End-of-Life Documents

Judon Fambrough
Senior Lecturer and Attorney at Law

REAL ESTATE CENTER
TEXAS A&M UNIVERSITY

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Editor's Note

This publication is for information only. Questions should be directed to competent legal counsel, specifically an attorney certified in estate planning and probate law. Instructions for finding such attorneys are on page 8.

The average Texas licensee in 1998 was 50 years old, according to a study by the Real Estate Center. In a National Association of Realtors survey conducted in 2012, the typical Realtor nationwide was 56, and in Texas, 54. Texas real estate licensees are not getting any younger, so it is prudent for them to give thought to their future business and health care decisions.

Wills come to mind immediately. Two *Tierra Grande* articles discuss the various types of wills recognized in Texas, how to make them self-proving and how your assets will be divided if you die without one (see Center publications No. 2001, "Self-Proving Wills" and No. 2019, "Where There's No Will . . .").

Other documents beg consideration as well. For example, Durable Powers of Attorney are needed to manage your assets when you are unable to do so; Living Wills and Medical Powers of Attorneys can be used to make advance critical medical decisions or grant the authority to others.

These and other documents will be discussed. In addition, forms for each document are included for the reader's scrutiny.

Powers of Attorney

By executing a Power of Attorney, you (the principal) grant another person, known as an attorney-in-fact or agent, the authority to manage your assets, among other things. You decide how long the agent serves and the scope of his or her authority.

Your attorney-in-fact should be someone you trust implicitly, even though this person owes you a fiduciary duty to serve in your best interests. For married couples, this is generally the spouse. A subsequent divorce or annulment terminates the Power of Attorney.

The duration of the agent's authority depends on whether you make it durable or not. According to the statute, a Durable Power of Attorney confers on the agent the continued authority to act, notwithstanding your subsequent disability or incapacity.

Statements such as "This power is not affected by subsequent disability or incapacity of the principal" or "This Power of Attorney becomes effective on the disability or incapacity of the principal" confirm its durability. Apparently, the absence of this or similar language means the right to act does not survive your subsequent disability or incapacity.

More specifically, the statute describes a Durable Power of Attorney as one that "does not lapse because of the passage of time unless the instrument creating the Power of Attorney specifically states a time limitation."

The statute defines a Durable Power of Attorney as one that:

- designates another person as an attorney-in-fact or agent,
- is signed by an adult principal,
- contains wording that the power survives the principal's disability or incapacity as described earlier and
- is acknowledged by the principal before an officer authorized to take acknowledgements to deeds and administer oaths.

An added benefit of a Durable Power of Attorney is that you avoid having the court appoint a guardian once you become incompetent. However, if the court appoints a permanent guardian, the Durable Power of Attorney terminates, and all assets under the agent's control must be delivered to the guardian of the estate.

Whether durable or not, no Power of Attorney survives the principal's death.

Finally, the scope of the authority depends on whether you grant a general or special Power of Attorney. Basically, a General Power of Attorney permits the agent to enter any legal transaction you could enter. A Special Power of Attorney limits the authority to specific tasks.

The promulgated Statutory Durable Power of Attorney Form lists 13 specific types of transactions the agent may enter into on your behalf, real property transactions being one of them.

You have the option of eliminating one or more of the transactions by crossing them out or not initialing the space provided before the enumerated transaction. You may also enter special instructions limiting or extending the powers and the time frames in which they may be exercised.

The statute provides that the validity of the Power of Attorney is not affected by the fact that one or more of the listed categories are not initialed or the principal includes specific limitations or additions to the environmental powers.

These tasks are described in the State Legislature Statute For more information on the exact powers conferred on the agent within each

category, consult Sections 752.101 through 752.114 of the Texas Estates Code.

To better understand the powers conferred by each of the 13 types of transactions mentioned in the Statutory Durable Power of Attorney, Sections 752.101, 752.102 and 752.106 have been included. These sections deal with powers conferred in general, as well as those associated with real estate transactions and banking and other financial institutions.

FORM: *Powers Conferred by Powers of Attorney*.

