

Glossary of Estate Planning Terms

Will: A legal document that provides instructions for how to distribute assets after death. A will may also (1) state the guardian for minor children and/or (2) appoint an executor to administer the estate in accordance with the Testator's wishes.

Decedent: A person who has died.

Probate: The legal process of proving the validity of a will. Probate is often understood to refer to the legal process in which the estate of a decedent is administered.

Testate: A Decedent with a valid will is described as being "testate" and is referred to as a testator (male) or testatrix (female).

Intestate: A Decedent without a valid will is described as being "intestate."

Intestate Statute: A state law that sets out the distribution of assets for a person who dies without a valid will.

Codicil: A supplement, modification or addition to an existing will. A codicil is considered to be a legal instrument and so must be executed with the same legal formalities as the will.

Attested Will: A will is considered to be "attested" when it has been signed by two witnesses, who in Texas must be over the age of 14, in the presence of the testator.

Self-Proving Affidavit: A document that in court serves as a substitute for live testimony of the attesting witnesses.

Holographic Will: A will that is entirely in the handwriting of the Testator.

Beneficiary: A person or entity eligible to receive assets of the Decedent as specified in the will.

Descendant: A person who is the offspring or adopted child of the decedent.

Administrator: A personal representative appointed by the probate court to oversee the settling of the Decedent's affairs.

Executor: A personal representative appointed in the will by the Testator to administer the estate in accordance with the instructions in the will.

Guardian: A Guardian is one who has the right and duty to care for a person (Ward) or Ward's property. A **Guardian of the Person** is charged with the right to care for the Ward and has a duty to provide care, supervision and protection of the Ward. The Guardian of the Person also has the power to consent to medical treatment of the Ward. A **Guardian of the Estate** is one who is charged with the right and duty to manage the Ward's property. The Guardian of the Estate also has the duty to enforce the Ward's obligations and bring or defend suits involving the Ward.

Trustee: A Trustee is the person who is responsible for long-term management of property for the benefit of a beneficiary, such as children, surviving spouse or other beneficiaries.

Non-Probate Assets: Assets that do not pass through probate to be transferred to beneficiaries. Examples of Non-Probate Assets include: life insurance policies, pension plans, 401(k) plans, IRAs, joint bank accounts, payable-on-death accounts, and property owned as joint tenants with right of survivorship.

Per Stirpes and Per Capita: These terms refer to methods of distributing an estate to a group of individuals. Per Capita is distribution equally to each person. Per Stirpes is the distribution to an eligible member's descendants in the event the eligible member predeceases the Testator.

Incapacity Planning Documents

Statutory Durable Power of Attorney.

Under Texas Estates Code, a Durable Power of Attorney is a written document that enables the person executing the document (the principal) to designate a holder of the power (the attorney-in-fact or agent) to act on the principal's behalf for financial matters. The power of attorney can be effective on the date that the principal signs the document or it can take effect when the principal becomes incapacitated or disabled.

Declaration of Guardian for Children.

If one spouse survives the other, the surviving spouse is the natural guardian of his or her minor children. However, in the event that both of the child's natural parents die, individuals who have children who are under the age of legal majority need to insure that their estate plan includes a Declaration of Guardian for minor children pursuant to the Texas Estates Code. Each parent must decide who should be given the responsibility of raising the minor child.

Declaration of Guardian for Self.

Texas Estates Code allows a person to designate a guardian of the person and/or estate for himself or herself in case the person later becomes incapacitated to the extent that a court supervised guardianship is required. This document is called A Declaration of Guardianship in the Event of Later Incapacity or Need of Guardian.

Medical Power of Attorney.

A Medical Power of Attorney allows a person to designate a third party to make health care decisions in the event the event of the person's incapacity. The Medical POA's authority generally begins when a doctor certifies that the individual who executed the Medical Power of Attorney lacks the capacity to make health-care decisions for himself or herself.

HIPAA Authorizations.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) can be read to require an express authorization for disclosure of confidential information about a patient. The use of this separate document can also alleviate concerns that some medical professionals may have about relying upon a medical powers of attorney.

Directive to Physicians.

Also known as the Living Will or Medical Directive, this document indicates the patient's intentions should the patient become disabled or otherwise lack the legal capacity to make decisions for himself or herself with regard to life-sustaining treatment. Generally speaking, the Directive deals with health care measures that the patient wants imposed should he or she become unable to express his or her desires.

