

## **Chapter Thirteen**

### **Surrogate Decisionmaking and Individual Rights (Advance Directives)**

#### **INTRODUCTION**

This chapter discusses certain documents which an individual of sound mind can use to make decisions ahead of time, regarding health care and personal matters. As is discussed, four of the documents can be prepared by specially certified Benefits Counselors. The chapter also discusses management of Social Security and Supplemental Security Income (SSI) by Representative Payees.

Paragraphs 1 – 3 address the *Cruzan* decision of the U.S. Supreme Court and Texas documents that are consistent with it.

Paragraphs 4 – 6 address Section 81.1011 of the Texas Government Code and the four documents which it authorizes specially certified Benefits Counselors to prepare.

Paragraph 7 addresses the fact that the general durable power of attorney is not a document which non-attorneys can prepare for another individual.

Paragraphs 8 – 11 address a website of the Texas Department of Aging and Disability Services, at which certain advance directives can be located.

Paragraph 12 addresses certain forms of management of benefits, as surrogate decisionmaking.

Paragraph 13 addresses where statutes and rules, mentioned in the chapter, can be found on the Internet.

Paragraphs 14 – 15 address unauthorized practice of law.

Paragraph 16 addresses the requirement of sound mind, as a pre-requisite to execution of an advance directive.

Paragraphs 17 – 27 address the Directive to Physicians.

Paragraphs 28 – 42 address the Medical Power of Attorney.

Paragraphs 42 – 44 address the Consent to Medical Treatment Act.

Paragraphs 45 – 51 address the Out-of-Hospital Do Not Resuscitate Order.

Paragraphs 52 – 59 address the Designation of Guardian Before Need Arises.

Paragraphs 60 – 70 address the General Durable Power of Attorney.

Paragraphs 71 – 83 address Representative Payee.

Paragraphs 84 – 91 summarize the chapter.

Paragraph 92 addresses where to find the laws pertaining to the documents discussed in the chapter.

Paragraph 93 addresses how to get the forms discussed in the chapter.

1. **The sources of individual rights in the context of surrogate decisionmaking.** In 1990 in a case from Missouri, the U.S. Supreme Court stated, “It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment.” *Cruzan v. Director, Missouri Department of State Health Services*, 497 U.S. 261, 281 (1990). The U.S. Supreme Court also stated that “[T]he common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment.” *Id.* at 277. But the U.S. Supreme Court additionally said that the Missouri legislature could require that persons make known their instructions for end-of-life decisions by “clear and convincing” proof. *Id.* at 282.

Question: Which answer below includes the two sources cited by the United States Supreme Court in affirming the right of Americans to name surrogate decision-makers?

A. \_\_\_\_\_ The Medicaid Eligibility Handbook and the Code of Federal Regulations.

B. \_\_\_\_\_ The Texas Health and Safety Code and the Texas Probate Code.

C. \_\_\_\_\_ The Due Process Clause and the common-law doctrine of informed consent.

D. \_\_\_\_\_ The Rule Against Perpetuities and the Texas Administrative Code

Answer: \_\_\_\_\_

2. Thus, in the *Cruzan* case, the U.S. Supreme Court made three points: (1) The Due Process Clause of the U.S. Constitution protects a person's right to decide if life-sustaining procedures will be used. (2) The common law right to consent (or to refuse to consent) to medical treatment is another source of the individual's right to decide what medical treatment the individual will receive. (3) States can determine what standard of proof a person must provide, in order for the person's instructions to be followed. The Due Process Clause used by the U.S. Supreme Court in the *Cruzan* case is in the Fourteenth Amendment to the U.S. Constitution. The common law, referred to in *Cruzan*, is the body of law created by court decisions. Laws passed by a state or federal legislature constitute statutory law, rather than case law (rather than the common law). The "clear and convincing" standard of proof, mentioned in *Cruzan*, is a higher standard of proof than, for instance, in typical "fender-bender" auto accidents in which the standard of proof is "the preponderance of the evidence." The "clear and convincing" standard, though, is not as high as the "beyond a reasonable doubt" standard that is used in criminal cases.

Question: In its decision in 1990 affirming the right of Americans to name surrogate decisionmakers, the U.S. Supreme Court held that states could require that individuals make known their choice by "clear and convincing" proof. Which one statement below is correct?

A. \_\_\_\_\_ The "clear and convincing proof" standard is a lower standard of proof than the "preponderance of the evidence" standard.

B. \_\_\_\_\_ The "clear and convincing proof" standard is a higher standard than "proof beyond a reasonable doubt."

C. \_\_\_\_\_ The "clear and convincing proof" standard is a higher standard than the "preponderance of the evidence" standard, but it is a lower standard than "proof beyond a reasonable doubt."

D. \_\_\_\_\_ States have no authority to determine what the standard of proof will be, which applies to surrogate decision matters.

Answer: \_\_\_\_\_

3. In keeping with the holding in the *Cruzan* case, the Texas legislature has passed several laws that allow persons to make health care decisions, either directly, or through surrogates.

Thus, Texas law has (1) a Directive to Physicians (“Living Will”), (2) a Medical Power of Attorney, (3) an Out-of-Hospital Do Not Resuscitate Order, and (4) the wording for a Designation of Guardian in Before Need Arises. Individuals of sound mind in Texas can use any of these, all of them, or part of them.

4. The four advance directives listed in paragraph 3 are the advance directives listed in Texas Government Code Section 81.1011. Under that section of the Government Code, the Texas Department of Aging and Disability Services can certify specially trained Benefits Counselors to prepare the four advance directives mentioned in paragraph 3. The specially trained and certified Benefits Counselors must be serving in an Area Agency on Aging System of Access and Assistance. Under those circumstances – special training, special certification, and service in an Area Agency on System of Access and Assistance – Benefits Counselors can prepare the advance directive(s) listed in paragraph 3, for a client, if the Area Agency on Agency offers advance directives preparation as one of its services. The ability of specially trained and certified Benefits Counselors to prepare the Directive to Physicians, the Medical Power of Attorney, the Out-of-Hospital Do Not Resuscitate Order, and the Designation of Guardian Before Need Arises, is an exception to the definition of practice of law. Texas Government Code Section 81.1011 must be followed *strictly*.

5. The Directive to Physicians is enacted in Texas Health and Safety Code Chapter 166, Subchapter B. The form is found verbatim in that subchapter. It is formally called “Directive to Physicians and Family or Surrogates.” The Out-of-Hospital Do Not Resuscitate Order is authorized by Texas Health and Safety Code Chapter 166, Subchapter C. The form is not found in that subchapter; rather that subchapter authorized the Texas Department of State Health Services (“DSHS”) to promulgate the form (which DSHS has done). The Medical Power of Attorney is enacted in Texas Health and Safety Code Chapter 166, Subchapter D. The form is found verbatim in that subchapter. Subchapter A of Chapter 166 of the Texas Health and Safety Code contains many terms (such as definitions and witness requirements) that are applicable to Subchapters B, C, and D of Chapter 166. Chapter 166 of the Texas Health and Safety Code may be referred to as the “Advance Directives Act.” For many years, the advance directives under Chapter 166 each required two witnesses, one of whom has to be free of what can be termed conflicts of interest. In 2009, the 81<sup>st</sup> Texas Legislature amended Chapter 166, to allow for notarization of the three advance directives covered by Chapter 166. Notarization is not required, but is permitted to be used in lieu of the two witnesses, in regard to the advance directives authorized by Chapter 166 of the Texas Health and Safety Code. Some health care facilities, some insurance agencies, and many banks have notaries who can acknowledge

signatures (which is “notarization”). The Legislature, in 2009, also authorized the use of digital and electronic signatures in connection with advance directives, but that approach to signing is not yet prevalent nor easy to accomplish for many individuals.

6. The Designation of Guardian Before Need Arises is not found in the Texas Health and Safety Code, but rather is found (verbatim) at Section 679 of the Texas Probate Code. The title on the form, enacted by Section 679 of the Texas Probate Code, is Declaration of Guardian in the Event of Later Incapacity or Need of Guardian. That title is used interchangeably with Designation of Guardian Before Need Arises (which is the heading for Section 679 of the Texas Probate Code).

