

# PLANNING FOR INCAPACITY: HELPING CLIENTS PREPARE FOR POTENTIAL FUTURE HEALTH CRISES

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I. INTRODUCTION .....	230
II. PROPERTY MANAGEMENT .....	232
A. <i>The Revocable Living Trust</i> .....	232
1. <i>Establishing the Revocable Living Trust</i> .....	232
2. <i>Settlor as Trustee and Primary (or Original)</i> <i>Beneficiary</i> .....	233
3. <i>The Successor or Contingent Trustee</i> .....	233
4. <i>The Remainder Beneficiaries</i> .....	234
5. <i>Functions of the Revocable Living Trust in the Incapacity</i> <i>Planning Context</i> .....	234
a. <i>Protecting the Settlor and His Assets</i> .....	234
b. <i>Providing for the Grantor's Beneficiaries</i> .....	235
6. <i>Negative Aspects of the Revocable Living Trust</i> .....	235
a. <i>Cost</i> .....	235
b. <i>The Trust Requires Constant Attention</i> .....	236
c. <i>Probate Still Possible</i> .....	236
d. <i>No Savings on Transfer Taxes</i> .....	237
7. <i>Revoking a Revocable Living Trust</i> .....	237
B. <i>Durable Power of Attorney</i> .....	238
1. <i>Types of Powers of Attorney</i> .....	238
a. <i>The Regular Power of Attorney</i> .....	238
b. <i>The Durable Power of Attorney</i> .....	239
2. <i>Fundamental Requirements of the Durable Power of</i> <i>Attorney</i> .....	239
3. <i>Springing Durable Power of Attorney</i> .....	240
4. <i>Revocation of Power of Attorney</i> .....	241
5. <i>The Agent's Fiduciary Responsibilities</i> .....	242
6. <i>The Principal's Capacity to Execute a Durable Power of</i> <i>Attorney</i> .....	242
III. HEALTHCARE MANAGEMENT .....	243
A. <i>The Directive to Physicians, Family and Surrogate</i> .....	243
1. <i>Formal Requirements of the Directive to Physicians,</i> <i>Family and Surrogate</i> .....	244

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2.	<i>Notice to Physician</i> .....	244
3.	<i>Form of Directive</i> .....	244
4.	<i>Validity of Nonwritten Directive</i> .....	245
5.	<i>Institutional Policies</i> .....	245
6.	<i>Witness Requirements</i> .....	246
7.	<i>Patient Desire and the Living Will</i> .....	246
8.	<i>Revocation of a Living Will</i> .....	247
9.	<i>The Right to Transfer</i> .....	247
10.	<i>Texas Living Will Definitions</i> .....	248
	a. <i>Artificially Administered Nutrition and Hydration</i> .....	249
	b. <i>Life-Sustaining Treatment</i> .....	249
	c. <i>Terminal Condition</i> .....	249
	d. <i>Irreversible Condition</i> .....	249
	e. <i>Imminent Death</i> .....	250
B.	<i>Medical Power of Attorney</i> .....	250
1.	<i>Formalities of the Medical Power of Attorney</i> .....	250
2.	<i>Revocation of Medical Power of Attorney</i> .....	251
3.	<i>Form of Execution and Disclosure</i> .....	251
4.	<i>Potential Conflicts</i> .....	251
	a. <i>Appointment of a Guardian</i> .....	252
	b. <i>Conflict Between Advance Directives</i> .....	252
	c. <i>Duty to Health or Residential Care Provider</i> .....	253
	d. <i>Limitations on Liability</i> .....	253
5.	<i>Liability for Health Care Costs</i> .....	253
C.	<i>Out-of-Hospital Do-Not-Resuscitate Orders</i> .....	253
1.	<i>Life-Sustaining Procedures Covered by OOH-DNR Orders</i> .....	254
2.	<i>Requirements of the OOH-DNR Order</i> .....	254
	a. <i>Execution of the OOH-DNR Order</i> .....	254
	b. <i>OOH-DNR Order for an Incompetent Person Who Previously Executed a Directive to Physicians, Family, and Surrogate</i> .....	255
	c. <i>OOH-DNR Order for an Incompetent Person Who Previously Executed a Directive to Physicians, Family, and Surrogate Designating a Proxy</i> .....	255
	d. <i>OOH-DNR Order for an Incompetent Person Who Previously Executed a Medical Power of Attorney Designating an Agent</i> .....	255
	e. <i>Effectiveness of OOH-DNR Order</i> .....	255
3.	<i>Form of OOH-DNR Order</i> .....	256
4.	<i>Issuance of OOH-DNR Order by Nonwritten Communication</i> .....	256
5.	<i>OOH-DNR Identification Device</i> .....	256
6.	<i>Duration of OOH-DNR Order</i> .....	256
7.	<i>Revocation of OOH-DNR Order</i> .....	257

8. Liability Shield .....	257
IV. DECLARATION OF GUARDIAN.....	258
A. Avoiding Guardianship.....	258
B. Declaration of Guardian.....	259
C. Filing of Declaration and Self-Proving Affidavit.....	259
D. Revocation of the Declaration of Guardian.....	260
E. Effect of Divorce .....	260
F. Alternate or Other Court-Appointed Guardian .....	260
V. CONCLUSION .....	260

## PROLOGUE

*In many ways, we were friends. We had grown up together; lived in the same house; played the same games; eaten the same foods; and gone to the same schools until high school, when she went to the Girls' High School and I to the Boys' High School. Even then, we traveled to school in the same car and came home in that same car. And then we started college the same year. She opted for the sciences; I chose business. After graduation, she went to work at a lab, testing the oil content in coconuts; I went to teach. Nine months later, we were together again: I was a junior accountant at the same plant where she worked. She tested the oil content in the coconuts; I did the accounting work in the business office.*

*And then one day, my world came crashing down. She was on a plane heading to the hospital in London. Her heart was sick and it needed repair. The cost would be astronomical. London was "out of network," so the insurance company would not pay. I called my fellow musicians and singers. We staged some benefit concerts. We raised some money to pay for her surgery and aftercare. My employer generously contributed the difference. She survived. She came back home. Full of energy. Full of life.*

*It is twenty-five years later. I am back to teaching. I am at my office when my phone rings. It is a doctor calling from New York. He tells me he just administered her some test, and she asked him to call me. He tells me he just diagnosed her with Alzheimer's disease. This must be a bad dream. I finish the conversation and replace the phone. I pick the phone up again. I call American Airlines. I book a flight to New York.*

*Ten years later. My duties are almost all performed. Trustee. Agent. Healthcare Proxy. Executor. I am standing at the cemetery. The coffin drops slowly into the hole. Mourners wail. Singers sing. I remember Fred reciting at the wake: "Don't go gentle into that good night. Old age should rave and burn at close of day. Rage, rage, against the dying of the light."*

*I smile. "Goodbye," I say, "goodbye, twin sister and friend. I'll miss you."*

## I. INTRODUCTION

According to the Council for Disability Awareness, just over twenty-five percent of today's twenty-year-olds will become disabled before they reach retirement age.<sup>1</sup> In fact, the U.S. Census Bureau's 2015 Community Survey revealed that 39.9 million Americans—about 13% of the total population—were disabled; more than half of these people were between the ages of eighteen and sixty-five.<sup>2</sup> This is very significant because, for most people, the ages eighteen through sixty-five are the “work years,” the most productive years for employment and wage-earning capacity.<sup>3</sup> Yet, as the Census Bureau's 2015 Survey reveals, at that stage of their lives, 13% of Americans are disabled.<sup>4</sup>

Beyond age sixty-five, the Census Bureau reports that, as of the end of the 2008–2012 reporting period, 38.7% of the 40.7 million Americans in that age range reported having one or more disabilities.<sup>5</sup> Among that group, individuals of ages eighty-five and older represented 13.6% of the older population but accounted for 25.4% of the older population with a disability.<sup>6</sup>

It appears, then, that as people age, they become more prone to suffer disabilities.<sup>7</sup> This result of the aging process appears to be due to the reality that “the process of aging is marked by physical, psychological, and social changes.”<sup>8</sup> In regard to physical changes, Professor Kohn writes:

As individuals age, they experience a vast array of physical changes. Typical changes include declines in the functioning of the immune system (making them more vulnerable to disease) and declines in organ functioning (including in major organs such as the heart, lungs, and the skin). Critical systems such as the nervous system and the endocrine system also experience changes, including reduced responsiveness.<sup>9</sup>

In regard to psychological changes, Professor Kohn states:

Although individuals experiencing normal aging typically retain the ability to learn and engage in complex problem-solving throughout their lives, aging is associated with predictable declines in certain types of cognitive

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1. See *Disability Statistics*, COUNCIL FOR DISABILITY AWARENESS (July 3, 2015), [http://www.disabilitycanhappen.org/chancesdisability/disability\\_stats.asp](http://www.disabilitycanhappen.org/chancesdisability/disability_stats.asp) [https://perma.cc/7XZ7-3ST4].

