

*An Abbreviated Guide to
Estate and Disability Planning in Texas*

Prepared by
Kathleen Ford Bay
Potts & Reilly, L.L.P.
401 West 15th Street
Suite 850
Austin, Texas 78701-1669
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Board Certified, Estate Planning
and Probate, by the Texas Board of
Legal Specialization

AN ABBREVIATED GUIDE TO ESTATE & DISABILITY PLANNING IN TEXAS

Plan, while you are able to, while you're healthy. Please. Doing so helps your family in the sad and difficult time immediately after your death.

This brochure addresses questions our clients often ask during estate and disability planning. There is, of course, so much more than what is touched upon here. Consult your own attorney, CPA, financial advisor, and spiritual leader. While we have tried to be up-to-date on Texas and federal law, there are changes that take place. So, use this as a guide, not as the etched-in-stone answers, to questions you have. Your specific situation needs to be discussed with your own advisor – do not rely on generalities and while you can do your own Will, after reading and considering this pamphlet, you may not want to be your own lawyer.

WILLS: TEXAS IS A COMMUNITY PROPERTY STATE

Q. ***Should I have a Will?***

A. Absolutely, everyone should. A well-drafted, valid Will can help your loved ones avoid those additional administrative complexities that arise when there is no Will. More importantly, a Will ensures that your assets – that is *your probate assets* -- are distributed to your intended beneficiaries, rather than those specified by a statute written by the Texas Legislature. If you die without a Will and a portion of your property goes to minors, there will probably be a need for a guardianship of the estate of any minor since a minor is not able to

hold property in his or her own name. With a Will, you can provide for administration of a minor's property without a guardianship, with a trust or, even simpler, with a custodianship under the Texas Uniform Transfers to Minors Act.

Q. How can I make sure that my property is distributed to my beneficiaries at my death with the least expense and trouble?

A. Texas law provides for ***independent*** administration which is much simpler and more economical than that available in most other states. Your Will must be drafted with the appropriate language to appoint an independent executor.

Q. Do I need a Will if I don't own a home, if I really don't have much?

A. Yes. Your Will contains your instructions on how, and to whom, you want your **probate** property to pass upon your death. Most of us own a lot of property other than a home, such as a car, jewelry, clothing, china, bank accounts and so forth.

Q. Can I write my own Will?

A. Yes. However, by going to an attorney, you ensure that your Will is valid and that your desires for giving your **probate** property away at your death are translated into the proper legal language.

Q. What happens if I die without a Will?

A. Your **probate** property will pass to persons designated by the law. Also, court involvement will be greater than if you had written a Will and appointed an independent executor. Also, the persons to whom your **probate** property passes may or may not be the ones you would choose.

Q. You keep using the term "probate property;" what do you mean?

A. Not all property passes at your death under your Will; only your “*probate property*.” Life insurance proceeds, pension benefits, IRAs, 401ks, and property you hold with “right of survivorship” or “payable on death” **do not** pass under your Will unless your “estate” is named as the beneficiary. (Naming your “estate” as the beneficiary may not be advisable in many cases.)

Q. What is community property?

A. In Texas, community property is generally all property acquired during your marriage other than gifts and inheritances, such as your earned income and unearned income from interest and dividends. Texas law *presumes* that everything owned by either or both husband and wife is community property and this presumption can be overcome only by “tracing” property from its original, separate property origin. Community property is owned 50/50 by husband and wife.

Q. What is separate property then?

A. Separate property is what you bring into the marriage and what you receive during marriage by gift, devise, or bequest, as well as “partitioned” (divided per a written agreement) community property and the income from the partitioned property. Capital gains from separate property are also separate property. If there is a written agreement (pre- or post-nuptial agreement), then earned and unearned dividends and interest can be made into separate property; otherwise, they are community property. Personal injury awards, at least in Texas, are separate property. If you move to Texas from another state, then property that was separate before the move remains separate in Texas. There is a presumption that all property on hand during the marriage is community property—so, if you want to preserve separate property, you'll need to take steps to do so. Ask your lawyer.

