

**BETWEEN DEATH AND PROBATE:
SELECTED END-OF-LIFE ISSUES**

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**BETWEEN DEATH AND PROBATE:
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I. INTRODUCTION, or, Overture¹

Death is difficult. Death is emotional. Death can be messy. As estate planners, we deal mostly with the practical, “cleaner” aspects of death – preparing estate planning documents, probate, transfers of assets, trust formation and funding. There are many ways that we can help clients prepare for death. But what about those messy parts? Besides calling the lawyer, what happens when someone dies? What happens to the body? This outline explores some of the practical aspects of death and preparing for death.

**II. PLANNING FOR PHYSICAL REMAINS, or,
Always Look on the Bright Side of Life**

A. Advanced Directives. Texas has three types of advanced directives related to death which are governed by Chapter 166 of the Texas Health and Safety Code as the Advanced Directives Act. There are some general provisions that apply to all three types of advanced directives. Some of the more important general provisions are definitional. For example, many people may believe that a living will deals with life support issues but it is so much more. The relevant term is “life-sustaining treatment” which means “treatment that . . . sustains the life of a patient and without which the patient will die. The term includes both life-sustaining medications and artificial life support, such as mechanical breathing machines, kidney dialysis treatment, and artificial nutrition and hydration.” TEX. HEALTH & SAFETY CODE § 166.002(10). Importantly, life-sustaining treatment does not include pain management medication or other care to alleviate pain. *Id.* Two other important terms are “irreversible condition” and “terminal condition.” “Irreversible condition” refers to a condition that cannot be cured but which causes a person to be unable to care for himself and is fatal without life-sustaining treatment. TEX. HEALTH & SAFETY CODE § 166.002(9). In contrast, a “terminal condition” is an incurable condition that will cause death within six months, regardless of the use of life-sustaining treatment. TEX. HEALTH & SAFETY CODE § 166.002(13). If someone is part of a hospice program, he is presumed to have a terminal condition. *Id.* All health care providers are required to maintain written policies regarding advance directives, including procedures that the provider will not provide or withhold, and except for limited circumstances, must provide notice of the policies to the patient or someone

on behalf of the patient. TEX. HEALTH & SAFETY CODE § 166.004. Additional general provisions include the mandate that directives validly executed in another state will be recognized in Texas, an advance directive cannot be a factor in obtaining, denying, or otherwise influencing life insurance, and a person cannot be required to have an advance directive for purposes of obtaining health insurance. TEX. HEALTH & SAFETY CODE §§ 166.005, 006, .007.

1. Directive to Physicians. One type of advanced directive recognized in Texas is the Directive to Physicians (“Directive”), commonly known as a living will. The statutory provisions regarding a Directive are found in Sections 166.031 *et seq.* of the Texas Health and Safety Code. Section 166.033 of the Texas Health and Safety Code provides a form for the Directive which is entitled a “Directive to Physicians and Family or Surrogates. Interestingly, although the name of the form includes the word “surrogates,” the term is not defined.

a. Making a Directive. Although a written Directive is to be signed in the presence of and by two witnesses or a notary, a Directive may also be oral, as long as it is made in the presence of the attending physician and two qualifying witnesses. TEX. HEALTH & SAFETY CODE § 166.034. In addition to a competent adult, a Directive may be made on behalf of a minor by the patient’s spouse (if the spouse is an adult), parents or legal guardian. TEX. HEALTH & SAFETY CODE § 166.035.

b. Revoking a Directive. Clients may be concerned that if they execute a Directive but at the pivotal time, they would like a different decision, the Directive controls. Several statutory provisions deal with this issue. First, the desire of the patient “supersedes the effect of a directive,” even if the patient is a minor. TEX. HEALTH & SAFETY CODE § 166.037. In addition, even if a person is incompetent, he can revoke a Directive. Revocation is done either by the person, or someone on his behalf and at his direction, destroying the Directive, signing and dating a written revocation, or orally revoking the Directive. TEX. HEALTH & SAFETY CODE § 166.042(a). If the revocation is done orally, it is not effective until the attending physician is notified. TEX. HEALTH & SAFETY CODE § 166.042(c).

c. Effect on Physicians. Many (if not most) physicians treat a Directive as a guideline and even when presented with the document, will routinely speak to the family. A careful reading of the statutory provisions makes this understandable. If a patient has previously executed a Directive and is now incompetent or unable to communicate, the physician

¹ Thanks to Monty Python for help with the subtitles.

may make a treatment decision in conjunction with a person the patient has designated to make a treatment decision on his behalf, and if there is no such person, the physician must comply with the Directive unless he believes that the Directive “does not reflect the patient’s present desires.” TEX. HEALTH & SAFETY CODE § 166.038. Furthermore, prior to a physician withholding life-sustaining treatment, the physician must determine that doing so comports with the patient’s existing desires. TEX. HEALTH & SAFETY CODE § 166.040(b). It seems that neither of these requirements can be met without talking to a family member or someone associated with the patient.

d. Absence of a Directive. What if a patient has not executed a Directive or made an oral declaration? Who can make such a decision on the patient’s behalf? The answer is found in Section 166.039 of the Texas Health and Safety Code. According to that section, the physician and the person’s legal guardian or agent under a medical power of attorney will make the decision. If neither of those persons exists, there is a hierarchy of decision makers, namely, the physician along with the person’s spouse, “reasonably available” adult children, parents, or nearest living relative. TEX. HEALTH & SAFETY CODE § 166.039(b). If none of these persons exist, the decision is made by the physician and another physician who is not involved in the patient’s treatment or who is part of the facility’s ethics or medical committee. TEX. HEALTH & SAFETY CODE § 166.039(e). A challenge to the decision may only be made by a temporary guardian. TEX. HEALTH & SAFETY CODE § 166.039(g). Also, it is important to note that the appointment of a guardian of the person does not necessarily revoke the power of the agent under a medical power of attorney to make the decision, although the court may be petitioned to determine who has the power. TEX. HEALTH & SAFETY CODE § 166.156.

e. Refusal to Honor. Even if a person signs a Directive that states their desire to not have life-sustaining treatment withheld, it does not mean that medical care providers must keep the person alive indefinitely. If a physician or other health professional chooses not to honor a Directive or other treatment decision, a procedure is outlined for review of the refusal by an ethics or medical committee, and life sustaining treatment is to be given during the process. TEX. HEALTH & SAFETY CODE § 166.046. If the professional does not either go through the review process or allow the chance to transfer the patient to another physician’s care, then among other potential liability, the professional is subject to disciplinary

action by his licensing board. TEX. HEALTH & SAFETY CODE § 166.045.

f. Review Process. During the review process, various notices may be given or are required to be given to the patient or whoever is responsible for the health care decisions for the patient. Furthermore, if the physician, or the patient or the patient’s agent, do not agree with the decision of the committee, any of them may seek to transfer the patient to another physician’s care. TEX. HEALTH & SAFETY CODE § 166.046(d). If the physician and the committee agree that life-sustaining treatment should not be given, the patient or his agent have a minimum of ten (10) days to find another facility to take the patient since there is no obligation to continue life-sustaining treatment after the tenth day. TEX. HEALTH & SAFETY CODE § 166.046(e). A court order can be sought to give additional time if a finding can be made that “there is a reasonable expectation that a physician or health care facility that will honor the patient’s directive will be found if the time extension is granted.” TEX. HEALTH & SAFETY CODE § 166.046(g). The Texas Health Care Information Council (www.dshs.state.tx.us/thcic) is charged with maintaining an online list of health care providers that will consider accepting a transferred patient, whether it be for withholding or for continuing life-sustaining treatment. TEX. HEALTH & SAFETY CODE § 166.053. This author’s recent review of the list shows that no health care providers are listed with regard to withholding treatment and only one physician and two home health care facilities in Texas are listed with regard to providing life-sustaining treatment.

g. Other Issues. While the statutory provisions make it clear that mercy killing is not condoned, it is also clear that the withholding of life sustaining treatment is not considered the aiding of suicide. Tex. Health & Safety Code §§ 166.047, .050.

2. Medical Power of Attorney. A second type of advanced directive recognized in Texas is a medical power of attorney (“Medical Power”), and the relevant statutory provisions are found in Sections 166.151 *et seq.* of the Texas Health and Safety Code. A Medical Power is effective only if a person’s attending physician certifies in writing that the person is incompetent to make medical care decisions for himself. TEX. HEALTH & SAFETY CODE § 166.152(b).

a. Writing Required. Like a written Directive, a Medical Power is to be signed in the presence of or by two witnesses or a notary, but unlike a Directive, there is no provision for an oral Medical Power. However, although a Medical Power may be signed by another person if the principal is unable to

sign the document, no similar provision exists for a Directive. TEX. HEALTH & SAFETY CODE § 166.154.

b. Grant of Authority. Pursuant to a Medical Power, a person is granting his agent the power to make any health care decisions that the person could make if he was competent. TEX. HEALTH & SAFETY CODE § 166.152(a). Both the principal and the agent must be adults. Importantly, *even if the person is incompetent and even if the person has a Medical Power*, treatment may not be given or withheld from the person if he objects. TEX. HEALTH & SAFETY CODE § 166.152(c). It seems obvious that in Texas we put a high value on allowing people to make health care decisions for themselves if possible.

c. Limitations. Although the powers granted to an agent are quite broad, there are some limitations. First, if the Medical Power itself contains limitations on the agent's power, those limitations apply. TEX. HEALTH & SAFETY CODE § 166.152(a). Second, by statute, the agent may not consent to voluntary inpatient mental health services, convulsive treatment, psychosurgery, abortion, or neglect of the principal though omitting care intended to provide comfort. TEX. HEALTH & SAFETY CODE § 166.152(f).

d. Revocation. The Medical Power may be revoked by the principal, (1) either orally or in writing, by giving notice to the agent or a health care provider or by an act that evidences the intent to revoke, (2) executing a new Medical Power, or (3) divorcing his spouse, if the spouse is named as the agent, unless the Medical Power provides otherwise. The revocation may be made without regard to whether the principal is competent at the time. TEX. HEALTH & SAFETY CODE § 166.155. As mentioned above, the appointment of a guardian of the person does not necessarily revoke the power of the agent under a medical power of attorney. TEX. HEALTH & SAFETY CODE § 166.156. Nothing in the statute provides that the Medical Power is revoked by death.

