

Substitute Decision-Making During COVID-19:

Why you need (or may need to update) your Power of Attorney



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April 2020

We are living in extraordinary times. Many of us are confined to our homes, while others go to work to perform and provide us with the essential services on which we all rely. In these already uncertain times, it can be unpleasant, and even frightening, to think about our own incapacity or end-of-life planning. We ought to do it anyway.

A Power of Attorney for Property and a Power of Attorney for Personal Care are legal documents that allow you to assign one or more individuals (referred to as an “attorney”, but does not need to be a lawyer) to manage your finances and/or healthcare. Except in certain exceptional situations, you will not receive any medical treatment unless you or your substitute decision-maker provide consent. As a general rule, your appointed attorney must be capable of quickly communicating, getting informed, asking questions, and providing consent where necessary. Your attorney should also be someone who knows ahead of time what choices you would want to make; for example, what comfort measures you prefer, whether you want a ventilator or other extraordinary measures to keep you alive, whether you would agree to be transferred to a hospital or hospice rather than remain at home, etc.

Your substitute decision-maker can have extensive powers and obligations. With the current restrictions on travel and social gathering, you may need to reconsider if the attorney you have appointed is the most appropriate person for the job; for example, if that person is (or is responsible for someone who is) immune-compromised, in quarantine, or otherwise vulnerable, he or she may not be able to safely or effectively perform the necessary functions. If you have appointed more than one attorney and require unanimous decision-making, you should consider if that is still feasible. If your attorney is a frontline worker, you may wish to confirm that he or she can be available for you if the time comes. And, you should ensure that you have appointed an alternate decision-maker, in the event that your attorney becomes incapable or unwilling to act.



Having a Power of Attorney is important not just for end-of-life care or decision-making. If you are an essential worker deployed on the front line, possibly separated from your family and far away from home, a General or Limited Power of Attorney for Property will enable someone you trust to manage your assets and finances while you are away. Likewise, if you are a member of a vulnerable population who is taking extra precautions during this time, you may wish to appoint someone on a limited basis to manage your assets while you isolate at home.

If you do not have a Power of Attorney, your next of kin may need to bring a guardianship application before the Court in order to manage your money, property, and personal care. In the normal course, this process is timely and expensive. In the current circumstances, it will also be difficult. If you are an essential worker, you may not have the time or access to consent to a Court application. Further, if you become ill or mentally incapable, you will not be able to consent. Your loved one will have to engage and meet virtually with a qualified lawyer, remotely arrange for the preparation of application materials, and swear and commission an affidavit, either virtually or in person, while maintaining social distancing. In the case of your incapacity, the Court will require a medical opinion. This means that your loved one will also have to find a health professional who is willing and qualified to conduct a capacity assessment without having an opportunity to meet or speak with you in person. Because the assessment is conducted virtually, it is ripe for challenge by another friend or family member who may wish to oppose the appointment. In addition, most Courts are currently closed to all but urgent matters and select applications. If the Court does not decide to hear your loved one's application, he or she will not be appointed your guardian.

COVID-19 has, at least temporarily, changed the way we live. Your incapacity and end-of-life planning should be responsive to that change, and should afford you the protection you need. During this time, we also suggest creating or updating your Will, as Matthew Getzler outlines in "[The Importance of a Will](#)." I outline five other times you should consider updating your estate in "[Love and Marriage – 5 Critical Events That Can Impact Your Estate](#)."

For more information on estate or Power of Attorney matters, contact Wills and Estates litigator [Sheila Morris](#) at smorris@mindengross.com.