



LEGAL HOTLINE FOR TEXANS

815 Brazos, Suite 1100, Austin, Texas 78701

(800) 622-2520 or (512) 477-3950

Pension Counseling (888) 343-4414

ALTERNATIVES TO GUARDIANSHIP UNDER TEXAS LAW

THIS PUBLICATION IS NOT A SUBSTITUTE FOR THE ADVICE OF AN ATTORNEY.

The pamphlets of the Legal Hotline for Texans are general in nature and should not be relied on as advice for your particular circumstances. For advice that is specific to your particular circumstances, you should consult a lawyer.

The Legal Hotline for Texans (LHT) is a telephone hotline providing free legal advice and consultation and other free legal services to Texans Age 60 and Older or Eligible for Medicare; Crime Victims Age 60 and Older and their Family Members and Authorized Claimants; and Pension and Retirement Plan Employees, Participants and Beneficiaries.

Eligible Clients can consult with an attorney of the Legal Hotline for Texans free of charge by calling one of the phone numbers listed above. If clients would like to consult with an attorney in their communities, or if ongoing representation by an attorney is needed, the Legal Hotline for Texans may be able to make a referral.

Depending on individual circumstances and local availability, such a referral may be to an organization providing free attorneys to low income persons, or may be to an attorney on the Legal Hotline for Texans' reduced-fee panel, or may be to a statewide or local lawyer referral service.

The Legal Hotline for Texans is a project of the Texas Legal Services Center with support from the Texas Department of Aging, and Disability Services (DADS), the U.S. Centers for Medicare and Medicaid Services (CMS), the U.S. Administration on Aging (AoA) and the Texas Equal Access to Justice Foundation through the Texas Basic Civil Legal Services Program (BCLS) and the Texas Crime Victims Civil Legal Services Program (CVCLS)

© Copyright 2006, Texas Legal Services Center
All rights reserved.

GUARDIANSHIP ALTERNATIVES UNDER TEXAS LAW
Table of Contents

PREFACE.....	1
GUARDIANSHIP ALTERNATIVES UNDER TEXAS LAW.....	1
I. Directive to Physicians.....	3
II. Medical Power of Attorney.....	5
III. Consent to Medical Treatment Act.....	7
IV. Durable Power of Attorney.....	8
Legal Requirement for a Durable Power of Attorney.....	8
V. Representative Payee.....	10
Responsibilities of a Representative Payee:.....	11
Use of Benefits.....	12
Replacement of the Representative Payee.....	12
Stopping Representative Payment.....	12
Accounting.....	13
Appeal Rights.....	13
VI. Designation of Guardian in Advance of Need.....	14
SUMMARY.....	15
Where to find the laws discussed in this pamphlet.....	16
How to get the forms discussed in this pamphlet.....	16
To order items or request referrals from the Legal Hotline for Texans:.....	17
Contact Information.....	17

PREFACE

The document described in this pamphlet must be executed while the person is of sound mind.

As you read this pamphlet, please keep in mind these important points: The Directive to Physicians (Living Will), the Medical Power of Attorney, and the General Durable Power of Attorney 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. The same holds true for the Declaration of Guardian in the Event of Later Incapacity or Need of Guardian

GUARDIANSHIP ALTERNATIVES UNDER TEXAS LAW

There is a need to plan ahead.

A person who is mentally disabled or incapacitated (incompetent) to the point where he or she cannot handle his or her own affairs often needs to have a guardian appointed. No matter how gently this matter is handled, a guardianship can be a traumatic, draining experience for family members. If a person has planned ahead and executed the documents afforded by Texas law to deal with the possibility of future mental disability or incapacity, a terrific burden can be lifted from family members. An accident causing incapacity could strike anyone at any time. Therefore, each Texan – no just seniors – should consider using the documents discussed here. For some of these documents, an attorney is not necessary. For those documents for which an attorney is recommended, the cost will likely not be great, especially when compared to the cost – in money, time, and worry – of a guardianship.

Topics covered:

- Directive to Physicians
- Medical Power of Attorney
- Durable Power of Attorney
- Representative Payee
- Designation of Guardian in Advance of Need

The alternatives to guardianship, which will be discussed, are

- (1) Directive to Physicians (sometimes called a “living will”);
- (2) Medical Power of Attorney;
- (3) General Durable Power of Attorney, and
- (4) Representative Payee.