There are methods for converting community to separate and separate to community, but they are too involved to discuss briefly. Ask your attorney about them.

Q. How do I know if my estate will be subject to estate and inheritance taxes?

A. If your property, life insurance coverage, and retirement plan approach \$3.5 million in 2009 (it was \$2,000,000 in 2008), you should consult an estate planning attorney and/or tax advisor regarding taxation of your estate. See page 14 for the scheduled increases in taxable estates. Be aware, however, that all estate planning attorneys believe Congress will make significant changes before the scheduled departure of the estate tax in 2010 and scheduled reappearance with a \$1 million exemption in 2011.

REVOCABLE TRUSTS (LIVING TRUSTS)

Q. When would the use of a Revocable Trust be appropriate for me?

A. Revocable trusts, also known as management trusts and living trusts, have become increasingly popular. Many people try to use them as replacements or substitutes for Wills. A revocable trust is not necessarily superior to a Will, to a testamentary plan. A revocable trust's greatest advantage is probably its use in managing property in the event of your incapacity. Establishing a revocable trust now can prevent the need for a guardianship of your estate/property later. However, the less formal and more flexible durable power of attorney can also be used to manage property, but only if you are comfortable with it.

The trustee of a revocable trust can be given the responsibility of managing your income-producing properties, such as investment assets and business interests. You can choose a trustee with expertise in those areas (a bank or trust company), or a trusted family member or friend. You may appoint co-trustees.

Revocable trusts are also advantageous if you simply do not want to spend your time recording and managing assets. (You can also hire and pay a professional to do the record-keeping for you rather than using a revocable trust.)

Recently (in 2008), we have learned that assets you place in trust while you are alive and able to do so are a lot less subject to bureaucratic rules and paperwork after your death. For example, many publicly-traded companies absolutely require Medallion-signature guarantees from a court-appointed executor or administrator after death in order to follow instructions for transferring those assets.

Q. What are the tax advantages of a Revocable Trust? I've heard you need one to save estate taxes.

A. There are no estate, gift, or income tax advantages to a revocable trust. Your creditors can reach assets in a revocable trust. You can, in your Will, do all the tax planning necessary to minimize estate taxes. You do not need to have a revocable trust in order to minimize estate taxes.

Q. What are the advantages and disadvantages of using a Revocable Trust?

A. Advantages: There can be a number of advantages. These include:

1. Avoiding a guardianship by setting up the revocable trust prior to disability to handle assets if you become disabled.
2. Avoiding the sometimes cumbersome and expensive “ancillary” probate for real property located in other states.
3. Providing confidentiality in some cases by keeping the assets from being included in probate court proceedings, for court records are available for public inspection (but a copy of the trust may need to be provided anyway to brokers, *ad valorem* property tax offices, etc., and, thus, confidentiality is not complete). (We have heard from some clients that after the

death of a loved one and after filing an Inventory listing assets, they receive cold calls and letters from financial advisors offering their services. This probably will not happen with a revocable trust that is fully funded – that is, where you actually transfer assets out of your name into the trust.)

4. Minimizing the possibility of a contest in court after your death to set aside a Will on the basis of undue influence or incompetency.
5. Providing for management of assets during life.
6. Sometimes providing for a quicker distribution of assets at death. *Avoid the Medallion-signature guarantee hassle after death.*

Disadvantages: There are a number of disadvantages to using revocable trusts. These include:

1. Administrative requirements that do not apply when you own property outright; many people find these requirements to be burdensome.
2. Greater cost to creating a revocable trust initially than if you just have a Will (and the expenses for doing so are not deductible – while deductible after death, they may or may not result in a tax advantage).
3. You still need a Will to cover after-acquired or assets you never actually transfer to the revocable trust (like your checking account).

