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## **Elder Law Forms Part 1 – Estate Planning and Medicaid**

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## **PART I - INTRODUCTION**

One of the first pearls of wisdom that I heard as a new attorney at one of my first continuing legal education conferences was that attorneys do not sell forms. They sell advice. I wish I could remember who said this so I could give them proper credit because the phrase has served me like a beacon from a lighthouse when I need reminding of my purpose and worth as an attorney.

However true that statement may be, the fact remains that an elder law practitioner utilizes many different forms across multiple practice areas, in the course of their practice. While some situations come up time and again, there is usually a case-specific nuance that prevents a cookie-cutter or “search and replace” approach to practicing elder law. Even forms created with the best drafting software require customization by the elder law practitioner. Thus, cultivating a collection of useful forms and phrases, is ingrained early in all elder law practitioners and continues well after years of seasoned practice.

At inception, the intent of this paper was to provide forms for all areas of law an elder law practitioner may encounter. However, this turned out to be a monumental task. Thus, the scope of this paper aims to provide useful forms, phrases, paragraphs, and wording for the elder law practitioner’s estate planning and Medicaid planning form collection.

## **PART II – ESTATE PLANNING FORMS**

### **Subpart A – Ancillary Estate Planning Documents**

#### **1. Statutory Durable Power of Attorney**

The law pertaining to durable powers of attorney is found in the Texas Estates Code (the TEC) Title 2 Estates of Decedents; Durable Powers of Attorney, Subtitle P Durable Powers of Attorney, Chapters 751 through 753. Chapter 751 provides general provisions regarding durable powers of attorney. Chapter 752 provides a non-exclusive statutory form that may be used. Chapter 753 provides the procedures for removing an agent.

**Appendix 1** is an example of a **Statutory Durable Power of Attorney** with enhanced powers. Drafting a power of attorney document for an elder law client requires different considerations than for other estate planning clients. In a nutshell, these considerations can be summarized as balancing the need for future flexibility in protecting assets in a Medicaid planning context with the need to protect clients from bad acting agents.

Useful TEC Sections:

§ 751.0021 Requirements of Durable Power of Attorney, provides the elements and execution requirements of a durable power of attorney instrument.

§ 752.051 Form, provides the non-exclusive statutory form.

§ 751.023 Successor Agents, provides that not only may a principal designate successor agents, the principal may also grant authority to an agent or another person, to designate successor agents.

§ 751.024 Reimbursement and Compensation of Agent, notes that unless otherwise provided in the document, an agent is entitled to reasonable compensation.

§ 751.031 Grants of Authority in General and Certain Limitations, incorporates the list of powers found in Chapter 752, Subchapter C (powers A-N on the statutory form) into the power of attorney document as the powers bestowed upon an agent, but subjects such authority to limitations. Unless expressly allowed, a durable power of attorney document does not grant authority to create, amend, revoke or terminate a living trust, make gifts, change rights of survivorship, change beneficiary designations, nor delegate authority. Further, unless expressly allowed in the durable power of attorney document, unrelated and distantly related agents may not make gifts to themselves nor make themselves a beneficiary of the principal's property.

§ 751.032 Gift Authority, states that unless otherwise indicated, the authority to make a gift is limited to the Internal Revenue Service (the IRS) annual gift tax exclusion, currently \$15,000. Further, gifts must be made consistently with the principal's objectives, if known. If not known, an agent has a duty to preserve the principal's estate plan (see TEC § 751.122), and gifts must be made in the principal's best interest.

§ 751.033 Authority to Create or Change Certain Beneficiary Designations, includes the power to create or change beneficiary designation under an account, contract, or other arrangement, multi-party account, and non-probate assets in general. Without this power, an agent may only change beneficiaries of insurance policies, annuities, and retirement plans (if given powers G and L in the statutory list), and cannot name themselves unless already named as a beneficiary by the principal.

**Appendix 2** is a document to provide to an elder law client, that includes the statutory language from the **Texas Estates Code Sections 752.101 – 752.1145**, defining each statutory power.

**Appendix 3** is an example of **language allowing for the appointment of co-agents** in a Statutory Durable Power of Attorney. Per § TEC 751.021, unless specified, each co-agent may exercise power independently of one another.

**Appendix 4** is a **Notice to Person Accepting the Appointment as Agent**, to make an agent aware of their appointment as an agent and of their duties as an agent. Given the need to protect principals from agents with bad intentions or from equally dangerous, uninformed agents, this is a useful form to educate agents of their responsibilities and the consequences of behaving badly.

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