

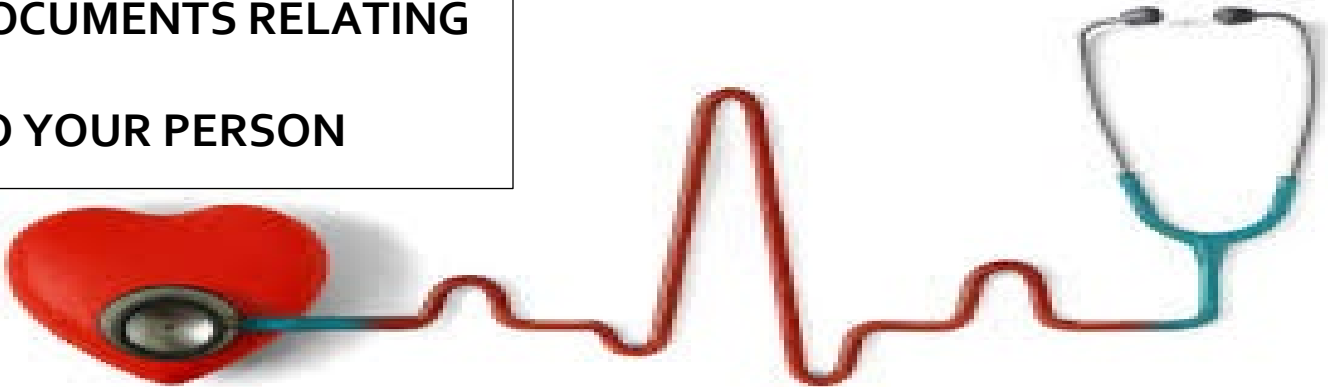
Documents You Cannot Live (or Die) Without



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Documents Relevant While You Are Alive

DOCUMENTS RELATING TO YOUR PERSON



1. Medical Power of Attorney

The Medical Power of Attorney is a document by which someone can appoint another person to make medical decisions for them in the event they are not competent to make that decision themselves. The medical power of attorney is one of the primary methods of avoiding a guardianship of the person because, subject to certain express limitations, the agent may make any health care decision on the person's behalf that the person could make if she were competent.

To be effective, the medical power of attorney must be signed by the person in the presence of two witnesses, who also must sign the document. In the alternative, the statute permits the person to sign the medical power of attorney before a notary public.

An agent may exercise authority only if the person's attending physician certifies in writing and files the certification in the person's medical record that, based on the attending physician's reasonable medical judgment, the person is incompetent to make medical decisions for herself.

A Medical Power of Attorney, by definition, becomes effective only when the person is not able to make medical decisions on her own behalf. Thus, if the person objects to treatment while competent, the agent under the power of attorney cannot override the person's decision.

After consultation with the attending physician and other health care providers, the agent is required to make a health care decision (1) according to the agent's knowledge of the person's wishes, including the person's religious and moral beliefs; or (2) if the agent does not know the person's wishes, according to the agent's assessment of the person's best interests.

The power of attorney is effective indefinitely on execution and delivery of the document to the agent, unless it is revoked. If the medical power of attorney includes an expiration date and on that date, the person is incompetent, the power of attorney continues to be effective until the person becomes competent unless the power of attorney is revoked.

A medical power of attorney is revoked by any of the following means: (1) oral or written notification at any time by the person to the agent or a licensed or certified health or residential care provider or by any other act evidencing a specific intent to revoke the power, without regard to whether the person is competent or the person's mental state; or (2) execution by the person of a subsequent medical power of attorney.

Further, an agent's authority under the medical power of attorney is revoked if the agent's marriage to the principal is dissolved, annulled, or declared void, unless the medical power of attorney provides otherwise.

Although a medical power of attorney should be effective regardless of its age, it may be wise to update the medical power of attorney from time to time. A medical power of attorney which is executed at or near the time a person is being admitted to a nursing home or other care facility, or while the person is a patient at such a facility, will be viewed with suspicion. Furthermore, “dueling” powers of attorney may give rise to a necessity of a guardianship if the care provider or doctor will not honor either one.

2. Directive to Physicians and Family or Surrogates (fka the "Living Will")

A written directive is a document by which the person states whether they wish to be made comfortable or if they would prefer life support in the event they are diagnosed with a terminal or irreversible condition. The document used to be known as a “living will,” but that term is very confusing because the document is not a will. It is a directive to the person’s physician.