2. See *Comparing 2015 American Community Survey*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/acs/guidance/comparing-acs-data/2015.html> [https://perma.cc/K9FF-CJYA] (identifying population statistics in America) (last visited May 4, 2017).

3. See *id.*

4. See *id.*

5. See *id.*

6. See *id.*

7. See *id.*

8. Nina A. Kohn, *ELDER LAW: PRACTICE, POLICY, AND PROBLEMS* 6 (Vicki Been et al. eds., 1st ed. 2014).

9. See *id.* at 6–7.

functioning. These changes can have a significant impact on older adults' well-being. Declines in cognitive functioning are associated with reduced quality of life, declines in physical and mental health, and increases in depression and social isolation.<sup>10</sup>

Although disabilities are more common among the elderly, younger people are not immune.<sup>11</sup> The Census Bureau reports that in 2015, 5.9% of Americans between the ages of sixteen and twenty reported having a disability; 10.7% of Americans between the ages of twenty-one and sixty-four also reported having a disability.<sup>12</sup> Disabilities—and incapacity—are not reserved for the elderly population.<sup>13</sup>

Accordingly, it is prudent for all people to plan for incapacity.<sup>14</sup> As individuals plan, they will turn to their lawyers—or estate planners and personal financial planners—to help them.<sup>15</sup> This article examines various ways in which these professionals can help their clients prepare for potential health crises or accidents that lead to disability or incapacity.<sup>16</sup> As an initial matter, Part I of the article notes that planning for incapacity involves planning along two “management tracks”—property management and healthcare management.<sup>17</sup> Various tools available to legal practitioners, estate planners, and personal financial planners populate these tracks.<sup>18</sup> Part II of this article will discuss the property management track and the tools therein—the Revocable Living Trust and the Durable Power of Attorney.<sup>19</sup> Part III will discuss the healthcare management tracks and the tools contained therein—the Directive to Physicians, Family, and Surrogate, Medical Power of Attorney, and Out-of-Hospital Do-Not-Resuscitate (OOH DNR) Orders.<sup>20</sup> Part IV will discuss a Texas tool that effectively straddles both tracks: the Declaration of Guardian.<sup>21</sup> Part V, the conclusion, will summarize the tools and tracks discussed in the article and will urge the reader to lead adult clients—regardless of their age—to begin the process of planning for incapacity.<sup>22</sup>

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10. *See id.* at 8.

11. *See* U.S. CENSUS BUREAU, *supra* note 2.

12. *See id.*

13. *See id.*

14. *See id.*

15. *See id.*

16. *See infra* Parts I–IV.

17. *See infra* Parts II–III.

18. *See infra* Parts II–III.

19. *See infra* Part II.

20. *See infra* Part III.

21. *See infra* Part IV.

22. *See infra* Part V.

## II. PROPERTY MANAGEMENT

To effectively plan for incapacity, the planner must assist the client in planning for the future management of property in the event the client loses the capacity to act as an effective manager.<sup>23</sup> Likewise, the planner must assist in planning for the management of the client's healthcare and end-of-life decisions in the event that, at some point in time, the client loses the capacity to make these decisions.<sup>24</sup> In Texas, a person can execute two instruments to satisfy the property management prong of the planning conundrum: the Revocable Living Trust (sometimes simply referred to as the Texas Living Trust) and the Durable Power of Attorney.<sup>25</sup>

### A. *The Revocable Living Trust*

Simply stated, in Texas, as elsewhere, trusts are a method by which one person, the trustee, holds property for the benefit of another person or group of persons, the beneficiary or beneficiaries.<sup>26</sup> To establish a trust, someone, (the settlor) must transfer title to an identified property, with the specific intent to create a trust, to the trustee who then manages and administers the property for the benefit of the beneficiary.<sup>27</sup> Unless the instrument creating the trust sets out specific instructions, Texas statutes govern the trustee's duties, rights, and liabilities toward the trust property and beneficiary.<sup>28</sup>

#### 1. *Establishing the Revocable Living Trust*

A trust can be either testamentary—that is, included in the settlor's last will and testament—or *inter vivos*.<sup>29</sup> An *inter vivos*, or Living Trust, is established while the settlor is alive, with such settlor typically intending that the trust will take effect while the settlor is still alive.<sup>30</sup> The Revocable Living Trust belongs to the *inter vivos* category.<sup>31</sup> To establish the trust, the settlor determines the trust's goals and transfers assets to the trust.<sup>32</sup> The trust instrument itself provides that the settlor could, at any time prior to death, alter, amend, or revoke the trust.<sup>33</sup> Of course, the trust becomes irrevocable upon the settlor's death.<sup>34</sup>

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23. TEX. HEALTH & SAFETY CODE ANN. § 166.152 (West 2015).

24. *Id.*

25. TEX. EST. CODE ANN. § 751.002 (West 2015).

26. TEX. PROP. CODE ANN. § 112.001 (West 2015).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* § 112.005.

32. *See id.* § 112.001.

33. *See id.* § 112.003.

34. *See id.* § 112.035.

## 2. *Settlor as Trustee and Primary (or Original) Beneficiary*

In addition to being a settlor, the trust creator is also the trustee and the primary or original trust beneficiary.<sup>35</sup> As trustee, the individual manages the trust and its assets on a daily basis.<sup>36</sup> In effect, the trustee serves as the legal owner and manager of all the trust assets.<sup>37</sup> As primary or original beneficiary, the trust creator receives trust income during life, along with all other lifetime benefits from the trust, and is liable for all income taxes owed on income distributions from the trust.<sup>38</sup> Moreover, the settlor—as primary or original beneficiary—has access to the trust corpus and to the use of the trust's other assets, such as the individual's home, car, and other personal property.<sup>39</sup>

## 3. *The Successor or Contingent Trustee*

This article has already noted that upon the settlor's death, the trust becomes irrevocable.<sup>40</sup> The trust, however, continues to function.<sup>41</sup> For this to happen without interruption, the trust instrument must name a successor or contingent trustee at the time of creation.<sup>42</sup> The successor trustee succeeds to the office of trustee one nanosecond after the death of the settlor, who was also the original trustee and original beneficiary, and administers the trust pursuant to the terms provided in the original instrument.<sup>43</sup>

The successor or contingent trustee has a very important role.<sup>44</sup> In addition to becoming trustee upon the settlor's death, the successor trustee succeeds to the trusteeship in the event the settlor-trustee-primary beneficiary suffers a disability and is no longer able to function as trustee of the Revocable Living Trust.<sup>45</sup> This very important provision makes the Revocable Living Trust an important tool in the property management arsenal of those planning for incapacity.<sup>46</sup>

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35. *See id.* § 111.004(14).

36. *See id.* § 111.004(18).

37. *Id.*

38. *See id.* § 112.009.

39. *Id.* § 112.003.

40. *See supra* Section II.A.1.

41. PROP. § 112.001(2).

42. *Id.*

43. *Id.* § 113.083.

44. *Id.*

45. *Id.*

46. *Id.*

#### 4. *The Remainder Beneficiaries*

Another important provision is the one appointing remainder or secondary beneficiaries, people who will either share in the settlor's estate upon death or receive distributions from the trust while the settlor is alive.<sup>47</sup> Through this provision, the settlor can determine what will become of the settlor's property if incapacity—rather than death—strikes.<sup>48</sup>

#### 5. *Functions of the Revocable Living Trust in the Incapacity Planning Context*

An individual may have several reasons for establishing a Revocable Living Trust.<sup>49</sup> The typical reason is to avoid or, at the very least, minimize probate.<sup>50</sup> However, the trust is also functional as a property management tool for someone preparing for potential future incapacity.<sup>51</sup> For such a person, the Revocable Living Trust is a tool that allows for: (1) protection of the settlor and the settlor's assets, and (2) provision for the settlor's beneficiaries.<sup>52</sup>

##### a. *Protecting the Settlor and His Assets*

When a settlor establishes a Revocable Living Trust, the settlor ascends to three important roles: settlor, trustee, and primary beneficiary.<sup>53</sup> As time passes, though, the person may want someone else to be trustee.<sup>54</sup> Several reasons may exist for this change of heart: maybe the settlor's spouse died, the settlor made plans to travel in "old age" and therefore cannot attend to trust property management issues daily, the person is just tired and wants to rest from the stress of trust management, or the settlor has suffered a disability.<sup>55</sup> Whatever the reason, the settlor may want to take a break from the duties of trusteeship.<sup>56</sup>

Fortunately, the settlor chose a trusted person to serve as successor or contingent trustee, and the settlor can, pursuant to the terms of the trust, turn over the trust management functions to that person.<sup>57</sup> Management of the

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47. *See id.* § 112.053.

48. *Id.*

49. *See id.* § 112.031.

50. *Id.*

51. *See id.* § 113.084.

52. *See id.* § 112.031.

53. *See id.* § 112.051.

54. *See id.* § 113.081.