On Sept. 1, 2015, two new statutes became effective impacting powers of attorney that authorize real estate transactions.

The first change, found in Section 751.151 of the Texas Estates Code, requires county clerks to record any real estate transaction authorized under a durable power of attorney within 30 days after being filed for recording. This effects instruments such as releases, assignments, satisfactions, mortgages, security agreements, deeds of trust, encumbrances, deeds of conveyance, oil, gas, or other mineral leases, memorandum of leases, liens or other claims or rights to real property.

The second change, found in Section 1101.005 of the Occupations Code, requires certain persons acting under a power of attorney to conduct real estate transactions to obtain a real estate license. The new law states "an attorney-in-fact authorized under a power of attorney to conduct not more than three real estate transactions annually" is required to obtain a real estate license from the Texas Real Estate Commission. The law is unclear as to the effect it has on a real estate transaction where the law is violated. Those granting the power of attorney may wish to limit the permitted number of annual real estate transactions to no more than three to avoid any licensing issues. This can be accomplished by placing the limitations in Special Instructions of the document.

FORM: Statute Durable Power of Attorney

Advance Directives Act

Texas legislators passed the Advance Directives Act found in Chapter 166 of the Texas Health & Safety Code (THSC) to explain and clarify three advance medical directives for Living Wills, Medical Powers of Attorney and DNR (Do Not Resuscitate) Orders. The act describes how each is issued (declared) or executed and revoked. The act does not cover Powers of Attorney or Anatomical Gifts.

Any competent adult (the declarant) may at any time execute a *written advance directive*. The written directive must be signed in the presence of two qualified witnesses who also signed. Alternatively, the directive may be signed and acknowledged before a notary public.

Likewise, any competent qualified adult patient may issue a *nonwritten directive*. However, the nonwritten directive must be issued in the presence of the attend-ing physician and two qualified witnesses. The attending physician must evidence the existence of the nonwritten directive by making this fact a part of the declarant's medi-cal record along with the names of the witnesses.

According to the statute, a qualified witness, whether to a written or nonwritten directive, must be a competent adult. But, one of the two cannot be:

- a person (sometimes referred to as the agent) designated by the declarant in the document to make a treatment decision;
- a person related by blood or marriage;
- a person entitled to any part of the declarant's estate by will or by operation of law;
- the attending physician or his or her employee;
- an employee of a health care facility where the declarant is a patient and the employee is providing direct patient care to the declarant or is an officer, director, partner or business office employee of the health care facility or of any parent organization of the health care facility or
- a person who, at the time the directive is issued, has a claim against any part of the declarant's estate after the declarant's death.

The declarant must notify the attending physician of the existence of a written directive. If the declarant is incompetent or otherwise mentally or physically unable to communicate, another person may notify the attending physician of the existence of the written directive. The attending physician must make the directive a part of the declarant's medical record.

"The attending physician" as defined by the statute refers to the physician selected by or assigned to a patient who has primary responsibility for a patient's treatment and care.

"A qualified patient" refers to a patient with terminal or irreversible conditions that have been diagnosed and certified in writing by the attending physician. The terms *terminal* and *irreversible conditions* are used most often in association with Living Wills. They are defined in the next section.

A *nonwritten directive* is not defined.

Once a directive is issued, it remains effective until revoked. This occurs one of three ways. The first is by the declarant or someone in the declarant's presence and at the declarant's direction canceling, defacing, obliterating, burning, tearing or otherwise destroying the written directive. The second way is by the declarant signing and dating a written revocation that expresses the declarant's intent to revoke the directive. Finally, the declarant may orally state his or her intent to revoke the directive, after which this fact is communicated to the declarant's attending physician.

If the revocation is in *writing*, it takes effect only after the declarant or a person acting on his or her behalf notifies the attending physician of its existence or mails the revocation to the attending physician. The attending physician or the physician's designee must record in the patient's medical record the time and date when the physician received the written notice of the revocation. Thereafter, the word "VOID" must be written on each page of the directive in the patient's medical record.