7. It is very important to note that the general durable power of attorney (“statutory durable power of attorney”) is not covered by Government Code Section 81.1011 and a non-attorney preparing a general durable power of attorney for another would be engaged in the unauthorized practice of law.

8. As of October of 2011, the website of the Texas Department of Aging and Disability Services included certain advance directives forms (most in both English and Spanish). Visit [http://www.dads.state.tx.us/news\\_info/publications/handbooks/advancedirectives.html](http://www.dads.state.tx.us/news_info/publications/handbooks/advancedirectives.html).

9. The website mentioned in paragraph 8 includes (as of October of 2011) the statutory durable power of attorney in both English and Spanish Consent. As mentioned in paragraph 5, that is not a form, which Texas Government Code Section 81.1011 authorizes Benefits Counselors to prepare.

10. The website mentioned in paragraph 8 includes (as of October of 2011) another form that is not mentioned in paragraph 4 (and thus, not included in Section 81.1011 of the Texas Government Code). This further form is a “Declaration for Mental Health Treatment.” Texas Government Code Section 81.1011 does not authorize Benefits Counselors to prepare the “Declaration for Mental Health Treatment.”

11. The website mentioned in paragraph 8 also refers (as of October of 2011) to the “Consent to Medical Treatment.” The website states “This form is for a person who has not issued a directive and needs medical care.” The “Consent to Medical Treatment” form at the DADS website is provided for in Chapter 313 of the Texas Health and Safety Code. It requires the signature of a doctor, and thus cannot be fully completed without the participation of a doctor. It is not a form which Texas Government Code Section 81.1011 authorizes Benefits Counselors to

prepare.

12. Other forms of surrogate decisionmaking are provided for in the federal provisions for representative payee under Social Security, Supplemental Security Income (SSI), and fiduciary management of Veterans Benefits.

13. The state laws referred to in this chapter are accessible through the website <http://www.statutes.legis.state.tx.us/>. State administrative rules are accessible at [http://info.sos.state.tx.us/pls/pub/readtac\\$ext.viewtac](http://info.sos.state.tx.us/pls/pub/readtac$ext.viewtac). Federal statutes are accessible at <http://uscode.house.gov/search/criteria.shtml>. Federal administrative rules are accessible at <http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>.

14. **Unauthorized practice of law considerations.** Texas Government Code Section 81.101 currently defines the practice of law as including the preparation of the general durable power of attorney. Section 81.1011 of the Texas Government Code, already mentioned, was enacted by virtue of House Bill 1420 of the 77<sup>th</sup> Legislature, effective September 1, 2001 (Appendix A). Section 81.1011 authorized the Texas Department of Aging and Disability Services to certify certain employees or volunteers of Area Agencies on Aging to prepare the Directive to Physicians, Medical Power of Attorney, and Designation of Guardian Before Need Arises. Persons so certified by the Texas Department of Aging and Disability Services will also be authorized to provide technical advice regarding the Out-of-Hospital Do Not Resuscitate Order. House Bill 1420, which is now Section 81.1011 of the Texas Government Code, permits the Texas Department of Aging and Disability Services to certify employees and volunteers of the Area Agencies on Aging Systems of Access and Assistance to provide the foregoing services, provided certain requirements are met. The requirements include: The employees and volunteers (1) are Benefits Counselors of an Area Agency on Aging, (2) comply with the rules of the Texas Department of Aging and Disability Services regarding these services, and (3) have received specific training regarding these services. If these requirements are met, then the services described by House Bill 1420 are excepted from the definition of the practice of law at Texas Government Code § 81.1011.

Question: Which one statement below is correct regarding House Bill 1420 from the 77<sup>th</sup> Texas Legislature?

A. \_\_\_\_\_ It requires Area Agencies on Aging to prepare advance directives.

B. \_\_\_\_\_ It forbids Area Agencies on Aging from preparing advance

directives.

C. \_\_\_\_\_ It establishes a process by which Area Agencies on Aging can offer preparation of advance directives, after their Benefits Counselors successfully complete a certification process.

D. \_\_\_\_\_ It requires Medicare providers to prepare advance directives for patients.

Answer: \_\_\_\_\_

15. As noted, the General Durable Power of Attorney is not a document which a non-lawyer can prepare for another individual (just as a will, or a deed, cannot be prepared by a non-lawyer for another individual).

16. **Sound mind is generally a prerequisite for a person to execute a legal document.**

The written Directive to Physicians, the Medical Power of Attorney, the Out-of-Hospital Do Not Resuscitate Order, and the Designation of Guardian Before Need Arises are each documents that a person can execute only if that person is of sound mind. These documents should therefore be executed well before they are needed for use. By their very terms, the Consent to Medical Treatment Act and representative payee can be used when a person is not of sound mind.

17. **Directive to Physicians.** The Directive to Physicians is sometimes called a “living will.” It is provided for in Subchapter B of the Advance Directives Act. This is Chapter 166 of the Texas Health and Safety Code. The person making the Directive is called the “declarant.” The Directive’s purpose is to tell the attending physician (the declarant’s regular doctor) whether the declarant wants life-sustaining procedures withheld or stopped if there is a terminal or irreversible condition caused by illness, disease, or injury, or whether the declarant in fact directs that such procedures be used.

Question: In Texas, which document is sometimes called a “living will?”

A. \_\_\_\_\_ The General Durable Power of Attorney

B. \_\_\_\_\_ The Appointment of an Agent for Disposition of Remains

C. \_\_\_\_\_ The Declaration of Guardian in Event of Later Incapacity or Need of Guardian

D. \_\_\_\_\_ The Directive to Physicians and Family or Surrogates

Answer: \_\_\_\_\_

18. The Directive to Physicians only takes effect if the attending physician examines the

declarant and makes a written report that the declarant has a terminal or irreversible condition. A “terminal condition” is incurable, and even with medical care is likely to result in death within six months. An “irreversible condition” is one that can be treated, but not cured, leaves the person unable to take care of the person’s own self, and is fatal without life-sustaining treatment. “Life-sustaining treatment” means medical treatment, such as medication, mechanical life support (for instance, a breathing machine), and artificial feeding and water, without which the patient will die. It does not include treatment just for pain, or comfort care. A patient who has been admitted to a hospice program is presumed to have a terminal condition.

Question: In the field of advance directives in Texas, a condition that is incurable and that even with medical care is likely to result in death within six months, is called (Choose one):

- A. \_\_\_\_\_ Terminal
- B. \_\_\_\_\_ Irreversible
- C. \_\_\_\_\_ Palliative
- D. \_\_\_\_\_ Acute

Answer: \_\_\_\_\_

Question: In the field of advance directives in Texas, a condition that can be treated but not cured, and that leaves the person unable to take care of the person’s own self, and that is fatal without life-sustaining treatment, is called:

- A. \_\_\_\_\_ Terminal
- B. \_\_\_\_\_ Irreversible
- C. \_\_\_\_\_ Palliative
- D. \_\_\_\_\_ Acute

Answer: \_\_\_\_\_

Question: True or False? In the field of Texas advance directives, “life-sustaining treatment” does not include treatment for pain or comfort care.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

19. It may happen that a treatment decision, which was not already thought out and specified in the Directive to Physicians, must be made when the patient is too ill to understand or communicate a decision. The Advance Directives Act allows the declarant, in the Directive to

Physicians, to appoint another person to consult with the doctor and make the treatment decision. When the declarant makes out the Directive to Physicians, and appoints this other person, the declarant should write down for the appointed person what treatment the declarant would want, including whether the declarant would want artificial feeding and water.

20. The Advance Directives Act provides a written form for the Directive to Physicians. The declarant in the presence of two witnesses, who also sign the form, must sign the written Directive to Physicians, unless notarization (allowed by Section 166.032) is used.

Question: How many witnesses are required for the Texas Directive to Physicians (if notarization is not used)?

- A. \_\_\_\_\_ Four
- B. \_\_\_\_\_ Three
- C. \_\_\_\_\_ Two
- D. \_\_\_\_\_ One

Answer: \_\_\_\_\_

21. The Advance Directives Act also allows a competent patient to make an oral (spoken) Directive to Physicians. A non-written Directive must be spoken in the presence of the attending physician and two witnesses (or a notary), and someone must write it down, together with the names of the two witnesses, in the patient's medical record.

