

ESTATE PLANNING, GUARDIANSHIP, AND SPECIAL EDUCATION BASICS

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ESTATE PLANNING:

Durable (General/Financial) Power of Attorney

- Appoints an agent to manage financial and personal business affairs.
- You can grant specific powers, such as managing bank accounts, transferring real estate, or other affairs, or you can appoint a General Power of Attorney (POA) that allows the agent to handle everything.
- A Power of Attorney can grant immediate power that continues through incapacity (“durable”), or it can grant power upon the occurrence of some condition, such as future incapacity (“springing”).
- Some banks, financial institutions, or mortgage companies require specific forms and language. If you are considering a Power of Attorney to handle specific transactions with an entity, you should call that entity
- Lastly, spouses may consider granting each other POA so that there are not any problems dealing with separate property, joint real estate, or other property if one spouse is incapacitated or absent for a period of time.

Medical Power of Attorney

- Appoints an agent to make your healthcare decisions in the event you are unable to.
- A Medical Power of Attorney (MPA) becomes active when you are unconscious, incapacitated, or otherwise unable to make medical decisions for yourself. A MPA is generally more useful than a living will, but it may not be a good choice if you don’t have another person you trust to make these decisions for you.
- However, the power of a MPA is limited - in general, your agent cannot put you in any facility for inpatient mental health services, convulsive treatments, psychosurgery, or abortion. Furthermore, your attending physician must certify in writing that you are unable to make health care decisions, and file the certification in your medical record.

Living Will (also known as Directive to Physicians, Family or Surrogates; or Advance Directive in Texas)

- Type of advance directive that expresses your wishes with regard to the use of life-sustaining treatment, in the event you become terminally ill or incapacitated due to injury, disease, or illness.
- A Living Will allows you to make a decision; there is no agent appointed. It informs your doctor of your wishes, and it relieves your family of having to make a very difficult decision – whether or not to continue life-support. It is a good idea to have one if you plan on undergoing surgery.

DNR (Do Not Resuscitate)

- Type of advance directive that instructs that certain resuscitative measures not be used, such as not to have cardiopulmonary resuscitation (CPR) if your heart stops or if you stop breathing. Other resuscitative measures specifically listed in a DNR are advanced airway management, defibrillation, artificial ventilations, and transcutaneous cardiac pacing.
- A DNR order should be put in your medical chart by your doctor, and they should be accepted by doctors and hospitals in all states. The DNR has very specific formalities for proper signing.

The term “Intestacy” – No Will

- When you die without a Will, you die intestate. The Texas Estates Code provides for an order in which heirs can inherit and divide your estate. The default rules in the Estates Code will apply since you didn’t establish your own plan. A person dying without a Will may require that person’s estate to go through probate court.

Will

- Document that allows you to direct the distribution of your assets, appoints guardians for minor children, establishes testamentary trusts for certain beneficiaries, etc. It is your specialized plan versus using the default in the law book.

Your own “Will” vs. Intestacy

Benefits of having a Will

1. Provide for disposition of your assets according to your specific wishes;
2. Avoid passing assets to those you want to exclude, who would otherwise inherit under intestacy;
3. Designate your preferred guardian or a trust for minors or incapacitated adults;
4. Provide for long-term management of assets;
5. Reduce likelihood of disagreements over property;
6. YOU appoint executor/trustee/guardian, rather than the court;
7. Provide for charitable gifts;
8. Coordinate will or trust with beneficiary designations of non-testamentary assets

Other Forms that can be used to by-pass Probate Court upon Death

The below can be independent of a Will or in conjunction therewith.

