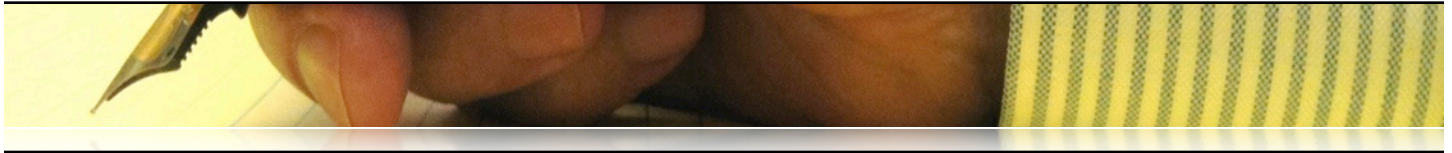


FAQ: Wills & Wishes

Teaching workshops about middle-class milestones, I answer a lot of questions for people. This is one of them.



Question: Should I make my durable power of attorney effective immediately or upon my incapacity?

Answer: It depends on the purpose of the document, your stage in life, and your relationship with your agent.

If your power of attorney is effective upon your incapacity, then your agent cannot use it until you have been declared incapacitated, in writing, by a doctor. This protects you against unexpected actions by your agent while you can still act for yourself.

On the other hand, you should only appoint a person you trust implicitly to be your agent. You have the right to expect that person will act only in your best interest. If there is no one you trust implicitly, then making the power of attorney effective upon incapacity is probably best.

In this scenario, in order to act in your interest, your agent must first take you to a doctor to be examined and then declared mentally incapacitated. It can be embarrassing, and it can impair your right to act on your own behalf.

If your power of attorney is effective immediately, it does not take away your right to act. You can still conduct business as usual. But if you find yourself needing someone to sign papers for you when you are away, for example, your agent can do so with your power of attorney. Sometimes, people sign a limited power of attorney just so someone can sign a deed in their absence. If your agent has a durable power of attorney that is effective, he or she can take care of it.

On the other hand, your agent can sell your house without your knowledge. Don't appoint an agent who would do that.

In this scenario, if your focus on business begins to fade, and your agent needs to act in your interest, the power of attorney is ready to be used. There is no trip to the doctor that draws the line between forgetful and incapacitated. The transfer of responsibility can be gradual.

The closer you are to the time when your agent may need to act for you, the more sense it makes for your power of attorney to be effective immediately.

Source: Texas Estates Code §§ 751.002, 752.

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