e. Disclosure of Medical Information. In the Code, there is a provision that authorizes medical information, whether written or oral, to be given to an agent in order to make a health care decision. TEX. HEALTH & SAFETY CODE § 166.157. It makes sense that an agent should have such a right. Otherwise, how could he make an informed decision? An observation in this regard relates to the Health Insurance Portability and Accountability Act of 1996, or HIPAA. The regulations under HIPAA set forth detailed requirements for valid disclosure authorizations. *See*, 45 CFR § 164.508. Since the requirements under HIPAA are federal, can a state law give the agent the authority to receive protected health information, even though neither

the Texas statute nor the sample Medical Power contain all of the language required under the HIPAA regulations? The better practice would be to either include all of the HIPAA-required language in the Medical Power or prepare a separate HIPAA authorization that includes any agents named in the Medical Power.

f. Required Disclosure Statement. Certain information must be disclosed to the principal prior to execution of a Medical Power and the Code provides a sample form. The Code also mandates that the Medical Power “is not effective unless the principal, *before* executing the medical power of attorney, signs a statement that the principal has received a disclosure statement and has read and understood its contents.” TEX. HEALTH & SAFETY CODE §§ 166.162, .163 (emphasis added). Therefore, the order of executing the disclosure statement and the Medical Power is important.

3. Do Not Resuscitate Order. The third type of advanced directive recognized in Texas is an out-of-hospital do-not-resuscitate, or OOH DNR, order. The relevant statutory provisions are found in Sections 166.081 *et seq.* of the Texas Health and Safety Code.

a. Compared to Directive. Although an out-of-hospital DNR is not to be confused with a Directive, there are similarities.² A DNR directs health care providers not to initiate or continue certain life-sustaining treatments in non-hospital settings, including homes, long-term care facilities, physicians' offices, and ambulances. TEX. HEALTH & SAFETY CODE §§ 166.081, .082. The treatments described are cardiopulmonary resuscitation, advanced airway management, artificial ventilation, defibrillation, and transcutaneous cardiac pacing. *Id.* Although the statute also allows for the Texas Department of State Health Services to specify other treatments, no other treatments have been adopted.

b. Contrasted with Directive and Medical Power. As opposed to a Directive or a Medical Power, an out-of-hospital DNR order must be in the standard form as set forth by the Texas Department of State Health Services.³ TEX. HEALTH & SAFETY CODE

² Currently, there are no specific statutory provisions for an in-hospital DNR order, although to some extent a Directive could be classified as such.

³ Numerous references are made throughout the Texas Health & Safety Code to the Texas Department of Health and the Texas Board of Health. By legislation in 2003, several Texas health agencies, including those two, were merged into the Texas Department of State Health Services, and as a result, the Texas Department of Health and the Board of Health were abolished. Although various statutes still refer to the prior agencies, I will refer to the Texas

§ 166.083. In addition to being signed in either the presence of and by two witnesses or a notary, the DNR must be signed by the person's attending physician (although the physician need not be present when the other signatures are made). TEX. HEALTH & SAFETY CODE § 166.082(b). To acknowledge that the document has been properly completed, each person executing the order must sign a second time at the bottom of the form. TEX. HEALTH & SAFETY CODE § 166.083(b)(13). Like a Directive, a DNR may be oral. An oral DNR must be made in the presence of two witnesses and the doctor, all of whom must sign the DNR order. TEX. HEALTH & SAFETY CODE § 166.084. In addition, a DNR may be made on behalf of a minor. TEX. HEALTH & SAFETY CODE § 166.085. A DNR can be evidenced by a type of necklace or bracelet as designed by the Texas Department of State Health Services and such necklace or bracelet is to be honored as if it was the signed document. TEX. HEALTH & SAFETY CODE § 166.090.

c. Approval by Others. There are several alternatives that allow a DNR to be issued for a person even if they have not executed the form prior to becoming incompetent. If the person executed a Directive, the physician may rely on the Directive and sign the DNR order, thereby making the DNR effective. If the person executed a Directive and named a proxy, the proxy may sign the DNR order in lieu of the patient. In addition, if the person executed a Medical Power, the agent may sign the order in lieu of the person. TEX. HEALTH & SAFETY CODE § 166.082.

d. Incompetent Patient. Again, we put a high value on allowing people to make health care decisions for themselves. Therefore, even if someone is incompetent, any communication by that person will control over an existing DNR. TEX. HEALTH & SAFETY CODE § 166.086. If a person is comatose or incompetent, the agent named in a Medical Power, proxy named in a Directive, or legal guardian may sign a DNR or if none of these "agents" exists, a qualified relative along with the attending physician, or another physician along with the attending physician may sign a DNR. TEX. HEALTH & SAFETY CODE § 166.088. The only way to challenge such a DNR is by applying for temporary guardianship. TEX. HEALTH & SAFETY CODE § 166.088(g).

e. Effect on Caregivers. If aware that a person has a DNR, health care professionals are

mandated to follow a person's DNR. Of course, prior to doing so, the professional must make sure the person is really the same person that executed the DNR and must review the DNR to make sure it is valid. If any of the rules are violated, the DNR is not to be honored. At the same time, if a valid DNR exists but the person, his physician, guardian, qualified relative, or Medical Power agent ask that life-sustaining treatment be initiated or continued, the health care professionals must do so. TEX. HEALTH & SAFETY CODE § 166.089.

f. Revocation. The person, or certain persons on his behalf, may revoke the DNR by destroying the written DNR such as a legal guardian or agent under a medical power of attorney, removing the identifying necklace or bracelet, or orally communicating the revocation to the necessary health care professionals. TEX. HEALTH & SAFETY CODE §166.092.

g. Other Issues. As with a Directive, while the statutory provisions make it clear that mercy killing is not condoned, it is also clear that the withholding of life sustaining treatment is not considered the aiding of suicide. TEX. HEALTH & SAFETY CODE §§ 166.096, .099. In fact, any act of hiding or destroying someone's DNR without that person's consent or the consent of someone who may act on their behalf is a criminal offense. TEX. HEALTH & SAFETY CODE § 166.097. Likewise, someone who falsifies or forges a DNR with the intent to withhold life-sustaining treatment from someone against that person's wishes can be charged with criminal homicide. *Id.*

4. Physician Orders for Life-Sustaining Treatment (POLST). A national movement to educate patients and provide consistency in end-of-life health care issues began in Oregon and has been adopted in fifteen states with many other other states in the process of developing a program, one of which is Texas. Serving as a hybrid of, as well as a supplement to, a Directive, Medical Power and OOH DNR, the POLST (known by other names in the various states) begins as a conversation among a physician and a patient (or the patient's surrogate such as an agent under a Medical Power). The conversation about POLST ideally occurs when the physician and other caregivers would not be surprised if the patient did not live for another year and is meant to be for patients of advanced progressive illness or frailty. A POLST form provides medical orders for the patient, is designed to address cardiopulmonary resuscitation (CPR) plus detailed instructions regarding other medical treatments, and is meant to be transferred with the patient regardless of his current medical setting as part of his medical records. Because a physician initiates

Department of State Health Services, since that agency took on the various powers and duties of the former agencies. The Texas Department of State Health Services is subject to sunset on September 1, 2015 and is under review by the Texas Sunset Advisory Commission.

the conversation with a patient, the thought is that much more frank and thorough conversations with the patient will yield a better, more thorough treatment plan. The POLST form is divided into at least three parts regarding treatment decisions: one that deals with the use of CPR, one that addresses the level and invasiveness of treatment desired by the patient from comfort care to full treatment, and one that addresses the use of medically-supplied, artificial nutrition. The form is designed to be effective and implemented immediately, although the treatment plan can evolve over time as the conversations with the physician take place. For a more detailed discussion, *see* Wolf, Maag, and Gallant, “The Physicians Orders for Life-Sustaining Treatment (POLST) Coming Soon to a Health Care Community Near You,” ACTEC Annual Meeting, Symposium I (2014) and *visit* www.polst.org.

B. Anatomical Gifts. An anatomical gift may be a gift of a part of or all of someone’s body for the purpose of transplantation, therapy, research, or education. TEX. HEALTH & SAFETY CODE § 692A.002(3). One important observation – Two chapters of the Texas Health and Safety Code address the manner of making anatomical gifts but the focus of each overlaps. In a broader sense, anatomical gifts are governed by the Revised Uniform Anatomical Gift Act found in Chapter 692A of the Texas Health and Safety Code.⁴ Gifts under the Anatomical Gift Act may be made to a broad array of organizations and gifts can be categorized as whole body donations or partial body donations, which include organ and tissue donations. However, if someone wants to donate their body solely for the purpose of research and education, he may wish to make such a gift to the Anatomical Board of the State of Texas and one of its member organizations. This narrower gift may be made pursuant to Chapter 691 of the Texas Health and Safety Code. Gifts to the Anatomical Board may also be made pursuant to the Revised Uniform Anatomical Gift Act. Although much of this seems circular, let’s see if some of that confusion can be cleared up.