If the revocation is rendered *orally*, it takes effect only after the declarant or a person acting on his or her behalf

notifies the attending physician of the revocation. The attending physician or the physician's designee must record in the patient's medical record the time, date and place of the revocation, and, if different, the time, date and place that the physician received notice of the revocation. The attending physician or the physician's designees must also enter the word "VOID" on each page of the directive in the patient's medical record.

Once a directive is revoked, it may be re-executed at any time in the same manner as it was initially. This is possible even though the re-execution occurs after the declarant has been diagnosed with a terminal or irreversible condition.

Advance directives or similar instruments validly executed in other states or jurisdictions must be given the same effect as ones executed under Texas law. However, the recognition of an advance directive from another state or jurisdiction does not authorize the administration, withholding or withdrawal of health care otherwise prohibited in Texas.

Finally, 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 receiving health care services or for obtaining insurance for health care services.

Likewise, the fact that a person has executed, issued or failed to execute or issue an advance directive may not be considered in establishing insurance premiums. The fact that a person has executed or issued an advance directive does not:

- restrict, inhibit or impair the sale, procurement or issuance of a life insurance policy or
- modify the terms of an existing life insurance policy.

The fact that life sustaining treatment is withheld or withdrawn from an insured qualified patient (a person diagnosed with a terminal and irreversible condition) does not legally impair or invalidate that person's life insurance policy or make it a factor in determining whether benefits are payable or the cause of death.

Even though the promulgated form does not have a provision to this effect, a declarant who has not signed a Medical Power of Attorney may designate in a Living Will or a DNR Order someone to make medical treatment decisions for the declarant in the event the declarant becomes incompetent or otherwise mentally or physically unable to communicate (166.032[c]).

Living Wills (Directives to Withhold Life-Support Devices)

Living Wills assist in managing your health care decisions. They do not necessarily delegate your health care decisions to others but rather relieve others from having to make health care decisions on your behalf.

According to Texas statutes, any competent adult or an authorized agent may execute an effective Living Will as long as it meets the requirements set forth in the Advance Directives Act. Texas legislators provided a statutory form to assist in the process (Section 166.033 of the THSC).

FORM: Directive to Physicians/Living Will

The preamble to the form gives insight for its use. "It (the form) is designed to help you communicate your wishes about medical treatment at some time in the future when you are unable to make your wishes known because of illness or injury." The form contains the following language: "If there comes a time that I am unable to make medical decisions about myself because of illness or injury, I direct that the following treatment preferences be honored. . . ."

The directive describes the choices. First, if, in the judgment of your physician, you are suffering with a *terminal condition* from which you are expected to die within six months, even with available life-sustaining treatment . . ., you request that (1) all treatments, other than those needed to keep you comfortable, be discontinued or withheld and let you die as gently as possible or (2) keep you alive using available life-sustaining treatment. The second alternative is not available to those under hospice care.

Second, if, in the judgment of your physician, you are suffering from an *irreversible condition* where you cannot care for or make decisions for yourself and you are expected to die without life-sustaining treatment, you have the same two options.

Third, if after signing the directive you understand and agree that if you are placed in hospice care, only those treatments needed to keep you comfortable will be provided, and you will not receive any life-sustaining ones. There are no other options in this situation.

In a section entitled *Additional Requests,* you may list particular treatments that you do or do not want administered in specific situations, such as the administration of artificial nutrition and fluids and intravenous antibiotics.

Finally, if you *do not* have a Medical Power of Attorney (discussed later) and you are unable to make your wishes known, you may designate a person or persons to make treatment decisions compatible with your personal values. Likewise, you may appoint a proxy in the directive authorizing him or her to execute a DNR Order (discussed later) on your behalf should you later become incompetent.

The statutory form contains several examples and explanations for various types of conditions such as cancer, failure of major organs (kidneys, heart, liver or lungs) and even Alzheimer's/dementia. The terms "irreversible condition," "life-sustaining treatment," "terminal condition" and "artificial nutrition and hydration" are used throughout the form. This is how the statute defines the terms.