Any competent adult may at any time execute a written directive. The declarant must sign the directive in the presence of two witnesses, who must also sign the document. In the alternative, the statute permits the principal to sign the directive before a notary public. The attending physician shall make the directive a part of the declarant's medical record.

A physician, health facility, health care provider, insurer, or health care service plan may not require a person to execute or issue an advance directive as a condition for obtaining insurance for health care services or receiving health care services.

The desire of a qualified patient, including a qualified patient younger than 18 years of age, supersedes the effect of a directive. To the extent that a treatment decision or an advance directive validly executed conflicts with another treatment decision, or an advance directive executed, the treatment decision made or instrument executed later in time controls.

If an adult patient is incompetent but has designated a person to make a treatment decision, the attending physician and the designated person may make a treatment decision in accordance with the declarant's directions.

If an adult patient is incompetent but has not designated a person to make a treatment decision, the attending physician must comply with the directive unless the physician believes that the directive does not reflect the patient's present desire.

If an adult patient is incompetent or otherwise mentally or physically incapable of communication and has not executed or issued a directive, the attending physician and the patient's legal guardian or an agent under a medical power of attorney may make a treatment decision that may include a decision to withhold or withdraw life-sustaining treatment from the patient.

If the patient does not have a legal guardian or an agent under a medical power of attorney, the attending physician and one person, if available, from one of the following categories, in the following priority, may make a treatment decision that may include a decision to withhold or withdraw life-sustaining treatment:(1) the patient's spouse; (2) the patient's reasonably available adult children;(3) the patient's parents; or (4) the patient's nearest living relative.

The treatment decision must be based on knowledge of what the patient would desire, if known. If the patient does not have a legal guardian and a person listed above is not available, a treatment decision must be concurred in by another physician who is not involved in the treatment of the patient or who is a representative of an ethics or medical committee of the health care facility in which the person is a patient.

The fact that an adult qualified patient has not executed or issued a directive does not create a presumption that the patient does not want a treatment decision to be made to withhold or withdraw life-sustaining treatment. A person listed above who wishes to challenge a treatment decision made under this section must apply for temporary guardianship over the patient, ‘

3. HIPPA Release

Everyone’s medical records are confidential and are not to be revealed to others unless the patient has authorized release of the information. Sometimes a person will want a particular person to be named as their agent under the medical power of attorney, but they want others to at least be able to receive medical information. In that instance, the

person would execute a release which would authorize the medical provider to release confidential health care information to the persons named on the form.

4. Out of Hospital Do Not Resuscitate Orders

Any competent person may at any time execute a written out-of-hospital DNR order directing health care professionals acting in an out-of-hospital setting to withhold cardiopulmonary resuscitation and certain other life-sustaining treatment designated by the Texas State Board of Medical Examiners.

The declarant must sign the out-of-hospital DNR order in the presence of two witnesses, who must also sign the document. In the alternative, the declarant may sign the out-of-hospital DNR order and have the signature acknowledged before a notary public.

The attending physician of the declarant must sign the order and must make the fact of the existence of the order and the reasons for execution of the order a part of the declarant's medical record. An out-of-hospital DNR order is effective on its execution.

The desire of a competent person, including a competent minor, supersedes the effect of an out-of-hospital DNR order executed or issued by or on behalf of the person when the desire is communicated to responding health care professionals.

If the person is incompetent but previously executed or issued a directive to physicians, the physician may rely on the directive as the person's instructions to issue an out-of-hospital DNR order and must place a copy of the directive in the person's medical record.

If the person is incompetent but previously executed or issued a directive to physicians designating a proxy, the proxy may make any decisions required of the designating person as to an out-of-hospital DNR order and must sign the order in lieu of the person signing.

If the person is incompetent but previously executed or issued a medical power of attorney designating an agent, the agent may make any decisions required of the designating person as to an out-of-hospital DNR order and shall sign the order in lieu of the person signing.

The following persons may execute an out-of-hospital DNR order on behalf of a minor:

- (1) the minor's parents;
- (2) the minor's legal guardian; or
- (3) the minor's managing conservator.

However, such person may not execute an out-of-hospital DNR order unless the minor has been diagnosed by a physician as suffering from a terminal or irreversible condition.

5. Declaration of Guardian in the Event of Later Incapacity

A declaration of guardian also permits you to specifically disqualify an individual from serving as your guardian. The following are the requirements of a valid Declaration of Guardian:

- The person signing the Declaration of Guardian (the "Declarant") must not be incapacitated.
- The Declaration of Guardian must be written wholly in the declarant's handwriting, or if not, it must be signed by two credible witnesses in the declarant's presence who are 14 years of age or older and not named as guardian or alternate guardian in the designation.

