BASIC ESTATE PLANNING WITH AN EMPHASIS ON REPRESENTING THE ARTIST

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BASIC CONSIDERATIONS IN ESTATE PLANNING WITH AN EMPHASIS ON REPRESENTNG THE ARTIST

Lawyers and accountants who do estate planning must face the fact that clients do not like to think about dying or incapacity. Artist-clients are no exception. Our challenge is to recharacterize the estate planning process as an exercise in empowerment, rather than a forced acceptance of one's mortality. The empowerment comes from the client's ability to control, through a will, medical power of attorney, financial power of attorney, directive to physicians, and other estate planning documents, future decisions affecting the client's health and property. In the case of our artist-clients, estate planning steps taken now could impact future public recognition and appreciation. A client's failure to take charge of these matters may result in the most personal of future decisions being made by the state, the court system, the medical community and individuals the client may not have wished to be in control. This article reviews issues relating to wills and the various estate planning statutory forms promulgated by the State of Texas which give the client the power to set forth preferences with respect to disposition of property, health care and property management decisions and discusses basic considerations to take into account in tailoring these instruments for the specific needs of the client.

PART ONE
WILLS

I. Drafting the will

A. Why a will?

1. Without a will, property passes under the Texas laws of descent and distribution.

a. Section 38(a) of the Texas Probate Code provides that if a person dies intestate leaving no husband or wife, such person's property shall pass in the following order:

i) to such person's children and the descendants of a predeceasing child,

ii) or if none, to such person's mother and father in equal shares,

iii) or if only a mother or father is then surviving, such person's property shall be divided in half and split between the

surviving parent and such person's brothers and sisters and the descendants of a predeceasing sibling (or all to the siblings, and the descendants of a predeceasing sibling, if no parents survive),

iv) or if there are no siblings or descendants of siblings, all of such person's estate shall pass to the surviving father or mother.

b. Section 38(b) of the Texas Probate Code provides that if a person dies leaving a surviving spouse and children, the surviving spouse shall take one-third of such person's separate property personal estate, and the balance of such person's separate property personal estate shall pass to such person's children and their descendants. The surviving spouse shall also be entitled to an estate for life, in one-third of the land of such person, with remainder to the children of such person. If such person has no children, the surviving spouse shall be entitled to all of such person's personal estate, and to one-half of the lands of such person, or all thereof if such person is not survived by a father, mother, nor any surviving brothers or sisters or their descendants.

c. Effective September 1993, Section 45 of the Texas Probate Code was amended to provide that the community property of a deceased spouse will pass to the surviving spouse if no descendant survives the deceased spouse, or if all surviving children and descendants of the deceased spouse are also children or descendants of the surviving spouse. If a child of the deceased spouse is not a child of the surviving spouse, one-half of the total community estate is retained by the surviving spouse and the other one-half passes to the children or descendants of the deceased spouse.

2. Other reasons for a Will:

a. Name guardian of the person of minor children.

b. Tax planning purposes.

B. Requirements of a valid will:

1. Testator must be identified;

2. Will must be made with testamentary intent:

a. Testator must intend to create a revocable disposition of his property to take effect at his death; such testamentary wishes must be expressed in the instrument offered for probate. Hinson v. Hinson, 280 S.W.2d 731, 733 (Tex. 1955);

b. Testamentary intent generally can be evidenced by the testator's execution of an instrument labeled as a "will."

3. The testator must have testamentary capacity:

a. Testator must be eighteen years of age or over, or lawfully married or member of the armed forces of the United States or of an auxiliary thereof or of the maritime services.

b. Testator must by of sound mind, which includes the following elements:

i) an understanding by the testator of the business in which he is engaged;

ii) an understanding by the testator of the effect of his act in making the will;

iii) knowledge by the testator of the objects of his bounty;

iv) an understanding by the testator of the general nature and extent of his property;

v) ". . . memory sufficient to collect in [the testator's] mind the elements of the business to be transacted, and to 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." Prather v. McClelland, 13 S.W. 543 (Tex. 1890).

4. Will must be executed with the necessary testamentary formalities (See Section 59 of the Texas Probate Code):

a. Signed by the testator or by another person at his direction and in his presence

i) Testator may make a "mark" if necessary

ii) As of September 1, 1991, Section 59 of the Texas Probate Code provides that "[a] signature on a self-proving affidavit is considered a signature to the will if necessary to prove that the will was signed by the testator or witness, or both, but in that case, the will may not be considered a self-proved will."

b. Attested by two or more credible witnesses who shall subscribe their names thereto (not necessary for a holographic will).

c. Signed by the witnesses in the presence of the testator (not necessary for a holographic will) which has been interpreted to mean that "the attestation

must occur where where testator, unless blind, is able to see it from his actual position at the time, or at most, from such position as slightly altered, where he has the power readily to make the alteration without assistance." Nichols v. Rowan, 422 S.W. 2d 21, 24 (Tex. Civ. App. - San Antonio 1967, writ ref'd n.r.e.).

C. Dispositive provisions

1. Specific bequests:

a. An advantage of making a specific bequest is that its distribution will not be deemed to carry out estate income to the beneficiary.

b. Property that is the subject of a specific bequest should be clearly described. If desired, the will should provide that policies of insurance covering such items should also pass to the beneficiary.

c. Descriptions of real property should be detailed enough that there can be no confusion as its identity. Note that encumbrances against specifically devised real property will be exonerated unless the will provides otherwise.

d. Consider the use of a holographic codicil to distribute certain personal effects if the testator wants the flexibility to change the beneficiaries. In such a situation the Will may contain the following language:

> Notwithstanding the preceding provisions of this paragraph, I may have bequeathed certain items of mine in a separate memorandum completely in my handwriting and signed by me. My Executor shall not be subject to any liability to anyone as a result of his reliance on any such separate memorandum completely in my handwriting and signed by me.

2. Pecuniary legacies are general legacies of a specific dollar amount.

a. Consider using percentages of an estate rather than dollar amounts to avoid depleting an estate that is much smaller at the testator's death than it was when the will was executed.

b. The will should address whether or not interest should be paid on pecuniary legacies, when the interest starts to accrue and at what rate.

3. Residuary bequest disposes of all of the assets of the estate (after the payment of the obligations of the estate) that remain after the specific and pecuniary legacies have been made.

