

**JUST IN CASE: PLANNING FOR MENTAL OR PHYSICAL DISABILITY:
TWENTY QUESTIONS AND ANSWERS FROM AN ATTORNEY**

1. **What is an Incapacitated Person?**
An adult, who because of a physical or mental condition, is substantially unable to feed, clothe or shelter himself/herself, to care for his/her physical health, or to manage his/her financial affairs.
2. **Who determines if my loved one is “substantially” unable to perform these tasks?**
Beyond age eighteen, we are all presumed to have mental capacity regardless of our actual ability to manage our business and personal affairs. So, even when your doctor informs you that your loved one is “incapacitated”, that is not a LEGAL determination of incapacity.
3. **How can the presumption of capacity be legal overturned?**
A court-ordered legal Guardianship from a court of jurisdiction overturns the presumption. The documents of legal planning PRIOR to incapacity are preferable to an expensive and time-consuming legal Guardianship.
4. **When is it too late to plan for possible incapacity?**
That is the “\$64.00” question... We don’t know how much time we have to plan. However, with the dementias, it is possible AT AN EARLY STATE to reach a time when the ability to execute a legal document is impaired or does not exist?
5. **What factors must be present in order for a competent and willing person to execute a legal document?**
Generally, the person, in the presence of the document, witnesses and a notary (if required) must have sufficient ability to read (or have the document read) and understand the nature of the document, be willing to sign it, agree to any agent or agents appointed in the document AND actually sign and execute the document in the presence of witnesses and a notary (if required). All factors must be present at the same time.
6. **What is a Durable Power of Attorney/**
A durable power of attorney is any document executed that authorizes another person to act as an agent or surrogate AND the document STAYS IN EFFECT after it is executed (at a time when the person has mental capacity) even with the later onset of incapacity of the principal.
7. **What happens to a power of attorney when I die?**
Generally, a power of attorney expires at death...IF the document was used to access a bank account or accounts, these accounts are usually closed at the principal’s death until the bank receives notice and proper documentation as to the disposition of the testamentary estate. If an account is Pay On Death to a certain beneficiary (s), a death certificate is generally sufficient to release the proceeds at death...
8. **Do I have any rights left if I sign a power of attorney for business purposes?**
A power of attorney, whether medical or for business purposes, does not remove any rights of the person who executes the document.
9. **If I have a spouse, why do I need a medical power of attorney?**
Life is more complicated today. Hospitals and doctors can no longer be certain your spouse is the person you have appointed to make health decisions on your behalf, if you are unable to indicate consent or withdraw consent to medical treatment...

10. **What happens if I don't have the medical documents and I go to the hospital in an emergency?**
You will not be denied medical treatment in an emergency and, even without a power of attorney, if no one objects, your spouse or nearest relative can make decisions for you.
11. **What if I am a widow(er) and have several children?**
A power of attorney for medical purposes will probably make treatment go more smoothly if you can not make the decisions for yourself. IF one person can make the decisions necessary for you, you can be more assured that the person YOU choose will be making the decisions you would make for yourself.
12. **What is a Directive to Physicians?**
A Directive to Physicians deals with end of life decision-making. Our Texas form is excellent and allows us choices when confronted with terminal illness or an irreversible condition.
13. **Are there any other "end of life" documents, I should know about?**
Texas has three medical documents: the medical power of attorney, the directive to physicians and the Out-of-Hospital Do Not Resuscitate document. The Out of Hospital document is not an advance directive and is supportive other documents. It is a request that aggressive treatment cease and all care be palliative only.
14. **How often should I review my Last Will and Testament? Let's see, I think I DO have one...but where is it?**

Great questions! Reviewing a will is just as important as our annual physical exam... Our family situations change. Review your will whenever one of your beneficiaries or executors die or have a change in circumstance OR whenever you change your mind and wish to make other choices... A will is not a will if it can not be found after your death... Keep it in a safe place.
15. **Can I just use one of those fill in the blank forms and get it notarized?**
A fill in the blank WILL generally can not be probated in a County or Probate Court. Probate is the court process used to certify that this is your LAST will and testament so that I can transfer property to your heirs named in your will.
16. **Can I disinherit my natural heirs?**

Yes
17. **Is there a worksheet I can use to design my will, possible powers of attorneys for medical purposes and other advance documents?**
Yes, these are available from several sources. Make sure you are designing TEXAS documents if you are a Texas resident. The worksheet not only helps you but also the attorney drafting your documents.
18. **I hear there is a document called Appointment of Agent To Control Disposition of Remains. I made my burial and funeral arrangements. Why would I need such a document?**

Increasingly, funeral homes are nervous about who is in charge of your remains. They must deal with a person with authority to put the process in motion even if you have already made your arrangements.

19. **What if I don't have a Disposition of Remains document?**

It has been my experience, that some funeral homes will request a copy of your Will (prior to Probate) and are willing to deal with the person they believe will be appointed your Independent Executor...Eventually, some attorney will inform them that the Independent Executor is not actually appointed until the Will is admitted to Probate.

20. **This sounds so complicated. Are there attorneys that concentrate in the area of Elder Law?**

Yes, there is so much support out there for you and for your family... Contact your local bar association or the National Association of Elder Law Attorneys at www.naela.org. You can find Elder Law Attorneys for your state and city.

Courtesy of Rosemary Redmond, Attorney

TEXAS GUARDIANSHIP GLOSSARY

Agent	One who has permission to act.
Attorney Ad Litem	A lawyer appointed by the court to represent the potential ward during the guardianship proceeding. Serves as disinterested person for an objective investigation.
Bond	An insurance policy required by the court in an amount set by the judge to cover the assets of the estate.
Conservatee	A minor being protected.
Conservator	Legally appointed protector, preserver of a minor.
Conservatorship	A legal relationship between the conservator and the conservatee.
Durable Power of Attorney	A document executed authorizing another person to act as agent which continues in effect upon the onset of incapacity of the principal.
Estate	Denotes the real and personal property of a ward.
Fiduciary	A person or entity to whom property management or other responsibility is entrusted.
Guardian	A person who is appointed by the probate court to protect the property and/or person of one who Does not have capacity to protect his or her own Interests.
Guardian Ad Litem	A disinterested person who is appointed by the court on behalf of the ward to represent the Ward's best interest.
Guardian of the Estate	A person or entity who is responsible for managing the financial affairs of the ward, e.g., paying the bills, collecting benefits, selling property.
Guardian of the Person	A person who is responsible for and who advocates for the health, well-being and personal needs of the ward.
Incapacitated Person	An adult, who because of physical or mental condition, is substantially unable to feed, clothe, or shelter himself/herself, to care for his/her physical health, or to manage his/her financial affairs.
Letter of Guardianship	An official letter issued by the County Clerk's office which is Written evidence of the appointment and authority of the guardian to act for the ward.
Oath	A sworn statement made by the guardian in writing in which he or she wears to fulfill their obligation.
Probate	Relating to a matter or proceeding involving a guardianship or an estate of a decedent.
Payee	A person who receives and disburses the ward's Social Security income or SSI outside of the jurisdiction of the court.
Probable Cause	A reasonable ground for supposing that an allegation is well founded.
Principal	The person from who an agent's authority is derived.
Surrogate	One appointed to act in place of another.
Testator	A person who dies leaving a Will.
Trust	A legal method used to manage and distribute property without a guardianship.
Ward	A person who has been found some measure of incapacity
Guardian of the Person and of the Estate	A person who acts in both capacities of a ward