# 17.0 ESTATE PLANNING & WILLS

## ESTATE PLANNING

### 17.1 Overview

There are several estate planning documents that every person should have to ensure that their wishes are known in the case of illness, incapacity, or death. These documents include Durable Powers of Attorney, Medical Powers of Attorney, Wills, and Transfer on Death Deeds. Each of these and others are discussed below. Often, people do not think about their estate planning documents until a situation arises where they might need them but do not have them or a health concern prompts a person to get their affairs in order.

A key to estate planning is getting the documents in place before the need arises to make these difficult times less difficult. Probate can be cumbersome and often requires an attorney. Planning ahead can help reduce cost, time, and the burden on the individual and their loved ones.

### 17.2 Durable Powers of Attorney

**A.** A durable power of attorney allows the principal (the client) to designate an agent (the person who will hold the power of attorney) to act on the principal's behalf with respect to business and financial matters. A durable power of attorney generally allows the agent to act on the principal's behalf and is particularly useful if the principal becomes incapacitated. Once a person is incapacitated, they can no longer sign a durable power of attorney and a more arduous guardianship proceeding may be necessary. Planning ahead and preparing a durable power of attorney should alleviate burdens later. Chapter 751 of the Texas Estates Code contains the Texas Durable Power of Attorney Act, which contains the provisions governing durable powers of attorney, and contains a form for the Statutory Durable Power of Attorney, found in Tex. Est. Code § 752.051 *et seq*.

**B.** Generally, a durable power of attorney grants broad authority to the agent. *See, e.g.*, Tex. Est. Code §§ 751.031—751.034 *et seq*. Unless the principal expressly withholds powers from the agent in the financial power of attorney, the agent generally has the power to perform any act that the principal could perform, subject to certain limitations. *Id*. When authorized, an agent's acts generally have the same effect as if the principal performed them. Tex. Est. Code § 751.051.

**C.** Effective September 1, 2017, amendments to the Texas Estates Code permit a principal to grant the agents powers beyond those provided for in the statutory form. *See* Tex. Est. Code § 752.052. Sometimes referred to as "hot" powers, these additional grants must appear in the durable power of attorney. "Hot" powers that can be granted include, among other things, the express authority to make gifts, the power to change rights of survivorship, and the power to change beneficiary designations. *Id.*

#### *D. Requirements of a Power of Attorney*

1. Length of Duration

   a. Texas Estates Code § 751.0021 describes the requirements of a durable power of attorney. One of the requirements is for the principal to select when the powers begin. Principals have two

options: (1) they can have their durable power of attorney become effective immediately upon signing, or (2) they can have a "springing" durable power of attorney that will become effective later upon their disability or incapacity. In practice, however, agents attempting to act under "springing" durable powers of attorney face additional hurdles. The agent will have to prove to the financial institution's satisfaction that the principal is, in fact, incapacitated. This process can be extremely tedious during an already difficult time. Once a power of attorney has become effective it will remain effective for the life of the principal unless the principal revokes it, the power of attorney contains a termination date, the agent resigns or becomes unable to perform and there is no alternative agent designated, or a court appoints a guardian of the estate. Tex. Est. Code § 751.131.

i. *What does it mean to be disabled or incapacitated?*
ii. Under the Texas Estates Code, for purposes of a durable power of attorney, a person is disabled or incapacitated "if a physician certifies in writing at date later than the date the durable power of attorney is executed that, based on the physician's medical examination of the individual, the individual is determined to be mentally incapable of managing the individual's financial affairs." Tex. Est. Code § 751.00201.

2. Other General Requirements

a. In addition to the designation regarding effectiveness upon disability or incapacity, a durable power of attorney must be:

i. in writing,
ii. signed by the principal or by another in the principal's conscious presence at the principal's direction, and
iii. acknowledged before a notary by the principal or other person signing on behalf of the principal. Tex. Est. Code § 751.0021.

b. This document MUST be notarized, and typically requires a "wet" signature.

## 17.3 Medical Powers of Attorney

**A**. A person can appoint an agent under a medical power of attorney to make health care decisions on behalf of that individual if the individual cannot communicate with their doctors and begins when a doctor certifies that the individual lacks competency to make health care decisions for himself or herself. A statutory form is provided in section 166.164 of the Texas Health & Safety Code. A medical power of attorney is valid until the individual revokes it, becomes competent again, a court appoints a guardian of the person, or they pass away. Tex. Health & Safety Code § 166.152(g), § 166.155-156.

