will discuss the proliferation of do-it-yourself sites, the problems that can and have occurred by the use of such sites, and what we as lawyers can do to protect our profession. Part B will

discuss the increasing popularity of do-it-yourself estate planning. Part C will detail the potential problems caused by do-it-yourself estate planning. Part D will discuss possible post-mortem fixes. Part E will identify positive aspects of do-it-yourself estate planning. Part F will discuss what we, as attorneys, can do to protect the estate planning profession itself.

B. Popularity Of Do-it-Yourself Estate Planning

1. As of March 31, 2011, there were more than 272,066,000 Internet users in North America alone. *See* Internet World Stats at www.Internetworldstats.com/stats.htm (last visited June 2011). At the same time, at least 80 percent of lower income Americans report that they are not having their legal needs fulfilled. *See* Michael S. Knowles, Note, *Keep Your Friends Close and the Laymen Closer: State Bar Associations Can Combat the Problems Associated With Nonlawyers Engaging in the Unauthorized Practice of Estate Planning Through a Certification System*, 43 Creighton L. Rev. 855 (April 2010). In addition, as of 2009, only 35 percent of Americans had a will or other testamentary instrument, and only 51 percent had any estate planning documents at all. *Lawyers.com* Survey Reveals Drop in Estate Planning by Americans in 2009, at <http://press-room.lawyers.com/2010-Will-Survey-Press-Release.html?page=1>. *See also* Deborah L. Jacobs, *The Case Against Do-It-Yourself Wills*, at www.forbes.com/2010/09/07/do-it-yourself-will-mishaps-personal-finances-estate-lawyers-overcharge_print.html (Sept. 7, 2010). Fueled by continually evolving technology and increasing Internet availability, it is no surprise that online websites such as LegalZoom.com, offering the production of estate planning documents at a fraction of what an attorney would charge, have proliferated. *See* Jacobs, *Do-It-Yourself Wills*, *supra*.
2. LegalZoom.com launched its website on February 12, 2001, to provide assistance to individuals and businesses preparing online legal documents, including trusts, divorces, corporations, copyrights, and wills. The mission of the LegalZoom founders (which include O.J. Simpson's lawyer Robert Shapiro) was to "set new standards for convenience and service in an industry not typically known for great customer care." *See* <http://legalzoom.com/about-us> (last visited June 2011). The founders further believed that "it should be easy for anyone to create a last will...the goal is not simply to provide a smart, cost-effective alternative — it's to make sure everyone gets the legal protection they need." *Id.* Since opening its virtual doors, LegalZoom claims to have over 1 million customers, and with respect to its will service, a "100% satisfaction guarantee." *Id.*
3. LegalZoom professes to offer no legal advice, and in fact, before receiving a document from LegalZoom, users must represent that "LegalZoom did not provide [user] with any advice, explanation or representation" about any legal rights, remedies, defenses, or options. *See* Fred Bernstein, *Being of Sound Mind, and a \$55 Consultation*, N.Y. Times (May 16, 2002), available at www.nytimes.com/2002/05/16/technology/being-of-sound-mind-and-a-55-consultation.html. In addition, each page of the website includes an abbreviated disclaimer as well as a link to the site's full disclaimer, which is approximately 550 words long. *See* www.legalzoom.com/disclaimer-popup.html (last visited June 2011).

4. So how does it work? According to LegalZoom's website, a "standard" will — which includes credit shelter trust provisions enabling married couples to "minimize estate taxes," guardianship appointment provisions, and guides to help "executors and guardians understand their roles" — can be "built" using the site's document assembly program in under 15 minutes for a "special price" of \$69.00. The original document (printed on "archival" paper) can be delivered within two business days. See www.legalzoom.com/legal-wills/wills-pricing.html (last visited June 2011). A user simply answers a string of questions using a "decision tree" form of logic with help text provided to guide the user in building the will. See Jonathan G. Blattmachr, *Looking Back and Looking Ahead: Preparing Your Practice for the Future: Do Not Get Behind the Change Curve*, 36 ACTEC Law Journal 1 (Summer 2010). A user who has a question can call customer service for basic help, but if the question is legal in nature, the user will be told to consult an attorney. If the user does not readily have an attorney to turn to, LegalZoom offers an online attorney referral service. See www.legalzoom.com/sitemap-attorney-locator1.html (last visited June 2011). Once the document is complete, a "document assistant" reviews it for spelling, grammar, and consistency, and then prepares it be printed and mailed. See www.legalzoom.com/legal-wills/wills-3-step-process.html (last visited Jan. 5, 2011).
5. The do-it-yourself movement is not limited to online estate planning sites. In increasingly frequent numbers, people are accessing online legal libraries and other sources of legal research to cobble together their own estate planning documents, either written by hand (a holographic will) or using "fill-in-the blank" forms purchased online or at an office supply store.

