



THE NOVA SCOTIA PERSPECTIVE

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Having prospered over the years, Larry currently holds business assets and personally owned land in Nova Scotia. In this article, we will be looking primarily at the effects of Larry's Nova Scotia springing power of attorney.

With respect to the power of attorney Larry previously executed to deal with his property and finances in Nova Scotia, as long as the conditions for Larry's springing power of attorney have been met, Grace as the duly appointed substitute attorney would be in a position to act as Larry's attorney following Sally's death. A copy of Sally's death certificate would typically need to be attached to the power of attorney document.

Under Nova Scotia's recently expanded *Powers of Attorney Act*, for a power of attorney to be effective even when the donor of the power of attorney has become incapacitated, it

must be an enduring power of attorney.²³ Assuming that Larry's Nova Scotia power of attorney is a validly executed enduring power of attorney, the condition in his springing power of attorney provides that it will be effective only when accompanied by a letter from a doctor stating that Larry lacks the capacity to manage his affairs. Even though Grace has been duly appointed as Larry's substitute attorney, she will not be able to act as his attorney under his Nova Scotia power of attorney without providing the evidence required to trigger the springing condition.

Grace is now questioning Larry's memory and decision-making ability, as are the employees at Larry's bank and a manager at his company; these issues may indeed all be signs of his reduced capacity. However, these observations are not sufficient evidence to trigger a springing power of attorney in Nova

his Nova Scotia springing power of attorney to Grace is limited, since proof of her authority to act as his attorney hinges on a doctor's note attesting to Larry's inability to manage his affairs. If Grace cannot furnish the proof required in the springing power of attorney by way of a doctor's note that confirms Larry's inability to manage his affairs, her authority as Larry's attorney cannot be exercised. Further, the courts of Nova Scotia will not appoint a legal representative for an adult who has an existing enduring power of attorney that addresses the same area of decision making that is the subject of the application.²⁴ As a result, in order to meet the springing condition in Larry's power of attorney so that she is able to manage Larry's property and interests in Nova Scotia, Grace will need to have a doctor's note attesting to Larry's inability to manage his affairs. If Larry can no longer manage

services or support services to him for compensation. However, her status as Larry's daughter allows her to take advantage of an exception made for immediate family members of the donor.²⁵

Finally, assuming that Larry's Ontario will was validly executed under the laws of Ontario while he was resident there, it would be effective to deal with his Nova Scotia property and could be probated in Nova Scotia (either a primary or an ancillary grant could be issued, as needed). However, in view of the relationship between Larry and his daughter Brenna, he may wish to inquire about using a will substitute, including an alter ego trust. A will substitute would provide greater protection from claims made by a child of a testator, including claims made under the *Testators' Family Maintenance Act* against a parent's will, which in Nova Scotia includes consideration of moral claims by non-financially dependent children (similar to the situation in British Columbia).²⁶

If Larry has the required capacity to settle a trust, Larry could settle an alter ego trust to hold his Nova Scotia assets; if he does not have the capacity required to settle such a trust, Grace as his attorney could do so, assuming that she had satisfied the springing condition in Larry's power of attorney and that the terms of the power of attorney document permitted such actions. If Larry was able to overcome his trust issues and appoint Grace as the initial trustee of the new trust, that would also allow Grace to manage the trust property for Larry during his lifetime without relying on her authority as Larry's attorney under the springing

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Scotia under its terms and the *Powers of Attorney Act*. Further, Larry's history of alcohol abuse may make it more difficult to discern whether his current issues are a result of an actual lack of capacity to manage his affairs, or whether they stem from unwise decision making influenced by alcohol abuse.

Because Larry has refused to attend at his doctor's office for a discussion about his capacity, the usefulness of

his affairs but he refuses to voluntarily submit to a capacity assessment, Grace would need to initiate procedures for an involuntary assessment in Larry's home jurisdiction.

The fact that Grace is a nurse by profession is relevant. She should be aware that in Nova Scotia she would not ordinarily be able to act as Larry's attorney, even if the springing condition is met, if she provides health care

23 *Powers of Attorney Act*, RSNS 1989, c. 352 (POAA), section 1A(e).

24 *Adult Capacity and Decision-making Act*, SNS 2017, c. 4, section 27(2)(b).

25 Section 9(1)(e) of the POAA.

26 *Testators' Family Maintenance Act*, RSNS 1989, c. 465.

power of attorney. Larry and/or his attorney would be wise to consult with a local lawyer about his changed life circumstances following Sally's passing.