D. Order of abatement - unless the will states otherwise, Section 322B of the Texas Probate Code provides that the order of abatement (the reduction of bequests if the estate has insufficient assets to pay the testator's debts and administration expenses of the estate) is as follows:

1. Property not disposed of by will, but passing by intestacy;

2. Personal property of the residuary estate;

3. Real property of the residuary estate;

4. General bequests of personal property;

5. General devises of real property;

6. Specific bequests of personal property; and

7. Specific devises property.

NOTE: Section 322A of the Texas Probate Code governs the allocation of estate taxes unless the will provides otherwise.

E. Fiduciary appointments

1. To avoid dependent administration, the will should name an independent executor (or co-executors, if desired), without bond. Unless the will provides otherwise, co-executors will be able to act independent of each other except in conveyances of real property, so it may be wise to provide that co-executors shall act jointly if two are acting, and by a majority, if more than two are acting. Successor executors should be named to act in the event the originally named executor is unable or unwilling so to act.

2. If one or more trusts are created in the will, trustees and successor trustees should be named.

3. Under Section 676 and Section 677(b) of the Texas Probate Code, a parent of (i) a minor child, or (ii) an adult individual who is an incapacitated person, may appoint a guardian of the person of such minor child or incapacitated individual to act in the event neither parent is able to act as guardian due to death or incapacity. The guardian so designated is entitled to be appointed guardian of the estate by the court if a guardianship of the estate is necessary. Section 677A of the Texas Probate Code contains a statutory form for appointing a guardian of a child in the event of a parent's death or incapacity.

F. Establishment of trusts - other than the establishment of trusts for tax purposes (which is beyond the scope of this outline), the testator may wish to create one or more trusts for the following purposes:

1. To hold assets which would otherwise pass to a minor child or an incapacitated individual and thus avoid a guardianship;

2. To hold assets for the life of a child or until the child reaches an age at which, in the opinion of the testator, the child would be able to manage the property without a trust;

3. To hold assets for a beneficiary who has creditor problems (in this case the trust should include a spendthrift provision).

4. To hold assets for a beneficiary who is receiving government aid so as to preserve eligibility for such aid.

II. Coordinating will with nonprobate assets

A. Non-probate assets pass outside of the testator's probate estate. Their disposition is controlled by a contract rather than by the testator's will. Examples of nonprobate assets include life insurance proceeds, retirement plans, joint tenancy with right of survivorship property and series "E" federal savings bonds.

B. Avoid naming the testator's estate the beneficiary of a nonprobate asset on the beneficiary designation. Doing so may subject what would otherwise be an exempt asset to creditor's claims. If the testator desires the provisions of the testator's will to apply to the nonprobate assets (for example, if the testator wants proceeds to which a minor is entitled to pass to a trust for the benefit of the minor until the minor reaches a certain age), the relevant beneficiary designation may name the testamentary trustee in the testator's will as beneficiary of the proceeds on the testator's death. The will should than provide instructions to the trustee named in the will as to how to deal with the proceeds from a nonprobate asset. Sample language for such an instruction follows:

> The proceeds of any retirement plan or any insurance policy on my life which are payable to a trustee or trustees named in this Will and which are not made payable to the trustee of any specific trust created hereunder shall be allocated in the same manner as the share of my property passing under Paragraph __ hereof passes to or for the benefit of_____________. If _______________is not then surviving, all of such proceeds shall pass as provided in Paragraph ___ hereof. Notwithstanding any other provision of this Will to the contrary, in the event a trust, the Trustee of which is designated as the recipient of any such proceeds, is not created at my death, the Executor shall qualify as Trustee without bond for the sole purpose of receiving and distributing such proceeds in accordance with the provisions of this Paragraph.

One note of caution: Before making a trust the beneficiary of any retirement benefits or other funds on which there has been tax deferral, make sure that you have investigated the tax ramifications of doing so.

III. Anticipating Will Contests

A. Most common grounds for bringing a will contest

1. Lack of testamentary capacity

a. Before the will is probated, the proponent of the will has the burden of proving the testator had testamentary capacity; after the will is probated, the burden of proof is on the contestant.

b. See discussion under Section I(B)(3) of this outline for what constitutes testamentary capacity.

2. Undue influence

a. One alleging undue influence must prove:

i. existence and exertion of an influence;

ii. the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the will; and

iii. the execution of a will which the maker thereof would not have execute but for such influence.

b. Influence is not undue unless the free agency of the testator was destroyed and the will produced expresses the will of the one exerting the influence. Rothermel v. Duncan, 369 S.W. 2d 917 (Tex. 1963).

3. Improper Execution

B. Steps to take if a will contest is anticipated

1. Consider an inter vivos revocable trust - trust will be confidential when established, so the trust could be in existence for years before it is attacked; this means that the one attacking the creation of the trust must also attack each transaction in which the trust participated over the years.

2. Include a no-contest provision in the will stating that a beneficiary contesting the will shall receive no benefits under the will.

a. May not be enforced if the contest was made in good faith and upon reasonable cause.

b. The testator should leave enough of a gift to the beneficiary from whom a will contest is feared as a disincentive from contesting the will; otherwise the contestant has nothing to lose if the will is contested.

3. If an allegation of undue influence is anticipated, consider suggesting that the client appoint as executor an individual other than the person likely to be accused of exerting the undue influence (or a corporate fiduciary).

4. Avoid making statements in the will as to why certain beneficiaries are not included. Any inaccuracies in the statement may be used by a contestant as a weapon to defeat the will.

5. Pay close attention to observing the formalities of the will execution ceremonies:

a. The testator, the witnesses and the notary public should remain in the room where the will execution ceremony is taking place until the whole will, including the self-proving affidavit has been executed by all.

b. Before the testator signs, the notary public should ask the testator the following:

> "Do you declare this document to be your last will and testament and that you are executing it as your free act and deed? Do you request that the persons present act in the capacity of witnesses and notary to your will by signing their names thereto?"

The notary should also ascertain that the testator is age 18 or older and that the witnesses are age 14 or older. The notary should ask the witnesses whether the testator appears to be of sound mind.

c. The testator should sign the will, then each witness should sign the will and include his or her residential address.

d. After the will is signed, the notary public should ask the witnesses (based of the language of the self-proving affidavit) the following:

> "Do each of the witnesses swear that the testator declared this to be his/her last will and testament, that he/she had executed it as his/her free act and deed and he/she requested each of you to sign his/her will as witnesses in his/her presence and in the presence of each other? Do you further swear that you are each over the age of 14 year, that the testator is over the age of 18 year and is of sound mind?"

e. The testator, the witnesses, then the notary public should sign the self-proving affidavit.

f. Discuss with the testator where the will is to be kept. Some attorneys may offer to keep the original will in a vault, but consider what continuing responsibilities may be associated with retaining a client's original will. If the client keeps the will, note that in your file. While only one will should be executed, copies can be made of the executed will.