Also discussed is the Texas Form “Declaration of Guardian in the Event of Later Incapacity or Need of Guardian,” for situations where a guardian is necessary. Texas law also provides a statutory form for an “Out-of-Hospital Do-Not Resuscitate Order,” used under some special circumstances; for information about this document see Hotline information item # 0476.

Persons age 60 and over or Medicare eligible, regardless of income level, are encouraged to get assistance from Area Agency on Aging (AAoA) Benefits Counselors with:

- 1) Directives to Physicians
- 2) Medical Powers of Attorney
- 3) Out-of-Hospital Do-Not Resuscitate orders
- 4) Designations of Guardian in Advance of Later Need

As an alternative to the AAOA, the Legal Hotline for Texans can help low income clients (indigent crime victims with incomes below 187.5% of the Federal Poverty Level (FPL) and non-victim clients with incomes below 125% of the FPL). Non-victim clients must be either age 60 or over or eligible for Medicare. The Legal Hotline for Texans can assist with:

- 1) Directives to Physicians
- 2) Medical Powers of Attorney
- 3) Designation of Guardian in Advance of Later Need

Private attorneys may provide services to most clients, however, services will cost a fee.

I. Directive to Physicians

The Directive to Physicians is also called a “Living Will.”

A person may request that life-sustaining procedures be withheld or stopped if there is a terminal or irreversible condition. Comfort care and pain control still provided.

Another person can be named to consult with the doctor and make a decision if the patient is unable.

A form for the Directive to Physicians is provided in the law.

An oral Directive is possible. It must still be witnessed.

At least one of the two witnesses required must be disinterested. Tex. H&S § 166.003

The Directive to Physicians, sometimes called a “**living will**,” is provided for in Subchapter B of the Advance Directives Act. 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, or specific procedures administered**, if there is a **terminal or irreversible** condition caused by illness, disease, or injury. 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, it is likely death will result within six months. An “irreversible condition” is one that can be treated, but not cured; leaves the person unable to take care of himself or herself; 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 nutrition and hydration, 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.

Because 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 state in writing what treatment he or she would want, including whether the declarant would want artificial nutrition and hydration.

The Advance Directive Act provides a **written form** for the Directive to Physicians. The declarant must sign the Directive to Physicians form in the presence of two witnesses, who must also sign the form.

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

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 a 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).

The declarant may revoke a Directive to Physicians. Tex.H&S § 166.042

If, after signing a Directive to Physicians form, 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 form. 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, in the first place, 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.**

The patient’s presently expressed desires must be followed at all times. Tex. H&S § 166.037

Procedure available when there is no Directive to Physicians.

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 pamphlet 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.

A treatment decision must be based on what is known about the patient’s desires.

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.

Requirement that death must be imminent.

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

Specific instructions, such as whether artificial nutrition and hydration should be administered, should be included in the Directive.

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 all of these matters with his or her attending physician, before filing out the Directive to Physicians.

Two further aspects of the Advance Directives Act, which seniors who are grandparents will want to know, are the following: (1) the Advance Directive Act does not allow the withholding of life-sustaining procedures from a pregnant woman;(2) 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.

II. Medical Power of Attorney

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

It is recommended that a person consider having 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 health care decision would be in the principal's best interest, under the current conditions, which might not have been anticipated when the principal was healthy. 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 that was signed later in time controls.

A trusted agent may be appointed to make health care decisions at some future time when a person becomes unable to make his or her own decisions. Tex. H&S § 166.152

Texas law provides a statutory form. Tex. H&S 166.164

A person should consider having both a Directive to Physicians and a Medical Power of Attorney.

The agent's authority under a Medical Power of Attorney. Tex. H&S § 166.152(b-e)

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.

What an agent cannot do. Tex. H&S § 166.152(f)

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).

There is a need to specify the agent's authority in regard to artificially supplied food and water.

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 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.

The agent under a Medical Power of Attorney has the right to look at the principal's medical records. Tex. H&S § 166.157

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. 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.