1. Donations Under Chapter 691. Although Chapter 691 uses the terms “body” and “anatomical

⁴ Chapter 692 of the Texas Health and Safety Code was the former Texas Anatomical Gift Act. In 2009, House Bill 2027 enacted the Revised Uniform Anatomical Gift Act and repealed the former Act. However, two weeks after HB 2027 was signed by the governor, Senate Bill 1803 which amended one subsection of the former Texas Anatomical Gift Act was passed and signed by the governor. Although this Section 692.003(d) of the Texas Health and Safety Code is still shown to be in effect while the rest of the Chapter is repealed, it is this author’s opinion that the subsection has no effect, should be treated as if it was repealed, and that Chapter 692A controls.

specimen,” the chapter outlines how a person can donate their body to science, not just a part of their body. Gifts pursuant to this chapter are governed by the Anatomical Board of the State of Texas. The Board is made up of representatives of the various Texas medical, chiropractic, osteopathy, and dental schools and is charged with the responsibility of distributing “bodies and anatomical specimens to institutions authorized to receive them” and adopting rules “to ensure that each body and anatomical specimen . . . is treated with respect.” TEX. HEALTH & SAFETY CODE § 691.022. The Board’s website (sab.state.tx.us) also provides information regarding how to make a “whole-body” donation.

a. What is Body Donation? What does it mean to donate a body to science? Bodies that are donated are used to “further medical science” and can be dissected, operated on, examined, and experimented on. TEX. HEALTH & SAFETY CODE § 691.033(a). The Board must keep records of the bodies it receives and the bodies it distributes. TEX. HEALTH & SAFETY CODE § 691.007(c). The Board is charged with inspecting and approving the institutions that are allowed to receive and use bodies, and in turn, may suspend or revoke an institution’s right to receive and use bodies. TEX. HEALTH & SAFETY CODE § 691.034. Although an institution has the right to use a body in the manners described, the use is not considered mutilation for the purposes of other laws and the Board must adopt rules describing what is authorized for a dissection. TEX. HEALTH & SAFETY CODE § 691.033. Accordingly, Title 25, Part 4 of the Texas Administrative Code provides additional regulations.

b. How to Donate a Body. So, how does someone donate his or her body to science? One way is to donate by Will or “other written instrument.” TEX. HEALTH & SAFETY CODE § 691.028. Pursuant to Chapter 691, only adults of sound mind may donate their bodies. TEX. HEALTH & SAFETY CODE § 691.028(a). If done by way of “other written instrument,” one option is to contact the Willed Body Program at a member organization and request forms, or the forms are available on the members’ websites. The donor can then complete the form and provide it to the organization. Some organizations require the form to be completed prior to death and will not accept a donation after death by someone else.

c. Member Organizations and Their Criteria. Every form references only a gift of the entire body. Although not all members are currently accepting donations, the current member organizations are Baylor College of Dentistry, Parker Chiropractic College, University of North Texas HSC, University of

Texas Southwestern, Baylor College of Medicine, Texas A&M HSC, Texas College of Chiropractic, University of Texas HSC Houston, University of Texas Medical Branch, Galveston, University of Texas HSC San Antonio, and Texas Tech Health Science Center Schools of Medicine in El Paso and Lubbock. Even though a gift is made, it does not mean that a program will accept the donation. Each program has specific criteria, and some programs will not accept a body if it has been autopsied or embalmed, or if the person was morbidly obese or emaciated. In addition, some programs will not accept the body of a person who donated organs. This is an important factor that is not necessarily made clear to potential donors.

d. Statutory Requirements. When making a donation, the statute provides that no particular words are needed, just that the donor's intent is clear. TEX. HEALTH & SAFETY CODE § 691.028. Two witnesses are required. *Id.* Each of the member's forms includes this requirement. If the donation is by Will, an administrator or executor does not need to be appointed prior to delivery of the body. *Id.* Revocation of the donation is to be made by executing a document in a way similar to the original donation document. *Id.* However, keep in mind that even if a person makes a donation, if no one contacts the program or Board after death, neither the program nor the Board will know to pick up the body.

e. Distribution of Bodies. Pursuant to Section 691.030 of the Texas Health and Safety Code, the Board is charged with distributing bodies that are donated to the Board and is allowed to redistribute bodies that are donated to other organizations. The Board is to follow a priority when making distributions. First, bodies go to schools and colleges that need them for lectures and demonstrations. Next, the Board is to distribute and redistribute bodies "proportionately and equitably" according to the number of students those institutions with classes in normal or morbid anatomy and operative surgery. The Board is also allowed to transport bodies to another state if Texas has too many bodies and the person authorized such a transport when making the donation either pursuant to Chapter 691 or pursuant to Chapter 692A. If a person is adamant that only a particular institution receive the body, it would be important to so specify in the donation document. Whoever receives the body may pay the costs associated with transport as specified by the Board, or as otherwise agreed. TEX. HEALTH & SAFETY CODE § 691.032. Typically, the member institutions will cover the cost for transportation based on a maximum number of miles and each form then indicates the cost for additional miles.

f. After Donation. After donation, there is no set time period for when an institution must be finished with using the body. Understandably, if the body is accepted for donation, it is immediately taken to the recipient organization and is not available for a funeral service. The body may even be kept for permanent use. Most bodies, however, are not kept permanently and are cremated afterwards. Although the programs typically cover the cost of cremation, there may be a charge if the cremains are returned to a designated person. If someone wants the cremains, it is important to provide the institution with contact information and to keep that information updated since it may be two years or more before the institution is done with the body.

2. Donations Under Chapter 692A. As mentioned above, Chapter 692A of the Health and Safety Code is known as the Revised Uniform Anatomical Gift Act and can include whole body and partial body donations for purposes of transplantation, therapy, research, or education. TEX. HEALTH & SAFETY CODE § 692A.002. Gifts under this Chapter include gifts of organs, eyes, and tissue but do not include blood, unless it is donated for research or education. *Id.* Organs include heart, kidneys, pancreas, lungs, and liver. Section 692A.002(34) defines tissue as a part other than an organ or eye, which would include skin, bone, heart valves, and tendons.⁵ It is unclear whether sperm or eggs are considered organs or tissue, and if they are, for which of the four purposes a donation could be made.⁶ If organs and/or tissue are donated, the donor's body can be available for a funeral service, but as with gifts under Chapter 691, if the entire body is donated, no body is available for a funeral service.

a. Method of Donation. The requirements to make a gift under this Chapter are not the same as under Chapter 691. Instead, a gift may be made by a Will, orally, by allowing a statement or symbol to be

⁵ Texas Organ Sharing Alliance reports on its website that up to 85 people can benefit from one tissue donor. For more information, see www.txorgansharing.org/donationInfo/faqs.php.

⁶ For a discussion of many of the issues regarding the treatment of reproductive material at death, see Fuselier, "To Be or Not to Be?" *that is the Question Surrounding the Disposition of Reproductive Material at Death*, 38th Annual State Bar of Texas Adv. Est. Pl. & Prob. Course (2014), which includes a discussion of *In re Est. of Evans*, 2009 WL 7729555 in which the Travis County Probate Court gave a mother who had donated her son's organs the right to have sperm retrieved from his body for personal use. The importance of the terms of the contract with the clinic that retains reproductive material in relation to the disposition of the material at divorce or death is made evident in *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. – Houston [1st Dist.] 2006, pet denied).

placed on the person's driver's license or identification card (although expiration, suspension, revocation of either does not invalidate the gift), by donor card or other record, or other type of donor registry. The gift via statewide registry may be made online at www.donatelifetexas.org/register. If a person is unable to sign a record, the record may be signed by someone else on the donor's behalf and at their request, in the presence of and signed by two witnesses. If the gift is made by Will, it takes effect at death, even if the Will is not probated. Furthermore, if the Will is later invalidated, the gift is not invalidated. TEX. HEALTH & SAFETY CODE § 692A.005. For Texas driver's license and identification certificate purposes, when someone applies for a new, renewal, corrected, or duplicate license or identification certificate, the Texas Department of Public Safety must provide the applicant with the opportunity to indicate on the license or identification certificate that the person is willing to make an anatomical gift at death and to consent to being included in the statewide registry. TEX. TRANSP. CODE § 521.401. To give the opportunity, the Texas Department of Public Safety representative must ask the applicant "Would you like to register as an organ donor?", and if the applicant does, the department is to provide certain identifying information to the statewide registry. TEX. TRANSP. CODE § 521.401; TEX. HEALTH & SAFETY CODE § 692A.020(d). Notice that the question does not refer to donating the entire body.

b. Authorizations by Agents. Before death, donations may be made by adults and minors (albeit with parental consent if the minor is unemancipated), by an agent under a Medical Power, by another document expressly authorizing anatomical gifts, by a parent of an unemancipated minor, or by a guardian of someone's person. TEX. HEALTH & SAFETY CODE § 692A.004. Interestingly, nothing in Chapter 166 regarding Medical Powers, including the required disclosure statement, indicates that an agent has this power. Making a gift on behalf of someone is somewhat complicated. If a person makes a gift on behalf of a donor and the gift is unrevoked, no one else (other than the donor) may make, amend, or revoke the gift. TEX. HEALTH & SAFETY CODE § 692A.008(c). At the same time, if a person makes the gift and then later revokes it, it does not bar another person from making a gift on behalf of the donor. TEX. HEALTH & SAFETY CODE § 692A.008(d).