IV. SPECIAL CONCERNS FOR ARTISTS

A. Estate planning for artists, including authors and entertainers, requires special considerations because (tax concerns aside since they are outside of the scope of this outline) of the way artists earn their income and the assets which will be held by their estates. Special concerns that need to be addressed in an artist's plan include:

1. Unified management of copyrighted material
2. Royalties and other deferred compensation arrangements; and
3. Lack of liquidity to pay debts and administration expenses due to the nature of the assets in the artist's estate.

B. Unified Management of copyrighted material

1. A copyright is an aggregation of many intangible rights, including rights of reproduction and distribution, rights of public performances and display, and the right to prepare derivative works. If there is more than one owner of a copyright (which could be the case if a copyright owner died intestate or if the copyright passed under the copyright owner's will as part of the copyright owner's residuary estate to more than one beneficiary each owner could enter into transactions with respect to the subsidiary rights included in the copyright, thus diluting the economic value of the copyright. This could also lead to the copyright owner's heirs or beneficiaries under the copyright owner's will be competing with each other to market the copyright.

2. One solution is for the copyright owner's will to prove that the copyright passes to a testamentary trust for the benefit of the copyright owner's intended beneficiaries.

a. The trustee should be well versed in managing copyrighted material.

b. This would maximize the economic value of the copyright for the copyright owner's beneficiaries because fragmentation of management would be avoided.

c. This would increase protection from copyright infringement because a trustee could take appropriate action to ensure that maximum copyright protection is maintained and could take the necessary actions if an infringement occurs.

d. If a trustee is to be compensated for acting as such, consider keying the trustee's compensation to cash flow, rather than a set amount.

3. If the copyright owner wishes to provide continuity of management after death or if there is a likelihood that the copyright owner may become incapacitated, the copyright owner may wish to consider transferring the copyright to an inter vivos trust.

4. Another solution is for a corporation created by the artist to own the copyright. In addition to the unified management provided by the corporation, the artist during the artist's lifetime, would be able to control "income bunching" by taking a salary from the corporation, as opposed to receiving royalties which may be plentiful one year while meager the next. A corporation also provides access to retirement planning for the artist. At the artist's death, interests in corporate shares would pass to the artist's beneficiaries as opposed to interests in any copyrights the artist may own.

C. Royalties and deferred compensation arrangements – because income to the artist's estate may consist of royalties and other forms of deferred compensation, if a trust is created under the artist's will, the trustee should be given the right to allocate such receipts to trust income or principal, as the trustee determines in the trustee's discretion. If the trustee does not have this right, state law characterizing certain receipts as income or principal may have the effect of benefiting, for example, a reminder beneficiary to the detriment of the income beneficiary, which could thwart the artist's intention if the income or life beneficiary is the one the one the artist/testator desires to benefit the most.

1. If the artist wishes to avoid the sale of art work from the artist's estate to pay debts and administration expenses, the artist may wish to consider life insurance so that the proceeds from the life insurance policy, as opposed to the art work may be used to pay such obligations. The designated beneficiary may be the trustee named in the artist's will and the will

could provide instructions to the trustee as to how such proceeds should be used.

2. Problems with liquidity can result if the disposition of nonprobate assets is not coordinated with the will. For example, if an artist is a party to a bank account held in joint tenancy with right of survivorship with one or more other persons, the assets of the artist's residuary estate, which may include art work, will be used to pay the artist's debts and administration expenses of the estate, as opposed to the cash in the bank account.

D. If the artist-client has a name, voice, signature, photograph, or likeness that has commercial value at the time of his or her death (or might have commercial value after that time) the artist-client may wish to consider making a testamentary disposition, as authorized under Chapter 26 of the Texas Property Code, of the use of his or her name, voice, signature, photograph, or likeness after the death of the artist-client.

PART TWO
OTHER ESTATE PLANNING DOCUMENTS

The statutory forms referred to in this paper may be found at the website www.texasprobate .com under the heading "consumer forms." This website, put together by attorney, Glen Karisch, is full of helpful information for the estate planner.

I. STATUTORY DURABLE POWERS OF ATTORNEY.

A. Introduction. The durable power of attorney is a relatively recent legal invention which has its roots in agency law. Under common law, an agent's authority automatically terminates upon the principal's incapacity or death. The "durable" feature which allows an agent's authority to survive the principal's incapacity or disability if the instrument so provides was incorporated into the Uniform Probate Code in 1969. According to the Prefatory Note to Part 5 of Article V of the Uniform Probate Code, the concept of a durable power of attorney was developed "to assist persons interested in establishing non-court regimes for the management of their affairs in the event of later incapacity or disability. The purpose was to recognize a form of senility insurance comparable to that available to relatively wealthy persons who use funded, revocable trusts [or] for persons who are unwilling or unable to transfer assets as required to establish a trust." According to the American College of Trust and Estate Counsel, by 1986 all fifty of the United

States and the District of Columbia had adopted some form of durable power of attorney legislation.

Effective September 1, 1993, the Texas Legislature amended the Texas Probate Code by repealing Section 36A, previously dealing with powers of attorney, and adding Sections 481 to 506, the new Texas Durable Power of Attorney Act. The 1993 Texas Durable Power of Attorney Act differed from previous legislation in four important ways. It provided the option of a "springing power" (the power of attorney becomes effective on the principal's disability), it included a statutory form which may, but is not required to be used, it no longer requires two witnesses and it dispensed with the recording requirement, except for real property transactions.

