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Trust UPDATE

Stillman BANK

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Will AI put estate planners out of business?

The first online legal resource, LegalZoom, was founded in March 2001, a quarter century ago. Among other things, the new firm offered low-cost access to forms for creating a will, sometimes referred to as a "will kit." Ordinary people could download and complete the forms at a minimal cost, saving themselves the trouble and expense of hiring an estate-planning attorney for the job.

One might expect that the new ease of access would lead many more people to execute wills. Reality has been quite different. In 2001, when will kits first became readily available, an estimated 41% of Americans had a will in place. By 2025, according to a Caring.com study, the proportion had fallen to 24%.

Why didn't more people take advantage of online will planning?

Retargeting of the federal estate tax. In 2001, the federal estate tax exemption was $675,000—low enough to easily ensnare middle-class families that owned their own homes. Saving death taxes has always been a key hot button for motivating people to consult an estate planner. Since 2001, the federal estate and gift taxes have been redirected to the wealthiest Americans, with a federal transfer

tax exemption this year of $15 million. Estate planning remains vital, but money is a motivator.

The states have default plans in place. Dying without a will creates an intestacy. The states have rules in place creating rights to the property in an intestate estate, generally directing the property to the nearest blood relatives. One valuable service of the will kits was educating the public about the laws of intestacy and rights of succession. It may be that some folks decided that the state-provided estate plan was good enough—and it was free!

One size really does not fit all. If the state intestacy provisions are inadequate, generic will kits are only marginally better. Family circumstances and financial assets vary widely. Income tax issues have emerged as an important dimension in planning, and the tax rules for various types of property are complex.

Won't Artificial Intelligence be better?

AI may be helpful as a starting point in learning about the essentials of estate planning, basic information about wills, trusts, powers of attorney, tax laws, and rights of inheritance. However, the quality of AI advice is dependent upon the accuracy of the prompts used to gather that advice. For the amateur working without the help of a professional advisor, how does one know what to ask? How can any untrained person know what might be important that they don't know?

Areas where AI might run into problems include:

- proper execution of the will in accordance with state law;
- proper identification of all beneficiaries;
- assuring that provisions are unambiguous and not in conflict;
- coordinating probate and non-probate assets;
- dealing with unusual family structures;
- proving testamentary capacity.

What problems might develop if an AI-created will proves inadequate? Family disputes, increased legal fees, delays in estate distributions, even unintended distributions are all possibilities. Probate lawyers must deal with:

- challenges to the will, such as undue influence or fraud;
- fiduciary disputes over the conduct of executors, administrators, or trustees;
- determination of heirs if the AI-created will is so inadequate as to create an intestacy;
- challenges to beneficiary designation when the terms of a will conflict with the terms of a trust.

Unknown unknowns

Donald Rumsfeld famously stated, "There are known knowns; there are things we know we know. We also know there are known unknowns; that is to say, we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know." This is the sort of uncertainty that may hamper an amateur trying to use AI to create an estate plan without professional supervision.

Steps taken by an estate-planning professional

To begin, an estate planner listens.

Family dynamics. Who are the intended beneficiaries of the estate plan? Are there prior marriages? Do all the beneficiaries get along well? Are there special considerations for any of the beneficiaries, such as financial immaturity, disability, or other vulnerability? Will any potential heir be disinherited? Will any heirs be disappointed enough by the plan that they will challenge it during probate?

Inventory assets. Bank and brokerage accounts, retirement assets, real estate, closely held business interests, fine art, jewelry, collectibles—each asset class will have its own characteristics and considerations for its place in an estate plan. Non-probate assets, such as jointly owned real estate or insurance policies, need to be integrated into the estate plan.

Tax analysis. Will there be a state inheritance or estate tax to be paid? Will the estate be large enough to trigger federal estate taxes? Will the estate include income in respect of a decedent? Should lifetime gifts be incorporated into the estate plan? How can the estate plan be optimized for all taxes arising after death?

Draft the estate plan. Prepare the will and any trusts for implementation of the testator's goals. Document the execution of the will and trusts to prepare a record against claims of incapacity, undue influence, or other challenges from disappointed heirs.

Follow-up reviews. From time to time, the estate plan needs to be re-examined in light of changes to family circumstances, legal and tax developments, and the composition of the assets that will make up the estate.

When should a trust be considered?

