



## Letting a Computer Plan Your Estate: Is It Worth the Risk?

### *A White Paper From ElderLawAnswers*

Software programs and Web sites selling customized, do-it-yourself wills and other estate planning documents seemingly offer a cost-effective and convenient alternative to visiting an estate planning attorney. After all, does anyone really want to discuss their dying wishes and health care directives with a perfect stranger? On top of that, most people are wary of the fees an attorney would charge.

In times of economic uncertainty, families tend to be even more concerned about the cost of legal advice and often put off planning that they hope will not be necessary until they are much older. A simple will, durable power of attorney and health care proxy prepared by an attorney can cost several hundred dollars per person. Online services promise the same basic estate planning documents for a fraction of that. Such services have the virtue of encouraging people who might not otherwise do so to create a will and other essential planning documents.

But is online estate planning worth the initial cost savings? Are the documents created an adequate replacement for a consultation with a qualified attorney? To help answer these questions, ElderLawAnswers recently reviewed three leading online estate planning services. As is outlined in detail below, we found that while the documents these programs produced were adequate, each online service had significant limitations in the information-gathering process that could lead to defects in the final product received. Moreover, no pre-packaged program can take account of crucial differences in state laws or encompass the complicated family arrangements so common in modern society. As a result, the use of these off-the-shelf programs can lead to unfortunate results for their users and their families.

We conclude that while online estate planning could possibly work for people who have little or no property, small savings or investments, and a traditional family tree, the significant remainder of the population should not rest easy using one of these programs and should instead consult with a qualified estate planning attorney. In other words, in all but the most commonplace estate planning situations (and only an attorney can determine what is "commonplace"), do-it-yourself estate planning programs can be a risky, and often quite costly, substitute for in-person planning with an experienced estate planning attorney.

### **Online Programs Are Easy to Use**

We reviewed three leading online estate planning programs: Nolo's Online Will, BuildaWill and LegalZoom. We purchased wills from all three, and also ordered a "living trust" from LegalZoom. Two experienced estate planning and elder law attorneys completed the documents and evaluated the programs. All three offer easy-to-use interfaces and provide help via e-mail or over the phone if a user runs into trouble preparing the documents. Nolo and BuildaWill both allow users to download their wills instantly, while LegalZoom ships the documents in a personalized estate planning binder.

#### *Nolo*

Nolo's Online Will package can be purchased for \$69.95 at [www.nolo.com](http://www.nolo.com), and took about 30 minutes

from start to finish. Once we created an account, Nolo walked us through eight steps, with multiple questions in each step that were designed to fill in our will. Every time Nolo asked a question, a text box next to the question clarified what the program was looking for in greater detail and often offered links to more specific questions. For instance, when filling in a spouse's name, the program offered hints for spouses who are known by more than one last name, as well as what to do if one's marital status changes. When we finished creating the will, Nolo not only saved it, but allowed us to go back and edit the will for up to a year after purchasing it.

Nolo's Online Will allows users to name a registered domestic partner in place of a spouse, and properly provides a warning about the legal status of those partners in states that refuse to recognize them. Unfortunately, Nolo's program does not address the legal implications of leaving all of a user's property to a spouse under one of their simplified property distribution options. For families with large estates, leaving the property directly to a spouse can lead to avoidable estate taxes upon the spouse's death. Even leaving a more modest estate to a spouse can have unintended consequences, as explained in the discussion below of "Mixed Marriages." Later on in the estate planning form, Nolo's system does suggest speaking with an estate planning attorney if a user is concerned about the size of her estate, but the warning is not prominent; in order to find it, we had to poke around more than the typical consumer is likely to do.

### *BuildaWill*

BuildaWill, found at [www.buildawill.com](http://www.buildawill.com), was the most basic program and at \$19.95 it was by far the least expensive, but it performed a pre-screening evaluation before allowing customers to create a will – an important step that the other two sites neglected. This questionnaire checked to make sure the customer was a U.S. resident, and asked several questions about the possibility of the will being challenged and the mental capacity of the person creating the document. The BuildaWill questionnaire was easy and took only 15 minutes to complete.

On the other hand, BuildaWill often simplified complicated decisions, such as allowing us to pick either an executor and an alternate or up to three executors to serve together, without really explaining the difficulties of having several people serve at the same time. Like Nolo, BuildaWill ignored the ramifications of leaving property to a surviving spouse. Unlike the Nolo will, the BuildaWill document did not include trusts for minor children. If a parent dies without such a trust, the child could get all of the money outright, in his name. Leaving it in trust is a much better option.

### *LegalZoom*

We used LegalZoom to prepare the more complicated document, a "living trust" designed to hold assets while someone is still alive and then pass on any residual estate when the individual dies. The living trust, which also comes with a will designed to pour into the trust, costs \$228.95 at [www.legalzoom.com](http://www.legalzoom.com). Living trusts can hold substantial assets and are often used to avoid probate and reduce or eliminate estate taxes. LegalZoom offered the option of what it called an "A-B" trust as part of an overall estate tax plan, but the Web site did not adequately explain the implications of funding such a trust, including the possibility that the surviving spouse would need to request funds from an independent trustee if her own funds ran out.

