

Two decades ago, the greatest threat to a person's estate was death taxes. Essentially, any estate worth more than \$600,000 would incur a substantial federal inheritance tax of about 50 percent. Since that time, Congress has increased the exemption and, in most cases, taxes are no longer the major factor in estate planning.

As baby boomers begin to die and collectively leave \$58 trillion¹ in assets to their surviving families, friends and favorite charities, the number of litigated matters is rising,² and the fees associated with inheritance litigation are consuming a large portion of inheritances.³ As such, the greatest threat to the financial well-being of an estate after someone's death now appears to be litigation.

The Internet legal forms industry contributes to these disputes. Websites provide standardized forms to consumers, who have been led to believe that, for a significantly reduced price, they can attend to all their testamentary planning.⁴ Consumers' ease of access to these services is ever-increasing, as evinced by the recent announcement that LegalZoom will now be offering its estate planning forms and services through Sam's Club at a discounted price of \$299.⁵

No Clear Direction as to Legality of Self-Help Legal Forms

At least eight state jurisdictions have examined whether or not organizations such as LegalZoom.com or U.S. Legal Forms are engaging in the unauthorized practice of law (UPL). An examination of these cases shows a significant difference in holdings and outcomes.

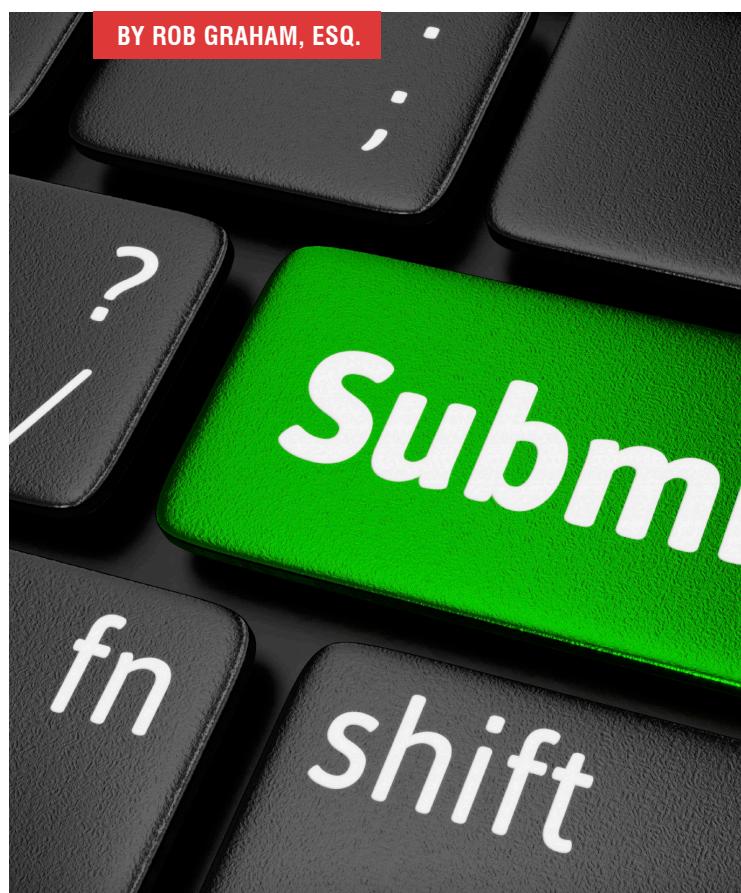
In Missouri⁶ and North Carolina,⁷ for example, courts have scrutinized LegalZoom's actions, fearing the company is violating UPL laws. In contrast, South Carolina's Supreme Court has ruled that, with safeguards, such services are not providing legal advice.⁸

In each matter, the courts examined the process and procedures in which consumers would necessarily engage, when creating their own personalized wills or trusts. The courts have especially looked at whether any legal advice was actually provided, or if the forms were truly self-directed: something the consumers could complete themselves on any word processor.

In a Florida case, the state's highest court determined that a last will and testament form, provided by a form service, did not contain a residuary clause and, as a result, frustrated the actual testamentary intent of the consumer.⁹ Regrettably, the court could not reform the will, and the property of the decedent passed to unintended parties through intestacy.

EMPTY WHEN LEGAL FORMS TESTAMENT

BY ROB GRAHAM, ESQ.



Even Basic Will Forms Can, and Do, Result in Harm to Consumers

As the jurisdictions are split in terms of allowing these automated legal form services to prosper, it is only fair that the perspective of estate planning attorneys be considered in the ongoing debate. In particular, a simple analysis of a common consumer estate plan demonstrates how these businesses fail to serve the public. Through a simple example, we will see how consumers are ultimately harmed because testamentary intent is frustrated by the consumer's improper reliance on services rendered by form shops.

CACHE: FORMS FRUSTRATE TESTAMENTARY INTENT



Before the analysis, a comment must be made regarding the motivation of attorneys opposing form shop services. Attorneys supporting the cause of automated legal forms have argued that the opposition of estate planning lawyers is grounded in greed and a desire to protect inefficient, traditional legal practices. One attorney who chairs a technology committee for the American Bar Association asserted that this is done at the expense of consumer access to affordable legal services.