55. *Id.*

56. *Id.*

57. *See id.* § 113.083.



settlor's assets would then continue uninterrupted.<sup>58</sup> Specifically, investments would continue without interruption, payments would be made on time, expenses would be managed, medical bills would be paid, and the settlor's healthcare would be provided for continuously.<sup>59</sup> Everything concerning the trust would continue as if the settlor was still in charge.<sup>60</sup> In this way, the Revocable Living Trust would continue to protect the settlor and the settlor's assets even when the settlor no longer continued serving as trustee.<sup>61</sup>

*b. Providing for the Grantor's Beneficiaries*

The scrivener could draft the Revocable Living Trust so that the trust partly mimics a Last Will and Testament.<sup>62</sup> The trust instrument can contain instructions for distributing the settlor's assets to the remainder or secondary beneficiaries after death.<sup>63</sup> In this way, the trust can provide benefits to the settlor's heirs.<sup>64</sup> Additionally, the settlor can also choose to provide benefits to one or more beneficiaries while the settlor is still alive.<sup>65</sup> Indeed, a Revocable Living Trust provides the settlor with much flexibility, allowing the settlor to direct giving so that the beneficiaries the settlor most cares about get the trust funds, and the property benefits the causes that matter to the settlor the most.<sup>66</sup>

*6. Negative Aspects of the Revocable Living Trust*

Notwithstanding the Revocable Living Trust's wonderful attributes, the trust creator should be cognizant of some of the trust's negative aspects.<sup>67</sup> The following subsections include a brief discussion of four such negative aspects.<sup>68</sup>

*a. Cost*

A fully funded Revocable Living Trust requires the settlor to transfer ownership of the settlor's assets out of the settlor's name to that of the trust.<sup>69</sup>

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58. *See id.* § 113.084.

59. *Id.*

60. *Id.*

61. *Id.*

62. *See id.* § 112.053.

63. *Id.*

64. *Id.*

65. *See id.* § 113.003.

66. *See id.* § 113.002.

67. *See infra* Sections II.A.6.a–d.

68. *See infra* Sections II.A.6.a–d.

69. *See* FREDERICK M. SEMBLER & MICHAEL J. FEINFELD, *PLANNING AN ESTATE: A GUIDEBOOK OF PRINCIPLES AND TECH.* § 7:6 (4th ed. 2016).

The attorney must draw up new deeds for property being transferred into the trust; the trust must then acquire new title to these properties.<sup>70</sup> Ownership of trust assets must be registered with the trust itself.<sup>71</sup> These transfers cost money.<sup>72</sup> Accordingly, a person desiring to create a Revocable Living Trust must ensure that funds exist to expend on the project.<sup>73</sup> It is not enough to only have a sufficient amount of money to pay the attorney to draft the trust instrument.<sup>74</sup> If all the attorney does is draft the instrument, and no subsequent transfer of assets to the trust occurs, upon the potential settlor's death the potential remainder beneficiaries will discover that the trust had no assets, is therefore not effective, and the settlor's estate is subject to probate.<sup>75</sup>

*b. The Trust Requires Constant Attention*

As Trustee of the Revocable Living Trust, the settlor must interact with the trust regularly throughout the rest of the settlor's life.<sup>76</sup> Whenever the settlor wants money, the settlor must interact with the trust.<sup>77</sup> Whenever the settlor wants to acquire or sell an asset, the settlor must also interact with the trust.<sup>78</sup> Whenever the settlor receives income, the settlor must transfer that income to the trust.<sup>79</sup> While these duties are not much different from the ordinary duties of managing one's life without a Revocable Living Trust—that is, performing tasks like balancing a check book, paying bills, and making investment decisions—an elderly person who is not very knowledgeable about these matters, or who is not as “sharp” as in previous years, may find fulfilling these duties quite difficult.<sup>80</sup>

*c. Probate Still Possible*

One of the best reasons people have for establishing a Revocable Living Trust is to minimize—if not eliminate—probate.<sup>81</sup> However, the trust will succeed in doing that only if, at the time of the settlor's death, it owns all of the settlor's assets.<sup>82</sup> If so much as a single stock certificate, single bank account, or single parcel of real estate remains out of the trust at the time of

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70. Comerica Bank—Tex. v. Tex. Commerce Bank Nat'l Ass'n, 2 S.W.3d 723, 724 (Tex. App.—Texarkana 1999, pet. denied).

71. *Id.* at 725.

72. *Id.*

73. *Id.*

74. *See id.* at 724–26.

75. *See* TEX. ESTATES CODE ANN. § 31.002 (West 2015).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *See id.*

81. *Id.*

82. *Id.*

the settlor's death, that portion of the estate will most likely go through the probate process.<sup>83</sup> It is, therefore, of great importance that the scrivener carefully draft the trust instrument, the settlor subsequently transfers all assets to the trust to properly fund the trust, and that the pour-over will executed along with the trust (a Last Will and Testament that literally pours over any of the settlor's non-trust assets existing at the time of death into the trust) be well-written so that, upon the settlor's death, any assets that are not in the trust will be transferred therein by the pour-over will, thereby minimizing—or even avoiding—probate.<sup>84</sup>

*d. No Savings on Transfer Taxes*

The Revocable Living Trust is not designed to save on federal transfer taxes—that is, the estate, gift, and generation transfer-skipping taxes.<sup>85</sup> People with large estates desiring to save on transfer taxes should look to other trust instruments and estate planning techniques for relief.<sup>86</sup> The truth is that a Revocable Living Trust will not give a taxpayer any greater tax savings than the taxpayer is already entitled to receive.<sup>87</sup>

*7. Revoking a Revocable Living Trust*

Most Revocable Living Trusts automatically meet their end as the settlor schedules in the trust instrument—typically after the settlor dies.<sup>88</sup> Even after the trust terminates—such as at the settlor's death—the successor trustee may continue to exercise the powers of trustee for the reasonable period of time required to wind up the affairs of the trust and to distribute the assets to the secondary beneficiaries.<sup>89</sup>

It is possible, however, for the settlor to want to revoke the trust prior to death.<sup>90</sup> Texas law provides that a settlor may revoke a trust unless, per the express terms of the instrument creating it or an instrument modifying it, states that the trust is irrevocable.<sup>91</sup> This power is subject to one limitation: If a written instrument created the trust, the revocation must also be in writing.<sup>92</sup>

If a settlor is authorized to revoke the trust after executing the document effecting the revocation, the individual must “un-fund” the trust—essentially

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83. *Id.*

84. *Id.*

85. *See* Comerica Bank—Tex. v. Tex. Commerce Bank Nat'l Ass'n, 2 S.W.3d 723, 724 (Tex. App. —Texarkana 1999, pet. denied).

86. *See id.*

87. *Id.*

88. *See* TEX. PROP. CODE ANN. § 112.051 (West 2015).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

re-transfer the assets from the trust to the settlor individually.<sup>93</sup> Although this is a lengthy and somewhat costly process, it is necessary for effective revocation of the trust.<sup>94</sup>

### *B. Durable Power of Attorney*

Before discussing the intricacies of the durable power of attorney, we are behooved to discuss powers of attorney first.<sup>95</sup> Generally, with a power of attorney, an individual selects a representative to assist with financial and property matters.<sup>96</sup> The individual, the principal, delegates to the representative, the agent or attorney in fact, whatever powers the principal feels the agent will need to properly manage the property.<sup>97</sup>

Many powers of attorney are written to grant very broad powers to the agent.<sup>98</sup> However, the principal may, if the principal wishes, grant very narrow powers to the agent, and be very specific in detailing what the agent may do.<sup>99</sup> Generally, the powers granted are extensive for estate planning purposes, thus allowing the agent great flexibility.<sup>100</sup>

#### *1. Types of Powers of Attorney*

Financial powers of attorney may be broken down into two types: “regular” and “durable.”<sup>101</sup>

##### *a. The Regular Power of Attorney*

A regular power of attorney is based on the common law of agency and related statutes.<sup>102</sup> Under agency law, to create a power of attorney, a principal appoints an agent who can only exercise authority while the principal has the capacity to undertake the same action.<sup>103</sup> Hence, if the principal cannot do something individually, the agent cannot do it either.<sup>104</sup>

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93. *See id.*

94. *How to Revoke Your Living Trust*, FREE ADVICE LEGAL, law.freeadvice.com/estate\_planning/trusts/revocable-trust.htm [https://perma.cc/ATW5-W89A] (last visited Apr. 3, 2017).

95. *Power of Attorney*, AM. BAR ASS'N, www.americanbar.org/groups/real\_property\_trust\_estate/resources/estate\_planning/power\_of\_attorney.html (last visited Apr. 3, 2017) [https://perma.cc/5F80-MX2X].

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. David Carnes, *Two Types of Power of Attorney*, LEGAL ZOOM, info.legalzoom.com/two-types-power-attorney-20227.html [https://perma.cc/R5TT-9MMX] (last visited Apr. 3, 2017).