The LegalZoom questionnaire was the most extensive of the three Web-based programs (no doubt because a living trust is typically more detailed than a will). The program's interface was easy to use but required us to look for help if we needed it, usually by clicking on a help icon. Since the trust is

designed to hold property, the site asked us to complete a quite detailed list of the property we were planning to transfer into the trust, including information about that property. While doing so, the Web site explained that it could also prepare deeds to transfer property into the trust, for an additional fee. When our documents arrived weeks later, via standard shipping, the package included detailed instructions for executing the estate planning instruments, along with guides for executors and trustees.

However, LegalZoom (as well as the other two programs) never offered advice about who would be appropriate to name as trustee or executor. This means that a user could name a minor child or someone with diminished capacity as the protector of their assets, leading to the need for a replacement trustee and resulting in unnecessary expenses.

## **Assessment**

While all three programs make it very easy to create basic documents, they do not perform a detailed analysis of the user's true estate planning needs. Estate planning attorneys generally have detailed discussions with their clients about their situation, hopes and goals, including their relationships with their children. If a child has problems with debt, or is anticipating a divorce, or has special needs, certain portions of the estate plan must be adjusted. The online programs didn't ask these questions or address these potentially crucial issues.

Outside of the specific pluses and minuses of each site, the online programs suffered from a number of significant general defects.

### *State Probate Laws Vary*

First and foremost, most estate planning programs do not address complicated and often unyielding variations in state law. Since there is no national probate code, a computer program or Web site cannot hope to replicate the knowledge of a qualified local estate planning attorney who knows the intricacies of state law.

For example, Florida law allows those making a will to attach a separate written memorandum, which can save money by not requiring the will to be redrafted every time a change is needed. But making proper use of this option is tricky and those executing wills can easily end up failing to effectively transfer items included in the memorandum.

In Texas it's important to state in your will that you want an executor who is independent, something most generalized forms won't mention. "You're not going to have somebody who is Texas-specific on the other end of your e-mails," Aric Short, associate professor of law at Texas Wesleyan University, has commented. "There's nobody to answer specific questions, and that's what a lawyer does. You might have all kinds of issues that, to you, don't seem notable but to an attorney who practices in this area they might require special attention in your estate plan."

### *Undesired Results Abound*

Using a do-it-yourself will or other estate planning document may have undesired consequences. There was the Massachusetts man who used a pre-packaged will form to leave his home to his wife and his four grown children. This sounds fine, except that the will didn't give the wife the option to remain in the house for the rest of her life. A court case ensued because the children, who possessed

the majority interest in the property, could have legally forced the wife to move.

In another case, after a man passed away his son found his will, which the father had purchased online. The will left specific items and bank accounts to certain people. But in the years after the man had executed the will, some of his beneficiaries had died and some of the specific items mentioned in the will dropped out of his estate. Cars were sold, accounts closed and new ones opened. His will had made no provision for what to do if a beneficiary died and it had no "residuary clause" to tell his executor where items not specifically mentioned in the will should go. Much of what was in the man's estate passed according to his state's intestacy laws, as if he had never made a will at all. Trying to save money, the man had cost his intended heirs dearly.

In yet another case, a man executed a trust form leaving his substantial estate to one niece, but because he never funded the trust or executed a will, everything was divided among all of his nieces and nephews, including one he didn't know who lived on the other side of the country.

A 2004 court case from the state of Washington, *Woodard v. Gramlow*, offers a particularly costly example of how do-it-yourself estate planning instruments can backfire on the preparer. In June 1998, Charlene Young's half-sister, Jacqueline Gramlow, helped Ms. Young plan her estate. Using a legal software program, Ms. Gramlow prepared three documents: (1) Ms. Young's will; (2) an attachment; and (3) a living trust. Ms. Gramlow was not a trained legal advisor. The attachment provided that the proceeds of Ms. Young's life insurance policy should be used to pay funeral costs and other debts normally paid by an estate.

When Ms. Young died, the question became whether the attachment was a part of her will and, if so, whether it created a trust that held the insurance proceeds. If the attachment was part of the will, then the insurance proceeds would be under the control of Ms. Young's estate to pay its debts. If the attachment was determined not to be incorporated into the will, then Ms. Gramlow would receive all the life insurance proceeds. In the end, a state appeals court determined that the insurance was part of Ms. Young's estate, and Ms. Gramlow lost a portion of her inheritance. This conclusion was reached at great expense and could have been avoided with a visit to a qualified attorney.

### *Programs Often Overlook Tax Issues*

Many states also have their own estate tax systems that have wildly different thresholds. For instance, Massachusetts currently taxes estates holding more than \$1 million, even though the federal estate tax for those dying in 2009 does not take effect until an estate reaches \$3.5 million. An estate planning Web site that prepares basic wills for customers without regard to the size of the estate could miss this distinction, resulting in tens or hundreds of thousands of dollars in increased estate tax liability.