DURABLE POWER OF ATTORNEY (FOR FINANCES)

Q. How can a General or Special Durable Power of Attorney help me?

A. A General Durable Power of Attorney involves the authority to manage property, including both real and personal. A General Power

of Attorney is generally (pun intended) quite broad. A Special (or Limited) Power of Attorney grants only specific authority. A *durable* power of attorney contains special language stating that the agent's power to act on behalf of the principal does not end when the principal becomes incapacitated. A durable power can be effective immediately or only upon disability.

Q. What are the advantages and disadvantages of using a Durable Power of Attorney, one that is valid after my incapacity?

A. Advantages: You can eliminate the need for a guardianship of your estate (your assets) if you become incapacitated and unable to manage your own property. Since a court-supervised guardianship is an expensive and cumbersome proceeding, a properly drafted General Durable Power of Attorney can provide a simple and inexpensive method for managing your assets, especially in the event of your disability or incapacity.

Disadvantages: Your chosen agent must be someone you can trust to act in your best interests because your only recourse for improper acts by your agent will be either to revoke the agency or, if you are unable to do so because of incapacity, for your family to seek legal intervention. You may want to designate family members, other than the agent, as special agents with the power to review books and records. Doing so provides an independent person who can monitor the agent's actions.

Q. Can my agent make gifts?

A. Your agent may make gifts only if you specifically authorize gifts. Making gifts within the annual exclusion amount (currently \$13,000 per year per donee) has a tremendous estate tax advantage. If you have a power of attorney, check to see if gifts are authorized.

Q. How can I make the power of attorney effective only on my disability?

- A. Lawyers refer to these as “springing” powers because they spring into being on your incompetency. The Texas Legislature in 1993 created for the first time statutory powers of attorney which can either be springing or effective immediately. Springing powers of attorney are much less flexible than powers that are effective immediately. Often clients who want springing powers rather than ones that are effective immediately say it because they do not really “trust” the agent being appointed. If you cannot trust your attorney-in-fact to act properly while you are competent, what makes you think that you can trust that person when you are incompetent? Also, a bank or other third party such as a broker must be assured with a springing power that the principal really is disabled. Concerns over what proof the third party will require for disability – perhaps even a declaratory judgment that the power is now in effect – may lead to you deciding to use a power of attorney that is effective immediately, rather than a springing one.

Q. How can I revoke my Durable Power of Attorney?

- A. You may revoke it by letting those whom your agent might approach know that the power has been revoked. This is known as “giving notice” and would include writing (and notifying by telephone) your bank, stockbroker, insurance agent, accountant, lawyer, and financial advisor, and filing the revocation in counties where you own real estate and wherever the power of attorney has been recorded. Also, let the agent know and demand that any originals or copies be returned to you. Third parties, such as banks, who accept your agent’s authority before being informed that you have revoked the power, will not be liable to you. Revocation in a practical sense can be difficult; all the more reason to choose your agent or co-agents wisely.

MEDICAL POWER OF ATTORNEY FOR HEALTH CARE

Q. How can a Medical Power of Attorney help me?

- A. It allows another person to make health care decisions on your behalf in the event that you are unable to make those decisions yourself.

Q. When is a Medical Power of Attorney for Health Care effective?

A. The agent named in your Medical Power of Attorney may make health care decisions for you only if your doctor certifies in writing that you lack the competence to make health care decisions for yourself. Your agent should be a trusted relative or friend. With state and federal (HIPAA) confidentiality rules that prohibit release of medical information about you without your permission, a doctor may be wary of certifying that you are incapacitated. What should you do? Ask your attorney to add to your power of attorney (for finances) language that allows release of medical information or do a separate special power of attorney addressing this.

Q. What if I change my mind? How can I revoke a Medical Power of Attorney?

A. You may revoke it at any time by written or oral notification to your agent and health care provider.

**ADVANCED DIRECTIVE: DIRECTIVE TO PHYSICIANS AND FAMILY
OR SURROGATES/LIVING WILL**

Q. How can a Living Will help me?

A. A “Living Will” (the everyday name for an Advanced Directive) is a document that allows you to communicate your wishes about medical treatment in the future if you are unable to do so, especially when your condition is terminal.

