WHAT DO I DO?

A Simple Explanation of Powers of Attorney, Medical Powers of Attorney, HIPAA Authorizations, Advance Directives, Directives for Mental Healthcare and Do Not Resuscitate Forms

I have spent a lot of time in and around health care facilities in the last few years. I have been an Elder Law Attorney in the Austin area for over 20 years. It has recently come to my attention that most health care professionals do not really understand all of the legal documents related to health care, what they do, what they don't do, and what to look for in each document that could create issues. I have created this presentation to give you a reasonably simple explanation of each of the documents.

I. Statutory Durable Power of Attorney.

This document grants to an "agent" the authority to manage your financial affairs. While it can be limited to certain financial matters, this form is usually a broad grant of financial powers to the agent intended to be used when the person giving the powers ("Principal) becomes incompetent or incapacitated to the point they can no longer manage their financial affairs. **THIS DOCUMENT DOES NOT GRANT ANY POWER RELATED TO MEDICAL DECISIONS OR TREATMENT!** It does not grant the power to determine where the Principal lives, what treatment they receive, what type of facility they may be admitted to, or any other health care related matter.

Some of the issues that you should be aware of in reviewing this document:

a. Some people name Co-Agents for their financial power of attorney. This is generally done to enable two family members to share the burden of managing the Principal's financial affairs. However, if there are Co-Agents named, make certain that you determine if they have the power to act independently or whether they must work together. The form should clearly indicate this. If it does not, then the agents must work together. That means that you must get both of them to sign documents related to financial matters, both of them must authorize payments, or make any other financial decision.

b. The power of attorney can have a specific threshold event that must be reached before the document becomes effective. In Texas, the law allows for the form to either be effective immediately on execution, not requiring any limitation on the competency or capacity of the Principal; or the form can require proof of incapacity and/or incompetence before the form becomes effective. Make certain that you do not allow a form that requires proof of incompetence or incapacity to be used without the required proof. Again, this should be clearly indicated on the form. If not, the default is to allow the form to be effective from the time of execution.

II. Medical Power of Attorney.

The Medical Power of Attorney is the health care version of the financial power of attorney. The form allows the Principal to name an agent to make health care decisions for the Principal **when the Principal has reached a level of incompetency or incapacity that prevents the Principal from being able to make such decisions for themselves. This must be determined by a physician who has examined or is familiar with the health history of the Principal.** Please be certain that the Principal has indeed reached this level of incapacity or incompetence before permitting the agent under the Medical Power of Attorney from making any decisions for the Principal. Texas does not allow for the Medical Power of Attorney to be effective upon execution like the Statutory Durable Power of Attorney.

Also, Texas does NOT allow for Co-Agents for a Medical Power of Attorney except in very rare instances. The agents are generally named in a sequence of succession and if the person you are working with is not the primary agent listed, you must have some proof of why the primary agent is not available or serving as the agent.

Be aware that there are statutory limitations on some medical matters that may not be decided by an agent under the Medical Power of Attorney. An agent cannot require an abortion, mental health commitment, use of psychotropic drugs, or electroshock therapies. Some of these procedures are allowed under the Declaration of Mental Health Treatment below. Further, an agent under the Medical Power of Attorney cannot make any financial

decisions or handle financial matters for the Principal without a financial power of attorney.

III. HIPAA authorization. Most of you are well versed in HIPAA. However, there is a lot of misinformation regarding the use or misuse of HIPAA authorizations. Since the Texas Medical Power of Attorney is a "springing' form, it only goes into effect when the threshold event of incompetence or incapacity is reached, the agent under the Medical Power of Attorney needs to have a HIPAA authorization to discuss with the physician whether the Principal has reached a sufficient level of incompetence or incapacity to enable the agent to effectuate the Medical Power of Attorney.

Issues to watch for with HIPAA authorization:

a. The authorization may have classes or hierarchy of who receives the information. Make certain that the person you are working with is the primary recipient of the information or can provide proof that the primary person is not available to serve as agent under the power of attorney.

b. HIPAA authorizations may be limited in time or scope. Make certain you have researched what limitations might be included in the authorization you are answering.

c. HIPAA law requires that you provide the MINIMUM personal health information required to answer the specific request you have received. So, if a potential agent under a Medical Power of Attorney asks if the Principal has reached a level of incompetence to utilize the power of attorney, be certain that is the question you answer, and the only question you answer at that time. Do not go into a long explanation of the prognosis, diagnoses, or any other unrequested information.

d. Once you have given the information to the agent, you are NOT responsible for what happens to the information. The law ONLY applies to health care providers and their associates. It does not apply to dissemination by another party, to church groups discussing someone's illness at a church gathering, or to a neighborhood or community group offering to assist someone in obtaining donations for their medical expenses, unless there are medical professionals in those groups and then it only applies to those members.