102. *Id.*

103. *Id.*

104. *Id.*

Stated another way, if the principal becomes disabled in any way, the agent can no longer act on the principal's behalf.<sup>105</sup> This situation is problematic in the estate planning context.<sup>106</sup> After all, when the principal becomes disabled is when the principal truly needs someone to act on the principal's behalf.<sup>107</sup> Alas, under agency law, this is just when the regular power of attorney vanishes.<sup>108</sup>

States were dissatisfied with this outcome and began devising ways to create an instrument whereby an agent could act on behalf of a principal who lacked capacity.<sup>109</sup> In 1954, Virginia became the first state to authorize a durable power of attorney, which provided that the agent retain the authority to act even if the principal was incapacitated.<sup>110</sup>

### *b. The Durable Power of Attorney*

The most significant difference between a regular power of attorney and a durable power of attorney is this: a durable power of attorney remains in force even if the principal becomes disabled.<sup>111</sup> Moreover, a durable power of attorney does not lapse because of the passage of time unless the instrument creating the power specifically states a time limitation.<sup>112</sup> Accordingly, unless the principal revokes a power of attorney, or a court of competent jurisdiction acts to revoke it effectively, a power of attorney remains in effect and continues to work until the principal's death.<sup>113</sup>

However, the common law did not create the durable power of attorney; the statute created it.<sup>114</sup> Hence, to create and use a durable power of attorney, the client—or the client's attorney—must carefully follow the instructions that the governing statute provides.<sup>115</sup>

## *2. Fundamental Requirements of the Durable Power of Attorney*

Relevant sections of Chapter 751 of the Texas Estates Code govern the formation of the Texas Durable Power of Attorney.<sup>116</sup> The statute requires

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105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Richard Mayberry, *Handbook for Using Durable Financial Power of Attorney*, MAYBERRY LAW FIRM, [www.mayberrylawfirm.com/bio/writings/va-durable-power-of-attorney](http://www.mayberrylawfirm.com/bio/writings/va-durable-power-of-attorney) [https://perma.cc/2BJJ-FE9B] (last visited Apr. 3, 2017).

110. *Id.*

111. *See* Carnes, *supra* note 101.

112. *See id.*

113. *See id.*

114. *See* Mayberry, *supra* note 109.

115. *See id.*

116. *See* TEX. EST. CODE ANN. § 751.001 (West 2015).

few formalities to create a Durable Power of Attorney.<sup>117</sup> Essentially, the principal must “write out” instructions, date, sign, and notarize the Durable Power of Attorney.<sup>118</sup> The statute does not require that anyone witness the instrument and its execution—except for the notary.<sup>119</sup>

To assist people in creating the Durable Power of Attorney, the legislature created a form called the “Statutory Durable Power of Attorney.”<sup>120</sup> However, the form and its wording are not exclusive, and attorneys are free to draw up their own forms, or use other formats, so long as the wording used complies substantially with the language in Section 752.051.<sup>121</sup>

The statute does not require an individual to file the Durable Power of Attorney with the county clerk.<sup>122</sup> However, if the agent uses the power with respect to a real property transaction, the agent must record the Power of Attorney with the county clerk’s office in the county where the real property is located.<sup>123</sup>

A principal can use the durable power of attorney to grant a wide variety of powers to the agent.<sup>124</sup> The agent could have the power to, on the principal’s behalf, complete transactions ranging from personal and real property transfers to development and transfers of foreign interests.<sup>125</sup> However, to grant these powers to the agent, the principal must specifically mention them in the instrument.<sup>126</sup> When using the statutory Durable Power of Attorney form, the principal must ensure to initialize the line to the left of each power he grants to the agent.<sup>127</sup> The principal’s failure to initialize the line to the left of each enumerated power is construed as an indication that the principal did not wish to grant this power to the agent.<sup>128</sup>

### 3. *Springing Durable Power of Attorney*

Unless the instrument states otherwise, a power of attorney takes effect upon its execution.<sup>129</sup> The Texas statute changes this because it allows principals to choose whether the power takes immediate effect or whether their agents’ authority to act only takes effect if the principal loses the ability

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117. *See id.*

118. *See id.*

119. *See id.* § 751.002.

120. *See id.* § 752.051.

121. *See id.* § 752.003.

122. *See id.* § 751.001.

123. *See id.* § 751.151.

124. *See id.* § 752.101–.15.

125. *See id.* § 752.102–.03.

126. *See id.* § 752.051.

127. *Id.*

128. *Id.*

129. *See id.* § 152.051.

to act for themselves—that is, if they become disabled or incapacitated.<sup>130</sup> This latter form of durable power of attorney is called a “springing power of attorney.”<sup>131</sup>

The advent of the statutorily-blessed springing power of attorney raises a valid question: If someone executed a durable power of attorney prior to its being authorized by the Durable Power of Attorney Act in 1993, is that power of attorney valid?<sup>132</sup> If the principal signed a durable power of attorney with a springing power in 1991 and suffers a disability today, is the springing power effective notwithstanding the fact that it was created prior to its being authorized by law?<sup>133</sup>

In *Comerica Bank v. Texas Commerce Bank*, the Texarkana Court of Appeals held that although no explicit statute authorizing springing powers of attorney existed prior to 1993, such powers were legal.<sup>134</sup> Notwithstanding the court’s authorization of these pre-1993 springing powers of attorney, someone with such a power of attorney is advised to execute a current durable power of attorney based on the Texas Durable Power of Attorney Act.<sup>135</sup> This would save the individual—or the individual’s agent—from going to court to determine whether the springing power is valid.<sup>136</sup>

#### 4. Revocation of Power of Attorney

A durable power of attorney does not lapse because of passage of time unless the instrument creating the power specifically states a time limitation.<sup>137</sup> However, other circumstances can give rise to a termination of the power:

1. The principal’s death;
2. Where the principal appointed the spouse as agent (or a court appointed the spouse as agent) and the principal and agent divorce or their marriage is annulled, the power of attorney terminates as a matter of law unless the instrument creating the power of attorney expressly states otherwise;
3. A court sitting in the principal’s domicile appoints a guardian of the principal’s estate.<sup>138</sup>

Although a durable power of attorney can indeed be revoked, a third party who relies upon the existence of the power while unaware of its

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130. See *id.* § 151.001.

131. See *id.*

132. See *Comerica Bank—Tex. v. Tex. Commerce Bank Nat’l Ass’n*, 2 S.W.3d 723, 724 (Tex. App.—Texarkana 1999, pet. denied).

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. See TEX. EST. CODE ANN. § 152.004 (West 2015).

138. See *id.* § 151.052–53.

revocation has legal coverage: the law states that a revocation of a durable power of attorney is not effective as to that third party until the third party receives actual notice of the revocation.<sup>139</sup>

### 5. *The Agent's Fiduciary Responsibilities*

Even as the attorney drafts the instrument and envisages the ways it could help the client in the event disability strikes, the attorney should consider the reality that the agent is a fiduciary with fiduciary responsibilities.<sup>140</sup> The Durable Power of Attorney Act is clear on that point, the "agent is a fiduciary [with] a duty to . . . account for actions he or she takes under the power of attorney."<sup>141</sup> Accordingly, the agent has an obligation to perform the duties in accordance with prevailing standards of good faith and trustworthiness.<sup>142</sup> Should the agent fail to perform those duties, the principal may either revoke the power of attorney, seek restitution from the agent for misused funds or other property, or both.<sup>143</sup>

But what happens when the principal is disabled and as a result lacks capacity?<sup>144</sup> Texas law provides an avenue to remove the agent.<sup>145</sup> If, after a principal has executed a durable power of attorney, a court sitting in the principal's domicile is convinced that the agent has been abusing the power, the court may appoint a guardian of the principal's estate—either permanent or temporary—at which time the powers of the agent will terminate, and the agent will turn over to the guardian all of the principal's property in the agent's possession.<sup>146</sup>

### 6. *The Principal's Capacity to Execute a Durable Power of Attorney*

It is only natural to expect that a principal who executes a durable power of attorney should have a certain requisite level of mental capacity.<sup>147</sup> However, Texas has no statutory requirement that a principal possess a certain level of capacity to execute a power of attorney.<sup>148</sup> Nonetheless, Texas courts have stepped in to fill that gap.<sup>149</sup> When determining whether a principal had the requisite capacity to execute a durable power of attorney,

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139. *See id.* § 751.056.

140. *See id.* § 751.101.

141. *Id.*

142. *Id.*

143. *See* TEX. HEALTH & SAFETY CODE ANN. § 166.042 (West 2015).

144. *Id.*

145. *Id.*

146. *Id.*

147. *See generally* Viogt v. Underwood, 616 S.W.2d 266, 269 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.) (discussing mental capacity of a principal).

148. *See* In re Estate of Vackar, 345 S.W.3d 588, 596–99 (Tex. App.—San Antonio 2011, no pet.).