c. Revocation vs. Refusal. There is a distinction that is made when a person changes their mind about making the gift. Namely, a person can amend or revoke the gift, or the person can refuse to make the gift. A gift may be amended or revoked by a

later-signed document, which again may be signed on behalf of the donor. TEX. HEALTH & SAFETY CODE § 692A.006. A donor may refuse to make the gift by a written record, including one that is signed on behalf of the donor; by the person's Will; or "any form of communication made by the individual during the individual's terminal illness or injury" if in the presence of two witnesses. TEX. HEALTH & SAFETY CODE § 692A.007. The donor can then revoke the refusal by one of the options for making a refusal, by later making an anatomical gift, or by destroying or canceling the record of the refusal. *Id.* Why the distinction? Because, unless the refusal clearly indicates otherwise, an unrevoked refusal bars anyone else from making an anatomical gift of that person's body or part of their body. TEX. HEALTH & SAFETY CODE § 692A.007(d). One exception applies in this regard, and that is, if an unemancipated minor makes a refusal, the parent can revoke the refusal. TEX. HEALTH & SAFETY CODE § 692A.008(h). A parent may also revoke or amend a gift made by an unemancipated minor. TEX. HEALTH & SAFETY CODE § 692A.008(g). Furthermore, unless a procurement organization knows that a minor is emancipated, when a minor who is a donor or who signed a refusal dies, the organization is directed to conduct a "reasonable search" to allow the parents to revoke or amend the gift or a refusal. TEX. HEALTH & SAFETY CODE § 692A.014(f). What is not at all indicated in Chapter 692A (and seems to directly conflict with that chapter) is that if the gift is made through the Department of Public Safety as part of a donor's driver's license or identification card and the donor wants to revoke the gift, the donor must apply for an amendment to the license or identification card. TEX. TRANSP. CODE § 521.402. In addition, the donor must also notify the statewide registry to have their name deleted from the registry. *Id.*

d. Revocation by Others. As with putting a high value on allowing people to make health care decisions for themselves, we also put a high value on allowing people to decide if they want to donate their body. Therefore, unless the donor clearly indicates otherwise, no one, other than the donor, may make, amend, or revoke an anatomical gift if the donor makes a gift pursuant to the Revised Uniform Anatomical Gift Act. TEX. HEALTH & SAFETY CODE § 692A.008. Again, it is important for a donor to be clear. A refusal and a revocation are not the same. Therefore, if a donor revokes (but does not refuse) a gift, it is not a bar to another person later making an anatomical gift of all or part of the donor's body. *Id.*

e. Gifts after Death. What about after death? Who can make an anatomical gift on behalf of

a decedent? Presuming the other person is not barred by one of the other subsections, the hierarchy is as follows: the decedent's agent under a Medical Power or under another document specifically authorizing anatomical gifts, spouse, adult children, parents, adult siblings, adult grandchildren, grandparents, "an adult who exhibited special care and concern for the decedent," guardians of the person, the hospital administrator, and finally, any other person with authority to dispose of the decedent's body. TEX. HEALTH & SAFETY CODE § 692A.009(a). If there is more than one person in a particular class, the gift may be made by one of the members unless the member knows of an objection by one of the other members of the class or the person or organization that will receive the gift. TEX. HEALTH & SAFETY CODE § 692A.009(b). If an objection is known, the gift may only be made by a majority of the members of that class. *Id.* Furthermore, if a person in a higher class is reasonably available to make or object to the gift, a person in a lower class may not make the gift. TEX. HEALTH & SAFETY CODE § 692A.009(c). It is possible to revoke a gift made by someone on behalf of a decedent. To be effective, the procurement organization, transplant hospital, or physician or technician must know of the revocation prior to any incision to remove part of the body or initiation of invasive procedures to prepare the recipient of the part. TEX. HEALTH & SAFETY CODE § 692A.010(c).

f. Gift Recipients. Who can receive an anatomical gift? We know that the Anatomical Board and its member organizations can receive a gift pursuant to Chapter 691. Pursuant to Chapter 692A, the potential recipients are broader and include an organ procurement organization if for transplantation, therapy, research, or education; a hospital if for research; an individual named by the donor unless the part cannot be transplanted into the donee; an eye or tissue bank; a forensic science program at a statutorily defined general academic teaching institution or private or independent institution of higher education; or the Anatomical Board. TEX. HEALTH & SAFETY CODE § 692A.011(a). Another recipient that falls into this category is mortuary schools. With programs that teach forensic sciences, bodies are used in so-called "body farms," like those maintained by the Southeast Texas Applied Forensic Science Facility which is part of Sam Houston University's College of Criminal Justice and by the Forensic Anthropology Center at Texas State University. In the case of these gifts, most donations are accepted regardless of condition, except bodies of persons who had infectious diseases, and once the remains are reduced to skeletal remains, the skeleton remains with the program.

g. Effect of Limiting the Gift. A donor can specify the purpose of the gift and the part to be gifted. In case a donor does not specify the recipient but does specify the purpose, the statute sets out who the recipient will be. For example, if a gift or all or part of a body is made for the purpose of education or research, the Anatomical Board will be the recipient, and Chapter 691 will apply for purposes of distribution. TEX. HEALTH & SAFETY CODE § 692A.011(b). As a further example, if the gift is tissue for the purpose of transplantation, the recipient will be the tissue bank. TEX. HEALTH & SAFETY CODE § 692A.011(e)(2). There appears to be an inconsistency in the statute that this author has not been able to resolve. While the recipient of gifts for the purpose of education or research is generally the Anatomical Board as provided in Section 692A.011(b), it appears that the recipient of gifts of an organ, eye, or tissue for the purpose of education or research is the appropriate procurement organization such as an eye or tissue bank. TEX. HEALTH & SAFETY CODE § 692A.011(e)(4).

h. Priority of Use. If a donor specifies more than one purpose for the gift with no particular priority, first the gift will be attempted to be used for transplantation or therapy, and then for research or education. TEX. HEALTH & SAFETY CODE § 692A.011(f). If a donor does not specify a purpose for the gift and does not name a recipient or only specifies a general intent to make a gift, the gift may only be made for transplantation or research. TEX. HEALTH & SAFETY CODE §§ 692A.011(g), (h). Therefore, if a donor makes a general gift, such as through a donor registry, thinking that their body will go to science if it cannot be used for organ donation, this is not necessarily the case. Once again, being specific in the gift can be important in order to meet the donor's wishes. If a gift is not valid or is not used, the body or the body part passes to the person obligated to dispose of the body or the part. TEX. HEALTH & SAFETY CODE § 692A.011(k).

i. Rules for Hospitals. Hospitals must enter into agreements or affiliations with organ procurement organizations and establish policies and protocols for a donation system that are available to the public. TEX. HEALTH & SAFETY CODE § 692A.015. Organ procurement organizations are exempt from HIPAA because the procurement is not considered health care to the donor. 45 CFR § 164.512(h). Therefore, a hospital may make a referral of a patient to a procurement organization and disclose to the organization what would otherwise be considered protected health information. When a hospital makes a referral, the procurement organization is to make a

“reasonable search” of the Texas Department of Public Safety record and local donor registries to see if the patient has made an anatomical gift. TEX. HEALTH & SAFETY CODE § 692A.014. In addition, the organization is permitted to conduct any “reasonable examination” needed to determine if a part is medically suitable. TEX. HEALTH & SAFETY CODE § 692A.013(c).

j. Who May Remove. For removing a part, only a physician or technician who is qualified may do so. In addition, neither a person’s attending physician nor the physician who declares the person’s death may be involved in removing or transplanting a part. TEX. HEALTH & SAFETY CODE §§ 692A.014(i), (j). There are three federally designated organ procurement organizations, or OPOs, in Texas. OPOs focus on organ and tissue donations, rather than whole body donations. OPOs provide clinical staff who oversee maintaining the donor’s body, help match the organs and tissue with donees, and coordinate the organ recovery surgery, as well as provide emotional support for donor families. Each of the Texas OPOs, LifeGift, Southwest Transplant Alliance, and Texas Organ Sharing Alliance, covers a specific and separate region of Texas. The Association of Organ Procurement Organizations (www.opo.org) represents each of the 58 nationwide OPOs.

k. Fees. Section 692A.016 provides that the sale or purchase of a body part to be removed after death and used for transplantation or therapy is prohibited and either action rises to the level of a criminal offense. TEX. HEALTH & SAFETY CODE § 692A.016(b); TEX. PEN. CODE § 42.08. A reasonable amount may be charged, however, for the removal, transplantation, storage, etc. of the part. TEX. HEALTH & SAFETY CODE § 692A.016(b). The donor’s family is never charged for costs related to donation.

l. Liability. Several immunities exist for the various participants in the donation process. Of importance, both the donor of the anatomical gift and the donor’s estate are immune from any injury or damage that result from making or using the gift. TEX. HEALTH & SAFETY CODE § 692A.018(d).

m. The Glenda Dawson Donate Life-Texas Registry. The Revised Uniform Anatomical Gift Act mandates the Texas Department of Public Safety designate a nonprofit organization to maintain and administer a statewide donor registry, called the Glenda Dawson Donate Life-Texas Registry, and an online registry. TEX. HEALTH & SAFETY CODE § 692A.020. The nonprofit organization that administers the registry is comprised of representatives

from each of the Texas organ procurement organizations, LifeGift, Southwest Transplant Alliance, and Texas Organ Sharing Alliance. There are two main online donor registries in Texas: Donate Life Texas (www.donatelifetexas.org) and The Living Bank (www.livingbank.org). Donate Life Texas Inc. is the statewide registry mandated by Chapter 692A. The Living Bank is a longstanding nonprofit organization that works to raise awareness about the need for organ donation. If a person registers with The Living Bank, the information is then provided to Donate Life Texas. Both organizations allow for online registration, but only Donate Life Texas asks donors if they are registered with a whole body donation program.

n. Conflict with Other Documents. If a donor has a Directive, a Medical Power or other declaration regarding life support, and the terms conflict with the measures needed to be taken while maintaining the body for transplantation or therapy, the attending physician and donor will try to resolve the conflict. If the donor is not able to do so, the donor’s agent under one of the documents, if available, or someone else who is authorized to make health care decisions for the donor will try to resolve the conflict. If the conflict cannot be resolved, a review is made by the ethics or medical committee of the health care facility. Pending resolution, no treatment may be withheld or withdrawn from the donor that would make the body part medically unsuitable. TEX. HEALTH & SAFETY CODE § 692A.021.

o. Attorney Involvement. One other requirement of the Act of note – Donate Life Texas is required to “encourage attorneys to provide organ donation information to clients seeking advice for end-of-life decisions.” TEX. HEALTH & SAFETY CODE § 692A.020(o)(1). Although this author routinely provides information to estate planning clients, she has never received information directly from Donate Life.

C. Agent to Control Disposition of Remains. Controlling what happens to the body when someone dies can be extremely emotional. Although neither a body nor parts of a body are considered “property” of a decedent’s next of kin or of the estate of the decedent, Section 711.002 of the Texas Health and Safety Code allows each person to give instructions as to the disposition of their remains or to designate someone to do so. *See, Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377 (Tex. 2012) (rights regarding a body and parts of a body are not part of the bundle of sticks related to property ownership and as a result, give possessory rights and quasi-property rights, but not full property rights); *Burnett v. Surratt*, 67 S.W.2d 1041 (Tex.Civ.App. – Dallas 1934); *Gray v. State*, 114 S.W.