22. For both the written and oral Directive to Physicians, at least one of the two required witnesses must be someone who will not be personally affected by whether the declarant lives or dies. To qualify, this one witness cannot be any of the following: (1) a relative of the declarant (by blood or marriage), (2) someone with a claim against the declarant's estate, (3) the person designated by the declarant to make treatment decisions, (4) the attending physician or an employee of the attending physician, (5) an employee of the health care facility where the declarant is a patient if the employee is involved in caring for the declarant, or (6) a person involved in the ownership or admission of the health care facility, such as an officer or director or an employee in the facility's business office. (It is all right for the second witness to be one of these.)

Question: Read the indented wording below to answer the question which follows:  
(1) a relative of the declarant (by blood or marriage), (2) someone

with a claim against the declarant's estate, (3) the person designated by the declarant to make treatment decisions, (4) the attending physician or an employee of the attending physician, (5) an employee of the health care facility where the declarant is a patient if the employee is involved in caring for the declarant, or (6) a person involved in the ownership or admission of the health care facility, such as an officer or director or an employee in the facility's business office.

What does the above indented wording describe (Choose one answer)?

- A. \_\_\_\_\_ Who cannot be a declarant in a Texas Directive to Physicians.
- B. \_\_\_\_\_ Who cannot be a principal under a Texas Medical Power of Attorney.
- C. \_\_\_\_\_ Who at least one of the witnesses to a Texas Directive to Physicians, Medical Power of Attorney, and Out-of-Hospital Do Not Resuscitate Order is prohibited from being.
- D. \_\_\_\_\_ Who cannot be the declarant under a Texas Declaration of Guardian in Event of Later Incapacity or Need of Guardian.

Answer: \_\_\_\_\_

23. If, after signing a Directive to Physicians, the declarant changes his or her mind, he or she can always revoke it. The revocation may be oral (spoken), or it may be made by the declarant "canceling, defacing, obliterating, burning, tearing, or otherwise destroying" the Directive. The declarant may also sign and date a written revocation to the Directive, or later sign a different Directive. If the Directive is revoked, it is important that the attending physician and others who were originally informed of the Directive be told about the revocation. A person is not liable for failure to honor a revocation unless the person has actual knowledge of the revocation. (The law requires that the patient notify the attending physician of the existence of a Directive. The attending physician must make the Directive a part of the patient's medical record.) At all times, the present expressed desires of the patient must be followed, even if they are different from what the patient said before a Directive.

Question: True or False? Once a Directive to Physicians and Family or Surrogates is signed, the declarant can never revoke it.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

24. The Advance Directives Act also contains a section about what to do if a patient has not

made a written or oral Directive to Physicians, and has become incompetent or unable to communicate. For such a patient, the attending physician, together with the patient's legal guardian or agent under a Medical Power of Attorney (see the next section of this chapter for a discussion of the Medical Power of Attorney), may make the treatment decision to withhold or withdraw life-sustaining procedures. If the patient does not have a legal guardian or a Medical Power of Attorney, the law says that the attending physician and at least one other person, if available, may make the treatment decision. The law lists who may be the "other person" in the following order of priority: the patient's husband or wife, the patient's reasonably available children, the patient's parents, or the patient's nearest living relatives. If the patient has no legal guardian or agent, and none of the listed people are available, then the attending physician may make the treatment decision if it is agreed with by another physician, who is not involved in the patient's treatment, or who is on the ethics or medical committee of the health care facility where the patient is being treated. The ethics committee also has a role in resolving disputes between patients and health care facilities.

25. A treatment decision made for the patient who is incompetent or unable to communicate, who does not have a Directive to Physicians, must be based on the patient's desires, if those desires are known. The decision must be written into the patient's medical records and signed by the attending physician. The law also says that it may not be presumed that just because a person has not signed a Directive to Physicians, the person would not want life-sustaining treatment withheld or withdrawn.

26. While the Advance Directives Act requires that the patient be diagnosed with a terminal or irreversible condition before life-sustaining treatments are withheld or withdrawn, it is important to note that many serious illnesses may be considered irreversible early in the course of the illness, but they may not be considered terminal until the disease is fairly advanced. Many serious illnesses such as cancer, failure of major organs (kidney, heart, liver, or lung), and serious brain disease such as Alzheimer's or dementia may be considered irreversible early on. There is no cure, but the patient may be kept alive for prolonged periods of time if the patient receives life-sustaining treatments. Late in the course of the same illness, the disease may be considered terminal when, even with treatment, the patient is expected to die fairly soon. It is important that the declarant consider the relative benefits and burdens of treatment at these various stages of illness. Furthermore, a declarant should carefully and explicitly express in the Directive to Physicians any particular treatments to be withheld or withdrawn in specific circumstances, such as artificial feeding and water or intravenous antibiotics. It is generally considered wise for the declarant to discuss these matters with his or her attending physician,

before filling out the Directive to Physicians.

27. Two further aspects of the Advance Directives Act, which seniors who are grandparents will want to know, are the following: First, the Advance Directives Act does not allow the withholding of life-sustaining procedures from a pregnant woman. Second, a Directive may be executed on behalf of a qualified minor (person under eighteen years of age), by the minor's adult husband or wife, or by the minor's parents, or by the minor's legal guardian.

Question: True or False? The Advance Directives Act does not allow the withholding or removal of life-sustaining treatment from a pregnant woman.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

**Medical Power of Attorney.** The Medical Power of Attorney is also provided for in the Texas Advance Directives Act. The Medical Power of Attorney is in Subchapter D of Chapter 166 of the Texas Health and Safety Code. Normally, every competent adult individual has the legal right to make his or her own decisions about health care. For each individual, however, there may come a time when he or she is too ill to understand or make health care decisions. If a guardian has been appointed by a court, the guardian may be authorized by the court to make such decisions. A guardianship may be avoided if the individual (called the "principal") has chosen who should make such decisions after he or she has become incompetent, and has signed a Medical Power of Attorney appointing the chosen person (called the "agent").

29. Under this law, "health care decision" means consent, refusal to consent, or withdrawal of consent to health care treatment, service, or procedures to maintain, diagnose, or treat an individual's physical or mental condition. The agent appointed must be an adult. The Advance Directives Act sets forth a form for the Medical Power of Attorney, and requires that it be used without substantial changes.

30. Many individuals decide to have both a Directive to Physicians and a Medical Power of Attorney, because the overall focus of each document is so different. The Directive to Physicians only guides the physician about whether the declarant wants life-sustaining procedures withheld or withdrawn if death is imminent or will result within a relatively short time. In contrast, in a Medical Power of Attorney, the principal designates an agent to make

health care decisions for the principal. This gives the doctor and other health care providers a person to turn to, and confer with, about what would be the best health care decision for the principal, under the current conditions, which might not have been anticipated when the principal was healthy.

31. A principal can prepare the Medical Power of Attorney in such a way that the agent is allowed to authorize the withholding or withdrawal of life-sustaining procedures. If there is a conflict between a Directive to Physicians and a Medical Power of Attorney, the document executed later in time controls.

32. Although a Medical Power of Attorney gives the agent a very broad range of authority to make health care decisions for a principal, there are several controls on this authority. First, the agent cannot act unless the principal's own doctor certifies in writing, and writes in the medical record, that the principal is incompetent. Second, the attending physician must at least try to inform the principal of the agent's proposed decision. Third, if the principal objects, the agent's instructions are not to be followed, even if, the principal is incompetent. Fourth, the agent must make any health decision according to the agent's knowledge of the principal's wishes or (if the principal's wishes are unknown) according to the agent's assessment of the principal's best interest.