B. The Texas Durable Power of Attorney Act.

1. Requirements. A durable power of attorney executed before September 1, 1993 is governed by the law in effect when the power of attorney was executed. To be effective under Texas law, a durable power of attorney executed on or after September 1, 1993 must meet the following requirements:

a. In writing. A durable power of attorney must be in writing; an oral designation will not be effective.

b. Signed by the principal. The principal must sign the durable power of attorney. Though the Probate Code does not define the term "signed," Section 311.005 of the Texas Government Code states that the term, signed, "includes any symbol executed or adopted by a person with the present intention to authenticate a writing." Conceivably, under this definition, the durable power of attorney could be signed by a person other than the principal as long as the principal adopted the signature with the present intention to authenticate the durable power of attorney. See Beyer, Durable Powers of Attorney -The Texas Perspective, ESTATE PLANNING DEVELOPMENTS (April 1990).

c. Principal must be an adult. The term "adult" is not specifically defined in the Probate Code. Section 3(t) of the Texas Probate Code provides that a "minor" is a person under eighteen years of age who has

never been married or who has not had the disabilities of minority removed for general purposes. It is probably reasonable to assume that, under the Texas Probate Code, an adult is a person who is not a minor. This coincides with the language of Section 745(a)(1) of the guardianship provisions of the Texas Probate Code which recognizes that a minor becomes an adult by reaching 18 years of age. In addition to the requirement that a principal be an adult, Texas courts have recognized that the principal must be competent at the time the instrument is executed. See e.g., Tomlinson v. Jones, 677 S.W.2d 490 (Tex. 1984).

d. Words of non-termination on subsequent disability or effective on disability. The writing must contain 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 intent of the principal that the power shall not terminate on the subsequent disability or incapacity of the principal.

e. Acknowledged. The durable power of attorney must be acknowledged by the principal before an officer authorized to take acknowledgments to deeds of conveyance and to administer oaths under the laws of the State of Texas or any other state. The durable power of attorney need not be witnessed.

f. Recording required for real property transaction. Though the recording requirement added by the 1989 amendments to the power of attorney statute was repealed by the 1993 legislation, the current statute does make it clear that a durable power of attorney for a real property transaction requiring the execution and delivery of an instrument that is to be recorded also shall be recorded in the county where the real property is located.

2. Agent's Authority and Powers.

a. Strictly construed. As with any agency arrangement, the durable power of attorney will be strictly construed. Gittings, Neiman-Marcus,

Inc. v. Estes, 440 S.W.2d 90 (Tex. Civ. App. - Eastland 1969, no writ); Montgomery v. Nevins, 270 S.W.2d 427 (Tex. Civ. App. - Austin 1954, writ ref'd n.r.e.). The powers granted should be described with specificity; it should not be assumed that powers not expressly described will be implied. See RESTATEMENT (SECOND) OF AGENCY §37 (1958). Generally speaking, an agent acting under a general durable power of attorney is authorized to act on behalf of the principal within the ordinary and usual scope of business entrusted to the agent. Von Wedel v. McGrath, 180 F.2d 716 (3rd Cir.), cert denied, 340 U.S. 816 (1950).

b. Powers to consider. The powers granted under a durable power of attorney may be as numerous or as limited as the principal desires. Some powers to be considered include: granting access to safe deposit boxes; ability to sign tax returns and settle tax disputes; the authority to deal with retirement plans (including individual retirement accounts, rollovers and voluntary contributions); the power to deal with life insurance; the power to borrow funds; the power to establish and/or fund intervivos trusts; the power to collect debts; the power to complete charitable pledges; the power to make statutory elections and disclaimers; the power to litigate on behalf of the principal; and, in appropriate situations, the power to take the actions necessary to qualify the principal for government entitlement programs. See Collin, Planning and Drafting Durable Powers of Attorney (American College of Probate Counsel Annual Meeting, March 1989). If the principal has any special assets or needs which must be addressed such as running a business, the drafter should consult with the principal regarding what other specific powers should be included in the power of attorney.

c. Government agencies and Financial Institutions. If the principal's affairs require dealing with government agencies and specific financial institutions, the power of attorney forms for the specific agency and financial institution should be reviewed to make sure that the provisions included by the drafter meet the requirements of the government agency and specific financial institution.

d. Gifts. If the agent or attorney-in-fact is to be authorized to make gifts, this

should be specifically addressed in the power of attorney. The current statutory form for the durable power of attorney specifically addresses whether the principal allows gifts to be made. If the power to make gifts is not specifically included in the power of attorney, the Internal Revenue Service may take the position that gifts made by an agent or attorney-in-fact who had no authority to make such gifts on behalf of the principal will be included in the principal's estate for estate tax purposes under Internal Revenue Code §2038 as a revocable transfer. Generally the IRS looks to state law to determine whether this authority is granted when the power of attorney is silent on the matter. Tech. Adv. Mem. 86-35-007 (May 19, 1986). (But see, Estate of Bronston v. Commissioner, 56 T.C.M. (CCH) 550 (1988) where it was held that an agent could make gifts under a broad general durable power of attorney that did not mention gifts because the principal had a history of making gifts; see also, IRS Technical Advice Memorandum 199944005, in which the IRS concluded that gifts made by a decedent's daughter as attorney-in-fact under a general power of attorney were not prohibited under Texas law because, despite the absence of specific language in the power of attorney granting gift-giving authority, the ambiguity in Texas law concerning an agent's power to make gifts under a power of attorney, the small size of the gifts, the decedent's intent as expressed in the decedent's will, and the decedent's prior history of making gifts led to the conclusion that this particular general power of attorney authorized the attorney-in-fact to make gifts.)

One must exercise caution in granting an agent under a power of attorney the authority to make gifts so as to avoid giving the agent a general power of appointment which would result in adverse tax consequences for the agent. One way to avoid this result is to limit the agent's gift giving authority to gifts that qualify for the annual exclusion from gift tax. That is the approach taken in the statutory form which provides that "the amount of a gift to an individual may not exceed the amount of annual exclusions allowed from the federal gift tax for the calendar year of the gift." The drafter may also add the following language:

> Any authority granted to my agent shall be limited so as to prevent this power of attorney from causing my agent to be

taxed on my income and from causing my agent's estate to be subject to a general power of appointment held by my attorney as that term is defined in Section 2041 of the Internatl Revenue Code of 1986 as amended from time to time.

e. Compensation. While compensation of an executor is usually addressed in a Will, the same considerations should be given to whether or not an agent under a power of attorney should be compensated. An agent's job under a power of attorney is comparable to, and may even be more difficult than, an executor's, depending on the situation,

f. Wills. It should be noted that an agent does not have the authority to make a Will for the principal. This power is too personal to delegate, although it appears to be acceptable for an agent to have the power to create what could amount to a will substitute, such as an intervivos trust. In such a case, it is recommended that the invervivos trust be revocable or contain a general power of appointment.

