

PARENTING YOUR AGING PARENTS – LEGAL ISSUES

INTRODUCTION

The transition from one generation to another presents a large number of legal issues, and the program outline lists the most obvious and significant ones. My objective is to raise and address some of the more common issues and, in doing so, persuade you to believe three things:

1. **There is no second chance,**
2. **Planning makes a difference,** and
3. The issues quickly become very complicated so **professional advice will be necessary**, including but not limited to the fields of medicine, accounting, law, financial planning and investment, insurance, and social service.

PROPERTY TRANSFER

Property is going to pass from one generation to another. The question is, “What are the consequences?” Planning ahead and choosing the timing and the vehicle have an impact on who gets what, how much, when, what the expenses are, how long it takes, how much trouble it is, how many arguments there are, and the liability for estate, inheritance and generation skipping transfer taxes, as well as income taxes.

A **Will** is the basic estate transfer vehicle in Texas. In some situations a **revocable trust**, popularly called a living trust, is an alternative. Such situations are where incapacity of the individual is probable, where a Will contest can be expected or where privacy is a major priority. A revocable trust provides no advantage over a Will for estate, inheritance and generation skipping transfer tax liability and overall cost. In states where the probate process is long and expensive, such as California, a revocable trust is attractive because it transfers property outside of probate. Unfortunately for Texas consumers, revocable trusts are pushed onto the public using misinformation and fear by persons who are often under-informed and more interested in the sale of their particular product than they are providing professional advice. **Gifts** are generally made to provide assistance, for tax avoidance and to anticipate Medicaid qualification. A very common mistake is to blindly make gifts usually in fear of probate. One consequence is the loss of the step up in the basis of property that occurs upon the death of the owner. Another consequence is disqualification from Medicaid benefits. **Multiple party accounts** (Texas Probate Code, Chapter XI) are basically for financial management but they can also be used to transfer assets, such as a **joint account with right of survivorship** (Texas Probate Code, Section 439) and a **pay on death** account (Texas Probate Code, Section 446). The **convenience account** is particularly apropos for managing the account of a parent. Texas Probate Code, Section 438A. Even if the estate plan is to avoid probate, it is prudent to have a Will. Other than the fact that they have become a scam, the biggest problem with revocable trusts is that the Grantors fail to properly transfer their assets to the trustee. Without a Will the un-transferred assets would have to pass by intestate succession. A transfer can only be accomplished by use of the appropriate instrument such as an assignment, change of account holder or deed.

INCAPACITY

It is virtually certain that a person will be incapacitated for a period of time, even if it is only for the several hour period of a medical procedure. Someone with Alzheimer's could be incapacitated for years. The questions are, "Who will make the decisions for the incapacitated person?" and "Will the agent's authority be honored?". Although we think of people being incapacitated or not, Incapacity is a matter of degree or nature of activity. No one wants to be declared incapacitated and the courts and medical doctors are loathe to do it. In fact the philosophy of the Texas Probate Code in granting an application for guardianship is to provide for the least interference with the ward's rights. Therefore, if the elder's incompetence is financial management that will be the extent of the authority of the guardian.

Substitute decision making is divided into two general areas: financial and personal.

Financial. Planned substitute financial decision making is provided by a **Revocable Trust, Durable Power of Attorney** (Texas Probate Code, Chapter XII) and **multiple party accounts** (Texas Probate Code, Chapter XI). In these contracts persons are able to select whom they wish to manage their financial affairs during their incapacity. While revocable trusts are expensive and complicated, durable powers of attorney and multiple party account agreements are basically statutory fill-in-the-blank forms. Multiple-Party Account Form, Texas Probate Code, Section 439A Durable Power of Attorney Form, Texas Probate Code, Section 490 There are two huge risks to a financial power of attorney. One is that the agent will abuse the power and the other is that the financial institution will not honor it. A solution to the first problem is to appoint co-agents, requiring that they act together, with the expectation that they will keep each other honest. A solution to the second problem is to visit the various financial institutions after the power is signed and obtain their commitment to accept it. Unplanned substitute financial decision making is provided by a **Guardianship of the estate**. Texas Probate Code, Chapter XIII. A guardian is selected by the court after a process of pleading, notice, hearing, order, possible appeal and posting of a bond which is followed by annual reporting and a final report. It is a time consuming and expensive process. While competent, a person can execute a Designation of Guardian just as one would do for minor children in a Will. Texas Probate Code, Section 679A. But, as with a guardian of children, the designation is really just a nomination or statement of preference; the Court will do what it in the best interest of the Ward.