The Texas Estates Code includes a form that separates medical conditions into two broad categories: (a) **irreversible conditions**, and (b) **terminal conditions** and gives the patient the choice in each case to have life-sustaining treatment procedures applied or withheld.

Some clients like to also include additional requests to clarify the types of treatments he or she would want or would not want to have under certain circumstances.

(1) **Irreversible Conditions and Terminal Conditions.** The patient indicates in the directive whether to have life-sustaining treatment either applied or withheld, and this decision must be made for each of two situations: (i) irreversible conditions and (ii) terminal conditions. Each of the conditions is determined in the judgment of the patient's physician.

(a) *Irreversible Condition* is one (i) that may be treated but is never cured or eliminated, (ii) that leaves the patient unable to care for or make decisions for himself, and (iii) that will be fatal without life-sustaining treatment.

(b) *Terminal Condition* is (i) an incurable condition (which appears to be different from an irreversible condition, and (ii) that will produce death within six months even *with* life-sustaining treatment.

(c) *Life-Sustaining is treatment* that sustains the life of a patient and without which the patient will die. The treatment specifically includes artificial life support, dialysis, and artificial nutrition and hydration.

(d) *The Six Month Distinction.* The obvious distinction between irreversible and terminal conditions is the six month window. One could almost say that both refer to conditions that are definitely going to cause death, with the only difference being that the former refers to conditions with a 6 month or longer life expectancy and the latter refers to conditions with less than a 6 month life expectancy.

(2) **Without a signed Directive**, the law provides that in the event a patient is incompetent to make a treatment decision, a Court-Appointed Guardian, if any, or agent under the Medical POA has the authority to make the decision. Therefore, if you want your Medical POA to make your final life and death treatment decisions, you do not need a medical directive. If you do not have a Directive, Medical POA or Guardian appointed, the statute provides the following family members in order to make these decisions: spouse, "reasonably available adult children," parents, nearest living relative. Note a Directive is not the same as a DNR (or do not resuscitate).

Estate Planning FAQ

Do I need a will?

Yes, unless you want the State of Texas to provide one for you. The Texas Estates Code Chapter 201 provides for persons who die without a will in the “Intestate Succession” provision. If you die without a will (Intestacy), your assets will be distributed according to a formula that does not take into account your wishes and unique circumstances. See the [Intestate Succession Chart](http://www.co.travis.tx.us/probate/pdfs/DnD_diagrams.pdf) (www.co.travis.tx.us/probate/pdfs/DnD_diagrams.pdf). A will, however, allows you to designate how and to whom your assets should be distributed.

Why should I hire a lawyer and not use DIY tools?

The benefit to hiring a lawyer is that lawyers have the knowledge and experience to assist you in planning for the future and the unknown ahead. Lawyers help to evaluate potential paths that may appear solid today, but can become a nightmare for heirs in the future. Each state has its own probate laws and a lawyer may raise issues that you might not have considered. This is especially true for matters of guardianship for minor children. Software and DIY tools cannot provide legal advice. These products disclaim that their services are not the substitute for an advice of an attorney. The products cannot review your answers for legal sufficiency, draw legal conclusions or advise you of the law based on your particular situation. The Texas Legislature passed major changes to the Texas Probate Code, now the Texas Estates Code in September, 2013. DIY products do not guarantee information that is correct or updated.

What basic estate planning documents do I need?

- ***Last Will and Testament***: A legal document that provides instructions for how to distribute assets after death. A will may also (1) state the guardian for minor children and/or (2) appoint an executor to administer the estate in accordance with the Testator’s wishes.
- ***Durable Power of Attorney***: A legal document that allows you to appoint a family member or friend to serve as an agent for you to manage your finances and legal affairs if you are no longer able to manage them yourself. This document is necessary in the event you become either temporarily or permanently incapacitated. Without this document in place, should you become incapacitated, the Court will order a guardianship for you. However, a court-ordered guardianship is both time-consuming and costly.

- **Medical Power of Attorney:** A legal document that allows you to appoint a family member or friend to make medical decisions for you in the event you become unconscious or mentally incapable of making those decisions on your own.
- **HIPAA Authorization:** HIPAA is the Health Insurance Portability and Accountability Act that was passed by Congress in 1996. HIPAA lays out rules and places limits on persons who are able to review your medical records or receive your health information. Doctors and medical staff who violate HIPAA regulations are subject to civil money penalties or imprisonment in extreme cases. Having a HIPAA Authorization in place allows you to name a family member or friend to have access to your medical information so that your health care provider or insurance company may share medical information with persons named on the authorization. (See discussion below regarding HIPAA for children 18 and over).
- **Medical Directive:** A legal document, also known as the living will, which directs physicians to administer, withhold or withdraw life-sustaining treatments in the event of a terminal or irreversible condition.