635 (1908) (stating “[a]t common law there can be no property in a dead human body; and after burial of such dead body it becomes a part and parcel of the ground to which it is committed. Nevertheless, the authorities hold the right to bury a corpse and preserve its remains is a legal right which the courts will recognize and protect. While the body is not property in the usually recognized sense of the word, yet it may be considered as a sort of quasi property, to which certain persons may have rights, as they have duties to perform toward it, and the right to dispose of a corpse by decent sepulture includes the right to the possession of the body in the same condition in which death leaves it.”).

1. **Disposition Instructions.** Section 711.002 provides a hierarchy of persons who have the right to control the disposition of the remains. The hierarchy applies, however, only if a decedent has not otherwise provided written instructions in a Will, prepaid funeral contract, or some other written instrument signed and acknowledged by the decedent. TEX. HEALTH & SAFETY CODE § 711.002(g). If the instructions are in a Will, similar to donations of organs or the entire body, the Will does not need to be probated before the instructions may be followed. TEX. HEALTH & SAFETY CODE § 711.002(h).

2. **Persons Who May Dispose.** If the decedent leaves no instructions, the persons who have the right to control the disposition of the remains, “shall inter the remains,” and are liable for the reasonable cost of interment are as follows: an agent designated in writing by the decedent, surviving spouse⁷, any one of the decedent’s adult children, either parent, any one adult sibling, or any adult person in the next degree of kinship in the order named by law to inherit the decedent’s estate. TEX. HEALTH & SAFETY CODE § 711.002(a). In the absence of written instructions, a surviving spouse’s right to control the disposition of remains is paramount, even when the spouses are estranged from each other. *Est of Woods*, 402 S.W.3d 845 (Texas.App. – Tyler 2013). In *Estate of Woods*, the court emphasized that even though the statute provides that a court may resolve a dispute among persons seeking to control the disposition of remains, the statutory priority that has been in place since 1934 must be followed.

⁷ Giving a surviving spouse a preferential right to control the disposition of his or her spouse’s remains has long been the standard. See *Foster v. Foster*, 220 S.W. 215 (Tex.Civ.App. – Texarkana 1920, no writ) (“The law accords [the surviving spouse] the privilege of controlling the place and manner of burial in deference to the sentiments which are presumed to attend the relations of husband and wife.”)

Although the right of disposition of the body is not a property right, interference with that right by someone else by disturbing the body without consent, is an actionable offense. See *Love v. Aetna Cas. & Sur. Co.*, 99 S.W.2d. 646 (Texas Civ. App. – Beaumont 1938), aff’d 121 S.W.2d 986 (1938) (autopsy obtained by insurance claims adjuster without notice or consent to next of kin found to be unlawful and considered mutilation of body); *Terrill v. Harbin*, 376 S.W.2d 945 (Tex.Civ.App – Eastland 1964, writ dismissed) (“[a]ny interference with [the] right of possession of the body of a deceased by mutilation or otherwise disturbing the body without the consent of the next of kin is an actionable wrong for which a claim for damages may be maintained.”). Cf. *Lions Eye Bank of Tex. v. Perry*, 56 S.W.3d 872 (Tex.App. – Houston [14th Dist.] 2001, pet. denied).

As noted, the person with the right to control the disposition of the remains is liable for the cost of interment. The person may seek reimbursement from the estate under Section 355.103 of the Texas Estates Code, but remains liable even if funds in the estate are not sufficient. See, *Glover v. Elliston*, 529 S.W.2d 119 (Tex. Civ. App. – Eastland 1975) (funeral home may proceed directly against person making arrangements who may then seek reimbursement from estate). Any person listed who has been indicted in connection with the decedent’s death for a crime involving family violence against the decedent has no right to control the disposition of remains. TEX. HEALTH & SAFETY CODE § 711.002(l). Furthermore, if a decedent was in the military, had completed an official emergency contact form (DD Form 93), and died under defined circumstances, that form is to control over any other document. TEX. HEALTH & SAFETY CODE § 711.002(a-1). It is worth noting that the list does not include a domestic partner, longtime companion, or executor or administrator of a decedent’s estate. For persons who are single and have someone close to them that is not on the list, or if they have special instructions that they would like carried out, it is extremely important that the person execute written instructions or appoint an agent.

3. **Time Limits and Jurisdiction.** The person with the right to control the disposition of remains has the earlier of 6 days after being notified of the decedent’s death or 10 days after the date of death to make arrangements or appoint someone else to make arrangements. If the person fails to do so, the person’s rights are terminated. TEX. HEALTH & SAFETY CODE § 711.002(a-1). Once the right is terminated, the right goes first to anyone in the same class as the person whose rights were terminated, then to someone in a different class. *Id.* Any conflict among persons in the

list is to be resolved by a court. TEX. HEALTH & SAFETY CODE § 711.002(k). If no person in the hierarchy exists, then if an inquest is held, the person conducting the inquest is to inter the remains and if no inquest is held, the county where death occurred is to inter the remains. TEX. HEALTH & SAFETY CODE § 711.002(d). If a dispute arises as to who has the right to control disposition, the dispute is to be resolved by a “court of competent jurisdiction.” TEX. HEALTH & SAFETY CODE § 711.002(k). As a reminder, in resolving a dispute, a court of competent jurisdiction must follow the statutory priority list. See *Est of Woods*, 402 S.W.3d 845 (Texas.App. – Tyler 2013). Presumably, if the dispute arises and action is sought prior to the filing of any probate proceeding, jurisdiction lies with the district court since the dispute is neither a probate proceeding nor a matter related to a probate proceeding. See TEX. ESTS. CODE §§ 31.002 *et seq.* and 32.001 *et seq.* In these matters, however, it is unclear as to where venue would lie, i.e. county of decedent’s residence, county where decedent died, etc. One would assume that it is wherever the body is located.

4. Designation of Agent. Section 711.002 provides a form to use in order to meet the statutory requirements. TEX. HEALTH & SAFETY CODE § 711.002(b). The form is not mandatory, but any form used must be substantially similar to the statutory form. *Id.* When listing the priority of persons who have a right to control disposition, the statute states only that a written instrument designating the agent need be signed by the decedent. A later subsection makes it clear, however, that the instrument is legally sufficient if it is “signed by the decedent, the agent, and each successor agent, and the signature of the decedent is acknowledged.” TEX. HEALTH & SAFETY CODE § 711.002(c).

5. Removal and Reinterment. Section 711.004 of the Texas Health and Safety Code provides that remains may be removed from a cemetery with the consent of the cemetery organization, the current plot owner, and certain other persons in a listed priority, starting with the surviving spouse then the surviving adult children and so on. Prior case law held for disinterment to occur, the person with the right to disinter had to also demonstrate a “necessity or compelling reason” subject to public policy considerations when removing the remains. See, e.g., *Fowlkes v. Fowlkes*, 133 S.W.2d 240 (Tex.Civ.App. – Galveston 1939, no writ); *Samsel v. Diaz*, 659 S.W.2d 143 (Tex.Civ.App. – Corpus Christi 1983, no writ). However, the court in *Dueitt v. Dueitt* found that the statutory language is clear and that if the persons described in the statute give consent, no other

requirements may be imposed. *Dueitt v. Dueitt*, 802 S.W.2d 859 (Tex.App. – Houston [1st Dist.] 1991). Disinterment without consent is akin to interference with a person’s right to dispose of another’s body and can give rise to a damage claim for such causes of action as intentional infliction of emotional distress, negligence, and trespass. See *Serv. Corp. Int’l v. Guerra*, 348 S.W.3d 221 (Tex. 2011); *Terrill v. Harbin*, 376 S.W.2d 945 (Tex.Civ.App. – Eastland 1964, writ dismissed).

III. THE BUREAUCRACY OF DEATH/WHAT TO DO WHEN SOMEONE DIES, or, He is Not Dead Yet – Well, Now He’s Dead

A. Who Do You Call? If someone is under hospice care or in a long term care facility or hospital and dies, the steps are there, the protocols are in place for what to do next. But when someone dies at home, and they are not under a physician’s or hospice care, the steps are not as clear. What about when there is no question that the person is dead? How about when someone has not been heard from in several days, was not going on a trip, and a family member or other loved one is worried and suspects someone has died?

1. Making a Call. Clients should know that the uniform rule for emergencies applies – call 911. The 911 dispatch will then determine whether the fire department, police or sheriff’s department, and/or emergency medical services should be dispatched. In cases where someone may have died but no one has access to the person’s house and a “welfare check” is needed, the city or county police are typically sent at the same time as the fire department and/or other emergency medical services so that the police may make a forced entry if needed.

When calling 911, loved ones should be specific. For example, if death is evident, be clear that the person is dead, cold, whatever. If death is not evident, loved ones should let 911 know this information as well. The dispatch person should then communicate the information given to the personnel that are sent to the location. The location and condition of the body will determine what measures the personnel may institute on arrival. In addition, every county and city has different “local rules” regarding the steps to be taken and protocols to follow. If the decedent executed an out-of-hospital do-not-resuscitate order or other advanced directive, the loved one should have it ready and available to provide to responders.

a. Duty to Report a Death. It appears that in addition to a physician, if anyone possesses a body or a body part of a person who has died or is aware of a death, and the death requires an inquest, he must report

the death to the justice of the peace or in counties that have a medical examiner, to the medical examiner, or to the city or county police. TEX. CODE CRIM. PROC. §§ 49.07, 49.25(7a). In counties where there is no medical examiner, it seems that the notification can be made to the police, who then must notify the justice of the peace. TEX. CODE CRIM. PROC. § 49.07(b). Most people are not familiar with the types of death that require an inquest, and in limited circumstances, other statutes are clear regarding the type of deaths that require notification. One example is that if any person knows that an adult's death may have resulted from suicide, family violence, or abuse, that person must immediately report the death to the justice of the peace or medical examiner, as applicable. TEX. HEALTH & SAFETY CODE § 672.012.

b. Notifying the Social Security Administration. A special note about Social Security. The Social Security Administration must be notified when someone dies. Typically, a funeral home will make the notification. If the decedent was receiving Social Security benefits prior to death, the benefits received during the month of death may or may not have to be returned to the Social Security Administration.