Proof of incapacity may or may not be required depending upon the contract. When it is required, a letter from a physician will usually suffice. Proof may or may not be required for a revocable trust. It will be required for a statutory durable power of attorney. Proof will not be required for multiple party accounts. Proof will be required for a guardianship. It is good practice to acquaint your financial institutions with your revocable trust and durable power of attorney to make sure that it is acceptable to them before incapacity makes it impossible to meet their requirements. The authority of a power of attorney terminates automatically when the principal becomes incapacitated unless it is a durable power of attorney. A durable power of attorney states that it is not affected by the principal's subsequent disability or incapacity. The authority of a durable power of attorney terminates automatically when the principal dies. The authority of a durable power of attorney also terminates when a guardian is appointed.

Medical. Planned substitute medical decision making is provided by a **Medical Power of Attorney, Advance Directive, Out of Hospital Do Not Resuscitate Order, declaration of Anatomical Gift and Appointment of Agent to Control Disposition of Remains.** All except for the declaration of Anatomical Gift and DNR Order are statutory fill-in-the-blank forms. In those two cases, a standard form or criteria is specified but not provided by statute. A Medical Power of attorney provides for the appointment of a substitute decision maker for medical care. Health & Safety Code, Section 166.164. An Advance Directive provides a statement of treatment preference in two defined circumstances, Terminal Condition and Irreversible Condition. Health & Safety Code, Section 166.033. The choice is basically between comfort care and available life-sustaining treatment. An Out of Hospital Do Not Resuscitate Order directs health care professionals acting in an out-of-hospital setting not to initiate or continue certain listed life sustaining treatment. Health & Safety Code, Section 166.081(6). An anatomical gift declaration can be made in any document but the criteria are defined by statute. Health & Safety Code Section 692.003. The Appointment of Agent to Control Disposition of Remains does just what it says. Health & Safety Code, Section 711.002(b).

Unplanned substitute medical decision making is provided by a Guardian of the person and by various statutes according to a list of seniority: medical treatment (Health & Safety Code, Section 31.004, Advance Directive (Health & Safety Code, Section 166.039), Out of Hospital DNR Order (Health & Safety Code, Section 166.88), anatomical gift (Health & Safety Code, Section 692.004), and disposition of remains (Health & Safety Code, Section 711.002(a)) The appointment of a guardian may terminate the authority of an agent. Health & Safety Code, Section 166.156.

If an individual has elected hospice care, make sure that everyone on site understands not to call EMS. The charge of EMS is to stabilize and transport the patient to the hospital for treatment and they will not be dissuaded. A police officer will likely be dispatched to the scene of any EMS call to provide assistance which may be to restrain a person trying to dissuade EMS.

The most effective planning is to communicate desires clearly and publicly to the nearest family members, and obtain their commitment to respect the decisions. Despite the best planning and communication it is not unusual that, when the time comes, a family member dissents or the wishes are frustrated by hospital protocol or the treating physician.

RIGHTS OF THE ELDERLY

Section 102.003 Rights of the Elderly (Human Resources Code)

- (a) **An elderly individual has all the rights, benefits, responsibilities, and privileges granted by the constitution and laws of this state and the United States, except where lawfully restricted. The elderly individual has the right to be free of interference, coercion, discrimination and reprisal in exercising these civil rights.**
- (b) **... . This means that the elderly individual:**
 - (1) **has the right to make the individual's own choices regarding the individual's personal affairs, care, benefits, and services;**

... .

It is said that the aging process causes the parent to become the child and vice versa. When the child is a minor there are bright lines marking the transformation to majority (18th and 21st Birthdays) and until those lines are reached the rights and responsibilities of the child are curtailed in favor of the parent. The same is not true for when an elderly person becomes the child. Although mental and physical disease may impair the ability of an elderly person to safely function and the elderly individual may exhibit many of the same lapses in awareness or judgment as a minor, there is no calendar date when his rights and responsibilities are curtailed. Until some action is affirmatively taken the elderly person possess all of the rights and protections of an adult. The rights which a child may have the most difficulty dealing with are the right to privacy, the right to independence and the right to contract.