IV. Advanced Directive.

The advance directives were recently updated in Texas. In 2017, the legislature decided to expand some of the uses of this document. However, generally speaking the main purpose of the Advance Directive to Physicians and Family concerns the use of life preserving measures in the treatment of the Principal in TWO specific conditions: the end stages of a terminal disease in which the Principal is expected to die within six months, or a vegetative or coma state for a period of 14-30 days with an unlikely chance of recovering.

The choices available on the form are to withhold life sustaining measures, keep the person comfortable and allow them to die as gently as possible; OR to use whatever life sustaining measures may be available at the time.

Advanced Directives have no authority over the use of resuscitative measures like CPR or respiratory treatments.

The revised form also includes an option for advance stages of dementia or mental incapacity to the point that the Principal does not know their family or cannot participate in the activities that give meaning to their life. It also allows the agent under the Medical Power of Attorney to make a decision regarding the use of life sustaining measures for any other situation that is not covered by the form specifically based on their understanding of the choices selected on the form for the noted conditions.

Many of these selections are options. Be certain that you have thoroughly read the form to ascertain what choices were made by the Principal and what limitations have been placed on life sustaining measures.

It is also important that you are aware that this document is verbally revokable at any time by the Principal even if the Principal lacks capacity to otherwise make decisions for themselves related to their healthcare.

V. Do Not Resuscitate

There is apparently some current issues with EMS honoring Do Not Resuscitate orders. However, this form is completed by the Principal, the agent under a Medical Power of Attorney, a Guardian of the PERSON, a legal parent, or two physicians who have examined the Principal and have determined that to resuscitate the Principal would be a greater risk to their

health than the underlying cause requiring resuscitation. Generally, these are executed when the Principal is in advanced stages of disease or debility such that CPR or respiratory measures are likely to cause severe damage to the individual causing the Principal to end up in a worse position and in pain and disabled to the point that it is likely to cause more complicated and untreatable damage than allowing them to die from the condition that would initiate resuscitation in a healthier individual. For instance, these are often executed by elderly women in their late 70s to 90s due to the frailty of their bones, for example, which often result in broken ribs and/or breast bones that may puncture lungs or other vital organs during the CPR procedure. An individual, however, may sign the DNR at any time, at any age, if they decide they do not want to be resuscitated. This document is also verbally revokable at any time regardless of the capacity of the Principal at the time.

Be aware that there are two forms of this document. There is an Out of Hospital DNR and an In Hospital DNR. Be certain that you are using the correct one. Also, it is required that the original be presented to EMS or be on file at a facility where the form is being observed. A copy is not sufficient if the Principal is at home and EMS is called. Also, be aware, that there are significant damages awarded for a failure to honor a DNR that was properly executed and presented at the appropriate time.

Also be aware that a DNR does not have anything to do with using other life saving measures like feeding tubes, transfusions, or any other treatment.

VI. Declaration of Mental Health Treatment

This document is not often used but is very important when it is properly executed and utilized. This document allows the Principal to appoint someone to make mental health decisions for them. It allows the Principal to specify what mental health treatments the agent can authorize, what medications the agent may allow, and may allow the agent to have the person admitted to a mental health care facility under emergency situations if there is a potential for injury to the Principal or others. The Principal can execute this document at any time, and it may be used at any time the Principal is incompetent to make decisions for themselves or is exhibiting mental illness symptoms that indicate a high potential for harm to the Principal or another person if treatment is not administered.

Obviously, this is a very limited and very specific document. The law does not favor other people making decisions that could have a permanent affect on the mental capacity of the Principal without them being able to make those decisions for themselves. For this reason, under a NORMAL Medical Power of Attorney, the agent may not approve psychoactive drugs, abortions, electroshock therapy, or confinement in a mental care facility. These may be allowed under the Declaration for Mental Health Treatment document.

Also, this document expires three (3) years from the date of execution unless the Principal is mentally incompetent at the time of the three year expiration when it remains in effect until the Principal regains capacity.

This form is especially useful in situations where there is already a diagnosis of mental illness that has not yet reached the level of mental incapacity or incompetence.

A final note about these documents:

Some of these documents require witnesses to sign and some do not. It is abundantly clear when witnesses are required. However, a witness may not be someone involved in the care of the individual or an employee of the health care facility where the Principal resides or its parent organization. If a health care provider serves as a witness, they will need to stop being involved in the treatment of the Principal, especially if there is any concern about the intent of the Principal in executing the document.