As a trust institution, we do not draft estate plans—that's a job for an attorney. We work with estate planners when a trust is the appropriate tool to facilitate creating a lasting legacy for their clients. During your discussions with an estate planner, it may become apparent that a trust will be the best way to achieve your goals and objectives for managing your wealth. Professional investment management may be provided for loved ones utilizing testamentary trusts; philanthropic support may be maximized; or perhaps a special-needs person may receive the care and quality-of-life improvements that you wish to ensure are always there. Should the idea of a trust be raised during your estate-planning session, we would be pleased to meet and share more information about how we could partner on those goals.

How to avoid premature distribution tax penalties

The easiest way to avoid the 10% tax penalty for a premature distribution from a qualified retirement plan, such as a 401(k), 403(b) or IRA, is to wait until age 59½ or later to receive it. However, there are two additional rules to keep in mind if one needs access to retirement funds early.

Rule of 55

If you are 55 or older, and you separate from service with your employer, you may receive penalty-free distributions from that employer's plan if the plan allows for it. The rule does *not* apply to retirement accounts still held at a previous employer, nor does it apply to IRAs. For certain public safety personnel, this rule applies at age 50 and up.

Some early retirees take advantage of this rule to provide a financial bridge until they begin receiving Social Security benefits. Note that if a distribution is rolled over to an IRA, the tax penalty will then apply to early distributions from that account.

Substantially equal periodic payments

You may annuitize an IRA or an employer's retirement plan benefit at any age (sometimes referred to as "72(t) payouts"). Payments must continue for five years or until age 59½, whichever is longer. The amount of the annuity must be calculated according to one of three formulas provided by the IRS, and they may not be adjusted during the annuity period.

With this approach, if you stop or alter the distributions early, the 10% tax penalty applies retroactively to all withdrawals, with interest. It is much less flexible—but on the other hand, the annuity can be started earlier than age 55. The table below compares the key features of the two strategies.

Note that with either strategy, ordinary income taxes will apply. This is a tricky area, so the advice of a tax professional is recommended.

Early retirement plan distributions compared

FEATURE	RULE OF 55	RULE 72(t) (SEPP)
Minimum Age	55 (or 50 for qualified public safety employees)	Any age
Eligible Accounts	Only the 401(k)/403(b) from the employer you just left	IRAs, 401(k)s, 403(b)s and other qualified plans
Separation from Service Required	Yes—you must leave job in or after the year you turn 55	Not required for IRAs; required for employer plans
Withdrawal Flexibility	High—take any amount, any time (as plan allows)	Low—fixed "substantially equal periodic payments" (SEPP)
Commitment Period	None	5 years or until age 59½, whichever is longer
Risk if Rules Broken	Minimal (just taxes and possible plan restrictions)	Retroactive 10% penalty on all prior withdrawals, plus interest

Source: M.A. Co.

Guardrails for GRATs

According to SEC filings, grantor-retained annuity trusts (GRATs) have been used by wealthy families to move assets within the family at little or no transfer tax cost. Attempts to limit the effectiveness of strategies by the IRS have not proven effective. Senators Ron Wyden and Angus King have introduced the "Getting Rid of Abusive Trusts Act," which would reduce the attractiveness of these arrangements. Key elements of their legislation include:

- a 15-year minimum term for a GRAT;
- a prohibition on decreasing the annuity interest during the trust term;
- a minimum value for the remainder GRAT interest to be subject to federal gift tax (no more "zeroed-out" GRATS in which the annuity interest fully offsets the remainder);
- transfers between a trust and its deemed owner will be treated as sales incurring income tax; and
- taxes paid by the trust grantor on trust income will be treated as additional taxable gifts.

The legislation is not expected to progress this year, but it could gain support if control of either the House or Senate changes hands next year.

A new revenue source for Social Security?

Senator Chris Van Hollen has introduced the "Strengthen Social Security by Taxing Dynastic Wealth Act." The most important provision of the legislation is the immediate reduction of the basic exclusion amount from the federal estate tax from the current $15 million to $3.5 million, an exclusion last seen in 2009. Such a change would have an immediate major effect on many existing estate plans.

In addition, the legislation would increase the federal estate tax rate from the current 40% to 45% for estates larger than $3.5 million. For gift tax purposes, the exclusion would be set at $1 million. Usage of the deceased spousal unused exclusion (DSUE) would be limited to $1 million for lifetime gifts.

In the history of the federal estate tax, the amount exempt from the tax has never been reduced. Prospective reductions have been enacted, including a drop that had been scheduled for the end of 2025, but in every case, Congress reversed the reduction before it took effect. That suggests that there is not much appetite for a return to 20th-century level transfer taxes.

On the other hand, this legislation explicitly links the increase in estate and gift tax revenue to the Social Security trust funds, which could run dry as soon as 2032. That might increase the appeal of such changes for some legislators.