So, death needs to be reported. Death has to be pronounced. The cause and manner of death must be determined in order to obtain a death certificate. And, the body has to be removed.

2. Pronouncing Death. A person is considered dead when, "according to ordinary standards of medical practice, there is irreversible cessation of the person's spontaneous respiratory and circulatory functions." TEX. HEALTH & SAFETY CODE § 671.001(a). In this circumstance, if permitted by the particular health care facility, a registered nurse or a physician assistant has the power to pronounce a person dead. TEX. HEALTH & SAFETY CODE § 671.001(d). If artificial means of support are being used, the person is dead when, "in the announced opinion of a physician, according to ordinary standards of medical practice, there is irreversible cessation of all spontaneous brain function." TEX. HEALTH & SAFETY CODE § 671.001(b). Clients should provide family or other loved ones with the name of and contact information for their current primary care physician. Why? Because if the decedent is currently under the physician's care, the physician can pronounce death and potentially determine the cause and manner of death without the further need for an inquest. When a physician is not involved, oftentimes the investigating officials rely on emergency medical services to make the call.

a. Time of Death. Pronouncement of death is not necessarily the same as time of death. In preparing a death certificate, the instructions provide that time of death is to be given and marked as actual, presumed, estimated, or found. The instructions further note that: "This item establishes the exact time of death, which may be important in inheritance cases when there is a question of who died first. This is often important in the case of multiple deaths in the same family." For federal estate tax purposes, the decedent's domicile controls to determine time and date of death. Therefore, regardless of the time and date of death on a death certificate, the date and time in the place of the decedent's domicile at the instant of death will be the date and time of death for federal estate tax purposes. Rev. Rul. 74-424, 1974-2 CB 294. For federal income tax purposes, the decedent's taxable year ends with his date of death, so the estate begins the day after death. Treas. Reg. § 1.451-1(b)(1). In the case of a presumptive death, although Texas law provides that the date that a court order is entered establishing death controls for state tax purposes, for federal estate tax purposes, the court order does not control but rather the state's statutory period for presumption of death controls. Rev. Rul. 80-347, 1980-2 CB 342. In Texas, the statutory period is seven years and death is presumed to occur at the end of the seven-year period. TEX. CIV. PRAC. & REM. CODE § 133.001; *Kansas City Life Ins. Co. v. Fisher*, 83 S.W.2d 1063 (Tex. Civ. App. – Amarillo 1935).

Once the pronouncement of death is made, the cause and manner of death must be determined.

3. Determining the Cause and Manner of Death. So, who determines the manner and cause of death? The answer: it depends. If death occurs when the decedent is under medical care for the condition that caused death, the attending physician may make the determination. TEX. HEALTH & SAFETY CODE § 193.005(b). If the attending physician is unavailable, provision is made for certain other physicians who can make the determination. TEX. HEALTH & SAFETY CODE § 193.005(c). However, if death occurs when there is no attending physician involved or in a manner that requires an inquest, the medical certifier is either a justice of the peace or a medical examiner. TEX. HEALTH & SAFETY CODE § 193.005(e). The medical certification portion of the death certificate is to be completed within five days of receipt of the death certificate, but if it cannot be completed in that timeframe, the justice of the peace or medical examiner must inform the funeral director of the reason for the delay. TEX. HEALTH & SAFETY CODE § 193.005(g).

a. Inquest. Chapter 49 of the Code of Criminal Procedure defines what deaths require an inquest by a justice of the peace or medical examiner and include situations where a death is not natural (other than those by legal execution), a body or body part is found and the cause of death is unknown, and a death is by suicide. TEX. CODE CRIM. PROC. §§ 49.04, 49.25(6). An inquest is a formal or an informal investigation into the cause and circumstances of a person's death and a determination as to whether the death was caused by an unlawful act or omission. TEX. CODE CRIM. PROC. §§ 49.01(2), .25(8). In conducting the inquest, the justice of the peace or medical examiner is given complete access to the scene and the body, and will speak with emergency personnel involved, whether it be police or medical, and may speak with family, friends, the decedent's physician, or others.

b. JP or ME. Whether the inquest is performed by a justice of the peace or by a medical examiner depends on the county and whether the county is large enough that its commissioners court has adopted a medical examiner's office. If so, the medical examiner's office will determine the cause and manner of death rather than the justice of the peace and all powers of the justice of the peace related to the investigation of deaths and inquests are transferred to the medical examiner. TEX. CODE CRIM. PROC. § 49.25(12). Note that there is no such thing as a "coroner" in the state of Texas.

For counties that do not have a medical examiner's office, the number of justices of the peace is also determined by the population size. TEX. CONST. ART. 5, § 18. Each justice of the peace is responsible for all inquests, formal or informal, for his precinct. TEX. CODE CRIM. PROC. § 49.04. If there is more than one precinct, the justices of the peace may share responsibility and "cover" each other, but the determination of the cause and manner of death must be made by a justice of the peace. A justice of the peace is an elected position but there is no requirement for any medical training. In contrast, a medical examiner must be a physician. TEX. CODE CRIM. PROC. § 49.25(2). If approved by a county's commissioners court, the county may employ a death investigator to assist the justices of the peace or medical examiner. TEX. CODE CRIM. PROC. § 49.23.

c. Autopsy. If needed or required, a justice of the peace will order an autopsy to be performed and the body will be transferred to an autopsy facility. In the case of a medical examiner, the examiner's office performs the autopsy. If autopsy results change the

medical certification, the death certificate is amended. TEX. HEALTH & SAFETY CODE § 193.005(i).

d. Disposing of the Body. Disposition of the body cannot be made until the person making the medical certification gives authorization. TEX. HEALTH & SAFETY CODE § 193.005(g); TEX. CODE CRIM. PROC. § 49.05, .25(8). If an inquest is needed, a body cannot be cremated until the justice of the peace or medical examiner certifies that an autopsy was performed or was unnecessary. TEX. CODE CRIM. PROC. §§ 49.09(b), 49.25(10).

e. Sealing the Scene. If an inquest is held and if the location in which the decedent died was under the sole control of the decedent, the justice of the peace can order that the property be sealed during the continued investigation. TEX. CODE CRIM. PROC. § 49.22. Reasonable expenses related to the property are chargeable to the decedent's estate. *Id.*

B. Autopsy. A justice of the peace will order a full or limited autopsy to be performed by a physician, or a medical examiner will perform an autopsy, whenever it is necessary to confirm or determine the cause of death, if the death is of a child younger than 6 years of age and death was unexpected or suspected to be from abuse, or if a district or county attorney requests him to do so, and may order an autopsy for purposes of identification. TEX. CODE CRIM. PROC. §§ 49.10, 49.25(9); TEX. FAM. CODE §§ 264.514, .515. A justice of peace may not order and a medical examiner may not perform an autopsy on a body when death occurred because of certain contagious or pestilent diseases. TEX. CODE CRIM. PROC. §§ 49.10(d), 49.25(10).

The authority of a justice of the peace to order an autopsy derives from statute, meaning that the order may only be made if it is permitted by statute. *TNA Cas. & Sure. Co. v. Love*, 121 S.W.2d 986 (Tex.Com.App. 1938). In *TNA Casualty*, the court noted that because ordering an autopsy is an official act, a presumption arises that the justice of the peace is acting pursuant to statutory authority and in the exercise of sound discretion, although the presumption is rebuttable. Although this case predates the establishment of medical examiner's offices by the Texas Medical Examiner's Act of 1955, presumably the same rule would apply to medical examiners since the powers and duties of justices of the peace in death investigations and inquests transfers to medical examiners. TEX. CODE CRIM. PROC. § 49.25(2).

Keep in mind that a justice of the peace is authorizing someone else to perform an autopsy, while in a county with a medical examiner's office, persons in that office

will both determine the necessity for and perform the autopsy. Where a justice of the peace is involved, a person performing an autopsy who believes in good faith that the order is valid may not be held liable for damages. TEX. CODE CRIM. PROC. § 49.12. Although these statutes do not specify criminal penalties for justices of the peace, any person who knowingly violates the duties of a medical examiner commits a Class B misdemeanor. TEX. CODE CRIM. PROC. § 49.25(14).

If no autopsy is ordered or required to be performed, certain other persons have the right to consent to or request an autopsy. These persons, in priority, include a spouse, person who was the guardian of the person or the executor or administrator of the decedent's estate, adult children, parents, or adult siblings. TEX. CODE CRIM. PROC. § 49.33.

A physician who performs an autopsy is instructed to file the autopsy report no later than 30 days after the autopsy request is made, unless a required test cannot be completed in that time and a physician certifies the same. TEX. HEALTH & SAFETY CODE § 671.012. Practically speaking, autopsies always take months.

C. Death Certificates. Both state and local registrars must maintain vital records, including death records. TEX. HEALTH & SAFETY CODE §§ 191.026, .032; 25 TEX. ADMIN. CODE § 181.23. The local registrar may be the justice of the peace, county clerk, municipal clerk or secretary. The Texas Department of State Health Services maintains a list of local registrars (www.dshs.state.tx.us/ns/field/localremotedistrict.shtm).

1. Form. The Texas Department of State Health Services prescribes the form and content of death certificates. TEX. HEALTH & SAFETY CODE § 193.001, 25 TEX. ADMIN. CODE § 181.2(a). Certain basic information about the decedent must be included on the certificate as well as the name, place, and plot, crypt, or niche number where the remains will be interred, or if not interred, the place and manner of other disposition. *Id.* In addition, the death certificate must have a medical certification which addresses the cause and manner of death. If the decedent is a veteran, the death certificate will also include any military service information. TEX. HEALTH & SAFETY CODE § 193.006.