Tax issues also play a part in any decision about whether to incorporate trusts into an estate plan. If planning software addresses trusts at all, it inevitably produces a rudimentary and risky document. But well-off families, or even families without many liquid assets but with substantial real estate holdings, farms or businesses must engage in far more complicated tax planning. Qualified estate planning attorneys know how to structure intricate trust instruments to properly manage, and in many cases avoid, an estate tax burden. These trusts often allow couples to maximize their separate estate tax credits so that the surviving spouse's estate does not get hit with a large tax bill.

Computerized estate planning programs are not designed to provide estate tax advice or planning, and the programs do not draft complicated trust instruments. With the federal estate tax rate close to 50 percent, families need to consider whether the "convenience" of a computerized estate plan outweighs the risks of improper estate tax planning.

### *Mixed Marriages Muddy the Waters*

The classic "Ozzie and Harriet" family paradigm is rapidly ceasing to be the norm. Many parents have been married more than once or have had more than one relationship that either produced children or that brings with it non-biological children who are viewed as part of the family. Many parents in these so-called "mixed marriages" run into problems with do-it-yourself estate planning documents because they often think of their stepchildren, whom they may not have legally adopted, as their own children. When the parents then draft do-it-yourself wills or trusts leaving their estate to their "children," legal chaos can ensue and it often takes a court to sort out what a parent actually wanted to accomplish with the estate plan. Did he want to leave his property to his entire, extended, family (including stepchildren) or merely to his biological children? Litigation in this area can be prohibitively expensive and often ends up squandering the parent's estate. In one recent case, stepchildren paid \$100,000 in legal fees to claim their inheritance.

Second marriages, especially those in which one or both partners have children from a previous relationship, add planning concerns not addressed in these programs. While husbands and wives generally want to provide for one another, when they're both gone they want their respective children and grandchildren to receive their shares of their combined estate. This is unlikely to occur if they have so-called "I love you" wills giving everything they have to the surviving spouse. Then, at the death of the surviving spouse, in most cases everything will go to his or her family (or to the new spouse) rather than being split evenly. Or else it will be eaten up by the surviving spouse's long-term care costs. All of these possibilities can be protected against through proper estate planning, not provided for in these programs.

Same-sex relationships, with or without children and with or without state sanction, can create the need for more complicated estate planning. The large number of grandparents raising grandchildren creates the need for "handmade" as opposed to computer-generated documents. For a rigid, forms-based system to anticipate all of the alternatives is difficult or impossible.

### *Strategies for Shielding a Child's Inheritance*

None of the online programs we reviewed offered parents the opportunity to protect their adult children from some of the financial consequences of divorce, bankruptcy and illness. Rather than giving an inheritance to a child outright and risk the child's later losing it to creditors or in a divorce settlement, parents can create "spendthrift" or "family protection" trusts that hold assets for the child. This shields the inherited assets from some (but not all) creditors.

### *Special Rules for Special Needs Children*

One of the most delicate areas of estate planning involves families of children with special needs. In most cases, especially when the child with special needs receives or anticipates receiving government benefits, it is essential to avoid leaving money to the child directly. An entire category of trusts, known as supplemental needs or special needs trusts, are designed to work within the arcane rules and restrictions of governing disability benefits. Once again, the do-it-yourself estate planning tools we reviewed don't account for these special, and very complicated, rules. When a child with special

needs is involved, an improper distribution from a parent's do-it-yourself estate plan could result in the loss of the child's health insurance, education, and supported living arrangement, along with the disappearance of the inheritance due to mismanagement or to unscrupulous individuals taking advantage of the child.

### *Liability*

Every day, families prepare their most important estate planning documents using computerized estate planning programs that issue standard disclaimers. Companies selling these documents want to make sure customers understand that they are not applying the law to the facts in their particular situation, that they are not giving legal advice, and that the information they provide is not guaranteed to be correct, complete or up-to-date. Although no one likes to talk about it, occasionally estate planning attorneys make mistakes as well. But when they do, the legal system offers a remedy through a malpractice suit and damages, paid for through professional liability insurance. Unfortunately, online estate planning programs are merely tools for consumers to use to draft their own documents. If there are errors, there is no remedy and no recovery.

### **Conclusion: Is It Worth the Risk?**

The documents produced by the online programs we tested were good. The problem is that estate planning involves a lot more than producing documents. As the examples in this paper illustrate, it is impossible to know, without a legal education and years of experience, what the right legal solution is to any particular situation and what planning opportunities are available. The actual documents produced are simply tools to put into effect the plan developed based on each client's particular situation and goals.

If there is anything about a family situation that's not commonplace, using a DIY estate planning program means taking a large risk that can affect one's family for generations to come. And only an attorney can determine whether a particular situation qualifies as commonplace. The problems created by not getting competent legal advice probably won't be borne by the person creating the will, but they may well be shouldered by the person's children and grandchildren.

If the choice is using an online program or doing nothing, use the online program. But if you want to make certain that you are taking the right steps for yourself and your family, seek the advice of an experienced estate planning, elder law or special needs planning attorney.