

McGuireWoods

# *Legacy Planning, Once Removed*

ESTATE PLANNING | TRUSTS | PROPERTY  
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## **Once Removed: Healthcare Decisions: Naming the Right Agent and Communicating Wishes**

### **Episode 51 Summary**

An estate plan can address not only what happens upon a person's passing but also how decisions are made if the person cannot make them during life. One set of documents — called a living will, healthcare power of attorney, advance directive or advance medical directive, depending on the state — designates an agent to make healthcare decisions on the person's behalf and communicates what care they would or would not want to receive if they cannot make those decisions themselves.

This document can be critical in providing clarity and avoiding confusion in the event of incapacity — such as if the client is in a coma or unconscious, is disabled or is in surgery. This episode explores these documents and how best to structure them.

### **Transcript:**

**(0:00):**

Hello and welcome back.

I'm Steve Murphy, a trust and estates attorney with McGuireWoods LLP. And this is Legacy Planning Once removed my podcast on family, legacy, and everything else on my clients' minds.

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

On this podcast, we help people with estate planning, and we also help them think through their overall legacy, how to frame it and how to build it.

And because we think so much about legacy, we have a tagline here.

We say: Walk Like You Leave Footprints.

This is an episode about another key document or set of documents that should be part of your estate plan.

And this relates to healthcare decision making. Who would make those decisions on your behalf regarding healthcare if you're not able to?



Now I say it's a set of documents, depending on the state, the document might be one or might be several.

For example, some states call it a living will or a healthcare power of attorney, or an advance directive or an advance medical directive. And some states also have a separate HIPAA authorization to make sure agents can speak with healthcare professionals about that care.

So, the key here probably isn't what the document is called, but rather what's its function.

And I think there are generally two functions of this document or this set of documents.

**(01:30):**

So, first is to name that healthcare agent, that person who will make decisions on your behalf regarding your healthcare if you're not able to like if you're disabled or you're in a coma or you're in the middle of surgery.

Now for some individuals, they name their spouse or children as agents. As you're considering naming multiple agents, just think through how you would prefer decisions to be made.

Some clients like people to act unanimously, some like them to act by majority vote. Some like to just name one decision maker and then maybe encourage that decision maker to get input from others.

And it's important that the agent will know and will carry out your wishes.

I think of two scenarios where this might be especially important.

So, one might be when you might be worried that a particular agent would be reluctant to actually carry out your wishes.

**(02:29):**

For example, it might be that your wish in a certain scenario would be to have the agent withdraw care that infamous pull the plug decision.

Well, if you're concerned, the agent might not have the confidence to take that step. You might want to consider naming another agent or a co-agent.

Now there are some other clients who comment, they might be worried someone might act too quickly in taking that step of withdrawing or even approving care. And so maybe they would want to name someone else who is more deliberative.

Again, no right or wrong answer here.

And the second thing that these documents would do is to instruct the agent of what care you would or would not want to receive if you're not able to decide for yourself.

Some clients keep this very general and in a lot of states forms there's general language included about when the agent should withdraw care.

And some clients like to get very specific. Some clients like to comment about non-traditional medicine or experimental medicine.

During COVID, a lot of clients were commenting on whether they would or would not want to be put on a ventilator.

So, you could include those specific directions.



But I think maybe more important than actually having the document is to have an engaging conversation with the agent and with other family members about your wishes.

In these scenarios, where there's a question about what the person would or would not want to receive in terms of healthcare, if they can't decide for themselves, almost everyone would say they're trying to carry out this person's wishes.

**(04:04):**

And it's really helpful in those scenarios if you've had that conversation and given the agent and family members an opportunity to ask questions, so they can really understand your wishes and carry them out.

And then remember, for these documents especially, remember to review them, review them from time to time.

So, for example, as your children get older, you might want to name children as an agent or agents and as other circumstances change, such as if you have a diagnosis where you feel like this document might be triggered sooner.

And again, as you're thinking through this documentation, remember to talk with an experienced estate planning professional and your other advisors and family to help you create and update this document over time.

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.