g. Statutory Forms. See Appendix A for a copy of the permissive statutory form incorporated into the Durable Power of Attorney Act. The Act specifically states that the form is not exclusive and that other forms of power of attorney may be used. The form itself is based on the Uniform Statutory Form Power of Attorney Act and is fairly short. It lists the powers a principal may desire to grant to an agent with each area identified by a letter of the alphabet (for example, real property transactions are identified by (A), (B) is tangible personal property, (C) is stock and bond transactions, etc.). The Principal is instructed that any power crossed out will be withheld. If no power of crossed out, the document shall be construed as a general power of attorney. There is also a section for the principal to describe in more specificity the limitations or extensions of the authority he is granting to the agent. The powers relating to the categories set forth in (A) through (M) of the statutory form are described in detail in the sections of the Durable Power of Attorney Act following the statutory form. If a category is checked, the agent will have the powers described in the Act for that category. The principal then decides whether the power is to be effective immediately or effective only on subsequent disability by

crossing out the alternative not chosen. If neither alternative is crossed out, the form states that it is assumed that the power is effective immediately.

3. **Third Party Acceptance.** As a practical matter, powers of attorney are effective only to the extent that they are accepted by the third parties (such as banks, title companies and transfer agents) with whom the agent must deal on behalf of the principal. The Durable Power of Attorney Act deals with this problem by providing that, if acts were undertaken in good faith reliance on a durable power of attorney, an affidavit executed by the agent stating that the agent did not have at the time of the exercise of the power actual notice of its termination would be conclusive proof as between the agent and the party with whom the agent is dealing of the non-termination of the power. If the power is a springing power, an affidavit executed by the agent stating that the principal is disabled or incapacitated as defined in the power is also conclusive proof, as between the agent and the third party of the disability or incapacity of the principal at that time. Note that the conclusive proof is only between the agent and the third party. If the agent has executed such affidavit in connection with abusing the agent's authority under the durable power of attorney, the principal still has recourse against the agent notwithstanding the affidavit that the durable power of attorney was in effect at the time.

4. **Staleness.** The Texas Durable Power of Attorney Act states that a durable power of attorney does not lapse because of the passage of time unless a time limitation is specifically stated in the instrument creating the durable power of attorney. The purpose of this language is to combat the policies of some banks, insurance companies, title companies, brokerage firms and other third parties not to honor a power of attorney more than a certain number of years after its execution. This practice may make sense with a non-durable power of attorney, but the essence of a durable power of attorney is that the principal intends for the agent's authority to extend indefinitely into the future.

5. **Third Party Acceptance in Other Jurisdictions.** Generally, the laws of the state where a durable power of attorney is executed will control the validity of the power. However, there is some authority to the effect that the validity of a durable power of attorney affecting real property will be governed by the state

where the real property is located. If multi-state transactions involving real property are contemplated, the drafter of a durable power of attorney should prepare the power of attorney so that it complies with the laws of the various states where the principal's real property is located. Another option is to prepare a different power of attorney for each state containing real property belonging to the principal. See Schlesinger, Planning for the Elderly or Incapacitated Client, AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL NOTES (1991).

6. Protecting Against Abuses. Since a durable power of attorney in the hands of the wrong person has tremendous potential for abuse, the principal should choose his or her agent with great care. The drafter should specifically advise the principal of the risks involved by describing the extent of the agent's authority under the power of attorney. If the situation warrants it, drafting safeguards such as the following may be included in the instrument creating the durable power of attorney:

a. appointing more than one agent and requiring that the agents act jointly;

b. permitting one who is not an agent to terminate the authority granted under the durable power of attorney;

c. requiring periodic accountings and advance notice of certain actions to one who is not an agent, but who is granted veto power; and

d. authorizing the agent to do nothing more than to fund on the principal's disability an already existing revocable trust established by the principal. An added precaution would be to have a corporate trustee of such trust.

In many situations, such safeguards may not be practical. If it is necessary to use one or more of such safeguards, the attorney should inquire as to whether the principal has selected a person trustworthy enough to serve as agent.

7. Agent's Duty to Inform and Account. Recent additions to the Durable Power of Attorney Act have made it clear that an agent is a fiduciary and has a

duty to inform and account for actions taken pursuant to the power of attorney. (See Section 489B of the Texas Probate Code which was added in 2001.) An agent must maintain records of each action taken under the power of attorney and must be prepared to account to the principal when the principal demands such an accounting.

8. Revocation and Termination of a Durable Power of Attorney. A durable power of attorney may expressly state that it will terminate on a certain date or upon the happening of a certain event. Otherwise, the validity of a durable power of attorney will not be affected by the lapse of time. The revocation of a durable power of attorney will not revoke the agent's authority with respect to the agent or any other person who acts in good faith reliance on the durable power of attorney without actual notice of its revocation.

a. Revocation by the principal. There is no statutorily mandated method for revocation. The Durable Power of Attorney Act states that, unless otherwise provided by the durable power of attorney, a revocation is not effective as to a third party relying on the power of attorney until the third party receives actual notice of the revocation. The drafters of the legislation felt that the principal is in the best position to know the makeup of his property and the best way to notify those third parties with whom an agent may be dealing that the power of attorney has been revoked. The one thing to remember is, the more work a revocation mechanism requires a third party to do, the less likely the third party will be inclined to accept the power of attorney.

b. Termination on the death of the principal. In accordance with agency law, the durable power of attorney automatically terminates on the death of the principal.

c. Termination by appointment of guardian. The Durable Power of Attorney Act provides that, if a permanent guardian of the estate is appointed for the principal, the powers of the attorney-in-fact or agent shall terminate upon the qualification of the guardian, and the attorney-in-fact or agent shall deliver to the guardian all assets of the estate of the ward in his possession and shall account to the guardian as he would to his

principal, had the principal himself terminated the power of attorney. If a temporary guardian is appointed, the court may suspend the powers of an agent until the expiration of the temporary guardianship.

The fact that the qualification of a guardian terminates all powers of the agent under a durable power of attorney emphasizes how important it is for continuity of administration of the principal's assets to coordinate the naming of an agent under a durable power of attorney with the designation of a guardian in a declaration of guardian under the new Section 679 of the Texas Probate Code.

9. Springing Powers. The Durable Power of Attorney Act authorizes the creation of "springing powers"-- powers that are not currently exercisable but which will become exercisable upon the occurrence of a future event, such as the principal's incapacity or disability.

