

McGuireWoods

# *Legacy Planning, Once Removed*

ESTATE PLANNING | TRUSTS | PROPERTY  
TAXES | FAMILY | LEGACY

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## Once Removed: **The Power of Attorney**

### Episode 49 Summary

A power of attorney is a foundational document in an estate plan that names an agent to make decisions on behalf of the principal who, for instance, is disabled or not available. While it can be an important method of managing the principal's finances, there are key issues the planner should consider when drafting a power of attorney.

#### **Transcript:**

**(0:00):**

Welcome back to Legacy Planning, Once Removed.

I'm Steve Murphy, a trust and estates attorney with McGuireWoods LLP. And this is my podcast on trusts, legacy, taxes, family, and everything else on my mind.

For those who are returning again, welcome back and for those who are new to the podcast, again, welcome.

On this podcast, we try to help people with estate planning but also with legacy planning generally.

So, we have a tagline here.

We say: Walk Like You Leave Footprints.

Today is more of a foundational episode. Today we're diving into a key foundational, yet often misunderstood estate planning tool, and that's the power of attorney.

I get a lot of questions about that.

When you're planning for your own future or helping a loved one, understanding powers of attorney—what they are, how they work, and the choices involved—can make a world of difference. So, let's get started.

A power of attorney sometimes called a POA is a legal document that allows you—we call that the principle—to appoint someone else—we call that the agent or the attorney-in-fact—to act on your behalf.

This can cover a wide range of decisions from managing your finances to making healthcare choices. So, there are generally two main types of powers of attorney.

There's the financial power of attorney or property power of attorney.

This gives your agent authority over your financial affairs, things like paying bills, managing investments, signing tax returns, even selling property.

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And then there's a healthcare power of attorney. This allows your agent to make medical decisions for you if you're unable to do so.

Today we're going to focus on that first kind of power of attorney, the financial or property power of attorney. We'll cover the healthcare power of attorney in another episode.

And on this episode, we'll talk about just some key issues and questions to ask in framing this power of attorney.

The first is the scope.

What are the specific powers granted to the agent? These could be broad or limited.

And also importantly, what's the effective date?

When does the power of attorney become effective?

Maybe we should start with that question.

There are two important variations of the power of attorney.

One is typically called a durable power of attorney, and the second is typically called a springing power of attorney.

A durable power of attorney is effective immediately upon signing, and it remains in effect even if you lose capacity or lose the ability to manage your financial affairs.

This word durable means it endures through your incapacity, which is crucial for estate planning.

If you want your agent to step in right away or at any point you're unable to act, then a durable power of attorney is often the way to go.

A springing power of attorney, on the other hand only springs into effect upon a specific event, usually some determination of your incapacity.

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This means your agent can't act for you until maybe a doctor or sometimes a court certifies that you're unable to manage your affairs.

Each approach has its pros and cons.

A durable power of attorney offers immediate flexibility, but some worry about giving up control too soon to their agent.

A springing power of attorney can feel safer, but it may cause delays or complications if there's disagreement about your capacity.

Another key question, and maybe one of the most sensitive decisions in the power of attorney is the scope of these powers you give to your agent.

And specifically, whether to give your agent the authority to make gifts or take other actions on your behalf related to your estate plan.

So, you might ask this question if you don't have capacity or are unable to act, would you want an agent on your behalf to make gifts or shape your estate plan?

You might wonder why would you want to allow your agent to take these steps?

Well, it might be helpful for tax planning—the agent could make gifts on your behalf to reduce estate taxes—or it might be helpful for family support. Maybe the agent could act on your behalf to help family members in need or to continue your charitable giving.

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We also might want to empower the agent to be able to update your beneficiary designations and joint ownership of property.

As we talked about way back on episode two, that could be a critical part of your estate plan and making sure it's carried out efficiently upon your death while minimizing things like probate.

But as with any of these tools, there are risks, and here are just a few.

Some clients are concerned about abuse of power—an unscrupulous agent could deplete your assets or favor themselves or others unfairly—or this all might have unintended consequences. Gifts could disrupt your intended inheritance plan or create family conflict.

So, if you do grant these powers, it's essential to be thoughtful and specific.

Maybe you could limit the amount of the gift, the recipients or the circumstances under which gifts can be made.

Some people require a second signature or notice to other family members for added protection.

Finally, let's discuss what happens if there is such a conflict between the agent and other family members or individuals related to the principal.

And we might talk about two particular provisions that often appear in the power of attorney.

One is called an exculpatory clause.

An exculpatory clause is language that limits the agent's liability for mistakes usually the liability for mistakes made in good faith.

So, this can encourage someone to serve as your agent without fear of being sued for every minor error. However, it's important to note that exculpatory clauses generally don't protect against intentional wrongdoing or gross negligence.

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A second clause you might consider is a waiver of reporting. Under some state's laws, you can waive the agent's requirement to report their activity.

This could be really helpful. This might make things easier for the agent, but it also reduces oversight.

And if you're concerned about transparency, you might want to require at least annual reports, maybe to a third party or to other individuals involved in your life.

So, to sum up, a power of attorney is a powerful tool for ensuring your affairs are managed, especially if you can't do so for yourself.

But with that power comes responsibility and the need for careful planning.

Even in such a document that might seem simple, think carefully about who you choose as your agent, what powers you grant, and what safeguards you put in place.

And if you're considering a power of attorney for you or your loved ones, talk with an experienced estate planning attorney and other advisors.

They can help you tailor the document to your needs and avoid these kinds of pitfalls.

I'm Steve Murphy and this has been Legacy Planning Once removed my podcast on thoughtful legacy planning.

Thanks for listening.

And until next time: Walk like you leave footprints.