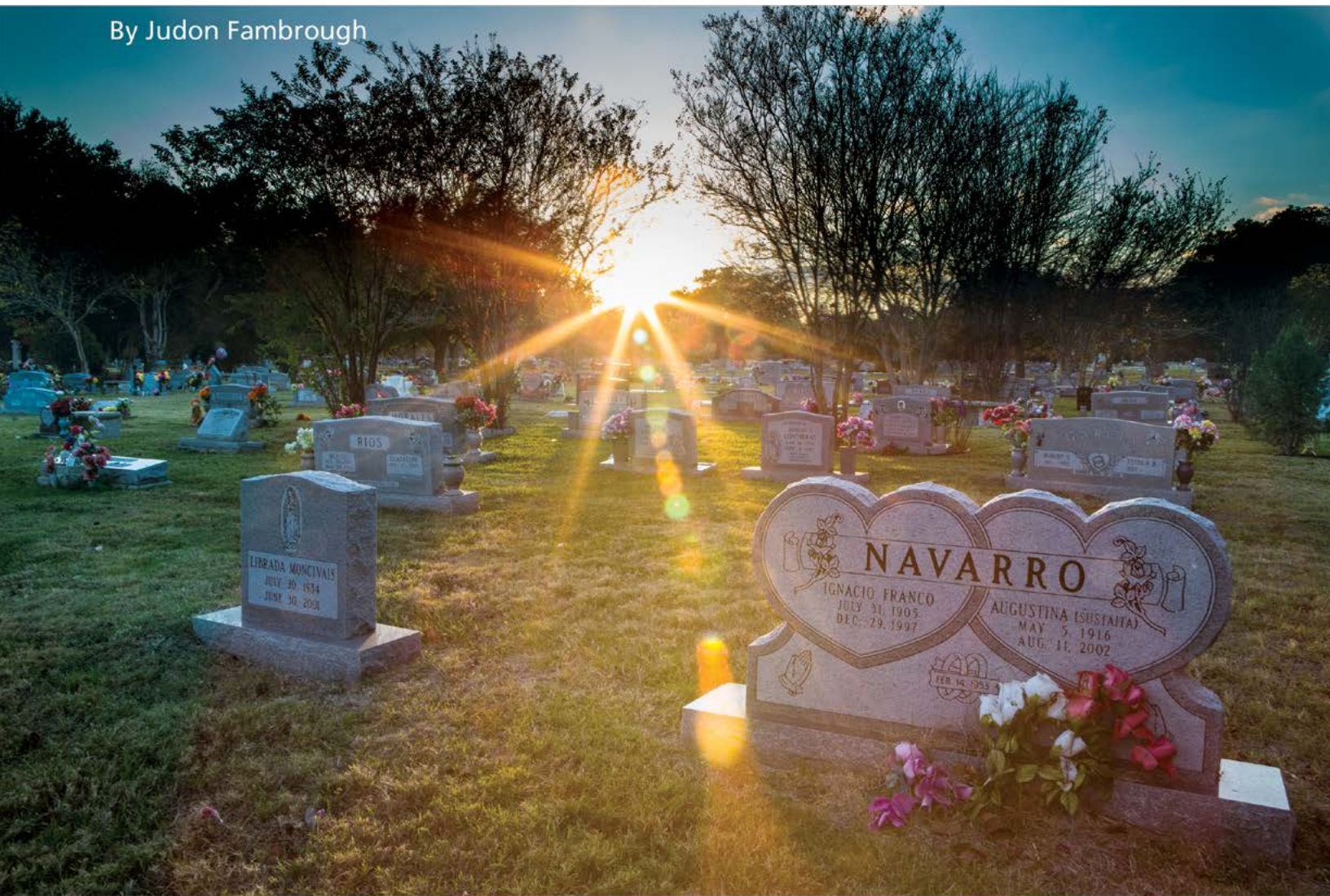


# Last 'Writes'

## End-of-Life Decisions

By Judon Fambrough



**N**one of us will live forever. When contemplating death, most people ponder preparing and executing a will or trust, or implementing probate-avoiding techniques. These are certainly wise choices. But other critical documents should be considered.

Five of these (Powers of Attorney, Living Wills, Medical Powers of Attorney, Do Not Resuscitate [DNR] Orders, and Anatomical Gifts) are briefly described here.

For more details, instructions and copies of forms, see Real Estate Center publication 2044, *End-of-Life Documents*, at [recenter.tamu.edu/pdf/2044.pdf](http://recenter.tamu.edu/pdf/2044.pdf).

### Powers of Attorney

By executing a Power of Attorney, you grant another person, known as an attorney-in-fact or agent, the authority to manage your assets, among other things. You decide how long the agent serves and the scope of his or her authority.

The person serving as your attorney-in-fact should be someone you trust implicitly even though this person owes you a fiduciary duty to serve in your utmost best interests. For married couples, this is generally the spouse.

The duration of the agent's authority depends on whether you make the power durable or not. According to the statute,

a durable power of attorney confers on the agent the continued authority to act notwithstanding your subsequent disability or incapacity. More specifically, the statute describes a Durable Power of Attorney as one that “does not lapse because of the passage of time unless the instrument creating it specifically states a time limitation.”