The Durable Power of Attorney Act allows for springing powers if the document evidencing the durable power of attorney includes words to the effect that "this power of attorney becomes effective on the disability or incapacity of the principal."

A springing power is often desired by a client who is in good health and who may not want to grant to an agent immediate broad powers over his or her property. The idea of a springing power appeals to these clients who still wish to provide for a method of handling their property in the event of a future disability.

When an agent's authority is triggered by the onset of the principal's disability, it will be necessary to arrive at a definition of disability. This, of course, should be addressed in the instrument. The drafter should keep in mind that incapacity need not be limited to the principal's mental incompetency. For example, the New Jersey springing power of attorney statute provides that a principal will be considered under a disability if the principal is unable to manage his or her property and affairs effectively for reasons such as "mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance." N.J. Stat. Ann. §46:2(b)8(a). See Schlesinger, Planning for the Elderly or Incapacitated Client, AMERICAN COLLEGE OF TRUST AND

ESTATE COUNSEL NOTES (1991).

After disability has been defined, the instrument should then outline a procedure or mechanism for objectively certifying the onset of the disability. The method widely used for establishing the incompetency of the principal is by written certification of one or more doctors who have examined the principal.

The default definition of disability, as provided in the statutory form, states that the principal shall be considered disabled or incapacitated if a physician certifies in writing at a date later than the date of the power of attorney, that the principal is mentally incapable of managing his or her financial affairs.

An alternative for clients desiring a springing power because they are reluctant to name an agent with immediate authority to deal with their property because they don't know anyone they trust to have this power may be the use of a durable power of attorney in conjunction with an unfunded revocable trust. The only authority granted to the agent under the durable power of attorney would be to fund, upon the principal's disability, a revocable trust previously established by the principal. The present exercise of the durable power of attorney poses no threat to the principal and yet the mechanism for handling the principal's property in the event of disability is in place.

10. Use of Durable Power of Attorney with a Revocable Trust. Even if a client decides to use a funded revocable trust to manage his or her assets, the client should be encouraged to consider also executing a durable power of attorney granting an agent the powers a trustee will not normally possess because the trustee's powers are limited to the assets actually transferred to the trust. Such powers not usually possessed by a trustee include the authority to gain access to the principal's safe deposit box, to sign the principal's tax return, to participate in tax proceedings involving the principal, and to handle matters affecting the principal's personal business such as redirecting the principal's mail and canceling or continuing credit cards. See Collin, Planning and Drafting Durable Powers of Attorney (American College of Probate Counsel Annual Meeting, March 1989).

II. MEDICAL POWERS OF ATTORNEY

A. Background. Chapter 166 of the Health and Safety Code includes provisions

relating to advance directives, such as the directive to physicians, out-of-hospital do-not-resuscitate orders, and the medical power of attorney. (See Appendix B for a copy of the statutory form for the Medical Power of Attorney). Under a medical power of attorney, an agent may make any health care decision on the principal's behalf that the principal could make if the principal were competent.

B. Who May Act as Agent. The principal may appoint as agent any individual 18 years of age or older (or a person under 18 years of age who has had the disabilities of minority removed). A person may not exercise the authority of an agent while such person serves as the principal's health or residential care provider or as an employee of the principal's health or residential care provider, unless such person who is an employee of the principal's health or residential care provider is related to the principal.

C. Requirements for a Valid Medical Power of Attorney:

1. **Principal must be an adult.** The individual executing the health care power must be a person 18 years of age or older or a person under 18 years of age who has had the disabilities of minority removed.

2. **In Writing.** The health care power must be in writing and signed by the principal (or by another at the principal's direction and in his presence).

3. **Witnessed.** The health care power must be executed in the presence of at least two or more subscribing witnesses. Each witness must be an adult and at least one witness must be a person who is not one of the following: the agent named in the medical power, a person related to the principal by blood or marriage, any person entitled to any part of the principal's estate on the principal's death under a will or deed in existence or by operation of law, the attending physician, an employee of the attending physician, an employee of the principal's health care facility if the employee is providing direct patient care to the principal or is an officer, director, partner, or business office employee of the health care facility or of any parent organization of the health care facility, or any other person who, at the time the medical power of attorney is executed, may have a claim against the principal's estate.

D. Acting Under the Medical Power of Attorney. The agent can act only after the

principal's attending physician certifies that, based on the attending physician's reasonable medical judgment, the principal is "incompetent," meaning lacking the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to a proposed treatment decision. A health care decision is defined as consent, refusal to consent, or withdrawal of consent to health care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition. The certification must be in writing and filed in the principal's medical record.

1. **Agent's Responsibilities.** Once the medical power of attorney is in effect, the agent should make health care decisions for the principal, after consultation with the principal's health care providers, based on the agent's knowledge of the principal's wishes, taking into account the principal's moral and religious beliefs. If the agent is not aware of the principal's wishes, the agent may make a decision based on the agent's determination of what is in the principal's best interests. The principal's health or residential care provider shall follow the agent's instruction to the extent they are consistent with the desires of the principal and the medical power of attorney. If the principal's health or residential care provider finds it impossible to follow an agent's directive because of a perceived conflict with the medical power of attorney or the statutes relating to the medical power of attorney, the agent should be informed of such as soon as possible and the agent may select another attending physician. The attending physician is under no obligation to ascertain that the agent's instructions are consistent with the principal's wishes or religious or moral beliefs. If an attending physician refuses to honor a patient's medical power of attorney, the physician's refusal shall be reviewed by an ethics or medical committee.

2. **Restrictions on Agent's Decision-Making.** The agent cannot consent to: voluntary inpatient mental health services, convulsive treatment, psychosurgery, abortion, or neglect of the principal through the omission of care primarily intended to provide for the comfort of the principal.

E. Liability for Health Care Costs. Liability for health care costs is the same as if the health care were provided as a result of the principal's decision. The agent has no liability for such costs solely as a result of acting as agent.

D. **Revocation.** The principal may revoke the medical power of attorney at any time orally, in writing, or by any other act evidencing a specific intent to revoke the medical power of attorney, without regard to the principal's competency or mental state. The execution of a subsequent medical power of attorney will revoke the previously executed medical power of attorney.

1. **Divorce.** If a spouse has been named as agent, a subsequent divorce will revoke the medical power of attorney, unless the medical power of attorney provides otherwise.