149. *Id.*



Texas courts apply the same capacity requirements required for someone to enter into a contract.<sup>150</sup> Under this standard, someone who challenges a principal's mental capacity when signing a power of attorney has the burden of showing that the principal "did not understand the nature or consequences of his act at the moment the power of attorney was executed."<sup>151</sup>

### III. HEALTHCARE MANAGEMENT

The tools available to the Texas practitioner in the area of healthcare management are grounded in the Texas Advance Directives Act.<sup>152</sup> The statute authorizes three types of instruments to assist a person to plan for disability and death: (1) the directive to physicians, family, or surrogate; (2) the medical power of attorney; and (3) the out-of-hospital do-not-resuscitate order.<sup>153</sup>

#### A. *The Directive to Physicians, Family and Surrogate*

A competent adult has the right to refuse medical treatment for any reason even if such refusal will lead to an otherwise preventable death.<sup>154</sup> But if the person is in a coma, brain damaged, or for some other reason is unable to communicate personal wishes, the only way the individual's physician, family members, or surrogate medical decision maker would know such wishes would be through a "living will" in which the person expressed the desire (or lack thereof) to be kept alive through the use of medical technology if the individual was ever in a terminal condition and was then unable to communicate personal wishes regarding whether or not to decline further life-sustaining treatment.<sup>155</sup>

In 1977, Texas became the fifth state of the union to enact "living will" legislation when the legislature enacted the Natural Death Act.<sup>156</sup> In 1999, the legislature re-codified the Act in the Advanced Directives Act, now found in Chapter 16 of the Texas Health and Safety Code.<sup>157</sup>

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150. See generally *id.* (listing the requirements of a Durable Power of Attorney).

151. *Id.* at 597.

152. See TEX. HEALTH & SAFETY CODE ANN. § 166.042 (West 2015).

153. *Id.*

154. *Id.*

155. *Id.*

156. Acts 1977, 65th R.S., Ch. 398, General & Special Laws of Texas.

157. See HEALTH & SAFETY § 166.042.

### 1. *Formal Requirements of the Directive to Physicians, Family and Surrogate*

The Texas statute speaks of a person's "directive" to the person's physicians, family members, and surrogate(s).<sup>158</sup> Members of the public refer to this instrument as a "living will."<sup>159</sup>

In Texas, any competent adult may execute a living will.<sup>160</sup> The person must sign the directive in the presence of two competent adult witnesses, at least one of whom is not personally involved in the declarant's healthcare.<sup>161</sup> The witnesses must also sign the instrument.<sup>162</sup>

In lieu of signing in the presence of witnesses, the person may sign the directive and have the signature acknowledged before a notary public.<sup>163</sup>

### 2. *Notice to Physician*

Patients are advised to inform their physicians when they execute a living will.<sup>164</sup> Texas law makes provision for such notice-giving.<sup>165</sup> Accordingly, a patient who has executed a living will must inform the individual's attending physician.<sup>166</sup> If the patient is incompetent, or otherwise mentally or physically unable to communicate, another person may notify the attending physician of the living will's existence.<sup>167</sup> Upon being informed, the attending physician will make that information a part of the patient's record.<sup>168</sup>

### 3. *Form of Directive*

The Texas Health and Safety Code provides a fill-in-the-blank form for use in creating a living will.<sup>169</sup> However, the law does not require the use of this form, or of any form that a physician, healthcare facility, or healthcare professional provides.<sup>170</sup>

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158. *Id.*

159. *Id.*

160. *Id.*

161. *See id.*

162. *Id.*

163. *See id.* § 166.032.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

#### 4. *Validity of Nonwritten Directive*

Texas law does not require that all directives be in writing.<sup>171</sup> Rather, the law provides that “[a] competent qualified patient who is an adult may issue a directive by non-written means of communication.”<sup>172</sup> The declarant must issue the directive in the presence of the attending physician as well as two witnesses who qualify pursuant to Section 166.003 of the Health and Safety Code, at least one of whom must not be involved in the declarant’s healthcare.<sup>173</sup> The physician will then include in the patient’s medical record a notation to the fact that the patient made a non-written directive and will also record the names of the witnesses to that event.<sup>174</sup>

#### 5. *Institutional Policies*

Not all healthcare providers sanction the use of living wills.<sup>175</sup> To address this reality, Texas law requires healthcare providers in the state to develop and maintain written policies regarding the use of advance directives.<sup>176</sup> The policies must include a precise and clear statement of any procedures the healthcare provider is unable or unwilling to administer or withhold in accordance with a directive.<sup>177</sup>

As used in this context, the term “healthcare provider” is very broad.<sup>178</sup> It includes hospitals, licensed nursing facilities, home and community support services agencies, assisted living facilities, and special care facilities.<sup>179</sup> The statute requires healthcare facilities to provide patients with written notice of their written policies regarding directives either at the time the patients (1) are admitted to receive services from the facility, or (2) begin receiving care from the facility, whichever is sooner.<sup>180</sup> If the patient is not competent at the time the facility provides notice, the facility must give the notice to the patient’s representative in the following order:

1. The patient’s legal guardian, if any;
2. The person responsible for the patient’s healthcare decisions (such as the agent under the patient’s medical power of attorney);
3. The patient’s spouse;

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171. *See id.* § 166.034(a).

172. *Id.*

173. *Id.* § 166.034(b).

174. *Id.*

175. *See Will Your Advance Directive be Followed?* ROBERT POWELL CTR. FOR MEDICAL ETHICS 3 (2015), [www.nrlc.org/uploads/medethics/WillYourAdvanceDirectiveBeFollowed.pdf](http://www.nrlc.org/uploads/medethics/WillYourAdvanceDirectiveBeFollowed.pdf) [<https://perma.cc/TT47-PJMV>].

176. *See* HEALTH & SAFETY § 166.004(b).

177. *Id.*

178. *Id.* § 166.004(a).

179. *Id.* § 166.004(a)(1–5).

180. *Id.* § 166.004(c).

4. One of the patient's adult children;
5. The patient's parent; or
6. The person admitting the patient to the facility.<sup>181</sup>

The facility must conduct a "diligent search" to locate the preferred representative.<sup>182</sup> If, after such a search is conducted, the facility still cannot locate a representative, the facility is not required to provide the notice.<sup>183</sup> However, if the patient regains competence, the facility must give the patient the written notice.<sup>184</sup>

### 6. Witness Requirements

Texas law is extremely particular when it comes to witnessing a directive to physicians, family, or surrogate.<sup>185</sup> First, two adults must witness the instrument (or non-written directive), one of whom must satisfy a strict list of requirements.<sup>186</sup> That witness cannot be: (1) a person designated to make a treatment decision for the patient, (2) related to the patient by blood or marriage, (3) entitled to any part of the estate, (4) the attending physician or an employee of the attending physician, (5) an employee of a healthcare facility in which the patient is looked after if the employee is involved in giving direct care to the patient or is a partner, director, officer, or business office employee of a healthcare facility or of any such parent organization of the healthcare facility, and (6) a person who has a claim against the estate.<sup>187</sup> The second witness must simply be a competent adult.<sup>188</sup>

Texas law does not require an individual to notarize or file a living will with the county clerk to be legally effective.<sup>189</sup> The law also forbids physicians, healthcare facilities, and healthcare professionals from requiring either that individuals notarize the directives or that declarants use forms provided by these healthcare providers.<sup>190</sup>

### 7. Patient Desire and the Living Will

Regardless of what is indicated in a living will, the patient's present desire supersedes the effect of the directive.<sup>191</sup> Hence, it is quite possible for patients' directives to say, "Pull the plug," but for the patients to miraculously

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181. *Id.* § 166.004(d)(1)–(6).

182. *Id.* § 166.004(e).

183. *Id.*

184. *Id.* § 166.004(f).

185. *Id.* § 166.003.

186. *Id.* § 166.003(1)–(2).

187. *Id.* § 166.003(2)(A)–(G).

188. *Id.* § 166.003(1).

189. *Id.* § 166.036(a).

190. *See* TEX. EST. CODE ANN. § 752.003 (West 2015).

191. *See* HEALTH & SAFETY § 166.037.

open their eyes, stare at everyone in bewilderment, and say, “Don’t you dare turn off that machine! Keep me alive as long as possible.”<sup>192</sup>

### 8. Revocation of a Living Will

A person can revoke a living will at any time.<sup>193</sup> However, until the declarant revokes the living will, it remains effective.<sup>194</sup> Revocation can be accomplished by “canceling, defacing, obliterating, burning, tearing, or otherwise destroying” the written declaration, which may legally be done by the declarant or by a person in the declarant’s presence under the declarant’s directions.<sup>195</sup> The declarant may also sign and date a written revocation that expresses the intent to revoke the living will.<sup>196</sup> However, the written revocation will take “effect only when the declarant or a person acting on behalf of the declarant notifies the attending physician of its existence or mails the revocation to the attending physician.”<sup>197</sup> The “attending physician or the physician’s designee will then record the fact of the revocation in the client’s medical records.”<sup>198</sup> A declarant can also vocally express the intent to revoke a living will.<sup>199</sup>

Whether the revocation is written or oral, it becomes effective only if the physician is notified personally or by mail.<sup>200</sup> The physician must then record the time, date, and place the physician received the oral or written revocation and write “the word ‘VOID’ on each page of the directive in the patient’s medical records.”<sup>201</sup>

### 9. The Right to Transfer

This article has already noted that not all healthcare providers are willing to follow the directives of a living will.<sup>202</sup> In 2003, Texas enacted extensive procedures which physicians must follow when either: (1) the attending physician wishes to cease life-sustaining treatment but the patient’s Advance Directive or medical agent indicates that treatment should be continued, or (2) the attending physician wishes to continue life-sustaining treatment, but the patient’s advance directive or medical agent indicates that

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192. See generally *id.* (providing an example of patient desire superseding directive).