If the Declaration of Guardian does not specifically disqualify an individual from serving as guardian, the Declaration of Guardian can be signed by the declarant and acknowledged by a notary instead of being signed in the declarant's presence by witnesses.

6. Supported Decision-Making Agreement

In 2015, the Texas Legislature enacted the “Supported Decision-Making Agreement Act,” which is to recognize a less restrictive alternative to guardianship for adults with disabilities who need assistance with decisions regarding daily living but who are not considered incapacitated persons for purposes of establishing a guardianship under this title.

An adult with a disability may voluntarily, without undue influence or coercion, enter into a supported decision-making agreement with a supporter under which the adult with a disability authorizes the supporter to do any or all of the following:

- (1) provide supported decision-making, including assistance in understanding the options, responsibilities, and consequences of the adult's life decisions, without making those decisions on behalf of the adult with a disability;
- (2) assist the adult in accessing, collecting, and obtaining information that is relevant to a given life decision, including medical, psychological, financial, educational, or treatment records, from any person;
- (3) assist the adult with a disability in understanding the information described by above; and
- (4) assist the adult in communicating the adult's decisions to appropriate persons. The supported decision-making agreement extends until terminated by either party or by the terms of the agreement.



1. Durable Power of Attorney

A financial power of attorney is a document whereby someone can name another person as his agent to handle various financial and business transactions on his behalf. Any competent adult may appoint another person to be his agent.

A “non-durable” power of attorney terminates upon a person’s disability or incapacity. The Texas legislature has introduced a form of “durable” power of attorney wherein the powers of the agent do not terminate on the principal’s disability or incapacity. This is now the most common form of power of attorney regarding handling someone’s financial affairs.

An instrument is a durable power of attorney for purposes of this subtitle if the instrument is a writing or other record that designates another person as agent and grants authority to that agent to act in the place of the principal, regardless of whether the term “power of attorney” is used, is signed by an adult principal or in the adult principal's conscious presence by another adult directed by the principal to sign the principal's name on the instrument; contains: the words: (i) “This power of attorney is not affected by subsequent disability or incapacity of the principal”; or (ii) “This power of attorney becomes effective on the disability or incapacity of the principal”; or (B) words similar to those of Paragraph (A) that clearly indicate that the authority conferred on the agent shall be exercised notwithstanding the principal's subsequent disability or incapacity; and (4) Is acknowledged by the principal or another adult directed by the principal as authorized before an officer authorized under the laws of this state or another state to take acknowledgments to deeds of conveyance; and administer oaths.

An agent may take the following actions on the principal's behalf or with respect to the principal's property only if the durable power of attorney designating the agent expressly grants the agent the authority and the exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject:

- (1) create, amend, revoke, or terminate an inter vivos trust;
- (2) make a gift;
- (3) create or change rights of survivorship;
- (4) create or change a beneficiary designation; or
- (5) delegate authority granted under the power of attorney.

Authority granted in a durable power of attorney is exercisable with respect to property that the principal has when the power of attorney is executed or acquires later, regardless of whether: (1) the property is located in this state; and (2) the authority is exercised in this state or the power of attorney is executed in this state.

An act performed by an agent under a durable power of attorney has the same effect and inures to the benefit of and binds the principal and the principal's successors in interest as if the principal had performed the act. The statutory durable power of attorney is probably the most common method used to avoid a guardianship of the estate.

Most powers of attorney, especially those which follow the form set out in the statute, give the agent broad powers to handle the business affairs of a principal in the event of incapacity. However, in spite of this great benefit, there are many abuses of powers of attorney. Sometimes, a child of the principal will have his parent sign a power of attorney when he does not have the mental capacity to do so. This often results in "dueling powers of attorney" where two or several children claim to have a valid power of attorney from his parent. Another big drawback is that banks and other financial institutions have become leery of powers of attorney especially when the principal does not present herself at the institution.

2. Living Trusts

A living trust is probably a more desirable method of appointing someone to handle financial affairs because the settlor (the one who creates the trust) can usually build into the document more protective features which better enable the settlor or beneficiaries to monitor the trustee's activities. A living trust can take many forms and can be made to be revocable or irrevocable.

