

Winter 2016 Bulletin

DO IT YOURSELF WILLS: WILL THEY LEAD TO MORE LITIGATION?

Here's my prediction: do it yourself wills, also referred to as "homemade wills" or "online wills" or "internet wills" (I'll refer to them in this bulletin as "DIY Wills") will result in a significant (though not massive) increase in estate litigation, but society won't see that spike for another decade or two.

What are DIY Wills? The term encompasses wills that can be created by filling in blanks on a preexisting template, usually found online. A variety of companies offer such a service for a price that is somewhat significantly reduced compared to what an estate planning attorney would typically charge. The customer pays the price, receives access to the template, fills in the information (such as naming the executor and beneficiaries), and may receive some guidance as to how to properly execute the DIY Will. Online services for DIY Wills have proliferated in recent years and the trend will likely continue into the future.

There is a large debate about the wisdom of creating a DIY Will. The purpose of this bulletin is not to enter that debate, but rather to discuss how the proliferation of DIY Wills will impact estate disputes (and you can probably determine my view after having read what I believe will be the consequences of their proliferation).

The proliferation of DIY Wills will almost certainly increase the volume of estate litigation in the future. That's because the vast majority of DIY Wills are created and executed without any oversight from an attorney. The result will be a larger number of wills that are not executed in compliance

with the proper will formalities. Because attorneys do not review the language in most DIY Wills, the odds of a drafting ambiguity or contradictory language significantly increases, meaning that there will be a rise in the number of will interpretation disputes.

In addition, a DIY Will increases the ability of an unethical person to unduly influence a family member or friend into executing a will. When estate planning attorneys draft wills, they meet with the testator (the person making the will) and ensure both that the will accurately expresses his or her desires and that he or she was not pressured by anyone into instructing his or her attorney to draft the will in that manner. In short, estate planning attorneys play a critical role in safeguarding vulnerable people from undue influence. That safeguard is entirely absent with DIY Wills. Instead, an unethical person could easily assemble a DIY Will and pressure the testator into executing it, only needing (in most states) to round up two unsuspecting people to serve as witnesses.

Though there will be a noticeable uptick in estate litigation as a result of DIY Wills, there will not be an extremely large explosion of litigation. That's because a sizeable number of users of DIY Wills are younger people and people of modest financial means. By most accounts, a good number of the younger people who initially use a DIY Will (at a time in their life when they have limited assets) will likely retain an estate planning attorney to draft a new estate plan when their familial situation becomes more complex or when the level of their assets increases.



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People of modest wealth who enact DIY Wills late in life will likely pass with a modest estate. Therefore, the incentive for disgruntled heirs to litigate over their DIY Will is tempered by the modest financial sum that would be at issue. In short, the age and financial demographics of users of DIY Wills will help moderate what otherwise could be a large explosion in estate litigation.

It will likely be another decade or two before we begin to see the noticeable uptick in litigation involving DIY Wills. That's because most of the users of DIY Wills are people in their 20s – 50s. In the vast majority of states, a person only has legal standing to contest a will after the testator has passed away, so it will take a bit of time before the users of DIY Wills begin to pass away in significant numbers.