**B**. Section 166.011 of the Texas Health & Safety Code permits these documents to be executed electronically. In addition, the declarant may sign before either two witnesses or one notary. However, if the medical directive is witnessed, the two witnesses will still need to be in the presence of the declarant.

## 17.4 Other Advance Directives

**A.** ***Declaration for Mental Health Treatment***

This document allows you to make decisions in advance about mental health treatment in the event of a psychiatric hospitalization and, specifically, three types of mental health treatment: psychoactive medication, convulsive therapy, and emergency mental health treatment. The instructions that you include in this declaration will be followed only if a court believes that you are incapacitated to make treatment decisions. Otherwise, you will be considered able to give or withhold consent for the treatments. Tex. Civ. Prac. & Rem. Code § 137.

**B**. ***Directive to Physicians and Family or Surrogates Form***

This form is designed to communicate an individual's wishes about life-sustaining medical treatment when the individual has a terminal condition or an irreversible condition. Tex. Health & Safety Code §§ 166.031-.053. A Directive to Physician does not replace a hospice plan.

**C**. ***Out-of-Hospital Do Not Resuscitate Information & Form***

This form instructs emergency medical personnel and other health care professionals to forgo resuscitation attempts and to permit the patient to have a natural death with peace and dignity. This order does NOT affect the provision of other emergency care including comfort care. Tex. Health & Safety Code §§ 166.081-.102. This document is prepared with the attending physician of the individual. Tex. Health & Safety Code §§166.081(6)(A), 166.083.

## 17.5 Wills

**A.** In Texas, the testator must be at least 18 years old (or married or in the armed forces) to execute a valid will. The testator must also have testamentary capacity. Testamentary capacity refers to the mental ability to understand and make necessary decisions regarding a will at the time of execution. Testamentary capacity requires that at the time of the execution of the will the decedent must have had sufficient mental ability to:

1. understand the business in which the decedent was engaged (the making of a will);

2. understand the effect of their act in making the will;

3. understand the general nature and extent of their property;

4. know their next of kin and natural objects of their bounty; and

5. collect in their mind the elements of the business to be transacted and hold them long enough to perceive at least their obvious relation to each other, and to be able to form a reasonable judgment as to them.

    a. The Texas Estates Code allows attested wills, holographic wills, and codicils to wills. Nuncupative (oral) wills are not valid in Texas if made on or after September 1, 2007.
    b. Section 251.051 of the Texas Estates Code contains the general requirement that wills must be:

        i. in writing,

ii. signed by the testator in person or by another person on behalf of the testator in the testator's presence at the testator's direction, and
iii. attested by two or more witnesses who are at least 14 years old.

c. The witnesses must be above the age of 14, be credible, not be interested parties, and must sign in the presence of the testator.
d. A will can be valid without a notary. However, a will cannot be self-proving without a notarized self-proving affidavit. *See* Texas Estates Code §§ 251.101 *et seq*. A self-proved affidavit eliminates the necessity of a witness to the will to testify at the probate hearing. Tex. Est. Code § 251.102. So, even if a notary is unavailable, but two witnesses are available, a person can execute a valid will.
e. If having two witnesses physically present at the execution of the will is a challenge, an alternative is a holographic will. Section 251.052 of the Texas Estates Code contains an exception to the witness requirement for wills. Under Section 251.052, if a will is "written wholly in the testator's handwriting," witnesses are not required. While the statute does not require the holographic will to be dated, or technically even signed by the testator, it should be. Two witnesses must testify in court, during probate proceedings, to the testator's handwriting. The holographic will can be self-proved by the testator making an affidavit before a notary. Holographic wills result in many different challenges and the rules must be followed exactly before the will is approved for probate.
f. Some important provisions to keep in mind in drafting a will are:

i. *Family*—States who is in the testator's family and specifically states if they intend to include or leave out someone.
ii. *Bequests*—States who will receive what property. Make specific, general, and residual bequests.
iii. *Appointment of Executor and their Powers*—States who will be in charge of administering the estate and should include the testator's designation on whether an independent administration is authorized.
iv. *Revocation of prior wills*—If the testator has other/older wills, state whether they want to revoke them or have this document treated as a codicil to avoid conflicts.
v. *Designation of Trustee and/or Guardian*—States who will be the trustee for any minor children or trusts that are created by the will.
vi. *No Contest Clause*—States that if a person contests the validity of the will, they will forfeit the share that they were bequeathed in the will.
vii. *Requiring or Waiving Bond*—States whether the testator wants the executor to pay a bond to the probate court.