2. **Effect of Guardianship.** If a guardianship is opened, the court shall determine whether to suspend or revoke the authority of the agent appointed in a medical power of attorney. The court shall consider the principal's preferences as expressed in the medical power of attorney. A person who does not have actual knowledge of the appointment of a guardian for the principal is not subject to criminal or civil liability for implementing an agent's health care decision.

G. **Conflict With Other Instruments.** If there is a conflict between a medical power of attorney and another advanced directive, such as the directive to physicians, the instrument executed later in time controls.

H. **If No Medical Power of Attorney Has Been Executed.** Chapter 313 of the Health and Safety Code outlines who may consent to medical treatment on behalf of an incapacitated patient if no agent is acting for such patient under any other specified statutory provisions. In such a case, an adult surrogate from the following list, in order of priority, may consent to medical treatment on behalf of a patient who is mentally or physically incapable of communication:

1. the patient's spouse;
2. an adult child of the patient who has the waiver and consent of all other qualified adult children of the patient to act as the sole decision-maker;
3. a majority of the patient's reasonably available adult children;
4. the patient's parents; or
5. the individual clearly identified to act for the patient by the patient before the patient became incapacitated, the patient's nearest living relative or a member of the clergy.

III. DIRECTIVE TO PHYSICIANS

A. Advance Directives Act. The Advance Directives Act, contained in Chapter 166 of the Texas Health and Safety Code, authorizes the use of written and oral instructions to a person's physician directing that artificial means not be used to extend the natural process of dying (referred to herein as directive to physicians or directive). The individual issuing this directive to physicians will be referred to as the declarant. TEXAS HEALTH AND SAFETY CODE ANN § 166.031 et. seq.

B. Written Directive. A competent adult individual may execute a directive to physicians in the presence of two witnesses, at least one of whom must be a witness who is not one of the following: the agent named in the directive, a person related to the declarant by blood or marriage, any person entitled to any part of the declarant's estate on the declarant's death under a will or deed in existence or by operation of law, the attending physician, an employee of the attending physician, an employee of the declarant's health care facility if the employee is providing direct patient care to the declarant or is an officer, director, partner, or business office employee of the health care facility or of any parent organization of the health care facility, or any other person who, at the time the medical power of attorney is executed, may have a claim against the declarant's estate. While there is a suggested statutory form, its use is not mandatory. (See Appendix C for a copy of the permissive statutory form). A directive to physicians may be executed on behalf of a minor (a person younger than 18 years of age) who is a "qualified patient" by the minor's spouse (if the minor's spouse is an adult), the parents of the minor, or the minor's legal guardian. A minor would be a "qualified patient" if the minor has a terminal or irreversible condition (as defined below) that has been diagnosed and certified in writing by the minor's attending physician. Notwithstanding the existence of a directive to physicians executed on behalf of a minor, as with a directive executed by an adult, the expressed desires of the minor will supersede any such directive.

C. Oral Directive. An adult who has a terminal or irreversible condition (as defined below) may issue an oral directive to the attending physician and to two witnesses, at least one of whom must be a witness who is not one of the following: the agent named in the directive, a person related to the declarant by blood or marriage, any person entitled to any part of the declarant's estate on the declarant's death under a will or deed in existence or by operation of law, the attending physician, an employee of the attending physician,

an employee of the declarant's health care facility if the employee is providing direct patient care to the declarant or is an officer, director, partner, or business office employee of the health care facility or of any parent organization of the health care facility, or any other person who, at the time the medical power of attorney is executed, may have a claim against the declarant's estate. The physician must note the existence of the directive in the declarant's medical record and include the names of the witnesses.

D. **Notification of Attending Physician.** A declarant should notify the declarant's attending physician of the existence of a written directive. If the declarant is not capable of communication, another person, on behalf of the declarant, may notifiy the attending physician of the existence of the directive. The attending physician shall make the directive a part of the declarant's medical record.

E. **Definition of Terminal Condition.** Section 166.002(13) of the Health and Safety Code defines "terminal condition" as an incurable condition caused by injury, disease, or illness that according to reasonable medical judgment will produce death within six months, even with available life-sustaining treatment provided in accordance with the prevailing standard of medical care. A person admitted to a hospice program is presumed to have a terminal condition.

F. **Definition of Irreversible Condition.** Section 166.002(9) of the Health and Safety Code defines "irreversible condition" as a condition, injury, or illness that may be treated, but is never cured or eliminated, that leaves a person unable to care for or make decisions for the person's own self, and that, without life-sustaining treatment provided in accordance with the prevailing standard of medical care, is fatal.

G. **Definition of Life-Sustaining Treatment.** Section 166.002(10) defines "life-sustaining treatment" as treatment (including life-sustaining medications and artificial life support) that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die. The term includes artificial nutrition and hydration, but does not include the administration of pain management medication or the performance of a medical procedure considered to be necessary to provide comfort care, or any other medical care provided to alleviate a patient's pain.

H. **Designation of Agent.** The statutory form does not include the option of naming an agent to make decisions for the declarant if the declarant if incapable of

communication. Since the use of the statutory form is permissive, an agent may be appointed in a form of a directive other than the statutory form. For obvious practical reasons, any appointment of an agent under the directive to physicians should be coordinated with the declarant's medical power of attorney.

I. **Not Valid if Declarant is Pregnant.** The directive is invalid and of no effect if the declarant is pregnant. TEXAS HEALTH AND SAFETY CODE §166.049.

J. **Effect of Directive.** An attending physician who has knowledge of the existence of a directive shall, provide for the declarant's certification as a qualified patient (as defined above) on the diagnosis of a terminal or irreversible condition (both defined above). Before withholding or withdrawing life-sustaining procedures, the attending physician must determine that the steps taken are in accord with the provisions of the Advance Directives Act relating to Directives to Physicians and the patient's existing desires. An attending physician is subject to review and disciplinary action by the appropriate licensing board for failing to follow a qualified patient's directive. If an attending physician refuses to comply with a directive or treatment decision and does not wish to have such decision reviewed by an ethics or medical committee, life-sustaining treatment shall be provided to the patient, but only until a reasonable opportunity has been afforded for the transfer of the patient to another physician or health care facility willing to comply with the directive. An attending physician may elect to have the refusal to honor a patient's directive reviewed by an ethics or medical committee. While the attending physician's actions are being reviewed by the ethics or medical committee, the patient shall be given life-sustaining treatment. If the attending physician, the patient, or the person responsible for the patient's health care decisions does not agree with the committee's decision, the physician shall make a reasonable effort to transfer the patient to a physician who is willing to comply with the directive. If the patient is requesting life-sustaining treatment that the attending physician and the committee have determined is inappropriate, the patient shall be given available life-sustaining treatment pending transfer to another physician and facility. The patient is responsible for any costs associated with the transfer to another facility. The physician and health care facility are not obligated to provide life sustaining treatment after the 10th day after the committee's written decision is provided to the patient of the person making the health care decisions for the patient. This time frame can be expanded by a court

upon the application of the patient of the person responsible for the patient's health care decisions.