Question: True or False? An agent under a Texas Medical Power of Attorney can decide alone when the medical power of attorney has sprung into effect; there is no need for the principal's attending physician to do anything in order for the agent to be able to make treatment decisions under a Texas Medical Power of Attorney.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

Question: If a principal of a Texas Medical Power of Attorney objects to a treatment decision by the agent under that Medical Power of Attorney, and the principal is incompetent, the principal's objection does not have to be heeded.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

Question: True or False? Once a principal has named an agent under a Texas Medical Power of Attorney, it is the wishes of the agent that are to be followed; knowledge of the wishes of the principal in regard to health

treatment is irrelevant; the principal's wishes, even if known, no longer matter.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

33. In addition, there are some procedures, which the law prohibits an agent from consenting to. The agent cannot consent to these five procedures: (1) voluntary inpatient mental health services; (2) convulsive treatment (electro-shock treatment); (3) psychosurgery (i.e., lobotomies); (4) abortion; and (5) neglect of the principal through the omission of care primarily intended to provide for the comfort of the principal (such as pain-reducing medicines).

Question: True or False? Under a Texas Medical Power of Attorney, there are no limits on the types of procedures for which an agent can give consent.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

34. The form for the Medical Power of Attorney has a space where the principal can write out special instructions or limit the authority of the agent. Each person making out a Medical Power of Attorney should seriously consider including an instruction about whether artificial feeding and water should be withheld or withdrawn if the principal's condition is terminal or irreversible. If the principal is not specific in regard to the agent's authority concerning artificially supplied food and water, such artificially supplied food and water may continue to be administered, even though the principal would have wanted the agent to order their removal.

Question: True or False? The Texas Medical Power of Attorney form has a space where the principal can write special instructions for the agent.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

35. Assuming that none of the above limitations on the agent's authority is present, an agent's instructions are to be followed if the principal is unable to make his or her own treatment decisions. If the health care provider is not able to follow the agent's instructions, the health care provider is to notify the agent "as soon as is reasonably possible." Then the agent may decide to get a different health care provider – one that is able to carry out the agent's decision.

36. For the purpose of making a health care decision, an agent under a Medical Power of Attorney may request, review, and receive any information regarding the principal's physical or

mental health. This includes the right to look at the medical and hospital records of the principal. There has been some concern that under Health Insurance Portability and Accountability Act (HIPAA), an agent under a Medical Power of Attorney does not become a “personal representative” (so as to have access to “protected health information”) until the Medical Power of Attorney “springs” into effect (by the doctor certifying that the patient no longer has the ability to make health care decisions). This appears to be a more theoretical than actual problem. It appears that most HIPAA-covered health care providers either have the patient complete a HIPAA authorization that gives the agent-to-be access to the medical records, or the health care provider realizes the agent-to-be needs access to the health care records in order to be ready to make decisions, when the time arrives. Until the HIPAA regulation catches up with the fact that agents-to-be under Medical Powers of Attorney should be considered “personal representatives” at the time of the signing of the Medical Power of Attorney, one must hope that medical providers will have their patients execute HIPAA authorizations for their agents-to-be, while the patient has that ability. If the patient has already lost that ability, of course, the Medical Power of Attorney will likely have sprung into effect, and access to HIPAA-protected health information should not be a problem.

37. There are some additional restrictions on the Medical Power of Attorney. The agent cannot be the principal’s health care provider or residential care provider (nor an employee of either of these, unless the employee is a relative of the principal). Unless notarization is used, the statutory form Medical Power of Attorney requires two witnesses, both of whom must be competent adults. Just as with the Directive to Physicians, at least one of the witnesses must be disinterested, or in other words, must not be: (1) a relative of the principal (by blood or marriage), (2) someone with a claim against the principal’s estate, (3) the person designated by the declarant to make a treatment decision, (4) the attending physician or an employee of the attending physician, (5) an employee of the health care facility where the declarant is a patient if the employee is involved in caring for the declarant, or (6) a person involved in the ownership or admission of the health care facility, such as an officer or director or an employee in the facility’s business office. The witnesses must sign the document. If the principal is physically unable to sign, another person may sign the Medical Power of Attorney with the principal’s name – in the principal’s presence – and at the principal’s express direction.

Question: True or False? The agent under a Texas Medical Power of Attorney can be the principal’s health care provider, unless the health care provider is related to the principal, in which case the health care provider, being a relative, cannot be the principal’s agent.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

38. The Advance Directives Act requires that, before signing a Medical Power of Attorney, the principal must sign a disclosure statement, in order for a Medical Power of Attorney to be valid. The disclosure statement informs the principal of the principal's rights in regard to the Medical Power of Attorney, and of the agent's authority under it.

Question: What must the principal read and understand before signing the Medical Power of Attorney?

- A. \_\_\_\_\_ Chapter 166 of the Texas Health and Safety Code
- B. \_\_\_\_\_ Chapter 102 of the Texas Human Resources Code
- C. \_\_\_\_\_ The disclosure statement for the Medical Power of Attorney
- D. \_\_\_\_\_ Chapter 12 of the Texas Probate Code

Answer: \_\_\_\_\_

39. The principal may revoke (cancel) a Medical Power of Attorney at any time, regardless of the principal's mental state or competency. The Medical Power of Attorney may be revoked by oral (spoken) or written notification from the principal, or by any other act evidencing a specific intent to revoke the power. The revocation is to be immediately recorded in the principal's medical record. Revocation also occurs when a principal later signs a different Medical Power of Attorney. Furthermore, if the spouse was appointed as the principal's agent, divorce of the principal and spouse automatically revokes the Medical Power of Attorney. If a court appoints a guardian for the principal, the judge must decide whether to suspend or revoke the Medical Power of Attorney.

Question: True or False? If the principal named the principal's spouse as agent under a Texas Medical Power of Attorney and if the principal and the agent later are divorced, the appointment of the agent is revoked automatically due to the divorce.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

Question: True or False? If a person executes a Texas Medical Power of Attorney and the court later appoints a guardian for the person, the Medical Power of Attorney is automatically revoked.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

40. As with any other document in which one person is authorizing another to act, the principal should choose someone as the principal's agent under a Medical Power of Attorney only if the principal has trust in the agent. Assuming that the agent is worthy of trust, then the use of Medical Power of Attorney can be very effective. When used in combination with a Directive to Physicians, the need may never ever arise for guardianship.

41. Care providers and insurers are prohibited from discriminating based on the presence or absence of a Medical Power of Attorney.

Question: True or False? Insurance companies are permitted to discriminate against Texans who do not have Medical Powers of Attorney.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

42. The Medical Power of Attorney can be executed without the assistance of an attorney. As with other legally binding documents, in order to be effective it must be executed at a time when the person executing it is of sound mind.

43. **Consent to Medical Treatment Act.** The Consent to Medical Treatment Act is found at Chapter 313 of the Texas Health and Safety Code. If an adult hospital or nursing home patient does not have a Medical Power of Attorney, and does not have a court-appointed guardian, and is in a coma, is mentally incapacitated, or physically or mentally unable to communicate, the Consent to Medical Treatment Act *may* be a way of avoiding a guardianship. If a guardianship solely for the purpose of medical decisionmaking can be avoided, many courts prefer that, as opposed to establishing a guardianship. Under the Consent to Medical Treatment Act, an adult surrogate (another person) from the following list, in order of priority, may consent to medical treatment on the patient's behalf. The list is: (1) The patient's spouse; (2) An adult child, with consent of all other adult children of the patient; (3) A majority of the patient's reasonably available adult children; (4) The patient's parents; or (5) Someone clearly identified to act for the patient by the patient before capacity has been lost, or the patient's nearest living relative, or a clergy-person. Disputes must be resolved by the Probate Court.

44. Although the Consent to Medical Treatment Act is a useful law, it is limited in scope. It does not override a properly executed Medical Power of Attorney, and does not apply when there

is a court-appointed guardian. It does not apply to consent to inpatient mental health services or electro-convulsive treatment. Furthermore, it does not apply to a decision to withhold or withdraw life-sustaining treatment. The Consent to Medical Treatment Act only operates within Texas. The Medical Power of Attorney and/or Directive to Physicians may be honored outside of Texas. For all these reasons, individuals should still consider having a Medical Power of Attorney and/or a Directive to Physicians.

