

Life Planning Documents Couples Should Consider in Case of Incapacity or Death

Information, not
legal advice

This fact sheet describes documents couples can use to make sure a partner's legal power passes to their loved one.

Children

In many families of unmarried couples, some of the children may be biologically related to only one of the parents. Even if you are not the biological parent, you may be considered the child's legal parent if:

- You helped raise the child; and
- You have claimed the child as your own.

Other times, only the biological parent is recognized as the legal parent of a child. When this happens, the non-biological parents may have few rights/power when it comes to the child. For example, a non-biological parent may not be considered a guardian or have the right to visit the child in the hospital. The child may not have anyone to take care of them if their parent dies. It may be hard for the non-biological parent to get custody, child support, and visitation rights if the partners split up.

Here are some documents that specifically address the legal issues of raising children when only one parent is the biological parent:

(1) Adoption. Adoption is the safest and most effective way to achieve legal protection for the parent-child relationship for a non-biological parent.

Some Texas courts have recognized "second parent adoptions." This means that a partner can adopt his or her partner's biological or adoptive child. The issue has not been addressed by appellate courts in Texas. Adoption is a complex issue. Talk with a lawyer if you are considering adoption.

(2) Custody Arrangements. A "joint custody agreement" is a written record of a couple's intentions concerning their children. It provides the non-biological parent with specific rights and responsibilities.

Specifically, a joint custody agreement can give legal power to approve medical treatment for the child. It can protect the non-biological parent's right to ask for visitation, custody, or child support. Joint custody agreements may not be enforceable. Nevertheless, the agreement is evidence of the partners' state of mind on the day it was signed. It can provide guidance to a court even if the agreement is not enforceable by itself.

(3) Court Orders. When a relationship ends, the couple can seek a court order for custody, visitation, and child support. This is done through a Suit Affecting the Parent Child Relationship (SAPCR) filed in court. This type of court proceeding is governed by the Texas Family Code. It is complex and difficult. Because these suits involve one of the most precious relationships in a person's life,

they can be emotionally grueling as well. Try to get a lawyer's help if you file a SAPCR. You can find SAPCR forms on TexasLawHelp.org under "family law."

Even if you are not the legal parent, you can ask for visitation or custody if:

- **You** had "actual care, control, and possession"
- **For a six month** period (minimum)
- **Ending** no more than **90 days** before filing for a SAPCR.

The six months do *not* have to be continuous and living with the child is *not* required. Because of the 90 day deadline, a non-biological parent must act immediately after they no longer are taking care of the child on a regular basis. Merely visiting the child regularly, such as Sunday afternoons, will not preserve your rights to custody or visitation.

Incapacity

"Incapacity" means that someone cannot make decisions for themselves because of a mental or physical problem. Here are some documents used by married and non-married couples to protect:

- The wishes of the incapacitated partner and
- The right of the other partner to make decisions regarding his/her loved one's health.

A "**Designation of Agent**" or a "**Hospital Visitation Directive**" can allow the partners to visit each other in hospitals, nursing homes, hospices, and other health care institutions. It also allows someone to list the individuals who *cannot* visit, which can be helpful if there are relatives who are unsupportive or hostile.

Be aware that some hospital staff may refuse to honor the wishes of same sex couples even when they have health directives in place. The Joint Commission on Accreditation of Healthcare Organizations (JCAHO) regulates member hospitals. The JCAHO has adopted a definition of family that includes same sex partners. This definition must be honored by member hospitals. The JCAHO defines family as "the person(s) who plays a significant role in the individual's [patient] life. This may include a person(s) not legally related to the individual." Many couples quote the JCAHO definition in healthcare directives. Since the JCAHO accredits hospitals, medical staff tend to take JCAHO definitions seriously.

A "**Healthcare (Medical) Power of Attorney**" and the **HIPAA Release** work together. You can find the forms on www.TexasLawHelp.org.