## 17.6 Transfer on Death Deeds

A Transfer on Death Deed (TODD) is a way to transfer title to real estate upon the death of the decedent without the necessity of probate. The TODD allows a property owner to keep title to real property during their life and transfer title to their beneficiary upon their death without the need of going to court. Multiple beneficiaries can be named and the TODD may be changed or canceled at any time during the property owner's life. The TODD must meet certain requirements. It must be in writing, signed and notarized, contain a legal description of the property and have the names and addresses of the beneficiaries. Tex. Est. Code § 114.055. The TODD must also state that the transfer is to take place at the

owner's death, and it must be filed and recorded during the owner's lifetime in the real property records of the county in which the property is located. Although there is no longer a statutory form, Texaslawhelp.org offers a Transfer on Death Deed form which can be located here.

## 17.7 Life Insurance

- Life insurance is a way to provide your family with additional funds after your death. Sometimes, the policies are meant to cover funeral costs. Other times, they are meant to provide additional support to a family as a result of losing an income when a person dies.
- When you buy a life insurance policy, you will designate a beneficiary who is to receive the death benefit on your death.
- Life insurance passes by beneficiary designation so it is not subject to probate. In addition, the money is typically not subject to income taxes. There are various kinds of life insurance.
- Depending on the type of insurance and other factors, such as your age, gender, health, tobacco use, and hobbies, the insurance company will decide whether to sell you life insurance and how much the premium will cost. If you are young and healthy, the policy will be cheaper than if you are older or unhealthy.

## 17.8 Remote Notarization

1. Digital Signatures. Generally, the electronic execution of documents through the use of digital signatures is authorized by the Texas Uniform Electronic Transactions Act (TUETA), found in chapter 322 of the Business and Commerce Code. Unfortunately, this statue does not provide authority to execute estate documents using electronic or digital signatures. Wills are expressly excluded from TUETA. Tex. Bus. & Com. Code Ann. § 322.003(b)(1). Additionally, TUETA applies only to "transactions between parties" who have "agreed to conduct transactions by electronic means." Tex. Bus. & Com. Code Ann. § 322.005. Estate documents generally do not fit the definition of a "transaction" under the statute. Tex. Bus. & Com. Code Ann. § 322.002.

Despite this, authorization to electronically sign medical directives is specifically authorized by section 166.011 of the Texas Health & Safety Code.

2. Remote Notarization. Separate from the question of whether an electronic or digital signature is authorized to execute a document is a question of whether the document can be remotely notarized. The Texas Government Code Subchapter C of Section 406 provides authority for when a document can be notarized online. Historically, online notaries can only notarize electronic signatures; documents that require a "wet" signature were required to be notarized.

**Legislative Update.** Documents that require "wet" signatures can now be notarized remotely. **SB 1780 removed the limiting language restricting online notarization to electronic signatures. SB 1780 became effective January 1, 2024. Now, an online notary can notarize "wet" ink signatures remotely**. Tex. Gov. Code § 406.1103. The estate planning documents continue to require a "wet" signature. To be properly remotely notarized, the online notary must follow the procedures as required in Tex. Gov. Code §406.1103(b).

**Note About Documents Remotely Notarized During the COVID-19 Pandemic.** Remote notarization by traditional notaries was temporarily authorized by the Texas Governor in response to the COVID-19

Disaster Declaration. On April 8, 2020, Governor Abbott issued a temporary order suspending the physical presence requirements for notarization and permitting the following documents to be notarized by traditional notaries over two-way video:

- Self-proving affidavits for wills
- Financial Powers of Attorney
- Medical Powers of Attorney
- Advanced Directives
- Oath of Executors
- Oath of Guardians

The press release can be found here. This temporary order was quietly terminated effective at 12:01 A.M., September 1, 2021. *See* the Texas Secretary of State's "Frequently Asked Questions for Notaries Public" fact number 31. Experts on the topic did not learn of the termination until July 21, 2022.

Documents that were executed in compliance with the temporary order between April 8, 2020, through 12:00 A.M. on September 1, 2021, while the suspension was in effect, remain valid. It may be best practice to review and possibly re-execute these documents.