Question: True or False? The Texas Consent to Medical Treatment Act operates throughout the U.S.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

45. **The Out-of-Hospital Do Not Resuscitate Order.** Subchapter C of Chapter 166 of the Texas Health and Safety Code provides for the Out-of-Hospital Do Not Resuscitate Order. This is a form which the attending physician of a person must sign, if the person wants to have certain resuscitating procedures not be used. Unlike the Directive to Physicians and the Medical Power of Attorney, the Out-of-Hospital Do Not Resuscitate Order cannot be fully executed without the signature of a medical doctor. Thus, it may be more practical for advance directives preparers, certified under Texas Government Code Section 81.1011, to refer an individual wanting this form to the individual's doctor, than to actually complete the form. At most, the form can only be completed to the point of needing the doctor's signature. However, advance directives preparers, certified under Texas Government Code Section 81.1011, can provide technical advice regarding the Out-of-Hospital Do Not Resuscitate Order, as long as the client wants that and as long as the Area Agency on Aging offers such technical advice as a service.

Question: Which characteristic below differentiates the Texas Out-of-Hospital Do Not Resuscitate Order from the Texas Directive to Physicians and Family or Surrogates and from the Texas Medical Power of Attorney?

- A. \_\_\_\_\_ The Texas Out-of-Hospital Do Not Resuscitate Order must be notarized; the other two documents do not have this requirement.
- B. \_\_\_\_\_ The other two documents must be notarized; the Texas Out-of-Hospital Do Not Resuscitate Order does not have this requirement.
- C. \_\_\_\_\_ The other two documents are effective in emergency rooms; the Out-of-Hospital Do Not Resuscitate Order is not.
- D. \_\_\_\_\_ The other two documents do not have to be signed by the attending physician; the written Out-of-Hospital Do Not Resuscitate form must be signed by the physician of the individual who executes it.

Answer: \_\_\_\_\_

46. The procedures which the Out-of-Hospital Do Not Resuscitate Order will prevent are cardiopulmonary resuscitation, advanced airway management, artificial ventilation, defibrillation, transcutaneous cardiac pacing, and any other life-sustaining treatment as the Board of the Texas Department of State Health Services from time-to-time specifies.

47. An “out-of-hospital setting” is defined as a location in which health care professionals are called for assistance, including long-term care facilities, in-patient hospice facilities, private homes, hospital out-patient or emergency departments, physicians’ offices, and vehicles during transport.

48. As noted, the Out-of-Hospital Do Not Resuscitate Order is a form signed by the attending physician of the person. It directs that health care personnel in out-of-hospital settings not initiate or continue listed procedures.

49. The Out-of-Hospital Do Not Resuscitate Order can be revoked at any time. This can occur by the person destroying the order and removing the “identification device” if any, or by the person communicating to the health care professionals the desire to revoke the order. (The identification device can be either worn around the neck or the wrist, and it is as prescribed by the Texas Department of State Health Services.)

Question: True or False? Once a person has executed an Out-of-Hospital Do Not Resuscitate Order, the person can never revoke it.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

50. A competent adult can put into place an Out-of-Hospital Do Not Resuscitate order by “Nonwritten Communication.” This still requires the signature of the attending physician and two witnesses (unless notarization is used). (At least one of the witnesses must be a person who is without a conflict of interest. See paragraph 22, above, for the requirements that at least one of the two witnesses must meet, unless notarization is used.)

51. There is a procedure at Section 166.088 of the Texas Health and Safety Code, for an Out-of-Hospital Do Not Resuscitate Order to be entered for a person who is incompetent or incapable of communication. This requires the involvement of the attending physician, and the person’s legal guardian, proxy, agent under a medical power of attorney, spouse, or nearest living relative.

If no such other person is available, the Out-of-Hospital Do Not Resuscitate Order must be concurred with by another physician who is not directly involved in treatment of the patient.

52. **Designation of Guardian Before Need Arises.** This chapter has thus far discussed the Directive to Physicians, the Medical Power of Attorney, the Out-of-Hospital Do Not Resuscitate Order, and the Consent to Medical Treatment Act. Depending on the need to be met in regard to decisionmaking, and depending on the health care setting, and depending on who is available for surrogate decisionmaking, one or more of the foregoing may totally eclipse any need for a guardianship. But that can never be fully assured. Surrogates may themselves become incapacitated, or the setting may not be one covered by the document or the provision of law. Thus, even with the use of *all* available advance directives and despite the Consent to Treatment Act, the need for a guardianship may still arise. Texas law provides for the Designation of Guardian Before Need Arises, so that, should a guardianship come to be needed, at least the person affected will have been able to state who they wanted to have as their guardian (and who they did not want to have as their guardian).

53. Section 679 of the Probate Code of Texas provides for this. The Designation of Guardian Before Need Arises (also called a “Declaration of Guardian in Event of Later Incapacity or Need of Guardian”) “may be in any form adequate to clearly indicate the declarant’s intention to designate a guardian.” The form in the statute, however, is very short, and it makes most sense to use it word-for-word. The form allows a declarant to nominate different individuals to serve as guardian of the person and as guardian of the estate. It is the fourth advance directive, which Texas Government Code Section 81.1011 allows advance directives preparers, certified by the Texas Department of Aging and Disability Services, to prepare.

Question: True or False? Under Texas’ Declaration of Guardian in Event of Later Incapacity or Need of Guardian, a declarant can nominate different individuals to serve as guardian of the person and as guardian of the estate.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

54. Under the Designation of Guardian Before Need Arises – under Texas’ Declaration of Guardian in Event of Later Incapacity or Need of Guardian, the declarant may also disqualify named persons from serving as guardian of the declarant’s person or estate. Any persons thus excluded by the declarant “may not be appointed guardian under any circumstances.”

Question: True or False? Under Texas' Declaration of Guardian in Event of Later Incapacity or Need of Guardian, a person can actually forbid the court from appointing an unwanted individual as guardian.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

55. The declarant, who is naming his or her choice of a guardian before need, must be an adult of sound mind. The declaration must be attested to (witnessed) by at least two credible witnesses 14 years of age or older, who are not themselves named as guardian or alternate guardian in the declaration.

56. A self-proving affidavit – a sworn statement signed by the declarant and the two witnesses who saw that the declarant signed the declaration and appeared to be of sound mind – must be attached to the declaration. A properly signed and witnessed declaration and affidavit are evidence, in court, of these two very important matters: (a) That the declarant had sufficient mental capacity at the time he/she executed the declaration and (b) That the guardian named in the declaration would serve the best interest of the declarant.

57. If the designated guardian is the declarant's spouse and there is later a divorce, the designation of the spouse (now the ex-spouse) "has no effect."

58. The declaration may be filed with the court "at any time after the application for appointment of a guardian is filed, and before a guardian is appointed." The judge must appoint the designated guardian unless the judge finds the person named to be disqualified or to be a person who would not serve the best interest of the ward (the incapacitated person).

59. A declaration designating a guardian in advance of need may be revoked by a later declaration executed in the same way as the original or by canceling the declaration, or causing its destruction or cancellation in the declarant's presence.

60. **General Durable Power of Attorney.** This is not a document which non-attorneys

can prepare for others. This document is not covered by – not included in – Texas Government Code Section 81.1011. The purpose of the General Durable Power of Attorney (often simply called “Durable Power of Attorney”) is for a person to be able to appoint someone else to make decisions and transact business for him or her. The Durable Power of Attorney allows a mentally competent Texan to appoint another person to immediately handle a wide range of business affairs without any court action. It can also be made “springing,” which means it will not take effect until the person executing it becomes unable to handle his or her own affairs. In Texas, the legal requirements for a Durable Power of Attorney, together with a suggested statutory form, are found in Sections 481 to 500 of the Texas Probate Code. In this chapter, “General Durable Power of Attorney” and “Durable Power of Attorney” are the same document.

Question: If a Texan, mentally competent, wants to appoint another person to immediately handle a wide range of business affairs without any court action, which one document will be best to meet this need?

