

Durable Powers of Attorney: “Springing” or “Surviving”?

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For over four decades, Arizona law has permitted residents to create powers of attorney that continue to be valid even after the signer becomes incapacitated. That simple concept, once thought to be radical, has become widespread: all U.S. states now permit powers of attorney to be “durable.”

To make a power of attorney “durable” under Arizona law, it should include language that indicates the signer intends it to either:

Continue in effect even if the signer becomes incapacitated, OR
Become effective only if/when the signer becomes incapacitated.

You can read the law in question, Arizona Revised Statutes sections 14-5501 and those following, to see how durable powers of attorney work in Arizona. There is even a basic form for what the signature block might look like.

But what is the difference between the two kinds of durable powers of attorney? Lawyers often refer to them as “surviving” or “springing” powers — the former exist and are operative as soon as signed (they “survive” the later incapacity), while the latter become effective (they “spring” into existence) upon the later incapacity of the signer.

Which is better? Of course that depends on what the signer prefers, but there are some practical considerations that you might not have thought about.

Many of our clients feel uncomfortable about giving their agent(s) the power to handle financial matters immediately. While they completely trust the person they name as agent, those clients think it might be tempting fate to give authority to someone else. They don’t really expect their agent to act unless and until they are unable to take care of things themselves, and prefer to make their powers of attorney the “springing” type.

There are problems with this approach, however. Those problems can include:

How to prove incapacity? How, exactly, will your agent prove that you have become incapacitated? Will it require a letter from your attending physician? Or two letters from two different physicians? Or your consent? How protective do you think you should be? Of course, one of the reasons you are signing a power of attorney is so that we won’t have to initiate legal proceedings to permit your agent to take over your finances. By making the proof of incapacity difficult, you might be reducing the value of the very document itself.

Is there a doctor in the house? Perhaps you have considered the problem described above, and you're willing to let any doctor (not necessarily your attending physician) certify your incapacity — and you are not planning on requiring a second opinion. Still, it can be quite a challenge to get any medical person to sign a letter saying you're incapacitated. It might be that your medical care isn't even being provided by a physician — maybe you'll be evaluated by a nurse practitioner, or a psychologist. Can we write the document so that your chiropractor could make the decision? And have you tried to get a letter signed by any medical provider in the modern era of HIPAA?

"I'll be the first to know when I need it." No, tragically, you won't. In fact, you'll probably benefit from assistance for a period of time when you are still capable of doing things yourself. The law has a quaint notion — people are fully competent until some future instant when they suddenly, and demonstrably, become incapacitated. That isn't actually how it happens. You are much more likely to slowly decline, needing help with some large decisions (perhaps investment management, or organizing assets) long before you absolutely need help with smaller decisions (like signing checks). Consider the importance of letting your agent take over gradually, leaving you in control of as much as you can (and wish to) manage for as long as possible.

Planning on leaving Arizona (even for visits)? Some states (notably Florida) don't even permit "springing" powers of attorney. Maybe you think it unlikely that you will relocate to Florida, but we are a pretty mobile society. You might well end up in a state where the "springing" power of attorney is problematic — and possibly at a time when you are unable to sign new documents.

Really? You don't trust your agent? Giving someone a power of attorney is, literally, giving them the tools to misuse your assets. Of course they are not supposed to commingle assets, take your funds or make decisions in their own interest. Some do. You need to make your selection very, very carefully — your agent needs to be completely trustworthy. And if you trust them when you're incapacitated (when you don't have the mental acuity to protect yourself), why wouldn't you trust them right now, when you are able to monitor their actions closely?

As you can probably tell, we are inclined to recommend that people sign "surviving" durable powers of attorney, rather than "springing" powers. That said, clients frequently are just uncomfortable giving immediate authority, and we will respect your decision. Don't be surprised if we try to convince you to reconsider, though.

Incidentally, the same considerations apply when we consider health care powers of attorney — but there is a different practical reality. Since you will necessarily be present when health care procedures are undertaken, and since medical personnel are almost certainly involved, it is much easier to assess whether you are able to make your own decisions. A good agent will involve you in the decision-making process to the extent that you are able to participate. A good medical provider will do the same.