The statute defines an *irreversible condition* as a condition, injury or illness that:

- may be treated but is never cured or eliminated,
- leaves a person unable to care for or make decisions for the person's own self and
- is fatal without life-sustaining treatment provided in accordance with the prevailing standard of medical care.

The statute defines a *life-sustaining treatment* as one that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die. The term includes both life-sustaining medications and artificial life support, such as mechanical breathing

machines, kidney dialysis treatment, and artificial nutrition and hydration. The *term does not include* (emphasis added) the administration of pain management medication or the performance of a medical procedure considered to be necessary to provide comfort care or any other medical care provided to alleviate a patient's pain.

The statute defines a *terminal condition* as an incurable condition caused by injury, disease or illness that according to reasonable medical judgment will produce death within six months, even with available life-sustaining treatment provided in accordance with the prevailing standard of medical care. A patient who has been admitted to a program under which the person receives hospice services provided by a home and community support services agency licensed in Texas is presumed to have a terminal condition.

The statute defines *artificial nutrition and hydration* as the provision of nutrients or fluids by a tube inserted in a vein, under the skin in the subcutaneous tissues, or in the stomach (gastrointestinal tract).

The form is lengthy with several options and alternatives provided. The document must be signed by the declarant (you) before a notary public or in the presence of two qualified witnesses who also sign as discussed earlier.

The statute discusses oral directives and even addresses two situations where a third person or persons may execute a Living Will on another's behalf. These include directives issued:

- by a competent adult with a terminal condition and communicated orally in the presence of the attending physician and two qualified witnesses (Section 166.034, THSC);
- on behalf of a terminally ill minor under the age of 18 by the patient's spouse, parents or guardian (Section 166.035, THSC) and
- on behalf of a qualified adult who has not executed a directive, is incapable of doing so, and does not have a guardian. In such cases, the attending physician and one person from the following list and in the following priority may make the decision:
  1. the patient's spouse,
  2. the patient's parents or
  3. the patient's next of kin (Section 166.039, THSC).

The execution of these directives on behalf of another person must be before a notary public or two qualified witnesses in the same manner as if the person were executing them on his or her behalf.

Medical Powers of Attorney (MPOA)

MPOAs permit another individual (your agent) to make medical decisions on your behalf when you become incompetent. This directive differs from the others because two documents must be read and one signed in the correct order to be effective.

The first, the *Disclosure Statement* found in Section 166.163 of the THSC, must be read. Then, the second, the actual MPOA found in Section 166.164 of the THSC, must be read and signed before a notary public or two qualified witnesses.

Even though the Disclosure Statement must be read and understood before reading and signing the MPOA Form, neither the statute nor the statutory Disclosure Statement Form require a signature on the Disclosure Statement. However, the declarant must, before executing the MPOA, sign a statement that he or she has received the Disclosure Statement, read it and understood its contents (Section 166.162). The actual MPOA Form contains a statement to this effect. Apparently by signing the MPOA Form, the declarant complies with the statutory requirement.

Alternatively, a separate form could be signed stating that, "I have been provided with a Disclosure Statement explaining the effect of the Medical Power of Attorney. I have read and understood the information contained in the Disclosure Statement." Another possibility would be for the following language to be added at the end of the Disclosure Statement: "I have read and understood the information contained in this document and have signed it before reading and signing the Medical Power of Attorney."

FORM: Medical Power of Attorney

The *Disclosure Statement* provides an excellent overview. "This document (the MPOA) gives the person you name as your agent the authority to make any and all health care decisions for you in accordance with your wishes, including your religious and moral beliefs, when you are no longer capable of making them yourself. Because 'health care' means any treatment, service, or procedure to maintain, diagnose or treat your physical or mental condition, your agent has the power to make a broad range of health care decisions for you."

The *Disclosure Statement* describes the procedure. The agent's authority begins when your doctor certifies your lack of competence to make health care decisions. This certification must be placed in your medical record. The agent is then obligated to follow the instructions set forth in the MPOA in making your health care decisions.

The person (agent) you appoint must be 18 or older and should be someone you know and trust. The agent is not liable for health care decisions made in good faith. You should discuss the document with your agent and your physician and give each a signed copy.