- A. \_\_\_\_\_ The Medical Power of Attorney
- B. \_\_\_\_\_ The Declaration of Guardian in Event of Later Incapacity or Need of Guardian
- C. \_\_\_\_\_ An Application for Representative Payee
- D. \_\_\_\_\_ The General Durable Power of Attorney

Answer: \_\_\_\_\_

61. A person who gives a Durable Power of Attorney is called the “principal.” The “attorney-in-fact” is the person to whom the principal gives power to act under a Durable Power of Attorney. “Durable” means that the power of attorney does not go out of effect merely because the principal becomes mentally disabled. Because the Durable Power of Attorney is a document by which the principal authorizes another to act for the principal, its greatest potential for use has always occurred at the point when the principal became mentally disabled (and therefore unable to carry out his or her own affairs). Before the Durable Power of Attorney Act became law, a power of attorney ended upon mental incapacity of the principal – just when it was needed the most. To correct this, Section 482 of the Probate Code provides special language that may be used to make the power of attorney continue in effect even after the principal becomes mentally incapacitated: “A durable power of attorney ... contains the words ‘This power of attorney is not affected by subsequent disability or incapacity of the principal,’ or ‘This power of attorney becomes effective on the disability or incapacity of the principal,’ or similar words showing the principal’s intent that the authority conferred on the attorney in fact or agent shall be exercised notwithstanding the principal’s subsequent disability or incapacity...”

62. As an additional safeguard, Section 482 requires that a Durable Power of Attorney be acknowledged before a notary public. If it is used to carry out a real estate transaction, which is to be filed in the county deed records, then the Durable Power of Attorney must also be filed in the county deed records. In addition, many title insurance companies require that a Durable Power of Attorney, to be used in a real estate transaction, must give the property description and specifically say that the attorney-in-fact is authorized to carry out that transaction.

Question: True or False? The Texas General Durable Power of Attorney must be acknowledged before a notary public.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

63. As noted above, the Texas Probate Code provides a statutory form for a Durable Power of Attorney. The form provides a checklist of powers that may be granted. These powers, while noted on the form, are not defined there. The definitions are found in Section 491 to 500 of the Probate Code.

64. It is important to remember that a Durable Power of Attorney does not give the attorney-in-fact the authority to tell the principal what to do. It only gives the attorney-in-fact the ability to transact business on behalf of the principal. A Durable Power of Attorney may be revoked (cancelled) by the principal. To revoke a Durable Power of Attorney signed under the current Probate Code, it is necessary to notify directly the attorney-in-fact and any third parties (such as banks, real estate agents, landlords, and others) with whom the attorney-in-fact may have done business on behalf of the principal. The notice should be by certified mail, return receipt requested. Revocation is not effective until the third party receives actual notice of the revocation. In an emergency, it is strongly recommended that all third parties be notified by telephone that the power of attorney is no longer in effect. Most third parties will refuse to accept a power of attorney if there is any concern that it might not in effect. However, in case there is ever a dispute about whether a third party knew that the power of attorney was revoked, the certified mail notice should always follow the telephone call.

Question: True or False? If a General Durable Power of Attorney is revoked and notice of revocation is published in a local shoppers' paper, the revocation is effective even against third parties in other cities who do not know about the revocation.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

65. As indicated above, the Probate Code also provides that the Durable Power of Attorney can be made “springing.” Thus, an attorney-at-law can prepare the document so that only becomes effective in case the principal later on becomes incapacitated.

Question: True or False? A person can have a General Durable Power of Attorney prepared by an attorney-at-law in such a way that it only becomes effective in case the principal later on becomes incapacitated.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

66. Although the above legal requirements are important, there are also certain very important practical concerns. These practical concerns, combined with the above legal requirements, make it most advisable to use the services of a lawyer for the drafting of a Durable Power of Attorney.

67. Some practical considerations include the following: (1) The principal must have utmost trust in the attorney-in-fact, and the attorney-in-fact must be a trustworthy person. A spouse or an adult child of mature character often is appropriate. (2) The attorney-in-fact will have to be physically able to act in place of the principal -- some physical stamina may be helpful in view of the “running around” that an attorney-in-fact has to do. (3) The Durable Power of Attorney should give the attorney-in-fact sufficient authority, but not more than the principal desires the attorney-in-fact to have. It is here that the advice and counsel of a lawyer can be particularly important. If a Durable Power of Attorney fails to include some authority, which the principal wanted the attorney-in-fact to have – such as the authority to carry on the affairs of a business – then the need for a guardianship may still arise. On the other hand if there is some transaction which the principal utterly does not want to happen until death – such as the transfer of a major family heirloom – then the power of attorney should not authorize such a transfer (it can be explicitly prohibited in the Durable Power of Attorney).

68. In 2001, the 77<sup>th</sup> Texas Legislature enacted House Bill 1883 which imposes on attorneys-in-fact a duty to inform their principals of actions taken pursuant to a Texas durable power of attorney. Under House Bill 1883, “The attorney-in-fact or agent shall timely inform the principal of all actions taken pursuant to the power of attorney.” The attorney-in-fact or agent must also maintain records of each action taken or decision made by the attorney-in-fact or agent. The

principal can demand an accounting of the attorney-in-fact or agent. House Bill 1883 sets forth the required contents of the account. If the accounting is not provided within 60 days of request, House Bill 1883 authorizes the principal to sue for the accounting. House Bill 1883 accomplishes these protections by adding them as Section 489B of the Texas Probate Code. House Bill 1883 is Appendix B. It is effective September 1, 2001. Another law, House Bill 1813 of the 77<sup>th</sup> Texas Legislature, also increased protection against wrongdoing by attorneys-in-fact or agents under general durable powers of attorney. House Bill 1813 does this by adding attorneys-in-fact or agents under durable powers of attorney under the Probate Code, as fiduciaries subject to § 32.45 of the Penal Code. (Penal Code § 32.45 makes it a crime for a fiduciary to intentionally, knowingly, or recklessly misapply property held as fiduciary. The crime ranges from a Class C misdemeanor to a felony of the first class, depending on the amount of property misapplied.)

Question: True or False? The 77<sup>th</sup> Texas Legislature made it a requirement that attorneys-in-fact timely inform principals of all actions taken pursuant to a power of attorney.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

Question: True or False? The 77<sup>th</sup> Texas Legislature made it a requirement that attorneys-in-fact under Texas General Durable Powers of Attorney render an accounting within 60 days of the principal requesting the accounting.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

69. The variations on what authority a principal should give an attorney-in-fact under a Durable Power of Attorney are as varied as the circumstances of each individual Texan. Compared with the cost and anxiety that a guardianship entails, a Durable Power of Attorney is a very cost-effective document. Benefits Counselors who are not attorneys are not permitted to prepare the Texas General Durable Power of Attorney for another individual. Legal Aid programs may be able to prepare the Texas General Durable Power of Attorney for low-income individuals, depending on the caseload of the Legal Aid office.

Question: True or False? Benefits Counselors who are not attorneys are not permitted to prepare the Texas General Durable Power of Attorney.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

70. A properly drawn Durable Power of Attorney, carefully reflecting the particular needs of the principal, can be a major tool to help avoid the need for a guardianship. When there is a Durable Power of Attorney to address personal and business matters, and a Medical Power of Attorney and a Directive to Physicians, the need for a guardianship may be very remote. These documents provide a way that a person can keep some personal autonomy, even though at some later time the person may lose the ability to make personal and financial decisions.

71. **Representative Payee.** If a person receiving Social Security benefits becomes unable to handle the person's own money, but there is no other need for a court-appointed guardian, having a trustworthy person appointed Representative Payee is often a good way to avoid guardianship. The Social Security Administration appoints a Representative Payee. A Representative Payee is a person to whom Social Security will send the monthly Social Security and/or SSI checks, to be used for the benefit of the beneficiary (the person entitled to the checks). A person may apply to be a Representative Payee on Social Security's form SSA-11-BK. The beneficiary, or a friend, relative or guardian, can begin this process. The Veterans Administration has a similar process for VA benefits. The Social Security representative payment regulations are at 20 CFR §§ 404.2001 –2065. The SSI counterpart is at 20 CFR §§ 416.601 – 665. The Social Security website at <http://www.ssa.gov/payee/> has information about the Social Security "Representative Payee program." The VA counterpart regulations are at 38 CFR §§ 3.850 – 3.857. The Veterans Administration website has information at <http://www.vba.va.gov/bln/21/Fiduciary/index.htm> regarding the "fiduciary program." This chapter will focus on the Social Security Administration's provisions applicable to Representative Payees.

Question: If an individual receives SSI and needs a person to manage the SSI benefit, which agency can appoint a representative payee?