193. See *id.*

194. See *id.*

195. *Id.* at § 166.042(a)(1).

196. See *id.*

197. See *id.* § 166.042(b).

198. *Id.*

199. See *id.*

200. See *id.*

201. See *id.*

202. See *supra* Part III.

treatment should be withheld.<sup>203</sup> These procedures are designed to assist the patient in being transferred to a facility willing to comply with the advance directive or the agent's instructions.<sup>204</sup> Further, effective September 1, 2015, the legislature further amended certain crucial sections of the Health and Safety Code to make it easier for patients to transfer from one healthcare facility to another in search of attending physicians who would honor their advance directives.<sup>205</sup>

As an initial matter, Texas law requires that whenever an attending physician refuses to honor an Advance Directive or healthcare treatment decision requesting the provision of life-sustaining treatment, or the attending physician refuses to comply with an Advance Directive or treatment decision requesting the withholding or withdrawal of life-sustaining treatment, the healthcare provider must furnish the patient with a statement explaining the patient's right to transfer.<sup>206</sup> The statement required in the former scenario shall be substantially the same in form as found in Section 166.052(a) of the Texas Health and Safety Code.<sup>207</sup> The statement required in the latter eventuality is found in Texas Health and Safety Code Section 166.052(b).<sup>208</sup>

As a second matter, beginning September 1, 2015, the Texas Department of State Health Services began maintaining a registry listing the identity and contact information of healthcare providers and referral groups, both in and out of Texas, who informed the department that they are either willing to accept transfer patients or may know a provider who would accept such patients.<sup>209</sup> The law requires the department to post the list on its website in a manner that patients and persons responsible for the healthcare decisions of patients may easily comprehend.<sup>210</sup>

### 10. Texas Living Will Definitions

The provisions of the Advance Directives Act are applicable only to certain patients in certain situations.<sup>211</sup> Also, the Act only covers certain types of medical treatment.<sup>212</sup> It is important, therefore, that practitioners remain aware of the definitions of these terms under the statute.<sup>213</sup>

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203. See HEALTH & SAFETY § 166.046.

204. See *id.*

205. See *id.* § 166.053.

206. See *id.* § 166.052.

207. See *id.*

208. See *id.*

209. See *id.* § 166.053.

210. See *id.*

211. See TEX. ESTATES CODE § 751.002 (West 2016).

212. See *id.*

213. See *id.*

*a. Artificially Administered Nutrition and Hydration*

The term “‘artificially administered nutrition and hydration’ means the provision of nutrients or fluids by a tube inserted in a vein, under the skin in the subcutaneous tissues, or in the gastrointestinal tract.”<sup>214</sup>

*b. Life-Sustaining Treatment*

Essentially, “Life-sustaining treatment [is] treatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient would die. The term includes both life-sustaining medications and artificial life support such as mechanical breathing machines, kidney dialysis treatment, and artificially administered nutrition and hydration. The term does not include the administration of pain medication, the performance of a medical procedure necessary to provide comfort care, or any other medical care provided to alleviate a patient’s pain.”<sup>215</sup>

*c. Terminal Condition*

Medical professionals may withhold or withdraw life support from a patient with a terminal condition—that is, “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.”<sup>216</sup>

*d. Irreversible Condition*

The Advance Directives Act also authorizes a patient to avoid artificial life support if the patient has an “irreversible condition.”<sup>217</sup> The statute defines an “irreversible condition” as a “condition, injury, or illness (A) that may be treated, but is never cured or eliminated; (B) that leaves a person unable to care for or make decisions for the person’s own self; and (C) that, without life-sustaining treatment provided in accordance with the prevailing standard of medical care, is fatal.”<sup>218</sup>

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214. HEALTH & SAFETY § 166.002.

215. *Id.*

216. *Id.*

217. *See id.* § 166.031.

218. *See id.* § 166.002.

*e. Imminent Death*

If a patient's condition is terminal and the attending physician expects death "within minutes to hours, even with the use of all available medical treatment provided within the prevailing standard of care," the medical provider may withhold or remove all treatments except those needed to maintain the patient's comfort.<sup>219</sup>

*B. Medical Power of Attorney*

In a medical power of attorney, someone, as principal, appoints an agent to make healthcare decisions for the principal if the principal becomes incompetent.<sup>220</sup>

*1. Formalities of the Medical Power of Attorney*

The Texas Health and Safety Code provides that anyone may serve as agent except "the principal's healthcare provider; an employee of [his] healthcare provider, unless that person is related to the principal; the principal's residential care provider; or an employee of the [] residential care provider, unless that person is related to the principal."<sup>221</sup>

Normally, the principal must sign the medical power of attorney—made in writing—in the presence of two witnesses who must themselves sign the document.<sup>222</sup> The witness requirements are similar to those for a Directive to Physicians, Family, or Surrogate.<sup>223</sup> Instead of signing in the presence of the witnesses, the principal may execute the medical power of attorney in the presence of a notary public.<sup>224</sup>

If the principal is physically unable to sign, another person may sign the medical power of attorney at the principal's express direction in the principal's presence using the principal's name.<sup>225</sup> The person may "sign" the principal's name using a digital or electronic signature.<sup>226</sup>

To be effective, the medical power of attorney must be delivered to the agent.<sup>227</sup> Upon execution, the power of attorney remains effective until it expires—if it contains an expiration date—is revoked or the principal regains capacity.<sup>228</sup>

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219. *See id.* § 166.033.

220. *See id.* § 166.152.

221. *See id.* § 166.153.

222. *See id.* § 166.154.

223. *See id.*

224. *See id.*

225. *See id.*

226. *See id.*

227. *See id.* § 166.152.

228. *See id.*



## 2. *Revocation of Medical Power of Attorney*

The principal can revoke a medical power of attorney through an oral declaration, handing a written notification to the agent, a licensed health or residential care provider, or through any other act that evidences the principal's intent to revoke.<sup>229</sup> The principal's competency or mental state is irrelevant to the principal's ability to issue this notification.<sup>230</sup> The principal can also execute a new power of attorney as a means of revocation.<sup>231</sup>

Finally, unless the medical power of attorney provides otherwise, a divorce of the principal and the principal's spouse revokes a medical power of attorney if it lists the spouse as the principal's agent.<sup>232</sup>

## 3. *Form of Execution and Disclosure*

Before signing the medical power of attorney, the principal must sign a statement indicating that the principal received a disclosure statement and understood its contents.<sup>233</sup> Section 166.163 of the Health and Safety Code provides the form of the disclosure statement the principal must receive before signing the medical power of attorney.<sup>234</sup> Although not provided in the form, practitioners usually add a signature line at the end, along with a statement that the principal has read and understood its contents.<sup>235</sup> The principal should then sign this statement before signing the medical power of attorney.<sup>236</sup>

Section 166.164 of the Health and Safety Code provides the form, which the principal completes and signs to appoint an agent to make healthcare decisions.<sup>237</sup> The principal may provide individualized instructions in the section labeled "limitations of the decision-making authority of my agent."<sup>238</sup> The medical power of attorney must either be (1) witnessed by two adult witnesses, or (2) signed by the principal and notarized.<sup>239</sup>

## 4. *Potential Conflicts*

Before we leave the issue of the Medical Power of Attorney, we recognize that because life is uncertain—even as the end of life approaches—

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229. *See id.* § 166.155.

230. *See id.*

231. *See id.*

232. *See id.*

233. *See id.* § 166.162.

234. *See id.* § 166.163 (West 2015).

235. *See id.*

236. *See id.*

237. *See id.* § 166.164.

238. *See id.*

239. *See id.*

and because people view various issues differently, conflicts sometimes arise over the care of the incapacitated as the individuals entrusted with their care fail to agree on what steps to take.<sup>240</sup> Accordingly, conflicts arise.<sup>241</sup> Following is a brief discussion of some of these potential conflicts.<sup>242</sup>

*a. Appointment of a Guardian*

If, for some reason, a court appoints a guardian for a principal who executed a medical power of attorney, the court will determine whether it should suspend or revoke the authority of the agent.<sup>243</sup> However, because the medical power of attorney expresses the principal's wishes for healthcare, the principal could write into the medical power of attorney just what the individual would desire regarding healthcare, as well as personal wishes should there ever be an adjudication of incompetence and a guardian appointment.<sup>244</sup> That way, when the judge makes a determination, the judge will have the principal's own words to consider.<sup>245</sup>

*b. Conflict Between Advance Directives*

In a conflict between any of a patient's advance directives, the directive executed later in time has priority.<sup>246</sup> Looking specifically at the Directive to Physicians and Family or Surrogates and the Medical Power of Attorney, a conflict can arise only if both documents name agents who are not the same person.<sup>247</sup> If, however, both instruments name the same person as agent, no conflict will exist.<sup>248</sup> If the Directive to Physicians does not appoint an agent, it will take priority over the Medical Power of Attorney for the simple reason that it speaks directly to the physician, not to an agent who then communicates the patient's wishes to the physician.<sup>249</sup>

Further, if the patient has signed only a Medical Power of Attorney, the 1999 Act allows the agent to withhold or withdraw life support systems and put the patient into a hospice program.<sup>250</sup> This power did not exist under the law that preceded the 1999 Act.<sup>251</sup>

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240. See *infra* Section III.B.4(d).