After signing the document, you have the continued right to make your health care decisions as long as you are competent. As long as you are competent, you have the right to revoke the document by informing the agent orally or in writing or by executing a subsequent MPOA. The appointment of your spouse as agent terminates on a subsequent divorce or annulment unless you direct otherwise.

The MPOA may *not* be changed or modified once signed. To make changes, you must execute a new form.

To grasp the nature and scope of the decisions that can be made on your behalf, you should discuss the document with your health care provider before signing. You do not need the assistance of an attorney to complete the form, but you should ask your health care provider to explain anything you do not understand.

The form is found in Section 166.164 of the THSC. You insert the name of the agent " . . . to make any and all health care decisions for me, except to the extent I state otherwise in this document. This Medical Power of Attorney takes effect when I become unable to make my own health care decisions, and this fact is certified in writing by my physician."

The statute defines *incompetency* as that point when you lack the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to a proposed treatment decision (Section 166.002[8]).

Following the grant, the form contains "Limitations on the Decision-Making Authority of My Agent." Here, you may insert restrictions, if any, on the scope of the agent's authority. Either way, the statute does not allow the agent to authorize voluntary inpatient mental-health services, convulsive treatments, psychosurgery, abortions or omission of care that are designed primarily for your comfort.

Unless you limit the agent's authority, the agent may, before making a health care decision on your behalf:

- request, review and receive any information, oral or written, regarding your physical or mental health, including medical and hospital records,
- execute a release or other documents required to obtain the information and
- consent to the disclosure of the information (Section 166.157, THSC).

The form allows you to designate alternate agent(s) and to limit the duration of the powers granted. Without a termination date, the MPOA exists indefinitely from the date it is signed. But if you insert a termination date and you are incompetent when the MPOA expires, the agent's authority continues until you become competent.

Finally, a health or residential-care provider, a health care service plan, insurer issuing disability insurance, self-insured employee plan or nonprofit hospital service plan may not:

- charge a different rate solely because the person has executed a Medical Power of Attorney,
- require a person to execute a Medical Power of Attorney before:
  1. admitting the person to a hospital, nursing home or residential-care home,
  2. insuring the person or
  3. allowing the person to receive health or residential care, or
- refuse health or residential care to a person solely because the person has executed a Medical Power of Attorney.

The manner in which the MPOA form is signed and who can serve as a witness were outlined in the earlier discussion of the Advance Directive Act.

Out-of-Hospital DNR (Do Not Resuscitate) Orders

Any competent person or an agent acting under a MPOA may execute a written Out-of-Hospital DNR Order directing health care professionals acting in an out-of-hospital setting to withhold cardiopulmonary resuscitation as well as other life-sustaining treatments. The order must be honored by responding health care professionals provided they discover the order and establish the patient as the one who executed it. However, health care professionals or health care facilities with no actual knowledge of the order are not civilly or criminally liable for failing to act accordingly.

A person cannot be charged with promoting or assisting in the commission of suicide under Section 22.08 of the Texas Penal Code for withholding cardiopulmonary resuscitation or other life-sustaining treatments as described in a DNR Order or other medical treatments recognized by the board (Section 166.096).

Identification devices (bracelets and necklaces) may be worn to assist in the recognition process. The presence of a DNR identification device on a person is conclusive evidence that the person executed or issued a valid order or had one issued on his or her behalf. These devices may be worn around the neck or on the wrist as prescribed by the medical board. More information on the identification necklaces or bracelets can be found in 25 TAC 157.25.

The manner in which health care professionals respond upon arriving at a scene depends on whether the person is wearing an identification device or not. If one is present, the professionals may conclude that the order is valid, and this is the person who issued or had it issued. However, if the person is not wearing a device and the professionals discover an executed order, the professionals must establish the identity of the person who issued it and determine if the order appears to be valid. The validity depends on whether:

- written responses were placed in all the designated spaces for names, signatures and other information required of the person who executed it as well as the signatures of the witnesses or an acknowledgment,
- the date of execution was placed in the proper space and
- the signatures of the declarant and the attending physician were inscribed in the appropriate places.