If I have a revocable trust, do I also need a will?

No, but it may be wise to have a “pour-over” will in the event that you forgot to include a piece of property in that revocable trust. A revocable trust allows the trustee at your death to manage assets held in the trust according to the terms of the trust. However, if you inherited a piece of land, or acquired property after creating the trust (or forgot to include it at the time the trust was created), that property will not be included in the trust. In that case, without a will, the property not named in the trust will be distributed according to the Texas Intestacy laws. A properly drafted “pour-over” will would allow for any assets left out of the trust to be directed to the trust from the estate and managed and distributed according to the trust terms.

What is Probate?

Probate is the legal process in which a decedent’s will is proved to be valid or invalid by the court. The process involves appointment of an executor (in the case of a will) or an administrator (no valid will) of the decedent’s estate. Simply explained, the executor or administrator, once appointed, is charged with paying the decedent’s liabilities and distributing the decedent’s assets. In the case of a will, the distribution will occur according to the decedent’s instructions. Without a will, the distribution will occur according to the formula set forth under Texas Law. See the Texas Intestacy Chart.

May I name an executor who does not live in Texas? May I name a Guardian who lives outside of Texas?

Yes, if you file the correct documents. Under the Texas Estates Code, §304.003, nonresidents of Texas are excluded from serving as an executor or administrator *unless*

the nonresident has appointed a Texas resident to accept service of process in all actions or proceedings with respect to the estate and filed the appointment with the Court. Similarly, under the Texas Estates Code, §1104.357 nonresidents of Texas may not be named guardians if the nonresident failed to file with the proper court the name of a Texas resident agent to accept service of process in all actions or proceedings with respect to the guardianship.

Will my Life Insurance be considered as part of my will?

No. Life insurance and retirement plans are considered non-probate assets. In other words, these items are not part of the will. However, these assets could be tied to your will with some additional legal steps and planning.

My sister is really great with my kids, but not great with money. May I name someone else to manage my estate and name my sister as my children's Guardian?

Yes. In fact, it is not uncommon to name one trusted family member or friend as Guardian of your minor children and a second person as manager of the estate, or Trustee.

How would I plan my burial or cremation?

You could create a document that would Appoint an Agent for Disposition of Remains. If you do not have such a document, and do not designate otherwise, Texas law provide a priority list of persons who have the right to control the disposition of a decedent's remains. These persons include your spouse, followed by an adult child, a parent, an adult sibling, and then an heir. You may designate someone to dispose of your remains, and in that case, the document controls instead of Texas law.

How can I see Medical Information for my child?

Custodial parents with children under 18 are generally designated by a health care proxy to have access to the child's medical information. For children over 18, a doctor is generally prohibited by law from giving the parent medical information unless the child consents. Your adult child may sign a HIPAA authorization designating you as an authorized agent to receive medical information. That would allow the doctor to share medical information in the event your child is unable to give consent, as in the case of an accident.

Trust v Will? What do I need?

You may have heard that trusts are better than wills, or vice versa. Both estate planning tools are used to distribute assets and property, and each has its advantages and disadvantages. Some of the differences between Wills and Trusts are highlighted below:

Privacy: Once filed with the county probate court, a Will becomes a public document. A trust is not filed with the court, and a fully-funded trust may allow for full asset distribution without court involvement.

Funding: A trust will not exist without trust property. To avoid the probate process, all property must be re-titled in the name of the trust. This can be time consuming and costly. A Will (and trusts created in a Will) is not funded until death and a properly worded Will may dispose of all property efficiently with less initial cost.

Providing for Minors: A trust allows the trust creator (Settlor) to determine how much of an asset a minor should receive, and when. It allows the Settlor to have more control over the *disposition* of the asset. Many clients set up trusts within their Wills to provide for minor children.

Creditor Protection: Trust property may be protected from creditors so long as the Settlor names a Trustee other than himself and retains no control over the trust property.

Probate: A carefully worded and funded Trust is not subject to probate upon the death of the Settlor. The property passes according to the terms of the trust. This reduces expenses after death. However, probate would still be required for any property or accounts that was not included in the trust.

Note also that trust provisions may also be added to a Will (referred to as testamentary trusts) to accomplish some of these goals.