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The Case Against Do-It-Yourself Wills
Deborah L. Jacobs, 09.07.10, 9:50 AM ET

A will is one of the most important financial planning documents, especially as you move toward retirement. Yet an astonishing number of people of all ages still don't have one.

Psychological factors are at play--it's extremely stressful to confront one's own mortality. Plus it's painful to spend money on estate planning, because you don't live to reap the benefits even if you know your heirs will.

Purveyors of do-it-yourself books, software and online forms are trying to change that. The cookie cutter documents they sell to help you generate a will cost a fraction of what many lawyers charge. Fueled by the technological revolution, these products have proliferated in recent years, with at least a dozen offered online, plus many books and assorted boxed software.

This development makes me cringe--so much, that I won't mention specific products in this article, because I don't want any of them saying in promotion materials, "As featured in Forbes."

Why am I strenuously opposed to do-it-yourself wills? There are just so many things that can go wrong--from the wording of the document, to the required formalities for how it must be signed and witnessed before it can be valid. As the author of a consumer-oriented book, *Estate Planning Smarts: A Practical, User-Friendly, Action-Oriented Guide*, I make it a hobby of collecting DIY horror stories. And I've gathered some doozies. As Timothy E. Kalamaros, a lawyer with his own practice in South Bend, Ind., says, using a DIY will is like "pulling your own tooth with a pair of pliers instead of going to the dentist."

One sad example involved Charles Kuralt, the CBS News correspondent and anchor. Several weeks before he died in 1997, he penned a note to Patricia Elizabeth Shannon, his mistress for 29 years, promising to leave her 90 acres and a renovated schoolhouse near the Montana fishing retreat where they spent time together. After Kuralt's death, his family and Shannon spent six years in court fighting over whether this note was a valid amendment to the 1994 will that a lawyer had prepared, or simply a promise to revise the document--a promise that Kuralt never carried out. Without ruling on this issue, a Montana court awarded Shannon the $600,000 property but stuck Kuralt's family with all the estate taxes.

In Pictures: 10 Celebrity Estate Mistakes

More recently, a wealthy Texan who tried to save a few bucks wound up forfeiting his $3.5 million federal estate tax exemption.(Texas has no estate tax). Using a form he

copied from a library book, this guy cobbled together a will, leaving everything--a cool $7 million--to his wife. There was no estate tax due at that point because assets left to a citizen spouse (or to charity) generally aren't subject to the tax. But anything left when she died, less her own exemption amount, could be taxable as part of her estate.

To fix the problem after the husband died, William Wollard, a lawyer with his own practice in McKinney, Texas, recommended the wife disclaim (or turn down) the entire $3.5 million exemption amount, allowing it to pass under state law, estate-tax free to the couple's three adult sons. The assets she chose to disclaim were most of the ranch land the couple owned, and a large sum of cash.

Had he been consulted before the husband died, Wollard would have offered a much better, more flexible, way to apply the husband's estate tax exemption. It involves setting up a family trust that can be funded up to the tax-free amount when the first spouse dies. The wife could have received income or principal from the trust if need be, but whatever remained when she died would bypass her estate.

Proponents of self-help products argue that a DIY will is better than having no will. But they're only partially right.

I give them credit for educating people about the dangers of not having a will. Without one, if your children are minors and you were a single or surviving parent, a court will appoint a guardian for them. And state law determines how most of your belongings are distributed.

Whatever is left after taxes would be distributed according to the law of intestacy. This law, which varies from state to state, establishes a ranking of inheritors of people who die without a will or living trust. Some newer laws say everything will go first to the spouse, then to children, parents and siblings. However, plenty of state laws still divide an estate between the surviving spouse and children in preset proportions (You can check out the law in your state here.)

But what the DIY folks don't usually mention, and many people don't realize, is that the rules of intestacy also apply if you foul up a DIY will. Dennis Riley, a lawyer in Oregon, Ill., recalls a situation several years ago where a father was estranged from one of his children and wanted to disinherit him. Dad bought DIY will software from a big-box store and, following the prompts, listed his assets, but omitted some important ones: small numbers of shares of various phone company stocks that he had bought many years earlier. Those shares, which probably once seemed like tiddlywinks, had burgeoned in value because of mergers and stock splits and were worth more than $1.5 million, comprising most of Dad's estate, by the time he died.

Unfortunately, the DIY will did not include what's called a residuary clause--indicating how to distribute what is left after estate expenses, creditors and taxes have been paid and

gifts of specific items or sums of money have been satisfied. So guess what happened? The stocks passed according to the law of intestacy, and the son, who the father wanted to disinherit, walked away with almost $400,000. To make matters worse, he had a substance abuse problem and blew through the money in less than a year.

Even if your situation seems far less complicated, you can easily screw up filling out the forms. George Fox, a lawyer with Fox+Mattson in Atlanta, recently sent me two of his favorite examples, gleaned from a tax group he frequents. One involved someone who left the form blank where instructions for the DIY will said "[Insert name here]" and wound up leaving $200,000 to "[Insert name here]" instead of to a loved one. And then there was the poor soul who left "$200.000 to my sister." The typo, putting a decimal point where there should have been a comma, became a source of contention. (Resolution unknown; the story lives on as a listserv cliffhanger.)

David Ludgin, a lawyer with McCarter & English in Newark, N.J., commented last week on a listserv of the American College of Trust and Estate Counsel, a group of trust and estate lawyers, that he had received a "blind inquiry from someone who told me that the will she prepared for her now-deceased husband inadvertently named her brother-in-law as executor, although she had meant to name herself." (Ludgin says the story breaks off here, since she did not hire his firm.)