241. See *infra* Section III.B.4(d).

242. See *infra* Section III.B.4(d).

243. See HEALTH & SAFETY § 166.156.

244. See *id.*

245. See *id.*

246. See *id.* § 166.008.

247. See *id.*

248. See *id.*

249. See *id.* § 166.155.

250. See *id.* § 166.152.

251. See *id.*

*c. Duty to Health or Residential Care Provider*

A principal's health or residential care provider must follow the instructions the principal's agent provides, unless the care provider feels the instructions are contrary to the principal's wishes, the law, or to the medical power of attorney's limiting statement.<sup>252</sup> Nevertheless, the attending physician does not have a duty to verify that the agent's directive is consistent with the principal's wishes or religious or moral beliefs.<sup>253</sup>

*d. Limitations on Liability*

An attending physician, health or residential care provider or a person acting as an agent for or under the physician's or provider's control is not subject to criminal or civil liability and has not engaged in unprofessional conduct for an act or omission if the act or omission:

- (1) is done in good faith under the terms of the medical power of attorney, the directives of the agent, and the provisions of the Health and Safety Code; and
- (2) does not constitute a failure to exercise reasonable care in the provision of healthcare services.<sup>254</sup>

*5. Liability for Health Care Costs*

This article closes Part III.B with words that should provide comfort and relief to agents and their representatives.<sup>255</sup> Texas law does not hold the agent responsible for paying the bill for the care chosen; indeed, the fact that an agent consents to medical treatment for the principal has no effect on the person financially liable for the costs associated with that care—the principal, or patient, himself.<sup>256</sup>

*C. Out-of-Hospital Do-Not-Resuscitate Orders*

The 1995 Texas Legislature authorized a physician, in accordance with a patient's wishes, or the wishes of the patient's legally authorized representative, to issue an order directing healthcare professionals acting in out-of-hospital settings to refrain from initiating or continuing certain life-sustaining procedures.<sup>257</sup> In 1999, the Advanced Directives Act recodified these provisions.<sup>258</sup> This order is designated as an Out-of-Hospital

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252. *See id.* § 166.037.

253. *See id.* § 166.033.

254. *See id.* § 166.160.

255. *See id.*

256. *See id.*

257. *See id.* § 166.082.

258. *See id.*

Do-Not-Resuscitate Order (OOH-DNR).<sup>259</sup> OOH-DNR orders are effective when a patient suffering from a terminal condition is in a setting, such as a long-term care facility, hospice, or even a private home, and healthcare professionals are called for assistance.<sup>260</sup> The order also applies to situations in which the person is being transported in an ambulance or other vehicle.<sup>261</sup>

### *1. Life-Sustaining Procedures Covered by OOH-DNR Orders*

The OOH-DNR order is effective only with respect to certain specified life-sustaining procedures including: (1) cardiopulmonary resuscitation; (2) advanced airway management; (3) artificial ventilation; (4) defibrillation; (5) transcutaneous cardiac pacing; and (6) other life-sustaining treatment that the Texas Board of Health specifies.<sup>262</sup>

An OOH-DNR order may not authorize the withholding of any treatment designed to provide comfort, care, or pain relief, nor the withholding of either water or nutrition.<sup>263</sup>

### *2. Requirements of the OOH-DNR Order*

Section 166.082 of the Health and Safety Code provides the requirements for an OOH-DNR.<sup>264</sup> The following sections of this article discuss these requirements.<sup>265</sup>

#### *a. Execution of the OOH-DNR Order*

According to Section 166.082(a), “a competent person may at any time execute an OOH-DNR order.”<sup>266</sup> Moreover, “the declarant must sign the OOH-DNR order in the presence of two witnesses who qualify under [Health and Safety Code] § 166.003(1), at least one of whom must be a witness who qualifies under [Health and Safety Code] § 166.003(2).”<sup>267</sup> The statute requires that “the witnesses must sign the order.”<sup>268</sup> The declarant’s attending physician “must sign the order and shall make the fact of the existence of the order and the reasons for its execution a part of the declarant’s medical record.”<sup>269</sup> Instead of signing in front of witnesses, the declarant may sign

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259. *See id.* § 166.083.

260. *See id.* § 166.081.

261. *See id.*

262. *See id.* § 166.081(6)(A)(i)–(vi).

263. *See id.* § 166.081(6)(B).

264. *See id.* § 166.072(a)–(g).

265. *See infra* Sections III.A.10(a)–(e).

266. HEALTH & SAFETY § 166.082(a).

267. *Id.* § 166.082(b).

268. *Id.*

269. *Id.*

the OOH-DNR “and have the signature acknowledged before a notary public.”<sup>270</sup>

*b. OOH-DNR Order for an Incompetent Person Who Previously Executed a Directive to Physicians, Family, and Surrogate*

If a mentally incapacitated person had previously executed or issued a directive to physicians, family or surrogate, “the physician may rely on the directive as the person’s instructions to issue an OOH-DNR order and shall place a copy of the directive in the person’s medical record.”<sup>271</sup> The physician will sign the order in the declarant’s stead and “may use a digital or electronic signature authorized under [Health and Safety Code] § 166.011.”<sup>272</sup>

*c. OOH-DNR Order for an Incompetent Person Who Previously Executed a Directive to Physicians, Family, and Surrogate Designating a Proxy*

If a mentally incapacitated person had “previously executed or issued a directive to physicians,” family or surrogate designating a proxy, “the proxy may make any decisions required of the designating person as to an OOH-DNR order and shall sign the order in lieu of the person designated by Health and Safety Code § [166.082](b).”<sup>273</sup>

*d. OOH-DNR Order for an Incompetent Person Who Previously Executed a Medical Power of Attorney Designating an Agent*

If the person is now 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.”<sup>274</sup>

*e. Effectiveness of OOH-DNR Order*

Pursuant to Health and Safety Code Section 166.082(g), “an OOH-DNR order is effective upon its execution.”<sup>275</sup>

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270. *Id.* § 166.082(c).

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* § 166.082(e).

275. *Id.* § 166.082(g).

### 3. *Form of OOH-DNR Order*

OOH-DNR orders must be in the standardized form, as the Texas Department of Health requires.<sup>276</sup> The declarant must use the official form; the declarant cannot make up wording. Anything but the official form is legally invalid; the standard form is available at <http://www.hshs.state.tx.us/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=8589946120>.<sup>277</sup>

### 4. *Issuance of OOH-DNR Order by Nonwritten Communication*

A patient who is awake, aware, and competent can issue a non-written OOH-DNR order.<sup>278</sup> The patient must make the statement in the presence of the patient's doctor and two qualified witnesses.<sup>279</sup> The doctor and witnesses must then sign the OOH-DNR form for the patient.<sup>280</sup> The doctor shall then record the fact of the existence of the OOH-DNR order in the patient's medical record, as well as the names of the attesting witnesses.<sup>281</sup>

### 5. *OOH-DNR Identification Device*

The Texas Department of Health sells DNR Identification Devices—bracelets and necklaces—to healthcare facilities.<sup>282</sup> The presence of such a device on the body of a person is conclusive evidence that the person executed an OOH-DNR order or had one issued on the individual's behalf.<sup>283</sup> Health care professionals are obligated to honor the DNR identification device just as they would honor a validly executed OOH-DNR order.<sup>284</sup>

### 6. *Duration of OOH-DNR Order*

An OOH-DNR order is effective until it is revoked.<sup>285</sup>

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276. *Id.* § 166.083.

277. *Id.* § 166.083(b)(a).

278. *See id.*

279. *See id.* § 166.032(a).

280. *See id.* § 166.032(d).

281. *See id.*

282. TEXAS DEPT. OF STATE HEALTH SVCS., <https://www.dshs.texas.gov/emtraumasystems/dnr.Shtm> [<https://perma.cc/DE3N-EC46>] (last visited Apr. 3, 2017).

283. *See id.*

284. *See* HEALTH & SAFETY § 166.090.

285. *See id.* § 166.042.