Q. When is a Living Will effective?

A. A “Living Will” (the everyday name for an “Advanced Directive”) is effective if, in the judgment of your physician, you are suffering with a terminal condition from which you are expected to die within 6 months, even with available life-sustaining treatment provided in accordance with prevailing standards of medical care, or are suffering with an irreversible condition and are expected to die without life-

sustaining treatment. You may direct that you be kept alive using life-sustaining treatment or that all treatments other than those needed to keep you comfortable be discontinued and you be allowed to die as gently as possible. Choices can be made about hospice care as well.

Q. *Where can I get a form for a Medical Power of Attorney and Living Will?*

A. Forms for Medical Powers of Attorney and Advanced Directives (Living Wills) are generally available through attorneys. You may also obtain them (1) from your local hospitals, or (2) by sending a self-addressed, stamped, envelope with your request for one free copy to:

Texas Medical Association
Office of General Counsel
Attention: Advanced Directives
and Medical Powers of Attorney
401 West 15th Street
Austin, Texas 78701

Or you may download the forms at

<http://www.texmed.org/Template.aspx?id=62>

OUT-OF-HOSPITAL DO NOT RESUSCITATE ORDERS

Q. *What are these and where can I get a form?*

A. You may sign an Out-of-Hospital Do Not Resuscitate Order which directs health care professionals who are acting in an out-of-hospital setting to withhold cardiopulmonary resuscitation and certain other life-sustaining treatments. You and your attending physician and two witnesses, at least one of whom is not the doctor's employee and is not a relative, and to whom you do not owe money must sign this order (see Texas Health & Safety Code §116.003). Generally, your doctor is not going to sign an Out-of-Hospital DNR order unless you are terminally ill or suffering from an irreversible condition where you will die without life-sustaining treatment. You may, while competent,

always change your mind about this. The term “health care professionals” includes EMS. However, remember EMS’ job is to keep you alive until you get to the hospital and if EMS does not already know about your DNR order, just how will it be effectively communicated to them after a 911 call? You can order the form from the Texas Medical Association by sending a self-addressed, stamped, envelope with your request to:

Texas Medical Association
Office of General Counsel
Attention: DNR Form
401 West 15th Street
Austin, Texas 78701-1680
(512) 370-1306 (recorded message)

If you want a bracelet, there is a charge for that as well.

DECLARATION OF GUARDIAN

Q. What is a Declaration of Guardian?

- A.** You may sign a Declaration of Guardian as a back-up measure, even if you have planned to avoid a guardianship (by using Powers of Attorney for finances and health care decisions and a Revocable Trust). There is always the possibility that, for one reason or another, a guardianship of the estate or the person will be established for you or at least proceedings to appoint a guardian will be started by a family member other than your agent under the power of attorney. At the time a guardian is appointed by the Court, your Power of Attorney for finances may also be terminated. With a Declaration of Guardian, you can specify who will, **and who will not**, act as your guardian. Generally, you name as guardians the same people in the same order you have named as agents under a power of attorney. However, while you can appoint anyone as a co-agent under a power of attorney for finances, only married people may act as co-guardians.

ORGAN DONATIONS

Q. I am interested in being an organ/tissue donor and perhaps donating my body for research. How do I do this?

A. If you wish to be an organ or tissue donor, you should memorialize this intent by telling your family, indicating this wish when you renew your driver's license, and joining (for free) The Living Bank in Houston, Texas.

If you want your body to be available for medical research, you need to make arrangements with the school or hospital of your choice as it is extremely difficult for your family to do so after your death. You can get a list of schools that accept such donations from The Living Bank, P.O. Box 6725, Houston, Texas 77265-6725; 1-800-528-2971. Go to <http://www.livingbank.org> and on the drop down menu (to the left), hover over "Information" and then click on "Whole Body Donation."