A trust may be created by several means, but the most common is a written trust instrument which appoints a trustee, names the beneficiary, and sets out the terms and purpose of the trust. In many states, management of one's property by means of a trust is the norm because the probate system can be quite expensive. This is not the case in Texas. Probating an estate in Texas, particularly if the matter is uncontested, is not as expensive as it can be in other states. Texas also allows for an independent administration of estates which allows an executor or administrator to act without court authority on virtually all matters. However, although a trust may not be necessary to avoid the probate system upon death, a trust is a good device to use to avoid a guardianship proceeding over one's estate.

Almost every well-drafted trust covers the possibility of a trustee becoming incapacitated. If the trustee is a person other than the settlor, then the settlor's incapacity does not affect the administration of the trust. If the trustee is also the settlor, then the trust will provide for the appointment of a successor trustee upon the incapacity or resignation of the prior trustee. The transfer of authority can often occur without court intervention, which is often one of the purposes for establishing the trust.

Because a trust is a separate relationship with the assets, the assets must be transferred or conveyed to the trustee so that they are properly titled in the trust. Failing to fund a trust, or only funding the trust with some but not all of one's property, can present a problem when the settlor becomes incapacitated. Unless the settlor has appointed an agent under power of attorney with the authority to fund a trust, then there may be a need for the appointment of a guardian of the estate upon incapacity.

DOCUMENTS RELEVANT WHEN YOU DIE



Documents Relating to Your Person

1. Appointment of Agent to Control Disposition of Remains

The disposition of your remains is what you want done with your body following death. The most common dispositions are burial and cremation.

If you die without having a written document that appoints someone to make decisions about your remains, then your “next of kin” will have the right to control what happens to your body. In Texas “next of kin” means your relative(s) in the following order:

- surviving spouse
- surviving adult children
- parents
- surviving adult siblings

In some cases, a person’s next of kin may be a group of people, such as a group of adult children or a group of siblings.

The Disposition of Remains document lets you select the person you feel will best carry out your wishes regarding what happens to your body at the time of your death. The person you assign can be a family member, significant other, or a close friend. The document gives you the power to choose a person you trust to follow your wishes. It allows you to remove decision making from a group of people who may have differences of opinion regarding what should happen to your remains.

Your primary agent is your first choice for making decisions. The document allows you to name alternates in the event the primary agent is unable or unwilling to act. It is important to speak with your agents before completing the document to make sure they are comfortable following your wishes. Of course, whomever you choose must be a competent adult—that is, someone at least 18 years old.

The Appointment of Agent to Control Disposition of Remains is not valid until the agents you have named sign and date the last page of the document. You can revoke the document prior to your death.



Documents Relating to Your Estate

1. *Will*

A will is a legal declaration of your intentions which you want to be performed after your death. Generally, a will gives directions as to how to dispose of all the property you own after your death. Since a will does not take effect until your death, you can change your will at any time prior to your death so long as you are mentally competent and you fulfill the basic legal requirements.

To be valid, the will must be in writing, you must be identified, you must have the desire for the document to govern the disposition of your property upon your death, you must be of sound mind and over eighteen years of age at the time the will is executed, and two credible witnesses over the age of 14 years of age must attest to it and sign it in your presence. In Texas, there is an exception to the requirement of witnesses if the document is totally in the handwriting of the testator (the one making the will) and is signed by him.

What happens if you don't have a will? Some people mistakenly believe that the "state" will get your property. This is another myth. However, the state will determine who will get your property. This is set out in a statute that the court must follow. However, you may wish to distribute your property differently than the legislature sets out. If so, draft a will. You may wish to designate a guardian for your minor children. If so, draft a will. You may wish to save your beneficiaries the expense of proving who your heirs are. If so, draft a will.



2. *A Revocable Trust*

The Trust is listed a second time because one of the advantages of a trust is that it can control a person's property while they are alive and even upon their death. The trust can serve as a "will substitute" and direct how the person's property will pass upon their death. For example, the trust could provide that the trust assets are for the benefit of the settlor (the one who creates) the trust for her life. The trust could then provide that, upon the settlor's death, the remaining trust assets pass to her descendants (or whomever). If the settlor transferred assets into the trust while she was living, then the trust, rather than the will, governs the disposition of those assets. The will would cover any assets which were not made a part of the trust. Many times a trust is signed at the same time as a "pour over" will. The will would name the trustee of the trust as the beneficiary of the estate. Therefore, whatever items did not make it into the trust during the person's lifetime can be transferred into the trust upon her death. This is especially beneficial if the person wants the assets to remain in trust, which is not uncommon if the beneficiaries are minors or incapacitated, or even if they may be financially irresponsible. Keeping the assets in trust may also protect the assets from the creditors of those beneficiaries.