Who is disqualified from being an agent under a Medical Power of Attorney? Tex. H&S §§ 166.153-.154

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). The statutory form Medical Power of Attorney requires two witnesses, both of whom must be competent adults. Just as 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 principals 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, but only if in the principal's presence and at the principal's express direction.

A disclosure statement is provided to the principal.

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

The principal can revoke a Medical Power of Attorney.
Tex. H&S § 166.155

The principal may **revoke** (cancel) a Medical Power of Attorney at any time, regardless of the principal's mental state or competency. It 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.

Effect of Divorce.

Importance of choosing a trustworthy agent.

As with any other document in which one person is authorizing another to act, the principal should choose someone as his or her 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 a very effective instrument. When used in combination with a Directive to Physicians, the need may never arise for guardianship.

Discrimination prohibited.

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

There is usually no need to use an attorney.

The Medical Power of Attorney may be executed without the assistance of an attorney. As with other legally binding documents, the person signing the Medical Power of Attorney must be of sound mind at the time of execution in order for it to be effective.

III. Consent to Medical Treatment Act.

What to do when a patient cannot communicate, and has no Medical Power of Attorney Tex. H&S § 313.004

The **Consent to Medical Treatment Act** is found at Chapter 313 of the Texas Health and Safety Code. If (1) an adult hospital or nursing home patient does not have a Medical Power of Attorney, (2) does not have a court-appointed guardian, and (3) is in a coma, mentally incapacitated, or physically or mentally unable to communicate, then an **adult surrogate** (another person) from the following list, in order of priority, may consent to medical treatment on the patient's behalf.

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.

Limited usefulness of Consent to Medical Treatment. Tex. H&S §§ 313.003, 313.004(d)

Although the Consent to Medical Treatment Act is 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.

IV. Durable Power of Attorney

A Durable Power of Attorney authorized a person to transact business for another.

The purpose of the 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. 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.

Legal Requirement for a Durable Power of Attorney

“Principal,” “attorney in fact,” “durable” defined. Tex. Prob. Code § 484

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 cease 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 Texas 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:

Why it is important that a power of attorney be “durable.”

“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;”

What wording makes a power of attorney durable? Tex. Prob. Code § 482

A Durable Power of Attorney must be notarized. Tex. Prob. Code § 492

As an additional safeguard, Section 482 requires that a Durable Power of Attorney be acknowledged and signed 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.

There is a statutory form that may be used. Tex. Prob. Code § 490

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 on it. The definitions are found in Section 491 to 500 of the Texas Probate Code.

The principal can revoke a Durable Power of Attorney. Tex. Prob. Code § 488

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 Texas 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 received 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 any good. Most third parties will refuse to accept a power of attorney if there is any concern that it might not be good. 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.

There are specific notice requirements when a Durable Power of Attorney is revoked.

The Texas Probate Code also provides that the Durable Power of Attorney can be made “**springing**,” that is, it may be written to come into effect only at the time the principal loses mental capacity, but not before.

An attorney’s help is recommended for the Durable Power of Attorney.

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.

The attorney in fact should be someone who can be trusted.

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 is often 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 have to do. (3) The Durable Power of Attorney should give the

Careful thought should be given to what the attorney-in-fact should be authorized to do.

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 absolutely does not want to happen until death, such as the transfer of 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).

The variations on what authority a principal should give an attorney in fact under a Durable Power of Attorney are as varied as are the circumstances of each individual Texan. That is why, for the Durable Power of Attorney, the services of a lawyer are essential. However, compared with the cost and anxiety that a guardianship entails, a Durable Power of Attorney is a very cost-effective document.

A properly written 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 becomes very remote. These documents provide a way for a person to keep some personal autonomy, even though at some later time he or she may lose the ability to make personal and financial decisions.

The Durable Power of Attorney can be viewed as preserving some personal autonomy.

V. Representative Payee

If a person receiving Social Security becomes unable to handle his or her own money and there is no other need for a court-appointed guardian, then the person may avoid guardianship by appointing a trustworthy individual as their Representative Payee. A Representative Payee is a person 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.

If only a Social Security or SSI check must be managed, using a Representative Payee may avoid the need for a guardianship.

These three basis 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.

The Social Security Administration appoints the Representative Payee.