### 7. Revocation of OOH-DNR Order

A declarant may revoke an OOH-DNR order at any time without regard to the declarant's mental state or competency.<sup>286</sup> If the patient is competent, the patient's verbal wishes always supersede the OOH-DNR's instructions to withhold treatment.<sup>287</sup> Hence, a patient can verbally revoke an OOH-DNR order.<sup>288</sup> Likewise, a patient's legal guardian, qualified relative, or agent under a medical power of attorney may orally revoke an OOH-DNR order on the patient's behalf.<sup>289</sup> However, regardless of who executes the oral revocation, the oral revocation takes effect only when the declarant, or the person making the revocation, communicates the intent to revoke the order to the responding healthcare professionals or the attending physician at the scene.<sup>290</sup>

Regarding physical revocation, while competent and awake, the declarant may destroy the order form and remove the DNR identification device, if any, or have someone perform these acts in the declarant's presence.<sup>291</sup>

If the declarant is unable to communicate, the legal guardian, qualified relative, or agent under a medical power of attorney who executed the OOH-DNR order on the declarant's behalf can destroy the OOH-DNR order and remove the DNR identification device, if any.<sup>292</sup>

### 8. Liability Shield

Under Texas law, a caregiver who complies with an OOH-DNR order cannot be held civilly liable for fulfilling the caregiver's duties.<sup>293</sup> Also, the caregiver incurs no criminal liability or claims of "unprofessional conduct" on account of compliance with the directives of the OOH-DNR order.<sup>294</sup> Likewise, the caregiver is deemed not guilty of violating any licensing or regulatory rules and is not subject to any disciplinary action or sanction by any licensing or regulatory agency in Texas.<sup>295</sup>

A caregiver who does not know of the existence of an OOH-DNR order—and thus does not comply with it—is not liable under Texas civil or criminal laws.<sup>296</sup> On the other hand, a caregiver who knowingly refuses to

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286. *See id.* § 166.092.

287. *See id.* § 166.037.

288. *See id.*

289. *See id.* § 166.038.

290. *See id.* § 166.092.

291. *See id.*

292. *See id.*

293. *See id.* § 166.042(1)(d).

294. *See id.* § 166.044(c).

295. *See id.* § 166.044(d).

296. *See id.* § 166.163.

comply with an OOH-DNR order is subject to review and disciplinary action by the appropriate licensing board.<sup>297</sup> While the Health and Safety Code does not specify any penalty for the caregiver's refusal to comply, it states that its provisions do not limit remedies available under other laws of the state.<sup>298</sup>

#### IV. DECLARATION OF GUARDIAN

When all else fails and an incapacitated person has none of the aforementioned tools available, guardianship is the last resort.<sup>299</sup> Stated bluntly, guardianship is a court-supervised procedure that strips authority from one person and places it into the hands of another.<sup>300</sup> Guardianship is seldom a voluntary procedure; rather, it can often be thrust upon an elderly person if and when the individual becomes incapacitated.<sup>301</sup>

##### A. Avoiding Guardianship

Most people view guardianship as a procedure of last resort, something to avoid at all costs.<sup>302</sup> Texas attorney, Paul Premack, argues that guardianship is expensive, slow, and "a detailed and often troublesome task for the person appointed to be guardian."<sup>303</sup>

This being the case, practitioners should help their clients avoid guardianship.<sup>304</sup> To succeed at this task, the person seeking to avoid guardianship should engage in pre-planning.<sup>305</sup> In most cases, someone's execution of a durable power of attorney and a medical power of attorney should be sufficient to ward off future guardianship.<sup>306</sup> The durable power of attorney would normally make guardianship of the estate redundant, since the principal would have already appointed someone to act on the principal's behalf regarding finances and property.<sup>307</sup> Meanwhile, a medical power of attorney negates the need for guardianship of the person since the instrument

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297. *See id.* § 166.045.

298. *See id.*

299. *See id.* § 166.039 (West 2015).

300. *See Frequently Asked Questions About Guardianship*, TEX. GUARDIANSHIP ASS'N, <http://texasguardianship.org/guardianship-information/faqs-2/> [<https://perma.cc/7X5G-KJKQ>] (last visited Apr. 8, 2017).

301. *See* TEX. EST. CODE ANN. § 1251.001 (West 2015).

302. *See* Donna Ennis, *Avoiding the Guardianship Nightmare* (May 20, 2014), <http://giordanolaw.com/avoiding-the-guardianship-nightmare/> [<https://perma.cc/MP4B-NYKS>].

303. Interview with Paul Premack, a certified Elder law attorney in San Antonio (Apr. 3, 2017) [<https://perma.cc/MP4B-NYKS>].

304. *See* Ennis, *supra* note 302.

305. *See id.*

306. *See id.*

307. *See id.*



would have already delegated the power to make healthcare decisions to someone of the proposed ward's choosing.<sup>308</sup>

### *B. Declaration of Guardian*

While an individual's execution of both a durable power of attorney and a medical power of attorney should be sufficient to ward off guardianship, someone might still try to force the individual into guardianship.<sup>309</sup> This could have drastic consequences, because if a court of competent jurisdiction appoints a permanent guardian for a principal, both the durable power of attorney and medical power of attorney would become void.<sup>310</sup>

While it is unlikely that someone would force an incapacitated person into guardianship knowing that the individual executed powers of attorney, it is quite possible that a disgruntled family member, unhappy about the proposed ward's decisions, would try to force a guardianship upon the individual.<sup>311</sup> The way to stop this well-meaning relative is for the person—while still having capacity—to execute a “Declaration of Guardian.”<sup>312</sup>

A Declaration of Guardian is a legal document wherein a declarant tells the court whom the declarant wants to serve as guardian in the event of incapacity or a guardianship proceeding.<sup>313</sup> The Declaration allows the declarant to appoint a guardian of the estate and a guardian of the person.<sup>314</sup> The declarant may appoint one person to fill each role, or the same person could fill both.<sup>315</sup> Of much importance, the declarant could disqualify an individual from ever becoming one of the guardians.<sup>316</sup>

The Texas legislature has developed a form for use in the formation of a Declaration of Guardian.<sup>317</sup> However, the form is not exclusive.<sup>318</sup> While the form may be used, the legislature does not require that it *must* be used.<sup>319</sup>

### *C. Filing of Declaration and Self-Proving Affidavit*

The law does not require that a declarant file the Declaration of Guardian with the court system.<sup>320</sup> However, should a need arise to utilize

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308. See *Effect of Guardianship*, 51 TEX. PRAC., ELDER LAW § 4:70 (2016–17 ed.).

309. See Laura Miles-Valdez, *A Captain for the Ship: Guardianship 101*, 70 TEX. B.J. 252, 253 (2007).

310. See *Effect of Guardianship*, *supra* note 308, at § 4:70.

311. See Miles-Valdez, *supra* note 309, at 252.

312. See *id.*

313. See *id.*

314. See *id.*

315. See *id.*

316. See *id.* at 254.

317. See TEX. EST. CODE ANN. § 1104.204 (West 2015).

318. See *id.*

319. See *id.*

320. See *id.*

the Declaration, the proposed guardian must file the document when the individual becomes an appointed guardian.<sup>321</sup> Timing is important: the Declaration must be filed *after* someone starts a guardianship proceeding (by filing an Application for Guardianship) and *before* the court appoints a guardian.<sup>322</sup>

#### *D. Revocation of the Declaration of Guardian*

A declarant may revoke the Declaration of Guardian by using any of the methods that the Texas Estates Code authorizes for revoking a Last Will and Testament, *i.e.*, the declarant could destroy the instrument, cancel it, or have someone destroy or cancel it in his presence.<sup>323</sup>

#### *E. Effect of Divorce*

If a declarant designates a spouse to serve as guardian, and the declarant is subsequently divorced from the spouse before a court appoints a guardian, the provision of the declaration designating the spouse is effectively revoked and has no effect.<sup>324</sup>

#### *F. Alternate or Other Court-Appointed Guardian*

If the guardian designated in the declaration does not qualify, predeceases the declarant, refuses to serve, resigns, or is otherwise unavailable to serve as guardian, the court shall appoint the next eligible alternate guardian to serve as guardian.<sup>325</sup> However, if none of the eligible alternate guardians named in the declaration are available to serve, the court shall appoint someone else as guardian.<sup>326</sup>

### V. CONCLUSION

We see, then, that Texans have various tools available for preparing for incapacity.<sup>327</sup> Generally, these tools break into two tracks: property management and healthcare management.<sup>328</sup> One other tool, the Declaration of Guardian, stands alone as a tool that could serve either or both functions.<sup>329</sup> But because guardianship is a course of last resort, this tool would typically

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321. *See id.*

322. *See id.*

323. *See* Miles-Valdez, *supra* note 3.

324. *See id.*

325. *See id.*

326. *See id.*

327. *See supra* Part I.

328. *See supra* Parts II–III.

329. *See supra* Part IV.

be the last one used.<sup>330</sup> Because of the fragility and uncertainty of life, it behooves all practitioners in the fields of estate planning, personal financial planning, and elder law to counsel and assist their clients in preparing for incapacity long before disability and incapacity strike.<sup>331</sup>

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330. *See supra* Part IV.

331. *See supra* Part IV.