**Any documents that were executed at or after 12:01 A.M., September 1, 2021, in reliance on this order will need to be re-executed.**

## PROBATE

### 17.9 Non-Probate Assets

There are four general categories of non-probate assets:

- Property passing by contract (life insurance proceeds, employment benefits, etc.), provided a beneficiary has been designated
- Property passing by right of survivorship (joint accounts and property owned with right of survivorship)
- Property held in trust
- Pay or transfer on death agreements (bonds, mortgages, promissory notes, securities accounts, contracts, deeds, etc.)

### 17.10 Estate Administration

**A.** There are two types of administration: independent and dependent. *See* Tex. Est. Code §§ 401.001-401.003. The type of estate administration will depend on whether the decedent had a properly executed will and the terms within the will.

**B.** The primary difference is how much supervision the court has over the probate proceedings. An independent administration is free from judicial supervision, and typically no proceeding is required in the court other than admitting the will to probate and the filing of the probate inventory or the affidavit in lieu of the probate inventory and list of claims. Tex. Est. Code § 402.002, and §§ 309.051-.052.

**C.** Typically, the will provides for the appointment of an independent executor. If one is not appointed in the will, an independent administration will be permitted if:

1. all the decedent's heirs have been determined through a proceeding to determine heirship and
2. all the decedent's heirs consent to an independent administration. *See* Tex. Est. Code § 401.002.

**D.** With a dependent administration, each action that the personal representative takes must be approved by the court.

## 17.11 Alternatives to Probate

### A. *Muniment of Title*

1. Muniment of title is a proceeding that can be used if there is a will and there is no need for a formal administration, or if more than four years have elapsed since date of death and the will was never probated. Tex. Est. Code § 257.051–.054.

2. The Texas Estates Code provides that an order admitting a will to probate as a muniment of title "constitutes sufficient legal authority for each person who owes money to the testator's estate, has custody of property, acts as registrar or transfer agent of any evidence of interest, indebtedness, property, or right belonging to the estate, or purchases from or otherwise deals with the estate, to pay or transfer without administration the applicable asset without liability to a person described in the will as entitled to receive the asset." Tex. Est. Code § 257.102.

3. Probate of a will as muniment of title works best when the only asset that needs to be transferred is a home or other real property. In addition, the estate must not owe any unpaid debt (other than a debt secured by a lien on real estate, such as a mortgage). In order to probate a will as a muniment of title, an Application to Probate a Will as Muniment of Title must be filed with the court. The court will then schedule a hearing and testimony will be offered before the judge will sign the Order Admitting the Will to Probate as a Muniment of Title only. Once the order is signed, a certified copy of the Order Admitting the Will to Probate as Muniment of Title and a certified copy of the will should be filed into the county clerk's property records where any real property is located.

### B. *Small Estate Affidavit*

1. The Small Estate Affidavit can be used if there is no will. It is most often used for estates with small bank accounts, few debts, and homesteads. Once approved by the court, the Small Estate Affidavit serves as a legal document to identify a decedent's heirs and each heir's respective share of the decedent's property. *See generally* Tex. Est. Code §§ 205.001–.008. You cannot use this form if the person had a will.

2. Witness Requirements. Among other things, the Small Estate Affidavit must be subscribed and sworn to by: (1) each distributee of the estate who has legal capacity (or, if applicable, the natural guardian or next of kin of any minor distributee or the guardian of any other incapacitated distributee) and (2) two disinterested witnesses with personal knowledge of the facts. Tex. Est. Code § 205.002.

a. General Requirements

i. The Small Estate Affidavit must state that:
(a) thirty days have elapsed since the date of the decedent's death;

(b) no petition for the appointment of a personal representative is pending or has been granted; and
(c) the value of the estate assets, excluding homestead and exempt property, does not exceed $75,000. Tex. Est. Code § 205.001(a)(1)-(3).

ii. The Small Estate Affidavit must also include, among other things:
(a) a list of all known estate assets and liabilities;
(b) the name and address of each distributee;
(c) the relevant family history facts concerning heirship that show the right of each distributee to receive estate money or other property or to have any evidence of money, property, or other right of the estate as is determined to exist transferred to the distributee as an heir or assignee; and
(d) a list of all known estate assets that the applicant claims are exempt from listing. Tex. Est. Code § 205.002(b).

iii. Once prepared, the Small Estate Affidavit should be filed with the court. The court will then examine the Small Estate Affidavit and approve it if it satisfies the requirements of the Texas Estates Code.

iv. Note: Most courts have their own local rules and forms related to the use of the Small Estate Affidavit. An attorney is not necessary to prepare and file a Small Estate Affidavit with the court.

