

## Welcome to Sempre Avanti!

Welcome to the second issue of *Sempre Avanti!* We received many positive comments about our first issue, which was dedi-

cated to the **Advance Health Care Directive**, so we thought we would dedicate this issue to the **Durable Power of Attorney**

for **Property Management**, which is the “*financial cousin*” of the **Advance Health Care Directive**.

## What is a Durable Power of Attorney?

A **Durable Power of Attorney (DPA)** allows you to designate another person to assist you with the management of your financial affairs, especially if you become incapacitated. It is a grant of power **FROM** you (known as the *Principal*) **TO** a trusted relative or friend, who is known as your *Agent* (or your *Attorney-in-Fact*), with which power and authority

your Agent is able to manage some or all of your financial affairs on your behalf.

The ability to create a **DPA** enables you to protect your property and prevent it from being wasted or lost if you become unable to look after your own financial affairs.

A **Power of Attorney** is consid-

ered to be “*durable*” if it contains a provision clearly stating that powers that are granted to the Agent remain in effect **even if** you become incapacitated and can no longer manage your own affairs.



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## Who Should I Appoint as My Agent?

Usually, you would appoint your spouse, adult child, relative, friend, or some other adult to act as your agent. However, whenever you appoint to serve as your Agent **must be someone you trust completely**.

The person you appoint to serve as your Agent should have a thorough knowledge of

your financial and family affairs (or be able to easily learn this information), so that s/he will be sensitive and responsive to your personal circumstances and estate planning objectives.

You may appoint more than one person to act on your behalf (referred to as *Co-Agents*) and empower



them to act either separately or unanimously on your behalf (although having more than one person acting on your behalf can add a layer of complication that you may later regret). In addition, your **DPA** can include provisions for the appointment of *Successor* or *Alternate* Agents, who will act on your behalf if your initial Agent is unable or unwilling to act (due to death, unavailability, resignation, etc.).

## The Big Picture: DPAs and Your Overall Estate Plan

Occasionally, a client will ask us, “**Since I have a revocable trust and my property is held in the trust, I don’t need a durable power of attorney, right?**”

**Wrong!** Even if you have a revocable living trust in which most of your property is held, you still need a **DPA**! A **DPA** allows you to authorize your Agent to address myriad issues that are not related to your trust (e.g., your taxes, claims against you, claims you have against others, non-trust assets, etc.). **For example**, the Trustee of your trust has the power to manage and administer **only** the assets held in your

trust. The Trustee cannot manage assets that are normally held outside of your trust, such as your retirement account or life insurance policy. But the Agent acting under your **DPA** could have the authority to manage such assets.



Your Agent could also have the authority to transfer into your trust any assets that should be in

your trust but, for some reason, were left out—due to neglect, or to acquisition after your trust was established. Your Trustee does not have such power. Moreover, your Trustee cannot represent your interests in a lawsuit. If you are incapacitated—but your **DPA** provides your Agent with such authority. Your Agent could even be given the power to amend the terms of your trust if your family’s circumstances change after your incapacity. These are but a few of the powers your Agent might have over your estate and personal care that are not available to the Trustee of your trust.

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*Even if you have a revocable living trust in which most of your property is held, you still need a DPA!*

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## DPAs Are Easy to Implement and to Revoke

**DPAs** are quite flexible; they can be drafted very broadly to address a vast array of situations and circumstances **OR** they can



be drafted very narrowly to address the management of one specific asset or even to address one specific power over a specific asset. And you can execute a **DPA** quickly and easily.

A **DPA** can be executed even when your death is imminent; the only requirement is that you have sufficient mental capacity at the time you sign the **DPA**.

The **DPA** is also easy to revoke. As long as you have your capacity, you remain in ultimate control of your estate because you have the power to revoke the Agent’s power to act on your behalf by executing a simple document revoking the **DPA** and providing a copy to any third party who may have relied on the **DPA**.

## Periodic Review and Re-Execution of DPAs are Necessary

While the power of an Agent who is appointed under a **DPA** remains in effect for an unlimited period of time (terminating only upon your death or its revocation by you), we strongly advise our clients to periodically review their existing **DPAs** to re-confirm the appropriateness of the provisions of their **DPAs** and the appropriateness of the person(s) they have appointed to serve as their Agents. Even if no substantive

changes to your **DPA** appear necessary, we recommend that you regularly re-execute your **DPA** (every two years or so) to ensure it will continued to be honored by third parties, especially financial institutions. Many title companies and other financial institutions may refuse to honor an Agent’s power if the **DPA** is **stale**. A **DPA** may be considered **stale** if it was executed more than two years before



the date an Agent attempts to exercise his or her powers under the **DPA**, **even if the DPA is correctly drafted in all respects**. Such refusal can be quite frustrating, particularly when dealing with **urgent circumstances**.