If any of the above requirements were omitted, then the professionals at the scene may ignore the incompleted form and initiate life-sustaining procedures. The professionals acting in an out-of-hospital setting are not required to accept or interpret an order that does not comply with the requirements.

Note. In lieu of the declarant's actual signature appearing on the order, professionals may accept a digital signature (an electronic identification intended by the person to have the same force and effect as a manual signature) or an electronic signature (a facsimile, scan, uploaded image, computer-generated image or other electronic representation of a manual signature intended to have the same force and effect as a manual signature).

If available and valid, the order must accompany the person during transport.

If the person is taken to a health care facility that will not comply with an order or is unwilling to accept the DNR identification device as evidence of an order, then

the facility must take all reasonable steps to transfer the person to the person's home or to a facility that recognizes the order or identification device.

DNRs direct health care professionals not to initiate or continue the following life-sustaining treatments:

- cardiopulmonary resuscitation,
- advanced airway management,
- artificial ventilation,
- transcutaneous cardiac pacing,
- defibrillation or
- other life-sustaining treatments specified in Section 166.101 of the THSC.

The order does not authorize the withholding of medical interventions or therapies considered necessary to provide comfort care, alleviate pain or provide water or nutrition. The order cannot condone, authorize or approve mercy killing or permit an affirmative or deliberate act or omission to end one's life except to permit the natural process of dying as provided in the statute. The order does not apply to anyone who is pregnant.

The statute identifies an *out-of-hospital setting* as a location where health care professionals are called for assistance, including long-term care facilities, in-patient hospice facilities, private homes, hospital outpatient or emergency departments, physician's offices and vehicles during transport.

The statute identifies *health care professionals* as physicians, physician assistants, nurses, emergency medical services personnel and, unless the context requires otherwise, hospital emergency personnel.

The execution of the order is slightly different from the other directives. While the physician cannot be a valid witness, the physician must sign the order and make it a part of the patient's medical record. Also, in lieu of having to sign the order in the presence of two qualified witnesses, the patient may sign the order before a notary.

A photocopy or other complete facsimile of the original executed order may be used for any purpose for which the original executed written order could be used.

Unlike the other directives, no statutory form is provided. The statute simply says it must be in a standard, one-page format recommended by the medical department. At a minimum, the form must satisfy 17 requirements set forth in Section 166.083, THSC. (The requirements are reproduced in the *Statutory Requirements for DNR*.)

A suggested form with instructions has been provided by the Texas Department of State Health Services.

FORM: *Out-of-Hospital Do Not Resuscitate (DNR)*.

Audio information for ordering the DNR form and identification devices is available from the Texas Medical Association (512-370-1306).

The fact that an adult person has not executed an order does not create a presumption that the person does not want life-sustaining treatment withheld. Consequently, when an adult person has not executed an order and is incompetent or otherwise mentally or physically incapable of communication, the attending physician and the person's legal guardian, proxy or agent having a MPOA may execute an order on the person's behalf.

If the adult does not have a legal guardian, proxy or MPOA, the attending physician and one person from the following list and in the given priority may execute an order on behalf of the adult with the attending physician:

1. the patient's spouse,
2. the patient's parents or
3. the patient's nearest living relative (Section 166.088, THSC).

The decision must be based on knowledge of what the person would desire, if known.

If no one is available from the above list, then another physician who is not involved in the patient's treatment or who is a representative of the ethics or medical committee of the health care facility in which the person is a patient may concur with the attending physician in executing an order.

The statute allows parents, legal guardians or managing conservators to enter an order on behalf of a minor when the minor is suffering from a terminal or irreversible condition.

With the exception where two physicians sign the form, the execution of an order on behalf of another person must conform to the same procedure when the person executes the order on his or her behalf before the qualified witnesses or a notary public.

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 this desire is communicated to responding health care professionals.

Conflicting Directives

As mentioned earlier, the Advance Directives Act addresses Living Wills, MPOAs and DNR Orders. Which directive controls when a conflict occurs among them or with another treatment decision? The statute addresses the issue.