Privacy. The adult child will have a problem obtaining information from any vendor about the parent's business such as social and public services, bank and investment accounts, medical records, insurance policies, credit accounts, safe deposit boxes, etc. A partial solution is a durable power of attorney (and to some extent a revocable trust) in the case of financial issues and a medical power of attorney in the case of medical issues. Both instruments should authorize access to information as well as taking action on behalf of the principal.

One aspect of the solution is to be familiar with the parent's records and business affairs. I provide my estate planning clients with a copy of a book titled, Answers by Becky Barker. It is a three ring binder in which a person is prompted to supply information regarding his personal history, funeral and burial instructions, persons to notify, finances, property, insurance and business. It used to be available at Viva Bookstore

Independence. While "independence" isn't strictly a right, it is an aspect of the rights, benefits and privileges we enjoy and it is what the elderly worry about the most. The parent will not want to give up driving, to move out of his home or to allow someone to oversee his daily activities.

Driver's License. There is a process by which a driver's license can be taken away. It is the general process for revocation provided by statute for all drivers. Texas Transportation Code, Section 521.291, and following. For better or worse, it is a process that involves a complaint, an investigation and a hearing, the outcome of which can be appealed. Unfortunately, the most likely complainant is the child which creates suspicion and animosity. If there is no clear medical impairment, success requires some actual accidents or at least incidents. An elderly person may be more responsive to giving up driving if the suggestion comes from a third party, especially if it is a police officer, and if it is supported by a number of specific examples of dangerous driving. The person should also be given alternative arrangements for transportation such as family members, public transportation, carpooling with friends or church group, and an account with a transportation company (taxicab).

Moving out of home. When an adult child realizes that the parent is accidentally leaving stove burners on, failing to pay bills, and not taking medicine, the situation has deteriorated to the point that something must be done. The problem is that you can't grab Mom and drag her out to the car without risking charges of assault, battery and kidnapping. The solutions are: (1) to talk Mom into it - understanding that, even if she is willing to recognize that there is a problem, to her it is an emotional issue not a practical one, (2) to deceive Mom into believing that the move is temporary and hope for the best when she figures out the truth, and (3) to be appointed Guardian of the person of Mom thereby being entitled to the support of the police rather than to arrest.

Contract. One of the hallmarks of a good parent is the amount of supervision exercised over a child. After a lifetime without supervision, the elder is not going to

easily acquiesce to supervision by a child. Abuse and fraud on the elderly is a huge and probably largely unreported problem. We have all heard stories of theft by caregivers (including children), visitors and service people and unscrupulous solicitations of home repairs, magazine subscriptions, annuities, living trusts and gifts to charities. The solutions are (1) very close supervision, (2) move Mom to a protected environment and (3) have her declared incompetent (guardianship). Just as with a child, close supervision will cause friction and is most successful when it is consensual. A declaration of incompetence is handy because any contract signed by an incompetent is not enforceable. A declaration may come about as a result of an effort to invalidate a contract that the parent has entered into. In most cases a conversation with the third party will result in the contract or gift being rescinded. Some kinds of contracts have a specific right to rescind.

There is a state agency called **Adult Protective Services**, which is charged with the responsibility of protecting the elderly. Generally, it becomes involved after it learns of a situation by a report or complaint. One problem is that it too, respects the right to privacy. Therefore, a child could make a report, ask for an investigation (visit) and then be unable to find out the result or even if the visit occurred. Another problem is that the child can end up on the wrong end of the investigation. Forcing a parent to take an action, forcing a parent to refrain from taking an action, and taking an action on behalf of a parent that is not in the parent's best interest are all possible forms of abuse. An example is compelling a parent to transfer assets in order to set the parent up to be eligible for Medicaid.

ADDITIONAL RESOURCES

Elder Law Handbook 2002, distributed by the San Antonio Bar Foundation
www.CAPS4caregivers.org The website of Children of Aging Parents, a non profit organization
www.naela.org The website of the National Association of Elder Law Attorneys, a non profit organization.
www.findlaw.com A website which makes available federal and state laws, regulations and ordinances.