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CUSTOMIZING ANCILLARY PLANNING DOCUMENTS FOR DEATH AND INCAPACITY + THE USE AND MISUSE OF REVOCABLE TRUSTS

A practical guide to drafting the "ancillary" documents usually provided by Texas estate planning attorneys: Statutory Durable Power of Attorney, Medical Power of Attorney, Directive to Physicians, Declaration of Guardian, Appointment for Disposition of Remains, and HIPAA Release. Know the many options that should be offered and how to explain them to clients. Also, learn how to present the great debate on "will-based" vs. "trust-based" planning.

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DRAFTING ANCILLARY ESTATE PLANNING DOCUMENTS

I. DURABLE POWER OF ATTORNEY (BUSINESS AND FINANCIAL MATTERS).

A power of attorney allows an individual (the "principal") to designate another to act as his or her agent in financial matters. A "durable" power of attorney allows the agent to continue to act on behalf of the principal after the principal becomes incapacitated. Powers granted by a statutory durable power of attorney are broad and sweeping. Some practitioners have clients sign a disclosure statement that details and confirms the client's understanding of the risks and powers of a durable power of attorney. A sample of this type of form is attached as Exhibit A.

Durable powers of attorney are commonly used to plan for the management of the principal's financial affairs in the event of incapacity. A durable power of attorney can also be used to plan for a temporary or extended absence by the principal.

A. Risk of Abuse. An agent under a durable power of attorney is a fiduciary and therefore has a legal duty to act in the principal's best interest. *See* TEX. ESTATES CODE § 751.101. Nevertheless, the broad authority granted to an agent and lack of oversight creates the possibility of exploitation and abuse; even a well-intentioned agent can financially ruin a principal through inexperience with money management or other business and financial matters. It is therefore very important that the principal understand the breadth of the powers granted and the amount of trust that must be placed in the agent. The principal should have absolute confidence in the integrity and competence of the agent. If there is no person who inspires that level of confidence in the principal, the principal should not execute a durable power of attorney. Even a court supervised guardianship is preferable to naming a problematic agent.

B. The Statutory Form. Section 752.051 of the Texas Estates Code provides a form that can be used to grant an agent a durable power of attorney. This form is known as a "statutory durable power of attorney." The statutory form is not exclusive, meaning that other forms may be used to grant a durable power of attorney. *See* TEX. ESTATES CODE § 752.003.

An annotated version of the statutory form with drafting suggestions is attached as Exhibit B.

C. Drafting Considerations.

1. Deviating from the Statutory Form in General**.** Utilizing the statutory form has two primary benefits: (1) a form that is substantially similar to the statutory durable power of attorney will have the meaning and effect prescribed by the Durable Power of Attorney Act (meaning there is less chance it will be interpreted in an unpredictable way); (2) the service professionals at banks and other financial institutions are often more comfortable honoring a power of attorney that is in a familiar format (meaning it is more likely to be accepted by third parties with minimal difficulty).

The statutory form is therefore often the best starting point when drafting a durable power of

attorney; however, it should always be reviewed and modified as appropriate to reflect the client's specific circumstances and needs.

2. Springing vs. Presently Effective Power of Attorney. A power of attorney may be drafted to take effect upon its execution, meaning that the agent is authorized to act under the power of attorney immediately; to make such a power of attorney "durable," the document should specifically provide that the agent's authority continues after the principal's incapacity. Alternatively, a power of attorney can take effect only if and when the principal becomes incapacitated (this is commonly called a "springing" power of attorney). The statutory form offers both options.

Many estate planning specialists recommend against using springing powers of attorney for two reasons: (1) the process for determining the principal's incapacity and demonstrating that incapacity to third parties can be time consuming, cumbersome, and unnecessarily delay the payment of bills and the handling of the principal's other financial matters if the power of attorney is ever needed; and (2) if the principal does not trust the agent with authority while the principal has capacity (and could presumably discover and at least partially mitigate any wrongdoing), the principal should not grant said agent authority when the principal is incapacitated.

If the principal nevertheless insists on using a springing power of attorney, the document should provide unambiguous and specific procedures that can be used to determine the principal's incapacity and authorize the release of medical information to the agent and third parties as needed.

3. Co-Agents. Effective September 1, 2017, the statutory form includes a section where the principal may specify whether co-agents act jointly or independently. Unless the durable power of attorney provides otherwise, each co-agent may exercise authority independently of the other co-agent. If co-agents are named, it may be appropriate to include additional provisions addressing the effect of a co-agent ceasing or failing to serve (to confirm the principal's intentions). For example:

"I have intentionally named my co-agents, _____ and _____, to act jointly. Provided, however, that if either _____ or _____ dies, becomes incapacitated, resigns, or refuses to act, or if such co-agent's authority is otherwise terminated under Texas law, the one remaining shall serve as my sole agent, with all the powers and privileges as if appointed as my sole agent in the first instance. Any person may conclusively rely upon representations made by _____ or _____to establish his or her authority to act under this power of attorney."

"Either of my co-agents, _____ and _____, may act independently without the joinder of the other. In addition, if one of them dies, becomes incapacitated, resigns, or refuses to act, or if such co-agent's authority is otherwise terminated under Texas law, the one remaining shall continue to have full authority to act on my behalf as my sole agent. Any person may conclusively rely upon representations made by _____ or _____ to establish his or her authority to act under this power of attorney."

4. Specific Additional Powers. The current statutory form lists specific powers on Lines A through N; the principal can grant the agent all of these enumerated powers by initialing next to Line O. These powers are very broad. However, it is important to note that there are a number of powers that, if desired, should be specifically granted even in a general power of attorney; some of these powers are discussed below.

Title search: Customizing Ancillary Planning Documents for Death and Incapacity + The Use and Misuse of Revocable Trusts

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