> To the extent that a treatment decision or an advance directive . . . conflicts with another treatment decision or (another) an advance directive executed or issued under this chapter, the treatment decision made or instrument executed ***later in time*** (emphasis added) controls" (Section 166.008, THSC). When a health care provider finds it impossible to follow a directive by an agent because of a conflict with the Advance Directives Act, the provider shall inform the agent as soon as reasonably possible and the agent may select another physician (Section 166.158, THSC). However, when responding to a call for assistance, EMS personnel have no duty to review, examine, interpret or honor any other written directive except the DNR order (Section 166.102, THSC).

Anatomical Gifts

The discussion of death documents would not be complete without addressing the gifting of all or part of the body. The enabling statute, the *Revised Uniform Anatomical Gift Act* found in Section 692A.001 et seq. of the THSC, describes the process. As with Medical Powers of Attorney, no statutory form is provided. A suggested form is attached.

FORM: *Anatomical Gifts*.

Basically, a competent adult, emancipated minor, parents of an unemancipated minor, the donor's guardian, or an *agent* as defined by the statute (unless the MPOA prohibits it) may donate all or a part of the human body for transplantation, therapy, research or education.

The statute describes four ways an anatomical gift may be made. These include:

1. a statement or symbol imprinted on the driver's license or state identification card;
2. a provision in the person's last will and testament;
3. a statement, in any form, issued during a terminal illness or injury addressed to at least two adult witnesses, one of whom is *disinterested*; or
4. a statement or symbol signed by the donor indicating an anatomical gift has been placed on a donor registry.

The statute defines an *agent*, for purposes of an anatomical gift, as an individual authorized to make health care decisions on the principal's (donor's) behalf by a Medical Power of Attorney or someone expressly authorized to make an anatomical gift on the principal's behalf by any other record signed by the principal.

The statute defines a *disinterested witness*, for purposes of an anatomical gift, as someone other than the spouse, child, parent, sibling, grandchild, grandparent or guardian of the individual who makes, amends, revokes, or refuses to make an anatomical gift, or another adult who exhibited special care and concern for the individual. The term does not include a person to whom an anatomical gift could pass.

Section 521.401 of the Texas Transportation Code addresses gifts made on a person's driver's license or state ID card. A person who wishes to be an eye, tissue or organ donor may execute a statement of gift. The statement may be shown on the donor's driver's license, a personal identification certificate or on a card designed to be carried by the donor evidencing the donor's intentions. An affirmative statement of gift on the person's driver's license or personal identification certificate executed after Aug. 31, 2005, is conclusive evidence of a decedent's status as a donor and serves as consent for organ, tissue and eye removal.

Once made, the gift may be amended or revoked prior to death several ways including a signed document by the donor; a statement communicated in any form issued during a terminal illness or injury to two adults, one of whom must be *disinterested*; or a later-executed document of gift that amends or revokes a previous anatomical gift or portion thereof. If the initial gift was made by will, then the revocation must be made in a manner required by law to amend or revoke a will. Timely communication of the amendment or revocation to the right person or organization could be a problem.

A revocation, suspension, expiration or cancellation of the driver's license or identification card on which the anatomical gift was made does not invalidate the gift. By the same token, an anatomical gift made by will takes effect on the donor's death whether or not the will is probated. An invalidation of the will after the donor's death does not invalidate the gift.

The statute provides a means for a person to refuse to make an anatomical gift. Basically, by following the statutory guideline, THSC 692A.007, a person places the public on notice that he or she does not want all or a part of the body donated at his or her death. Without this notice in place, the statute allows an agent, spouse or adult children of the deceased to make anatomical gifts on the deceased's behalf for transplantation, therapy, research or educational purposes.

All anatomical gifts take effect at death. The physician who determines and/or certifies the time of death may not participate in the removal or transplantation of body parts.