2. Responsibility for Filing. The person in charge of interment or removal of a body from a registration district is responsible for filing the death certificate, entering the information regarding disposition of the remains, and signing the certificate. TEX. HEALTH & SAFETY CODE § 193.002. Practically speaking, funeral homes are the typical persons in

charge. All Texas death certificates must now be filed electronically via the Texas Electronic Registrar. Again, typically, the funeral home will obtain and complete the basic information regarding the decedent and then send an email to the person who determined the manner and cause of death, giving him notice that the death certificate is ready for certification in that regard.

In addition to maintaining a complete list of death records, the local and state registrars must review every death certificate presented to determine if each is complete. TEX. HEALTH & SAFETY CODE §§ 191.027, .031. If a death certificate is accepted for registration and later needs to be changed, an amending certificate may be filed to fix the record, and is affixed to and becomes part of the death certificate. TEX. HEALTH & SAFETY CODE §§ 191.028, .033.

3. Obtaining a Copy. Any "properly qualified applicant" has the right to obtain a certified copy of a death certificate from the state registrar. TEX. HEALTH & SAFETY CODE § 191.051, 25 TEX. ADMIN. CODE § 181.28. The state registrar is the Unit Director of the Vital Statistics Unit of the Texas Department of State Health Services. Properly qualified applicants include immediate family members related by blood, marriage or adoption and legal agents or representatives of the registrant. 25 TEX. ADMIN. CODE § 181.2(22). The Texas Department of State Health Services has narrowly defined these immediate family members to include the spouse of the decedent, and a child, parent, sibling, and grandparent of the decedent but not a spouse of these latter persons. A legal agent or representative must provide documentation showing the relationship.

4. Failing to Register. If a death occurs in Texas but is not registered within one year of the date of death, a record of death must be submitted to the county probate court in the county where the death occurred. TEX. HEALTH & SAFETY CODE § 193.007. An affidavit by the attending physician or funeral director who buried the body must accompany the certificate, or if one of them is not available, an affidavit by any person acquainted with the facts about the death and by one other person who was also acquainted with the facts but who is not related to the decedent must accompany the certificate. *Id.* Within seven days after the certificate is accepted and ordered filed by the probate court, the clerk must send the certificate and court order to the Texas Department of State Health Services. *Id.*

5. Reporting to the Attorney General. In addition to a death certificate, if the decedent was in a long-term care or other health care facility other than a

hospital and the attending physician cannot certify the cause of death, the facility must file a report of death with the Texas Attorney General's office within 24 hours of death. TEX. CODE CRIM. PROC. §§ 49.24, 49.25(7c). The form is directed to the Medicaid Fraud Control Unit.

6. Death Outside of Texas. If a person died in another state and a death certificate needs to be obtained, the National Center for Health Statistics, a division of the Centers for Disease Control and Prevention, maintains a list of the appropriate agency to contact to obtain a death certificate and the requirements to do so. The list may be found at www.cdc.gov/nchs/w2w.htm. If a person died in the United States and the body is to be taken to a foreign country or the death certificate needs to be presented in the foreign country, an apostille may have be obtained to certify the authenticity of the certificate. In Texas, the request is made through the Texas Secretary of State's office. All countries that subscribe to the Hague Convention will accept an apostille without further certification.

D. Transportation of Body. Prior to transportation of a body (not to be confused with "removal" of a body), the funeral director, or person acting as such, must file or complete a report of death with the Texas Department of State Health Services. 25 TEX. ADMIN. CODE § 181.2. Within 24 hours, the report is transmitted to the county clerk or local registrar where the death occurred or where the body was found. *Id.*

1. Burial-Transport Permit. In order to transport the body out of Texas by common carrier, or to cremate the body, a burial-transport permit must be obtained from the state registrar or the local registrar where the death certificate is or will be filed. *Id.* The permit will not be issued until a death certificate is filed. *Id.* If a valid burial-transport permit is issued outside of Texas according to the laws of the other jurisdiction, it is authority to transport the body in Texas and a cemetery must accept the permit as authority to dispose of the body in Texas. TEX. HEALTH & SAFETY CODE § 193.008.

2. Shipping Remains. A person's remains are considered cargo for purposes of transporting the remains within the United States. Arrangements need to be made in advance in order to have the remains shipped. The Transportation Security Administration requires that funeral homes register as a "known shipper" with each airline that they intend to use. Understandably, specific rules govern how a body can be shipped. When shipped by common carrier, the body must be placed in a "sound casket enclosed in a

strong outside shipping case" or a "metal container specifically designed for this purpose." 25 TEX. ADMIN. CODE § 181.3(a). If the body is not embalmed or is in decomposition, it must be enclosed in an "air-tight metal casket encased in a strong outside shipping case" or in a "sound casket encased in an air-tight metal or metal lined shipping case." *Id.* If the body is not shipped by a common carrier, it must be encased in a "container which insures against seepage of fluid and the escape of offensive odors." 25 TEX. ADMIN. CODE § 181(b). Licensed funeral directors using one of their vehicles are not subject to this requirement. *Id.* If the body is going to be held or in transit for more than 24 hours after death, it must be in a container that avoids seepage of fluids and the escape of offensive odors, embalmed, or kept at a temperature between 34 and 40° F. 25 TEX. ADMIN. CODE § 181.4.

3. Death in a Foreign Country. If a person dies in a foreign country, the United States Department of State, Bureau of Consular Affairs will help assist with what needs to be done next. Part 72 of Title 22 of the Code of Federal Regulations outline the duties of a United States consular office. If no one is with the decedent, the local United States Consular officer will take possession of personal effects if permitted, contact the United States Department of State, a legal representative or next-of-kin of the decedent, provide an inventory of the personal effects, provide information regarding the disposition of the remains to the decedent's personal representative, and other matters. If someone is with the decedent, the officer will assist with items such as obtaining the foreign death certificate and preparing documents for the disposition of the remains, and will notify the United States Department of State that the death occurred. An officer will also prepare a Consular Report of Death of a U.S. Citizen Abroad, which can serve as proof of death for United States purposes. 22 CFR § 72.5. The Report, however, cannot be prepared until after the foreign death certificate is completed. *Id.*

a. Decedent's Possessions. Because the local laws of each country vary as to what can be done with the remains, a consular officer's assistance can be important. A consular office is not permitted to use any federal funds for disposition of the decedent's remains or of the decedent's estate. 22 CFR §§ 72.7, 72.21. When taking possession of a decedent's property, the officer may take possession of jewelry, luggage, clothing, papers, and such, but may not take possession of foreign bank accounts. 22 CFR § 72.13. If, within one year of death, no one claims the estate or there is a conflict between claimants that is unresolved, the officer is permitted to sell the assets and transfer the proceeds to the Department of State. 22 CFR

§ 72.25. If no one claims the estate, at the end of five years beginning October 1 after the officer took possession, title is conveyed to the United States. 22 CFR § 72.26.

b. Return to U.S. If the body is to be brought back to the United States, a United States consular mortuary certificate, along with an affidavit of the foreign funeral director confirming the contents of the casket, and the required transit permit issued by health officials in the foreign country are required for the body to clear United States Customs and to address any quarantine issues. If the body has not been embalmed, the consular officer will need to alert Customs and public health officials that the decedent did not die from a contagious disease in order for the remains to enter the United States.

IV. DISPOSING OF WHAT'S LEFT, or, Bring Out Your Dead

A. Nuts and Bolts. There are some practical items that occur when someone dies. Utilities need to be maintained, plants watered, pets cared for, mail forwarded or otherwise collected. Criminals have been known to troll obituaries, so during any visitation, funeral, or memorial service, clients may consider asking someone to stay at the decedent's home or hiring an off duty police officer to be at the home.

B. Clean Up. Death can be messy. If someone dies in their home, especially if they die unattended, there may be quite a bit of clean up involved. Decomposition and bodily fluids can cause health hazards. Although families and other loved ones may think they have to do the cleaning, that is not necessarily so. Companies, such as USA Decon and Red-Alert Bio Response Services, specialize in removing biological waste, such as blood, tissue and fluids. Some homeowners insurance will help cover the cost. USA Decon even advertises itself as a company that will clean houses lived in by hoarders.

C. Authority to Deal with the Body. As discussed above, a person can appoint an agent to control the disposition of their remains. Otherwise, the Texas Health and Safety Code provides a hierarchy of persons with this right. It is important to know if the decedent has a prepaid funeral contract or some other arrangement in place so that their wishes related to their remains may be carried out, especially since this type of contract may not only describe the manner of disposition of the body but may also name someone to control the disposition.

1. Funeral Establishments. Licensed funeral directors certainly have the right to take custody of a body. Even in cases of first call, which would include

a situation where an ambulance is called, and dispatch knows that a dead body is involved, the duty falls to the funeral director to take charge of the body. TEX. OCCUP. CODE § 651.001. In Texas, the Texas Funeral Commission oversees the licensure of funeral directors and embalmers, the licensure of funeral businesses, cemeteries and the like, and is required to inspect all funeral businesses and crematories, although the commission is subject to sunset and is scheduled to be abolished on September 1, 2019. When discussing funeral services, funeral directors have specific information that must be given to prospective customers, including a brochure prepared by the Commission and price lists. TEX. OCCUP. CODE §§ 651.404, .454.

Once an investigating official releases the body, if family members are present, they may know which funeral home is to be called to pick up the body. If the person died in a hospital or other health care facility, the hospital will obtain the information and help with arrangements. Otherwise, when someone dies at home or elsewhere, each city and county typically has a list of companies to call that will pick up and store the body until a decision is made. When a funeral home has custody of a body, it is unethical for the funeral home to refuse to surrender the body to someone who is authorized to make funeral arrangements for the decedent. TEX. OCCUP. CODE § 651.456. Unless a person dies in an ambulance, an ambulance typically does not transport a dead body. Although historically ambulances were used to transport dead bodies and may still do so in a catastrophic situation, by definition, emergency medical service provider vehicles are for the transportation of "sick or injured persons." See, TEX. HEALTH & SAFETY CODE §§ 773.042 - .045.