An added benefit of a Durable Power of Attorney is that you avoid having the court appoint a guardian once you become incompetent. But, if the court appoints a *permanent* guardian, the Durable Power of Attorney terminates, and all assets under the agent’s control must be delivered to the guardian of the estate.

Whether durable or not, no Power of Attorney survives your death.

Finally, the scope of the authority depends on whether you grant a general or special Power of Attorney. Basically, a General Power of Attorney permits the agent to enter any legal transaction you could enter. A Special Power of Attorney limits the authority to specific tasks.

The promulgated Statutory Durable Power of Attorney Form lists 13 specific types of transactions the agent may enter on your behalf, real property transactions being one of them. You have the option of eliminating one or more of the listed transactions by crossing them out. You may also insert special instructions limiting or extending the powers and the time frames in which they may be exercised.

These tasks are described in the Promulgated Statutory Durable Power of Attorney Form ([recenter.tamu.edu/pdf/statutory\\_poa.pdf](http://recenter.tamu.edu/pdf/statutory_poa.pdf)). This form must be signed before a notary to be effective.

Effective Sept. 1, 2015, Section 1101.005 of the Occupations Code may impose a licensing requirement on persons acting under a power of attorney to conduct real estate transactions.

The new law states “an attorney-in-fact authorized under a power of attorney to conduct not more than three real estate transactions annually” is required to obtain a real estate license from the Texas Real Estate Commission. The law is unclear as to the effect it has on a real estate transaction where the law is violated. Those granting the power of attorney may wish to limit the permitted number of annual real estate transactions to no more than three to avoid any licensing issues. This can be accomplished by placing the limitations in the Special Instructions of the document.

## Living Wills

Living Wills, also known as Directives to Withhold Life-Support Devices, do not delegate your health care decisions to others, but relieve others from having to make them on your behalf.

The preamble to the form gives insight regarding its usage. “It (the form) is designed to help you communicate your wishes about medical treatment at some time in the future when you are unable to make your wishes known because of illness or injury.” The form contains the following language: “If there comes a time that I am unable to make medical

decisions about myself because of illness or injury, I direct that the following treatment preferences be honored. . . .”

The directive describes two scenarios. First, if in the judgment of your physician you are suffering with a *terminal condition* from which you are expected to die within six months even with available life-sustaining treatment, you may request that (1) all treatments other than those needed to keep you comfortable be discontinued or withheld and let you die as gently as possible or (2) that you be kept alive using available life-sustaining treatment.

Second, if in the judgment of your physician you are suffering from an *irreversible condition* which prevents you from caring for or making decisions for yourself, and you are expected to die without life-sustaining treatment, you have the same two options.

If after signing the document you are placed in hospice care, only those treatments needed to keep you comfortable will be provided, and you will not receive life-sustaining treatments.

Finally, if you *do not* have a Medical Power of Attorney (next section) and you are unable to make your wishes known, you may designate a person or persons to make treatment decisions compatible with your personal values at that time within the context of the Living Will.

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*Living Wills, also known as Directives to Withhold Life-Support Devices, do not delegate your health care decisions to others, but relieve others from having to make health care decisions on your behalf.*

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The statutory form contains several examples and explanations for various types of conditions including cancer, failure of major organs (kidneys, heart, liver or lungs) and dementia, including Alzheimer’s. It defines the terms “irreversible condition,” “life-sustaining treatment,” “terminal condition” and “artificial nutrition and hydration” as used in the form.

## Medical Powers of Attorney

As the name implies, a Medical Power of Attorney (MPOA) permits another individual to make medical decisions on your behalf when you become incompetent. The procedure for implementing an MPOA differs from the others because the statute contains two prescribed forms. The first, known as the *Disclosure Statement*, must be read and understood before the second, the actual MPOA, is read and signed.

The Disclosure Statement explains the importance of understanding the MPOA before signing it. The agent’s (the person you appoint to make your medical decisions) authority begins when a doctor certifies your incompetence to make health care decisions. This certification must be placed in your medical record. The agent is then obligated to follow the instructions set forth in the MPOA (the second form) in making medical decisions on your behalf.

After signing the MPOA, you have the continued right to make health care decisions as long as you are competent. As long as you are competent, you have the right to revoke the document by informing the agent orally or in writing or by executing a subsequent MPOA. The appointment of your spouse

as agent terminates if you subsequently divorce or have the marriage annulled unless you direct otherwise.

The form allows you to designate alternate agent(s) and to limit the duration of the power granted. Without a termination date, the Power of Attorney exists indefinitely from the date it is signed. But, if you insert a termination date and are incompetent when the MPOA expires, the agent's authority continues until you become competent, if ever.

## Out-of-Hospital DNR Orders

**A**ny competent adult or an agent acting under an MPOA may execute an Out-of-Hospital DNR Order directing health care professionals acting in an out-of-hospital setting to withhold cardiopulmonary resuscitation and other life-sustaining treatments specified in the statutes. The order must be honored by medical care professionals provided they are aware of the order and establish the patient as the one who executed it.