- A. \_\_\_\_\_ The Probate Court
- B. \_\_\_\_\_ The Social Security Administration
- C. \_\_\_\_\_ The Veterans Administration
- D. \_\_\_\_\_ The Texas Health and Human Services Commission

Answer: \_\_\_\_\_

72. These three basic points are important: (1) an investigation by Social Security is required before the appointment of a Representative Payee; (2) the beneficiary does not have to be legally incapacitated (incompetent), only in need of help with handling the Social Security check; and

(3) the Representative Payee must file yearly report forms with Social Security, explaining how he or she used the benefits for the care and expenses of the beneficiary.

73. A Representative Payee can be another person, or an organization. The following types of information can be used by Social Security to determine if a Representative Payee is needed: A certified copy of a court determination of legal incapacity (the copy must be dated within the past year); Medical evidence (statement by a physician or other medical professional), based on recent examination of the beneficiary and knowledge of the beneficiary's present condition (if it includes an opinion as to whether the beneficiary is able to manage benefit payments); or Statements of the beneficiary, the beneficiary's relatives, and others in a position to know and observe the beneficiary.

74. Social Security is supposed to select, as Representative Payee, that individual, agency, or organization, which "will best serve the interest of the beneficiary." Social Security considers the relationship of the proposed Representative Payee to the beneficiary, whether the proposed Representative Payee has any legal authority (such as guardianship) over the beneficiary, and whether the potential payee is in a position to know of and look after the needs of the beneficiary.

75. There are "flexible preferences" used by the Social Security Administration to determine who would be an appropriate Representative Payee. The preferences, in order, are: (1) A legal guardian, spouse (or other relative) who has custody of the beneficiary or who demonstrates strong concerns for the personal welfare of the beneficiary. (2) A friend who has custody of the beneficiary or who demonstrates strong concerns for the personal welfare of the beneficiary. (3) A public or non-profit agency having custody of the beneficiary. (4) A private institution operated for profit and licensed under State law, which has custody of the beneficiary. (5) Persons other than the above who are qualified to carry out the responsibilities of a payee and who are able and willing to serve as a payee for a beneficiary (such as members of community groups or organizations who volunteer to serve as payee for a beneficiary).

76. The Representative Payee must use the benefits "only for the use and benefit of the beneficiary in the best interest of the beneficiary." The Representative Payee must notify Social Security of any event that will affect the amount of benefits or rights to benefits. The Representative Payee must account in writing regarding the use of benefits, at Social Security's request. The Representative Payee must notify Social Security of any changes in circumstances that may affect the Representative Payee's performance of Representative Payee responsibilities.

77. The Representative Payee may use the Social Security benefits for the following purposes: (1) Current maintenance of the beneficiary. This includes shelter, clothing, medical care, and personal comfort items. If the beneficiary is institutionalized due to mental or physical incapacity, payment of customary charges for institutional care and payment for items that will aid the beneficiary's recovery or release or personal needs to improve the beneficiary's condition while in the institution, are authorized. (2) Support of the beneficiary's family. If—but only if—the beneficiary's current maintenance needs are met, the payee may use part of the benefits to support the beneficiary's legally dependent spouse, child, and/or parent. (3) Debts. A Representative Payee may not be *required* to pay debts of the beneficiary arising before the Representative Payee was appointed. The Representative Payee may pay such prior debts (out of benefits) only if the current and reasonably foreseeable needs of the beneficiary are met.

Question: True or False? A Representative Payee under Social Security must use the benefits first to pay for the current maintenance needs of the beneficiary, before paying debts of the beneficiary that arose before the Representative Payee was appointed.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

78. Social Security has the authority to remove a Representative Payee and appoint a new one: A new Representative Payee will be appointed if the present Payee: (1) Has not used the benefit payments properly on the beneficiary's behalf in accordance with the applicable guidelines. (2) Has not carried out other required responsibilities. (3) Has died. (4) Has decided he/she no longer wishes to be Representative Payee. (5) Has become unable to manage the benefit payments. (6) Has failed to cooperate, within a reasonable time, in providing evidence, accounting, or other information requested by Social Security.

79. There are certain circumstances under which Representative Payment will be stopped, and direct payment restored (given back) to the beneficiary. If the beneficiary shows the mental and physical ability to manage or direct the management of benefits, direct payment will start. To make this showing, the beneficiary can give Social Security any of the following: (1) A medical statement showing the ability to manage or direct the management of benefits; (2) A certified copy of a court order restoring rights (if the beneficiary had previously been adjudged legally incapacitated); or (3) Other evidence establishing ability to manage, or direct the management of, benefits.

80. A Representative Payee should be aware of accounting requirements, which apply to the benefits the Representative Payee receives on behalf of a beneficiary. Federal law requires an annual accounting. Social Security may require periodic written reports from Representative Payees. Social Security may also verify how a Representative Payee used funds. A Representative Payee should keep records of how benefits were used. Social Security may ask the following questions: (1) The amount of benefits on hand at the beginning of the accounting period; (2) How the benefit payments were used; (3) How much of the benefit payments were saved and how the savings were invested; (4) Where the beneficiary lived during the accounting period; and (5) The amount of the beneficiary's income from other sources, during the accounting period.

81. Appeal Rights. Beneficiaries, who are not satisfied with decisions by Social Security to appoint a Representative Payee, or concerning who will be the Representative Payee, have a right of appeal. An Administrative Law Judge who is an expert in Social Security cases hears the appeal. A person, who wants to be appointed Representative Payee, but is denied the appointment, does not have the right to appeal. A Texan 60 or older, who needs help appealing a decision by Social Security, may call the Legal Hotline for Texans for a referral. The Benefits Counselors of Texas Area Agencies on Aging may be able to help an elderly Texan with a Social Security appeal.

Question: True or False? If Social Security declines to appoint a person as Representative Payee, the person who sought appointment as Representative Payee has a right to appeal.

Answer: T \_\_\_\_\_ F \_\_\_\_\_

Question: Which statement below is not accurate?

A. \_\_\_\_\_ An investigation by Social Security is required before the appointment of a representative payee.

B. \_\_\_\_\_ The beneficiary does not have to be legally incapacitated for there to be a representative payee appointed.

C. \_\_\_\_\_ The representative payee must report annually to Social Security, explaining how the benefits were used.

D. \_\_\_\_\_ A representative payee can seek state court judicial review of any adverse decision by Social Security.

Answer: \_\_\_\_\_

82. How to start or stop the Representative Payee process. Anyone interested in starting (or stopping) the Representative Payee process can call Social Security at 1-800-234-5772 (1-800-2345-SSA). The Social Security employee will send the information given to the employee, to the local Social Security office. The local Social Security office will then contact whomever placed the call, to discuss steps to either start or stop representative payment.

83. Many persons who are in nursing homes or elsewhere have no income other than Social Security and/or SSI. If the only reason such a person might need a guardian would be to manage monthly benefits, the Representative Payee approach, which requires no court hearing, will take care of this need. For such persons, a court proceeding for guardianship may be avoided.

84. **Summary.** As noted above at Paragraph 4, the Texas Department of Aging and Disability Services can certify specially trained Benefits Counselors to prepare the Designation of Guardian Before Need Arises. As with legally binding documents generally, none of the documents discussed in this pamphlet can be executed by a person who is, at the time of signing, not of sound mind – such a document would not be valid.

85. Three documents Texans may use to avoid the need for guardianship are (1) the Directive to Physicians, (2) the Medical Power of Attorney, and (3) the General Durable Power of Attorney.

86. Completing the Directive to Physicians and the Medical Power of Attorney may or may not require assistance. Some people are able to complete those documents themselves. As noted above at Paragraph 8, the Texas Department of Aging and Disability Services has at its website -- [http://www.dads.state.tx.us/news\\_info/publications/handbooks/advancedirectives.html](http://www.dads.state.tx.us/news_info/publications/handbooks/advancedirectives.html) -- several advance directives. Additionally, pursuant to Texas Government Code §81.1011, the Department can certify specially trained Benefits Counselors to prepare the Directive to Physicians, Medical Power of Attorney, Out-of-Hospital Do Not Resuscitate Order, and Designation of Guardian Before Need Arises.