FUNERAL DIRECTIONS

Q. How can I make sure that my wishes for my funeral are followed?

A. You may appoint an agent – for example, a friend or family member – to act for you after your death to make funeral arrangements for you or to carry out funeral arrangements you have already planned. There is a form for doing this which is published in the Texas statutes and which you can obtain from your legal advisor, called by the wordy name: **Appointment of Agent to Control Disposition of Remains.**

If you do not appoint an agent or make arrangements yourself, then your surviving spouse (if any), your adult children, your parents, your adult siblings, or other next-of-kin, in that order, will have the right to control the disposition of your body and to make funeral arrangements.

WHAT ABOUT MY PETS?

You can provide for the care of your pets in a variety of ways, from informal arrangements to formal ones: (1) ask a friend to care for your pet when you die and perhaps leave the friend some money with the understanding, not legally enforceable by the way, that the money will be used for the pet; (2) include in your Will a Pet Trust (now authorized by the Texas Legislature); (3) arrange for the care of your pet through either Texas A&M's unique Stevenson Companion Animal Life-Care Center or the Austin Humane Society—there is a cost to this. See <http://www.cvm.tamu.edu/petcare/> and <http://www.austinhumanesociety.org.>; and (4) there are rescue groups you can contact as well.

NOTE: All the addresses, including websites, were current when Bay wrote this. However, this information changes from time to time so please check it when you are using it.

WHAT ABOUT NON-PROBATE PROPERTY?

When you are looking at your estate and disability planning, you need to coordinate the way in which you hold property as you could, on purpose or inadvertently, make it non-probate, or you could incorporate or lose income tax planning options – ever heard of the “stretch IRA?” If you intend for a bank account to be a “convenience account” only where another person can sign checks on it, be sure it is not held “ROS” (right of survivorship) or “POD”) payable on death of TOD (“transfer on death”). If you did not intend that the check signer get the account at your death, be sure you make that person a “signatory” only.

Pension benefits like IRAs and 401ks might be able to be **rolled over** into the beneficiary’s IRA and all income taxes deferred until distributions are made **only** when people are married to each other. In non-marriage situations, like where the beneficiaries are your children, there is, if planned properly, the possibility of having an “inherited IRA” which can be “stretched” into annuity-like payments based on the lives of the decedent and the oldest named or designated beneficiary. The decedent’s “estate” is not considered to be a “designated beneficiary” and allowing an IRA to be paid to an estate can create immediate income tax problems.

If you own treasury bonds, putting another person’s name on them (even without an ROS or POD designation) makes the treasury bond pass outside of the Will to the other person – this is federal law, not state.

THE UNIFIED CREDIT AMOUNT;
ALSO KNOWN AS EXEMPTION EQUIVALENT AND
APPLICABLE EXCLUSION AMOUNT

The executor of a U.S. citizen's or resident's estate must file a federal estate and generation-skipping transfer tax return (IRS Form 706) for a decedent whose gross estate is greater than the applicable exclusion amount noted below for the year of death, even if no estate taxes are due.

Year	Highest Estate Rate	Applicable Exclusion Amount
2003	49%	\$1,000,000.00
2004	48%	\$1,500,000.00
2005	47%	\$1,500,000.00
2006	46%	\$2,000,000.00
2007	45%	\$2,000,000.00
2008	45%	\$2,000,000.00
2009	45%	\$3,500,000.00
2010	No Estate Tax	No Estate Tax
2011	55%	\$1,000,000.00

Estate planners do NOT expect that Congress will allow the estate tax to go away entirely in 2010. Also, we expect that Congress will make "permanent" for awhile a unified credit that covers approximately \$5 million to \$6 million apiece and perhaps that even lets a wife and husband "bequeath" to the other unused unified credits. Stay tuned!

Potts & Reilley, L.L.P.
401 West 15th Street
Suite 850
Austin, Texas 78701-16695
(512) 469-7474