The gift may specify (1) which part or parts of the body are to be donated, (2) the purpose for the donation and (3) the named recipients. Section 692A.011 contains a list of the qualified recipients and the purposes for which they may receive anatomical gifts. Section 692A.008 provides that, in the absence of anything expressed to the contrary by the donor, a gift of a part of the body for a particular purpose does not limit or restrict the making of a subsequent gift of another part or parts for a different purpose by the donor or other qualified person.

If the gift specifies the parts to be donated and the recipient, but does not identify the purposes, Section 692A.011 designates the purposes based on the donated part or parts. Likewise, if more than one purpose is specified without prioritizing them, the statute designates the priority. If the gift specifies the anatomical part or parts but does not name the recipient or the purposes, again the statute fills the void.

Finally, if the gift is for general purposes only and simply uses the words "donor," "organ donor," "body donor," or a symbol or statement of similar import, the statute determines who gets what and for what purposes based on the anatomical gift (*Section 692A.011 of the Texas Health and Safety Code*).

The statute prohibits a person from knowingly purchasing or selling parts for transplantation or therapy. Likewise, it is an offense to intentionally falsify, forge, conceal, deface or obliterate a document of gift for financial gain. Either offense is a Class A misdemeanor. However, a person may charge a reasonable amount for the removal, processing, preservation, quality control, storage, transportation, implantation or disposal of a part.

If only part or parts of a body are taken (donated), the statute does not address the fate of the remaining part or parts. Some states provide the excess body parts not used must be cremated and ashes returned to the deceased's family. Perhaps this issue should be addressed in the gift document.

To administer and maintain a statewide Internet-based registry of organ, tissue and eye donors, the Texas Department of State Health Services contracts with a nonprofit organization, the Glenda Dawson Donate Life-Texas Registry. The registry includes representatives from each organ-procurement organization recognized in Texas.

At least monthly, the Department of Public Safety transfers electronically to the registry information on anyone who indicates on his or her driver's license application that the person desires to make an anatomical gift.

If a prospective donor has an advance health care directive (Living Will, MPOA or DNR Order) containing terms

that may expressly or impliedly conflict with an anatomical gift, the prospective donor and attending physician must confer to resolve the conflict. If the donor is incapable of resolving the conflict, an agent acting under the directive or another person authorized by law to make a health care decision will act on behalf of the donor to resolve the conflict.

If the conflict cannot be resolved, an expedited review must be initiated by an ethics or medical committee of the appropriate health care facility. In the meantime, measures necessary to ensure the medical suitability of the anatomical part(s) may not be withheld or withdrawn from the prospective donor.

The statute addresses the validity of anatomical gifts executed in other states or jurisdictions. Texas recognizes gifts executed according to the laws of the state or country where the gift was made or executed in accordance to the laws of the state or county where, at the time of execution, the donor:

- was domiciled,
- was a national or
- had a place of residence.

However, the interpretation of these documents, if called into question, is governed by Texas law.

Instructions for Finding a Board Certified Attorney in Real Estate Law in Your City or County

The Real Estate Center at Texas A&M University is an organization supported by the Texas real estate industry to research issues affecting real estate in this state. The Center is not a public entity supported with taxpayers' money. We exist to research and relay information only. We do not get involved in personal legal matters, give legal advice, provide real estate forms or recommend attorneys. All the information we have can be found online at: http://recenter.tamu.edu/.

If you are looking for an attorney, the State Bar of Texas maintains a website on which you can find board-certified attorneys in different areas of the law. There are certifications for various specialialities, including estate planning and probate law.

To find a board-certified attorney in a particular geographical area of the state, go to: http://www.tbls.org/Default.aspx?tabid=55. Fill in the city or county where you would like to locate the attorney. Do not fill in the first name or last name on the first two lines.

On the last line entitled "Specialty Area," select *estate planning and probate law* on the drop-down menu. Then go to the bottom of the page and click on "Submit."

The attorneys having a board certification in the area of the law you selected and who practice in the geographic area indicated will be displayed on the screen.

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MAYS BUSINESS SCHOOL

Texas A&M University
2115 TAMU
College Station, TX 77843-2115

http://recenter.tamu.edu
979-845-2031

DIRECTOR

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