- Beneficiary designation directly with life insurance, retirement, bank accounts, IRAs, etc.
- Survivorship or beneficiary designation for vehicles (SEE VTR 121 & VTR 122 – Texas Motor Vehicles Dept)
- Survivorship designation for Real Property (Community property agreement, Lady Bird Deed, Transfer on Death Deed, Life Estate Deed)

Trusts

- A trust is a written agreement created when a property owner (Settlor) transfers legal title of an asset to a person or entity (Trustee) who has the duty to hold and manage the asset for the benefit of one or more persons (Beneficiary).
- Trusts by-pass probate (court administered winding-up of affairs upon death)

There are different types of trusts:

- Testamentary trust – created in a Will and comes into being at death (or some future time); usually created to provide for the management of assets, creditor protection, and tax benefits; may also be appropriate for minors, adults and children with special needs, persons who lack sound financial judgment.
- Living trust – created during the life of the Trustor/Settlor; can be revocable (can be changed) or irrevocable (permanent); also known as “inter vivos.”
- Medicaid Planning – helps preserve assets while qualifying for SSI and Medicaid, however, must be in existence for at least 5 years prior to receiving Medicaid benefits or may be subject to Texas Medicaid Recovery.
 - Review exemptions to Medicaid Recovery since may not be an immediate concern.
- Special Needs Trusts
 - Specifically for an individual with a qualifying disability who is under the age of 65.
 - A trust operated by a 3rd party trustee, not the person with a disability. The beneficiary has no authority over the trust assets.
 - Assets of the trust must not include any income from the beneficiary.
 - Trustee has discretion in disbursements according to the rules of the trust to usually ensure that beneficiary first and foremost continues qualification for public assistance (SSI, Medicaid, Section 8 housing, etc). Can only disburse funds below a certain threshold and as supplementary.
 - Can include SSI and Medicaid funds but funds must be used in accordance with appropriate rules so no forfeiture.
 - May hold tangible assets, such as real estate.
 - Designate a Trust Protector in addition to Trustee to ensure rules and uses are followed.
 - Can have at the same time or separately from an ABLÉ account
 - ABLÉ account is a special bank account that allows the person with a disability to save and invest money for qualifying disability-related expenses without losing SSI, Medicaid and other public assistance.

Supported Decision Making Agreement

- Document for helping a person with a disability with educational, financial, living and medical decisions without affecting the self-determination and decision-making of the person with a disability
- Must be competent to Sign
- Can revoke at any time
- Limited in comparison to power of attorney. Cannot make the decision; may only advise and provide assistance in gathering information and forming the decision.
- Great for child who turns 18 yrs old and is still in high school (but consider a power of attorney)

Guardianship:

- Court proceeding to request authority to act on behalf of and govern the activities of an incapacitated person
- Incapacitation can be below the age of 18 or a person who is legally incapable by medical evaluation to meet basic legal capacity requirements for understanding.
- Once appointed, usually have full authority to act on behalf of the incapacitated person (similar to a parent-child relationship)
- Rigorous requirements for governing assets and yearly accounting requirement with the Court.
- May be only avenue if person is incompetent to understand and sign any of the forementioned documents (supported decision making agreement or power of attorney).

Special Education Services:

- Representation and assistance with the educational needs of a child receiving accommodations under Section 504 or services and accommodations under special education (IDEA) at a public or charter school.
 - Services include, but are not limited to, speech/language, occupational therapy, feeding therapy/assistance, behavioral support, ABA therapy, dyslexia interventions, music therapy, physical therapy, counseling services, etc. (There are limitations, however).
- Consultation and counsel with understanding evaluations and 504 Plan or Individualized Education Plan (IEP)
- Attend 504 meetings or ARD/IEP Meetings with the child's school
- Advance a complaint for due process hearing with school district for violation of Section 504 (correcting the denial of or failure to implement accommodations)
- Advance a complaint for special education due process hearing with Texas Education Agency (correcting educational programming and accommodations but also addressing related services. Remedy limited to corrective actions and compensatory education services (normally not monetized).
 - Assist with juvenile charges or truancy when alleged conduct was a result of a manifestation of the child's disability
- Evaluate and assist with Office of Civil Rights (OCR) complaints and investigations
- Evaluate and assist with TEA special education investigative complaint.

(More information on www.thegallinigroup.com)

Notes:

Disclaimer: *Not to be considered legal or medical advice. This is just a brief overview and is situational. It may be advisable to speak to an attorney about your specific legal needs.*