K. **Revocation.** A declarant, competent or not, may revoke a directive at any time. This may be done by the declarant's destroying the directive (or someone else may destroy the directive at the declarant's request and under the declarant's direction), by signing and dating a written revocation, or by the declarant's orally stating an intent to revoke the directive. The revocation is effective only when the attending physician is notified of the revocation. The attending physician shall record in the declarant's medical record the time and date the attending physician received notice of the revocation and shall mark "VOID" on each page of a directive in the declarant's medical record.

L. **Directive to Physician on Reverse Side of License.** Section 521.125(1)(B) of the Texas Transportation Code provides that on the reverse side of each driver's license shall be printed "Directive to Physician has been filed at tel. #" followed by a line that the holder of the license may use to indicate the appropriate telephone number.

IV. DECLARATION OF GUARDIAN IN THE EVENT OF LATER INCAPACITY OR NEED OF GUARDIAN.

A. Designation of Guardian Before Need Arises. Section 679 of the Texas Probate Code allows a competent adult to name an individual to act as guardian of his or her person and/or estate in the event of later incapacity. A declarant may also in the declaration disqualify certain individuals from ever serving as the declarant's guardian. The disqualified persons may not be appointed as declarant's guardian under any circumstance.

B. Requirements of Declaration. The designation, called a declaration of guardian in the event of later incapacity or need of guardian, must be either wholly in the handwriting of the declarant, or in writing and attested to by at least two credible witnesses 14 years of age or older who are not named as guardian or alternative guardian in the declaration.

1. A self-proving affidavit, signed by the declarant and the witnesses and

acknowledged before a notary public must be attached to the declaration.

2. A form for the declaration is set forth in the Texas Probate Code at § 679(i). A copy is attached as Appendix D. The statutory form may, but need not, be used.

3. The declaration and self-proving affidavit 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.

C. Effect of Declaration. Unless the court finds that the person designated is disqualified from serving as guardian or would not serve the best interests of the ward, the court shall appoint the designated person as guardian in preference to others who might be entitled to priority. If the declarant designates the declarant's spouse to serve as guardian and the declarant is subsequently divorced from that spouse before a guardian is appointed, the designation of the declarant's spouse is not effective.

D. Revocation. The declarant may revoke the declaration in any manner provided in Section 63 of the Texas Probate Code for the revocation of a will, including the subsequent reexecution of a declaration in accordance with the requirements of Section 679 of the Texas Probate Code.

V. APPOINTMENT OF AGENT TO CONTROL DISPOSITION OF REMAINS.

A. Written Instructions. Section 711.002(g) of the Texas Health and Safety Code provides that a person may leave written directions for the disposition of the person's remains in a will, a prepaid funeral contract or a written instrument signed and acknowledged by such person. The statute further states that these directions shall be carried out to the extent that the person's estate or the individual controlling the disposition of such person's remains is financially able to do so. If the directions are in a will, they shall be carried out immediately without probate. If the will is not probated or is declared invalid for testamentary purposes, the directions are valid to the extent that they have been acted upon in good faith.

B. Statutory Form Appointing Agent to Control Disposition of Remains. The Texas legislature developed a statutory form (See Appendix E for copy) in which a

person may name an agent to control the disposition of such person's remains. Any written instructions outside of such person's will or a prepaid funeral contract entered into by such person, should be in substantially the same form as the statutory form. The written instructions maybe modified or revoked only by a subsequent written instrument that complies with the statute.

C. **If No Written Instructions.** Unless a person has left written instructions providing for the disposition of such person's remains, the following individuals, in the order named, shall have the right to control disposition of such person's remains, shall inter the remains, and will be liable for the costs of interment:

1. the person designated in a written instrument signed by the decedent;
2. the decedent's surviving spouse;
3. any one of the decedent's surviving adult children;
4. either one of the decedent's surviving parents;
5. any one of the decedent's surviving adult siblings; or
6. any adult person in the next degree of kinship in the order named by law to inherit the estate of the decedent.

VI. ETHICAL CONSIDERATIONS: THE INCAPACITATED CLIENT

A. **Scope of Representation.** State Bar Rule 1.02(g) requires a lawyer to take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client. The State Bar Rules recognize that a client under a disability may or may not be able to consent, as required under State Bar Rule 1.05 regarding confidentiality of information, to the lawyer's revealing to the court confidential information reasonably necessary to obtain the appointment of a guardian for the client. In such a situation, State Bar Rule 1.05(c)(4) authorizes the lawyer to reveal the

information necessary to comply with Rule 1.02(g). According to Comment 13 to State Bar Rule 1.02(g), if a legal representative has already been appointed for the client, the lawyer should look to the representative for decisions on behalf of the client.

B. Communications With a Client Under a Disability.

State Bar Rule 1.03 provides that a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. In addition, a lawyer should explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Comment 5 to State Bar Rule 1.03 states that a lawyer representing a client under a disability should seek to maintain reasonable communication insofar as possible. Comment 5 further notes that, to an increasing extent, the law recognizes intermediate degrees of competence. Certain clients, while under a disability, may have the capacity to understand, deliberate upon, and reach conclusions about some matters affecting his or her well-being. In any event, the fact that a client is under a disability does not relieve the lawyer from the responsibility of treating the client with attention and respect.

VII. CONCLUSION.

Though it is convenient to have the various statutory forms to aid in the estate planning process, the estate planner must not forget that each client is different and that careful thought must be given to tailor these forms to the client's specific needs and goals. Through the use of these statutory forms and a will or living trust arrangement, the client has the ability to take control of the most personal decisions affecting his or her property and health. This not only provides a sense of empowerment and peace of mind to the client, but also helps the client's loved ones during difficult times because they can take comfort from the fact that they are able to participate in carrying out the client's wishes.