- A *Healthcare Power of Attorney* allows a person to give the legal power to make health care decisions to someone they trust when they are unable to communicate their desires to healthcare providers.
- A “HIPAA release” document allows a person to say with whom healthcare staff can share information.

Having both a medical power of attorney *and* a HIPAA release that designate his or her life partner as agent, means the partner can make medical decisions and access the medical information needed to carry out the principal’s wishes if the principal becomes incapacitated.

Many couples use a form called the “**General Durable Power of Attorney**” to protect their finances in case of incapacity. It lets one partner give legal power to the other partner to pay bills and make financial decisions.

You can choose when the powers start:

- *Immediately* when it is signed; or
- Only when you become incapacitated.

You can choose the types of financial decisions the agent can make or withhold some powers from the agent. Some banks have their own in-house forms for powers of attorney. Some banks refuse to honor powers of attorney. You can find the form on TexasLawHelp.org.

Death

If one partner dies, there are several legal issues that the surviving partner must handle. The first issue is what to do with the remains of the deceased. Then there are claims to personal effects, arranging the funeral, and making burial arrangements. Later, problems arise with how the couple’s property will be divided and who will inherit from the partner who died.

To ensure that your wishes are honored, here are some documents to consider:

A “**Disposition of Remains**” describes what a person wants to happen to his or her body after death. It prevents other parties from making decisions contrary to the wishes of the deceased.

Having instructions helps prevent problems like family members insisting on burial when the deceased wanted to be cremated. A disposition of remains can be used with instructions in a will saying who will pay for the funeral and make the funeral decisions.

A “**joint ownership with right of survivorship**” is used for people to own property together. When an owner passes away, the percent of his or her ownership *automatically* transfers to the surviving owner. It is common for people to have bank or other financial accounts to set up as joint accounts with right of survivorship.

Alternatively, a “**tenancy in common**” gives each owner distinct shares of ownership to the property. When one owner dies the share of ownership does not pass to the surviving owner automatically. It passes according to the

deceased owner’s will. If there is no will, it passes according to state law.

With a tenancy in common, it is critical to have a will. Without a will, shares pass through the intestacy laws of the state where the property is located. When that happens, problems arise between those who inherited the deceased’s share of the property and the surviving partner. If the problems cannot be resolved, the property must be sold and the sale money distributed among the owners.

A **will** states how a person’s assets (money, property, and personal belongings) will be divided. A will can be a catch-all document that can offer protection for both the division of property and the funeral arrangements.

A “**Living trust**” shifts ownership of property from an individual to the trust. Property transferred to the trust is owned by the trust for the benefit of people named as beneficiaries in the trust instrument.

The trust instrument also names a trustee who manages the property in the trust. The trustee can be the person who set up the trust. The trustee can be a beneficiary. It allows a person to control the property in the trust during their lifetime and be able to determine who benefits from the trust after they die.

A living trust is complicated to set up, and some living trust companies are scams. It is critical to have the help of a skilled estate planning lawyer before trying to set up a living trust.

Signing and Keeping Documents

When planning for incapacity or death, it is wise to do everything one can to avoid conflict later. The safest practice is to assume that your documents will be challenged in court, and plan accordingly.

- Sign your legal documents in blue ink so there is no question that the document presented is an unchanged original.
- Keep your original documents in a safe place that can be accessed after your death.
- Make copies of your important documents and give copies to the people who will need them. Your partner could have difficulty if your will is in the safe deposit box because a safe deposit box is not quickly or easily accessible. It is possible your wishes may not be learned until the safe deposit box is opened after the funeral.
- Make certain that someone trustworthy knows how to locate a copy of your medical power of attorney, visitation directive, HIPAA release, and will.
- When drafting these documents, partners should give each other a little distance to complete the documents individually. This is to avoid any accusations that one partner improperly influenced the other to give them preferential treatment or that the documents were not the voluntary act of the person who signed them.