### 17.12 Proceedings to Determine Heirship

1. When a person dies and does not have a will, there are several options available to transfer title to property. The first is an Affidavit of Heirship, which is frequently used to transfer title to real property when there is no will. *See* Tex. Est. Code §§ 203.001, 203.002. Section 203.002 of the Texas Estates Code provides a statutory form of Affidavit of Heirship. The Affidavit of Heirship must be signed and notarized by a person who is familiar with the family history, genealogy, marital status, or the identity of the heirs, and must be filed in the county where the real property is located. Tex. Est. Code § 203.001.

2. If property other than real property must be transferred and there is no will, then an Application for a Proceeding to Declare Heirship will need to be filed with the court. Chapter 202 of the Texas Estates Code governs this proceeding. In an heirship proceeding, the court will determine who the heirs of a decedent are, and what share of the estate that each will receive. Section 202.005 of the Texas Estates Code contains the requirements of what will need to be included in an Application for a Proceeding to Determine Heirship, which includes the names and physical addresses of all of the decedent's heirs, and their relationship to the decedent. If the names and addresses of the heirs are unknown, the court will appoint an attorney ad litem to represent their interests. *See* Tex. Est. Code § 202.009. In addition, notice must be given to each person who is 12 years of age or older or to the parent of a child who is under the age of 12, which can be done by mail if the name and address are known, or by publication if the name and address cannot be ascertained. *See* Tex. Est. Code §§ 202.051, 202.052.

At the court proceeding to declare heirship, testimony regarding a decedent's heirs and family history must be taken from two disinterested and credible witnesses. Tex. Est. Code § 202.151(b). The judgment to declare heirship will state the names of the heirs of the decedent and each of the heirs' respective share of the estate property. In addition, either at the same time or following the declaration of heirs, an Application to Appoint an Administrator for the estate must be done if there is real property to be distributed or other necessity for administration. The application to declare heirs and for administration

of the estate are often filed in one document. The application of an administrator is contained in Chapter 301 of the Texas Estates Code.

## 17.13 Medicaid Estate Recovery Program (MERP)

Medicaid is a governmental program that pays for health care for individuals with limited income. To defray the cost of providing long-term services, the State of Texas has the right to request money from a decedent's estate after they die.

Claims for Medicaid recovery in Texas are debts of the estate. If the decedent (1) applied for and received Medicaid benefits on or after March 1, 2005, and (2) was 55 years or older at the time services were received, then the Medicaid Estate Recovery Program (MERP) may have a claim against the estate. Tex. Admin. Code § 373.103. Before filing any type of probate proceeding, it is recommended to complete and send in the MERP Certification and Authorization Form to determine whether MERP intends to file a claim against the estate.

### A. *Exemptions*

1. MERP does NOT apply in cases where there is:

   a. A spouse who is still alive
   b. A child under 21 years of age
   c. A child of any age who is blind or permanently or totally disabled under 42 U.S.C. § 1382c
   d. There is an unmarried adult child who lived full-time in the Medicaid recipient's home for at least one year before the recipient died. Tex. Admin. Code § 373.207(a) (for items a-d)
   e. The value of the estate is $10,000 or less
   f. The amount of Medicaid costs is $3,000 or less
   g. The cost involved in the sale of the property would be equal to or greater than the value of the property. Tex. Admin. Code § 373.215 (for items e-g)
   h. The request for money would cause an undue hardship for the heirs. (Application for Hardship Waiver) Tex. Admin. Code § 373.209

   Certain assets and resources of American Indians and Alaska Natives are exempt from estate recovery claims. *See, e.g.*, Tex. Admin. Code § 373.207; Guide to Medicaid Estate Recovery Program.

2. What costs can be recovered?

   a. The MERP program can recover costs related to long-term care provided through: Nursing facility services, Services of Intermediate Care Facilities for Individuals with Intellectual Disabilities, home and community-based services under Social Security Act §1915(c) (all the long-term care Medicaid "waiver" services) and §1929(b) ("Community Attendant Services"), and related costs of hospital and prescription drug services. Tex. Admin. Code § 373.103.
   b. For purposes of MERP, "estate" includes all real and personal property of the decedent, "both as such property existed and as from time to time changed in form by sale, reinvestment, or otherwise" and as further described in Section 22.012 of the Texas Estates Code.