ADVANCE HEALTH CARE DIRECTIVES IN NEW BRUNSWICK

By Monica Barley & Catherine Blomquist

In December 2016, the *Advance Health Care Directives Act* ("Act") was enacted in New Brunswick. With the arrival of this Act, there are now three types of documents that a person can use to appoint someone to make decisions on his or her behalf in the event of incapacity:

- a Power of Attorney for property matters under the Property Act;
- a Power of Attorney for personal care under the Infirm Persons Act (which may be combined with a Power of Attorney for property matters); and
- an advanced health care directive under the Act.

According to the Act, an Advance Health Care Directive ("Directive") may express the maker's decisions, appoint a proxy or both, identify persons whom the maker wishes to have notified if the Directive comes into effect, and include a general statement of the maker's values, beliefs and wishes. These decisions mean a consent, refusal to consent or withdrawal of consent to anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment.

According to the Act, any person who has the capacity to make decisions can make a Directive. In the Act, capacity is defined as being "able to understand the information that is relevant to making the decision and able to appreciate the reasonably foreseeable consequences of the decision or the lack of decision". The maker of the Directive is presumed to have capacity unless the contrary is demonstrated.

A Directive must be in writing, signed and dated by the maker and a witness who is 19 years of age. The witness must not be the Proxy, or the spouse of either the maker or the Proxy.

The Directive comes into effect when the maker ceases to have capacity to make a decision or is unable to communicate a

decision in the opinion of two health care professionals, defined as a medical practitioner or a nurse practitioner.

Similar to the obligations and responsibilities of an Attorney under a Power of Attorney, a Proxy appointed under Act shall act in accordance with any decisions and statements of the maker's values, beliefs and wishes expressed in the Directive. If a decision is not expressed in the Directive, the Proxy must act in accordance with any wishes that the Proxy knows the maker expressed when he or she had capacity, and believes the maker would still act on if capable. However, if the decision is not expressed in the Directive and the Proxy has no knowledge of the maker's wishes, the Proxy must act in what they believe to be the best interests of the maker.

The New Brunswick Department of Health's Website entitled Advanced Heath Care Directive – Frequently Asked Questions has outlined that a Directive differs from a Power of Attorney as it does not need to be made under seal and the maker can give general or specific directions to be followed by health-care providers without the need to appoint a Proxy.

In fact, section 3 of the Act provides that a Power of Attorney for personal care under the Infirm Persons Act is not a health care directive. This means that Powers of Attorney for personal care continue to be governed by the Infirm Persons Act. The Act does not apply to a Power of Attorney for personal care, even if it contains an advanced health care directive or allows the Attorney to make health care decisions.

In an attempt to clarify the relationship between Powers of Attorney for personal care and a Directive under the Act, section 13 of the Act provides that in the event of a conflict between the provisions of a Power of Attorney for personal care and the provisions of a Directive, the provisions of the most recent document will prevail. In other words, if a person has a Power of Attorney for personal care and a Directive, both documents are operative except where the provisions are in conflict. In such cases, the provisions of the more recent document are the operative ones.

Finally, section 18 of the Act states that nothing in the Act affects the status of other documents containing decisions. We must now all wait to see how the Courts will interpret these sections to operate with Powers of Attorney for personal care containing decisions.

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By Robbie Brown, CPA, CA, CFP®, TEP

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