## “Immediately Effective” DPAs vs. “Springing” DPAs

Generally, there are two kinds of **DPAs** — those that are *immediately effective* upon execution, and those that “*spring*” into effect upon some occurrence. With an *immediately effective DPA*, you grant to your Agent the authority to act on your behalf immediately, even if you still have capacity to act (and do act) on your own behalf. It is important to remember that, by executing an *immediately effective DPA*, you do **not** relinquish your authority and ability to act on your own behalf. Indeed, so long as you retain your capacity, either you or your Agent may act on your behalf. However, since you should appoint only those persons whom you trust implicitly to act on your behalf, this should not be a concern.

With a *springing DPA*, you grant to your Agent the authority to act on your behalf *only* upon the occurrence of a *triggering event*, such as your mental incapacity. Upon the occurrence of the triggering event, the authority for a person to act on your behalf is transferred **from** you **to** the Agent (i.e., the Agent’s power *springs* into effect).

Of course, the most common triggering event for a *springing DPA* is the Principal’s incapacity. However, this is not always the case, so the provisions of the *springing DPA* should clearly specify (1) *what* specific trigger-

ing event is necessary to transfer power to the Agent, (2) *who* is to determine that the triggering event has occurred, and (3) *how* such determination is made. For example, the provisions of a *springing DPA* might indicate that the triggering event is your **mental incapacity** (*what* causes your Agent’s powers to *spring* into effect) and that your mental incapacity must be **certified in writing** (*how* the triggering event is verified) **by your treating physician** (*who* has the power to say that the triggering event has occurred).

Based on the foregoing, you might prefer a *springing DPA* over an *immediately effective DPA*. After all, you only need someone to act on your behalf if you are incapacitated or otherwise unavailable (e.g., out of the country, which itself could be a triggering event), right? Why have an *immediately effective DPA*, which results in at least two people—you and your Agent—having powers over your property? These are reasonable questions to ask.

Unfortunately, we have found that, over the past several years, the effectiveness and even the validity of *springing DPAs* have been substantially compromised, especially if the triggering event is one’s mental incapacity. This is due, in large measure, to the difficulty in proving that one is incapacitated and when such

incapacity began. Moreover, proof of one’s incapacity often requires medical providers to reveal the Principal’s personal medical information to financial institutions that are hesitant to honor an Agent’s authority unless they have **clear proof** that the Principal is incapacitated. This information is often quite difficult to obtain because many doctors are unwilling to attest to a patient’s capacity for fear that doing so would violate *privacy protections* provided by the federal statute known as the **Health Insurance Portability and Accountability Act (HIPAA)** or by California’s **Confidential Medical Information Act (CMIA)**. Violations of these laws could expose medical providers to substantial liability. Therefore, the usefulness of a *springing DPA* is limited, especially if your doctor refuses to provide information about your capacity or if there is disagreement regarding your capacity among your doctors (or the beneficiaries of your estate).

Powers granted to an Agent by an *immediately effective DPA* are much easier to exercise because there is no triggering event—your Agent *need not prove* that you are incapacitated. Thus, in our experience, the *immediately effective DPA* is the more convenient **DPA** to use and is therefore more commonly used by our clients.




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*Powers granted to an Agent by an immediately effective DPA are much easier to exercise than those granted by a springing DPA.*

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**Creighton Law Offices** is located in San Mateo, California. The firm specializes in providing exemplary estate planning, trust administration, probate, and long-term care planning services to its clients.

If you would like additional copies of this newsletter, or know someone who would benefit from receiving this newsletter directly, contact **Alison Moon** or **Faye Simpson** at **(650) 344-0700**.

Thank you for your attention.



*I am the autumnal sun,  
With autumn gales my race is run;  
When will the hazel put forth its flowers,  
Or the grape ripen under my bowers?  
When will the harvest or the hunter's moon  
Turn my midnight into mid-noon?  
I am all sere and yellow,  
And to my core, mellow.  
The mast is dropping within my woods,  
The winter is lurking within my moods,  
And the rustling of the withered leaf  
Is the constant music of my grief...*

From **I am the autumnal sun** by  
Henry David Thoreau