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:

What information is used to decide if representative payment is appropriate? 20 CFR § 404.2015

- 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 management of benefit payments); or
- Statements of the beneficiary, the beneficiary’s relatives, and others in a position to know and observe the beneficiary.

Who is to be selected as Representative Payee?
20 CFR §§ 404.2020, 404.2021

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.

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; and
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).

Responsibilities of a Representative Payee:

Responsibilities of a Representative Payee.
20 CFR § 404.2035

- 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; and
- The Representative Payee must notify Social Security of any changes in circumstances that may affect his or her performance of Representative Payee responsibilities.

Use of Benefits

Use of benefits.
20 CFR § 404.2040

The Representative Payee may use the Social Security benefits for the following purposes:

- 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.
- Support of the beneficiary's family. If, and 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.
- 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.

Replacement of the Representative Payee

Replacement of the
Representative Payee.
20 CFR § 404.2050

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:

- Has not used the benefit payments properly on the beneficiary's behalf in accordance with the applicable guidelines;
- Has not carried out other required responsibilities;
- Has died;
- Has decided he/she no longer wishes to be Representative Payee;
- Has become unable to manage the benefit payments; or
- Has failed to cooperate, within a reasonable time, in providing evidence, accounting, or other information requested by Social Security.

Stopping Representative Payment

Stopping representative payment.
20 CFR § 404.2055

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:

- A medical statement showing the ability to manage or direct the management of benefits;
- A certified copy of a court order restoring rights (if the beneficiary had previously been adjudged legally incapacitated); or

- Other evidence establishing ability to manage, or direct the management of, benefits.

Accounting

Accounting requirement.
20 CFR § 404.2065

A Representative Payee should be aware of accounting requirements that apply to the benefits he or she 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:

- The amount of benefits on hand at the beginning of the accounting period;
- How the benefit payments were used;
- How much of the benefit payments were saved and how the savings were invested;
- Where the beneficiary lived during the accounting period; and
- The amount of the beneficiary's income from other sources during the accounting period.

Appeal Rights

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, age sixty (60) or older, who needs help appealing a decision by Social Security, may call the Legal Hotline for Texans for a referral. The Texas Department on Aging, through local Area Agencies on Aging, provides non-attorney Benefits Counselors who may be able to help an elderly Texan with a Social Security appeal. See the end of this pamphlet for contact information.

How to start or stop the Representative Payee process.

No court hearing is required to establish a representative payee.

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

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.

VI. Designation of Guardian in Advance of Need

A suggested form is provided in the law.

A person can choose his or her guardian ahead of time, in case a guardian is needed someday.

The Probate Code describes a form for the declaration. Tex. Prob. Code § 679(i)

It is possible to exclude named persons. Tex. Prob. Code § 679(b)

The declarant must be of sound mind.

The declaration must be witnessed and notarized. Tex. Prob. Code § 679(a)(2),(d-f)

Effect of divorce. Tex. Prob. Code § 679(h)

The declaration is filed in the court if someone files for a guardianship. Tex. Prob. Code § 679(e)

The declarant may revoke a declaration. Tex. Prob. Code § 679(g)

Sometimes, even if the alternatives to guardianship described in this pamphlet are used, a guardianship may still be necessary. This may happen, for instance, if the attorney in fact (and any alternate) appointed by a Durable Power of Attorney, turns out to be unable to handle this responsibility when the time comes. Texas law provides for a person to select who his or her guardian will be ahead of time, if he or she ever ends up needing a guardian, in Section 679 of the Texas Probate Code (“Designation of Guardian Before Need Arises”). The declaration “may be in any form adequate to clearly indicate the declarant’s intention to designate a guardian.”

In the declaration, the declarant may also disqualify named persons from serving as guardian of the declarant’s person or estate, and any persons thus excluded by the declarant “may not be appointed guardian under any circumstances.”

The **declarant**, the person who is naming his or her choice of a guardian before need, must be a mentally competent adult. The declaration must be **wholly in the handwriting** of the declarant or **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.

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 – may 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.

The form in the statute provides for attestation and contains a self-proving affidavit, is very short, and may be used word-for-word.

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.”

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).

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

An attorney or AAoA Benefits Counselor is recommended.