D. Right of Sepulture. In general terms, the right of sepulture is simply the right to have someone's remains left undisturbed in their final resting place. Remember, in Texas, no property right exists in relation to a decedent's remains, but the right of sepulture can give someone the exclusive right to have their remains buried in a particular location. A plot in which a person has an exclusive right of sepulture, or right to be interred, is presumed to be the separate property of the owner. TEX. HEALTH & SAFETY CODE § 711.039(a). A "plot" is defined to include a grave or adjoining graves, a crypt or adjoining crypt, and a niche or adjoining niches. TEX. HEALTH & SAFETY CODE § 711.011(25). During marriage and as long as the plot owner with the sepulture right and the spouse are married at the time of the plot owner's death, the spouse has a vested right of interment, and joinder or consent of the spouse is needed to convey the plot. TEX. HEALTH & SAFETY CODE §§ 711.039(b), (c). If

the spouse's remains are buried elsewhere, the spouse's vested right is terminated. TEX. HEALTH & SAFETY CODE § 711.039(d)(2). If the plot owner does not make a specific reference to the plot in his Will or in a written instrument on file with the cemetery organization, a place in the plot is reserved for the surviving spouse and the owner's children have the right to be interred in any remaining spaces. TEX. HEALTH & SAFETY CODE § 711.039(e). The spouse and child may waive their right of interment in favor of a relative of the owner of the plot or a relative of the owner's spouse. TEX. HEALTH & SAFETY CODE § 711.039(f). If the plot owner has been interred in one of the spaces in the plot, the exclusive right of sepulture in the remaining places may be conveyed only by (1) the plot owner by specific reference in his Will or document on file with the cemetery organization, (2) the surviving spouse, or (3) the owner's heirs at law. TEX. HEALTH & SAFETY CODE § 711.039(g). If a plot owner with the exclusive right of sepulture is not interred in the plot, he may make a specific disposition of the plot; otherwise, the right of sepulture in at least one space is reserved for the surviving spouse and any remaining spaces pass to the decedent's heirs at law. TEX. HEALTH & SAFETY CODE § 711.039(h).

If a grave in a private cemetery is unoccupied and is abandoned for failure to maintain or pay assessments for maintenance for ten years, the ownership or right of sepulture reverts to the cemetery on a finding by a court of abandonment. TEX. HEALTH & SAFETY CODE § 714.003. The presumption of abandonment may be rebutted by the owner or the successor owners. *Id.*

E. Burial.

1. Cemeteries and Burials in Texas. A cemetery is defined by Texas law as a place that is used or intended to be used for interment and includes a graveyard or a mausoleum. TEX. HEALTH & SAFETY CODE § 711.001. Graveyards and mausoleums are defined only to allow human bodies and remains. *Id.* Therefore, pets are not allowed to be buried in a human cemetery, although the converse is not true.

a. Cemetery Businesses. In order for a business to be run as a cemetery, in addition to various regulations to survey and dedicate the cemetery, it must be organized as a corporation for cemetery purposes. TEX. HEALTH & SAFETY CODE § 711.021. The cemetery may be operated as a profit or nonprofit organization, but after September 1, 1993, cemeteries must provide perpetual care. *Id.* In general, a new cemetery may not be established if it is within city limits, with the distance from the cemetery to the city limits determined based on the population size. TEX.

HEALTH & SAFETY CODE § 711.008(a). Section 711.008(b) of the Texas Health and Safety Code exempts certain parties from this requirement, including existing cemeteries, a columbarium or mausoleum associated with certain religious organizations, and certain private family cemeteries.

b. Other Matters. A few last notes about burials in Texas. The body must be buried so that the outside top surface of the container containing the body is at least two feet below the surface if the container is not made of impermeable material or at least 1½ feet below the surface if the container is made of impermeable material. TEX. HEALTH & SAFETY CODE § 714.001. Local rules may establish additional restrictions. *Id.* It is possible to inter more than one person in the same plot, as long as the plot owner consents. TEX. HEALTH & SAFETY CODE § 711.0395. Maintaining or locating a feed pen for hogs, cattle or horses or a slaughterhouse within 500 feet of a cemetery in a county with a population of at least 525,000 is considered a nuisance and the cemetery owner can sue to abate the nuisance. TEX. HEALTH & SAFETY CODE § 714.002.

2. Burials in National Cemeteries. In addition to burial in a cemetery governed by Texas law, a veteran or spouse or dependents of a veteran may be eligible to be buried at a National Cemetery. Spouses and dependents may be buried in a National Cemetery, even if they predecease the veteran. Although gravesites cannot be reserved in advance, funeral homes will assist with making the request for burial at the time of death. Discharge papers must accompany the request, so knowing the location of these documents is important. The opening and closing of the grave, headstone or marker, and perpetual care are at no cost to the survivors.

F. Cremation. In Texas, cremation is defined as the "irreversible process of reducing human remains to bone fragments through extreme heat and evaporation." TEX. HEALTH & SAFETY CODE §§ 711.001(7), 716.001(5). The process can also include the processing or pulverization of the fragments whether by manual or mechanical means. *Id.* The cremated remains, or "cremains," may include nonhuman matter such as dental work or casket material. TEX. HEALTH & SAFETY CODE §§ 711.001(6), 716.001(4).

1. Crematory Establishments. Crematories may be adjacent to perpetual care cemeteries or funeral homes, and after September 1, 2003, new crematories must be adjacent to and owned by the same owner as the perpetual care cemetery or funeral home. TEX. HEALTH & SAFETY CODE § 716.003.

2. **Before Cremation.** Remains may be taken to a crematory to be held until cremation, but the remains may not be cremated earlier than 48 hours after the time of death on the death certificate unless waived by the justice of the peace, medical examiner, or by court order. TEX. HEALTH & SAFETY CODE §§ 716.0035, .004. In addition, with one exception, the remains cannot be cremated until the crematory receives a signed authorization form and a death certificate or death record indicating that the remains may be cremated. TEX. HEALTH & SAFETY CODE § 716.051. The authorization form is not required if a decedent left written directions to be cremated and the authorizing agent refuses to sign the form, as long as the costs are paid and the agent provides written identification that the remains are those of the decedent. TEX. HEALTH & SAFETY CODE § 716.054. The funeral home is otherwise responsible for certifying that the remains are those of the decedent. TEX. HEALTH & SAFETY CODE § 716.104. Once cremation occurs, the crematory must identify the cremains with an identification label on the outside of the container and some other disc or bracelet inside the container. TEX. HEALTH & SAFETY CODE § 716.103.

3. **The Cremation Process.** The remains must be cremated in the container being used for cremation, which need not be a casket; and no one other than a crematory employee or the authorizing agent or his delegate may be present during the cremation or the removal of the remains from the cremation chamber. TEX. HEALTH & SAFETY CODE §§ 716.151, .152(b). However, if authorized in writing by the authorizing agent for each deceased person, more than one person may be cremated at a time. TEX. HEALTH & SAFETY CODE § 716.153. Cremation may not knowingly be done if the decedent has a pacemaker or other hazardous implant that has not been removed. TEX. HEALTH & SAFETY CODE § 716.154.

4. **Release, Transportation, and Disposition.** Remains may be released to the funeral home that delivered the initial remains, in person or shipped to the authorizing agent, or in accordance with written directions from the decedent. TEX. HEALTH & SAFETY CODE § 716.156. No special permit is required to transport cremains in Texas. TEX. HEALTH & SAFETY CODE § 716.301. The cremains may be disposed of in a crypt, grave, or scattering area at a dedicated cemetery; by scattering them over uninhabited public land, sea, or other public waterways or on private property with the consent of the property owner, as long as the remains are first removed from the container or the container is biodegradable. TEX. HEALTH & SAFETY CODE §§ 716.302(e), 716.304.

G. Bodies of Indigent Persons. Every county is charged with the responsibility of disposing of the bodies of indigent persons and unclaimed bodies. TEX. HEALTH & SAFETY CODE §§ 691.023, 694.002. If a decedent is indigent, the county must arrange for the “disposition” of the decedent, which could include burial or cremation. TEX. HEALTH & SAFETY CODE § 694.002. Note, however, if a body is unclaimed, the county must bury the body and cannot cremate. TEX. HEALTH & SAFETY CODE § 691.023. The county may set up a fund to defray the costs for disposing of the bodies of indigent persons, and is allowed to take any cash that the decedent possesses, apply it to the costs for disposing of the body, and deposit any excess cash in the county’s fund. TEX. HEALTH & SAFETY CODE § 694.002. Any person with a claim to the money deposited in the fund has one year from the date of disposition to claim the cash. *Id.* In Harris County, the Harris County Bereavement Services program manages its county program related to indigent persons and will work with families to either provide burial or low-cost funerals.

H. Paying for the Disposition. Disposing of a decedent’s remains, including funeral and burial or cremation costs, can be expensive. In addition to paying for the costs out of the decedent’s estate, or by the person with the right to control the disposition of the remains, other ways of paying for or defraying the costs include:

- pre-paid funeral contracts
- purchasing a casket from an independent dealer, such as Pine Box in Houston (now Beresford Funeral Home)
- building your own casket – there are lots of DIY instructional materials online
- if the decedent was travelling abroad and paid for travel with a credit card, some cards provide a benefit to cover some of the costs
- if the decedent was a veteran, check with the local U.S. Department of Veterans Affairs for benefits that are available
- if the decedent was the victim of a crime, the Texas Department of Public Safety Crime Victims’ Compensation program (www.txdps.state.tx.us/administration/staff_support/victimservices/pages/crimevictimscompensation.htm) may help cover costs
- check to see if the \$255.00 one-time, lump sum Social Security benefit is available – funeral homes may assist with this benefit

- if the decedent was a member of a fraternal order or a religious organization, some organizations provide burial benefits, even if it is a just a special presence at the funeral service
- Salvation Army and United Way may have a referral available to local organizations that may provide benefits

V. CONCLUSION, or, The Finale

Mortality is an essential part of the human condition and one upon which every estate plan is premised. It is only to be expected that clients may turn to their trusted estate planner for answers to practical questions concerning death. The foregoing material is intended to serve as a resource to assist in answering these sometimes uncomfortable, albeit necessary, questions. As with other end-of-life planning, it is important that clients let their family and other loved ones know their wishes.