Estate planning and fiduciary litigators beg to differ. Inadequate or poorly expressed plans result in substantial expenses to heirs and trust beneficiaries. Problems that

arise, including the clouded expressed intent of a testator or trustor, the improper titling of assets, incorrectly named beneficiaries and the like, are guaranteed to create huge financial detriments to those expecting an easy transition after the death of a loved one. In contrast to the assertion that attorney opposition to form shops is based on greed, those in the know quickly point out that attorneys make much more money from estate disputes than in the quick creation of a will or simple trust. Competency is the byword, not greed.

Fact Pattern of a Typical Inheritance Model

The following simple, factual analysis exemplifies the problems consumers have experienced when placing trust in documents created by form shops..

Let's begin by establishing a typical inheritance model. A typical American family, needing advice on a will or living trust, might consist of a married couple with three children. The simplest testamentary objective of the parents would be to share their assets equally among their children. Their estate consists of an IRA, a house, a checking account and a savings account.

If deficiencies arise in dealing with such a simple fact pattern, it does not bode well for the legal forms industry. Indeed, in this fact pattern, we see the value of legal services provided by licensed attorneys, and we see the detriment in consumers' reliance on inadequate forms that foster an inability to properly express their final testamentary intent.

To conduct the analysis, let us join a law school class set in the Bronx, taught by famous law instructor Mr. Kotter. Among his students, we find a star pupil named Mr. Horshack. (Any similarities to the classic sitcom "Welcome Back Kotter" are entirely coincidental).

CAN YOU SPOT THE ISSUES?

"Given these facts," Professor Kotter asks his law students, "can any of you identify potential problems with providing equally for the three children of these generous parents?"

■ Of course, as is the norm, Mr. Horshack immediately raises his hand.

■ "Yes, Mr. Horshack?"

■ "Well, first," he blurts out, "Sam has an IRA. There are many problems with that alone."

■ "Go on," Kotter encourages.

■ "What if the husband only had his wife's name on the IRA as a beneficiary?" Horshack asks. "If he dies first, then

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EMPTY CACHE: WHEN LEGAL FORMS FRUSTRATE TESTAMENTARY INTENT

his wife would get all the money. That probably isn't a bad thing, but what if the wife then remarries. At best, if the mother doesn't designate a beneficiary on her accounts, the three children will have to share their father's money with their stepfather. At worst, if she puts her new husband down as the beneficiary, then the new husband gets all of the money originally intended for the three children."

"Good," Mr. Kotter replies. "But this is only one of the many issues that an attorney might need to address with the parents in a will interview. What about the home? What if the attorney learned that the home was held in joint tenancy between the parents and one of the children? Do we see any problems with distributing the home?"

Again Mr. Horshack extends his hand and waves it like the Scottish flag of independence.

"Again Mr. Horshack?" Kotter asks wearily.

"Once both parents die, the child on the title gets the property and the other kids get screwed."

"Perhaps not artfully described, but correct nonetheless."

This simple illustration provided by Kotter and Horshack shows the great deficiencies caused by unjust reliance on a form created online by the parents – who thought they were accomplishing their intent by paying \$299 and signing some documents in front of a notary. Non-lawyer consumers cannot be expected to understand the interplay of wills and beneficiary designations of titles and financial accounts. Most simply don't understand that beneficiary designations trump whatever they might put in a will. An attorney would ferret out this testamentary intent, but a form provided at a discount has no chance of giving such guidance.

My example doesn't address the deficiencies frequently found in the actual execution of standardized forms in a way that complies with state law, or the proper execution of amendments – two of the most common errors made by consumers when using this type of service.

LegalZoom advertises that, "everyone deserves access to quality legal services so they can benefit from the full protection of the law."¹⁰ How does frustrating testamentary intent benefit consumers?

In forming policy and law, from the perspective of estate planning attorneys, the courts and legislators need to include in the definition of the Unauthorized Practice of Law "any slogan or statement of inducement by any unlicensed person, that when combined with a service normally performed by a licensed attorney, such as the creation of a legal document, creates in any other person the impression that legal services have been fully and adequately rendered in such a manner as to receive the 'full protection of the law,' as if performed by a properly licensed attorney."

In other words, UPL needs to be expanded to include words inducing consumers to think they are addressing their legal needs. If the legislators or courts want to carve out an exception for legal form generators, then they should also carve out personal liability, so that the people harmed by unjust reliance on inadequate forms can sue for damages. Or, better yet, require a disclaimer on these forms, such as "The purchase of this product is not a substitute for professional legal advice, and the purchaser alone bears the risk inherent in not consulting with a licensed attorney."

In any profession, technology can make some services more affordable and more efficient; however, we still don't put laser scalpels in the hands of medical receptionists, nor do we delegate the computer calculations of a structural engineer to a high school student who has figured out how render CAD drawings.

Technology can make our lives easier, but technology should never replace, nor be used to create the impression of replacing, the discretion and advice of a learned professional.

In a word, as to the impending pandemic of consumers improperly relying on legal forms to express their testamentary intent: "CTL-ALT-DEL." **NL**



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