Many foul-ups with DIY wills involve what's called execution--the way these documents are signed and witnessed. Requirements, which may seem nitpicky, are designed to avoid foul play and vary from state to state. For example, Fox says, some state laws provide that if you witness the will, you can't inherit anything under it. Don't count on the instructions for DIY wills to tell you that.

Another typical required formality: The person whose property is covered by the will and the witnesses are supposed to sign in each other's presence; lawyers often require this be done in their office, says Robert V. Robertson, a lawyer with his own practice in Austin, Texas. Someone who carts wills around, collecting signatures of so-called witnesses, could cause the document to be found invalid, he says.

A lawyer can also flag issues that might be unique to your state or your situation. In some states, a living (revocable) trust is the preferred method for transferring assets because it can eliminate probate--the process through which a court makes sure a will is legally valid. (Privacy is another advantage of a revocable trust since, unlike a will, it's not a public document.) But you generally still need a will to appoint a guardian for children and to cover any assets that you haven't put into the trust.

Another important detail you might overlook in your do-it-yourself effort: Various types of assets do not usually pass through a will or living trust. These include savings bonds, and certain bank accounts or certificates of deposit, which can be made automatically payable on death to the person you name. Retirement accounts are distributed according

to beneficiary designation forms that you complete when you open an account and can later amend. Similarly, when you apply for life insurance, you are asked to choose a beneficiary, and the proceeds are paid out according to those instructions. In addition to preparing your will, a lawyer can coordinate all these moving parts.

By not getting legal advice to help navigate changing circumstances, one Washington state resident of modest means just deepened the mess he left his family. Using an online program, this fellow did his original will in 2003, leaving everything to his adult son and daughter in equal shares. Six years later, Son told Dad that he and his company were filing for bankruptcy and that he was getting a divorce. He asked Dad to see a lawyer about putting his share of the estate into a trust that would protect these assets from creditors, rather than leaving it to him outright.

Dad thought he knew better and didn't want to shell out the dough for a trust. Instead, he changed his will himself online, leaving everything to his daughter, with the expectation that she would "do the right thing" and give part of her inheritance to her brother, says Wendy S. Goffe, a lawyer with Graham & Dunn in Seattle. When the daughter refused to split her share after Dad died, the brother consulted Goffe, who told him nothing could be done at this point.

Much as I dislike DIY wills because of all the problems they can cause, I think estate-planning lawyers are partly to blame for their proliferation. They've gotten into the habit of charging some pretty hefty fees for very routine services. It cost my husband and me $4,500 for a package of basic estate-planning documents--his-and-her wills, powers of attorney, living wills and life insurance trusts--prepared in 1997 after our son was born. By today's standards, we got ripped off.

During the past 13 years, the same technology that has spurred the DIY movement has made it much easier for trust and estate lawyers to do their jobs. There's some spectacular software out there that they can now use to prepare clients' wills in minutes. But many lawyers are still charging as if it took them hours.

Lawyers have to lower their fees, or self-help products, which prepare a will for less than $100, will continue to lure clients who view wills as a commodity, says Jonathan G. Blattmachr, a retired partner of Milbank, Tweed, Hadley & McCloy, who founded the Melbourne, Fla., company, InterActive Legal, to provide estate-planning software to lawyers. Clients want "a competently prepared document done as quickly and as cost-efficiently as possible."

What's a reasonable price? After an initial learning curve, a lawyer can use the InterActive Legal software to do a simple will in three minutes or less and should spend another half hour re-reading it, Blattmachr says. That, plus counseling the client, should bring the total elapsed time on the matter (again, assuming no complexities) to about two hours. With fees for trust and estate lawyers running between $300 and $1,000 per hour, it should therefore be possible, paying on an hourly basis, to get an expertly drafted will and legal advice for $600 at the low end, he says.

Alternatively, consumers can bid their work to multiple firms and negotiate a lump-sum price, Blattmachr says. With that approach, I figure my husband and I could get a highly regarded New York lawyer to redo our estate plan, when necessary, at less than half of what we paid in 1997.

Whether they pay by the hour or on a lump sum basis, consumers will get advice that is not available from a self-help product. To test that hypothesis, Blattmachr donned the cloak of anonymity and recently tried to prepare his own will using a popular online product. The program didn't alert him to the fact that there is no estate tax this year, and the only way to use his tax-free amount was to have his wife disclaim--not how Blattmachr wanted to set things up. (For more on complications created by the lack of a 2010 federal estate tax, click here.)

When he tried to leave assets for his disabled son in trust "for life," someone from the software company called to say that the program required that he insert a specific age instead. After Blattmachr explained his reasons and offered to change the age to 100, this guy advised him to see a lawyer who could set up a special needs trust for his son.

In Pictures: 10 Tips For Parents Of Special Needs Children

As it happened, the circumstances didn't warrant one of these trusts. Nor did the schnook seem to realize who was on the other end of the phone. Blattmachr is widely presumed to be one of the legal minds behind the estate plan of Jacqueline Kennedy Onassis.

Deborah L. Jacobs, a lawyer and journalist, is the author of Estate Planning Smarts: A Practical, User-Friendly, Action-Oriented Guide *(DJWorking Unlimited, 2009). To keep readers current between editions, she writes for Forbes.com, issues updates that can be downloaded from the book's website www.estateplanningsmarts.com, and tweets at twitter.com/djworking.*