The order does not authorize withholding of medical interventions or therapies considered necessary, such as providing water or nutrition, comfort and care, or alleviating pain. The order does not condone, authorize or approve mercy killing or permit an affirmative or deliberate act or omission to end one's life except to permit the natural process of dying as provided in the statute. The order does not apply to pregnant women.

The presence of a DNR identification device (authorized bracelets or necklaces) on the person is conclusive evidence that the person executed or issued a valid order or had one issued on his or her behalf. These devices may be worn around the neck or on the wrist as prescribed by the medical board.

The execution of the order is slightly different from the other documents. While the physician cannot be a valid witness, the physician must sign the order and make it a part of the patient's medical record. Also, in lieu of having to sign the order in the presence of two qualified witnesses, the patient may sign the order before a notary public.

## Anatomical Donations

The donation of tissue, organs and other body parts may not be on everyone's mind. The enabling statute, entitled the Revised Uniform Anatomical Gift Act, sheds light on the process. It is quite lengthy. Some of the more critical provisions are summarized here.

The statute describes four ways in which an anatomical gift may be made. They are:

- statements or symbols imprinted on the driver's license or ID card;

- provisions in the donor's Last Will and Testament;
- statements, in any form, issued during a terminal illness or injury addressed to at least two adult witnesses, one of whom is disinterested; or
- statements or symbols signed by the donor indicating an anatomical gift has been placed on a donor registry.

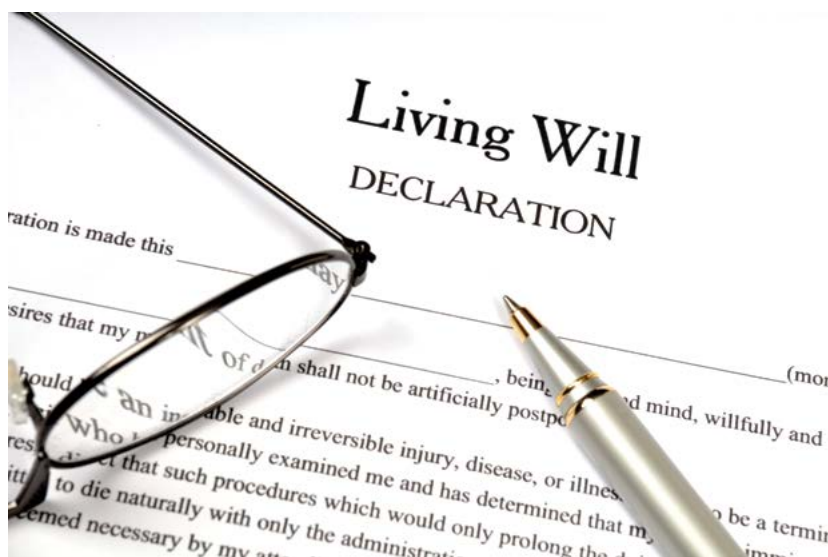
A revocation, suspension, expiration or cancellation of the driver's license or identification card on which the anatomical gift was placed does not invalidate the gift. Anatomical gifts take effect on the donor's death whether or not the will is probated. An invalidation of the will after the donor's death does not invalidate the gift.

Interestingly, the statute provides a method by which a person may indicate that he or she does not want to make an anatomical gift. Without implementing this procedure, the statute allows an agent (spouse, adult children of the deceased, for example) to make anatomical gifts of the deceased's body.

An anatomical gift may specify (1) which part or parts of the body may be donated, (2) purpose for the donation and (3) named recipients. In the absence of anything expressed to the contrary by the donor, a gift of a part of the body for a particular purpose does not limit or restrict the making of a subsequent gift(s) of another part or parts for a different person or purpose by the donor or a qualified person.

The statute prohibits a person from knowingly purchasing or selling body parts for transplantation or therapy. Likewise, it is an offense to intentionally falsify, forge, conceal, deface or obliterate an anatomical gift for financial gain. Either offense is a Class A misdemeanor. However, a reasonable charge is permitted for the removal, processing, preservation, quality control, storage, transportation, implantation or disposal of an anatomical gift. ♣

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## THE TAKEAWAY

Delegating management and medical decisions when you are no longer able to do so needs to be addressed now. For managing your assets, consider executing a Durable Power of Attorney. For medical decisions, consider signing a Living Will, a Medical Power of Attorney and a Do Not Resuscitate (DNR) Order. For donating all or a part of your body at your death, consider making an anatomical gift.



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The Real Estate Center at Texas A&M University is the nation's largest publicly funded organization devoted to real estate research. The Center was created by the Texas Legislature in 1971 to conduct research on real estate topics to meet the needs of the real estate industry, instructors and the public.

Most of the Center's funding comes from real estate license fees paid by more than 135,000 professionals. A nine-member advisory committee appointed by the governor provides research guidance and approves the budget and plan of work.

Learn more at [www.recenter.tamu.edu](http://www.recenter.tamu.edu)

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