C. Potential Problems Caused By Do-it-Yourself Estate Planning

1. Growing along with the popularity of do-it-yourself estate planning is the number and severity of problems associated with it. The most common errors associated with do-it-yourself estate planning documents are caused by the omission of specific requirements or formalities required by local law, usually involving the manner in which documents are executed. See Jacobs, *Do-It-Yourself Wills*, *supra*.
2. A fill-in-the blank or one-size-fits-all form may or may not follow the requirements for a validly executed document, which can vary widely from state to state. For example, in Washington State, a validly executed will must be in writing, signed by the testator or by some other person under the testator's direction in the testator's presence, and attested to by two or more competent witnesses by subscribing their names to the will or by signing a statutory affidavit while in the presence of the testator and at the testator's direction or request. Wash. Rev. Code 11.12.020. On the other hand, at one time Pennsylvania required three witnesses to a will (but no longer requires any). 20 Pa. Cons. Stat. §2504 (repealed Dec. 10, 1974).
3. Another common error occurs when the testator requests that a beneficiary under the will act as a witness to the testator's signing. In many jurisdictions an interested witness would invalidate his or her status as a beneficiary. Some jurisdictions, such as Washington, require three witnesses if one of the three is considered an interested witness (a beneficiary under the will). See, e.g., Wash. Rev. Code 11.12.160(1)

- (2). Some cause the witness/beneficiary to be an improper witness only as to the clauses that benefited him or her. *See, e.g.*, Wash. Rev. Code 11.12.160(1)(3); 755 Ill. Comp. Stat. 5/4-6; Iowa Code §633.281. A growing number of states allow an interested witness to sign without any legal effect. *See, e.g.*, Colo. Rev. Stat. §15-11-505; Del. Code Ann. tit. 12 §203; Fla. Stat. §732.504; Haw. Rev. Stat. §560:2-505; Idaho Code §15-2-505.
4. Another potential problem has to do with self-proving affidavits, which are required in most states. The affidavit is made by two or more witnesses, under penalty of perjury, and most, but not all, state statutes require that the witnesses actually observe the testator sign the will and hear the testator say that it is his or her will. *See, e.g.*, Ind. Code 29-1-5-3.1; Fla. Stat. §732.503; Cal. Prob. Code §8220. This document, which is usually attached to a will, allows a probate court to easily accept it as the true will of a person who has died. A self-proving affidavit makes it unnecessary for witnesses to appear in court to affirm a will's validity after the testator's death. *See, e.g.*, Fla. Stat. §733.201; Wash. Rev. Code 11.20.020(2).
 5. Another problem is that do-it-yourself sites and materials provide forms but not legal advice. If a dramatic change in estate tax law occurs, a document assembly website or provider of fill-in-the-blank forms — which cannot provide legal advice — will not contact users of its forms to let them know that a certain provision in their current estate planning document may have adverse consequences under new law. For example, assume that a testator purchased and prepared a will form online in 2001 (when the federal exemption amount was \$1 million) that included a trust for children funded with the largest amount that could pass free of federal estate tax, with the remainder passing to his surviving spouse. If the testator dies in 2011 with an estate of \$4 million, his entire estate would pass to the children's trust with nothing left to pass to the surviving spouse.
 6. Also with the scenario above, if the testator died in a state that had an estate tax exemption amount different from the federal amount, an unexpected — and unnecessary — estate tax liability would result. For example, in Washington State, the state estate exemption amount is \$2 million. Wash. Rev. Code 83.100.020(13). In the scenario mentioned above, the trust for children in the amount of \$4 million would have resulted in a Washington estate tax on the \$2 million above the state exemption amount.
 7. Yet another problem has to do with use of a holographic will, which is defined by *Black's Law Dictionary* as a will that has been written entirely by the testator in his or her own handwriting and typically not witnessed. Holographic wills are recognized, in varying degrees, in only half of the states. *See* Citations to state holographic will statutes at www.lawchek.net/Library1/_books/probate/qanda/holographic.htm (last visited June 2011). As of January 2011, the following states allow some form of holographic will: Alaska, Arizona, Arkansas, California, Colorado, Idaho, Kentucky, Louisiana, Maine, Michigan, Mississippi, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming. Some states, such as Maryland and New York, limit the validity of holographic wills to active service members. Even in states that recognize holographic wills, their use does not guarantee an easy road to probate. For example, prior to his death in 1997, Charles Kuralt, the CBS correspondent who hosted *On the Road* for over 15 years, wrote a holographic will and a codicil transferring his interest in real and per-