An AAoA Benefits Counselor can prepare a declaration for low-income clients free of charge.

A person must be of sound mind when executing the legal documents discussed.

For the Durable Power of Attorney, a lawyer's help is recommended.

A representative payee can help once inability to manage benefits arises.

A guardianship may prove necessary, despite the use of alternatives. One can designate ahead of time who the guardian will be.

The assistance of **an attorney or a certified Benefits Counselor from the Area Agency on Aging (AAoA) is recommended** for preparation of a declaration of guardian. For Texans age sixty (60) or older and persons eligible for Medicare should contact their local AAoA at 800-252-9240 to have a Designation of Guardian in Advance of Later Need prepared free of charge.

SUMMARY

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.

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 Durable Power of Attorney.

Completing the Directive to Physicians and the Medical Power of Attorney does not normally require the assistance of an attorney. The third helpful document is the Durable Power of Attorney. Because of its crucial importance, and because of the need for precise drafting, a Durable Power of Attorney requires the assistance of a lawyer.

A fourth 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. The Representative Payee arrangement can be started by a call to Social Security. It does not require an attorney. Representative payment may be sought even after the beneficiary becomes mentally disabled, and whether or not the beneficiary has a legal guardian.

The fifth tool discussed above is the Designation of Guardian Before Need Arises. 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. This type of document generally can be prepared quickly and inexpensively by an attorney, or free of charge by an AAoA Benefits Counselor; it is often prepared in conjunction with a will.

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.

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, 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 to receive the individual's Social Security checks.

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, a senior should consider designating a guardian in advance of need, under Section 679 of the Texas Probate Code. A lawyer can prepare this document while preparing a Durable Power of Attorney or a will.

Where to find the laws discussed in this pamphlet

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 Durable Power of Attorney, and the Declaration of Guardian in the Event of Later Incapacity or Need of Guardian, are found in the Texas Probate Code.

How to get the forms discussed in this pamphlet

- The Legal Hotline for Texans recommends that an attorney prepare the Durable Power of Attorney. For eligible callers, the Hotline may be able to make a fee or reduced-fee referral for this purpose.
- The Out-of-Hospital Do-Not Resuscitate Order should be prepared in consultation with your doctor and can be obtained from your doctor.
- The Directive to Physicians and the Medical Power of Attorney are available at no charge to **low income** Texans age sixty (60) or older and persons eligible for Medicare, in a single packet complete with instructions, from the Legal Hotline for Texans.
- The Declaration of Guardian in the Event of Later Incapacity or Need of Guardian should be prepared by an attorney. The Legal Hotline for Texans can prepare this document at no charge, for low-income Texans age sixty (60) or older and persons eligible for Medicare. The Hotline may also be able to make a free or reduced-fee referral for this purpose.

To order items or request referrals from the Legal Hotline for Texans:

- **By Telephone**, please call: 1-800-622-2520 or (877) 526-9953 (TDD) (512) 477-3950 or (512) 381-1179 (TDD) for local Austin area calls)
- **By Mail**, please write to: Legal Hotline for Texans, 815 Brazos, Suite 1100, Austin, Texas 78701. Mail request should include the older Texan’s name, address, date of birth, and a telephone number. The Legal Hotline for Texans can fill this request if you are not above 125% of the Federal Poverty Income Guideline.

If you are above 125% of the Federal Poverty Income Guideline, The Medical Power of Attorney and Directive to Physicians may be ordered from the Texas Medical Association by **sending a self-addressed stamped business envelope requesting that information to the Texas Medical Association, 401 West 15th Street, Austin, TX 78701.**

Contact Information

For help with the topics in this pamphlet:

Legal Hotline for Texans
815 Brazos, Suite 1100
Austin, Texas 78701
(800) 622-2520 (toll free)
(512) 477-3950 (Austin area)
www.tlsc.org/lhot

Texas Medical Association
401 West 15th Street
Austin, Texas 78701
(512) 370-1300

Department of Aging and Disability Services
701 West 51st Street
MC – W352
Austin, Texas 78751
(800) 252-9240
(512) 438-3200 (Austin)
www.dads.state.tx.us

Social Security Administration
(800) 234-5772
(800) 234-5SSA
www.ssa.gov