

The Integration of AI into Trust and Estate Law: Why Human Oversight Still Matters

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Artificial Intelligence (AI) is a rapidly evolving area of computer science dedicated to building systems capable of performing tasks with human-like intelligence.

With the rise of easily accessible platforms such as ChatGPT and Microsoft CoPilot, professional industries are examining how AI's arrival and continued development will impact their businesses.

The legal world has not been immune to this technological revolution. The alluring opportunity of utilizing AI to perform tasks that historically required the advanced education and specialized training of professionals is seemingly at anyone's fingertips.

Trust and estates attorneys may concede that for individuals seeking a "simple" estate plan, the potential benefits of AI are obvious: the free and immediate creation of estate planning documents from the comfort of home.

However, what are the risks? Should individuals continue to seek out trained estate planning practitioners to create and implement their estate planning objectives, and if so, why?

As curious estate planners, we decided to put these questions to the test. We asked a well-known AI platform to draft a Will, Revocable Trust, Health Care Proxy and Power of Attorney for a married New York Resident with three children.

At first glance, the results AI generated seemed impressive. AI also thoughtfully included a paragraph of "next steps" for the user, which notably advised in bold letters to "consult an estate planning attorney".

The estate plan that AI created was simple. The dispositive document was a revocable living trust agreement that allowed the grantor (the creator of the trust) to have complete access and control over the trust's assets during the grantor's lifetime.

On the grantor's death, the assets were to be distributed 50% to the grantor's spouse "outright or in further trust for their benefit" and 50% was to be divided equally among the grantor's children.

If a child had not yet reached a certain age (there was a prompt for the user to select an age, but AI recommended 30), the child's share was to be held in trust "with discretionary distributions for health, education, maintenance and support (HEMS) in the meantime."

Note that these were the only trust terms provided if such trust needed to be established. The Will was a so-called pour-over Will, which directed that any assets passing under the Will would be delivered to the trustee of the aforementioned trust and ultimately distributed to the beneficiaries under the terms set forth in the trust agreement.

AI got a few things right, but many important elements fell short. The estate plan generated by AI would be problematic for any person whose estate would be subject to estate taxes, as AI did not consider the relevant tax component involved in estate planning.

There was no attention given to minimizing or avoiding estate taxes, no direction relative to the way estate taxes should be paid (i.e., should it be apportioned?) and no follow-up question seeking asset or net worth information from the user to determine if estate taxes needed to be considered for this particular individual.

In not doing so, the AI-user forfeited the opportunity to utilize techniques to minimize or even eliminate estate tax. AI also neglected to consider the impact that beneficiary designation forms or transfer-on-death (TOD) accounts have on estate plans as these assets will pass outside the estate planning documents that AI crafted.

The equal split of assets between the two categories of spouse and children is interesting, as it deviates from the most common approach whereby the individual passes all of his or her assets to the surviving spouse. In a simple estate plan, the children do not generally inherit any substantial amounts until the death of the surviving spouse.

More alarming is the option of the spouse's share to be distributed "outright or in further trust". Presumably the successor trustee would be tasked with this determination, but it opens the door for the spouse to litigate if they disagree with the successor trustee's decision.

If a trust for the spouse's benefit is created, what are the terms? The trust agreement does not actually provide the terms for a continuing trust for the spouse's benefit.

The trust was also silent on what would happen to a beneficiary's share if the beneficiary did not survive the grantor. What if a child did not survive the grantor but was survived by children of his or her own?

Who gets the predeceased child's share – the child's surviving children, or should it be split among the surviving children of the grantor? Similarly, what happens to the spouse's share if he or she predeceased the grantor?

These questions could be answered by reviewing the state's lapse or anti-lapse statutes; however, AI did not ask the user to consider these issues so that they can be adequately provided for in the document (most grantors override the state's default rules).

Furthermore, the continuing trusts that AI attempted to set-up for children under the age of 30 were wholly inadequate and created more questions than answers.

At best, administering this estate plan could well force the beneficiaries to seek judicial direction in interpreting ambiguous wording and missing provisions, or at worst, be a litigious nightmare among fighting family members.

Either way, this grantor's legacy may be the headaches his heirs will endure as they attempt to carry out his wishes.

Notably, AI did not emphasize one of the more important aspects of the estate planning process – proper document execution and preservation. The Will that AI created included a space for the testator's signature at the end of the document and a "Witness Section" with two spaces for signatures, as well as a space for the witnesses' names and addresses.

However, AI did not include any additional instructions regarding how the Will should be executed or any mention of the strict requirements under EPTL §3-2.1.

The AI Will did not include a self-proving affidavit and without one, the probate process will be more complicated and costly for even a simple Will. A self-proving affidavit is signed by the witnesses, often simultaneously with the execution of the Will by the testator, in the presence of a notary public, attesting that the formalities of execution were met.

Without a self-proving affidavit, the witnesses will need to be located and testify to the circumstances surrounding the Will execution before the Will can be accepted for probate. In attempting to probate a Will without a self-proving affidavit, the proponent can face uncooperative, deceased or missing witnesses.

If a witness cannot be located, the Will can be denied probate. Further, in New York, self-proving affidavits typically name the attorney that supervised the Will execution which creates a presumption that the formalities of a properly executed Will were observed.

Other important details of estate planning that AI failed to mention is cautioning the user that the original Will is required to be filed for probate and emphasizing the importance of only executing one original Will.

If an individual executes more than one Will, each duplicative original is required to be produced for probate. If a duplicative original is missing, the court will presume that the testator revoked the Will and may deny probate altogether. AI also did not warn the user that an original Will should not be unstapled.

If the Will is unstapled to make a copy, the integrity of the document is compromised. The court will scrutinize the staple holes and require an explanation as to why the Will was unstapled.

Without an adequate explanation (which can be hard to substantiate because at the time that the Will is submitted for probate, the testator is dead), the presumption is that the Will was tampered with and may be grounds for denying probate.

A well-intentioned but unknowing testator who did not know these simple safeguards can create significant difficulty for his heirs.

Although the health care proxy that AI generated was sufficient, the Power of Attorney was shockingly inaccurate. This was most surprising as the New York Power of Attorney is a statutory form, but the document AI produced deviated too far from the statute.

It failed to recite most of the necessary "cautions to the principal", which consists of several warnings to the principal about the broad authority that they are granting and the ability of the agent to act immediately.

Among other misfires, it also left out certain powers in the Grant of Authority Section, mandated the agent receive commissions, and removed entire sections of the form including the essential "modifications" section. If executed, the document likely would not be valid.

Related to the conversation of combining artificial intelligence with the pursuit of legal advice, something obvious yet rarely discussed, is the fact that there is no attorney-client privilege with AI.

AI searches are traceable and have been discoverable in legal proceedings. Attorneys using AI should refrain from including identifying client information in a search in adherence to professional conduct obligations and also consider disclosing the use of AI in their engagement letters.

As tempting as it may be for a well-intended person in a time pinch or on a tight budget to rely on AI for estate planning documents, the outcome is likely to be counterproductive for the unwary.

Proper estate planning requires careful consideration to an individual's family structure (e.g., blended family, second marriage, prenuptial agreement), asset information (e.g., beneficiary designation accounts, business succession concerns), goals (charitably inclined, asset protection concerns, tax efficacy), and net worth.

Inefficient or ineffective estate planning can have a lasting negative impact on a person's legacy.

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