87. A further tool that can help avoid the need for guardianship is the appointment of a Representative Payee, under Social Security, to receive and manage Social Security or SSI benefits for the benefit of the beneficiary. The Representative Payee arrangement can be started by a call to Social Security. It does not require an attorney. Representative payment can be

sought even after the beneficiary becomes mentally disabled, and whether or not the beneficiary has a legal guardian.

88. Even if an individual has other advance directives, the Designation of Guardian Before Need Arises can be very useful. It is not a tool for avoiding guardianship. Rather, if a guardian becomes necessary, the Designation allows a person to specify ahead of time (before incapacity) who is to be the guardian and who shall not be the guardian. It is important to keep in mind that the Designation of Guardian Before Need Arises does not actually appoint a guardian (or even amount to an application for the appointment of a guardian). Rather, if the time arrives that a guardianship must be applied for, the Designation of Guardian Before Need Arises can tell the court who the individual (now incapacitated) wanted the court to appoint as guardian. It allows the individual executing it to specify a person or persons, whom the individual (now incapacitated) wanted to forbid the court from appointing as guardian. It should be noted that the Designation of Guardian Before Need Arises (as well as other advance directives) are often prepared by attorneys in conjunction with a will. A non-attorney cannot prepare a will for another individual; that would be the unauthorized practice of law.

89. If the first three documents mentioned above Directive to Physicians, Medical Power of Attorney, and Durable Power of Attorney are executed before they are needed (while the principal/declarant is still of sound mind) the need for a guardianship can often be completely avoided. If a person did not execute these three documents before becoming mentally disabled it is still possible to have a Representative Payee appointed for Social Security or SSI benefits. If the only income or property of a senior citizen is Social Security or SSI, then very likely the need for a guardianship for money management can be eliminated by having a Representative Payee appointed by Social Security. It is very unlikely that a court would appoint a guardian if the sole unaddressed need is management of benefits paid by the Social Security Administration (or by the VA) since a Representative Payee or Fiduciary can manage such benefits for the incapacitated individual.

90. The Medical Power of Attorney is a valuable planning tool for avoiding the need for a guardianship for health care purposes. The need for a court-appointed guardian can arise when informed consent is needed for medical treatment, but none of the people listed in the Consent to Medical Treatment Act is available to provide consent, and no Medical Power of Attorney has been executed. By executing a Medical Power of Attorney, individuals can appoint someone they trust to provide the required consent to medical treatment. If a person's sole source of income is Social Security or SSI or VA benefits, the need for guardianship often may be

completely avoided by (1) the execution of a Medical Power of Attorney while the individual is still competent, combined with (2) the appointment of a Representative Payee or Fiduciary to manage the individual's Social Security, SSI, or VA benefits.

91. In some situations, despite the execution of a Medical Power of Attorney and a Durable Power of Attorney, or the appointment of a Representative Payee, the need for a guardianship may still arise. For that reason, as noted, an individual should consider designating a guardian in advance of need, under Section 679 of the Texas Probate Code.

92. **Where to find the laws pertaining to the documents discussed in this chapter.** The Directive to Physicians, the Medical Power of Attorney, and the Out-of-Hospital Do Not Resuscitate Order are found in the Advance Directives Act, Chapter 166 of the Texas Health and Safety Code. The Consent to Medical Treatment Act is Chapter 313 of the Texas Health and Safety Code. The General Durable Power of Attorney, and the Designation of Guardian Before Need Arises, are found in the Texas Probate Code (§§ 481 – 506, and § 679, respectively).

93. **How to get the forms discussed in this chapter.** The Legal Hotline for Texans recommends that an attorney prepare the General Durable Power of Attorney. For Texans age 60 and older, the Hotline may be able to make a free or reduced-fee referral for this purpose. The Out-of-Hospital Do Not Resuscitate Order should be prepared in consultation with the doctor, and can be obtained from the doctor, although a Benefits Counselor, certified as an advance directives preparer, can prepare the form. The Directive to Physicians and the Medical Power of Attorney are at the website of the Texas Department of Aging and Disability Services, at [http://www.dads.state.tx.us/news\\_info/publications/handbooks/advancedirectives.html](http://www.dads.state.tx.us/news_info/publications/handbooks/advancedirectives.html). The Designation of Guardian Before Need Arises wording is made available to Benefits Counselors as part of the training for certification as advance directives preparers; it is from Section 679 of the Texas Probate Code.

**Appendix A**  
**House Bill 1420, Texas Legislature, 77<sup>th</sup> Session.**

AN ACT

relating to the definition of the practice of law.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter G, Chapter 81, Government Code, is amended by adding Section 81.1011 to read as follows:

Sec. 81.1011. EXCEPTION FOR CERTAIN LEGAL ASSISTANCE.

(a) Notwithstanding Section 81.101(a), the “practice of law” does not include technical advice, consultation, and document completion assistance provided by an employee or volunteer of an area agency on aging affiliated with the Texas Department of Aging and Disability Services who meets the requirements of Subsection (b) if that advice, consultation, and assistance relates to:

a medical power of attorney or other advance directive under Chapter 166, Health and Safety Code; or

a designation of guardian before need arises under Section 679, Texas Probate Code.

An employee or volunteer described by Subsection (a) must:

provide benefits counseling through an area agency on aging system of access and assistance to agency clients;

(1) comply with rules adopted by the Texas Department of Aging and Disability Services regarding qualifications, training requirements, and other requirements for providing benefits counseling services, including legal assistance and legal awareness services;

have received specific training in providing the technical advice, consultation, and assistance described by Subsection (a); and

(2) be certified by the Texas Department of Aging and Disability Services as having met the requirements of this subsection.

(b) The Texas Department of Aging and Disability Services by rule shall develop certification procedures by which the department certifies that an employee or volunteer described by Subsection (a) has met the requirements of Subsections (b) (1), (2), and (3).

SECTION 2. This Act takes effect September 1, 2001.

**Appendix B**  
**House Bill 1883, Texas Legislature, 77<sup>th</sup> Session**

AN ACT

relating to durable powers of attorney and statutory durable powers of attorney.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter XII, Texas Probate Code, is amended by adding Section 489B to read as follows:

Sec. 489B. DUTY TO INFORM AND ACCOUNT.

The attorney in fact or agent is a fiduciary and has a duty to inform and to account for actions taken pursuant to the power of attorney.

The attorney in fact or agent shall timely inform the principal of all actions taken pursuant to the power of attorney. Failure of the attorney in fact or agent to inform timely, as to third parties, shall not invalidate any action of the attorney in fact or agent.

The attorney in fact or agent shall maintain records of each action taken or decision made by the attorney in fact or agent.

The principal may demand an accounting by the attorney in fact or agent. Unless otherwise directed by the principal, the accounting shall include:

the property belonging to the principal that has come to the attorney in fact's or agent's knowledge or into the attorney in fact's or agent's possession;

all actions taken or decisions made by the attorney in fact or agent;

a complete account of receipts, disbursements, and other actions of the attorney in fact or agent, including their source and nature, with receipts of principal and income shown separately;

a listing of all property over which the attorney in fact or agent has exercised control, with an adequate description of each asset and its current value if known to the attorney in fact or agent;

the cash balance on hand and the name and location of the depository where the balance is kept;

all known liabilities; and

such other information and facts known to the attorney in fact or agent as may be necessary to a full and definite understanding of the exact condition of the property belonging to the principal.

Unless directed otherwise by the principal, the attorney in fact or agent shall also provide to the principal all documentation regarding the principal's property.

The attorney in fact or agent shall maintain all records until delivered to the principal,

released by the principal, or discharged by a court.

If the attorney in fact or agent fails or refuses to inform the principal, provide documentation, or deliver the accounting within 60 days (or such longer or shorter time that the principal demands or a court may order), the principal may file suit to compel the attorney in fact or agent to deliver the accounting, to deliver the assets, or to terminate the power of attorney.

This section shall not limit the right of the principal to terminate the power of attorney or to make additional requirements of or to give additional instructions to the attorney in fact or agent.

Wherever in this chapter a principal is given an authority to act, that shall include not only the principal but also any person designated by the principal, a guardian of the estate of the principal, or other personal representative of the principal.

The rights set out in this section and chapter are cumulative of any other rights or remedies the principal may have at common law or other applicable statutes and not in derogation of those rights.

SECTION 2. This Act takes effect September 1, 2001.