RECENT AMENDMENTS TO NOVA SCOTIA'S POWERS OF ATTORNEY ACT

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Recent amendments to Nova Scotia's outdated *Powers of Attorney Act*, effective as of July 7, 2022 ("the amended PAA"), bring significant changes to the preparation and use of powers of attorney in Nova Scotia. The amendments show a commitment by the province to increasing protection for incapacitated individuals and addressing issues of financial abuse, as well as modernizing key aspects of the legislation. Consequently, the preparation of powers of attorney in Nova Scotia is now a more complex endeavour than it was before. This article summarizes the key changes made in the amended PAA.

Execution Requirements

Section 3 of the amended PAA now requires that every power of attorney be executed by the maker of the power of attorney ("the donor") in the presence of two independent witnesses, who (1) must be 19 years or older, (2) must both be present at the time the donor signs the document, and (3) cannot be the attorney or the spouse, registered domestic partner, common-law partner, or child of the attorney.

Springing Powers

The amendments codify the common-law approach previously employed in Nova Scotia with respect to "springing powers of attorney," which come into effect only upon the donor's incapacity.

Section 8(5) of the amended PAA provides that the attorney's authority may be exercised only once it is determined that the donor lacks capacity with respect to property and financial affairs. Section 8(3) of the amended PAA provides that, in addition to a medical practitioner, the donor may name a specific individual, including the attorney, to determine that the donor lacks capacity.

Regulations drafted under the amended PAA have not been made available yet, but there may be more information to come regarding this role.

No Gifting

Section 11 of the amended PAA provides that, except as otherwise expressly provided in the power of attorney or as directed by the donor, an attorney may not effect gifts from the donor's estate. Even when directed or authorized to make such gifts, an attorney may not make a gift where it would compromise the estate's ability to fund the donor's needs.

Evaluation of Capacity

Section 2A of the amended PAA introduces a more robust capacity analysis than the common-law test that used to apply. In particular, at the time of execution, the donor must be able to understand and appreciate the type of property the donor owns and its approximate value, the legal obligations the donor owes to dependants, the attorney's role and the risks associated with appointing an attorney, and the donor's ability to revoke an attorney's appointment while the donor remains capable.

Under section 2B of the amended PAA, an attorney must now consult with a donor even after the donor has lost capacity (if it is reasonable to do so), in order to ascertain instructions prior to acting. If the donor is able to provide instructions, the attorney must follow the most recent relevant instructions from the donor, even if they are inconsistent with prior instructions.

Interested Persons

The former *Powers of Attorney Act* contemplated persons being interested in the estate of the donor, in broad terms, but did not provide a definition of such individuals or of their rights as against an attorney. Section 1A(g) of the amended PAA now establishes a definition for an "interested person." In contrast with recent case law in Nova Scotia, common-law couples are included, giving them standing to bring forward issues against an attorney or to seek direction from the court in connection with the power of attorney.

Accounts and the Role of the Monitor

In keeping with the trend toward broader accountability and oversight, attorneys have a duty, pursuant to section 12 of the amended PAA, to preserve and keep records regarding the donor's assets and liabilities and the attorney's transactions. Regulations (which will be forthcoming) may prescribe other information for which an attorney must keep records. The donor, interested persons, or the monitor (discussed below) can request that these records be presented at any time.

An attorney who resigns must give either the donor, the monitor, the other attorneys, or the immediate family members notice of the resignation. If there is no individual available to receive such notice, it must be served by the attorney on the Nova Scotia Public Trustee.

A donor may now appoint a monitor in a power of attorney, pursuant to section 16 of the amended PAA. A monitor is an individual who is not the attorney, but who may visit and communicate with the donor, request records from the attorney, demand an accounting, and apply to the court for direction or any other application available under section 18(1) of the amended PAA. A monitor effectively acts as a supervisor of the attorney, and keeps the donor and any other co-attorneys informed of the conduct of one or more of the attorneys.

Presumption to Act Jointly and Majority Rules

Section 14 of the amended PAA provides that where the donor has appointed multiple attorneys under a power of attorney, the attorneys shall act jointly unless the document provides otherwise. If there are more than two attorneys, the decision of the majority is deemed to be the decision of all.

Notice of Acting, Revocation, and Variation

Under section 15 of the amended PAA, when an attorney begins to act, the attorney must give notice to the persons to whom notice is required to be given, pursuant to the terms of the power of attorney. If the document itself does not specify any such individuals, the attorney shall deliver notice to the immediate family members of the donor, as well as to any delegate appointed under a personal directive.

An attorney who resigns must give either the donor, the monitor, the other attorneys, or the immediate family members notice of the resignation. If there is no individual available to receive such notice, it must be served by the attorney on the Nova Scotia Public Trustee.

A new burden on donors is the requirement to provide notice to each attorney upon the variation or revocation of a power of attorney, whether or not that attorney had begun to act. Section 17(4) of the amended PAA provides that until such time as this notice is given to the attorneys and any other individual prescribed by the forthcoming regulations, the variation or revocation will not be effective.

Powers from Outside of Nova Scotia and Substantial Compliance

Under section 20 of the amended PAA, a power of attorney made outside Nova Scotia will be deemed to be valid in Nova Scotia if (1) a person gives another person authority under the document to act on the person's behalf in relation to matters of property and finances; and (2) the document is valid according to the law of the place where it was made. This is consistent with other provinces' legislative provisions, and formally acknowledges that powers of attorney made in other jurisdictions are, in fact, valid and usable in Nova Scotia.

Further, section 18(1)(b) of the amended PAA provides the court with the ability to confirm and validate an otherwise invalidly executed power of attorney. Doing so provides flexibility and does not require an attorney to conform strictly to the rigidity of the amended PAA, while bringing a non-conforming power of attorney under scrutiny by the court.

Finally, section 19 of the amended PAA provides that existing powers of attorney that do not conform to the strict formalities set out in the amended PAA, but that were validly made under the former *Powers of Attorney Act*, remain valid and effective under the amended PAA.