Update - What you should know about Powers of Attorney and Substitute Decision Making

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As the COVID-19 emergency continues into another month and professionals are for the most part working remotely, there are practical issues that arise almost daily with and for vulnerable individuals. In addition to the more general issues raised in a previous article dealing with Substitute Decision Making, Attorneys for both property and for personal care need to be aware of a variety of points.

A Power of Attorney for Property that is written to have effect immediately can be very useful in assisting an individual who is mentally capable but cannot go out because he or she must remain isolated for health or safety reasons. The Attorney can use the Power of Attorney to do banking, pay bills and other necessary tasks and in doing so is acting as the agent for the person giving the power (the donor). Transactions carried out in that capacity must be at the direction of the donor of the power of attorney and they need to be well documented for future reference.

At a practical level, in order to use a Power of Attorney, the original document or a notarial copy of it must be presented at any financial institution where it is to be exercised. Banks may be prepared to accept electronic copies of an original Power of Attorney but for the most part it will still be necessary to provide a paper document, either the original to be authenticated by the bank, or a notarial copy certified by a Notary Public. The actual process of obtaining these documents may be challenging when law firms that are holding such original documents in safekeeping are largely closed with their lawyers and staff working remotely. If the donor has a signed original Power of Attorney at home, the Attorney can use it with the donor's permission, but it is important to make sure that the financial institutions are given the original to review and authenticate and return, and are not allowed to keep what is at this point probably the only actual signed original.

For personal care decision making where the donor has lost capacity, the care facility probably has a copy of a personal care power of attorney already if the donor is in a long term care

facility. The Attorney will have the responsibility for making care decisions, usually remotely because in current circumstances long term care facilities are closed to visitors. For a donor who has been at home and is admitted to hospital, the same issue arises in terms of providing an acceptable copy of the Power of Attorney, as occurs with a Property Power of Attorney and financial institutions. For health care facilities, hopefully there will be practical considerations given so that electronic copies of the documents will be accepted, since in many cases it is physically impossible to obtain and present paper copies. In either such situation, the Attorney will be required to make care decisions, and possibly without input other than from the care providers and through electronic means. Getting as much information as possible in order to make proper decisions may be difficult, but it is the obligation of the Attorney to obtain that information and make informed decisions that reflect as far as possible the prior stated wishes of the donor.

For individuals who had not prepared powers of attorney previously and now need them (assuming the capacity to make a valid power of attorney is there in the first place), they can still make valid powers of attorney for property management and for personal care. If appropriate social distancing protocols can be exercised, a power of attorney can be signed in the presence of two witnesses. For the duration of the COVID-19 Emergency time, powers of attorney still must be witnessed by two witnesses, but the signing can be done by way of audio visual communication, with the donor signing remotely and two witnesses watching and signing by a video call. For remote signing, one of the witnesses must be a lawyer or licensed paralegal. The process may not be workable for some elderly individuals who do not have access to any form of audio visual communications like ZOOM, but the option is available and in urgent cases should be explored to see if it can be implemented. The lawyers at Blaney McMurtry LLP are well aware of the social distancing protocols that need to be exercised if signing in person can be done, and can assist with the setting up and supervising of remote signing of powers of attorney if necessary, provided the audio visual communications can be established.

Note: The information provided is based on Ontario law, and the laws of Canada applicable therein. However, it does not constitute legal advice or create a solicitor-client relationship. Readers are encouraged to consult a member of Blaney's Wills and Estates practice group for advice specific to their circumstances. We are available by telephone and electronically during the COVID-19 crisis.